Title: Some aspects of the new DSM Directive in Europe

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Some aspects of the DSM Directive

- Text and Datamining
- Protection of press publications
- Certain uses of protected content by online services
- Fair remuneration in exploitation contracts of authors and performers

1. Text and Datamining

Articles 3 and 4
The data are not always free to use

- Privacy, personal data and image problems
- IP protection problems:
  - Copyright: images, music, text, graphics
  - Database rights: structured data sets

New mandatory exceptions

For scientific research
For various purposes

TDM exception for scientific research

- For the purposes of scientific research by research institutes, universities, public libraries, museums...

- Concerning works or other subject matter to which they have lawful access. This means (recital 14):
  - access to content based on an open access policy
  - access through contractual arrangements between rightholders and research organisations or cultural heritage institutions, such as subscriptions. Persons attached thereto should be deemed to have lawful access.
  - access to content that is freely available online.

TDM exception in general

Not just by a research organisation but also by “the private sector” and “public entities”

Not just for the purposes of scientific research, but also for various purposes, including for government services, complex business decisions and the development of new applications or technologies

for wider commercial purposes?

TDM in general

There are conditions!

1. It must concern lawfully accessible works, “including when it has been made available to the public online” (recital 18)
   - Thus not for secured documents (password etc.)?

2. “that the use of works and other subject matter has not been expressly reserved by their rightholders in an appropriate manner”
   - Opt out?
TDM in general

What is appropriate?

- publicly available online content: by the use of machine-readable means (art. 4.3), including metadata and terms and conditions of a website or a service (recital 18).

- In other cases: by other means, such as contractual agreements (art.7.1 a contrario) or a unilateral declaration (recital 18).

New Neighbouring Right

• The right belongs to the press publisher
• Authors of incorporated works (journalists...) have to receive an appropriate share of the publisher’s right

• Very short!

• Two years after publication (from 1. January following the date of publication)

2. Protection of Press Publications

Article 15

Very specific! Journalistic publications: written text, photograph, video... in any media

• On paper: newspapers, magazines
• Online: news websites

• Reproduction Right
• Making available Right

Against online use only: Google News...
BUT:

• Not for “individual words”
• Not for “very short extracts”: What about titles of newspapers’? What about parts of the opening sentences?
• Not for hyperlinking

• Not for mere facts
• Not for works or other subject matter for which protection has expired

• Original Author’s right on the content is not affected by art. 15 DSM Dir.

• What is the original author’s right?:
  • Text of the article, photograph, video..
  • Is there an author’s right on the bare title of an article?

• This right may have been transferred to the publisher
3. Certain Uses of Protected Content by Online Services

**Article 17 DSM Directive**

17.1 When an OCSSP gives the public access to protected content, this use is in itself a communication to the public or an act of making available: Prior authorisation required, e.g. licensing agreement.

This is primary liability!

**Authorisation granted:** primary liability OK

“Value gap” closed

**Authorisation not granted:** primary liability not OK

Excl.: Safe harbour

17.3 DSM Dir.: not the secondary liability regime of art. 14 E-Commerce Dir.

17.4 DSM Dir.: a new and stricter regime of limitation of own liability

**Art. 2, Par. 6 DSM directive**

Art. 17 concerns only a special type of ISP’s: the online content-sharing service providers (OCSSP’s).

This is an ISP of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter which it organises and promotes for profit-making purposes.

Not meant for not-for-profit online encyclopedias (Wikipedia), not-for-profit educational and scientific repositories, open source software-developing and sharing platforms, providers of electronic communications services as defined in Directive (EU) 2018/1972, online marketplaces, business-to-business cloud services and cloud services that allow users to upload content for their own use.

- Big players: YouTube, maybe Facebook?
- Smaller platforms also meant as long as their main purpose is to store large amounts of protected works uploaded by their users.

**The new safe harbour regime**

For the big players article 17.4 DSM Dir.: new strict safe harbour

For not being liable, OCSSP must 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).

Filters?!

For beginning platforms article 17.6 DSM Dir.: new relaxed safe harbour

Available less than 3 years and annual turnover under 10 Million Euro OCSSP must demonstrate that they have:

(a) made best efforts to obtain an authorisation

(b) x

(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 x

No Filters
What about the users?

- **Authorisation granted by rightholders to OCSSP:** the user is also covered
  
  17.2 DSM Dir.: User Uploaded Content covered for non commercial individual uploads within the scope of the agreement

- **Authorisation not granted by rightholders to OCSSP:** the user remains liable
  
  Except in case of:
  
  17.7 and 17.9 DSM Dir: **National exceptions from the optional list** in art. 5 Infosoc Dir (e.g. incidental use 5(3)i ?)
  
  17.7 DSM Dir: Some of these **existing exceptions are made mandatory** in OCSSP situations. Users must be free to upload and make available in cases of:
  
  a) quotation, criticism, review
  
  b) caricature, parody or pastiche

  How can the machine recognise this? Manually? 17.9: OCSSP’s shall have to put in place complaint and redress mechanisms with a human review

Best practices and guidance

- Commission shall organise **stakeholder dialogues** to discuss best practices:
  
  - how to use exceptions and limitations
  
  - how for the OCSSP to make “best efforts” in the sense of par. 4: in the search for obtaining authorisation, in filtering and blocking copyright material
  
  - how for the rightholders to provide sufficient information for identifying relevant copyright material

- Commission will issue a **guidance document** on the application of Article 17.

4. Fair remuneration in exploitation contracts of authors and performers

**Articles 18-22**

- **Art.18:** Principle of appropriate and proportionate remuneration

- **Art.19:** Transparency obligation: relevant and comprehensive information on the exploitation

- **Art. 20:** Contract adjustment mechanism: “Best-seller” Clause

- **Art. 22:** Right of revocation where there is a lack of exploitation
Transposition of the Directive

7 June 2021

National laws

どうもありがとうございます