C4C’S COMMENTS ON THE GERMAN DRAFT IMPLEMENTATION PROPOSAL ON ARTICLE 17 DCDSM

INTRODUCTION

The Copyright for Creativity (C4C) Coalition welcomes the opportunity to share written comments on the German draft implementation proposal on Article 17 of the Directive on copyright and related rights in the Digital Single Market (DCDSM – 2019/790/EU). For further questions on our submission, please do not hesitate to contact Caroline De Cock, C4C Coordinator, at cdc@n-square.eu.

ABOUT C4C

C4C is a broad-based coalition that seeks an informed debate on how copyright can more effectively promote innovation, access, and creativity. C4C brings together libraries, scientific and research institutions, digital rights groups, technology businesses, and educational and cultural heritage institutions that share a common view on copyright. Find a detailed overview of us and our members here: http://copyright4creativity.eu/about-us/.

DETAILED COMMENTS

GENERAL REMARKS

Good elements:

- The availability of an English working translation helps to create a broader debate: this is especially important considering the cross-border repercussions of the national implementations.
- Transposing Article 17 as a standalone instrument clarifies its lex specialis and sui generis nature. This approach hence increases legal clarity and readability.¹
- It is positive that the proposal attempts to strike a balance between users’ rights and the interests of rightholders and service providers.

PART 1 — GENERAL PROVISIONS

§ 1 Communication to the public, liability: Appropriate and effective means need to be linked to the maximum protection of user safeguards

Changes required: The reference to the “availability of appropriate and effective means” [§ 1(2)3] does not explicitly link these criteria to the necessity to safeguard users’ rights.

Recommendation: Add a clarification that these means can only be considered appropriate and effective if they safeguard users’ rights, notably as defined by Article 17(7) but also more broadly, by ensuring legal uploads are not blocked or removed and fundamental rights such as privacy are respected.

§ 2 Service providers: Provide guidance to define when services compete

Good elements: Clarification that Article 17’s scope is limited to services that compete for the same target audience, in line with Recital 62.

Recommendation: This assessment should not be left to stakeholders: an independent methodology

should be developed to ensure a uniform and coherent application of this criterion. It might also be necessary to refine the used criterion in line with principles used in competition law to assess when one can consider services are “competing”: an assessment must be made of, on the one hand, the specificities of the services looked at and on the other the audience they are intended for as well as the audience they end up serving.

§ 2 Service providers: Add the fact that Article 17 should only target online services that play an important role on the online content market

Changes required: Recital 62 also limits Article 17’s scope to “online services that play an important role on the online content market”. Regrettably, this clarification was left out in this draft.

Recommendation: Implement Recital 62’s clarification in full in § 2(1)4:

“4. play an important role on the online content market by competing with other online content services for the same audience”. [underlined text our addition]

§ 2 Service providers: Encourage small players to scale-up by creating a predictable and fair level playing field

Changes required: The ‘small is beautiful’ approach: although well-intended, the protection of small and startup services is not a long-term strategy in terms of growth and innovation. It creates more problems than it solves: the legislative framework risks supporting larger market players by creating barriers to entry through the adoption of ‘high industry standards that can be unattainable for smaller ones and/or jeopardize their access to investment capital’.

Recommendation: Small players need to be encouraged to scale-up and investors need to be reassured: this can be done by creating a level playing field based on clear definitions of:

1) what the industry standards are;
2) how the proportionality criterion should be applied in practice, and more specifically in the context of these industry standards.

§ 3 Services not covered: Complement the non-exhaustive list of services not covered with a flexible review mechanism

Good elements: The list of services not covered is framed as non-exhaustive, in line with the Directive.

Recommendation: A flexible review mechanism should be foreseen to complement the list in due time in light of technological developments.

PART 2 – AUTHORIZED USES

§ 4 Contractual rights of use: Ensuring workable solutions for service providers to obtain licences

Good elements: The proposal tackles the issue that workable solutions are needed to fulfil Article 17’s licencing obligations by precisely defining the efforts required by service providers.
§ 4 Contractual rights of use: Limiting licensing obligations to works that users typically upload

**Good elements:** Limiting service providers’ licensing obligations to works that their users typically upload is a helpful clarification: it counters attempts from rightholders to push licences onto service providers for content that is not the main use of their service. It remains to be seen by who and how this is assessed.

§ 4 Contractual rights of use: Need to correct translation inaccuracies; ‘best’ efforts ≠ ‘every’ effort

**Changes required:** The DCDSM directive and the BMJV’s proposal – in both German and English – refer to ‘every’ effort, instead of the ‘best’ efforts language in the English DCDSM.

**Recommendation:** This translation inaccuracy needs to be corrected. This could otherwise result in a higher threshold for Germany, leading to a differentiated legal interpretation that infringes the Directive.

§ 5 Mechanically non-verifiable uses authorized by law: Ensure the quotation exception (1) covers criticism and review and (2) is broadly interpreted

**Changes required:** German courts tend to narrowly interpret the quotation exception, to the detriment of users’ ability to quote.

**Recommendation:**
1) It needs to be spelt-out that quotation covers criticism and review.
2) A broad interpretation of the exception should be required for it to:
   a) be aligned with the users’ rights under Article 17(7); and,
   b) not jeopardize the Großzitat exception of § 51 UrhG.

§ 5 Mechanically non-verifiable uses authorized by law: Protect uploads that benefit from exceptions and limitations against blocking or removal by service providers based on their terms and conditions or acceptable use policies

**Changes required:** In the current draft, users are not safeguarded against ‘contractual override of copyright exceptions’²: service providers can (ab)use their terms and conditions, or acceptable use policies, to block or remove content based on a copyright claim, without specifically referencing copyright. If such practices are not prohibited this allows them to bypass users’ rights and users’ possibility to invoke the complaint and redress mechanisms foreseen under Article 17.

**Recommendation:** The law must clarify, in line with Article 17(9), that services cannot ‘override’ the copyright exceptions through their terms and conditions or acceptable use policies: copyright claims on uses of exceptions and limitations must always be handled in the framework of this legislation. One would recommend that proper redress would be ensured for all content moderation actions by a provider, regardless of the basis for its takedown.

§ 6 Mechanically verifiable uses authorized by law: Welcome the attempt to provide legal certainty for everyday uses through the *de minimis* exception

**Good elements:** A remunerated *de minimis* exception as a solution to safeguard everyday uses is a welcome attempt to respond to the outcries throughout the copyright debate. However, as set out in the points below, this approach cuts both ways and is far from ideal.

§ 6 Mechanically verifiable uses authorized by law: This approach confirms that filters are required to comply with Article 17 in Germany

**Changes required:** The reference to “mechanically verifiable” confirms the requirement to rely on automated content recognition technologies: this raises issues in terms of over-blocking to the detriment of users’ fundamental rights and compliance with the prohibition of general monitoring.

**Recommendation:** Notice and action should remain the core of the approach. Moreover, to better safeguard users’ rights, no ‘hard’ limits (i.e. ‘up to’) should be imposed: instead uses should be assessed based on ‘averages’ (i.e. ‘an average of 20 seconds of an individual film or motion picture’) with a flexible margin for ‘over-use’. This to avoid that a users’ upload is cut-off for re-using 21 seconds of AV material, instead of 20 seconds.

§ 6 Mechanically verifiable uses authorized by law: Make users aware that the *de minimis* exception does not act as a substitute for other exceptions and limitations

**Changes required:** The *de minimis* approach risks creating a distorted perception of what is allowed: it could induce confusion amongst users that the *de minimis* exception acts as a substitute for other exceptions and limitations, creating a sort of alternative dimension to copyright for Germany.

**Recommendation:** Avoid chilling effects whereby users think they are limited to use only 20 seconds of a movie or audio track under copyright law: users need to be made aware that the *de minimis* exception is no replacement for the exceptions and limitations. The quotation exception can for example perfectly allow them to go beyond these thresholds and that needs to be made clear.

§ 6 Mechanically verifiable uses authorized by law: Remove the ‘for non-commercial’ purposes criterion

**Changes required:** The non-commercial purposes criterion contradicts with the commercial nature of service providers. The commercial vs. non-commercial distinction should only be of importance when assessing harm and damages to be attributed. It has no role to play at the level of content moderation.

**Recommendation:** Drop the ‘for non-commercial purposes’ criterion in § 6.
§ 6 Mechanically verifiable uses authorized by law: Protect these mechanically verifiable uses against blocking and removal

Changes required: The proposal fails to provide the same explicit safeguards against blocking and removal as for pre-flagged content: this is especially surprising seeing the remunerated nature of this new exception.

Recommendation: The intention to safeguard this content should be made explicit in the legislative text, not merely in the explanatory memorandum: §§ 10 and 11 need to explicitly state that these uses under § 6 cannot be blocked or removed.

§ 7 Direct remuneration claim for contractual use, appropriate remuneration for uses authorized by law: Checks and balances need to be put in place to ensure that creators are the true beneficiaries

Good elements: The intention to ensure direct remuneration of creators is to be applauded.

Recommendation: Authors need to be the true beneficiaries: checks and balances need to be put in place to ensure that this remuneration ends-up with authors, and are not merely piling on to the revenues of large rightholders or CMOs.

§ 8 Pre-flagging of authorized uses: The proposed approach fails to safeguard (1) exceptions and limitations and (2) original works by users from blocking or removal

Changes required: This approach:

a) fails to safeguard (1) exceptions and limitations – as mandated by Article 17(7) – and (2) original works by users from blocking or removal;

b) promotes a ‘filtering by design’ approach – see § 12; and,

c) forces users to pre-flag content to fall under a ‘presumption of innocence’ to be able to benefit from exceptions and limitations or use content for which they have authorization.

Recommendation: Shift the focus on:

1) blocking and removing prima facie copyright infringements;
2) safeguarding legitimate uses, be it based on exceptions or limitations or original creations by users, without requiring general monitoring; and,
3) enabling users to flag their content in case of claims or disputes.

Several important pitfalls, highlighted below, need to be tackled if this approach is to be pursued.

§ 8 Pre-flagging of authorized uses: Prohibit service providers from enforcing the pre-flagging mechanism as a pre-condition to upload content

Changes required: Service providers could be tempted to take the safe-road by forcing users to pre-flag content as a pre-condition to allow them to upload it, be it through the design of their user interface and/or their terms and conditions.

Recommendation: Ensure that service providers are prohibited from forcing their users, through the design of their user interface and/or their terms and conditions, to pre-flag content as a pre-condition to allow uploads. Claiming loudly one's innocence should not become the norm online to not fall under a guilty presumption.
§ 8 Pre-flagging of authorized uses: Public domain content needs to be explicitly covered too

Changes required: Public domain content risks falling between the cracks if it is not explicitly covered: the use of such content does not trigger a copyright-relevant act, but it still is often wrongfully blocked or removed.

Recommendation: Introduce a 3rd category next to contractually or legally authorized uses: this category should explicitly cover public domain and other content that is not (or no longer) protected by copyright.

§ 8 Pre-flagging of authorized uses: Existing content uploaded before the intro into force of this provision also needs to be safeguarded

Changes required: The pre-flagging mechanism does not provide safeguards for existing content. There is a risk that service providers block or remove all content (partially) matching that provided by rightholders if a strict interpretation of this mechanism considers them to be liable for content uploaded before the entry into force of this provision.

Recommendation: If this approach is to be pursued then additional safeguards are needed for existing content upload before the entry into force of this provision: it should be clarified that the approach taken in transposing Article 17 has no retroactive application. More generally, notice and action must remain the core approach.

§ 8 Pre-flagging of authorized uses: Live-streams need to be covered under an exception for incidental uses

Changes required: The pre-flagging mechanism does not work for live-streams: users cannot be expected to know upfront if and under which conditions 3rd party content pops-up.

Recommendation: Live-streams need to be covered under an exception for incidental uses.

§ 9 Extension of authorisations: Users’ commercial activities or income generation is of no consideration for content moderation and their assessment should certainly not be the responsibility of the platform.

Changes required: The commercial vs. non-commercial distinction should only be of importance when considering the harm caused and damages to be attributed. It has no role to play at the level of content moderation: service providers should not be determining this. Moreover, the ‘generating substantial income’ criterion raises a lot of questions on its practical application and should be subject to careful consideration. Questions arising are, amongst others:

- What is the tipping point for falling into the substantial income category?
- What is the impact on content uploaded before crossing this tipping point?
- What types of income account for the calculation of this threshold (e.g. ad revenues, sponsoring deals, product placement, events/representation, etc.)?
- Should this income be assessed against average incomes on the platform as a whole or per content category (as advertisers have a different willingness-to-pay for different content types)?
- Should this income be assessed per platform or across the platforms on which the user has a presence?

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Recommendation: Drop these criteria: clarify that the commercial vs. non-commercial distinction is only relevant when considering harm and damages to be attributed. At the very least, it should be clearly stated that:

1) Make users responsible for indicating their commercial activities or income generation: users should be exempted from liability for good faith declarations if clear criteria and guidance lack to define if they fall under these thresholds.
2) Provide clear definitions for the concepts of for ‘acting commercially’ or ‘generating substantial income’ to avoid legal uncertainty: this also supports a consistent application of these criteria by users across platforms.

PART 3 – NON-AUTHORIZED USES

§ 10 Blocking of non-authorized uses – § 12 Blocking and removal of uses pre-flagged as authorized: Step-away from the ‘filtering by design’ approach: no general monitoring should be imposed

Changes required: Service providers can only comply with the requirements put forward by using automated content recognition technologies to monitor all uploads on their service. Such an approach is detrimental both for:

a) Users: it impedes their freedom of expression and information and the protection of personal data (Articles 11 & 8 Charter of Fundamental Rights of the EU); and
b) Business: it interferes with their freedom to conduct a business (Article 16 of the Charter).

§ 10 requires the blocking of all uses of content identified by rightholders, regardless of the type of content and the legality of its use in a specific case. The exception for pre-flagged uses (§ 8) does not offer sufficient safeguards, as content could still be deleted if found matching the arbitrary 90% threshold (§ 12). This flawed approach stimulates errors and over-blocking, which:

- is exactly the opposite of what the proposal tries to achieve;
- creates a de facto 10% error margin on top of the failure rate of content recognition technologies – which can also strongly vary depending on the investments made; and,
- adds complexity to the assessment of multi-layered works, such as audiovisual content that can contain moving images and sound, but also subtitles: on which basis is this threshold to be assessed and what if only one component is altered or ‘borrowed’?

Recommendation: Step-away from the ‘filtering by design’ approach: no general monitoring should be imposed, directly or indirectly. Delete §§ 10 and 12, and instead shift the focus on:

1) blocking and removing prima facie copyright infringements and implementing an efficient notice and action system;
2) safeguarding legitimate uses, be it based on exceptions or limitations or original creations by users, without requiring general monitoring; and,
3) enabling users to flag their content only in case of claims or disputes.
§ 10 Blocking of non-authorized uses – § 11 Removal of non-authorized uses: Spell-out the minimum information rightholders must provide to request the blocking or removal of non-authorized uses

**Changes required:** The proposal remains vague about the information required for blocking non-authorized uses.

**Recommendation:** It should be spelt-out what information service providers should receive from rightholders to envisage blocking or removing non-authorized uses, taking into account that “the burden of assessing whether a specific work is covered by a limitation or exception is also on rights holders”.

§ 10 Blocking of non-authorized uses – § 11 Removal of non-authorized uses: Define the minimum information users should receive to enable them to engage in the complaints and redress mechanism

**Changes required:** The proposal needs to be more specific on the information service providers need to give to users based on the information they receive from rightholders when a user’s content is blocked or removed. This information is necessary to enable the user to trigger the complaints and redress mechanism.

**Recommendation:** Service providers are to be mandated to inform users immediately of the blocking or removal of their content. This information should be initially provided by the rightholders and it should:

a) identify the content subject to the blocking or removal;

b) provide the legal basis for such blocking or removal, preferably with a user-friendly explanation;

c) set out the legal remedies available; and,

d) expose the identity of the rightholder requesting the blocking or removal.

§ 11 Removal of non-authorized uses: A notice-and-stay down obligation needs to be limited and well-defined to not turn into a general monitoring obligation

**Changes required:** Stay down obligations imply filters and general monitoring as a rule of thumb, two things the German government has clearly stated it wants to avoid. An overbroad stay down obligation risks imposing such a general monitoring obligation: it should, therefore, be limited and well-defined, to ensure that legitimate uses are not removed or, even worse, prevented.

**Recommendation:**

1) Remove references to the blocking mechanism (§ 10), which equates to a general monitoring obligation.

2) Clarify that removal and stay-down need to be linked to a specific infringing copyright act (i.e. reproduction without permission), taking into account that “the burden of assessing whether a specific work is covered by a limitation or exception is also on rights holders”.

3) Ensure that the information required from rightholders is aligned with the requirements of recent CJEU case-law (cf. McFadden & Glawischng-Piesczek). It should be noted that, for copyright infringements, only identical content should stay down, as an equivalency criterion is not appropriate in this context.

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PART 4 – LEGAL REMEDIES

§ 13 Remedies, access to the courts: Rightholders must be obliged to cooperate in the complaint and redress mechanism and to take responsibility

Changes required: Rightholders involvement in the complaint and redress mechanism cannot be of voluntary nature. The DCDSM clearly states that service providers act in cooperation with rightholders, not on a standalone basis. Rightholders therefore need to be held accountable for the request to block or remove content that they made.

Recommendation: Oblige rightholder to take responsibility and participate in the complaint and redress mechanism as one of the parties: this is especially justified by the fact that, under the German draft, service providers are also required to provide a complaints mechanism to rightholders, and not merely their users, therefore going beyond the requirements of Article 17(9) and Recital 70.

§ 14 Internal complaint procedure: Service providers need to stick to their intermediary role in the complaints and redress mechanism: they cannot be the judge, jury, and executioner in content disputes

Changes required: Decisions under the complaints’ mechanism about the (il)legality of the use of content should not be left to service providers.

Recommendation: Confirm that:

1) service providers need to stick to their intermediary role: they need to enable with due process and in due time (see below) the filing of complaints, notify the parties involved and act upon the final decision.

2) rightholders need to take-up their responsibility in content disputes: they need to ensure that impartial decisions are taken about complaints by external complaints bodies.

§ 16 Liability in case of uses pre-flagged as authorized: Service providers need better liability safeguards to limit the incentives to over-block content in two specific cases: (a) when the (il)legality of the use of content is under review in the internal complaints’ procedure and (b) when the content falls under the new de minimis exception for mechanically verifiable uses authorized by law

Changes required: Under the proposed text:

a) The liability safeguards for service providers lapse after the one-week deadline of the internal complaints procedure expires. This will put pressure on them to make a decision ‘at all costs’ when it is a known fact that some copyright issues can be very complex.

b) The liability safeguards do not cover content under the new de minimis exception for mechanically verifiable uses authorized by law.

Recommendation: a) Service providers need to stick to their intermediary role in the complaints and redress mechanism and should not be forced to take decisions by themselves. This is especially true when they face the risk of losing their liability exemption, as this creates an incentive for them to de facto block or remove content to shield themselves. Better safe than sorry should not be the outcome when fundamental rights such as the freedom of speech of users are at stake.

b) Extend the liability safeguards for pre-flagged content to cover content under the new de minimis exception for mechanically verifiable uses authorized by law.
PART 5 – FINAL PROVISIONS

§ 19 Measures against abuse: Empower user organisations to step-up against abusive rightholders

**Changes required:** User organisations also need a collective redress mechanism against abusive rightholders – like the one against service providers in paragraph 2.

**Recommendation:** Add a collective redress mechanism against abusive rightholders in § 19. This is motivated by the fact that:

a) individual users are less likely to pursue claims against abusive rightholders; and,

b) erroneous blocking or removal by abusive rightholders can impact multiple users at once, and bundling their cases can allow the identification of patterns more easily.

§ 19 Measures against abuse: Ensure rightholders are held to more rigorous standards against abuses

**Changes required:** The possibility for service providers to hold users and rightholders accountable for abusive behaviour is positive, but the flexibility to do this based on different standards is likely to harm users.

**Recommendation:** The legislation needs to mandate service providers to hold rightholders to more rigorous standards against abuses than users in terms of exclusion criteria and timeframes. Otherwise:

a) rightholders will get preferential treatment (i.e. shorter or no exclusion periods) as a result of the forced dependence on them to obtain licences; and,

b) users will be disproportionately ‘punished’ under the pressure of rightholders.

Only users intentionally abusing the system or blatantly acting in bad faith should be penalised. ‘Preferential’ treatment of users is proportionate, because:

1) rightholders are expected to behave diligently and professionally; and,

2) the average user cannot be expected to be a copyright expert, whilst rightholders do have an above-average knowledge in the field.

The latter is crucial to acknowledge if a pre-flagging mechanism is kept in the final legislation: copyright is a complex subject matter keeping scholars and the judiciary quite busy and it is hence inappropriate to hold users to impossible standards.

§ 20 Information rights: Enable user organisations to obtain adequate information from service providers to assess that users can benefit from exceptions and limitations

**Changes required:** The proposal enables user organisations to step-up against abusive service providers (a possibility we believe should be expanded against abusive rightholders) but fails to support them in this task. User organisations need to be empowered to pro-actively defend consumers through access to relevant information, instead of having to wait until enough disgruntled users find their way to them.

**Recommendation:** User organisations, just as rightholders, also need access to adequate information from service providers, especially on the functioning of the complaints and redress mechanism. This would help them to assess if users can notably benefit from an exception or limitation, and would be aligned with the spirit of Article 17(10).
§ 22 Application to related rights: Delete § 22 as it expands the legislation’s scope beyond Article 17

Changes required: This provision risks extending the scope of the German Article 17 implementation to all neighbouring rights covered under German copyright. This goes well beyond the specific limitation to the rightholders listed in Article 3(1) and (2) of the InfoSoc Directive (2001/29/EC) as stipulated in Article 17(1). Article 17’s sui generis regime would thus be extended to also cover the neighbouring rights in simple photos and the Article 15 press publishers’ right. Such a broad extension is not only ill-advised and likely not compliant with the Directive but also warrants an in-depth impact assessment.

Recommendation: § 22 must be deleted to ensure the German transposition of Article 17 is compliant.

MISSING ELEMENTS

Rightholders need to substantiate all notices also outside of the complaints and redress mechanism

Missing elements: Complaints should always be substantiated, not only during the complaints and redress mechanism. Associate Professor Sebastian Felix Schwemer remarks that a ‘sufficiently substantiated’ notice from rightholders “must live up to the standard set out in Article 17(7)”, which in his view implies that:6

“(…) a notice that wrongfully identifies a work as copyright infringement could not be qualified as ‘sufficiently substantiated’. Thus, the burden of assessing whether a specific work is covered by a limitation or exception is also on rights holders.”

Recommendation: Flawed notices should not trigger a service provider’s liability, especially when:

a) the notice lacks sufficient information; or,
b) the notice comprises inaccurate elements; or,
c) the illegality of the content is not obvious: this is also a crucial element to safeguard users’ rights.

Create more transparency on notice-and-takedown requests and copyright ownership claims to the benefit of all stakeholders

Missing elements: The German government stressed in its Council statement that (point 5): “the EU must develop concepts that counteract a de facto copyright register in the hands of dominant platforms by means of public, transparent notification procedures”. However, no trace of this intention can be found in this proposal.

Recommendation: Create more transparency at two levels:

1) notice-and-takedown requests issued by rightholders: this is crucial to enable users and users’ organisations to monitor the application of Article 17; and,
2) ownership claims by rightholders: this would benefit all stakeholders.

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