LMU LUDWIG-MAXIMILIANS-UNIVERSITÄT MÜNCHEN

Prof. Dr iur. Matthias Leistner

Implementation of Art. 17 DSM-Dir.

Selected Aspects from the Current German Discussion

Conference: ***Challenges of the Directive 2019/790 on Copyright and Related Rights in the Digital Single Market***
24-25 October 2019 Law Faculty, Jagiellonian University, Larisch Palace, Bracka St.12, Cracow

Sources: An overview

- **Declaration of Germany on the DSM-Directive of April, 15 2019**
  - Even expressly quoted in the **Ministry of Justices‘ consultation on the implementation** (Deadline: September 6)
- **Statement of GRUR on the implementation of the Directive of September, 5 2019**
  - Based on a **representative overview of the broad discussion** in legal literature
  - Statements by many stakeholders
  - Further process: ‚Inofficial‘ Ministry‘s Draft → Authorization by the Government → Government‘s Draft → Bundestag →
    Bottom line: Nothing to expect before 2020, nothing ‚officially‘ public to expect before Spring.
- **NB: First ‚avant projet‘ by the Ministry of Culture in France which has been circulated to the main stake-holders for comments**
  - First Dutch Draft – very close to the Directive‘s text
- **… and what about the Art. 10 Working Group? →**
  First meeting October 2019

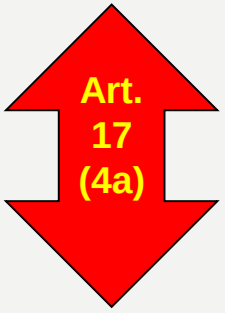
Sources: An overview

- **Declaration of Germany on the DSM-Directive of April, 15**
  - Art. 17 (4)? … „Ceci ne sera pas un filtre.“
  - But to be sure: Quite a number of **good & balanced *legal* ideas** in the Declaration to reach that (schizophrenic) *polititical* goal.

Agenda

- **Art. 1 (2) & 24: Relationship to InfoSoc-Directive**
  - In particular: relationship to the **‚YouTube'** & **‚Uploaded'** references by the BGH (German Federal Court of Justice)
- **Art. 2 No.6: Definition of ‚online content sharing service provider' (ocsp)**

- **Art. 12: Extended Coll. Licenses (ECSs)**
- **Art. 17: Liability of ocsps**



- **Details of preventive measures, notice, takedown & stay down (duties of care), Art. 17 (4)-(6), (8)**
- **Guarantee of certain exceptions, Art. 17 (7)**
- **Details of complaint & redress (c&r), Art. 17 (9)**

How to reach the harmonisation objective of the Directive?

- **Declaration of Germany**
  - **Main general objective: High degree of harmonisation**
    in particular concerning the specification of Art. 17 (4) ‚duties of care'
  - **Teleological argument: Unitary Market** objective of the Dir.
  - **Main instrument: Art. 17 (10) Working Group**
- **Does Art. 17 (4) provide for full harmonisation?**
  - **CJEU Judgments of July, 29:** individual assessment for each provision
    - Wording, context, telos: leeway for implementation
    - Fundamental rights, general principles of EU law → balanced, proportional approach
- **Is a ‚harmonized' implementation realistic?**
  - NB: Does France ‚jump the gun'?

Definition of ocsps

- **Declaration of Germany**
  - **Strict definition,** targeting the ‚market dominant platforms', e.g. YouTube and Facebook
  - **Criticism:** Market dominance is not an element of the definition
- **Specific, functional approach**
  - **Large amount of © protected content (size of audience, no. of works) (Rec. 63) → Specific thresholds? E.g. discussion in France.**
  - **Recital 62 → „…**only online services that **play an important role on the online content market by competing with other online content services … for the same audiences"**
  - … main or one of the **main purposes**
- **Challenges**
  - Under this approach, many ‚grey area'-services (e.g. certain blogs, news groups, cloud-services etc.) will be out… even Facebook would be a thin red line-case (but is licensed anyway)
  - …is it a problem or just in line with the Directive's objective?
  - … and what about fair remuneration for the creatives → In Ger: Relation to possible legislative project in the field of **collective remuneration for private copying in the cloud** (cf. France)

Not only a German Problem: Relationship to the pending CJEU References

- **Federal Court of Justice – References in YouTube & Uploaded**
  - YouTube as a ‚neutral' platform → only secondary liability & Art. 14 E-Commerce Dir.
  - Uploaded as an ‚active platform' soliciting infringement → Art. 3 InfoSoc-Directive
- **Uploaded – not really a problem, cf. Recital 62, para. 2**
- **Possible outcomes of YouTube**
  - **Future proof:** More or less general alignment with the Art. 17 liability principles (e.g. Mangold)
    - In fact, the Art. 17 regulation in its current form is a more or less **consistent further development of the CJEU's case law** on Art. 3 InfoSoc-Directive anyway
  - **Default:** More liberal general rules than under Art. 17
  - **Surprise?:** Stricter general rules than under Art. 17
- **If stricter general rules applied…**
  - Privilege for SME's (Art. 17 (6) would remain applicable)
  - What about platforms outside the scope of the Art. 2 definition?

- **Hybrid character of Art. 17 DSM-Directive**
  - **Art. 17 (1), (3) Infringement and ‚use' in the sense of Art. 3 →**
    „take a license or do not accept the upload…"
    vs.
  - **Art. 17 (4) ‚Exception' from liability→ effectively = indirect infringement based on violation of duties of care**
    - **Best efforts** to obtain a license
    - Preventive duties
    - Notice, takedown & staydown

- **Best efforts to obtain a license? –**
  Main focus of the (informed) German discussion

Art. 17 (4) lit. a – as the ‚hub' for implementation

- **Best efforts to obtain a license (lit. a)**
  - **Partly:** Typically impossible *ex ante* = Only upon notification by right holders? → notice, takedown & stay down (No real ‚news'? → new damages claims!)
  - **Partly:** Strict principle to license first
  - **Partly:** Flexible normative duty of care, depending inter alia on
    - **Availability of licenses for the typical content**
    - Risk aversion of the service
    - Role, function & size of the service provider
    - Category of material etc.
  - **Normative sources in the acquis?** Rec. 66: diligent provider, proportionality
    - **Art. 3 Orphan works Directive:** good faith search concerning the work category
  - **Might lead to acceptable situation for many platforms → but what about the users?**
- **→ Responsibility of the Member States to foster licensing (Recital 61)!**

Art. 17 (4) lit. a – as the ‚hub' for implementation

- **Responsibility of the Member States to foster licensing – ECLs as a way out?**
  - **Music → individual and/or collective licenses available for large repertorys**
    - ECLs for small parts/UGC uses? Generally applicable ECLs? What about neighbouring rights?
  - **Audio-visual: typically exclusive individual licensing**
    - ECL system conceivable? After a grace period? For small parts?
  - **Text etc. → licenses partly available at best**
    - **ECL system for small & medium sized content (vs. upload license)**
  - **Fine arts (photography) → individual and/or collective licenses available for professional repertorys**
    - **ECL system for small and semi-professional photographers (vs. upload license)**
- **Challenges**
  - Art. 12 was not really designed to serve that purpose; **opt out** as major stumbling block
  - No pan-European ECL → similar instruments would have to be foreseen in the major Member States as basis for reciprocity agreements or **further development in EU law?**
  - **Representative character** & structures of CMOs, registration system …

- **Art. 17 (7) on exceptions: ‚Member States shall ensure…“**
  - Caricature, parody, pastiche
  - Mandatory, i.e., ‚contract proof‘ exceptions
  - Genuine users‘ rights?
    - Different problem: cf. Federal Constitutional Court – Stadionverbot Decision (2018)
- **Legislative baseline**
  - **After the CJEU‘s judgments of July 29**, Germany will have to foresee new, mandatory exceptions for caricature, parody or **pastiche**
    (instead of some very unrealistic ideas in German politics on UGC exceptions)
    - What is pastiche?
    - French experience and (rare) case law
    - General exception or platform specific solution?
    - Remunerated exception (legal license) or ‚free use‘?
  - Existing exceptions for quotation, criticism, review might need adaptation after Pelham, Spiegel Online & Funke
  - Extending the system of statutory collective remuneration?

- How to **guarantee users exceptions from the outset**
  (i.e. ***before*** the Art. 17 (9) mechanism)
  - Right holders‘ notifications
    - Trusted flagger system ./. proof of ownership
    - Duties of care for right holders‘ notifications (cf. 9th Court of Appeals: *Lenz* case)?
    - Damages for bad faith notifications?
  - Users uploads:
    - ‚Pre-flagging‘ system for uses in the realm of potential exceptions?
    - Automated plausibility check would be needed
    - Sanctions for bad faith flagging would be needed
- **Art. 17 (9)**
  - DMCA‘s counter-notice procedure largely ineffective
  - Notice & delayed takedown for certain pre-flagged or technologically identified uses (such as parody, UGC etc.)?

Summary & Perspective

- **A lot of homework for the Art. 17 (10) group – depending on the scope of the group‘s discussions**
  - Who has to deliver concrete & relevant information → right holders
  - Different availability of filtering mechanisms (music, audiovisual, visual, text …)
  - Ger: API‘s no further or future monopolization of licensing information infrastructure
  - Etc.
- **Communication of the COM on the implementation of Art. 17?**
- **Germany: No specified implementation project yet.**
- **Better late than bad!**

Summary & Perspective

Thank you very much for your attention!

Matthias Leistner

LMU: https://www.jura.uni-muenchen.de/fakultaet/lehrstuehle/leistner/index.html

SSRN: https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=2742264