

# Kluwer Copyright Blog

## The Impact of the German Implementation of Art. 17 CDSM Directive on Selected Online Platforms

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*COMMUNIA and Gesellschaft für Freiheitsrechte co-hosted the Filtered Futures conference on 19 September 2022 to discuss fundamental rights constraints of upload filters after the CJEU ruling on Article 17 of the copyright directive. This blog post is the author's contribution to the conference's first session "Fragmentation or Harmonisation? The impact of the Judgement on National Implementations." It is published under a Creative Commons Attribution 4.0 International licence (CC BY 4.0). This post is based on the joint paper with Alexander Peukert, "Coming into Force, not Coming into Effect? The Impact of the German Implementation of Art. 17 CDSM Directive on Selected Online Platforms".*

On 26 April 2022, the CJEU dismissed the annulment action initiated by the Republic of Poland against Art. 17 CDSM Directive 2019/790 on copyright and related rights in the Digital Single Market (CDSMD): According to the Grand Chamber of the CJEU, the provision imposes a *de facto* obligation on service providers to use automatic content recognition tools in order to prevent copyright infringements by users of the platform. While this obligation leads to a limitation of the freedom of expression of users, appropriate and sufficient safeguards accompany the obligation, ensuring respect for the right to freedom of expression and information of users and a fair balance between that right and the right to intellectual property. However, guidelines of the CJEU as to how such safeguards have to be implemented in detail remain vague (C-401/19).

### User safeguards in the German implementation

The Member States of the European Union follow different approaches when it comes to the implementation of Art. 17 CDSMD. The result is a legal fragmentation of platform regulations and uncertainty for service providers, rightholders and users alike as to the prerequisites under which OCSSPs have to operate. When the [German Act on the Copyright Liability of Online Content Sharing Service Providers \(OCSSP Act\)](#) entered into force imposing several detailed obligations on

the service providers, many considered this new law as a model for the remaining implementations of other Member States. With its unique system, in which *ex ante* duties to block unlawful content are inseparably intertwined with *ex ante* duties to avoid the unavailability of lawful user content, the German OCSSP Act contains provisions which could pass as sufficient safeguard mechanisms in the meaning of the decision of the CJEU. In response to the debate on EU level and in other Member States, the OCSSP Act introduces a new category of “uses presumably authorised by law” – i.e., any statutory limitation to copyright –, which, as a rule, must not be blocked *ex ante*.

“Uses presumably authorised by law”, as laid down in sec. 9 of the OCSSP Act, can either be minor uses, which do not exceed the thresholds of sec. 10 OCSSP Act, or – if that is not the case – uses which the user flagged as legally authorised as per sec. 11 OCSSP Act. Both minor uses and flagged UGC must contain less than half of one or several other works (with an exception for images) and must combine this third-party content with other content. If these requirements are met cumulatively, the service provider must communicate the respective UGC to the public up until the conclusion of a complaints procedure. Thus, the category of “uses presumably authorised by law” enables the user to upload the content without interference by an automated copyright moderation tool. Rightholders, on the other side, are equipped not only with the possibility to initiate an internal complaints procedure but also with a “red button” which leads to the immediate blocking of content if it impairs the economic exploitation of premium content by the rightholder.

In sum, the German OCSSP Act provides a well-balanced legal framework. However, the quality of a statute is not only measured by its text and the concepts applied but also by the practical impact on the behaviour of its addressees. The question arises whether the OCSSP Act is able to deliver on its promises or if it turns out to be a toothless tiger in practice.

### **Effects of the German OCSSP Act**

Against this background, Alexander Peukert and I have analysed whether the enactment of the German OCSSP Act in August 2021 had an immediate impact on platforms’ policies. The results of the study are compiled in a paper published in January 2022, which was the foundation for the presentation at the Filtered Futures conference on 19 September 2022 in Berlin. For the purpose of answering the question of what factual effect the OCSSP Act has actually had on the platform policies, the study examines the terms and conditions of several service providers both before and after the enactment of the OCSSP Act on 1 August 2021. We reviewed and analysed the German-language websites of eight services as to whether their terms and conditions and other publicly accessible copyright policies changed upon the entry into force of the German OCSSP Act. The data was collected at four points in time between July and November 2021. At all four points, we analysed the source-data as to whether the service provider implemented six selected mandatory duties, including the possibility for rightholders to submit reference files, the flagging option, the red button solution and a complaint system in accordance with the requirements of the OCSSP Act. With a total of 514 saved documents, including terms and conditions, general community and copyright guidelines, complaint forms, FAQs and other relevant copyright help pages, the paper allowed us to identify the practical effect of the German OCSSP Act over time on individual services, and across the eight services covered.

The results of the data collection are twofold. On the one hand, the changes which could be observed in the terms and conditions of the platforms over time are minor. On the other hand, there

were differences between the service providers with regard to their compliance level with the statutory duties of the OCSSP Act already before its enactment (see table below).

	"Qualified blocking" (upload filters)	Information about all limitations and exceptions	Pre-flagging option	Internal complaints procedure	Red Button solution	Measure
YouTube	● → ●	●	●	●	●	●
Rumble	●	●	●	●	●	●
Twitter	●	●	●	●	●	●
Facebook	● → ●	●	●	●	●	●
Instagram	● → ●	●	●	●	●	●
TikTok	● → ●	●	●	●	●	●
SoundCloud	●	●	●	●	●	●
Pinterest	●	●	●	●	●	●

Most changes we witnessed concerned the duty of the OCSSPs to guarantee a “notice and prevent” procedure. The flagging option, by contrast, was not clearly laid out in the terms and conditions of any service provider, at best vaguely indicated by YouTube and Facebook. The obligation of the service providers to inform their users about all statutory limitations under German copyright law in their terms and conditions was not fully met by the services, as they primarily referred to exceptions and limitations under “fair use” or EU law, but never to the exceptions and limitations under German copyright law.

## Conclusions and outlook

In the conclusions of the paper, we raise the question of why larger platforms such as YouTube, Facebook and Instagram display a higher compliance with the OCSSP Act than comparatively small content sharing platforms. Furthermore, we note that it has become apparent that different Member State implementations and generally uncertain legal circumstances on the EU level impair the willingness of OCSSPs to take measures. It remains to be seen whether the decision of the CJEU will have any noticeable impact on the platform-side implementation. Lastly, the study brings to light the consequences of the lack of sanctions for failure to implement the user rights, in particular the regime regarding “uses presumably authorised by law”, i.e., minor or pre-flagged uses, in the German OCSSP Act.

In its essence, the study can serve as a starting point for further research. While the findings of the study reflect the changes of platform policies and primarily offer a text-based evaluation, they may provide incentives to investigate the upload process and other functionalities of the service providers further. More in-depth research on the legal and practical aspects of the new era of platform regulation is necessary to close the gap in legal doctrinal research on the implementation of Art. 17 CDSMD on platform level. The recently published decision of the CJEU and its

emphasis on sufficient user safeguards adds fuel to this fire.

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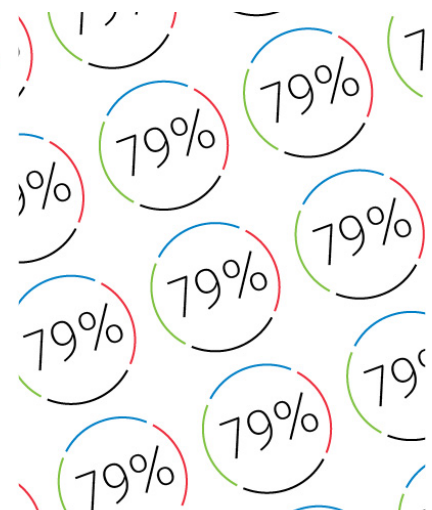
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