



European Copyright Society  
Oslo 2019

**Article 17 DSM Directive:  
A (tentative) cost-benefit analysis**

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# Agenda

- I. **Back to cost-benefit analysis**
- II. **Market failure and Article 17**
- III. **Social costs of filtering**
- IV. **Conclusions**

# Cost-benefit analysis

- Back to a more rational debate
  - \* Controversy over Article 17 was dominated by extreme positions on both sides
  - \* Broader public gave little attention to the actual wording of Article 17
  - \* Evaluation of Article 17 requires a careful cost-benefit analysis
    - What are the expected social benefits → increase in revenues for authors and creative industries?
    - What are the expected social costs → over-blocking of UGC, loss of diversity
    - Transactions costs, bounded rationality etc.

# Remedy for market failure

- **Premises of the model**
  - (1) Paid services cannot impose higher prices because of free services
  - (2) Revenues of paid services are insufficient to recoup the costs of creation
  - (3) Undersupply of cultural content and information offers

# Remedy for market failure

- Market failure and remedy
  - \* If premises are fulfilled → market failure
  - \* Creation of intellectual property rights as remedy
  - \* Article 17 does not create an intellectual property right but extends the catalogue of exclusive rights with similar effects
  - \* Making available by online content-sharing service provider reflects user experience
  - \* Rightholders obtain a stronger bargaining chip for negotiations with platforms

# Remedy for market failure

- **Premises of the model**
  - (1) Paid services cannot impose higher prices because of free services
  - (2) Revenues of paid services are insufficient to recoup the costs of creation
  - (3) Undersupply of cultural content and information offers
- **Any evidence for the premises?**
  - \* Empirical evidence is industry data („value gap“), but...
  - \* Plausibility of premises (1) and (2)
  - \* Premise (3) is difficult to prove because of intrinsic motivation of authors

# Remedy for market failure

- **Value of the bargaining chip**
  - \* German experience from the GEMA/Youtube cases
  - \* So far: annoyance of notice and take down as bargaining chip
  - \* Article 17 introduces full liability for breach of duty of care all over the EU
  - \* Expectation for higher revenues is plausible
  - \* Major drawback: no direct claims for authors; adequate participation?

# Social costs of filtering

- **Long list of concerns**
  - \* Lack of clarity of definition of „Online content-sharing service“ and of the exceptions
  - \* (Too) narrow exception for start-ups
  - \* Difficulties of licensing
  - \* Danger of overblocking, especially with regard to copyright exceptions
  - \* Insufficiency of remedies for users
  - \* ...
- Critics have achieved substantial improvements
- Three answers to the main concerns

# Social costs of filtering

## (1) Licensing efforts before notice?

- \* Article 17(1): An online content-sharing service provider shall therefore obtain an authorisation from the rightholders...
- \* Article 17(4): If no authorisation is granted, online content-sharing service providers shall be liable (...) unless (...) they have (...)
  - (a) made best efforts to obtain an authorisation (...)
  - (c) acted expeditiously, upon receiving a sufficiently substantiated notice

# Social costs of filtering

## Article 17

### Use of protected content by online content-sharing service providers

1. Member States shall provide that an online content-sharing service provider performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users.

An online content-sharing service provider shall therefore obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, for instance by concluding a licensing agreement, in order to communicate to the public or make available to the public works or other subject matter.

# Social costs of filtering

4. If no authorisation is granted, online content-sharing service providers shall be liable for unauthorised acts of communication to the public, including making available to the public, of copyright-protected works and other subject matter, unless the service providers demonstrate that they have:
  - (a) made best efforts to obtain an authorisation, and
  - (b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information; 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).

# Social costs of filtering

Where rightholders do not provide online content-sharing service providers with the relevant and necessary information on their specific works or other subject matter, or where no notification concerning the disabling of access to, or the removal of, specific unauthorised works or other subject matter has been provided by rightholders, and, as a result, those service providers cannot make their best efforts to avoid the availability of unauthorised content on their services, in accordance with high industry standards of professional diligence, such service providers should not be liable for unauthorised acts of communication to the public or of making available to the public of such unidentified works or other subject matter.

# Social costs of filtering

## (1) Licensing efforts before notice?

- \* Article 17(1): An online content-sharing service provider shall therefore obtain an authorisation from the rightholders...
- \* Article 17(4): If no authorisation is granted, online content-sharing service providers shall be liable (...) unless (...) they have (...)
  - (a) made best efforts to obtain an authorisation (...)
  - (c) acted expeditiously, upon receiving a sufficiently substantiated notice

- Must services ask proactively for authorisation before notice? Ambiguous text, Rec. 66
- If yes, then request to collecting societies should suffice to avoid damages
- Future role of Article 12

# Social costs of filtering

## (2) Incentives for services

- \* Incentives for services to gather as much content as possible remains
- \* Online services have shown no tendency for (over-)compliance in the past
- \* Experience with the German Network Enforcement Act (NetzDG)
  - Public outcry during legislative proposal
  - Few user complaints concerning overblocking
  - Reports of Facebook, Twitter, Youtube show moderate number of blocking cases

→ Incentives for services are not yet clear,  
Chilling effects must be monitored

# Social costs of filtering

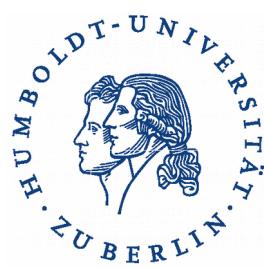
## (3) Filtering in a legal framework

- \* Article 17(4)(b) will lead to filtering
- \* But: Youtube is already filtering content for copyright infringement, hatespeech etc.
- \* So far, copyright filtering occurs without a legal framework
- \* Future regime under Article 17
  - para. 7: reservation for copyright exceptions
  - para. 8: Information duties vis-à-vis rightholders
  - para. 9: Complaint and redress mechanisms for users
  - para. 10: Stakeholder dialogues

→ Individual users may even be better off

# Conclusions

- Cost-benefit analysis: increase in welfare is not guaranteed but possible
- Empirical evidence is weak (as always)
- Doing nothing is not neutral, it backs the current business models
- Massive profits/market capitalisation for Youtube etc, small shares for European creative industries
- Legislator is testing new concepts
- Success or failure will be visible in 5-10 years ahead



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