Article 17, Pastiche and Money for Creators

Prof. Martin Senftleben, 18 June 2020
Objective: OCSSPs paying for UGC
Vehicle: Art. 17(1) DSM Directive

‘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 intervenes in full knowledge of the consequences of its action to give the public access to copyright protected works or other protected subject matter uploaded by its users.’
= no strict liability

...two options instead:

- licensing
  (Art. 17(1) DSM Directive)

- filtering
  (Art. 17(4) DSM Directive)
Much to say about filtering…
...but the money is in the licensing part

- Art. 17(4)(a) DSM Directive
- platform providers liable for infringing content unless…
- ‘…made best efforts to obtain an authorisation;…’
Practically speaking: industry negotiations

Content platform pays remuneration
Creative industry receives remuneration
Individual creator gets a share?
Typical copyright policy dilemma
New copyright contract law no solution

• Art. 18(1) DSM Directive

• ‘…where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration.’

• wonderful programmatic language!

• experiences in D and NL disappointing
  – evidence problem
  – black list problem
CMO deals much better for individual creators

CMO receives remuneration

% goes to individual creator

% goes to creative industry
What is the problem with CMO deals?

cross-border licenses for entire EU territory
How to make CMO deals mandatory?
Art. 17(7) DSM Directive

- ‘The cooperation between online content service providers and rightholders shall not result in the prevention of the availability of works or other subject matter uploaded by users which do not infringe copyright and related rights, including where such works or subject matter are covered by an exception or limitation.’

- focus on quotation, parody, pastiche

- remunerated copyright limitations = vehicle to channel money to CMOs
Going beyond industry interests

...third, alternative element:

licensing  filtering

broad, remunerated use privilege
(Art. 17(7)(b) DSM Directive)
What does broad mean?
Proposal

- underlying legislative model: private copying levies in the EU
- users enjoy freedom of remix, UGC platforms pay levies
- collecting societies pass on money directly to individual creators
- possibly even new collecting society serving as a one-stop shop for entire EU
EU implementation without fair use doctrine

‘use for the purpose of caricature, parody or pastiche; …’ (Art. 5(3)(k) InfoSoc Directive 2001/29)
CJEU, 3 September 2014, case C-201/13, Deckmyn/Vandersteen

• parody = autonomous concept of EU law
  – reference point: usual meaning in everyday language (para. 20)

• pastiche = autonomous concept as well?
  – usual meaning in everyday language?
  – ‘pastiche’ broad enough to cover user-generated content mash-ups and remixes?
Examples of pastiche
Boundary line

- quotation
  - remuneration
- parody
  - remuneration
- pastiche
  - remuneration
Identification of pastiche share difficult?

lumpsum payment anyway (% of advertising revenue)
Institutionalized Algorithmic Enforcement – The Pros and Cons of the EU Approach to UGC Platform Liability

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The End. Thank you!

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