

**Duties and liability of online content-sharing service providers (OCSSP) for use of protected content by their users**  
**Directive on copyright and related rights in the Digital Single Market (DSM Directive, Art. 17)**  
**First experience and developing practice in different European jurisdictions**  
Dr. Reinhard Oertli

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# Agenda

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1. Art 17 DSM Directive: What's it about?
2. Basics of EU copyright law
3. Art 17 DSM Directive: What's in it?
4. National Implementation
5. Implementing Art. 17 DSM Directive in Germany («UrhDaG-E»)
6. Wrap up and outlook

## Art. 17 DSM Directive: What's it about? (1)

### Safe Harbour

Directive 2000/31/EC ([E-commerce Directive](#)):

'safe harbour' principle: online intermediaries who host or transmit content provided by a third party are exempt from liability unless they are aware of the illegality and are not acting adequately to stop it.



## Art. 17 DSM Directive: What's it about? (2)

Art. 17 Directive (EU) 2019/790 ([DSM Directive](#)): Royal Navy storms the Safe Harbour



## Art. 17 DSM Directive: What's it about? (3)

- Core questions:
  - Under which conditions are YouTube and Co. obliged to stop copyright-infringing uploads?
  - Under which conditions are YouTube and Co. obliged not to stop uploads that could infringe copyright?
- Current Draft laws in France, the Netherlands and Germany implementing Art. 17 DSM Directive

## Art. 17 DSM Directive: What's it about? (4)

- Value gap:
  - ~~Authors Rightholders~~ can obtain take down
  - But no cash
  - Or only a копейка
  - YouTube Partner Program



## Basics of EU copyright law

- **No uniform European copyright law, only patchy harmonization**
  - Most central directive so far:
    - Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society ([Info-Soc Directive](#))
  - New kid on the block:
    - Directive (EU) 2019/790 of 17 April 2019 on copyright and related rights in the **Digital Single Market** ([DSM Directive](#))

# Art 17 DSM Directive: What's in it? (1)

## Definition of OS CCP

### DSM Directive

#### Definition of OCSSP

##### - Article 2 Definitions

- (6) ‘online content-sharing service provider’ (**OCSSP**) means a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for (*direct or indirect*) profit-making purposes.

## Art 17 DSM Directive: What's in it? (2)

### Excerpts from Art. 17

#### Article 17 Use of protected content by online content-sharing service providers

1. Member States shall provide that an online content-sharing service provider performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users.

An online content-sharing service provider shall therefore obtain an authorisation from the rightholders ....., for instance by concluding a licensing agreement, in order to communicate to the public or make available to the public works or other subject matter. 2. ....

3. When an online content-sharing service provider performs an act of communication to the public or an act of making available to the public under the conditions laid down in this Directive, the limitation of liability established in Article 14(1) of Directive 2000/31/EC (*no liability for good faith hosting*) shall not apply to the situations covered by this Article. ....

## Art 17 DSM Directive: What's in it? (3)

### Excerpts from Art. 17

4. If no authorisation is granted, online content-sharing service providers shall be liable for unauthorised acts of communication to the public....of copyright-protected works ....., unless the service providers demonstrate that they have:
- (a) made best efforts to obtain an authorisation, and
  - (b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works ....for which the rightholders have provided the service providers with the relevant and necessary information; and in any event
  - (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 in accordance with point (b). 5. .... 6. ....
- [*If their*]... average number of monthly .. visitors ... exceeds 5 million, ..., ... [*The OCSSPs have to*] demonstrate that they have made best efforts to prevent further uploads of the notified works .....

## Art 17 DSM Directive: What's in it? (4)

### Excerpts from Art. 17

7. The cooperation between online content-sharing service providers and rightholders shall not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation [*such as*]. .....:
  - (a) quotation, criticism, review;
  - (b) use for the purpose of caricature, parody or pastiche.
8. The application of this Article shall not lead to any general monitoring obligation. ....
9. .... Where rightholders request to have access to their specific works or other subject matter disabled or to have those works or other subject matter removed, they shall duly justify the reasons for their requests. Complaints submitted under the mechanism provided for in the first subparagraph shall be processed without undue delay, and decisions to disable access to or remove uploaded content shall be subject to human review. Member States shall also ensure that out-of-court redress mechanisms are available for the settlement of disputes. ....
10. ....

## Art 17 DSM Directive: What's in it? (5)

### Controversies around Art. 17

- Highly controversial and led to demonstrations throughout the EU in 2019
- In particular, regulation of the liability of sharing platforms (OCSSP) in Art. 17 DSM Directive
- Overblocking: Resistance against "introduction" of upload filters, fear that memes/GIFs would "get stuck" in upload filters if they contain (elements of) protected works
- Value Gap: Any progress?



# National Implementation (1)

## France and the Netherlands

- Both draft acts copy part (but not all) of the language of Art. 17 DSM Directive
- France: OCSS with direct or indirect profit purpose
- Both do not introduce any requirements on OCSSPs and/or platforms to ensure that non-infringing works are not blocked by overly aggressive upload filters.
- Both do not extend the parody and quotation limitation/exemption from authors to platforms.



## National Implementation (2)

### Excursus: United-Kingdom

- No Implementation of DSM Directive
- Maybe independent regulation, but presently other worries.



## National Implementation (3)

### Excursus: Russia

- ***Федеральный закон № 149-ФЗ от 27.07.2006 г. «Об информации, информационных технологиях и о защите информации»*** (Federal Law № 149-FZ of 27.07.2006. "About information, information technologies and about information protection")
- **Статья 15. Использование информационно-телекоммуникационных сетей.** (Article 15. Use of information and telecommunication networks.)

Vladimir Kharitonov v. Russia, re blocking of Electronic Publishing News, (<http://www.digital-books.ru>), ECtHR decision of 29.6.2020

ООО Flavus and Others v. Russia,

Bulgakov v. Russia,

Engels v. Russia

## National Implementation (4)

### Excursus: Russia



- 2018
- **Russian Federal Service for Supervision of Communications, Information Technology and Mass Media *Roskomnadzor***; Russian associations for the protection of rights of owners and licensees, large Russian media holdings and TV companies, Russian search engines and large Russian platforms that host video content, have signed a memorandum on cooperation for the protection of exclusive rights over digital technologies.
- System of self-regulation.

# National Implementation (5)

## Excursus: Switzerland

Revised Copyright Act, Art. 39d: Obligation of the OCSSP

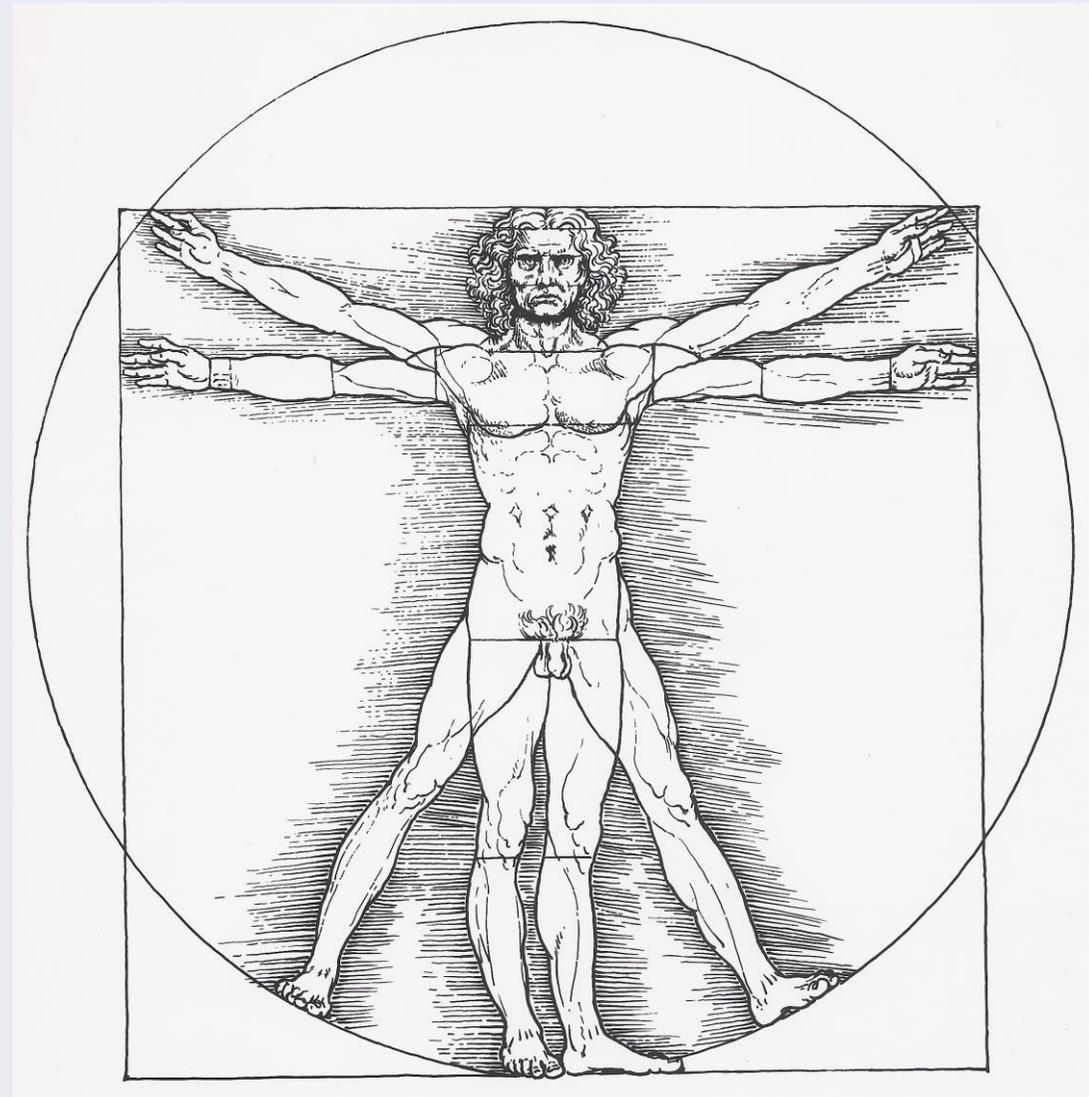
- to keep down content whose use is illegal
- that has already been uploaded illegally before
- has been notified to be platform to be illegal
- and the platform has created a particular risk of such infringements

Self-regulation, Code of conduct



## Implementation in Germany («UrhDaG-E») (1)

- Background: The German Government agreed to the DSM Directive, but invoked in an accompanying statement:
  - **“the spirit of guaranteeing appropriate remuneration for creatives, preventing ‘upload filters’ wherever possible, ensuring freedom of expression and safeguarding user rights”**
  - **Attempt to square the circle**



## Implementation in Germany (2)

- Draft act for national implementation of Art. 17 DSM Directive in Germany : Copyright Service Provider Act (*Urheberrechts-Diensteanbieter-Gesetz-Entwurf*, UrhDaG-E)
- to implement Article 17 of the Digital Single Market (DSM) Directive and to reorganise the copyright responsibility of upload platforms for the content uploaded by their users
- Applies to **OCSSP**, especially platforms like YouTube and Facebook
- Balance between interests of (1) users, (2) authors, (3) culture industry, (4) platforms, and (5) public at large

## Implementation in Germany (3)

1. Regulations in the interest of the users:

- a) Express permission for caricature, parody and pastiche.
- b) Reference to a legally or contractually permitted use is possible ("preflagging") already upon uploading.
- c) Platform cannot block preflagged content ("online by default").
- d) Exception for obviously illegal uploads, such as complete film works.
- e) Permission for minor uses for non-commercial purposes, even without the corresponding licenses (*de minimis* exception) against a flat-rate remuneration of the platform to the rightholders.

## Implementation in Germany (4)

2. Regulations in the interest of the authors:

a) direct claim of the authors for remuneration against the platforms for licensing of content, even if they otherwise have assigned their rights to a third party.

b) Authors benefit economically from the new minor use exception through a flat rate billing systems.

Claims pursuant to lit. a) and b) are to be asserted via collecting societies

c) Right to block use of works which infringe the moral rights of authors.

## Implementation in Germany (5)

3. Regulations in the interest of cultural industry (holders of exploitation rights):

- a) For all content that they make accessible, upload platforms must either acquire licenses or ensure that content whose use is not permitted by contract (license) or by law (barrier) is not available ("take down" and "stay down"). No invocation of host provider privilege ("safe harbour").
- b) Better negotiating position of right holders interested in the distribution and licensing of protected content on upload platforms (music industry).
- c) Rightholders of content marketed via exclusive services (film industry) can trust that reported content is not available on platforms.
- d) Upload platforms must inform rightholders about the functioning of their technical systems and, in the case of licensing agreements, provide information on the use of the licensed content.

## Implementation in Germany (6)

### 4. Regulations in the interest of the platforms:

#### a) Draft only covers services which

- have a commercial purpose and
- compete with online content services (online film, TV and music streaming services) for the same target groups.

b) Upload platforms must seek licenses where possible. Platforms must accept licence offers at appropriate terms for content typically uploaded to them; must actively approach collecting societies.

c) Exemptions for start-up companies in the start-up phase, derogations for micro-platforms.

## Implementation in Germany (7)

### 5. Legal peace and avoidance of abuses

- Users can complain against unjust blocking.
- Rightholders can complain if their content is made accessible without license or legal limitation or exception.
- The platforms have to make available a swift, effective and cost-free internal complaint resolution mechanism; decision by a human within one week.
- Users and rightholders may appeal to a private or official reconciliation body.
- Access to the courts.
- - Provisions against
  - "Overblocking"
  - "False Notification"
  - "False Pre-flagging"

## Implementation in Germany (8)

Principle: License to use rather than upload filtering

- Obligation for service providers to acquire rights of use against remuneration, if:
  - offered by rightholders or
  - available from collecting societies
- Duty to accept offers at "**reasonable conditions**"
- License by rightholder to platform also covers (non-commercial) users
- Negotiation to conclude a collective license for photos and other images between German Collecting Society for Photography and the German Organisation of Suppliers of Professional Photographs, covering also non-German photos

## Implementation in Germany (10)

Legally permitted "minor uses"

- New limitations of the copyright for **minor uses**
  - i.e. small parts of works or works of small size for non-commercial purposes
- Verifiable by machine
- Scope
  - 1. up to 20 seconds of each film or motion picture,
  - 2. up to 20 seconds of each audio track,
  - 3. up to 1 000 characters of text each and
  - 4. one photo or graphic each with a data volume of up to 250 kilobytes.
- Uploads may not be blocked, but must be compensated by platforms
- Compatibility with Union law is controversial

## Wrap up and outlook (1)

### Art. 17 DSM Directive and Antitrust

- Platforms as essential facility
- Duty to accept offers at "**fair, reasonable and non-discriminatory terms**"
- Similarity to **FRAND licenses** for standard essential patents
- Differentiation between dominant and small platforms, not between active and passive role of OCSSP
- Art. 17 DSM Directive ≠ CJEU decision L'Oréal v eBay, [Case C-324/09](#): size and maturity, not involvement in the offer
- Art. 17 DSM Directive as provision of antitrust law, not tort law

## Wrap up and outlook (2)

- Balancing different interests, squaring the circle
- German model will also influence practice in other countries, including the UK and Switzerland
- Is the German model compatible with EU law? Also the “minor use” exception?
- Will the German model withstand time?
- What about self-regulation?



Dr. Reinhard Oertli, LL.M.

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Attorney at Law, Partner

[reinhard.oertli@mll-legal.com](mailto:reinhard.oertli@mll-legal.com)

[www.mll-legal.com](http://www.mll-legal.com) | [www.mll-news.com](http://www.mll-news.com)

**Thank you**

Thanks you for your time and interest.