
Article 17

Use of content by online platforms



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Part 1: Understanding Article 17

What is at issue in Article 17?

New rules leading to
control of unauthorized
copyrighted content at
upload

Currently, platforms are not liable for the content uploaded and shared by their users, as long as they remove that content once they know it's infringing copyright ("hosting safe harbour" in Art 14 ECD).

Article 17 changes these rules for most for-profit content sharing platforms. They are now deemed to be "sharing" the uploaded content themselves and, thus, need permission from © owners and are liable for any uploads that infringe ©.

Breaking down Article 17

Case-by-case assessment
taking into account n.º
users, n.º uploads, etc

- **What are OCSSPs?**
 - (1) profit-making platforms
 - (2) that allow users to upload and share **large amounts** of protected content
 - (3) compete with other services in the online content market (e.g. on-demand streaming services)
 - (4) not explicitly excluded from the definition

Breaking down Article 17

- **What are not OCSSPs?**

(1) profit-making platforms explicitly excluded (B2B cloud services e.g. Amazon, cloud services e.g. Dropbox, online marketplaces e.g. eBay, sharing platforms e.g. Github, open source software development, electronic communications)

(2) non-profit making platforms (NC scientific and educational repositories, Wikipedia)

Breaking down Article 17

- What are OCSSPs deemed to do?

They are deemed to do a **copyright-restricted act** (“communication to the public” or “making available to the public”) when they give public access to content uploaded by their users.

Breaking down Article 17

New exclusive right not
mandated by international
treaties.

- What does this mean for copyright owners?

Copyright owners have the **exclusive right** to authorize (or not) OCSSPs to give public access to content upload by their users.

Copyright owners can control the content before it appears online. They can choose to keep works off the platforms.

Breaking down Article 17

**OCSSPs need to employ
upfront filtering tools**

- **What does this mean for OCSSPs?**

OCSSPs can only have publicly available content for which they have permission from copyright owners.

OCSSPs can be directly liable for having available content for which they have no permission.

OCSSPs have to control the content before it appears online.

Breaking down Article 17

- **Does this new right cover all copyright owners and all content?**

Everything, except:

- **Non-original databases**
- **Press publications**
- **Content that is protected only at national level (e.g. non-original photograph)**

Breaking down Article 17

- **Why can't OCSSPs rely on the liability limitation (aka safe harbour)?**

A.17.3 excludes that possibility.

A.17.1 assumes OCSSPs do themselves something that is restricted by © and thus are primarily liable for infringements.

Traditional rules assumed OCSSPs could only have secondary liability for the © infringements of their users.

Breaking down Article 17

Authorization

Filter and other
preventing measures

- **How OCSSPs can avoid being liable for infringing content?**

(A) OCSSPs can get permission for themselves. Permission extends to non-profit acts by users.

(B) OCSSPs can (1) show best efforts to get permission & (2) show best efforts to block at upload specific infringing content identified by © owners & (3) operate notice and staydown.

Breaking down Article 17

Clearing rights for each and every potential upload would be impossible.

- **What are best efforts to get permission (condition 1)?**

“Best efforts” will depend on e.g. content type; costs of clearing rights; size of audience. Proportionality test applies.

Condition 1 is fulfilled when (a) OCSSPs use best efforts but copyright owners deny their consent or when (b) obtaining an authorization is beyond the “best efforts” obligation.

Breaking down Article 17

No mention to filters; only to
“suitable and effective means”

- What are best efforts to **prevent availability** of specific content identified by copyright owners (condition 2)?

“Best efforts” made in accordance with “high industry standards” will depend on the state of the art, effectiveness and cost of the **means** used to block the content at upload; content type; type, size and audience. Proportionality test applies.

Breaking down Article 17

Depends on the size of
the copyright owners
and the type of content

- What are best efforts to **prevent availability** of specific content identified by copyright owners (condition 2)?

Condition 2 is fulfilled when;

(a) OCSSPs use best efforts; or

(b) copyright owners do not provide OCSSPs with **relevant and necessary** information; or

(c) blocking content is beyond the “best efforts” obligation.

Breaking down Article 17

- **What it means to operate a notice and staydown process (condition 3)?**

OCSSPs need to (i) act promptly, after receiving a “sufficiently substantiated” notice, to disable access to, or remove, notified content, and (ii) use best efforts to prevent new uploads.

Breaking down Article 17

- **What it means to operate a notice and staydown process (condition 3)?**

Condition 3 is fulfilled when

- (a) OCSSPs act as mentioned; or**
- (b) copyright owners do not provide OCSSPs with notices; or**
- (c) preventing future uploads is beyond the “best efforts” obligation.**

Breaking down Article 17

Startups not required to
prevent availability of content
upfront.

- **Specific regime for startups**

If the business is new (less than 3y), has a small turnover (below EUR 10 million) and a small audience (5 million of unique visitors per month, on average) it only needs to:

- (i) make best efforts to get permission and
- (ii) operate a notice and takedown (vs staydown) procedure.

Breaking down Article 17

Startups not required to prevent availability of content upfront.

- **Specific regime for startups**

If the business is new (less than 3y), has a small turnover (below EUR 10 million), *but exceeds* 5 million of unique visitors per month, on average, it needs to:

- (i) make ‘best efforts’ to obtain authorizations and
- (ii) operate a notice and staydown procedure.

Breaking down Article 17

The information should be sufficient to provide transparency but not affect business secrets.

- **Information obligations**

OCSSPs shall provide copyright owners, upon request, with information on

(1) the OCSSPs practices when blocking, taking down and preventing new uploads, and

(2) the use of licensed content (when OCSSPs enter into licensing agreements with owners).

Breaking down Article 17

Users are at less risk when OCSSPs get permission to have the content available (but permission will likely focus on mainstream content).

- **Are users rights at risk?**

Yes. The OCSSPs obligations (to block content, take down and staydown) requires in practice the use of automated filters and:

- **may lead to over-blocking of users' uploads**
- **may interfere with uses made under © exceptions**
- **may interfere with fundamental freedoms**

Breaking down Article 17

Ex ante

Ex post

- **How are users rights protected?**

Prohibition to prevent the availability of non-infringing content: A.17(7)

Complaint and redress mechanisms for users in the event of disputes: A.17(9)

Obligation on MS to implement copyright exceptions: A.17(7)

Prohibition to impose a general monitoring obligation: A.17(8)

Prohibition to share personal information of users: A.17(9)

Breaking down Article 17

- **Protecting users: prohibition to prevent the availability of uploaded content that does not infringe copyright**

OCSSPs cannot block at upload content that does not infringe copyright, namely when the use is covered by exceptions.

This obligation is independent from the obligation to run a complaint and redress mechanism.

Breaking down Article 17

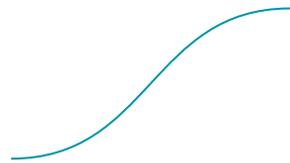
- **Protecting users: complaint and redress mechanism**

MS need to ensure:

- (1) copyright owners duly justify their requests to disable/remove**
- (2) OCSSPs process users complaints without undue delay and subject the decision to remove content to human review**
- (3) impartial out-of-court redress mechanism for the settlement**
- (4) efficient judicial remedies**

Breaking down Article 17

**Mandatory exceptions for
online uses on OCSSPs.**



- **Protecting users: copyright exceptions**

MS *must* implement copyright exceptions for:

**(i) quotation, criticism, review;
(ii) use for the purpose of
caricature, parody or pastiche.**

**The exception must cover acts
of users and acts of OCSSPs.**

**OCSSPs must inform users they
can benefit from exceptions.**

Breaking down Article 17

- **Protecting users: no general monitoring obligation**

Prohibition to impose a general monitoring obligation on OCSSPs.

OCSSPs need to prevent the availability of “specific” (as opposed to “all”) pieces of protected content, identified or notified by copyright owners.

Breaking down Article 17

- **Protecting users: no sharing of personal information**

The obligations of OCSSPs shall not lead to any identification of individual users nor to the processing of personal data, except in accordance with EU laws on data protection and privacy and electronic communications.



Part 2: Implementing Article 17



Member State implementation so far.

- **We have seen implementation proposals in France, the Netherlands, Hungary and Croatia.**
- **Implementations tend to stick very closely to the text of the directive.**
- **Implementations can be quite complicated depending on the structure of national copyright legislation. Some follow structure of Art.17, some don't.**

Member State implementation so far.

So far we have not seen a lot of legislative creativity. Will the German legislator take a different approach?

- **We have seen implementation proposals in France, the Netherlands, Hungary and Croatia.**
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How to implement Article 17?

Article 17: Use of protected content by online content-sharing service providers

USER RIGHTS SAFEGUARDS

- 1 OCSSPs perform acts of communication or making available to the public when giving public access to works uploaded by their users, and need to obtain authorisation from rightholders
- 2 Authorisations granted to OCSSPs also cover their users acts of communication or making available to the public
- 3 OCSSPs are not covered by the liability exemption of Art 14 ECD
- 4 OCSSPs are liable for having unauthorized uploads publicly available unless...
... they have made best efforts to obtain licenses and to implement measures to prevent the availability of works identified by their rightholders --> "Upload Filters"
- 5 Measures have to be proportionate
Criteria for proportionality
- 6 Reduced obligations for some startups
- 7 Cooperation between OCSSPs and rightholders shall not result in the prevention of the availability of works that do not infringe copyright
- 8 Uploaders must be able to rely on the exceptions permitting quotations, criticism, review, caricature, parody or pastiche
The measures implemented do not constitute a general monitoring obligation
OCSSPs must provide information on the functioning of the measures to rightholders
- 9 Complaint and redress mechanism for uploaders
Measures shall in no way affect legitimate uses, such as uses under exceptions
OCSSPs have to inform uploaders about exceptions
- 10 The European Commission shall organize stakeholder dialogues and issue guidelines

How to implement Article 17?

Example: Selective implementation in NL that skips many user rights safeguards (France is very similar)

INCLUDED IN IMPLEMENTATION PROPOSAL

NOT INCLUDED IN IMPLEMENTATION PROPOSAL

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How to analyse national implementations?

- Compare the text of the implementation to the text of the directive
- Large parts will likely be literal transpositions (especially Art.17(4)-17(6))
- Make note of where the text differs and what is omitted or added.
- Check if national implementations of the exceptions mentioned in Art.17(7) exist (and are complete).

How to analyse national implementations?

Example: The French text includes slight modifications of A.17(1) and 17(3) seemingly designed to expand scope to acts of reproduction

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- **Check if national implementations of the exceptions mentioned in Art.17(7) exist (and are complete).**

How to analyse national implementations?

Example: The Croatian draft includes references to two existing exceptions. The second of which only allows for parody and caricature but not for pastiche

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Definition of OCSSP

Objective: As targeted as possible definition of OCSSPs

- **Make sure that the definition from Art.2(6) is taken over in full**
- **Try to get additional language from R.62 (services “that play an important role on the online content market by competing with other services, such as online audio and video streaming services, for the same audiences“) into definition or explanatory text**

Definition of OCSSP

Example: In the first draft NL did not include the second half of A.6(2) with the list of excluded services

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Giving authorization to OCSSPs

- **Best:** Subject as much content as possible (it depends on the sectors) to compensated exceptions.
- **Better:** Subject as much content as possible (it depends on the sectors and if CMOs function properly) to collective management (mandatory collective licensing scheme or ECL scheme).
- **Bad:** Subject everything to individual licensing agreements.

Giving authorization to OCSSPs

Example (better): The proposed Hungarian implementation seems to require that rights are managed by a CMO

- **Best:** Subject as much content as possible (it depends on the sectors) to compensated exceptions.
- **Better:** Subject as much content as possible (it depends on the sectors and if CMOs function properly) to collective management (mandatory collective licensing scheme or ECL scheme).
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Giving authorization to OCSSPs

Example (best): See the proposal made by Prof Senftleben on a remunerated parody exception to enable “UGC”

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The “Best efforts” requirement

Pay attention to the transposition of “best efforts” requirement.

- **Be wary of efforts to introduce a higher standard than “best effort” through wordsmithing (also in explanatory text).**
- **Attempt to include criteria in explanatory text that links best effort to ability to comply with user rights safeguards.**
- **It is expected that the Commission will provide more guidance on “best efforts”.**

The “Best efforts” requirement

Example: French MPs tabled amendments to change “made best efforts” to “has taken necessary steps to”

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The “Best efforts” requirement

Example: The Croatian implementation proposal requires OCSSPs to “undertake everything in their power”

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No general monitoring obligation

Make sure that the obligation that the “application of this Article shall not lead to any general monitoring obligation” from Art.17(8) is implemented.

- This obligation sets a baseline against which the effectiveness and proportionality of measures undertaken by OCSSPs can be judged.

No general monitoring obligation

Example: The Dutch implementation law proposal does not transpose the first sentence of Article 17(8)

Make sure that the obligation that the “application of this Article shall not lead to any general monitoring obligation” from Art.17(8) is implemented.

- **This obligation sets a baseline against which the effectiveness and proportionality of measures undertaken by OCSSPs can be judged.**

User rights safeguards

Make sure that the user rights safeguards included in Art.17(7) and 17(9) are fully implemented.

- **Insist that the obligation on rightholders and platforms that their collaboration “shall not result in the prevention of the availability of works uploaded by users, which do not infringe copyright” is implemented in full.**

User rights safeguards

Examples: Both France and the Netherlands have not included 17(7) and the last paragraph in their proposed laws.

Make sure that the user rights safeguards included in Art.17(7) and 17(9) are fully implemented.

- **Insist that the obligation on rightholders and platforms that their collaboration “shall not result in the prevention of the availability of works uploaded by users, which do not infringe copyright” is implemented in full.**

User rights safeguards

The Commission has confirmed that 17(7) cannot be skipped and that obligations on platform must be given effect by Member States in legislation

Make sure that the user rights safeguards included in Art.17(7) and 17(9) are fully implemented.

- Insist that the obligation on rightholders and platforms that their collaboration “shall not result in the prevention of the availability of works uploaded by users, which do not infringe copyright” is implemented in full.

Complaint and redress mechanism

Make sure that the Art.17(9) complaint and redress mechanism is fully implemented

- **OCSSPs must provide an effective and expeditious complaint and redress mechanism for users.**
- **Rightholders must duly justify the reasons for their requests**
- **Complaints must be processed without undue delay, decisions to disable access to or remove must be subject to human review**

Complaint and redress mechanism

Example: The first Dutch draft only included an out of court redress mechanism and skipped over the first stage.

Make sure that the Art.17(9) complaint and redress mechanism is fully implemented

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The limits for automated filtering

Since filters are not able to recognize legitimate uses of works, their use must be limited to cases of obvious infringement

- In all other cases decisions to block or remove must be subject to human oversight or users must be able to override filters.
- Such overrides should be treated as complaints under Art.17(9) and content must stay up until a complaint is resolved.

The limits for automated filtering

COMMUNIA and a group of academics have proposed models how the complaint and redress mechanism can be implemented to meet this objective.

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The limits for automated filtering

How to reconcile the use of automated content recognition with its inability to detect legitimate uses will likely be part of the Commission guidelines

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Anticipate on the Commission guidelines

Art.17(10) requires the Commission to issue guidelines “on the application of article 17, in particular regarding the cooperation referred to in paragraph 4 [...] taking special account of the need to balance fundamental rights and of the use of exceptions and limitations.”

- **National legislators should either wait with their implementation until the guidelines are available or include provisions in national law that allow them to do so at a later stage**



Stakeholder Dialogue on Article 17: process

- **There have been 6 meetings of the stakeholder dialogue so far (October 2019 - February 2020)**
- **Has produced a lot of position statements but not a lot of empirical evidence.**
- **Commission conclude the process via a “targeted consultation” before the summer that will give a first indication of the topics to be addressed in the guidelines.**
- **Guidelines will be issued before the end of the year.**

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Anticipate on the Commission guidelines

Examples: The Dutch proposal allows the Minister of Culture to issue further rules via administrative decree, the Belgian proposal allows the King to do so

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Sanctions for unjustified blocking or removal

Push for national implementations to include provisions that sanction any party that abuses measures required by Article 17:

- **Article 17 does not contain sanctions for parties claiming rights in works that they don't own or engaging in other forms of unjustified removal / blockings.**
- **National legislators should consider adding such measures to prevent overblocking, copyfraud and copyright trolling.**

Sanctions for unjustified blocking or removal

While not included in Article 17 nothing in the directive should prevent Member States from adding such a provision to their national implementations

Push for national implementations to include provisions that sanction any party that abuses measures required by Article 17:

- Article 17 does not contain sanctions for parties claiming rights in works that they don't own or engaging in other forms of unjustified removal / blockings.
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Thank you!

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