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Implementing Article 17 – hot topics

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Article 17

Recital 61:

improve the ability of rightholders to obtain appropriate remuneration by fostering the development of the licensing market between rightholders and online content-sharing service providers.

2: definition of Online Content Sharing Service Provider

17.1: OCSSP performs act of communication to the public and therefor has to obtain authorization

17.2: also on behalf of uploaders when they are acting a non commercial basis or where their activity does not generate significant revenues

17.3 safe harbor Article 14 ecommerce Directive does not apply

17.4: limitation of liability. OCSSP not liable for unauthorised use if he demonstrates:

a) *best efforts to obtain authorisation, and*
b) *best efforts to block content for which the rightholder has provided the relevant and necessary information, and*
c) *take down upon notice; best efforts for stay down*

17.5: criteria for determining best efforts; proportionality

17.6: specific regime for new OCSSPs

17.7: non-infringing content available; users to rely on freedom of speech exceptions

17.8: no general monitoring obligation

17.9: complaint and redress mechanism; out of court dispute resolution

17.10: stakeholders to discuss best practices; best practices to take account of the need to balance fundamental rights and of the use of exceptions and limitations

17.10 EC to issue guidance (richtsnoeren) on application of Article 17

Implementing Article 17 - hot topics

- what online services qualify as OCSSPs?
- communication to the public (17.1): as in “communication to the public” in Article 3 Directive 2001/29/EC?
- authorization: contractual license or also extended license or statutory license?
- “not acting on a commercial basis”, “does not generate significant revenues” (17.2)
- scope of filtering obligation (17.4(b))
- what information to be provided by rightholder for filtering purposes? (17.4(b))

Implementing Article 17 – the hottest topic

How to ensure that content for which users can invoke copyright exceptions is available on the platform?

Filtering technology should ideally distinguish between infringing and non-infringing uses, but technology is not yet fully there

Article 17.9: users can invoke effective and expeditious complaint and redress mechanism in the event of disputes over the disabling of access

Academics proposal (November 2019) turns mechanism upside down:

- *ex ante* blocking only if content is identical or equivalent to the content submitted by the rightholder
- other content: OCSSP may decide whether or not to block, no obligation
- if the upload states “this post is a permissible quotation”, the complaint and redress mechanism is triggered. Rightholder must request for content to be blocked and explain why exceptions do not apply.

May 2020 – Dutch legislative proposal 35454

- article 17 implemented in sections 29c-e Copyright Act and 19b Act on Neighbouring Rights
- language stays close to that of Article 17
- not all provisions of Article 17 explicitly included

Explanatory Memorandum

- additional regulations may be adopted by decree (AMvB).
- reason to do so could be if the balance between the constitutional rights of property and freedom of speech would work to the detriment of the latter;
- for now the balance lies in the complaint and redress mechanism (17.9)
- EC guidance (richtsnoeren) may be included and elaborated in a decree.

July 2020

EC publishes consultation paper in preparation of guidance on the application of Article 17

- EC states its views on how Member States should implement
- article 17 is a *lex specialis* to Article 3 Directive 2001/29/EC; national law should explicitly introduce the notion of authorization for the act of communication to the public by the OCSSP.
- authorization (17.1): licensing agreement or another form of authorization. Licenses: individual, collective, extended
- significant revenues (17.2): no quantitative thresholds, case-by-case approach
- best efforts to obtain authorization (17.4(a)): proactively engage with rightholders which can be easily identified and located; OCSSPs should negotiate with rightholders who offer a license
- best efforts to ensure the unavailability of specific works (17.4(b)): OCSSP must act as diligent operator but free to choose the technology or other solutions; ex post blocking by means of NTD may be proportionate for smaller OCSSPs

EC consultation paper cont'd:

Safeguards for legitimate uses

- Member States should explicitly transpose 17.7 first paragraph

  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.

- *Ex ante* blocking only for likely infringing content
  - OCSSP to assess upfront whether content is likely infringing or likely legitimate
  - if OCSSP cannot reasonably determine: notify uploader
  - if uploader contests infringing nature: OCSSP to take a rapid decision by means of human review
  - if OCSSP decides to keep the content online: rightholder may revert to notice-and-take-down.
  - If OCSSP decides to block content: uploader may revert to complaint and redress mechanism

Rightholders response to EC consultation paper:

- attempt to rewrite the Directive and amend EU copyright law without due legislative process
- incompatible with the wording and the objective of Article 17, jeopardising the balance of interests achieved by the EU
- no *lex specialis*; Article 17 seeks to clarify the notion of communication to the public in Article 3 of Directive 2001/29/EC (Recital 64)
- dilutes the high best efforts standards that OCSSPs must meet; neither EC nor Member States can do this
- practically unworkable
- possibility for "likely legitimate" content to "stay up" while the possible application of exceptions and limitation is assessed, is inconsistent with Article 17, interpreted in light of its context and purpose.
- creates *de facto* copyright exception for uses "not likely to be infringing", in contradiction with the internal logic of Article 17 and EU and international copyright law

Consultation closed. EC to publish its guidance document

Dutch State Council (Raad van State):

- questions may be raised about the democratic legitimacy of EC guidance (richtsnoeren)
- EC guidance is not legally binding; no obligation to implement in national law
- advice to legislator: do not implement EC guidance one on one in decree (AMvB)

October 2020: amended proposal (Nota van Wijziging, Nota nav Verslag)

Government follows EC views as stated in consultation paper

- Article 17.7 explicitly included as suggested by EC
- Secretary of Justice in report (Nota nav verslag):
  - OCSSPs should not use filtering technology that is too rough (grofmazig) or that blocks legitimate content
  - automatic filtering should be limited to uploads that are likely infringing (with reference to EC consultation paper)
  - state of the art technology does not allow for filtering of other content than film and music so filtering technology does not yet have to be used for such other content

Will the Dutch proposal achieve the *effet utile* of Article 17?

- the useful effect of copyright is that the user risks an injunction and liability if he is not authorized to use the work
  - stimulates license agreements
  - enables rightholders to obtain an appropriate remuneration
  - ensures that content is available without risk of blocking
- Article 17 seeks to procure this same mechanism for use on online platforms
- Article 17 limits the risks for OCSSPs (17.4) to a certain extent
- EC consultation paper and Dutch proposal limit the risks too much
  - too many situations in which content does not have to be blocked or not be blocked directly
  - too many situations in which the best efforts obligation under 17.4(b) is *de facto* reduced to a notice and take down obligation.
  - too much legal uncertainty

The limitation of liability then becomes an alternative to license agreements

- undermines the *effet utile* of Article 17
  - reduces the incentive for OCSSPs to take out licenses
  - reduces the ability of rightholders to obtain appropriate remuneration
- OCSSPs will focus on showing that they made best efforts to obtain authorization (17.4(a)) and offer to pay what they think is just about enough to do this. The rightholder is left with little options:
  - settle for a less than appropriate fee
  - deny low fee offer and take the risk that content will be on the platform without any remuneration
  - accept that content will be available without remuneration and revert to notice and take down
  - engage in court proceedings

So then how to safeguard user interests?

1. license agreements (17.1). The more content is licensed, the more content will be available without the risk of blocking
2. best efforts to ensure the unavailability of specific works (17.4(b)) - ex ante blocking
3. effective and expeditious complaint and redress mechanism for users (17.9):
   - *online*
   - *centralized organization (uniform procedure and decisions for all platforms)*
   - *independent board*
   - *specialized arbiters from Member States*
   - *quick decision (within 3 days from complaint)*
   - *decision applicable to all platforms*
   - *representation of parties by accredited rightholder and user organisations*
   - *use of AI in decision making*
   - *database available to arbiters, OCSSPs and accredited rightholder and user organisations (building knowledge for future decisions; development of best practices; evaluation of Article 17)*
   - *recourse to regular court or out of court dispute settlement*