

The Implementation of European Union Digital Single Market Directive Article 17

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Abstract: The article offers a comprehensive analysis of the Digital Single Market Directive of the European Union, with a specific emphasis on Article 17. The Directive aims to achieve the objectives of unifying copyright laws throughout the European Union while striking a balance between the interests of copyright owners and the rights of internet users. An in-depth analysis is conducted on the intricacies of implementing Article 17, its ramifications on fundamental rights, and its influence on the digital economy in Europe. The study also examines the various approaches used to implement the Directive in European Union member states and the legal debates it has sparked, therefore enhancing the comprehension of the digital copyright framework in the European Union.

Keywords: European Union, Digital Single Market, Content Filtering, Copyright Law, Digital Rights

Introduction

The Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (Digital Single Market Directive or DSM Directive), particularly Article 17, signifies a crucial juncture in the development of copyright legislation in the European Union. The relevance of this lies in its endeavor to reconcile copyright laws across member nations and to strike a balance between the conflicting interests of copyright holders and internet users, particularly in the rapidly expanding digital world. This article aims to examine the complexities of Article 17, analyzing its influence on fundamental rights, the difficulties in putting it into practice, and the motivations for its adoption.

The emergence of the Digital Single Market inside the EU was driven by the necessity to tackle the fragmented condition of digital services and copyright legislation across member states. The DSM Directive, ratified in 2019, is an integral component of the European Commission's initiative to establish a unified marketplace for digital services throughout the European Union. The objective is to diminish obstacles and promote a more unified market, facilitating the effortless dissemination and availability of digital information and services. The Directive is not just a legal instrument, but also a substantial policy effort aimed at modernizing the digital economy in Europe.

Article 17, formerly referred to as Article 13 during its development, primarily focuses on the interaction between online platforms that share content and individuals or organizations who possess copyright. It aims to tackle the persistent problem of copyright infringement on platforms on online content sharing service providers (OCSSPs) like YouTube, Facebook, and others that permit users to post and distribute material. The clause mandates that these platforms get licenses for copyrighted material and take measures to prevent the availability of unlicensed content. This transition signifies a significant departure from the prior strategy of 'notice and takedown' to a more proactive stance in enforcing copyright, therefore reshaping the interactions among service providers, users, and copyright owners.

The introduction of Article 17 has sparked significant discussion and disagreement, mainly due to its possible consequences for fundamental rights such as freedom of expression and information. Critics

contend that the requirements placed on platforms might result in excessive filtering of information, which may include legitimate activities like satire, criticism, or pastiche, so encroaching upon users' rights. The lawsuit filed by Poland with the Court of Justice of the European Union (CJEU) serves as an example of these concerns, contesting the provisions of Article 17 on the grounds that they violate the fundamental right of freedom of speech.

Notwithstanding these difficulties, the CJEU affirmed the legality of Article 17, highlighting the need of finding a middle ground between preserving copyright and ensuring the protection of fundamental freedoms. The Court recognized the possible hazards linked to the utilization of automated recognition and filtering technologies by platforms, but highlighted the protective measures incorporated in the Directive to alleviate these hazards. The existence of this balance is not only required by law, but also serves as a representation of the intricate interaction between many interests in the era of digital technology.

Furthermore, the enforcement of Article 17 among EU member states has been inconsistent, resulting in a fragmented set of strategies and prompting doubts about the efficacy of the standardization endeavor. Austria and Germany have made efforts to address the problems that arise from the legislative requirements of Article 17. They want to establish a potential benchmark for automatic content screening on platforms where users contribute material. The variation in how different countries implement EU directives underscores the difficulties in converting these directives into effective national legislation, especially in areas as rapidly changing and disputed as digital copyright law.

The implementation of Article 17 of the DSM Directive is a crucial milestone in the European Union's efforts to establish a unified digital market. Nevertheless, the execution of this measure prompts significant inquiries regarding the equilibrium between safeguarding copyright and guaranteeing the preservation of fundamental rights in the digital realm. This study seeks to present a thorough examination of these topics, providing insights into the intricacies and consequences of this significant law. Through an analysis of the DSM Directive's background, the impact on fundamental rights, the varied implementation across the EU, the rationale behind Article 17, and the legal and technical solutions to implementation issues, this paper aims to offer a comprehensive perspective.

I. Digital Single Market Directive

A. Historical background and legislative process

The development of the Digital Single Market Directive commenced in 2015 as part of the initiative of the European Commission, under the leadership of then-President Jean-Claude Juncker. The objective was to create a unified digital marketplace throughout the European Union, with the intention of strengthening the EU's standing in the global digital economy and promoting the expansion of European digital businesses. This ambitious program acknowledges the necessity for extensive reforms in several areas, with a specific focus on the standardization of copyright legislation among European Union member countries.

The DSM Directive proposal was revealed by the European Commission in 2016. This proposition initiated a rigorous legislative procedure lasting three years, which demonstrated the intricate nature and importance of the subject matter. The Directive aimed to tackle several aspects of the digital and cross-border landscape, encompassing the adjustment of exceptions and limits such as those pertaining to text and data mining (TDM), digital education, and the safeguarding of cultural assets. Additionally, its objective was to strengthen licensing processes, facilitate access to material, and develop an equitable marketplace for copyright.

The primary objective of the DSM Directive was to update the current copyright framework and tackle the issues and possibilities arising from technology improvements and emerging business models. The

legislation implemented compulsory provisions for Text and Data Mining (TDM), specifically addressing the increasing demands of machine learning and Artificial Intelligence advancement in Europe. The Directive also established a novel related right for press publishers situated in the EU for the online use of their press publications, inspired by the lessons learned from countries such as Germany and Spain.

Article 17, formerly referred to as Article 13, was a crucial and controversial element of the Directive. This article aims to discuss the concept of the "value gap," which refers to the difference between the amount of value that some online content-sharing platforms get from copyrighted material and the compensation that is given to the rightful owners. The fundamental premise was two-fold: firstly, that these internet services are directly engaging in activities that infringe copyright, and secondly, that there was a necessity to address the legal ambiguity around the responsibility of these services.

The legislative process of the DSM Directive was characterized by intense discussions and amendments. The Directive was initiated by the European Parliament Committee on Legal Affairs in 2018. It underwent many revisions and talks before the final wording was adopted in early 2019. This procedure entailed official trialogue meetings and thorough deliberations among several stakeholders, which encompassed the wide range of interests and viewpoints present inside the EU.

The Directive encountered resistance from prominent technology corporations, internet users, and human rights campaigners, despite garnering backing from media organizations and publishers. The main issues were on the possible effects on fair use and freedom of expression, namely with the rules outlined in Articles 15 and 17. These articles, which discuss topics like the "link tax" and the responsibilities of service providers who host user-generated material, have prompted much discussion on the delicate balance between copyright protection and digital rights.

The DSM Directive was ratified by the European Parliament in March 2019 and later by the Council of the European Union in April 2019. Member states were provided with a two-year timeframe to enact the requisite legislation in order to adhere to the provisions of the Directive. The implementation of the DSM Directive marked a significant advancement in the European Union's endeavors to standardize digital copyright legislation and promote a cohesive digital marketplace. This action established a model for future progress in digital copyright and the wider digital economy within the EU.

B. Article 17 explained

Article 17 of the DSM Directive, addressing the responsibilities of OCSSPs, marks a pivotal shift in the digital copyright landscape. This article, underpinned by various recitals, reflects a nuanced approach to balancing the interests of copyright holders, OCSSPs, and users in the evolving digital environment.¹

Article 17's opening paragraph² redefines the function of OCSSPs within the framework of copyright law. The Directive imposes an additional level of accountability on OCSSPs by stating that they engage in a communication to the public when they grant access to copyrighted information submitted by users. The amendment, explained in Recitals 62 and 63, is a result of acknowledging the significant impact OCSSPs have on the market for copyrighted works. As a result, OCSSPs must now get authorizations from right holders, which is a notable shift from their previously presumed inactive role.

¹ For more detailed explanation see Eleonora Rosati, *Copyright in the Digital Single Market: Article-by-Article Commentary to the Provisions of Directive 2019/790* (Oxford University Press, 2021).

² 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.

To elaborate, the second paragraph of Article 17³ broadens the scope of these authorizations to include the acts of users, especially when they are not involved in commercial operations or earning substantial money. Recital 64 endorses this provision, which streamlines the legal framework for user-generated material and emphasizes the need of taking into account the diverse nature of user interactions on these platforms. In the third paragraph⁴, the Directive clearly eliminates the protection that was previously provided to OCSSPs under the e-Commerce Directive (Directive 2000/31/EC). As explained in Recital 65, this change recognizes the active involvement of OCSSPs in distributing material, requiring a break from the more permissive approach of the past.

The fourth paragraph⁵ of Article 17 specifies the criteria that OCSSPs must meet in order to be exempt from responsibility for unlawful actions of public communication. This involves making deliberate endeavors to get authorization and ensure the non-availability of particular works as communicated by the rightful owners. Recital 66 offers clarification on this matter, highlighting the requirement for OCSSPs to utilize efficient content recognition technology as a component of their endeavors. The fifth paragraph⁶ presents the concept of proportionality in assessing an OCSSP adherence to regulations, as elaborated in Recital 68. It is crucial to recognize that the responsibilities of OCSSPs need to be weighed against elements such as the scale and nature of the service, as well as the availability of technology resources.

The sixth paragraph⁷ of Article 17 provides a customized strategy for younger and smaller OCSSPs, as indicated in Recital 68a. This rule recognizes the diverse capacities and assets of various OCSSPs, guaranteeing that smaller organizations are not unfairly overwhelmed.⁸ The seventh paragraph⁹

³ Member States shall provide that, where an online content-sharing service provider obtains an authorisation, for instance by concluding a licensing agreement, that authorisation shall also 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.

⁴ 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 shall not apply to the situations covered by this Article.

The first subparagraph of this paragraph shall not affect the possible application of Article 14(1) of Directive 2000/31/EC to those service providers for purposes falling outside the scope of this Directive.

⁵ If no authorisation is granted, online content-sharing service providers shall be liable for unauthorised acts of communication to the public, including making available to the public, of copyright-protected works and other subject matter, 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 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 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).

⁶ In determining whether the service provider has complied with its obligations under paragraph 4, and in light of the principle of proportionality, the following elements, among others, shall be taken into account:

- a. the type, the audience and the size of the service and the type of works or other subject matter uploaded by the users of the service; and
- b. the availability of suitable and effective means and their cost for service providers.

⁷ Member States shall provide that, in respect of new online content-sharing service providers the services of which have been available to the public in the Union for less than three years and which have an annual turnover below EUR 10 million, calculated in accordance with Commission Recommendation 2003/361/EC, the conditions under the liability regime set out in paragraph 4 are limited to compliance with point (a) of paragraph 4 and to acting expeditiously, upon receiving a sufficiently substantiated notice, to disable access to the notified works or other subject matter or to remove those works or other subject matter from their websites.

Where the average number of monthly unique visitors of such service providers exceeds 5 million, calculated on the basis of the previous calendar year, they shall also demonstrate that they have made best efforts to prevent further uploads of the notified works and other subject matter for which the rightholders have provided relevant and necessary information.

⁸ Thomas Spoerri, "On Upload-Filters and Other Competitive Advantages for Big Tech Companies under Article 17 of the Directive on Copyright in the Digital Single Market" 10/2 (August 10, 2019), 184–185.

⁹ 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.

ensures the protection of lawful uses of copyrighted information, in accordance with Recitals 70 and 71. This guarantees that the implementation of copyright laws does not excessively limit lawful activity such as quoting, critiquing, and creating parodies, thereby safeguarding the principles of freedom of speech and access to information.

Moreover, the eighth paragraph¹⁰ of Article 17 explicitly states that the Directive does not enforce a broad requirement for OCSSPs to monitor, a fact that is highlighted in Recital 73. This difference is of utmost importance as it involves finding a balance between the necessity of safeguarding rights effectively and the potential dangers linked to excessive and wide-ranging surveillance. Ultimately, the ninth paragraph¹¹ requires the creation of a proficient system for consumers to file complaints and seek compensation, as described in Recitals 74 and 75. This approach guarantees that decisions about the removal or disabling of material undergo human evaluation, therefore offering an essential protection for the rights and interests of users.

Article 17 of the DSM Directive establishes a comprehensive framework that deals with the intricate relationship between copyright protection, the practical aspects of OCSSPs, and the rights of users in the digital realm.¹² This framework signifies a substantial advancement in digital copyright legislation, demonstrating the necessity for a fair and equitable approach that acknowledges the varied interests and dynamics within the digital content ecosystem.

II. The Impact on Fundamental Rights

The pivotal issue with Article 17 of the DSM Directive, in terms of copyright and related rights within the Digital Single Market, centers on its potential infringement on users' freedom of expression. The Directive mandates OCSSPs to prevent the dissemination of unauthorized copyrighted content. This directive risks leading to overly cautious compliance, where OCSSPs might implement overly restrictive content filters, inadvertently curtailing lawful uses under exceptions like parody, criticism, or review.

The Court of Justice of the European Union (CJEU) plays an indispensable role in this scenario, providing legal clarifications to ensure that the application of Article 17 is in alignment with fundamental rights. The CJEU's jurisprudence assists in establishing the operational parameters for OCSSPs, aiming to

Member States shall ensure that users in each Member State are able to rely on any of the following existing exceptions or limitations when uploading and making available content generated by users on online content-sharing services:

- a. quotation, criticism, review;
- b. use for the purpose of caricature, parody or pastiche.

¹⁰ The application of this Article shall not lead to any general monitoring obligation.

Member States shall provide that online content-sharing service providers 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.

¹¹ Member States shall provide that online content-sharing service providers put in place an effective and expeditious complaint and redress mechanism that is available to users of their services in the event of disputes over the disabling of access to, or the removal of, works or other subject matter uploaded by them.

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. Such mechanisms shall enable disputes to be settled impartially and shall not deprive the user of the legal protection afforded by national law, without prejudice to the rights of users to have recourse to efficient judicial remedies. In particular, Member States shall ensure that users have access to a court or another relevant judicial authority to assert the use of an exception or limitation to copyright and related rights.

This Directive shall in no way affect legitimate uses, such as uses under exceptions or limitations provided for in Union law, and shall not lead to any identification of individual users nor to the processing of personal data, except in accordance with Directive 2002/58/EC and Regulation (EU) 2016/679.

Online content-sharing service providers shall inform their users in their terms and conditions that they can use works and other subject matter under exceptions or limitations to copyright and related rights provided for in Union law.

¹² Dirk J.G. Visser, "Trying to Understand Article 13," (March 18, 2019).

balance the interests of copyright holders with the freedoms of users, particularly in the dynamic sphere of digital content exchange and consumption.

Academic discourse emphasizes the need for OCSSPs to implement balanced measures, ensuring a harmony between copyright enforcement and the preservation of fundamental freedoms.¹³ This requires the development of sophisticated content recognition technologies that can discern between infringement and lawful usage. These technologies must conform to principles of transparency, accountability, and user rights respect, to prevent a disproportionate impact on online free speech. The scholarly analysis of Article 17 underlines the necessity for a judicious implementation.¹⁴ It's imperative that the responses of OCSSPs to Article 17 don't overextend, thus safeguarding legal expressions and the unimpeded flow of information. The CJEU's guidance and its reinforcement of fundamental rights are crucial in steering both the DSM Directive's execution and the practices of OCSSPs, ensuring a thriving digital single market without eroding vital user freedoms.¹⁵

Article 17 assigns explicit responsibilities to OCSSPs. They are required to demonstrate significant efforts to obtain authorization, ensure unavailability of specific works as informed by rights holders, and promptly eliminate infringing content while preventing future uploads. The design of Article 17 favors the path of obtaining authorization by OCSSPs. In addition, Article 17(7) of the DSM Directive enacts a distinctive provision for certain exceptions and limitations. It obliges Member States to guarantee that users of OCSSPs can depend on exceptions such as quotation, criticism, review, caricature, parody, or pastiche in their uploads.

OCSSPs must also set up efficient and speedy complaint and redress systems for conflicts regarding the removal or restriction of uploaded content, as outlined in Article 17(9). This aspect is vital for endorsing the use of mandatory exceptions and assuring uniform protection of user rights across the EU. The obligations laid out involve both rights holders and OCSSPs. Rights holders requesting content removal must substantiate their demands, while OCSSPs are tasked with expeditiously processing complaints and ensuring human review of content removal decisions.

The implementation of preventive measures in Article 17(4)(b) and (c) assumes the availability of appropriate technology that meets the established legal standards in Article 17. These measures should be applied only if they fulfill the criteria of proportionality, facilitate recognition of mandatory exceptions and limitations, and do not negatively impact legitimate uses. It's crucial to note that the true equilibrium between fundamental rights is encapsulated in Articles 17(7) and (9). These articles contain mandatory exceptions and limitations designed to render copyright a more adaptable right, while still retaining its exclusive nature. The CJEU and the European Court of Human Rights (ECtHR) have recognized that filtering illegal content through an *ex-ante* evaluation of lawfulness is not inherently in conflict with fundamental rights like freedom of speech or expression. The protection of intellectual property rights, as enshrined in Article 17(2) of the Charter of Fundamental Rights and guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, aligns with this perspective.

In cases where fundamental rights such as freedom of expression clash with copyright, as seen in several ECtHR cases, they must be considered equivalent interests and weighed against each other. This

¹³ David El Sayegh, "Article 17 of Directive 2019/790: A Practitioner's Perspective," *RIDA* 264 (April 1, 2020), 31; Spoerri, "On Upload-Filters and Other Competitive Advantages for Big Tech Companies under Article 17 of the Directive on Copyright in the Digital Single Market"; Gerald Spindler - Gerald Spindler, "The Liability System of Art. 17 DSMD and National Implementation – Contravening Prohibition of General Monitoring Duties?," *JIPITEC* 10/3 (February 21, 2020), 344–374.

¹⁴ João Pedro Quintais et al., "Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics," *JIPITEC* 10/3 (February 21, 2020).

¹⁵ Quintais et al., "Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive."

includes understanding the exclusive nature of reproduction and making available rights as defined by the Directive 2001/29/EC. It's also recognized that any form of online availability can lead to further dissemination, thus impacting the essence of these rights.

The balancing of copyright and neighboring rights with user rights in the digital marketplace calls for OCSSPs to install technological systems that uphold these rights, without infringing on legitimate exceptions and limitations. The inexistence of a global work/performances database may encourage negligent activities, yet collective management organizations play a role in connecting users to rightsholders, thus forming part of the solution. The law also protects rights management information, indicating that technology can serve both rights holders and users. Hence, there's a need for legal clarity on what is permissible under exceptions of quotation, criticism, review, caricature, parody, or pastiche, requiring Member States to uniformly apply these mandatory exceptions, barring national specificities.

III. Implementation Challenges Across the Eu – German Example

The implementation of the Digital Single Market Directive, specifically Article 17, across the European Union presents a complex landscape, characterized by diverse strategies employed by member states. This section delves into these varied approaches, with a particular focus on Germany as a case study. Germany's unique interpretation and implementation of Article 17 offer insightful perspectives into the challenges and nuances inherent in adapting EU directives to national contexts. In contrasting Germany's approach with its European counterparts, a distinct divergence emerges.¹⁶ Unlike the more literal transpositions in France, the Netherlands, and Belgium, Germany has incorporated modifications into three separate acts: the Copyright Act, the Tele Media Act, and the Collective Management Organizations Act. This highlights the inherent flexibility and adaptability afforded to EU member states within the Directive's framework and offers a rich tapestry for examining varied responses to digital copyright challenges within the EU.

Central to Germany's modifications in response to Article 17 is the introduction of a new exception for caricature, parody, or pastiche (§ 51a UrhG), applying solely to OCSSPs. This specificity in the exception raises critical questions about broader legal and cultural implications, particularly given the absence of more generalized exceptions for such uses in German law. The restrictive nature of the parody, satire, and pastiche exception confined to OCSSPs presents a problematic scenario for sharing content on private or non-commercial platforms. This could lead to a dichotomy in the legal treatment of content based on the platform of dissemination, potentially prioritizing commercial platforms while stifling creative expression in less commercial or private spheres. The stipulation for remuneration in cases of parodies, satires, and pastiches invites complex debates. The existing framework does not mandate remuneration for parody and satire, leading to questions about the rationale behind this shift. Commentators, like Senftleben and Angelopoulos, suggest a nuanced approach to balance remuneration with the principles of free use, especially in less creative or transformative pastiches.¹⁷

The introduction of the 'trusted uploaders' concept by the German proposal raises questions about equitable treatment on digital platforms. This approach could inadvertently create a tiered system of rights and privileges on platforms, potentially influenced by commercial interests, thus challenging the principle of neutrality in digital spaces. By incorporating new exceptions and the *de minimis* rule, Germany's proposal aims to balance creator rights with user freedoms.¹⁸ However, the practical application of these rules, especially the remuneration requirement in *de minimis* use, poses challenges

¹⁶ Axel Metzger et al., "Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market into National Law – Comment of the European Copyright Society," *JIPITEC* 11/2 (April 27, 2020).

¹⁷ Christina Angelopoulos - Martin Senftleben, "An Endless Odyssey? Content Moderation Without General Content Monitoring Obligations," *Social Science Research Network*, (June 22, 2021).

¹⁸ Eleonora Rosati, "Five Considerations for the Transposition and Application of Article 17 of the DSM Directive," *Journal of Intellectual Property Law & Practice* 16/3 (March 3, 2021), 265–270.

that call for deeper exploration of their effectiveness in achieving a balanced copyright ecosystem.¹⁹ The *de minimis* rule, predicated on safeguarding minor, non-commercial uses of copyrighted material, presents a complex landscape for both users and platforms. Its effectiveness in protecting everyday online cultural activities, like meme sharing, while ensuring fair compensation to creators, is an area ripe for critical analysis, particularly in the context of evolving online user behaviors and the dynamic nature of digital platforms.

IV. Rationale Behind Article 17

The implementation of Article 17 in the Digital Single Market Directive signifies a notable change in the European Union's strategy towards digital copyright legislation, specifically in tackling the perceived disparity in value within the digital economy. This term, commonly linked to the music business, emphasizes the disparity between the value produced by cultural content accessible on the internet and the advantages received by the authors of this content²⁰. The Directive is a response to the ongoing worry that platforms where users may post content, like YouTube, can avoid having to follow copyright laws. These sites make money from cultural content without properly paying the authors.²¹

Before Article 17, the legal framework established by the InfoSoc Directive and the E-Commerce Directive permitted OCSSPs to function with a system of responsibility that was contingent upon certain conditions, largely relying on the notion of "knowledge, ability, inertia."²² Under this arrangement, platforms were able to evade legal responsibility for copyright infringement as long as they expeditiously eliminated unlawful content upon receiving information.²³ Nevertheless, as stated in Recital 62 of the DSM Directive, this strategy resulted in uneven competition with other digital platforms which provided remuneration to content providers.

The European Commission's drafting of Article 17 in the Digital Single Market Directive demonstrates a sophisticated approach to addressing the changing complexities of digital copyright issues. The main purpose of this reaction was twofold: firstly, to enhance the concept of a 'host' in the context of copyright, thereby providing a clearer understanding of the limits of non-liability. Furthermore, as highlighted in Recital 66, the aim is to develop a proactive duty of care for service providers rather than a reactive one. This strategy requires platforms to promptly delete reported content and use proactive efforts to prevent the availability of unlicensed content. As a result, these approaches require platforms to actively participate in enforcing license agreements, which represents a considerable departure from prior practices.²⁴

Although Article 17 has the potential to bring about significant changes, its implementation has prompted several issues, notably about its compatibility with current legislation such as Article 15 of the E-Commerce Directive, which forbids the imposition of general monitoring requirements, and the Charter of Fundamental Rights of the European Union. The concerns were around the potential infringement of fundamental rights, such as freedom of expression and information, due to the excessively strict standards that Article 17 may impose on digital platforms. Nevertheless, these concerns have been extensively disproven by analyses indicating that the procedures outlined in Article 17 are not tantamount to a broad surveillance requirement and do not violate fundamental rights.

¹⁹ Eleonora Rosati, "The Legal Nature of Article 17 of the Copyright DSM Directive, the (Lack of) Freedom of Member States and Why the German Implementation Proposal Is Not Compatible with EU Law," *Journal of Intellectual Property Law & Practice* 15/11 (December 25, 2020), 874–878.

²⁰ Alexandra Bensamoun, "The Value Gap: An Adaptation of Copyright for the Digital Single Market," *RIDA* 254/10/2017 (2017), 5–6.

²¹ Bensamoun, "The Value Gap: An Adaptation of Copyright for the Digital Single Market," 6.

²² Rosati, "The Legal Nature of Article 17 of the Copyright DSM Directive, the (Lack of) Freedom of Member States and Why the German Implementation Proposal Is Not Compatible with EU Law."

²³ Bensamoun, "The Value Gap: An Adaptation of Copyright for the Digital Single Market," 6.

²⁴ Bensamoun, "The Value Gap: An Adaptation of Copyright for the Digital Single Market," 7–9.

Recital 70 of the DSM Directive underscores the importance of balancing fundamental rights such as freedom of expression with the enforcement of copyright. Instead, these activities are perceived as deliberate and precise measures designed to strike a balance between the rights of content producers, the practical constraints of digital platforms, and the freedoms of the general public. This viewpoint argues that Article 17 aims to reconcile the many interests within the digital single market, rather than eroding fundamental rights.²⁵

From this perspective, Article 17 may be interpreted as an attempt to tackle the distinctive difficulties posed by the digital era. It provides a well-balanced resolution that acknowledges and adheres to current legal structures, while also accommodating the ever-changing world of digital copyright. Article 17 seeks to address the conflicts between copyright enforcement and the protection of fundamental rights and freedoms in the digital realm by promoting collaboration between rights holders and service providers and pushing for fair and reasonable actions.

The justification for Article 17 originates from a concerted effort by the music business in about 2015 to tackle the discrepancy in value. The objective of this effort was to redefine the legal structure that let platforms such as YouTube to utilize the industry's intellectual property while paying a lower amount per stream in comparison to specialized music streaming services like Spotify²⁶. The European Commission was swayed by this effort, recognizing the necessity for a more equitable allocation of the revenue produced from protected music on sites such as YouTube²⁷. Article 17 of the DSM Directive signifies a significant change in the European Union's copyright legislation, aiming to strike a balance between safeguarding copyright and ensuring equitable remuneration for authors, while also considering the fundamental rights and practical aspects of digital platforms. This equilibrium is attained by employing both stringent legal regulations and flexible guidelines, promoting open communication with stakeholders and the establishment of optimal methodologies. Consequently, it represents a noteworthy advancement in the progression of digital copyright legislation.²⁸

V. Legal and Technical Solutions to Implementation Issues

The Digital Single Market Directive brings about a substantial change in the legal structure for OCSSPs, affecting the governance and oversight of digital material inside the European Union. This transition is defined by a movement from a responsive approach based on liability to a proactive system of enforcement driven by algorithms. The DSM Directive clearly deviates from the safe harbor protections outlined in Article 14 of the e-Commerce Directive.²⁹ OCSSPs are now required to actively oversee and regulate user-generated material on their platforms, which represents a significant change from the previous assumption of non-infringement.³⁰ Article 17(4)(b) of the DSM Directive mandates OCSSPs to make every possible effort, in line with stringent industry norms, to block access to information that infringes on intellectual property rights.³¹

The Directive's strategy for algorithmic copyright enforcement has significant consequences for the freedom of expression and access to information. The utilization of automatic filtering techniques, which proactively obstruct material, profoundly transforms the realm of online content exchange. This novel

²⁵ Bensamoun, "The Value Gap: An Adaptation of Copyright for the Digital Single Market," 9–10.

²⁶ Annemarie Bridy, "The Price of Closing the 'Value Gap': How the Music Industry Hacked EU Copyright Reform," (June 30, 2019), 4.

²⁷ Bridy, "The Price of Closing the 'Value Gap': How the Music Industry Hacked EU Copyright Reform," 11.

²⁸ Bensamoun, "The Value Gap: An Adaptation of Copyright for the Digital Single Market," 11; Bridy, "The Price of Closing the 'Value Gap': How the Music Industry Hacked EU Copyright Reform," 5–6, 11.

²⁹ Wilhelm Sanmark, *The Intermediary Liability Conundrum: Are Safe Harbors Useful?* (University of Helsinki, 2021).

³⁰ Gerald Spindler - Spindler, "The Liability System of Art. 17 DSMD and National Implementation – Contravening Prohibition of General Monitoring Duties?," 344.

³¹ Gerald Spindler - Spindler, "The Liability System of Art. 17 DSMD and National Implementation – Contravening Prohibition of General Monitoring Duties?," 350.

approach considers any uploaded content as potentially suspicious, signifying a significant shift in the management and regulation of user-generated content.³²

The DSM Directive modifies the notice-and-takedown process by introducing the requirement to prohibit the re-upload of copyrighted material, commonly referred to as "staydown." This obligation is activated when a notification from the right holders is received, which is supported by enough evidence. This distinguishes it from the wider range of Article 14 of the E-Commerce Directive. The DSM Directive incorporates a combination of automatic and human components in content regulation. Although automatic upload filters are generally allowed, Article 17(9) mandates that user complaints must be evaluated by human beings, indicating a combination of automated and human content moderation.³³

The Directive's proactive content control obligations give rise to legal and constitutional problems. Extending the obligation of making content publicly available to service providers directly holds them accountable for any copyright infringements occurring on their services. This proactive duty contradicts ideas set forth in prior judicial decisions and gives rise to concerns regarding possible violations of fundamental constitutional rights. The DSM Directive is an instrument that completely harmonizes implementation, allowing Member States minimal latitude to diverge or define beyond its established standards. The objective of this uniformity is to provide consistency throughout the single market. However, it also poses difficulties in establishing and enforcing the necessary high industry standards.³⁴

To put it simply, the DSM Directive brings about an intricate and multi-faceted change in the governance of digital information. OCSSPs are required to traverse a complex legislative environment that requires them to actively manage material while considering the rights and responsibilities of other parties, including as service providers, users, and copyright holders. The Directive's novel approach generates crucial inquiries regarding the practicability of its execution and its repercussions on the digital ecosystem, specifically concerning the freedom of expression and the workability of its licensing and filtering requirements.

Conclusion

To summarize, Article 17 of the DSM Directive represents a significant change in the realm of digital copyright protection. The shift from a responsive to a proactive strategy requires OCSSPs to assume a higher level of accountability in actively overseeing and controlling material. This modification, with the intention of safeguarding the privileges of copyright proprietors, poses difficulties in harmonizing the concerns of several parties involved, such as OCSSPs, creators, and consumers.

The effect of the regulation on freedom of expression is a crucial topic of debate. There are concerns over the possibility of excessive control and the dangers of excessive screening of information, which might unintentionally suppress lawful uses of copyrighted material, such as for commentary or parody. This element emphasizes the intricate equilibrium between safeguarding copyright and maintaining the principles of freedom of speech. Another notable feature of the Directive involves the utilization of content recognition technology. The necessity of these technologies in the identification and administration of copyrighted material is widely acknowledged, but there is ongoing dispute on their efficacy and the possible hazards they may provide to lawful content sharing. There are apprehensions over the precision of these technologies and the potential for mistakenly obstructing or eliminating information that does not infringe against any rights.

³² Victor Castro Rosa, "How Article 17 of the Digital Single Market Directive Should Be Implemented: A Personal View," *EU Internet Law in the Digital Single Market*, (January 1, 2021), 49–76.

³³ Gerald Spindler - Spindler, "The Liability System of Art. 17 DSMD and National Implementation – Contravening Prohibition of General Monitoring Duties?," 350.

³⁴ Gerald Spindler - Spindler, "The Liability System of Art. 17 DSMD and National Implementation – Contravening Prohibition of General Monitoring Duties?," 364.

Emphasizing the need of clear, fair, and realistic principles is vital for the successful implementation of Article 17. In order to establish a fair digital market, these principles must take into account the rights and obligations of all parties involved. The difficulty is to provide a framework that is sufficiently adaptable to accommodate the changing digital environment, while yet being strong enough to effectively safeguard the rights of copyright holders.

The effectiveness of Article 17 will ultimately be evaluated by the extent to which these problems are effectively tackled throughout its implementation and the subsequent formulation of recommendations. The efficacy of the directive in establishing an equitable and impartial digital marketplace depends on its capacity to integrate input from all parties involved and adjust to the swiftly evolving digital landscape. Continual assessment and improvement of these laws and technology will be essential in attaining the desired objectives of the DSM Directive.

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