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Art. 17 EU DSM Copyright Directive – German implementation

**18th Annual US-EU-DE Copyright Summit
– Platform Responsibility**

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Art. 17 EU DSM Directive – German implementation

- German „Discussion Draft“ of June 24, 2020
- German Ministerial Draft published on October 13, 2020

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 - This is getting serious!

Art. 17 EU DSM Directive – German implementation

- The German implementation follows the “*sui generis*” approach – Art. 17 a new legal regime of its own.
 - National freedom to implement Art. 17.
- **A lot of room for German creativity for implementation.**

Art. 17 EU DSM Directive – German implementation

- Germany would be free to create a **new separate legislative act** (outside the German Copyright Act), which specifically implements Art. 17: The Copyright Service Provider Act.
 - OCSSP liable for any unauthorized communication to the public on platform. But:

Art. 17 EU DSM Directive – German implementation

- Germany would be free to create a **new separate legislative act** (outside the German Copyright Act), which specifically implements Art. 17: The Copyright Service Provider Act.
 - OCSSP liable for any unauthorized communication to the public on platform. But:
 - Does “communication to the public” in the new Act mean the same as before e.g. in Art. 3 EU Copyright Directive 2001/29?
 - Does this “communication to the public” come under international copyright law, e.g. Art. 10 WCT?

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- Germany would be free to implement Art. 17 with **new exceptions and limitations** not known yet in EU law

§ 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 a film work or moving picture, ...

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- Germany would be free to provide a **separate direct remuneration claim for authors** (and performing artists) against OCSSP in case of licensed uses.
 - Not waivable by contract between the producer and the author.
 - Management by collecting societies.

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- Germany would be free to **limit staydown obligations** of Art. 17.
 - No liability of OCSSP for illegal uploads, if pre-flagging as legal and pre-flagging not obviously wrong
 - Obviously wrong pre-flagging, if the content uploaded by the user corresponds to at least 90 percent of the information provided by the rightholder.

YouTube/Uploaded – CJEU and German BGH

- The YouTube case and Uploaded (cyberlocker) case pending before the CJEU.
 - Does Art. 3 EU Copyright Directive 2001/29 already hold YouTube and Uploaded directly liable for copyright infringements by users?
 - Comparable to Art. 17 EU DSM Copyright Directive?
- CJEU Attorney General:
 - No direct liability of YouTube and Uploaded.
 - Only secondary responsibility pursuant Art. 8 (3) Copyright Directive 2001/29.
 - Art. 17 DSM Directive does not apply yet to this case.
- No CJEU judgment date yet.
- German Federal Supreme Court (BGH) will finally decide case after CJEU.

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Thank you.

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