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Article 17 is coming. Will the Internet change?

I. Introduction:

Copyright reform should primarily adapt European copyright law to the needs of the digital age. The debate on Art. 13 in particular was fiercely fought. This was finally adopted - albeit as Art. 17 - together with the 'Directive on Copyright in the Digital Single Market' on 15 April this year.² The debate on this regulation polarised. The fear: The introduction of a liability of platform operators for copyright infringements by users could lead to the introduction of upload filters. These should automatically find copyright protected content before uploading and check for possible copyright infringements. Protected content should be deleted. This could lead to "overblocking", which - according to some opponents of the reform - could fundamentally change the Internet and lead to an end of the freedom of the internet. And thus ultimately represent a serious interference in the fundamental right of freedom of expression.

Member States now have 24 months to implement the Directive. According to Art. 17, upload filters are not a mandatory requirement for the platforms. Other models are also being discussed to meet the requirements of Art. 17. Upload filters could be prevented by the platforms by concluding licence agreements with the right holders. It is questionable, however, to what extent upload filters will be used in the implementation of the adopted directive. Furthermore, the question remains: Is it possible to implement the directive into member states law without upload filters?

II. What's New: Liability of Hosting Platforms

Hosting platforms are usually used for legitimate purposes. They enable users to present their own content to the public and thus have an Internet presence, but this also carries the risk that copyright-protected content may be made illegally accessible.³ Up to now, the perpetrator - and thus liable - has been who infringes copyright law.⁴ Which means that the users of the platforms have been liable of copyright infringements. The hosting platforms previously enjoyed a liability privilege in § 10 TMG, which implemented Art. 14 of the E-Commerce Directive.⁵

Pursuant to Article 17 (1) of the Directive, content-sharing service provider platforms are now required, in so far as they provide the public with access to works protected by copyright or other subject-matter uploaded by their users, to perform themselves an act

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² Directive on Copyright in the Digital Single Market. The text of the adopted version http://www.europarl.europa.eu/doceo/document/TA-8-2019-0231_EN.pdf.

³ Barudi, „Value Gap“? – Zur Debatte um das Haftungsregime für Hosting-Dienste in Bezug auf Urheberrechtsverletzungen, in: Immaterialgüter und Digitalisierung Junge Wissenschaft zum Gewerblichen Rechtsschutz, Urheber- und Medienrecht, 2017, S. 163.

⁴ Barudi, (Fn. 2), S. 168.

⁵ Barudi, (Fn. 2), S. 170.

of communication to the public or an act of making such works available to the public. Thus, the hosting platform itself is liable for copyright infringements by users.

Accordingly, the operator of the platform shall be required to obtain permission in the form of a licence agreement. Then there is an exemption from liability. If, however, there is no licence agreement, liability exists according to para. 4, unless the operator of the platform has made every effort to obtain permission or has made every effort according to industry standards to ensure that the protected works are not available.

III. Copyright protection vs. free access to works for the general public

1. Reasons for copyright protection

The creation of a work usually involves high costs for the author: The author spends time and effort to create the work. On the other hand it is possible to reproduce the work quickly and cheaply.⁶ Therefore, the author should retain control over his work and be given the opportunity to receive a reasonable wage for his creative work.⁷ In addition, German copyright law protects the intellectual and material interests of an author in his or her work.⁸ Intellectual property rights are designed to promote innovation and competition.⁹ Copyright law is intended to provide the author with an incentive to create new works and thus to create cultural diversity.¹⁰

By limiting the shortage of information and knowledge, intellectual property is also a legal monopoly.¹¹ This also leads to a restriction of progress. The conflicting interests of authors and the general public represent a central principle of copyright law. The general public has an interest in being able to use the work as unrestrictedly as possible. In order to do justice to this balance of interests between the interests of the author and the interests of the user, copyright can be restricted. In German copyright law, the copyright restrictions are found in §§ 44 et seq. of the Act on Copyright and Related Rights (UrhG). According to this, for example, there is no copyright infringement if the work is reproduced, distributed or publicly reproduced for the purpose of quoting, §51 UrhG.

2. Value-Gap

The argument of the value gap was always used to justify Art. 17.¹² The liability privilege in Art. 14 of the E-Commerce Directive allegedly would generate high revenues for platform operators through unlicensed uploads through the advertising that would be generated and make marketing considerably more difficult for the actual rights owners.¹³

⁶ *Landes/Posner*, An Economic Analysis of Copyright Law, *The Journal of Legal Studies* 1989, 325, 326; *Suwelack*, Leistungsschutzrecht und Upload-Filter aus ökonomischer Perspektive, *MMR* 2018, 582, 583.

⁷ *Schack*, Urheber- und Urhebervertragsrecht, § 1, Rn. 5.

⁸ *Schack*, Urheber- und Urhebervertragsrecht, § 1 Rn. 2.

⁹ *Dreier/Kur*, *European Intellectual Property Law*, S. 9.

¹⁰ *Schack*, Zur Rechtfertigung des Urheberrechts als Ausschließlichkeitsrecht, in: *Geistiges Eigentum: Schutzrecht oder Ausbeutungstitel*, S. 123, 134.

¹¹ *Suwelack*, *MMR* 2018, 582, 583.

¹² *Frosio*, To filter or not to filter? That is the question in EU copyright reform, *Cardozo Arts & Entertainment Law Journal* 2018, 331, 361.

¹³ *Suwelack*, *MMR* 2018, 582, 585; *Nolte*, Drei Thesen zur aktuellen Debatte über Haftung und Verteilungsgerechtigkeit bei Hosting-Diensten mit nutzergenerierten Inhalten (sog. »Value-Gap«-Debatte), *ZUM* 2017, 304.

There would be "remuneration gaps". However, there is no scientific evidence for the existence of such a 'value gap'.¹⁴ The figures quoted in particular by the music industry are not plausible.¹⁵

IV. National implementation using upload filters

By holding the platform operator liable for the infringement, the Directive makes them responsible for compliance with copyright laws. So-called upload filters can be considered as a possible implementation of the directive. The reason for this is that with the large number of uploads to Internet platforms, it is no longer possible for people to check the content. Upload filters are software that automatically checks the content for possible copyright infringements before it is uploaded to an Internet platform.¹⁶ However, it is questionable and controversial whether these are already technically mature enough to really only delete content that constitutes a copyright infringement. The fear: overblocking, which could considerably jeopardize the freedom of the Internet.

The use of upload filters is supported by the fact that the protection of authors can be enforced more effectively in this way. It also seems to be the most effective way to enforce copyright protection. By finding everything, the protection of authors can be clearly guaranteed.

The automatic deletion of contents by upload filters can lead to the fact that the exceptions of the copyright protection are not respected.¹⁷ The software cannot judge, like a human being, whether a content is a copyright infringement or whether it embodies a permitted use. If a machine deletes content that is permitted by a copyright barrier, such as the right to quote (§ 51 UrhG) or as a parody as a subset of free use (§ 24 UrhG), this constitutes a violation of freedom of expression, Art. 5 GG.¹⁸ The consequence is that the business model of many may become impossible.¹⁹

V. National implementation options excluding upload filters

As agreed in the coalition agreement between CDU/CSU and SPD, upload filters are to be prevented. According to the coalition agreement, these are considered 'disproportionate'.²⁰ It is therefore questionable which concepts are possible to implement the directive in order to prevent possible upload filters.

To prevent upload filters, the CDU has developed a proposal.²¹ According to this proposal, each work should be provided with a digital fingerprint so that it can be identified beyond doubt and assigned to the author. If a piece is uploaded, the author has three possibilities:

¹⁴ *Frosio*, To filter or not to filter? That is the question in EU copyright reform, *Cardozo Arts & Entertainment Law Journal* 2018, 331, 363.

¹⁵ *Nolte*, ZUM 2017, 304, 311.

¹⁶ *Sulewack*, MMR 2018, 582, 585.

¹⁷ *Frosio*, (Fn. 13), 331, 357.

¹⁸ *Frosio*, (Fn. 13), 331, 357.

¹⁹ Zum Beispiel Kreative, die über YouTube Geld verdienen.

²⁰ German coalition agreement, 18th legislative period, p. 49;

https://www.spd.de/fileadmin/Dokumente/Koalitionsvertrag/Koalitionsvertrag_2018-2021_Bund_final.pdf.

²¹ The proposal of the CDU: <https://www.cdu.de/artikel/cdu-vorschlag-zur-umsetzung-der-eu-urheberrechtsreform-die-wichtigsten-fragen-und-antworten>.

He could demand deletion from the platform, offer a licence and be remunerated accordingly, or he could waive measures whereby the content could appear on the platform. In cases of remixes or home videos no fingerprint should be given. In such cases, however, a flat-rate transfer by the platforms to the rights holders is planned.

The implementation of this proposal seems unrealistic given the large number of contents. Even in cases of remixes and satire, a flat-rate remuneration by the platforms does not seem to do justice to the interests of the players. In this respect, the precise provisions of copyright law and, in particular, the rights to which users are entitled, such as parodies or quotations, cannot be sufficiently appreciated.

Another possibility to meet the requirements of the directive could be to extend the existing barriers for parodies and quotations.²² This would protect the pluralism and the freedom of the internet.

VI. The social and political controversy about "Article 13"

Not willing to deal "Article 13" until the last possible moment was quite a large movement of people. The political protest that took place - especially in the German public - on the one hand, was based on the regulatory problems mentioned above: The amount of interested people was surprising - no less than five million people signed an online petition against "Article 13".²³ On the 23rd of March 2019 over 100 000 people attended different Demonstrations all over Germany.²⁴ This protest was actually catalyzed by Youtubers informing about the new copyright directive and article 13 as well as by some incidents in which politicians and even the European Commission were insensitive and ignorant.

Christian Solmecke, attorney at law, creates informatory, law-related content for his own Youtube channel that by now has over 400 000 subscribers.²⁵ He generated public interest for "Article 13" in his predominantly young German audience since early 2018²⁶, when he began to describe the process and the circumstances of the directive. His range grew that much that a daily paper with an opposing view on the whole matter, the FAZ, accused him of polemizing and primarily pursuing financial self-interests.²⁷

But the online "shitstorm" was only really getting started when the press department of the European Commission issued a blog post (title: "The Copyright Directive: how the mob was told to save the dragon and slay the knight"), in which they sweepingly called the critical and in Article 13 interested public a "mob".²⁸ Only one day later, Sven Schulze, representative of the European Parliament and CDU member in Saxony-Anhalt, tweeted that he was receiving mails "every second" regarding Article 13 and was rhetorically

²² For Example: <https://netzpolitik.org/2019/nationale-spielraeume-bei-uploadfiltern-zwischen-zitatrecht-und-metall-auf-metall/>.

²³ <https://www.change.org/p/stoppt-die-zensurmaschine-rettet-das-internet-uploadfilter> (accessed 24.04.2019).

²⁴ <https://www.sueddeutsche.de/digital/upload-filter-urheberrecht-demo-berlin-1.4380487> (accessed 24.04.2019); even before that there were more but smaller protests.

²⁵ In the niche subsection on youtube for German law the channel has the most subscribers; <https://www.youtube.com/user/KanzleiWBS> (accessed 24.04.2019).

²⁶ <https://www.youtube.com/watch?v=v-knUuW57aM> (accessed 24.04.2019).

²⁷ <https://edition.faz.net/faz-edition/medien/2019-03-02/887ded7c414acd4a30a74fbd4192d823/?GEPC=s3> (accessed 24.04.2019).

²⁸ The post was removed, but can still be accessed via the following archive-weblink:

<http://web.archive.org/web/20190215205444/http://medium.com/@EuropeanCommission/the-copyright-directive-how-the-mob-was-told-to-save-the-dragon-and-slay-the-knight-b35876008f16> (accessed 24.04.2019) - the internet never forgets.

wondering if google really was in need of that kind of "#fake" action behaviour.²⁹ Because he basically dismissed the protest and interest of many "real" persons this way, people did not receive his tweet well. As a consequence, protestors called themselves "bots" - automated computer programs - from now on and held signs during the Demonstrations with labels saying "This bot votes!".³⁰

The protest found their actual "bogyman" in the German CDU party, more specific in Axel Voss. He is CDU member and Rapporteur of the European Parliament supervising the legislative process of the directive. Therefore, in the public view he was a "person of interest" from the start. At the same time some unpleasant pictures of him celebrating a vote result in the European Parliament with regards to the directive made their way around the internet,³¹ so that he was parodistically declared "destroyer of the internet" by various memes.³² It was not helpful that he expressed himself partly incompetently³³ and had to represent the regulations of Article 13 as a party politician without "being allowed" to confirm the factual necessity of upload filters. This thankless tightrope walk was the result of the clear passage from the coalition agreement mentioned above. All in all, the CDU's reputation, at least among the younger generation, was harmed, which was reflected in the often shared Twitterhashtag #niewieder CDU (#cduneveragain).³⁴ The SPD, on the other hand, was able to "avoid the storm" by vehemently speaking out publicly against upload filters³⁵ and many of the MEPs voted - in vain - against the final version of the directive. However, the approval in the Council on 15.04.2019 came from the German Ministry of Justice led by Ms. Katarina Barley of the SPD. A No would have led to displeasure within the German Government, but the Directive in its current form could still have been prevented. In this light the actions of the SPD therefore do not even seem like a "little rebellion"³⁶.

Most interested parties might also have been negatively impressed by an article from the FAZ³⁷ according to which at least it could not be ruled out that there had been a "horse-trade" between Germany and France; in return for France's approval of the Nord Stream 2 gas pipeline, Germany might have been more "willing to compromise" in the copyright reform and accommodated France, which was more restrictive under copyright law.

In view of the above-mentioned aspects, it is not surprising that the EU could feel less democratic for the majority of those who have advocated changes in copyright law reform - and thus especially for the younger generations. At a time when the acceptance of

²⁹ https://twitter.com/schulzeeuropa/status/1096445520770404352?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1096445520770404352&ref_url=https%3A%2F%2Fwww.mobilegeeks.de%2Fnews%2Fartikel-13-politiker-halten-proteste-fuer-fake-kampagne-von-google%2F (accessed 24.04.2019).

³⁰ <https://www.heise.de/newsticker/meldung/Dieser-Bot-geht-waehlen-3000-demonstrieren-in-Koeln-gegen-Urheberrechtsreform-4316858.html> (accessed 24.04.2019).

³¹ <https://netzpolitik.org/2018/urheberrecht-axel-voss-weiss-nicht-genau-was-in-seinem-gesetz-steht/> (accessed 24.04.2019).

³² Siehe z.B.: <https://twitter.com/TrekkerfahrerLP/status/1095837146416627715> (accessed 24.04.2019).

³³ <https://www.golem.de/news/eu-urheberrechtsreform-das-absolute-unverstaendnis-des-axel-voss-1902-139511-2.html> (accessed 24.04.2019); For an overview on the controversy surrounding Axel Voss:

<https://www.watson.de/digital/reportage/141793841-artikel-13-axel-voss-gegen-das-internet-eine-feindschaft-in-5-akten> (accessed 24.04.2019).

³⁴ https://www.focus.de/digital/dldaily/eu-urheberrecht-hysterie-und-falsche-nutzer-wie-algorithmen-die-diskussion-im-netz-beeinflussen_id_10403047.html (accessed 24.04.2019).

³⁵ <https://www.spdfraktion.de/presse/pressemitteilungen/starken-urheberrecht-nein-uploadfiltern> (accessed 24.04.2019).

³⁶ "Rebellöchen" is the german diminutive to "rebellion"; Petra Sitte, Die Linke, during an hearing in the German parliament towards the SPD: <https://www.heise.de/newsticker/meldung/EU-Urheberrechtsreform-bringt-den-Bundestag-richtig-in-Wallung-4363720.html> (accessed 24.04.2019).

³⁷ <https://edition.faz.net/faz-edition/wirtschaft/2019-03-26/f30a5870c08cc1e1b4524c1be19d1faf/?GEPC=s3> (accessed 27.03.2019).

copyright on the Internet is being put to the test anyway, it is not illegal on the part of politicians to ignore the protests of so many people as a result, but it certainly is not helpful either. It is one thing for norm addressees not to behave in accordance with the applicable rules. It is another, if they go against not even valid law actively - and then even in vain - on the street.

VII. Conclusion

The protection of authors and their appropriate remuneration is an important concern. If copyright were not protected in an efficient and effective way, this could mean a loss of creativity.³⁸ These are precisely the objectives of the directive. However, the directive has also been created to adapt copyright law to the requirements of the digital age. This is also characterized by large quantities of content and creative users. The responsibility of the platforms will not change much. The current legal situation already offers incentives to conclude licence agreements. In addition, the new regulation will lead to great legal uncertainty for the platforms. Especially the general wording of Art. 17 is problematic. For small platforms in particular, implementation will be difficult.

It is to be welcomed that the directive does not necessarily require automatic upload filters. However, the wording does not seem to exclude such filters. Such automatic blocking could enormously restrict freedom of expression. Especially the examples provided by the program 'Content ID' from YouTube prove this. However, it will be difficult for platform operators to meet the requirements of the directive without using upload filters. Previous proposals to implement the Directive without the introduction of upload filters do not seem to meet the requirements of the Directive.

Important hosting platforms, such as Facebook and YouTube, would not exist, if they would have been liable for infringements at that time.³⁹ There is a risk that the internet as we know it will change. Large corporations are likely to dominate and small platforms will eventually give way.

³⁸ *Nordemann*, Upload Filters and the EU Copyright Reform, IIC (2019) 50:275-277, p. 277.

³⁹ *Nolte*, ZUM 2017, 304, 305.