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Art. 17 Copyright DSM-Directive **- and a look and the draft German implementation**

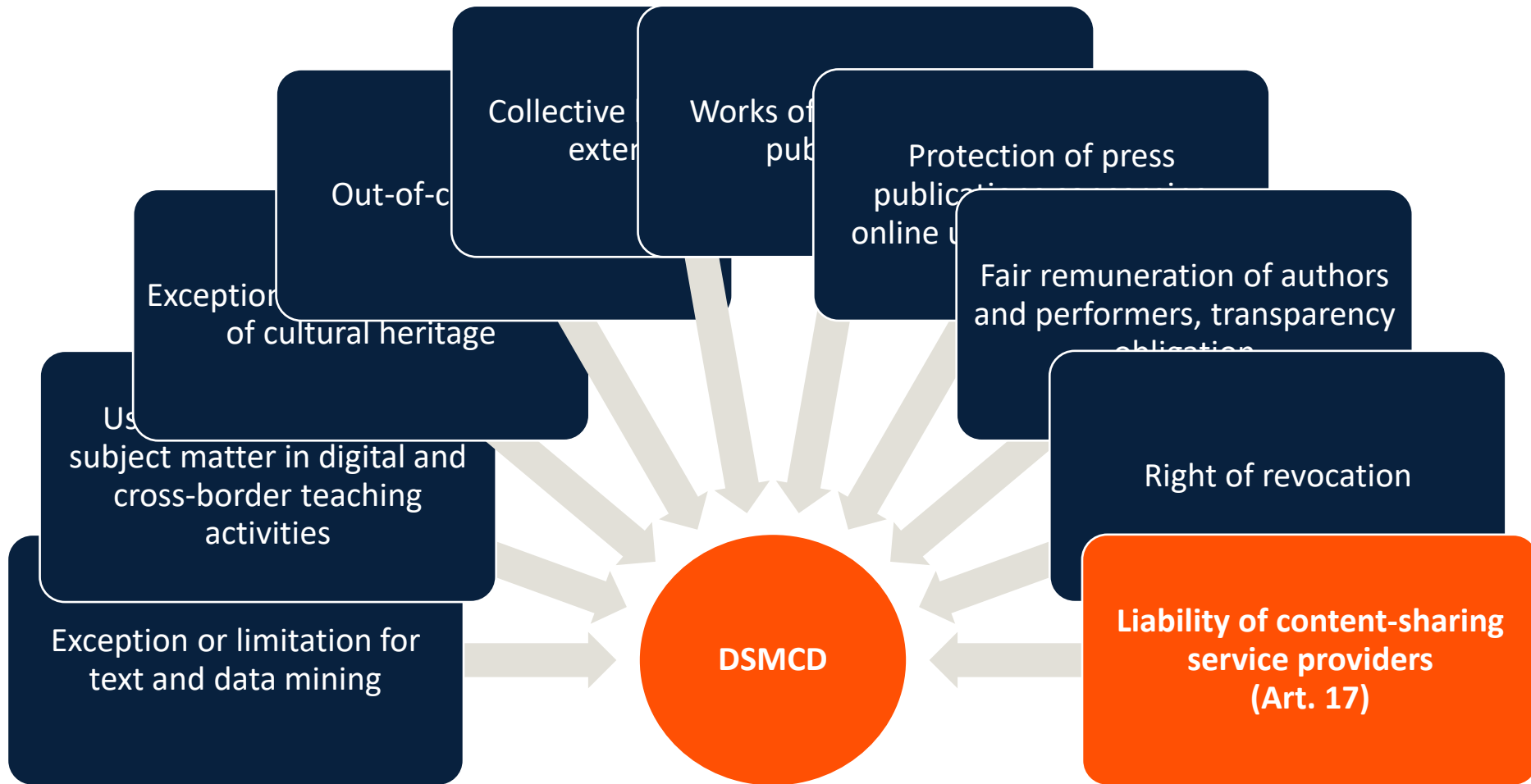
**BVA-ABA Belgische Vereniging voor het Auteursrecht –
Association Belge pour le Droit d'Auteur**

Lunch-causerie on Art. 17 Copyright DSM Directive, 29 March 2021

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Overview of the contents of the DSMCD



Art. 17:

The liability of online content-sharing service providers (OCSSPs)

Art. 17 DSMCD: Overview

- Art. 17 DSMCD Directive regulates the use of copyright-protected content by Online Content-Sharing Service Providers (OCSSPs) which gives the public access to the content uploaded by its users
- Main application and role model: YouTube



Art. 17 DSMCD can be perceived like this...



... or like this.



The picture shows the celebration of the MEP Axel Voss (Germany) in charge of the legislative project when the DSMCD was adopted by the European Parliament.

Art. 17 DSMCD: Overview

What does Art. 17 DSMCD say?

- Art. 17 DSMCD covers only **Online Content-Sharing Providers** (“OCSSPs”)
- OCSSPs are (as a principle) **liable** for **all infringements** of the right of communication to the public **committed by their users**, when uploading copyright infringing content.
 - Example: YouTube is (as a principle) liable for copyrighted content, illegally uploaded onto YouTube.



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 - Example: YouTube is (as a principle) liable for copyrighted content, illegally uploaded onto YouTube.
- The OCSSP is **exempt from liability** in case it meets certain **duties of care**.
- Start-up OCSSPs face only limited duties of care.
- Art. 17 DSMCD sets out specific exceptions to copyright protection (e.g. parody, caricature, quotation) to make it easier to separate infringements from legal uploads.
- Art. 17 DSMCD requires to implement safeguards into national law that ensure an effective complaint mechanism by users which think that their content was legal and should be allowed to be published by the OCSSP.

Art. 17 DSMCD: Scope of Application

Which services (OCSSPs) fall under Art. 17?

OCSSPs are providers, the main or one of the main purposes of which is to store and give the public access to a large amount of copyright-protected content uploaded by its users, which it organizes and promotes for profit-making purposes.

The following services do not fall under Art. 17:

- not-for-profit online encyclopedias,
- not-for-profit educational and scientific repositories,
- open source software-developing and-sharing platforms,
- providers of electronic communications services as defined in Directive (EU) 2018/1972,
- online marketplaces,
- business-to-business cloud services and cloud services that allow users to upload content for their own use (cyberlockers).

Art. 17 DSM Directive is complex and encompasses rules for ...

Exclusive rights
(communication to
the public)

Liability

Exceptions and
limitations

Redress mechanism
for uploaders

Art. 17 DSMCD: Overview

Art. 17 DSMCD is complex and encompasses several areas of copyright law, e.g.:

- **Exploitation/exclusive rights**
 - Art. 17(1) states that an OCSSP “performs an act of communication to the public or an act of making available to the public“.
 - Thus, the act of communication to the public or making available to the public by a user within the meaning of Art. 3 InfoSoc Directive 2001/29 must be treated as if the OCSSP (also) performs such an act.
 - Example: A YouTube upload means 2 uses of the right of making available to the public: By the user and by the OCSSP.
- **Liability**
 - Art. 17 holds the OCSSP “liable“ for unauthorized acts of communication to the public, unless the service providers demonstrate that they have complied with the duties set out in Art. 17 (4) lit. a)-c).
 - Start-ups are subject to limited duties (Art. 17(6)).
 - Art. 17(3) DSMCD clarifies that Art. 14(1) E-Commerce Directive (hosting provider privilege) does not apply to cases covered by Art. 17 DSMCD.

Liability privilege of the OCSSP (Art. 17(4))

If no authorization is granted, OCSSPs **shall be liable** for unauthorized acts of communication to the public, [...], **unless they demonstrate that they have:**

a) made best efforts to **obtain an authorization**

Liability privilege of the OCSSP (Art. 17(4))

If no authorisation is granted, OCSSPs shall be liable for unauthorised acts of communication to the public, [...], **unless they demonstrate that they have:**

b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the **unavailability of specific works** and other subject matter in which the rightholders have provided the service providers with the relevant and necessary

Staydown duty
- Filtering is
necessary (in
advance)

Liability privilege of the OCSSP (Art. 17(4))

If no authorisation is granted, OCSSPs shall be liable for unauthorised acts of communication to the public, [...], **unless they demonstrate that they have:**

c) acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to **disable access** to, or to remove from their websites, the notified works or other subject matter, and made best efforts to **prevent** their future uploads [...].

--> Compare Sec. 512 US DMCA:
Only take down

Staydown duty
- Filtering is
necessary (in
advance)

Liability privilege of the OCSSP: start-ups

Art. 17(6) provides for a „lighter“ liability regime for start-ups / smaller platforms:

- **available in the EU < 3 years**
- **annual turnover < EUR 10 million**

In order to enjoy the safe harbor of 17(4) DSMCD, it is sufficient for these OCSSPS to

- a) make best efforts to obtain an authorization
- b) [not applicable]
- c) act expeditiously, upon receiving a sufficiently substantiated notice, to disable access to the notified works or to remove those works

Art. 17 DSMCD: Overview

- Art. 17 DSM Directive is complex and encompasses several areas of copyright law, e.g.:
 - Exploitation rights
...
 - Liability
...
 - **Exceptions and limitations**
Art. 17 (7) subpara. 2 stipulates that – unlike Art. 5(3) of the InfoSoc Directive – the existing **exceptions or limitations** for quotation, criticism and review as well as for the use for the purpose of caricature, parody or pastiche are **mandatory**.
 - **Redress mechanism for uploaders:**
For uploaders, Art. 17(9) provides for an effective and expeditious redress mechanism.

Art. 17:

A „sui generis“ provision –

**Or a complement to the InfoSoc
Directive?**

Art. 17 DSMCD: The relationship between Art. 17 and the InfoSoc Directive 2001/29

- „Sui generis“ approach:
 - Art. 17 DSMCD is *lex specialis* to the InfoSoc Directive 2001/29
 - The right of communication to the public is not the right of Art. 3 InfoSoc Directive, but a new exclusive sui generis right.
 - Communication to the public in Art. 17 (1) does not correspond to Art. 8 WIPO Copyright Treaty (WCT) 1996
 - Art. 5 InfoSoc Directive 2001/29 and its prohibition to create new exceptions and limitation on the national level does not apply.
 - National legislator free to provide additional exceptions within Art. 17 DSMCD
- But unconvincing; Rather, Art. 17 DSMCD completes the InfoSoc Directive 2001/29
 - Arg. ex Art. 1 (2) DSMCD:
“[T]his Directive shall leave intact and shall in no way affect existing rules laid down in the directives currently in force in this area, in particular Directives ... 2001/29/EC.”
 - Arg. ex Recital 64: Art. 17 “clarifies” that an OCSSP performs an “act of communication to the public or of making available to the public” under certain circumstances.

Art. 17 DSMCD: The relationship between Art. 17 and the InfoSoc Directive 2001/29

- „Sui generis“ approach:
 - Husovec/Quintais: How to License Art. 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms,
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3463011
- Completion approach:
 - Nordemann/Waiblinger: Art. 17 DSMCD a Class of Its Own? How to Implement Art. 17 Into the Existing National Copyright Acts – Also a Comment on the Recent German Discussion Draft,
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3649626
 - Leistner, European Copyright Licensing and Infringement Liability under Art. 17 DSM-Directive Compared to Secondary Liability of Content Platforms in the U.S., 2020, page 13,
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3572040

Excursus:

**CJEU cases YouTube/Uploaded
(C-682/18 and C-683/18)**

YouTube/Uploaded – CJEU and German BGH

- The YouTube case and Uploaded (cyberlocker) case pending before the CJEU.
 - Does Art. 3 EU Copyright Directive 2001/29 already hold YouTube and Uploaded directly liable for copyright infringements by users?
 - Comparable to Art. 17 DSMCD?
- CJEU Advocate General:
 - No direct liability of YouTube and Uploaded.
 - Only secondary responsibility pursuant Art. 8(3) Copyright Directive 2001/29.
 - Art. 17 DSMCD does not apply yet to this case.
- No CJEU judgment date yet.

Art. 17:

Proposed implementation in

Germany

Art. 17 DSMCD – German implementation

- 24 June 2020: German „Discussion Draft“
- 13 October 2020: German Ministerial Draft
 - Follows “sui generis” approach
- **3 February 2021: German Government Draft**
 - No longer mentions “sui generis” approach

Response from content industry

"Politicians have missed the opportunity to create justice in the digital market - to the detriment of the German creative industries; the winners are the global platforms."

Coalition of German rightsholders, on 3 February 2021



03.02.2021

POLITIK HAT CHANCE VERTAN, GERECHTIGKEIT IM DIGITALMARKT HERZUSTELLEN – ZUM SCHADEN DER DEUTSCHEN KREATIVWIRTSCHAFT; GEWINNER SIND DIE GLOBALEN PLATTFORMEN
HEUTE IM KABINETT VERABSCHIEDETER ENTWURF ZUR URHEBERRECHTSREFORM

Der heute im Kabinett verabschiedete Entwurf zur Reform des Urheberrechts schädigt die deutsche Kreativwirtschaft und den europäischen Binnenmarkt! Die Politik hat die Chance vertan, Gerechtigkeit im Digitalmarkt herzustellen – Gewinner sind die globalen Plattformen.

Mit Blick auf den heute im Kabinett verabschiedeten Entwurf zur Umsetzung der DSM-Richtlinie in

Response from consumer protection organizations

"In this respect, the Federal Government is breaking its ... proposal that there would be no upload filters."

Verbraucherzentrale Bundesverband, on 6 November 2020



URHEBERRECHTSREFORM VERBRAUCHERFREUNDLICH GESTALTEN

Stellungnahme zum Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz (BMJV) für ein Gesetz zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes

6. November 2020

→ Klar ist aber auch, dass Uploadfilter mit dem vorliegenden Vorschlag nicht verhindert werden. Insofern bricht die Bundesregierung ihr – sowohl im Koalitionsvertrag als auch im Kompromissvorschlag der CDU³ – gegebenes Versprechen, dass es keine Uploadfilter geben wird.

Art. 17 DSMCD – German implementation

The new German Copyright Service Provider Act *[Urheberrechts-Diensteanbieter-Gesetz – UrhDaG]*

- Germany decided to create a **new separate legislative act** (outside the German Copyright Act), which specifically implements Art. 17
- The German Government considers it too complex to integrate Art. 17 into the current German Copyright Act

Art. 17 DSMCD – German implementation

Communication to the public by the OCSSP:

- General rule: OCSSPs communicate to the public, when users upload copyrighted content.

§ 1 Communication to the public

A service provider (Section 2) publicly reproduces works when it provides the public with access to copyrighted works uploaded by users of the service.

Art. 17 DSMCD – German implementation

Liability of OCSSPs:

Exemptions

- Duty to license (Art. 17 (4a) DSMCD)

- § 4 Obligation to Acquire Contractual Rights of Use; Direct Remuneration Claim of the Author
 - Duty for OCSSP to use best efforts to acquire license
 - Duty to acquire rights (1) offered to him, or (2) available through representative rightholders known to the OCSSP or (3) which can be acquired through collecting societies.
 - Direct remuneration claim for authors for *all* licensed uses (via collecting societies), even if license by individual rightholders

Art. 17 DSMCD – German implementation

Liability of OCSSPs:

Exemptions

- **Duty to prevent infringements (Art. 17 (4b) and (4c) DSMCD)**

- Two scenarios:
 - Qualified Blocking (implementing Art. 17 (4b) DSMCD)
 - Simple blocking (implementing Art. 17 (4c) DSMCD)

Note: The German government fears new user protests if blocking regime too strict...



Art. 17 DSMCD – German implementation: *Qualified* Blocking (implementing Art. 17 (4b) DSMCD)

- Duty to block uploads of works before publication
- But also duty to publish upload if legal
- In case of automated blocks - no liability for “**presumed legal uses**”
 - Upload must be published;
 - Must remain up for at least 48 hours and until end of complaint procedure, in case upload is a **mash-up, containing less than 50%** of the work *and*
 - Either: **flagged as legal**
 - Note: Anybody can flag, not only trusted flaggers; but sanctions, if repeated wrong flagging
 - Or: **Minor use**
 - Note: Up to 15 sec. film or music or 160 text characters, 125 kilobytes of photo
 - „**Red-Button**“ for trustworthy rightholders **after publication** if infringing and significantly impairing the economic exploitation of the work
 - OCSSP to pay remuneration to authors (via collecting societies) even for *legal* uploads

Art. 17 DSMCD – German implementation: *Qualified* Blocking (implementing Art. 17 (4b) DSMCD)

- Duty to block uploads of works before publication
- But also duty to publish upload if legal
- In case of automated blocks - no liability for “**presumed legal uses**”
- Legal questions:
 - Is that the introduction of a new exception to copyright (for mash-ups) in breach of Art. 5 InfoSoc Directive 2001/29? Or is this a national specification of the general proportionality clause in Art. 17 (5) DSMCD?
 - Is it proportionate (Art. 17 (5) DSMCD) to allow uploads by non-trusted flaggers, but only allow the red-button for trusted rightholders?
 - Is it in line with Art. 5 InfoSoc Directive 2001/29 that the OCSSP has to pay to authors even if cases of clear legal use (e.g. legal quote, legal parody)?

Art. 17 DSMCD – German implementation: *Simple Blocking* (implementing Art. 17 (4c) DSMCD)

- Applies after publication of upload only
- Requires a substantiated notice by the rightholder
- Meant to be only takedown, no staydown

Art. 17 DSMCD – German implementation: *Simple Blocking* (implementing Art. 17 (4c) DSMCD)

- Applies after publication of upload only
- Requires a substantiated notice by the rightholder
- Meant to be only takedown, no staydown
- Legal question:
 - Is “no staydown” in line with Art. 17 (4c) DSMCD, which requires the OCSSP to “**disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads**”?

Art. 17 DSMCD – German implementation

Complaint procedure

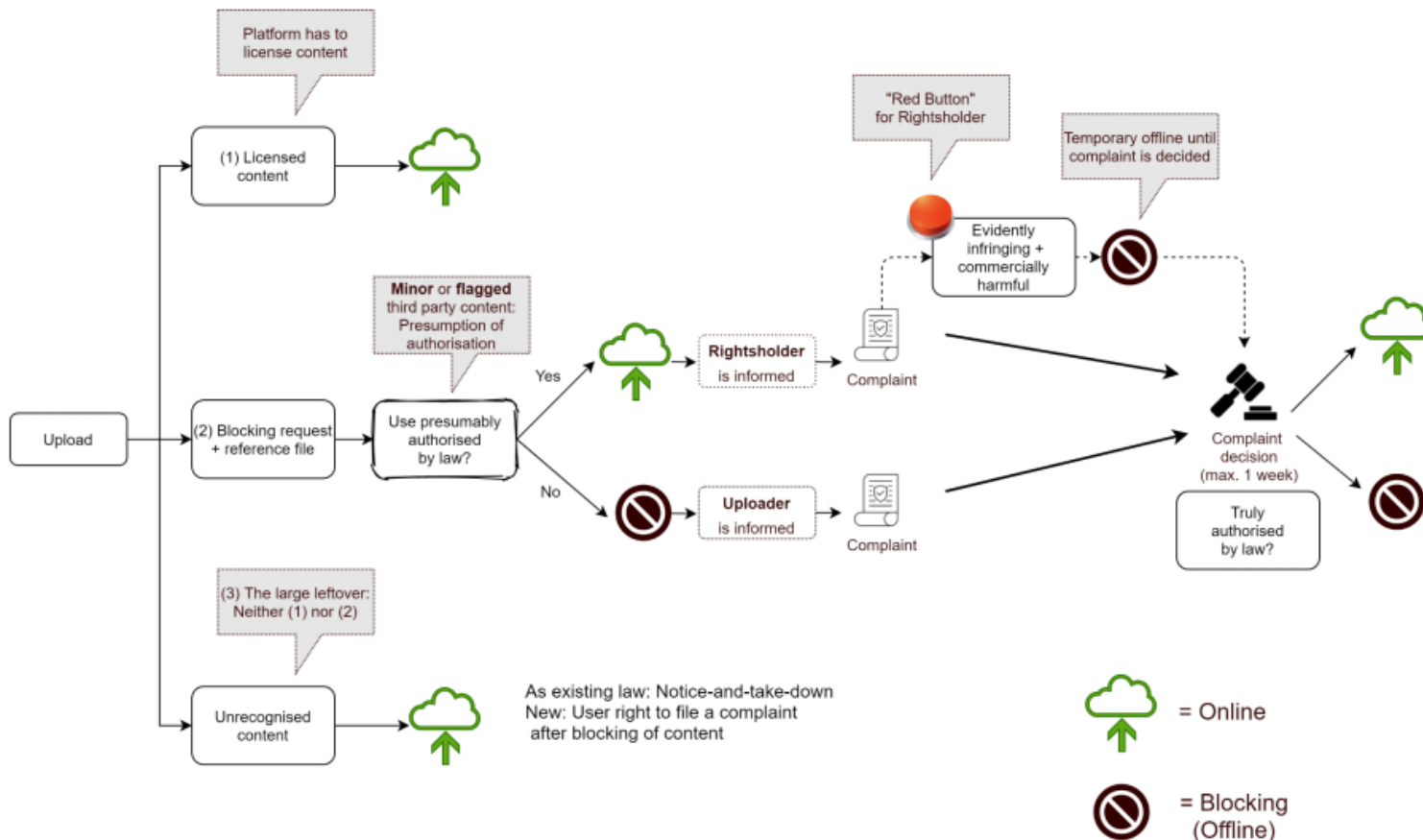
- Detailed rules as to complaint procedures:
 - Internal complaint procedure (mandatory for OCSSP)
 - External complaints procedure (mandatory for OCSSP)
 - Out-of-court dispute resolution through private arbitration bodies (voluntary for all)
 - Right to court proceedings remains unaffected

Art. 17 DSMCD – German implementation:

The new German solution (from official government FAQs):

https://www.bmjbv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_Gesetz_Anpassung_Urheberrecht_digitaler_Binnenmarkt_FAQ.pdf?blob=publicationFile&v=4

II. Appendix: Workflow under the Act on Copyright Liability of Online Content Sharing Service Providers (UrhDaG)



Art. 17 DSMCD – German implementation

International scenarios

- **Conflict of laws and the right of communication to the public:**
- **The law of the (protecting) country applies, if the content targets (also) this country** (CJEU C-173/11 – Football Dataco)

- Problem for the OCSSP:
 - Very detailed German implementation
 - Likely different in other EU Member States
 - See NL implementation: Verbatim/literal (“copy and paste”)
 - Other Member States likely to not follow the mash-up “exception”
 - How should an OCSSP comply in case an upload targets a pan-EU public?

Art. 17 DSMCD – German implementation

International scenarios

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- **The law of the (protecting) country applies, if the content targets (also) this country** (CJEU C-173/11 – Football Dataco)

Quote from Conrad/Nolte (German ZUM 2021, 111, 123), both Google counsel:

“In any case, it is to be expected that the coexistence of different procedural regulations and the uncertainty about questions of applicable law will lead to considerable legal uncertainty. This would also run counter to the objectives of the DSM-RL.”

Will OCSSPs start to disallow pan-EU uploads for content caught by Art. 17 DSMCD?

Art. 17 DSMCD – German implementation:

Summary

- Germany decided to create a new separate legislative act.
- Germany will implement the general rule that OCSSPs are liable for infringing user uploads.
- The draft law is bold to provide liability exemptions and duties to publish for mash-ups flagged as legal or for “minor uses”. This seems not in line with EU law.
- It also seems not in line with EU law to make the OCSSP pay even for legal uploads such as legal quotes or legal parody.
- The very complicated German procedural set-up creates a problem for OCSSPs in case of content which targets a pan-EU public. The result may be fragmentation – in contrast to the DSMCD’s aim.
- The law will come into effect until June 2021. Will the draft change?

NORDEMANN

Thank you.

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