

F. Gotzen, "Some aspects of the new DSM Directive in Europe", presentation at ALAI Japan special conference, 14 December 2019 in Waseda Univ.

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The new DSM
directive in the EU

Some aspects

Official Journal **L 130**
of the European Union

English edition Legislation Volume 62
17 May 2019

***Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC**

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




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).

2. Protection of Press Publications

Article 15

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)

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

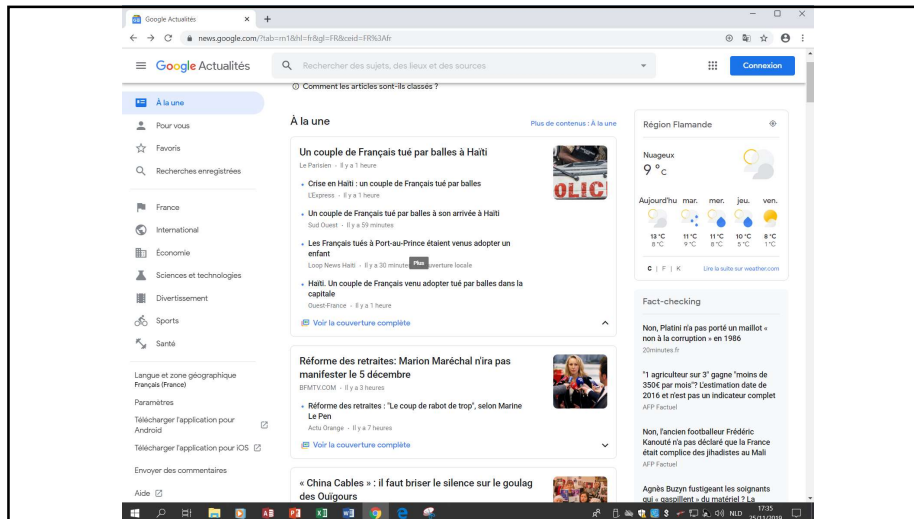
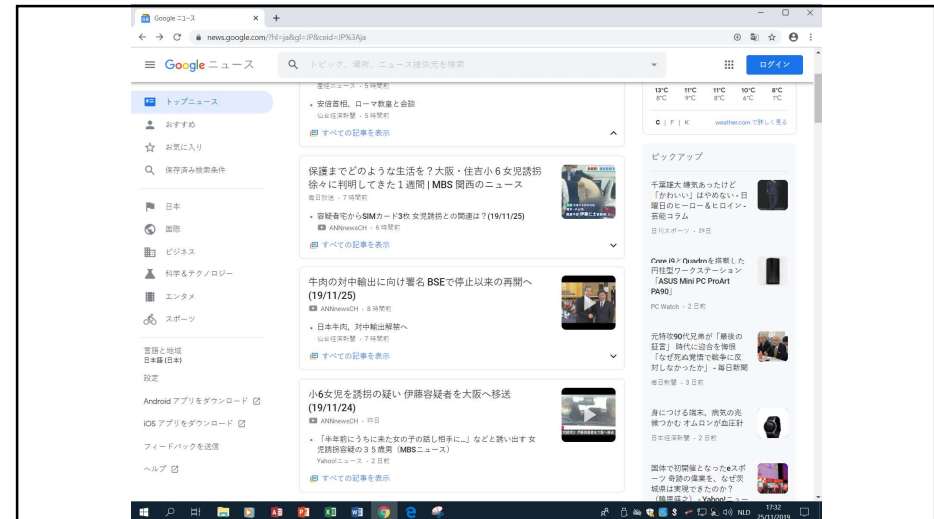
- **On paper:** newspapers, magazines • **Not for scientific journals**
- **Online:** news websites • **Not for blogs**

- **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.**

• **This right may have been transferred to the publisher**

• **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?**

3. Certain Uses of Protected Content by Online Services

Article 17

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 **uploaded by its users** 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

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

Music industry ?

Authorisation not granted: primary liability not OK *Audiovisual sector?*
Exc.: 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

The new safe harbour regime

For the big players art. 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 art. 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	How can the machine recognise this? Manually?
b) caricature, parody or pastiche	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