Compatibility of Section 6 of the German Proposal with EU Law

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COMPATIBILITY OF SECTION 6 OF THE GERMAN PROPOSAL WITH EU LAW

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Since, in the legal circles, some have questioned compatibility of the newly proposed Section 6 with the EU law, as scholars, we decided to share our analysis with the Ministry of Justice.

In short, in our view, Section 6 is compatible with EU law.

In its proposal, the Ministry of Justice adopted a view that entire Article 17 is *lex specialis* to the InfoSoc Directive, which permits the national legislators to construct exceptions and limitations to such right more freely, as would be normally the case under the InfoSoc Directive.

Why Article 17 is *lex specialis*?

According to Recital 64 of the DSM Directive:

> It is appropriate to clarify in this Directive that online content-sharing service providers perform an act of communication to the public or of making available to the public when they give the public access to copyright-protected works or other protected subject matter uploaded by their users. Consequently, online content-sharing service providers should obtain an authorisation, including via a licensing agreement, from the relevant rightholders. This does not affect the concept of communication to the public or of making available to the public elsewhere under Union law, nor does it affect the possible application of Article 3(1) and (2) of Directive 2001/29/EC to other service providers using copyright-protected content.

While the first sentence of the recital might suggest that "clarification" is of declaratory nature, Recital 64 immediately refutes this reading. It distinguishes the acts of OCSSPs from other exploitation acts covered by the concept of "communication to the public" elsewhere in EU copyright law. It emphasizes that Article 17 "does not affect" pre-existing exploitation rights, and even repeats the same for Article 3 of the InfoSoc Directive under its "possible application" to "other services providers". Article 17(1) then provides (our emphasis):

> *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 referred to in*** *Article 3(1) and (2) of Directive 2001/29/EC, 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.*

The text clarifies that acts of "communication to the public" by OCSSPs only take place for "the purposes of this directive". The second sentence then elucidates that the *beneficiaries* of this right should be the same as beneficiaries of the right in Article 3 InfoSoc Directive. If Article 17 was merely meant to clarify that OCSSPs perform the act of communication to the public within the meaning of Article 3 of the InfoSoc Directive, there would have been no reason to include the wording "for the purposes of this directive" or repeat the same set of beneficiaries. In the absence of this wording, a legal presumption would have triggered the application of Article 3 and the rest of the InfoSoc Directive. Instead, the legislator decided to highlight the particular nature of the right in Article 17.

This conclusion is reinforced by the comparison with Article 17(2), which explicitly subjects the acts of end-users uploading protected content to platforms to the regime of the InfoSoc Directive. The choice to not make that explicit connection in Article 17(1) must be construed as meaning that the right regulating the activities of OCSSPs is of a different nature.

In fact, the Article 17 is a right:

- included in a separate directive that claims to solve a particular industry problem (Chapter 2) and

- uses its own legal definition and carve-outs to trigger its application (Article 2(6)),

- foresees its own set of circumstances which lead to non-payment of licensing fees (Article 17(4)),

- explicitly amends the InfoSoc Directive, when it comes to some exploitative acts of *users* whose non-commercial acts cannot be subject to a separate license under some circumstances (Article 17(2)),

- explicitly amends the InfoSoc Directive, when it mandates some exceptions and limitations regarding *user's* exploitation which are normally optional under the InfoSoc Directive (Article 17(7)) and

- only bears the same name as the right under Article 3 InfoSoc Directive – right of communication to the public.

Therefore, as we argue in our paper, Husovec/Quintais (2019),[1] Article 17 is either a special right or a new sui generis right. *Both* of these readings are based on the understanding that Article 17 is lex specialis to the InfoSoc Directive. The consequences are materially the same – broader room for a national legislator to legislate when implementing Article 17.

Some authors argue that although some parts of Article 17 are clearly lex specialis, the entire provision is not. However, it is impossible to divorce Directive's different parts from each other. The right in Article 17(1), the liability mitigation mechanism of Article 17(4), or other parts of that provision, are not separate tools, but constitute overarching design of a single tool for a "value gap problem". If there is a doubt, a cursory look at the constitutionality of Article 17(1) without Article 17(4) or other parts should suffice. Article 17 simply merges many different perspectives into a design of a tool where scope, exceptions and enforcement are a unitary mechanism.

If Article 17 simply follows Article 3 of the InfoSoc Directive, why would Article 2(6) include its own definition of actors liable to license Article 17(1) right? Why are the communication the public criteria under the general case-law suspended from application in the area of Article 17 and instead substituted by Article 2(6) considerations? Why are start-ups and alike excluded at all? And how come that under some circumstances a limited set of actors (OCSSPs) do not have to pay for such right?

It is true that the Directive says that the InfoSoc Directive shall be left intact, expect for a specific explicit formal amending provision of Article 24. Everyone has to admit that despite the 'intact claim', the CDSM Directive clearly indirectly amends the InfoSoc Directive. The point of that statement, in our view, is that CDSM Directive shall not horizontally amend (have spillover effects on) the InfoSoc Directive (something that Article 25 reinforces), but not that it cannot do so within its own scope. If this were the case, how can it introduce Article 17(1), (3), (4), (5), (6), (7), which all amend the InfoSoc Directive?

In legal interpretation, we know that the legislator can express many things, but the newer special rule *always* overrides the earlier general rule, even if the law does not state this. According to the CJEU case-law, in accordance with the principle *lex specialis derogat legi generali*, special provisions prevail over general rules in situations which they specifically seek to regulate (Case T-60/06 RENV II, ECLI:EU:T:2016:233, para 81). When determining the scope, we primarily consider the content of rules, their wording, and only secondarily labels used.

The claims that *unless* the CDSM Directive explicitly says so, the Member States are *not* allowed to introduce new exceptions, are in our view incorrect. Any directive introducing an exclusive right, which does not foresee exact exceptions, simply leaves it to the Member States, with the condition that they respect *effect utile* of that directive. That is the very point of directives, which generally do not regulate exhaustively. The Member States do not need explicit permission, because they

[1] Husovec, Martin and Quintais, João, How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms (October 1, 2019). Available at SSRN: https://ssrn.com/abstract=3463011 or http://dx.doi.org/10.2139/ssrn.3463011

delegated sovereignty to the EU, and the EU only harmonizes/coordinates some non-exhaustive aspects by means of directives. Arguing that a *silent* directive automatically pre-empts any exceptions, although it never said so, is against the nature of the instrument itself.

The InfoSoc Directive does not set a limit to all other directives, it actually does not even attempt to do so (see the wording of Article 5). In CDSM Directive, the EU legislator decided to go for a *lex specialis* regulation of online content sharing services by partly carving them out of the InfoSoc framework (as their user's exploitation is still largely left intact). Article 17 is a unitary mechanism of lex specialis nature, which has its own scope set in Article 2(6).

Article 2(6) defines the scope of lex specialis.

Article 17(1) therefore remains limited by *effect utile* of the CDSM Directive itself, but not by mechanisms of other directives, which are not incorporated into it. It is a fundamental feature of the EU Directives that the Member States are at liberty to implement them as they see fit, as long as they respect its own provisions and the *effect utile* of the directive.

Moreover, without a possibility to carve out exceptions to the right in Article 17(1), even mirroring of users' regular 'InfoSoc' exceptions, which are not included in the list of Article 17(7) (e.g., for research or education purposes), does not have a legal footing to stand on (Recital 69 is limited to explicit authorizations of users). Article 17 simply does not foresee many other exceptions, such as research or teaching exceptions, known from Article 5 of the InfoSoc Directive; and these cannot be simply transposed by analogy, as OCSSPs themselves never engage in these activities, only facilitate such activities of their users. In this sense, Section 9(2) of the proposal, which extends authorizations from users to OCSSPs for exceptions beyond Article 17(7) is actually also relying on possibility to be able to carve new exceptions to Article 17(1).

Legal construction of Section 6

In Husovec/Quintais (2019), we have concluded the following:

- The right of Article 17(1) exists in its own special regime, either because it is lex specialis to Article 3 InfoSoc Directive ('special right'), or because it goes beyond Article 3 InfoSoc Directive ('new sui generis right'). Under both interpretations, licensing of the Article 17(1) right is *unconstrained* by the pre-existing general framework of EU copyright law, and is only limited by the *effect utile* of the CDSM Directive.
- Practical consequences of the above interpretation are, however, limited by the fact that the users' exploitative acts (covered by Articles 2 and 3 of the InfoSoc Directive) take place always in tandem with the OCSSP's acts under Article 17(1).
- At the same time, the special rule of Article 17(2), which automatically extends any authorisation concerning the Article 17(1) right, including that stemming from the statute, also to users who are acting on a "non-commercial basis", causes the licensing of users' exploitation acts to follow arrangements of OCSSPs in these circumstances.

The German Ministry proposed to make use of the flexibilities of the Union framework, which we have highlighted throughout this paper. Specifically, its Section 6 includes a new type of limited remunerated exception to the Article 17(1) right, which is subsequently extended by means of Section 9 also to accompanying exploitative acts of its users of non-commercial nature (a national pendant of Article 17(2) CDSM Directive).

Although Section 6 does not articulate this expressly, it concerns the exploitative acts of the right in Article 17(1) CDSM Directive. Hence, Section 6 of the German Proposal is an exception to a national rule implementing Article 17(1) of the directive, even if this is which is not explicitly stated in this provision. The criteria of Section 6 have to comply with the "non-commercial" requirement on the side of the users. Since the exploitative acts in Section 6 refers to users' uploaded content, the reference to "non-commercial purposes" is a reminder of this. The exception is remunerated, and applies only if there is no other exception or license available. Section 9, in compliance with Article 17(2), then extends the corresponding *ex lege* authorization to users.

We are of the view that this exception respects the limits of EU law.

We want to emphasize that any national exceptions are limited by *effect utile*, and are limited by the fact that user's exploitation acts remain covered by the pre-existing framework. These two limits make it clear that any national exception can make practical difference *only* as long as it can extent to users by means of Article 17(2), which is severely limited by non-commercial features. In our view, the German proposal exploits this flexibility appropriately.

Article 25 is no limit

Some authors point out that Article 25 of the CDSM Directive allegedly constrains new exceptions. It provides that: 'Member States may adopt or maintain in force broader provisions, compatible with the exceptions and limitations provided for in Directives 96/9/EC and 2001/29/EC, for uses or fields covered by the exceptions or limitations provided for in this Directive.' The title of the provision reads '[r]elationship with exceptions and limitations provided for in other directives'.

Looking at the legislative process, Article 25 is a provision that was drafted with reference to new exceptions introduced by CDSM Directive in Article 3 to Article 6 (text and data mining, cross-border teaching and preservation of cultural heritage). Its goal was to emphasize that CDSM Directive should not limit the possibility of the Member States to 'adopt or maintain' other exceptions covering the same uses, which are provided by the two pre-existing directives – InfoSoc and Database Directives. In other words, new provisions in the CDSM Directive should not narrow down pre-existing exceptions for research or education purposes; hence the wording 'compatible' with those directives.

Arguing the opposite not only ignores the language of the Directive but implies that *any limitation* to CDSM Directive has to be compatible with the two directives. This would have significant consequences for the maneuvering space of the Member States when it comes to defining concepts such as “best efforts”, “prevent”, “proportionality”, as in the end, they all limit Article 17. It would essentially lock-in the entire provision in its form adopted by the EU legislator, as the CDSM Directive obviously does not even remotely consider all novel issues it raises. This is contrary to the clear intention to leave a possibility for the Member States to adapt some of the rules in Title IV, as evidence by the fact that the Member States should explore best practices by means of the stakeholder dialogues (Article 17(10)).