

Senate Committee on the Judiciary Subcommittee on Intellectual Property

Written testimony for the hearing on

“Copyright law in foreign jurisdictions: How are other countries handling digital piracy?”

March 10, 2020

I welcome the opportunity to provide expert testimony to the Members of the Senate Subcommittee on Intellectual Property regarding international developments in copyright law. As a former Member of the European Parliament from 2014 to 2019, I was intimately involved in the drafting of the European Union’s recently adopted Directive on Copyright in the Digital Single Market (DSM Directive). I was the Parliament’s lead negotiator for the 2015 review of the 2001 Directive on Copyright in the Information Society (InfoSoc Directive), as well as one of the negotiators of the 2019 DSM Directive.

As the hearing takes place in the context of reviewing certain aspects of the US Digital Millennium Copyright Act, most notably the rules on intermediary liability for online hosting providers, I will focus my remarks on Article 17 of the DSM Directive. However, it is worth noting that Article 17 constitutes the most controversial element of the recent reform, which would most likely not have passed legislative scrutiny had it not been for a broad range of balancing provisions for the benefit of users, such as the introduction of a number of new mandatory copyright exceptions, measures to protect the public domain, and provisions for the online making available of out-of-commerce works.

The United States would be ill-advised to follow Europe’s example in reforming the safe harbor provisions for online intermediaries. The limited liability system enshrined in most international copyright systems – in the DMCA in the US context and in the E-Commerce Directive in the European context – has struck a delicate balance between the interests of rightsholders, online intermediaries and users. It has created an innovation-friendly environment for new online businesses and given rightsholders an effective means of enforcing their rights online, while limiting incentives for the over-removal of legitimate speech. By contrast, Article 17 of the DSM Directive creates substantial legal uncertainty, pits the interests of different creative sectors against each other and threatens to limit competition.

In any event, it would be premature to take inspiration from Article 17 before its entry into force in June 2021, the deadline by which EU Member States have to transpose the Directive into their national copyright laws. So far only one country, France, has officially submitted a proposal for national implementation, so it will likely take some time before the full effect of the new rules will become apparent. In the meantime, national legislators are struggling to make sense of a provision that is deeply internally contradictory and appears to place obligations on online platform operators that are impossible to fulfil.

1. Goals of Article 17 of the DSM Directive

The primary objective of Article 17 is economic regulation. It intervenes in the contractual relationship between platform operators and rightsholders to encourage the agreement of licenses for copyrighted content uploaded by users of those platforms, and to achieve higher license payments from platform operators to rightsholders¹. Article 17's primary goal is not the reduction of copyright infringement, but the transfer of value from certain online platforms to rightsholders. Most entertainment industry sectors have successfully adapted to the digital environment, for example by offering affordable and easy-to-use subscription models, and are experiencing growth. A study by the European Commission concluded in 2015, before the proposal for the DSM Directive was published, found no link between copyright infringement and sales of legitimate copyrighted content in the EU in most sectors². The proposal for Article 17 followed complaints from music industry representatives over the discrepancy between license payments from user-generated content platforms such as YouTube on the one hand and licensed services on the other hand. Article 17 was introduced to interfere in the market relationship between platforms and rightsholders to improve the rightsholders bargaining power.

Subsequently, Article 17 has been subject to criticism from more than two hundred European academics, who question the need for re-adjusting the negotiating power between rightsholders and platforms, or point to other more proportionate tools such as competition law to achieve this objective while avoiding the negative impact on online innovation and the suppression of legitimate content³. Article 17 is extremely controversial in the European public, with well over a hundred thousand people taking to the streets in protest⁴, primarily in Germany. The two German government parties who agreed to the adoption of the Directive in the Council of Ministers, providing it with the necessary majority, both suffered their worst election results in history in the subsequent European Parliament election in May of 2019⁵. The United Kingdom, which voted in favor the Directive in Council, has since announced that it will not implement the unpopular provisions after Brexit⁶. Poland, after having voted against the Directive in Council, has filed a complaint with the Court of Justice of the EU on fundamental rights

¹ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, Recital 61. Available online at: <https://eur-lex.europa.eu/eli/dir/2019/790/oj>

² European Commission: Estimating displacement rates of copyrighted content in the EU. <https://op.europa.eu/en/publication-detail/-/publication/59ea4ec1-a19b-11e7-b92d-01aa75ed71a1>.

³ Statement by EPIP Academics to Members of the European Parliament in advance of the Plenary Vote on the Copyright Directive on 12 September 2018.

<https://www.create.ac.uk/wp-content/uploads/2018/09/Statement-by-EPIP-Academics.pdf>; The Copyright Directive: Misinformation and Independent Enquiry. Statement from European Academics to Members of the European Parliament in advance of the Plenary Vote on the Copyright Directive on 5 July 2018. https://www.create.ac.uk/wp-content/uploads/2018/06/Academic_Statement_Copyright_Directive_29_06_2018.pdf.

⁴ Demos gegen Upload-Filter: Dieser Protest könnte Artikel 13 stoppen.

<https://www.sueddeutsche.de/digital/upload-filter-urheberrecht-demo-berlin-1.4380487>.

⁵ German electoral authority, European election results 2019.

<https://www.bundeswahlleiter.de/europawahlen/2019/ergebnisse.html>

⁶ Article 13: UK will not implement EU copyright law. <https://www.bbc.com/news/technology-51240785> (Article 13 was re-labeled Article 17 after the adoption of the Directive).

grounds⁷. European academics have continued to issue public statements which highlight the substantial legal uncertainty arising from Article 17, trying to guide Member States in mitigating its risks during national implementation.⁸

2. Affected Platforms

Article 17 defines a new category of hosting providers that can no longer benefit from the safe harbor enshrined in Article 14 of the E-Commerce Directive, the EU equivalent to the US safe harbors, which exempts hosting providers from liability for user uploads as long as they have no actual knowledge of illegal conduct on their services. Instead, Article 17 holds this new category of platforms, called online content sharing service providers (OCSSPs) directly liable for all copyright infringements by default. It then defines a new limited liability regime with stricter criteria, which still allows those platforms to avoid liability under certain narrow circumstances. Finally, it introduces a number of user rights to limit the new liability regime's impact on freedom of speech and to mitigate the risk of blocking legal content.

The new category of platforms which are going to be subject to the stricter liability regime, has been criticized for being far broader than what is required to achieve the legislator's objective, namely to cover "only online services that play an important role on the online content market by competing with other online content services, such as online audio and video streaming services, for the same audiences"⁹. By contrast, the legal definition of OCSSPs covers platforms whose purpose or one of the main purposes is to give public access to large amounts of copyright-protected user-uploads, and who organize and promote those uploads for profit-making purposes¹⁰. This definition is accompanied by a list of specific exceptions, including, among others, online encyclopediae, marketplaces, cloud storage and software code sharing platforms.

This long list of exceptions indicates that the legal definition is over-broad and encompasses a much wider range of services than those who are considered by the European legislator to be detrimental to the business model of rightsholders. It seeks to accommodate those platforms which managed to make their concerns heard during the drafting process, such as eBay, Wikipedia or GitHub, therefore it is not comprehensive and fails to protect a number of legitimate businesses, including all future startups, which by definition cannot have a lobbying presence in Brussels.

For example, a dating application like Tinder most likely fulfils all elements of the legal definition of an OCSSP by allowing large numbers of copyrighted material (pictures) to be uploaded and promoting them to their users for profit. It would be a stretch to argue that a dating app like Tinder is impacting the market for photographs by competing with licensed photography services, however. The vast majority of uploaded pictures are snapshots, taken by non-professional photographers and used with permission. At the same time, Tinder cannot prevent copyright infringement altogether, hence it risks facing strict liability under the new EU copyright rules. The consequence of the mismatch between legislative

⁷ Poland's Challenge to the DSM Directive – and the Battle Rages On...

<http://copyrightblog.kluweriplaw.com/2019/06/10/polands-challenge-to-the-dsm-directive-and-the-battle-rages-on/>.

⁸ Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics. <https://www.ivir.nl/recommendationsarticle17/>.

⁹ DSM Directive, Recital 62.

¹⁰ DSM Directive, Article 2 (6).

objective and legal definition of the affected platforms is that a broad range of online businesses is faced with significant enforcement costs to address a problem that does not exist on their services.

Member States have some leeway in limiting the scope of application of the new rules to those platforms that really do compete with licensed services. National legislators can do so by incorporating language from the Directive's recitals, but different applications between countries pose additional compliance challenges to online platform operators, who may end up having to follow 27 different legal regimes in order to do business in Europe. Unlike the GDPR, which is a directly applicable regulation across the EU, the DSM Directive is not directly applicable and will lead to slightly different implementations in the Member States' national copyright laws. Ironically, the stated objective of the DSM Directive was to complete the Digital Single Market, that is to reduce barriers to cross-border trade by "break[ing] down national silos" in copyright law, as then-President of the European Commission Jean-Claude Juncker put it¹¹. Article 17 of the DSM Directive is likely to achieve the opposite.

3. Platform obligations

According to Article 17, Online Content Sharing Service Providers are directly liable for copyright infringements committed by their users, unless they can show they have made best efforts to fulfil three cumulative obligations:

1. To seek license agreements from rightsholders;
2. To block the upload of copyrighted material once a rightsholder has provided the platform with information identifying the work, such as a fingerprint;
3. Once having been informed by a rightsholder of an infringement occurring on their services, to remove it and prevent the infringing content from being re-uploaded.

All three obligations are limited to best efforts, because they are impossible to fully comply with. What exactly constitutes a best effort in the context of a broad range of platforms based on divergent business models is left to the discretion of the Member States tasked with implementing the legislation. Diverging standards are likely to emerge. While the shortcomings of filtering obligations have received the most widespread attention, the obligation to seek licenses is potentially even more difficult to comply with.

3.1 Licensing obligation

The obligation to make best efforts to seek licenses for all user-uploaded content is very unclear, given that it is impossible to seek licenses in advance for all works that could potentially be uploaded in the future, but liability applies as soon as a work becomes available. In order to avoid liability, Article 17 requires a platform operator to demonstrate that it has made best efforts to obtain a license before a work is even uploaded, which is theoretically impossible, because the platform operator does not know which works users will upload.

This obligation is further complicated by the unique status of copyright as arising automatically upon creation of a work. Unlike other intellectual property rights, copyright does not require registration¹².

¹¹ Jean-Claude Juncker: A Digital Single Market for the benefit of all Europeans.

<https://ec.europa.eu/digital-single-market/en/news/digital-single-market-benefit-all-europeans>

¹² The Berne Convention for the Protection of Literary and Artistic Works, to which both the US and the EU Member States are parties, requires that copyright protection not be subject to any formalities (Article 5 (2)).

While the US has a copyright register for domestic works, there is no global comprehensive register of copyrighted works that platform operators could consult. Therefore, platforms cannot ascertain who the rightsholders in the user-uploaded works are. They have to rely on the statements of uploaders or those who approach them claiming to be rightsholders. False copyright claims are ubiquitous¹³ and many user uploads come without any copyright information whatsoever. This can be illustrated with a simple example. A user uploads a photograph that a friend of theirs has taken as their profile picture on Facebook. The user is not the copyright holder in the photograph, their friend is. Most likely, they will have not concluded a licensing agreement about the use of the picture, nor agreed a transfer of ownership. According to Article 17, Facebook is now liable for the copyright infringement by the user, who has uploaded their profile picture without permission from the rightsholder, unless Facebook can show that it has made best efforts to obtain a license from the rightsholder. Facebook has no way of knowing who that rightsholder is, so it cannot approach them for a license negotiation. Even if it did know the rightsholder, the transaction costs of individual license negotiations for each upload would be prohibitively expensive. The interpretation of this obligation is further complicated by the fact that Article 17 also states that platforms are not obliged to monitor all user uploads¹⁴. A general monitoring obligation has been repeatedly deemed incompatible with the Charter of Fundamental Rights by the Court of Justice of the European Union¹⁵. This begs the question how a platform can make best efforts to obtain licenses for the contents of all user uploads without monitoring those user uploads. This fundamental contradiction has led some academics to conclude that Article 17 is incompatible with the Charter of Fundamental Rights¹⁶.

One reasonable interpretation of this provision would be to oblige platform operators only to approach collecting societies about blanket licenses, rather than having to contact every rightsholder on the planet. This approach also causes many problems for platform operators and rightsholders alike. Many platforms which fall within the scope of Article 17, such as the aforementioned dating applications, or special interest online communities that encourage users to share their own creations, have absolutely no business interest in facilitating the upload of copyright-infringing content. Nevertheless, since the three criteria for avoiding liability are cumulative, Article 17 requires platform operators to seek licenses for the content that they do not want on their services, even when they are perfectly willing to make best efforts to prevent the content from being uploaded. This obligation puts a considerable financial burden on businesses that are not encouraging copyright infringement in any way and do not damage the economic interests of rightsholders. They are required to enter into licensing negotiations purely because they allow the upload of copyrighted material, which they cannot technologically prevent as long as they allow any user uploads whatsoever. The costs of negotiating licensing agreements with the hundreds of national collecting societies that exist within the EU will be prohibitively expensive for all but the largest online platforms, further entrenching their market power.

¹³ Jason Mazzone: Copyfraud. Brooklyn Law School, Legal Studies Paper No. 40, New York University Law Review, Vol. 81, p. 1026, 2006. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=787244.

¹⁴ DSM Directive, Article 17 (8).

¹⁵ CJEU Case C-70/10 Scarlet v SABAM; CJEU Case C-360/10 SABAM v Netlog.

¹⁶ Spindler: Gutachten zur Urheberrechtsrichtlinie (DSM-RL) Europarechtliche Vereinbarkeit (Artikel 17), Vorschläge zur nationalen Umsetzung und zur Stärkung der Urheberinnen und Urheber. https://www.gruene-bundestag.de/fileadmin/media/gruenebundestag_de/themen_az/netzpolitik/pdf/Gutachten_Urheberrechtsrichtlinie_01.pdf.

Many rightsholders are also critical of allowing collecting societies to offer blanket licenses, because they want to manage their rights themselves, or do not want their works to appear online at all. As most collecting societies are far from being representative of all rightsholders in a particular sector, the revenues they collect cannot be distributed to the correct rightsholders. Some Member States, such as Germany¹⁷, want to pursue blanket licensing schemes as a potential way of implementing Article 17 and avoiding the use of upload filters, while some other countries, who don't have strong collecting societies, are likely to choose a different approach. The diverging national approaches will create significant barriers to international trade in online services.

3.2 Filtering obligations

The other two obligations OCSSPs need to fulfil to be shielded from liability for their users' actions are closely connected. Unlike the obligation to seek licenses, both are contingent on a rightsholder taking action to contact an OCSSP first. The second obligation requires platforms to block content that has not previously been uploaded to the platform but has been identified by a rightsholder, whereas the third introduces a notice-and-staydown regime for situations when an infringement has already occurred on the service. It is difficult to imagine how platforms with thousands of user uploads per day could comply with these obligations without the use of automated tools. In order to benefit from the safe harbor, even OCSSPs that do not have a history of copyright infringements by their users would have to install such tools at their own cost, in order to comply with the second obligation, as soon as any rightsholder approaches them. A proportionality requirement enshrined in Article 17 (5) may help shield smaller platforms from excessive costs, but little guidance is given on how to apply this proportionality principle in practice.

Criticism of Article 17 has largely revolved around the use of such automated tools, or upload filters, which has led to the introduction of a number of user safeguards in Article 17, which appear to rule out the use of upload filters. Without those necessary safeguards, the Directive would not have found a majority in the European Parliament. Yet they leave platform operators in a very difficult situation, having to fulfil costly and contradictory obligations to rightsholders and users. If Article 17 is implemented by Member States without any adjustments, it may well lead to a situation where operating an online business is prohibitively expensive or impossible. In that case, Article 17 could run afoul of the freedom to conduct a business, enshrined in the Charter of Fundamental Rights.

Voluntary upload filters for certain types of copyrighted material (typically sound recordings or video content) are in use on major platforms such as YouTube or Facebook. In the context of the DMCA notice-and-takedown procedure, automated tools are used by rightsholders and their representatives to send takedown notices, as the sharp increase in notices over the last decade demonstrates¹⁸. Experiences with these filters have highlighted several types of typical failure modes. One category of mistakes is caused by the failure to attribute a copyright-protected work to the correct rightsholder in the absence of an authoritative copyright register, or failing to recognize that material is in the public domain. Copyright filters routinely block content uploaded by the original copyright holder after a wrongful copyright claim by a third party. For example, a man who played a piano piece by Bach that is

¹⁷ Council of the European Union. Statement by Germany on the adoption of the DSM Directive. https://www.parlament.gv.at/PAKT/EU/XXVI/EU/06/18/EU_61832/imfname_10895457.pdf.

¹⁸ Lumen Presents Comments to the Third Meeting of the Stakeholder Dialogue on Art. 17 of the Directive on Copyright in the Digital Single Market in Brussels. https://www.lumendatabase.org/blog_entries/807.

in the public domain and uploaded it to Facebook had his performance disabled because Facebook's (likely automated) copyright enforcement process attributed it to Sony Music¹⁹.

Another type of mistake is caused by the inability of automated tools to understand context. Even the more sophisticated upload filters which employ machine learning to go beyond simply identifying exact copies are unable to detect fair use or copyright exceptions such as parody. This type of mistake likely caused the blocking of a meme based on a music video by the band Nickelback, shared by President Trump. Twitter removed the video following a takedown request by Warner Music Group, probably without the consideration of fair use²⁰.

Both types of mistakes are likely to become more frequent if the use of upload filters becomes mandatory for certain platforms, as Article 17 suggests. At the same time, the user safeguards in Article 17 state that these mistakes must not occur.

4. User Safeguards

Article 17 (7) unequivocally states that the cooperation between platforms and rightsholders to block infringements must not lead to the deletion of legal content. Unlike the obligations to block content, this safeguard is not a "best effort" requirement, indicating that it would not be sufficient for a platform to reduce the number of wrongful takedowns to a certain threshold. Should these obligations come into conflict, the user safeguard is more strongly worded and should take precedent. Article 17 (9) requires platforms to subject all blocking decisions to human review. To address the frequent problem of wrongful blocking notices, a novel requirement is introduced for rightsholders to substantiate their requests with the necessary information for platforms to act. Nevertheless, Article 17 seems to acknowledge that legal content will invariably be blocked, and therefore requires the introduction of a complaint and redress mechanism to allow users to assert their rights, for example under a copyright exception such as parody or quotation. Article 17 also makes these previously facultative exceptions mandatory across the EU, given their particular importance for freedom of speech. Platforms are not allowed to override the users' rights to upload content under copyright exceptions in their terms and conditions, on the contrary, they are explicitly required to inform users that they can rely on those exceptions when uploading content to the platform.

While introducing these user safeguards was necessary to protect freedom of speech and gain majority support for the Directive as a whole, the combination of platforms' responsibilities towards rightsholders and users puts platform operators in an impossible situation. Even the most advanced, most expensive filtering systems are not without flaws, and they systematically fail when faced with wrongful copyright claims or legal uses under exceptions and limitations. For many types of copyrighted material other than sound recordings or videos, no filtering technologies are available. Platform operators are faced with the decision to either use the costly, insufficient and error-prone filters available on the market, thereby violating their legal obligations towards users, or not to use them and face strict liability for all users' copyright infringements, because they have failed to make best efforts to block them. The standard for best efforts is likely to be set by the most sophisticated filtering

¹⁹ Sony Finally Admits It Doesn't Own Bach and It Only Took a Bunch of Public Pressure.

<https://www.eff.org/takedowns/sony-finally-admits-it-doesnt-own-bach-and-it-only-took-public-pressure>.

²⁰ Even Trump Can't Turn Down a Nickelback Joke (but Twitter Did).

<https://cyber.harvard.edu/story/2019-10/even-trump-cant-turn-down-nickelback-joke-twitter-did>.

technologies available, such as YouTube's ContentID, which reportedly cost \$100 million to develop²¹, but still fails to implement the user safeguards necessary for Article 17 compliance. It's a catch 22 for platform operators that will be impossible to navigate for all but the largest platform operators who can afford to face costly litigation from both rightsholders and users. Article 17 will likely strengthen Google and Facebook by making it impossible for competitors to emerge and become commercially viable. The 3 year grace period for small startups included in Article 17 (6) is unlikely to change that, because startups will struggle to receive investments if their business model will predictably become unviable after three years of operation.

5. Conclusion

At this point, more than a year before implementation of Article 17 becomes mandatory for EU Member States, it is completely unclear how national legislators and the courts intend to reconcile the inherent contradictions in Article 17. Mandatory collective licensing seems to be the only approach that could satisfy all the requirements set out in the Directive, but it is controversial among some parts of the entertainment industry, in particular the film sector. One fundamental rights challenge, brought forward by Poland, is already pending with the Court of Justice of the EU, and more are likely to follow once Member States have passed their national implementations, which are likely to diverge substantially, contributing to legal fragmentation and increasing the cost of online business. A stakeholder dialogue convened by the European Commission to try to give guidance to Member States to achieve a uniform implementation, has only served to expose the widely diverging interests at stake, even between different rightsholder groups²². In any case, any recommendations arising from this process will not be legally binding. National implementation processes risk re-igniting the widespread street protests against the provision if user rights are not sufficiently protected.

The adoption of the DSM Directive has plunged online businesses into legal uncertainty that is likely to stretch for years, if not decades. Users, platforms operators and rightsholders have many avenues for challenging any conceivable implementation of Article 17 in court, be it on the basis of the Charter of Fundamental Rights should upload filters be imposed or the compliance costs become prohibitive for online businesses, or on the basis of international copyright treaties should legislators explore the avenue of mandatory collective licensing. By passing a vague and internally contradictory tweak to the well-established hosting safe harbor, the European legislator has shirked the responsibility to define implementable rules and pivoted to the courts to find a solution, which is entirely impossible to predict.

Before following the European example, the US legislator should know what exactly it is signing up for. Article 17 is an entirely inappropriate means of addressing online copyright infringement, which was never the European legislator's objective to begin with. The DMCA safe harbor, with all its flaws, has created a delicate balance between widely diverging interests of rightsholders, platforms and users, a balance that has held for many years. Any reform to the DMCA is likely to re-ignite a bitter fight and should not be undertaken without a goal in mind that constitutes a clear improvement over the status quo. After years of contention, protests, drafts and re-drafts, the European Union has adopted in Article

²¹ How Google Fights Piracy.

https://www.blog.google/documents/25/GO806_Google_FightsPiracy_eReader_final.pdf.

²² Article 17 stakeholder dialogue (day 2): Filters, not licenses!

<https://www.communia-association.org/2019/11/11/article-17-stakeholder-dialogue-day-2-filters-not-licenses/>.

17 a provision that does not constitute a clear improvement for any of the parties involved, and should not be used by the US legislator as anything other than a cautionary tale.