

# The DSM Copyright Directive: EU Copyright Will Indeed Never Be the Same

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*Viewed as a whole, the DSM Copyright Directive represents a setback for copyright protection in the EU. To most observers, the debate looks like a classic struggle between those who wish to strengthen copyright and those who wish to roll it back. The reality is, of course, far more nuanced, but in the legislative process nuance was a casualty. Most rightholder groups were supportive of adoption, but there were significant exceptions. Anti-copyright stakeholders sought its rejection. National implementation of this instrument, which has forever altered the face of EU copyright, is set to be the next battleground.*

## Introduction

On 26 March 2019, the European Parliament (EP) voted in plenary to adopt the Directive on Copyright in the Digital Single Market (the DSM Copyright Directive or the Directive).<sup>1</sup> The Directive, which was approved by the Council on 15 April 2019,<sup>2</sup> will take effect on 7 June 2019—i.e. the twentieth day following that of its publication in the Official Journal of the European Union. EU Member States will then have two years to implement the Directive.

Viewed as a whole, the DSM Copyright Directive represents a setback for copyright protection in the EU. To most observers, the debate over the Directive looks like a classic struggle between those who wish to strengthen copyright in the EU and those who wish to roll it back. The reality is of course far more nuanced, but in the marathon legislative process nuance was a casualty. Indeed, before the EP's plenary vote, most rightholder groups were supportive of adoption, but there

were significant exceptions on the copyright industry side. Anti-copyright stakeholders sought its rejection, considering that overall the Directive “is bad, and will not make the internet work for people”. Most rightholders seemed willing to accept the negative elements of the Directive in return for certain rewards that are specific to them. Indeed, the Directive is divisive as between rightholders. By giving titbits to different categories and types of rightholders, the EU legislator pitted them against each other.

The 2001 Copyright Directive<sup>3</sup> established strong exclusive rights, a balanced approach to exceptions, robust legal protection of technological measures (TPMs) and respect for contractual freedom in the EU. However, these aspects of copyright are undermined to varying degrees by the new Directive, notably:

- The exercise of exclusive copyrights is weakened by:
  - new cross-border exceptions;
  - bans on contractual overrides and other limitations on contractual freedom;
  - formalities/opt-in requirements (and conversely the need to opt-out in some cases);
  - new safe harbours for certain internet platforms;
  - increased collective management to the detriment of direct and individual licensing;
  - weaker protection of TPMs in certain cases.
- The balanced approach to copyright exceptions is distorted by:
  - new exceptions which must be implemented by the Member States (and as noted are generally immune from contractual override);
  - elevation of certain exceptions to the status of “rights”;
  - the accumulation of exceptions (get through the door with one and then use another to make copies to take home);
  - limitations on the use of TPMs.
- The legal protection of technological measures is undermined by (at least insofar as this Directive is concerned):

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<sup>1</sup> See <http://www.eurparl.europa.eu/news/en/press-room/20190321IPR32110/european-parliament-approves-new-copyright-rules-for-the-internet>. The final text of 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 [2019] OJ L130/92 is available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0790&from=EN>. The Commission's original proposal is available at <https://eur-lex.europa.eu/legal-content/en/txt/html/?uri=celex:52016> [All accessed 28 May 2019]. See generally T. Shapiro, “EU Copyright Will Never Be the Same: A Comment on the Proposed Directive on Copyright for the Digital Single Market (DSM)” (2016) 38 E.I.P.R. 771.

<sup>2</sup> See [http://europa.eu/rapid/press-release\\_IP-19-2151\\_en.htm](http://europa.eu/rapid/press-release_IP-19-2151_en.htm) [Accessed 29 April 2019]. Italy, Finland, Luxembourg, the Netherlands, Poland and Sweden voted against adoption, whereas Belgium, Estonia and Slovenia abstained.

<sup>3</sup> Directive 2001/29 of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (2001 Copyright Directive or the Infosoc Directive) [2001] OJ L167/10–19. Recall that this instrument also represents the EU/Member States' implementation of the 1996 WIPO Internet Treaties. On the Treaties and the Directive as well as national implementation, see B. Lindner and T. Shapiro, *Copyright in the Information Society: A Guide to National Implementation of the European Directive*, 2nd edn (Cheltenham: Edward Elgar, 2019).

- a bias in favour of exceptions;
- disapplication of the on-demand carve-out for certain exceptions;
- Contractual freedom is disrespected (as described above) through a series of measures limiting the rights of parties to override certain entitlements and exceptions in their agreements.

The Directive is itself a behemoth (comprising 32 articles and 86 Recitals), including:

- new exceptions to and limitations on copyright (arts 3–12);
- a new (voluntary) mechanism for VOD platforms intended to encourage cross-border licensing (art.13);
- a boost for the public domain? (art.14);
- a new related right for press publishers (art.15);
- a new private copy and reprography levy entitlement for publishers (art.16);
- a bridge for the value gap—a new provision clarifying that certain platforms implicate copyright and are not eligible for the hosting provider exemption in art.14 of the E-Commerce Directive<sup>4</sup> (art.17);
- new provisions on author/performer remuneration (arts 18–23).

In this article, we consider the substantive provisions (arts 3–23) of the Directive.

### **New exception for text and data mining for scientific research purposes (art.3)**

Article 3 provides for an exception in respect of text and data mining (TDM) for scientific research purposes. One of the more recent justifications asserted in support of TDM exceptions relates to the need to advance artificial intelligence research in the EU (though similar provisions do not necessarily exist in other more advanced jurisdictions). The beneficiaries of this exception include research organisations (ROs), and cultural heritage institutions (CHIs).

Research organisations are:

- a university, including its libraries;
- a research institute (and hospitals carrying out research); and
- any other entity with a primary goal of which is to conduct scientific research:
  - on a not-for-profit basis or by re-investing all the profits in its scientific research; or
  - pursuant to a public interest mission recognised by a Member State.

Recital 11 addresses collaboration with the private sector and explains that ROs should also benefit from the exception when their research activities are carried out in the framework of public-private partnerships. Recital 12 clarifies that organisations upon which commercial undertakings have a decisive influence, allowing such undertakings to exercise control because of structural situations which may result in preferential access to the mining results, should not be considered ROs.

The definition of CHIs in art.2(3) and Recital 12 covers publicly accessible libraries, museums, film archives or audio heritage institutions. Recital 13 includes national libraries and national archives, educational establishments, public sector broadcasting organisations and research organisations—insofar as their archives and publicly accessible libraries are concerned.

This TDM exception implicates the exclusive right of reproduction in the 2001 Copyright Directive as well as the extraction/reproduction and sui generis rights established in the Database Directive. In essence, beneficiaries may reproduce and extract content to which they have lawful access for purposes of TDM for scientific research purposes only. As Recital 14 explains, the term “lawful access” includes content based on an open access policy or through contractual arrangements such as subscriptions or through other “lawful means”.

Beneficiaries are obliged to store the datasets with “an appropriate level of security” and may retain the mining results for purposes of scientific research and verification of results.

As regards technological measures (TPMs), Recital 16 confirms that rightholders may use such measures to ensure that only persons with lawful access to their data can access it, including by means of IP address validation or user authentication. Rightholders are also permitted to apply measures to ensure the security and integrity of their networks and databases but the measures may not go beyond what is necessary to achieve that objective.

### **New (more general) exception for text and data mining (art.4)**

During the course of the legislative process, an additional TDM exception backed in particular by the software industry was introduced. Article 4 requires Member States to provide for a very broad TDM exception (affecting reproduction and extraction rights) unless the rightholders have expressly reserved in an appropriate manner for example by “machine readable means”. Thus, other means of reservation are also possible. Recital 18 makes explicit reference to metadata and website terms and conditions and indicates that: “In other cases, it can be appropriate to reserve the rights by other means, such as contractual agreements or a unilateral declaration.”

Anyone can benefit from the TDM exception: it is not limited to a specific beneficiary or beneficiaries. The content must be lawfully accessible to be mined.

<sup>4</sup> Directive 2000/31 of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1.

However, it should be noted that “lawfully accessible” does not necessarily mean lawfully made available. In terms of limitation on use, the reproductions and extractions made under this exception must only be used for TDM and may be retained for as long as necessary for purposes of text and data mining.

### New exception for illustration for teaching (art.5)

The Directive expands upon the teaching exception under the 2001 Copyright Directive by introducing a mandatory exception to certain exclusive rights (notably reproduction and making available) for the sole purpose of digital use of works in teaching. The key features of this exception are as follows:

- **Premises:**  
The use has to take place under the responsibility of an educational establishment—on its premises or other venues, or through a secure electronic environment accessible only by the educational establishment’s pupils or students and teaching staff.
- **Beneficiary:**  
the exception covers educational establishments—primary, secondary, vocational and higher education establishments.
- **Licences:**  
Member States are allowed to give licences priority over the exception. Such licences must be easily available in the market.
- **Cross-border effect:**  
Use of works through secure electronic environments shall be deemed to occur only in the Member State where the educational establishment is established which limits the licensing territory for online educational courses or distance learning.
- **Compensation:**  
Member States may provide for fair compensation for use of the works under the exception.
- **Whole works:**  
Recital 21 states that:  

“In most cases, the concept of illustration would, therefore, imply the use only of parts or extracts of works, which should not substitute for the purchase of materials primarily intended for the educational market.”

### New preservation exception (art.6)

The Directive introduces a mandatory exception, notably to the rights of reproduction and extraction from a database for the purposes of preservation. The beneficiaries of this exception are CHIs. However, Recital 28 states that CHIs may rely on third parties “acting on their behalf and under their responsibility” to do the copying, which has the potential to become a source of leakage, particularly where the third parties concerned are commercial entities.

### Common provisions relating to the new exceptions (art.7)

As a result of the contractual override ban in art.7, contractual provisions that are contrary to the exceptions in arts 3, 5 and 6 shall be unenforceable.

As regards the treatment of technological measure (TPMs) vis-à-vis the new exceptions, Recital 7 clarifies that the current protection of TPMs should be maintained while not preventing the enjoyment of exceptions and limitations. In addition, art.7 of the Directive states that:

“Article 5(5) of Directive 2001/29/EC shall apply to the exceptions and limitations provided for under this Title. The first, third and fifth subparagraphs of Article 6(4) of Directive 2001/29/EC shall apply to Articles 3 to 6 of this Directive.”

The approach which disapplies art.6(4)(4) represents a step backwards from the formulation under the 2001 Copyright Directive where TPMs could generally be said to trump exceptions, subject to a requirement that under certain conditions rightholders had to ensure that beneficiaries could benefit from certain exceptions. Crucially, art.6(4)(4) of the 2001 Copyright Directive provided that this requirement did not apply to content made available on-demand on agreed contractual terms.

Article 6(4) of the 2001 Directive establishes a complex mechanism to deal with the relationship between TPMs and exceptions. It provides that under certain circumstances Member States must “take appropriate measures” to ensure that TPMs do not erase the benefits of exceptions (for the private copy exception this is optional), while still protecting online business models that deliver copyright protected content on demand. As a result, the non-application of art.6(4)(4) of the 2001 Directive in the case of the new exceptions in the new Directive is problematic and risks undermining new business models and content protection.

Article 7(2) of the DSM Copyright Directive specifically incorporates the three-step test by reference to art.5(5) of the 2001 Copyright Directive. It is also set out in full in Recital 6.

## Use of out-of-commerce (OOC) works by cultural heritage institutions (art.8)

As a first approach, the Directive provides for a mandatory extended collective licensing scheme in which collective management organisations (CMOs) may, according to their mandates, conclude non-exclusive licences with CHIs for the use of OOC works permanently in their collection for non-commercial purposes. The ECL mechanism is subject to two provisos:

- The CMO must be “sufficiently representative of rightholders” in both the relevant type of works as well as the rights which are subject to the licence; and
- Equal treatment to all rightholders in relation to the term of the licence.

Licences should be sought from the CMO that is representative of the Member State where the CHI is established.

As a fall-back, the Directive includes an exception to allow CHIs to make OOC works that are permanently held in their collection available for non-commercial purposes. The proposed exception is also subject to two provisos:

- Attribution, unless it turns out to be impossible; and
- The works are made available on non-commercial websites or other portals.

The Directive provides for a rightholder opt-out from both the ECL and exception; and, it requires that rightholders must be able to exclude their works “easily and effectively”. The opt-out mechanism should cater to either a general or a specific exclusion. This provision allows rightholders to protect their catalogues from the future application of the OOC provisions.

In terms of the scope of out-of-commerce works, a work is considered to be OOC when it can be presumed in good faith that the whole work is not available through customary channels of commerce after a reasonable effort is made to determine such availability. The Directive provides for a broad definition of OOC, which encompasses works that were previously commercialised, never commercialised, and are older than a specified cut-off date.

## Cross-border uses of out-of-commerce works (art.9)

Article 9 provides for cross-border uses by CHIs of out-of-commerce works based on the ECL by stipulating that a licence granted may permit use of OOC works in any Member State.

In this context, the uses of works and other subject-matter under the exception or limitation will be deemed to occur solely in the Member State where the CHI undertaking that use is established—i.e. applying the country of origin principle.<sup>5</sup>

## Collective licensing with an extended effect (art.12)

Introduced by the Council, Ch.2 of the Directive, entitled “Measures to facilitate collective licensing”, establishes an EU-level enabling provision for extended collective licensing (ECL). Specifically, art.12 provides a broad EU-level legal basis for “Collective licensing with an extended effect”, going significantly beyond existing provisions in the copyright *acquis*.<sup>6</sup>

Under art.12(1) Member States *may* provide for the extended effect of collective licensing “as far as the use on their territory is concerned” and “subject to safeguards”, by a duly mandated CMO<sup>7</sup> to the rights of non-represented rightholders—i.e. “rightholders who have not authorised that collective management organisation to represent them by way of assignment, licence or any other contractual arrangement”—in certain circumstances.

Recital 46 explains that Member States should have flexibility in terms of the specific type of mechanism employed (ECL, legal mandate and presumptions of representation), provided that this is in compliance with EU law, notably the CRM Directive<sup>8</sup> and the SatCab Directive,<sup>9</sup> and should not affect existing possibilities of Member States to apply mandatory collective management or other collective licensing mechanisms with an extended effect, such as the one included in art.3 of the latter Directive.

Article 12(2) requires Member States to ensure that ECL:

“is only applied within *well-defined areas of use*, where obtaining authorisations from rightholders on an individual basis is typically *onerous and impractical* to a degree that makes the required licensing transaction *unlikely*, due to the nature of the use or of the types of works or other subject matter concerned and that such licensing mechanism safeguards the *legitimate interests of rightholders*” (Emphasis added).

<sup>5</sup> See also art.10 on publicity measures and art.11 on stakeholder dialogues.

<sup>6</sup> See Recital 18 of the 2001 Copyright Directive.

<sup>7</sup> DSM Copyright Directive art.12 applies to CMOs that are subject to the national rules implementing Directive 2014/26 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (CRM Directive) [2014] OJ L84/72–98, that have “mandates from rightholders”. See also Recital 49.

<sup>8</sup> Explicit reference is made to art.7 of the CRM Directive.

<sup>9</sup> Council Directive 93/83 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [1993] OJ L248/15–21.

The reference to “legitimate interests” in art.12(2)<sup>10</sup> is an incomplete and insufficient nod to the three-step test under art.5(5) of the 2001 Copyright Directive. As regards the three-step test, it should be noted that art.7(2) provides only that: “Article 5(5) of Directive 2001/29/EC shall apply to the exceptions and limitations provided for under [Title II],” and art.12 falls under Title III.

In terms of ensuring protection of the legitimate interests of rightholders, art.12(3) stipulates the following safeguards:

- the CMO, which must have mandates, needs to be “sufficiently representative of rightholders” in terms of the relevant type of works or other subject-matter and of the rights at issue;
- equal treatment of all rightholders, *including* in relation to the terms of the licence;
- a (non-represented) rightholder opt-out—“at any time easily and effectively”; and
- appropriate publicity measures, “without the need to inform each rightholder individually”.<sup>11</sup>

### Negotiation mechanism for VOD (art.13)

The Directive notes that the availability of works, in particular European works, on video-on-demand services remains limited; pointing to difficulties in concluding agreements for the online exploitation of such works due to issues related to the licensing of rights—e.g. where the rightholder for a given territory has a low economic incentive to exploit a work online and does not license or holds back the online rights, or where there are issues relating to the windows of exploitation.<sup>12</sup> In short, the purpose here is to encourage Portuguese VOD platforms to license more Finnish films.

To facilitate the licensing of rights in audio-visual works to video-on-demand services, art.13 requires Member States to provide for a negotiation mechanism to assist parties with their negotiations and help them reach agreements.

While there is a limited risk of undermining ordinary negotiations, at this juncture, the practical impact of art.13 appears likely to be negligible.

### Works of visual art in the public domain (art.14)

Article 14 requires Member States to provide that, when the term of protection of a work of visual art has expired, any material resulting from an act of reproduction of that

work shall not be subject to copyright or related rights, unless the material resulting from that act of reproduction is original in the sense that it is the author’s own intellectual creation. The operation of this provision should not prevent cultural heritage institutions from selling reproductions, such as postcards.<sup>13</sup>

As a practical matter, art.14 seems superfluous, basically stating the obvious: when the copyright in a work expires, that work is no longer protected. The intention behind this provision appears to be directed at weakening copyright by trying to strengthen the concept of the public domain. It appears designed to prevent rightholders from extending copyright protection in a work of visual arts by creating non-original derivative material. During the fifth trilogue on 13 December 2018, a legal adviser to the Greens tweeted triumphantly that this was the first time that “PD will be explicitly [*sic*] in EU © legislation!”<sup>14</sup>

The agreed provision contains two specificities: (1) it pertains only to works of visual arts; and (2) it is not confined to the preservation exception (which was the original intention). Finally, the physical ownership of a piece of visual art should be unaffected.

### Protection of press publications concerning online uses (art.15)

Publishers of “press publications” face problems in licensing the online use of their publications to the providers of these new online services, such as news aggregators or media monitoring services, making it more difficult for them to recoup their investments.<sup>15</sup> Moreover, a free and pluralist press is needed to ensure that quality journalism and citizens’ access to information “provide a fundamental contribution to public debate and the proper functioning of a democratic society”. Article 15 therefore introduces a new related right for press publishers (similar to that accorded to audio-visual/music producers and broadcasters).

This was one of the most controversial provisions of the Directive, but its rationale appears sound:

“The organisational and financial contribution of publishers in producing press publications needs to be recognised and further encouraged to ensure the sustainability of the publishing industry and thereby foster the availability of reliable information.”<sup>16</sup>

For the purposes of art.15, a “press publication” is defined in Recital 56 as a collection composed mainly of literary works of a journalistic nature, but which can also include other works or subject matter, and which (a) constitutes an individual item within a periodical or regularly updated publication under a single title, such as a newspaper or a

<sup>10</sup> Recital 48 also refers to Member States ensuring that appropriate safeguards are in place to protect the legitimate interests of rightholders.

<sup>11</sup> DSM Copyright Directive art.12(3)(d).

<sup>12</sup> DSM Copyright Directive Recital 51.

<sup>13</sup> DSM Copyright Directive Recital 53.

<sup>14</sup> See <https://twitter.com/AClorrain/status/1073236309349728256> [Accessed 29 April 2019].

<sup>15</sup> See DSM Copyright Directive Recital 54.

<sup>16</sup> DSM Copyright Directive Recital 55.

general or special interest magazine; (b) has the purpose of providing the general public with information related to news or other topics; and (c) is published in any media under the initiative, editorial responsibility and control of a service provider. Under art.15(1) Member States are required to provide publishers of press publications established in a Member State with the rights provided for in art.2 and art.3(2) of the 2001 Copyright Directive for the online use of their press publications by information society service providers. This protection does not apply to acts of hyperlinking, nor does it apply to uses of individual words or very short extracts of a press publication.

The rights referred to in art.15(1) expire two years after the publication of the press publication—calculated from 1 January of the year following the date of publication.<sup>17</sup>

Under art.15(5) Member States are required to ensure that the authors of the works incorporated in a press publication receive an appropriate share of the revenues that press publishers receive for the use of their press publications by information society service providers.

### **Publishers' claims to fair compensation (art.16)**

The main goal of art.16 is to restore publishers to their position *status quo ante* the Court of Justice decision in *Hewlett-Packard* case.<sup>18</sup> In that judgment, the Court of Justice took the view that publishers were not rightholders in EU law. As a result, publishers were disentitled from a share of the “compensation” accruing from private copy and reprography levies established in Member States under art.5(2)(a)–(b) of the 2001 Copyright Directive.

To address this situation, art.16 states that Member States *may* provide that where an author has transferred or licensed a right to a publisher, such a transfer or licence constitutes a sufficient legal basis for the publisher to be entitled to a share of the compensation for the uses of the work made under an exception or limitation to the transferred or licensed right.<sup>19</sup>

### **The value gap—use of protected content by online content sharing service providers (art.17)**

Articles 2(6) and 17 (and accompanying Recitals 61 to 71) collectively establish a new legal framework governing the liability of “online content sharing service providers” (OCSSPs) in order to bridge the so-called

“value gap”.<sup>20</sup> Along with the press publishers’ right, the value gap provisions were the most controversial of the Directive.

The new legal framework clarifies that an OCSSP performs an act of communication to the public right (CTTP) “when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users”.<sup>21</sup> OCSSPs must therefore secure authorisation for such activity.<sup>22</sup> This “licensing obligation” is inherent in the nature of exclusive rights (to authorise or prohibit). Moreover, in such cases, the OCSSP does not qualify for the hosting provider privilege under art.14 of the E-Commerce Directive.<sup>23</sup> The question of whether OCSSPs such as YouTube would already be considered to perform a CTTP is currently pending before the Court of Justice.<sup>24</sup>

The new legal framework, however, does not stop at a clarification that copyright is implicated and that, as a result, OCSSPs may find no solace in the hosting privilege for the liability arising from the provision of this Directive on the use of protected content by online content-sharing service providers. Despite the inclusion of a built-in proportionality mechanism (a standard feature of EU law), it goes on to provide OCSSPs with a new safe harbour through the establishment of a series of liability mitigation measures. This part of the value gap framework, in effect, creates a new liability privilege for active, (well-resourced) platforms; a lighter liability regime for start-ups; and a broad de facto user-generated content (UGC) exception. Concurrently, the impact of the provisions is to increase the burdens on rightholders and to give an elevated status for exceptions as quasi-rights for users. There is an exclusion from liability for CTTP where there is failure on a rightholder’s part to notify specific content.

Finally, the new framework imports language from art.15 of the E-Commerce Directive, providing that: “The application of this Article shall not lead to any general monitoring obligation”.<sup>25</sup> Depending on what general monitoring actually means (and this is, of course, a matter of debate), this confusing reference potentially creates internal conflicts within art.17 particularly when viewed in conjunction with the approach to exceptions.

Recital 61 sets the stage for the new legal framework. In the complex online content market, content sharing services which provide access to a large amount of content uploaded by their users have become key sources of access to content online to the detriment of services

<sup>17</sup> DSM Copyright Directive art.15(4). Article 15(1) does not apply to press publications first published before entry into force of the Directive.

<sup>18</sup> *Hewlett-Packard Belgium SPRL v Reprobel SCRL* (C-572/13) EU:C:2015:750; [2016] Bus. L.R. 73.

<sup>19</sup> This is without prejudice to existing and future arrangements in Member States concerning public lending rights.

<sup>20</sup> IFPI has described the “value gap” as “the growing mismatch between the value that user upload services, such as YouTube, extract from music and the revenue returned to the music community – those who are creating and investing in music. The value gap is the biggest threat to the future sustainability of the music industry”. See IFPI, “Rewarding creativity: Fixing the value gap” available at [https://www.ifpi.org/downloads/GMR2017\\_ValueGap.pdf](https://www.ifpi.org/downloads/GMR2017_ValueGap.pdf) [Accessed 29 April 2019].

<sup>21</sup> DSM Copyright Directive art.17(1) differentiates between an act of communication to the public and an act of making available, although of course the latter is a form of communication to the public.

<sup>22</sup> See DSM Copyright Directive art.17(1).

<sup>23</sup> See DSM Copyright Directive art.17(3).

<sup>24</sup> See *YouTube* (C-682/18), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=211267&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=9143259> [Accessed 28 May 2019]. See also *Joined Case Elsevier* (C-683/18) <http://curia.europa.eu/juris/document/document.jsf?text=&docid=211268&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=9143790> [Accessed 28 May 2019].

<sup>25</sup> DSM Copyright Directive art.17(8); see also Recital 66.

licensed directly, in particular by the music sector. While this is great for cultural diversity and the development of new business models, it has been proven to be a challenge for rightholders. This is because legal uncertainty exists as to whether these user-upload sites implicate copyright and therefore require authorisation from the rightholders—of course, “without prejudice to the application of exceptions and limitations” in EU law. This legal uncertainty affects rightholders’ ability to license their content and to secure remuneration therefrom.

The focus here is on the blanket licensing of entire repertoires by music labels and music author CMOs. The impact and concerns about the value gap vary from one content sector to another, depending, in particular, on their business models and the extent to which they license such platforms. These distinctions were not readily apparent to the EU legislator. While the Directive pays lip service to contractual freedom,<sup>26</sup> the main goals of the new framework is the development of a licensing market (with a preference for collective licensing), a reasonable balance and an “appropriate remuneration” for rightholders.

### **Scope/definition—“online content-sharing service provider” (art.2(5)–(6))**

The structure of the value gap legal framework is based on essentially imputing liability to information society services<sup>27</sup> that fall within the definition of OCSSP. In principle, any information society service that does not fall within that definition would be subject to the current liability regime under the 2001 Copyright Directive and the E-Commerce Directive. However, the definition in art.2(6) not only specifies who is in, but also gives examples of who is out. A covered service is defined as follows:

“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 profit-making purposes.”

The important issue of what constitutes “a large amount” was the subject of prolonged legislative debate. The word “large” was nearly changed to “significant”. According to Recital 63, the assessment should be made on a “case-by-case basis”, taking in factors such as audience and the number of files uploaded by users.

Article 2(6) also sets out a non-exhaustive list of services that are out of scope. This raises the question as to whether service providers that are specifically excluded from art.17 inhabit some kind of rarefied liability plane in between the *ancien régime* and this new framework.

Another question is why all these services have been lumped together. As such, there is a risk of confusion, particularly before the national courts.

Recital 62 provides some guidance. First, it explains in more detail what an OCSSP does. Such platforms,

“as part of their normal use, are designed to give access to the public to copyright-protected content or other subject matter uploaded by their user”.

Thus, the design of the platform as a mechanism for providing access to user uploaded content is a key element. Moreover, OCSSPs

“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”.

After much debate, OCSSPs are defined by the following:

- their purpose (main, or one of the main);
- enabling storage and sharing of a large amount of uploaded copyright protected content;
- profit motive—direct or indirect;
- active character vis-à-vis the content—organising it and promoting it in order to attract a larger audience, including by categorising it and using targeted promotion within it.

This definition sets the stage for the clarification that OCSSPs CTTTP and cannot avail themselves of the hosting privilege in art.14 of the E-Commerce Directive. It is worth noting that these attributes are not necessarily all relevant to the question of whether the exclusive right of CTTTP is implicated (though of course some inspiration is taken from CJEU jurisprudence). The purpose criterion, and the requirement of a profit-motive in particular, are both questionable (though the CJEU has said that the latter is “not irrelevant”).<sup>28</sup>

By way of further guidance, Recital 62 provides more details on the services referred to art.2(6) that are *excluded* from the definition of OCSSP and therefore the value gap legal framework. These include:

- internet access providers;
- business-to-business cloud services;
- cloud services, which allow users to upload content for their own use, such as cyberlockers;
- online marketplaces whose main activity is online retail and not giving access to copyright protected content;
- providers of open source software development and sharing platforms;

<sup>26</sup> DSM Copyright Directive Recital 61 states that “rightholders should not be obliged to give an authorisation or to conclude licensing agreements”.

<sup>27</sup> A term that is defined in DSM Copyright Directive art.2(5) as “a service within the meaning of point (b) of Article 1(1) of Directive (EU) 2015/1535”.

<sup>28</sup> See, for example, *Stichting Brein v Wullems (t/a Filmspeler)* (C-527/15) EU:C:2017:300; [2017] Bus. L.R. 1816 at [34]; *Football Association Premier League v QC Leisure* (C-403/08) EU:C:2011:631; [2012] Bus. L.R. 1321 at [204]. However, the CJEU has also noted that a profit-making nature is “not necessarily an essential condition”—see *SGAE v Rafael Hoteles SL* (C-306/05) EU:C:2006:764; [2007] Bus. L.R. 521 at [44].

- not-for-profit scientific or educational repositories;
- not-for-profit online encyclopaedias.

Finally and importantly, “in order to ensure a high level of copyright protection”, Recital 62 closes by noting that the art.17 “liability exemption mechanism” (here it is actually referred to in terms akin to a safe harbour) should not “apply to service providers the main purpose of which is to engage in or to facilitate copyright piracy”.

In principle, the availability of injunctions under art.8(3) of the 2001 Copyright Directive should be unaffected by this new framework.<sup>29</sup> However, the *YouTube* and *Elsevier* cases pending before the CJEU have raised the question as to whether rightholders must notify hosting providers of the specific infringement and for that infringement to have occurred again following such notice.

### ***Communication to the public/the hosting privilege (art.17(1)–(3))***

The structure of art.17 begins with the clarification that an OCSSP

“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”.

As a consequence, though arguably it does not need to be said, it requires “authorisation” from “the rightholders referred to in art.3(1) and (2) of Directive 2001/29/EC” (i.e. authors, producers, performers and broadcasters). Press publishers are added via art.15 of the Directive.

By operation of art.17(2), that authorisation is automatically extended to

“cover acts carried out by users of the services falling within the scope of Article 3 of Directive 2001/29/EC when they are not acting on a commercial basis or where their activity does not generate significant revenues”.<sup>30</sup>

This extension arguably should not apply where the content was initially obtained illegally.<sup>31</sup> At the same time, according to Recital 69, it goes both ways, such that where rightholders authorise users to upload and make available works on an OCSSP, the act of CTP by that OCSSP “is authorised within the scope of the authorisation granted by the rightholder”. However, the OCSSP should not be able to rely on a presumption that its users have cleared all the relevant rights.

Recital 64 notes that the aforementioned clarification in respect of OCSSPs does not affect the concept of that right elsewhere under EU law; nor does it affect the

possible application of art.3 of the 2001 Copyright Directive to other service providers “using” protected content.

Where the conditions established under the Directive are met, and further to the clarification that OCSSPsCTTP, art.17(3) confirms that the “limitation of liability established in Article 14(1) of Directive 2000/31/EC shall not apply to the situations covered by this Article”. Thus art.14(1) cannot be invoked to limit “the liability arising from Article 17”.<sup>32</sup> Of course, art.14 may still apply for other reasons. Thus, OCSSPs retain the potential (if they meet the conditions) to invoke the liability privilege for other forms of illegal content including with respect to other forms of IP such as trade marks. In any event, the value gap framework nevertheless establishes a new liability privilege for OCSSPs vis-à-vis copyright.

### ***The new liability privilege for OCSSPs (art.17(4)–(5))***

The EU legislator did not stop at merely clarifying that OCSSPs communicate to the public and do not qualify for hosting privilege. Recital 66 states that since OCSSPs provide access to content uploaded by their users (and not them), “it is appropriate to provide for a specific liability mechanism for the purposes of this Directive for cases in which no authorisation has been granted”. This part of the value gap legal framework deals with the situation where the platform is not licensed by the rightholders. In such cases, the OCSSP is liable for unauthorised acts of CTP unless it can demonstrate that it has:

- “(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 and other subject matter 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 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).”

OCSSPs must therefore fulfil three conditions in order to gain admission into this new safe harbour. The first requires the platform to seek a licence, but rightholders do not have to grant one. Recital 61 advises that “as

<sup>29</sup> DSM Copyright Directive, Recital 66.

<sup>30</sup> See also DSM Copyright Directive, Recital 69.

<sup>31</sup> Compare also *ACI Adam BV v Stichting de ThuisKopie* (C-435/12) EU:C:2014:254; [2014] E.C.D.R. 13, where it was held that the private copy exception did not apply to content from illegal sources. Similar reasoning should apply here.

<sup>32</sup> DSM Copyright Directive, Recital 65.



contractual freedom should not be affected by those provisions, rightholders should not be obliged to give an authorisation or to conclude licensing agreements”.

The second condition requires best efforts to “ensure the unavailability of specific works ... for which the rightholders have provided the service providers with the relevant and necessary information”. Despite the fact that any reference to technical measures or content recognition technologies became quite toxic during the debate, this provision should in practice require filtering, but of course it is dependent on the provision of “relevant and necessary information” (and is complicated in some cases by confusing requirements related to exceptions).

The third condition is in effect a notice and takedown/staydown requirement for content that has not been previously notified (i.e. is not covered by the filtering mechanism).

Article 17(5) establishes a further test for assessing compliance with the obligations in art.17(4). In undertaking this assessment, the principle of proportionality is key—in fact it is already inherent in EU law. It was argued that the proportionality principle was a sufficient safeguard and that the new liability privilege was not necessary. This argument did not prevail. The following factors *inter alia* *should* be taken into account:

- (a) the type, the audience and the size of services and the type of works uploaded by the users; and
- (b) the availability of suitable and effective means and their cost for service providers.

In the event of leakage (where the filters fail) and where unauthorised content still gets through, OCSSPs

“should be liable in relation to the specific works and other subject matter for which they have received the relevant and necessary information from rightholders, unless those providers demonstrate that they have made their best efforts in accordance with high industry standards of professional diligence”.

The onus is therefore on the OCSSPs to show that they have taken appropriate action.

Further to the third condition relating to notice and staydown, and thus irrespective of best efforts and regardless of whether advance notice was given by rightholders, where specific unauthorised works nevertheless become available on their services, the OCSSPs are only liable

“when, upon receiving a sufficiently substantiated notice, they fail to act expeditiously to disable access to, or to remove from their websites, the notified works or other subject matter. Additionally, such online content-sharing service providers should also

be liable if they fail to demonstrate that they have made their best efforts to prevent the future uploading of specific unauthorised works, based on relevant and necessary information provided by rightholders for that purpose”.

This obligation is arguably already part of EU law on the basis of art.14 of the E-Commerce Directive when read in conjunction with *eBay*.<sup>33</sup> Finally, this new safe harbour is intended to function

“without prejudice to remedies under national law for cases other than liability for copyright infringements and to national courts or administrative authorities being able to issue injunctions in compliance with Union law”.<sup>34</sup>

In addition to this new safe harbour for OCSSPs, the value gap framework also introduces a lighter liability regime for start-ups. Article 17(6) requires that new OCSSPs whose services have been available to the public in the EU for less than three years and which have an annual turnover below €10 million are only required to comply with the conditions requiring best efforts to secure authorisation and notice and takedown (but not filtering). However, where the OCSSP’s average number of monthly unique visitors exceeds 5 million, calculated on the basis of the last calendar year, it will also become subject to the notice and staydown obligation.

### ***Exceptions and limitations—the UGC exception (art.17(7))***

The value gap legal framework is reliant upon co-operation between OCSSPs and rightholders. However, there are limits to what that co-operation is permitted to do. In particular, art.17(7) states that it must

“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”.

It is not entirely clear how this will work in practice—it introduces yet another potential for internal conflicts within art.17. Recital 70 notes that:

“steps taken by [OCSSPs] in cooperation with rightholders should be without prejudice to the application of exceptions or limitations to copyright, including, in particular, those which guarantee the freedom of expression of users”.

Yet, at the same time, for many anti-copyright groups which fear the end of the internet, these provisions, even with the specific link made between exceptions and fundamental rights,<sup>35</sup> are meaningless. For rightholders,

<sup>33</sup> See *L’Oréal SA v eBay International AG* (C-324/09) EU:C:2011:474; [2012] Bus. L.R. 1369.

<sup>34</sup> DSM Copyright Directive, Recital 66.

<sup>35</sup> There are currently three cases referred from the German Supreme Court on the relationship between exceptions and fundamental rights pending before the CJEU. AG Opinions were issued recently: *Pelham GmbH v Hutter* (C-476/17) EU:C:2018:1002, [2019] E.C.D.R. 3; *Funke Medien NRW GmbH v Germany* (C-469/17) EU:C:2018:870, [2019] E.C.D.R. 1; *Spiegel Online* (C-516/17) EU:C:2019:16.

in conjunction with art.17(9) on redress (see below), they appear to elevate exceptions to the status of rights that are actionable by affected users.

Additionally, a further provision that creates a de facto mandatory UGC exception requiring Member States to ensure that users are able to rely on a series of (previously optional) exceptions in the 2001 Copyright Directive when they upload and make available content on OCSSPs. As a result, the exceptions for quotation, criticism and review in art.5(3)(d) and for caricature, parody or pastiche in art.5(3)(k) of that Directive are rendered mandatory and fused together to create a UGC exception. While much will depend on how this “exception” functions in practice, this cumulated super-UGC exception may be inconsistent with the three-step test under TRIPS and the WIPO Copyright Treaty.

The EU legislator sees the inclusion of this new UGC exception as safeguarding a balance between the relevant fundamental rights in the Charter of Fundamental Rights of the EU (freedom of expression, freedom of the arts, right to property, including intellectual property).

### **Monitoring and reporting**

Article 17(8) contains an isolated yet potentially problematic requirement that the “application of this Article shall not lead to any general monitoring obligation”. The prohibition on the imposition by Member States<sup>36</sup> of general monitoring obligations on information society services that qualify for the liability privileges in arts 12–14 of the E-Commerce Directive comes from art.15 of that Directive. It is supposed to apply only where a liability privilege applies.

Depending of course on what “general monitoring” actually means (and this, of course, is a matter of debate), it could also create internal conflicts within art.17. Can an OCSSP meet its obligations and qualify for the new safe harbour if it does not engage in general monitoring?<sup>37</sup> A possible distinction could be that art.17(4) is very much grounded by reference to “specific works” and reliant on the provision of relevant/necessary information and substantiated notices, and therefore narrower than “general” monitoring. While stating that art.14 of the E-Commerce Directive does not apply, the impact of art.17(4) is to import elements that are akin to the requirements of the hosting safe harbour and, having created a new safe harbour, it is arguably logical also to apply an art.15 equivalent. However, the general language appears to establish a broad expansion of art.15. A more workable interpretation may be that an OCSSP, once it is safely settled in its new safe harbour—having performed all its new duties and met all the relevant conditions in art.17—may not be subject to any additional monitoring obligations beyond what is relevant to and necessary for compliance with art.17. In other words, any

monitoring that is performed to comply with art.17 should not be considered as general monitoring within the terms of art.17(7).

Article 17(7) also requires OCSSPs to

“provide rightholders, at their request, with adequate information on the functioning of their practices with regard to the cooperation referred to in paragraph 4 and, where licensing agreements are concluded between service providers and rightholders, information on the use of content covered by the agreements”.

### **User redress/dispute resolution**

The purpose of art.17(9) on user redress is to assuage user concerns about the filtering, blocking or wrongful takedown of non-infringing content.<sup>38</sup> It requires OCSSPs to put in place an effective and expeditious complaint and redress mechanism available to users.

### **Stakeholder dialogues**

Article 17(10), the final provision of this “house of cards”, requires the Commission in co-operation with the Member States to organise stakeholder dialogues to discuss best practices for the co-operation between the online content-sharing service providers and rightholders.

### **Fair remuneration in exploitation contracts of authors and performers (arts 18 to 23)**

Chapter 3 of the Directive requires Member States to provide authors and performers a number of rights and protections where the authors and performers have licensed or transferred their exclusive rights of exploitation. These are:

- a so-called remuneration principle (art.18);
- a transparency obligation (similar to audit rights) (art.19);
- a contract adjustment mechanism (also referred to as a “best-seller” clause) (art.20);
- a dispute resolution mechanism (art.21);
- a revocation right (art.22);
- a specific ban on contractual overrides such that certain of these provisions ( arts 19, 20 and 21) are considered to be of a mandatory nature (art.23).

The remuneration principle, revocation right and ban on contract overrides are new features that were not part of the Commission’s original proposal. The first two are courtesy of the EP, while the latter comes from the Council. The Commission’s more limited approach to remuneration was intended to address what it termed an

<sup>36</sup> See also DSM Copyright Directive, Recital 66.

<sup>37</sup> See *Scarlet Extended v SABAM* (C-70/10) EU:C:2012:85; [2012] E.C.D.R. 4 at [38].

<sup>38</sup> DSM Copyright Directive, Recital 70.

“information asymmetry” between authors/performers and those exploiting their rights, including as regards possible and actual exploitation and remuneration.

As a general matter, these new “contract rights” are a blow to contractual freedom in the field of copyright at EU level (and part of a disturbing trend that affects copyright exceptions and the use of TPMs as well). However, it is worth recalling that these new provisions all have multiple national antecedents across the EU.

In contrast to the Commission’s original proposal, the Directive is more solicitous to the need to consider the specificities of each content sector, and gives stronger recognition to the role of collective bargaining agreements. Arguably, the Directive may incentivise greater adoption and use of such agreements in the EU. A number of other mitigating provisions were added during the course of the legislative process, although many of them are optional.

Indeed, these new “rights” are drafted in terms that leave considerable discretion to the Member States. However, in a number of countries, these provisions (or at least some of them) are quite alien to their current copyright laws. As a result, national implementation of this part of the Directive is likely to vary and will pose a particular challenge for the EU’s copyright industries.

## **Conclusion**

The Member States’ respective approaches to implementation of the Directive are set to be the next battleground, not only with regard to the most controversial aspects but also across the panoply of matters covered by this instrument, which has forever altered the face of EU copyright.