

WIPO-UNIGE Summer School on IP, July 9, 2021

Panel discussion: Recent Trends and Hot Topics for IP
Students and Practitioners

EU Digital Copyright and the Proposal for a Digital Services Act (DSA)

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- EU © acquis
 - No EU © act (in contrast to EUTM/EU Design)
 - 11 directives harmonizing 27 national © acts
 - 2 regulations providing directly applicable rules with respect to certain specific issues (portability Reg and Marrakesh VIP Reg)

- [InfoSocDir 2001/29](#)
- Right of communication to the public and right of making available to the public (Art. 3), transposing Art. 8 WCT
- [CJEU Petersen and Elsevier 22 June 2021](#):
 - the operator of a **video-sharing platform or a file-hosting and -sharing platform does not make a ‘communication to the public’** of that content
 - **unless it contributes**, beyond merely making that platform available, to giving access to such content **to the public in breach of copyright**. That is the case, inter alia,
 - where that operator **has specific knowledge** that protected content is available illegally on its platform **and refrains from expeditiously deleting it or blocking access to it**,
 - or where that operator, despite the fact that it **knows or ought to know, in a general sense**, that users of its platform are making protected content available to the public illegally via its platform, **refrains from putting in place the appropriate technological measures ...**,
 - or where that operator **participates in selecting protected content** illegally communicated to the public, **provides tools on its platform specifically intended for the illegal sharing of such content** or **knowingly promotes such sharing**.

- [Digital Single Market \(DSM\) Directive 2019/790](#)
- [Implementation process](#) ongoing, [Commission guidance](#)
- Article 17: Use of protected content by online content-sharing service providers (OCSSP),
 - An OCSSP **performs an act of communication to the public** or an act of making available to the public when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users (Art. 17(1))
 - **Unless** the OCSSP demonstrates that it has
 - (a) made best efforts to **obtain an authorisation**, and
 - (b) made ... best efforts to **ensure the unavailability of specific works** ...; 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) (Art. 17(4)).

- Proposal for a Digital Services Act (2020)
- Background: regulating Big Tech
- Horizontal compliance norms “for a safe, predictable and trusted online environment”
- Applicable to intermediary services (in particular access and host providers)
- Concerning the “moderation” of all types of illegal content

Critical ©/DSA topics

(1) Relationship between © acquis and DSA

- © infringing content is “illegal content” according to Art. 2(g) DSA
- But Art. 1(5)(c) DSA: This Regulation is “without prejudice to” Union law on copyright and related rights:
 - Subject matter, exclusive rights and I&e, including the authorisation and liability regime of Art. 17(1)-(6) DSM
 - Remedies
- But DSA takes precedence over “issues on which those other acts leave Member States the possibility of adopting certain measures at national level” (recital 9 DSA)
 - E.g. complaint and redress mechanisms according to Art. 17(9) DSM

Critical ©/DSA topics

(2) The prohibition of an obligation to monitor

- Art. 15 [E-Commerce Directive 2000/31](#), Art. 7 DSA and fundamental rights
- Conflict with Art. 17 DSM
 - Do Art. 17(4)(b), (c) DSM imply a duty to carry out prior automatic verification (filtering) of content? (cf. pending [CJEU case Poland v European Parliament and Council of the European Union](#))
- Conflict with the DSA
 - Obligatory preventive control mechanisms for very large online-platforms (VLOP, Art. 27)

Critical ©/DSA topics

(3) Automated (over-)blocking

- DSA:
 - VLOPs have to put in place “mitigation measures”, including adapting their (automated) content moderation or recommender systems (Art. 27 DSA)
 - In order to reduce the “systemic risk” of disseminating copyright-infringing content (Art. 26(1)(a) DSA)
- But Commission Guidance on Art. 17 DSM Dir:
 - “in order to ... leave unaffected legitimate uses, ... automated blocking ... should in principle be limited to **manifestly infringing uploads**”

Critical ©/DSA topics

(4) Blocking orders

- Blocking orders against access providers regarding piracy websites ([CJEU UPC Telekabel 2014](#))
- DSA access restriction orders, Art. 41(3)
 - As a matter of last resort, a temporary restriction of access may be ordered against intermediaries (not only VLOPs)
 - If illegal content “causes serious harm” and “entails a serious criminal offence involving a threat to the life or safety of persons”
 - Relationship to UPC Telekabel?