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Second Opinion¹ on certain aspects of the implementation of Article 17 of Directive (EU) 2019/790 of 17 April 2019 on copyright and related rights in the digital single market²

1. Introduction

ALAI welcomes the possibility to give its views on the Commission's consultation paper based on the stakeholder dialogue on Article 17 of the Directive on Copyright in the Digital Single Market (hereinafter 'DSM Directive'), not least against the background of the German Discussion Draft of 24 June 2020³.

ALAI would like to react on certain (4) aspects:

2. The nature of Article 17 in relation to pre-existing EU copyright provisions and its consequences for the possibility of introducing new exceptions and limitations

The German Discussion Draft bases its introduction of additional exceptions and limitations in § 64 on the assumption that Article 17 would introduce a novel legal regime that would stand

¹ Drafted by a working group composed of (in alphabetical order) Fabienne Brison, Victor Castro Rosa, Mihaly Ficsor, Jane Ginsburg, Frank Gotzen, Juan José Marin, Antoon Quaedvlieg, Jan Rosén, Jacqueline Seignette, Pierre Sirinelli, Paul Torremans, Silke von Lewinski and Michel Walter.

² OJ L 130, 17 May 2019, p. 92 et seq. (hereinafter: Directive 2019/790).

³ See:

[https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/DiskE_II_Anpassung%20Urheberrecht digitaler Binnenmarkt englischeInfo.pdf?__blob=publicationFile&v=4](https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/DiskE_II_Anpassung%20Urheberrecht%20digitaler%20Binnenmarkt_englischeInfo.pdf?__blob=publicationFile&v=4)

⁴ „§ 6

Mechanically verifiable uses authorized by law

(1) The communication to the public and the reproduction required for this purpose of copyright-protected works and parts of works for non-commercial purposes is permitted to the following extent:

1. up to 20 seconds of an individual film or motion picture,
2. up to 20 seconds of an individual audio track,
3. up to 1 000 characters of an individual text and
4. an individual photograph or an individual graphic with a data volume of up to 250 kilo-bytes.

outside of the InfoSoc Directive. The explanatory memorandum uses the following arguments to substantiate this assumption, to which ALAI wants to react as follows:

(i) *The author is not vested with the exclusive right, but the service provider needs an authorisation since he would otherwise infringe the right of the right owner.*⁵

ALAI would like to recall that the fact that a user needs an authorisation, because he or she would otherwise infringe the copyright, is inherent in the very nature of copyright as an exclusive right, which is a right to “authorise” or to prohibit an act covered by the right. And in the absence of an authorisation by the author or other right holder, a third party must assume that the relevant use of the copyright work is prohibited. Article 17(1) simply formulates this same need for authorisation for a legitimate use in a slightly different way from the standard clause (such as: “the author has the right to authorise or prohibit...”).

Accordingly, ALAI considers this argument not convincing.

(ii) *Furthermore, the memorandum for the Draft mentions that Article 17(4) exempts service providers from liability in a complex mechanism and complements this structure with a redress mechanism for users – a mechanism that would not exist otherwise in EU or international law.*⁶

Indeed, Article 17(4) provides for special and complex rules on the exemption from liability for infringements by the OCSSPs, but it does not affect the nature of the exclusive right of making available in itself. This is confirmed in Recital 66: “Taking into account the fact that online content-sharing service providers give access to content which is not uploaded by them but by their users, it is appropriate to provide for a *specific liability mechanism* for the purposes of the DSM Directive for cases in which no authorisation has been granted.” (emphasis by ALAI). Even if this special case of exemption from liability has not been regulated yet elsewhere, exemptions from liability are well known in copyright law in general, in particular in the EU’s e-commerce Directive. In fact, it is quite clear from Article 17(3) that this exemption is not *lex specialis* to the InfoSoc Directive or any other copyright directives, but only to the general safe harbor rules

(2) Paragraph 1 shall only apply if there is no contractual right authorizing uses according to paragraph 1 and it is not a use authorized by law according to § 5.”

⁵ “Allerdings regelt Artikel 17 DSM-RL ein **neuartiges Rechtsregime, das sich grundlegend von dem bisherigen Verständnis des Rechts der öffentlichen Wiedergabe bzw. der öffentlichen Zugänglichmachung unterscheidet**: So steht nicht dem Urheber das ausschließliche Recht zu (Artikel 3 InfoSoc-RL), sondern es wird bestimmt, dass der Diensteanbieter eine „Erlaubnis“ benötigt, weil er ansonsten in das Recht des Urhebers eingreift (Artikel 17 Absatz 1 DSM-RL).“ (p. 34 of the Memorandum, https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/DiskE_II_Anpassung%20Urheberrecht%20digitaler%20Binnenmarkt.pdf?__blob=publicationFile&v=2).

⁶ „Artikel 17 Absatz 4 DSM-RL lässt zudem die Verantwortlichkeit für diesen Eingriff über einen **komplexen Mechanismus** entfallen, und ergänzt diese Struktur mit einem Beschwerdemechanismus zugunsten der Nutzer. Diese Regelungstechnik findet sich, soweit ersichtlich, **an keiner anderen Stelle** des europäischen (oder internationalen) Urheberrechts.“ (p. 34 of the Memorandum, https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/DiskE_II_Anpassung%20Urheberrecht%20digitaler%20Binnenmarkt.pdf?__blob=publicationFile&v=2).

contained in the e-commerce Directive. Accordingly, although Article 17 has introduced particular regimes for exemptions from liability of OCSSPs and for redress, this does not mean

that it would introduce a special or *sui generis* right of making available that would be different from the making available right in the Article 3 InfoSoc Directive and could be limited beyond the exceptions and limitations permitted in Article 5 InfoSoc Directive and other existing EU directives.

In fact, Article 17 has not touched upon the substance of the *right itself*, as is clarified in Article 1(2) in combination with Article 24 of the DSM Directive. Rather, Article 17 addresses the question of *who performs the act* of making available in the situation covered by Article 17, namely, not only the user who uploads works, but also, under the conditions set out, the OCSSP. Clarifying that OCSSPs engage in an act of “making available to the public” does not give rise to a new “regime” that would justify rules outside of Article 3 and 5 InfoSoc Directive.

In addition, this determination is, according to recital 64, a mere clarification of the fact “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.” In particular, the CJEU has held in several cases that certain service providers may be considered as performing an act of making available in circumstances that would seem to apply to OCSSPs.⁷ Even if the Advocate General in the cases “Youtube” and “Uploaded” recommends that the Court deviate from its own consolidated jurisprudence by denying that the service providers in these cases perform an act of making available,⁸ ALAI urges the Court to continue its jurisprudence by holding them directly liable for acts of making available to the public.⁹

For all these reasons, the DSM Directive does not create a new species of right of communication to the public or making available (or a *sui generis* right) that would be different from Article 3 InfoSoc Directive. Rather, it sets out specific rules on other issues, in particular concerning who performs the act of making available, liability exemptions, the mandatory character of certain existing limitations, and a redress mechanism, all of which specifically apply to the defined OCSSPs in the situation described in Article 17.

As a consequence, there is also no freedom for Member States to introduce, in relation to the right mentioned in Article 17 as in general, new exceptions beyond those contained already in EU law. As the Court has, on several occasions, clarified,¹⁰ Article 5 InfoSoc Directive contains

⁷ See, in particular, CJEU Case C-610/15 (“The Pirate Bay”), C-160/15 (“GS Media”), and ALAI opinion <https://www.alai.org/en/assets/files/resolutions/190225-opinion-youtube-en.pdf> for further detail.

⁸ Opinion of the Advocate General of 16 July 2020, Joined Cases C-682/18 and C-683/18.

⁹ Again, for more detail, see ALAI Opinion <https://www.alai.org/en/assets/files/resolutions/190225opinion-youtube-en.pdf>. Where the Advocate General (AG) rejects the concept of “clarification”, he does so since he claims that the provisions of the DSM Directive would apply retroactively (recital 249); still, as also the AG mentions, Article 26 of the DSM Directive clearly states that it (and thus the clarification in Article 17(1)) does not cover (is “without prejudice to”) acts concluded or rights acquired before 7 June 2021, so it is not retroactive.

¹⁰ See CJEU Cases C-516/17 (Spiegel/Beck), C-469/17 (Funke/BRD) and C-476/17 (Pelham/Hütter).

an exhaustive list of exceptions and limitations to copyright. Permitting other exceptions and limitations not contained in EU law would go against the aim of harmonization.

Accordingly, ALAI considers that § 6 of the German Discussion Draft, which proposes new exceptions for UUC content that are not permitted by EU law, is not compatible with EU law, and proposes the Commission to set out in the guidance that Article 17 DSM Directive does not permit the introduction of new exceptions and limitations not otherwise explicitly regulated by EU law.

3. The need to ask for permission by rightholders under Article 17(1) DSM Directive

Article 17(1) DSM Directive obliges Member States to provide that OCSSPs, under the circumstances prescribed, perform an act of communication to the public or making available and that OCSSPs “shall *therefore* obtain an authorisation from the rightholders...” (emphasis by ALAI). This wording simply reflects the basic rule that anyone who performs an act covered by an exclusive right of an author or other holder of such right must beforehand ask the right holder for authorisation and obtain it from him, in whatever legal way; otherwise he would infringe the right.

The German Discussion Draft however at the outset seems to reduce this obligation of the OCSSP to certain scenarios, which in part seem to be based on the exemption from liability under Article 17(4) and (5) DSM Directive. Under § 4 of the Draft,¹¹ an OCSSP is not obliged to obtain authorisation for communication/making available to the public as required under Article 17(1) DSM Directive, but only to obtain rights that were “offered” to it (so that right holders have to approach OCSSPs rather than vice versa) or are available by or through a German-based CMO. Furthermore, the obligation to obtain authorisation is limited to certain kinds of works, namely those that are typically uploaded by users; to offers of a “representative repertoire”; and to rights for the German territory enabling use under “adequate conditions” (including remuneration); all these conditions are defined as representing “best efforts” to acquire “contractual”¹² rights of use.

In contrast, Article 17(1) establishes a full obligation to acquire the rights of communication/making available to the public and allows for exemptions from liability under

¹¹“§ 4 Contractual rights of use

(1) A service provider is obliged to make every effort to acquire the contractual rights of use for communication to the public and the reproduction required for this purpose of copyright-protected works. The service provider fulfils this obligation if he acquires rights of use which are either offered to him or which are available through a collecting management organization or a dependent collecting body established in Germany.

(2) Rights of use under paragraph 1 shall apply

1. to works that users of the service provider typically upload,
2. comprise a representative repertoire,
3. cover the territorial scope of this Act, and
4. enable the use on appropriate conditions.”

See also § 1(1) and (2) of the Draft in this context.

¹²Moreover, the DSM Directive requires obtaining the legal (not “contractual”) rights of communication/making available to the public by contract or otherwise from right holders.

Article 17(4) DSM Directive only if, in the first place, the authorisation was not granted (which presupposes that OCSSPs have first cooperated with right holders on a serious attempt to obtain

an authorisation, as may also be seen from recital 66 para. 3).¹³ The German Draft however does not oblige OCSSPs to cooperate in the first place with all right owners.

Accordingly, and in line with its previous opinion,¹⁴ ALAI recommends that the Commission include in its guidance the need for legislatures to distinguish between the principle of obtaining an authorisation from right holders under Article 17(1) in the first place, which must not be restricted, and the exemption from liability under Article 17(4) in the second place, which only applies where, despite the best efforts made by OCSSPs, a license could not be obtained; thus, the primary obligation to obtain authorisation should not be undermined.

4. The redress mechanism under Article 17(7) and (9) DSM Directive

ALAI would like to specify its previous opinion¹⁵ in view of the proposals in the German Discussion Draft. According to that Draft, the OCSSP must enable the user to indicate that a use is permitted by law or contract (§ 8(1) no. 2); if such indication is not obviously wrong under § 12¹⁶, such content must stay online (the OCSSP must not ensure the unavailability of the work under Article 17(4)b) nor remove it under Article 17(4) c) DSM Directive, see § 8(2) in combination with §§ 10, 11 of the Draft). Furthermore, the OCSSP in this case would not be liable for copyright infringement until the redress procedure has ended, which must be completed one week after the submission of the complaint by the right owner (§§ 16, 14(4) no. 3 of the Draft).

This mechanism goes clearly against the wording of Article 17(9) and recital 70 of the DSM Directive, which presupposes that the uploaded content has already been blocked or removed and thus provides for an *ex ante* blocking/*ex post* redress mechanism. In contrast, under the proposed German solution, the uploaded content under the above conditions must stay online until the right owner has complained about such upload and the complaint procedure has ended. ALAI recalls that in the digital environment, “any message tends to spread as a virus” (p. 4 of its above opinion) and even one week of availability worldwide would bring about “irreparable damage” (*idem*, p. 3) to the right owners, and considers that users’ freedoms would be less strongly affected during such period and could be fully enjoyed after determination, in a complaint and redress procedure, that users can rely on an exception or limitation. Therefore, ALAI reiterates its view that a solution such as that proposed by Germany would not constitute a proper balance between the fundamental rights of the authors and those of the users, and would in addition go against Article

¹³ “If unauthorised works and other subject matter become available despite the best efforts made *in cooperation with rightholders, as required by this Directive*, the online content-sharing service providers 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.” (emphasis by ALAI).

¹⁴ See ALAI draft opinion https://www.alai.org/en/assets/files/resolutions/200330-opinion-article-17directive-2019_790-en.pdf, in particular p. 2.

¹⁵ See ALAI draft opinion https://www.alai.org/en/assets/files/resolutions/200330-opinion-article-17directive-2019_790-en.pdf, in particular p. 4 et seq..

¹⁶ It is presumed to be obviously wrong, in particular, where the uploaded content represents at least 90% of the information made available by the right owner.

41 of the TRIPS Agreement and Article 1 and 3 of the Enforcement Directive (*idem*, p. 4). Rather, as the Commission has pointed out, a solution should be found through close cooperation between

right owners and OCSSPs: “The distinction between likely infringing and likely legitimate uploads could be carried out by service providers *in cooperation with rightholders...*” (emphasis by ALAI).¹⁷

Accordingly, ALAI considers that a solution such as that proposed by the German Discussion Draft is not in compliance with Article 17(7) and (9) DSM Directive and a proper balance of different fundamental rights; the provisions of the Directive require an ex ante blocking/ex post redress mechanism, supplemented by a mechanism of cooperation between OCSSPs and right holders to determine what is likely to be infringing or likely to be legitimate.

5. The exclusion of certain small service providers from Article 17(4)b of the DSM Directive

§ 10(3) in combination with § 2(3) German Discussion Draft establishes a rebuttable legal presumption to the effect that small OCSSPs (i.e., those with an annual turnover of up to one million € per year in the EU) are not obliged to ensure the unavailability of works and are thus not liable for their availability. The draft justifies this exemption by the principle of proportionality mentioned in Article 17(5) DSM Directive. Yet, ALAI agrees with the Commission¹⁸ that the “best effort” obligation should be applied on a case-by-case basis and does not justify an abstract, overall exclusion of certain groups of OCSSPs from obligations to avoid liability. Such group exclusion explicitly and exclusively has been provided in Article 17(6) DSM Directive for start-up companies under specific conditions only; *a contrario*, other, e.g. small, OCSSPs must not be exempted from obligations under Article 17(4) as a group; moreover, a legal presumption can only refer to facts rather than to a legal obligation (or, as under the Draft, to the exemption from such obligation).

Consequently, ALAI recommends that the Commission clarify in its guidance that such general exclusions of OCSSPs other than start-ups under Article 17(6), including legally presumed exclusions, from obligations under Article 17(4) may not be introduced into national law under Article 17(5).

¹⁷European Commission, Targeted consultation addressed to the participants to the stakeholder dialogue on Article 17 of the Directive on Copyright in the Digital Single Market, <https://ec.europa.eu/eusurvey/runner/4fd43123-6008-a214-f572-4ecd331b9e0e>. IV. under (ii).

¹⁸op. cit., under III. 2. regarding Article 17(4)b).

ALAI, the International Literary and Artistic Association, is an independent learned society dedicated to studying and discussing legal issues arising in connection with the protection of the interests of creative individuals. Founded in 1878 by the French writer Victor Hugo to promote the international recognition of the legal protection of authors for their intellectual work, ALAI fulfils its purpose by fostering the wider international dissemination of works so as to enrich the heritage of humanity. This objective was initially achieved at the end of the 19th century with the adoption of the Berne Convention for the Protection of Literary and Artistic Works. Since then, ALAI continues to play a key role in the preparation of international legal instruments related to copyright and performers' rights, specifically by organizing congresses and study days dedicated to the in-depth analysis of every aspect of copyright. For more information about ALAI please visit our webpage: www.alai.org

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