

DSM SERIES – PART 3

Online content sharing – pay to play?

10 June 2020

In the third of our series of briefings on the DSM Directive, we examine the new content management and liability regime for online content-sharing service providers

Article 17 of Directive (EU) 2019/790 on Copyright in the Digital Single Market (the “**DSM Directive**”), introduces a new content management and liability regime for online content-sharing service providers (“**OCSSPs**”) and in this briefing, we examine how it departs from the ‘safe harbour’ regime that applies to other information society service providers under the E-Commerce Directive.

Article 17 is one of the most controversial provisions of the DSM Directive. Its supporters view Article 17 as facilitating more licensing of copyright protected works online to generate remuneration for rightholders whose works are shared by users on profit generating online platforms, while its detractors argue that it goes too far and will have an adverse effect on freedom of expression and the proper functioning of copyright exceptions online. Indeed, shortly after the final text of the DSM Directive was published, the Polish Government took an action before the Court of Justice of the European Union (CJEU) challenging Article 17 as being in breach of the rights of freedom of expression and information under the Article 11 of the European Charter of Fundamental Rights. While a decision is not expected from the CJEU for some time, Member States will need to carefully consider how to implement Article 17 into domestic legislation in the interim.

WHAT IS AN OCSSP?

A provider is considered an OCSSP if it meets each of the following three criteria:

- it provides an “information society service” (i.e. “any service normally provided for remuneration, at a distance, by electronic means and at the individual request of the recipient of services”);
- its main purpose (or one of its main purposes) is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users; and
- which the provider organises and promotes for profit making purposes.

This definition of an OCSSP is intended to target services that play an important role in the online content market, such as audio, video or literary content sharing platforms. It is not clear from the text of the DSM Directive what falls within the scope of “organisation and promotion” of works for the purposes of the definition of an OCSSP. It is therefore open to interpretation, with the recitals giving only basic guidance, such as organising and promoting copyright-protected works in order to attract a larger audience, including by categorising them and using targeted promotion within them. The definition carves out certain services as not being included, such as business to

business cloud services, cloud services for private use or online marketplaces. There is also ambiguity as to what constitutes a “large amount” of copyright-protected works, however the DSM Directive’s recitals state that this will be analysed on a case-by-case basis, and will take into account the audience of the service and the number of files of copyright-protected content uploaded by users of the service.

WHAT IS CHANGING?

Currently, OCSSPs, as information society service providers (“**ISSPs**”), operate on a familiar “notice-and-take-down” liability regime established under the E-Commerce Directive. This ‘safe harbour’ regime provides immunity from liability for ISSP for any infringing content uploaded to its service by users in circumstances where the ISSP does not have knowledge of the infringement, and where they “act expeditiously” to remove or disable access to it once they obtain such knowledge. Therefore, primary liability remains with the user who uploads the content and ISSPs are not required to review or actively filter or monitor their services for infringing content.

Under the DSM Directive, the “notice-and-take-down” system is specifically disapplied for OCSSPs in relation to copyright infringement (but it will continue to apply for other kinds of illegal content,

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such as defamatory content). Instead, Article 17 requires OCSSPs in the first instance to take active measures to obtain the “authorisation” of rightholders whose works are made available to the public on their OCSSP site (in practice, this will generally mean concluding a licence agreement with the rightholder but other forms of authorisation are possible).

In circumstances where users upload content for which the OCSSP has not had an opportunity to seek such authorisation from the rightholder, then the OCSSP must demonstrate that it has:

- Made best efforts to obtain an authorisation from the rightholder of the copyright-protected work in question;
- Made best efforts to prevent unauthorised works from being made public on the site (where the rightholder has provided the relevant and necessary information); and
- Acted expeditiously, where unauthorised works have been uploaded to the OCSSP site, to disable access to or to remove these works from the site and prevent their being re-uploaded (upon receiving a sufficiently substantiated notice from the relevant rightholder(s)).

In essence, this new regime will mean that OCSSPs will have to take proactive measures, like using filtering technologies and/or authorisation models, which will significantly impact the business models and the internal policies and processes of ad-funded tech companies. These measures may potentially impact on the availability of audio-visual works online, given the immense practical and logistical challenges of clearing copyright authorisations in advance for potentially

millions of works.

WHAT SAFEGUARDS ARE IN PLACE FOR OCSSPS?

The DSM Directive encourages the adoption of a proportional approach in determining the liability of OCSSPs. The measures required in order to comply with these “*best efforts*” obligations must be proportionate to the size of the service, the type of works concerned and the availability of “*suitable and effective means*”, as well as their cost. Less onerous obligations are imposed on smaller enterprises. Given the potential for significant liability on the part of OCSSPs, any such approach will need to be clearly laid out in domestic legislation.

Member States are also required to ensure that OCSSPs can avoid liability where users generate or upload content for the purposes of quotation, criticism or review. Such exceptions also apply for works that constitute parody, pastiche or caricature. These are the only copyright exceptions recognised for the purpose of Article 17 (being exceptions that allow for new, transformative works). The extent to which these exceptions can, practically speaking, function in a context where filtering technologies are likely to be in operation remains to be seen.

WHAT SAFEGUARDS ARE IN PLACE FOR RIGHOLDERS AND USERS?

Member States must ensure that OCSSPs provide rightholders with “*adequate information on the functioning of their practices*” and put in place effective complaint and redress mechanisms for users of their site.

WHAT DOES THIS MEAN FOR YOUR BUSINESS?

- If your business is an ISSP engaged in making available or communicating copyright works to the public but does not fall within the definition of an OCSSP, then the existing liability regime for copyright infringement (i.e., the “notice-and-take-down” regime) continues to apply.
- If your business constitutes an OCSSP, you must first seek authorisations from rightholders to make their copyright works available on your site, failing which you must implement technical means and procedures to prevent unauthorised works from being made available to the public on your site. This will necessarily involve enhanced scrutiny of the content uploaded to your site, and will probably require an increase in resources required to ensure compliance with the new liability regime for OCSSPs. In each case, you should consider the size of your business and what is proportionately possible in implementing these means in light of domestic legislation implementing Article 17.
- If you are a rightholder, you should consider the nature of the rights that you hold in works that are shared online and what measures you already have in place to notify ISSPs of your rights and consider how to communicate the “*relevant and necessary information*” to OCSSPs when Article 17 becomes operational under domestic legislation.

In the next article in our series on the DSM Directive, we will be examining the new mechanism to ensure “appropriate and proportionate” remuneration for authors and performers.

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