

Kluwer Copyright Blog

Comparative Report on the National Implementations of Articles 15 & 17 of the Directive on Copyright in the Digital Single Market – Part 2

Christina Angelopoulos (CIPIL, University of Cambridge) · Thursday, December 1st, 2022

*In 2019, the EU's Copyright in the Digital Single Market Directive (CDSMD) was adopted. This included the highly controversial **Articles 15 and 17** on, respectively, the **new press publishers' right (PPR)** and the **new copyright liability scheme for OCSSPs** ("online content-sharing services providers"). In a report published in September 2022, I undertook research into the **national implementations** of these two provisions in **11 Member States**: Austria, Denmark, Estonia, France, Germany, Hungary, Ireland, Italy, Malta, the Netherlands and Spain. Based on information gathered through a questionnaire distributed to national experts from each examined Member State, the report assesses the compliance of the national implementations with the internal market objective of the Directive and the EU's law of*



Image by Clker-Free-Vector-Images from Pixabay

fundamental rights. The report was commissioned by C4C, but written in complete academic independence.

*This is **Part 2** of a two-part contribution highlighting the report's most significant findings. While **Part 1** focused on Article 15 CDSMD, Part 2 considers **Article 17 CDSMD**. The report's findings as regards Article 17 CDSMD were presented at the first session ("Fragmentation or Harmonisation? The impact of the Judgement on National Implementations") of the *Filtered Futures* conference co-organised by COMMUNIA and Gesellschaft für Freiheitsrechte on 19 September 2022.*

The post is published under a [Creative Commons Attribution 4.0 International licence \(CC BY 4.0\)](#).

Subject matter and right-holders

As opposed to Article 15 CDSMD, Article 17 CDSMD does not introduce a new related right to EU copyright law. Instead, it expands the protections already afforded by copyright and related rights law. To this end, Article 17(1) links to Article 3(1) and (2) of the [Information Society Directive \(ISD\)](#). While Article 3(1) ISD covers copyright, Article 3(2) ISD lists four related rights: those of performers, phonogram producers, film producers and broadcasting organisations.

Based on the national reports, from among the 11 examined Member States, only two (Malta and the Netherlands) appear to have restricted protection to these four related rights. Denmark explicitly extends protection to producers of photographic pictures and producers of catalogues – i.e., related rights owners not mentioned in Article 3(2) ISD. Other Member States eschew a closed enumeration in favour of a general reference to related rights – implying that all related rights recognised in their national law are covered. To the extent that such rights fall outside of the EU *acquis* such gold-plating is arguably unproblematic. However, where harmonised related rights – such as the new PPR – are affected, implementations start slipping out of compliance.

France presents an added twist, given the absence in the French transposition of Article 15 CDSMD of an exception for private or non-commercial uses by individual users, as the Directive requires (see [Part 1](#)). The logical conclusion is that in France OCSSPs may be liable for non-commercial public sharing of press publications by end-users on their platforms – contrary to Article 15's intended focus on own use by providers such as news aggregators and media monitoring services (see Recital 54 CDSMD).

Exclusive rights

Further issues arise with regard to the implicated exclusive rights. The Irish implementation of Article 17 is particularly perplexing in this regard: as the Irish national expert ([Giuseppe Mazziotti](#)) explains, while the transposition's language is ambiguous and hard to decipher, the Irish implementation appears to require that OCSSPs also obtain authorisation from the owners not only

of the right of communication to the public and of the making available right (as the CDSMD requires), but also of the reproduction right. Adding to the confusion, the immunity of Article 17(4) is transposed correctly, so that it is restricted to acts of communication to the public.

A number of possible interpretations exist. One option would be that absent authorisation from the holders of the reproduction right, OCSSPs are liable for communication to the public unless the immunity applies – though this would make little sense. An equally disconcerting possibility would be that there is no way out of a liability for unauthorised acts of reproduction that has no foundation in the Directive. Of course, it is also possible that the reference to the reproduction right is just a transposition glitch that should be ignored, in line with the *Marleasing* principle. This interpretation would be the most likely – were it not for the fact that it is very hard to say that OCSSPs (whose very definition in Article 2(6) CDSMD describes them as “storing” content) perform acts of communication to the public without also (at least temporarily) copying the relevant works: the absence of any reference to the reproduction right in Article 17 makes little sense. The omission has been belatedly recognised by the European Commission in its [Guidance on Article 17](#), according to which the

“acts of communication to the public and making content available in Article 17(1) should be understood as also covering reproductions necessary to carry out these acts”.

The Guidance notes that Member States should not provide for an obligation on OCSSPs to obtain an authorisation for reproductions carried out in the context of Article 17. However, the Guidance is non-binding and, moreover – from a certain perspective – just confirms that acts of reproduction are inherent to acts of communication or making available to the public.

Authorized uploads by end-users

Interestingly, France has ignored the suggestion in Recital 69 of the Directive that authorisations granted to users to upload protected subject matter extend to OCSSPs. As Valerie-Laure Benabou, the French national expert, points out, the key issue here is whether OCSSPs are participating in a single act of communication to the public or making available to the public performed by the end-user or whether there are two independent acts, one performed by the user and the other by the intermediary.

Given that the Directive establishes primary and not accessory liability for OCSSPs, there is a strong argument that there are two acts of communication to the public. Of course, this seems counter-factual, as clearly only one material act occurs – the upload by the user onto the OCSSP’s platform. But that is a problem embedded in the entire solution adopted by Article 17, which holds OCSSPs liable for those uploads as primary infringers. Moreover, while recitals do have interpretative value, they do not have binding legal force and therefore cannot be used to counteract the operative part of a directive. As a result, clarity on this issue can only come with CJEU intervention.

Interaction with other types of liability

Another headscratcher is provided by the Spanish implementation. This contains a provision

according to which, as has already [been reported on this blog](#) by the Spanish national expert, Miquel Peguera, even when OCSSPs abide by the conditions of Article 17(4), right holders will be still able to rely on other causes of action for compensation, such as unjust enrichment.

How to assess this is not obvious. One view is that the provision digs a hole under the entire concept of immunity. The result, therefore, is an interference with the “occupied field” of the Directive in a way that erodes its useful purpose: the same claimant would be granted the same protection against the same OCSSP for the same behaviour for which the directive provides immunity.

As persuasive as this interpretation is, there is also a different perspective from which the provision is unproblematic. It is important to consider the difference between Article 17 and the hosting safe harbour Article 6 of the [Digital Services Act \(DSA\)](#) (previously Article 14 of the [E-Commerce Directive](#)): the wording of the latter clearly indicates its purpose to ensure that the relevant providers are, in a harmonised way, *not held liable* across the EU under certain conditions. By contrast, Article 17 arguably has the opposite objective: to ensure that OCSSPs are, in a harmonised way, *held liable* across the EU under certain conditions. If that is the case, then it could be said that the Spanish provision avoids interference with Article 17’s useful purpose.

Of course, even if that is so, it is highly unlikely that any OCSSP that meets the conditions of Article 17(4) would fail to meet the conditions set by any other national rule of law. The hosting safe harbour will provide additional refuge. While the issue is therefore likely a storm in a teacup, the theoretical question is an interesting one: does Article 17 exhaust the liability of OCSSPs for infringing copyright/related rights over uploaded content – does it provide total harmonisation of OCSSP liability for copyright-infringing content uploaded by their users or only total harmonisation of OCSSP liability for communication to the public?

Filtering and general monitoring obligations

Perhaps the most interesting question that arose from the study concerns the different national approaches to the implementation of Article 17(4) CDSMD. The issue was brought before the CJEU by Poland in an [action for the annulment](#) alleging that Article 17(4) makes it necessary for OCSSPs to adopt filtering technology to the detriment of end-users’ freedom of expression. In its [decision](#), the CJEU accepted that the prior review obligations imposed by Article 17(4) on OCSSPs do require the use of filtering tools, but concluded that the resultant limitation on freedom of expression is acceptable because of the safeguards embedded in sub-paragraphs 7, 8 and 9. The Court [refrained](#), however, from a detailed explanation on how these safeguards should operate in practice.

Among the examined Member States, Germany and Austria have taken a proactive elaborative interpretation geared at establishing how these safeguards can be put into practice. This approach has been [described](#) as a “balanced” one, as opposed to the more “traditional” one taken by those countries that adopted a copy-out transposition.

The question that arises is whether this “balanced” approach is compatible with the directive. As [others](#) have suggested, there is a strong argument that – to the extent that Article 17 does not explain how its various sub-paragraphs are intended to interact or how it’s intended to navigate freedom of expression – such elaboration might be necessary. As mentioned in [Part 1](#), to be

copiable in national law, it is necessary that a directive be internally consistent and well formulated. When provisions are in need of legislative repair or clarification, literal transposition should be dismissed. It can be said that Article 17 is precisely such a provision – as the analysis above reveals, it is not a well-drafted piece of legislation: it raises many questions, its wording is complex and confusing, and its purpose and scope are ambiguous.

That said, following the decision of the CJEU in *Poland* it is hard to hold that those Member States that have taken a copy-out approach to transposition were wrong to do so. Instead, the answer can be found in the final paragraph of *Poland*. This emphasises both that Member States themselves must transpose Article 17 in such a way as to allow a fair balance and that, “the authorities and courts of the Member States” must interpret their transpositions so as to respect fundamental rights. In this way, the Court has enabled the compatibility with the Directive and the Charter of both the “balanced” and “traditional” implementation approaches: with the first the legislator takes on the task of identifying the appropriate “fair balance” itself, via the process of transposition. With the second, the details on the right balance are delegated to judicial interpretation. The first approach may be preferable from a policy perspective – but both are open to the Member States.

Conclusion

Examination of the national implementations of Articles 15 and 17 reveals a number of potential incompatibilities. While some of these can perhaps be attributed to national intransigence or misplaced inspiration despite clear EU requirements (for example, the French failure to protect private or non-commercial uses of press publications by individual users is hard to explain otherwise), very often the root cause can be found in bad drafting by the EU legislator. The contentious subject matter and intricate structures of these articles, as well as their heavy reliance on undefined terminology and the occasional misalignment between the recitals and operative texts, are not designed to facilitate smooth national implementation and homogenous interpretation and application. As the European Commission has acknowledged, “[b]etter law-making helps better application and implementation”. In the intense discussions on Articles 15 and 17 in the run-up to the adoption of the CDSMD, this principle appears to have fallen by the wayside. To address the consequences, the CJEU will no doubt have much CDSMD-focused work ahead of it. Hopefully, future judgments will be clearer than *Poland*.

To make sure you do not miss out on regular updates from the Kluwer Copyright Blog, please [subscribe here](#).

Kluwer IP Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers think that the importance of legal technology will increase for next year. With Kluwer IP Law you can navigate the increasingly global practice of IP law with specialized, local and cross-border information and

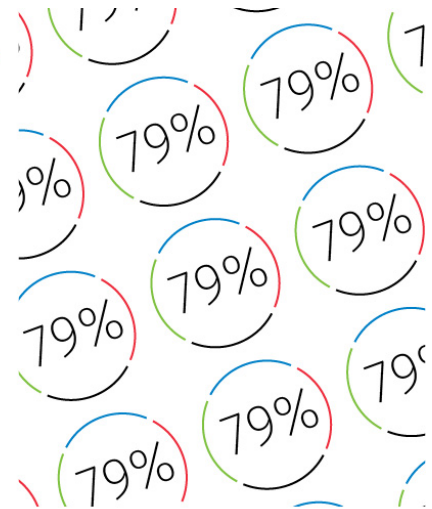
tools from every preferred location. Are you, as an IP professional, ready for the future?

Learn how **Kluwer IP Law** can support you.

79% of the lawyers think that the importance of legal technology will increase for next year.

Drive change with Kluwer IP Law.

The master resource for Intellectual Property rights and registration.



2022 SURVEY REPORT
The Wolters Kluwer Future Ready Lawyer
Leading change

This entry was posted on Thursday, December 1st, 2022 at 10:00 am and is filed under [CDSM Directive](#), inter alia, for ensuring that EU law is interpreted and applied in a consistent way in all EU countries. If a national court is in doubt about the interpretation or validity of an EU law, it can ask the Court for clarification. The same mechanism can be used to determine whether a national law or practice is compatible with EU law. The CJEU also resolves legal disputes between national governments and EU institutions, and can take action against EU institutions on behalf of individuals, companies or organisations.”>CJEU, Conference, Digital Single Market, European Union
You can follow any responses to this entry through the [Comments \(RSS\) feed](#). You can leave a response, or [trackback](#) from your own site.