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3A Copyright Law Session. EU Copyright Reform

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LAW & POLICY**

Thursday, April 8, 2021 – 11:45 a.m.

**SESSION 3: COPYRIGHT LAW
3A. *EU Copyright Reform***

Moderator:

Ted Shapiro

Wigin LLP, Brussels

Speakers:

Eleonora Rosati

Stockholm University, Stockholm

An Overview of the Digital Single Market Directive 2 Years On: What Lies Ahead for EU Copyright Law

Jan Bernd Nordemann

Nordemann, Berlin

Author Remuneration in Copyright – New Mandatory EU Rules

Jerker Rydén

National Library of Sweden, Stockholm

Article 15 of the Directive on Copyright and Related Rights in the Digital Single Market – From Theory to Praxis

Panelists:

Fiona Phillips

Fiona Phillips Law, Sydney

Giuseppe Mazziotti

Trinity College, Dublin

Silke von Lewinski

Max Planck Institute for Innovation and Competition, Munich

TED SHAPIRO: Welcome, everyone. Welcome to the EU¹ Copyright Reform Session. I hope you are all well. I miss you all. It's been said a million times, but I obviously wish we were all sitting in the Big Apple right now. Today, we have an impressive array of expert speakers and panelists from across the European Union, both in terms of nationalities and countries, as well as someone from Down Under.

We will peel back the layers of recent European copyright reform and consider a number of different themes ranging from member state implementation of the DSM Copyright Directive,² and the Commission's efforts to rewrite it; the potential impact of pending jurisprudence from the Court of Justice; new exceptions and limitations; the scourge of extended collective licensing; the new press publishers' related right, with some comparisons to Australia and earlier attempts in Germany and in Spain; author and performer remuneration; and Article 17,³ the value gap.

One of the general comments that was already made by the speakers, and it's obviously appropriate for this conference, is what can other jurisdictions learn about the EU experience and debate. When you think about that, one of the things that you do need to think about, when looking at EU-level legislation, is keeping in mind that there is the internal market factor that is also a driving force in EU-level legislation. Recent EU copyright legislation is in particular marked by a tendency, and we heard Marco alluding to this in his presentation earlier today, towards bans on contractual freedom; interference in contractual relations between parties that would normally bargain at arm's length; an erosion of the territoriality of copyright; redefining and narrowing of exceptions or creating new exceptions; more powerful exceptions and limitations; and, weaker protection of technological measures.

Another thing to bear in mind, and maybe we'll get to this at the end if there's time for discussion, is also what's on the future horizon. Hopefully not too much more EU copyright reform in the near term, but of course, we have a pending review of the collective rights management directive; a never-ending pipeline of cases before the Court of Justice; more talk about territoriality; the Digital Services Act,⁴ where clearly copyright law is *lex specialis*, but maybe more clarity may be needed. Of course, some aspects will apply to services that are not covered by the DSM, and perhaps there's some complementarity there as well. Then, of course, the ever-popular artificial intelligence and discussions around copyright infrastructure.

I think that's enough by way of introduction. Our first speaker is Eleonora Rosati, who is now at Stockholm University, I believe. I don't know if she's actually sitting in Stockholm. I'm guessing Jerker is. You also know her as one of the IPKat persons. She is going to give a first presentation, in particular about the Digital Single Market Directive. Eleonora, the floor is yours.

¹ European Union.

² Council Directive 2019/790, 2019 O.J. (L 130) (EC).

³ Council Directive 2019/790, art. 17, 2019 O.J. (L 130) (EC).

⁴ Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act), COM (2020) 825 final (Dec. 15, 2020).

ELEONORA ROSATI: Thank you very much. I hope you can hear me fine because I had some problems with the microphone before. It's always a great honor and pleasure to be part of the Fordham IP Conference. In the time at my disposal, indeed as Ted was mentioning, I will try to make the point as to where we are with the transposition of the Digital Single Market Directive. To this end, I've prepared a few slides.

With respect to where we are right now and where we are going, the short answer to the final point is that we're not going towards an age in which things would be easier than what they've been over the past few years. But let's start from the beginning, where we come from. Here, you see a timeline of events that I've prepared, some of them directly concerning the DSM Directive, others not directly relating to the Directive, which shows how complex this ecosystem in which the Directive finds itself is.

Just to go back to the beginning of this story: a formal understanding that copyright reform was in the air. It dates back to 2015 when the former European Commission unveiled its Digital Single Market strategy. It was submitted at that time that the copyright framework was unfit for purpose, it was not modern enough, and that there were barriers to this Digital Single Market, which I referred to earlier on. A year later, the proposal for a Directive saw the light. This was a period characterized by intense and intensive debates and discussions, controversies regarding the contents of the Directive.

In the end, the text that was adopted is a text of compromise. You see that the final text of the Directive is much longer than the original proposal. It is also much more complex, and in some cases, it is difficult to make sense of what the actual content of certain provisions is. Nonetheless, this compromise text was adopted by the European Parliament and the Council in April 2019. In all this, shortly after the adoption of the Directive, the Republic of Poland lodged a complaint with the Court of Justice of European Union, claiming that Article 17, one of the most discussed provisions, the one concerning online content sharing service providers, would be contrary to the EU Charter of Fundamental Rights and particularly to the right of freedom of expression.⁵

Let's go back to where we are now, April 2021. In a few days' time, on the 22nd of April, the Advocate General appointed in this case will deliver his opinion on this matter and it is expected that the CJEU⁶ judgment will follow in late 2021, earlier 2022. The Directive after the adoption by these institutions was published in the official journal and then put into force in June 2019. This moment signaled the beginning of the ticking clock for the national transpositions indeed. The member states have time until the 7th of June of this year to transpose the Directive into their own laws. I will explain in a moment where we are on national transpositions.

After the publication of the Directive in the Official Journal, the ball got back into the court of the European Commission, which is tasked by Article 17 itself with organization of stakeholder dialogue concerning the application of this provision. Indeed, there was a series of meetings that took place between late 2019 and early 2020. They were cut short by the advent of the COVID-19 pandemic.

⁵ Case C-401/19, Poland v. Parliament and Council, ECLI:EU:C:2021:613.

⁶ Court of Justice of the European Union.

What happened next was that the Commission launched a public consultation last summer, providing a preliminary view of its understanding of the correct application of Article 17.

The guidance of the European Commission is yet to be unveiled. We learned earlier today that the publication of Article 17 guidelines is due very soon, but we don't know when "very soon" will actually be. Perhaps sometime this month but might be also later than that. In all these, we've also had other macro events that have had an impact on the Directive itself. For instance, we now know what Brexit means. The United Kingdom decided not to transpose the Directive. Then, of course, the COVID-19 pandemic has meant that a delay in the discussion of EU copyright and national copyright reforms was, indeed, something due to happen.

Other things that matter for the Directive besides this Polish challenge to the legality of Article 17 is, of course, the pending YouTube/Uploaded referral. This is a case that was, of course, not referred to under the DSM Directive. It is a case concerning, among other things, the InfoSoc Directive.⁷ It is mostly about the question whether platforms like YouTube and cyberlocker Uploaded communicate to the public. What is important from the perspective of DSM Directive is the fact that the interplay between the InfoSoc and the DSM Directive featured prominently during the hearing before the Court of Justice and was also a significant part of the Advocate General opinion in this case.

According to the Advocate General, the DSM Directive's right of communication to the public will not be a clarification of the law as it preexisted the adoption of the Directive, but will be a novel regime which, of course, has a significant impact. Also, it will address what freedoms member states do enjoy when it comes to the national transposition of the Directive. This is something that has been brought to light by the German discussion around the transposition of the Directive.

For the time being, there is no date set yet for the release of the judgment. Nothing is scheduled, at least until the 6th of May. As you can see, our timeline of events is rather complex. The complexity of the Directive is only one piece of the puzzle. There are many other things that have a direct or indirect impact on the transposition, and understanding, and interpretation of the Directive.

This brings me where we are at the moment. This is a table that I have taken from the Communia website which gives an understanding of where we are with these national transpositions. As you can see, so far, only the Netherlands has proceeded to fully implement the Directive. This reform was passed in late 2020 and is due to enter into force in a couple of months.

What we have added, in addition to this, is partial transpositions of the Directive. This has been the case in France and Hungary. What we are seeing with the French case is that the discussion around the DSM Directive is anything but over. France has transposed the press publishers' right, and immediately after the adoption of this provision, there was a dispute between Google and a representative organization of the French press concerning the refusal by the former to indeed pay the fee for license of use of press publications.

⁷ Council Directive 2001/29, 2001 O.J. (L 167) (EC).

This is a dispute that, in the end, was solved not through the intervention of courts and tribunals, but rather the French competition authority. This understanding is that, indeed, this is going to be a very litigious season in which issues will arise not only from a copyright standpoint, but also from the point of view of competition law.

Coming to the end of this short overview, where are we going? In other words, are things ever going to become easier? The answer is no. The DSM Directive is a very ambitious harmonization attempt on the side of EU legislature, and what is ambitious about it is also the multifaceted rationale that supports EU intervention. The DSM Directive is not just an internal market instrument. It is an instrument to bring fairness in the copyright marketplace. This is something that we see in relation to the online platforms approach in Article 17, that we see in the press publishers' right, and that we see in authors and performers' contracts. It's also a Directive that seeks to make Europe competitive vis-à-vis their countries, and this is quite apparent when we look at the text and data mining exceptions.

Then, of course, there are elements about bringing European cultural heritage to the fore; make it usable, visible. This is what we see in relation to out-of-commerce works and the possibility of member states to introduce licenses with extended effect. In a nutshell, it is an ambitious piece of legislation, but it is also a very complex one. The prehistory of the Directive shows how controversial the very content of several provisions was perceived to be.

The post-natal life of the Directive is going to be equally or even more complex. We are already seeing questions of interpretation regarding the nature of the right of communication to the public in Article 17, regarding the waivability of the press publishers' right in Article 15. What has happened in France is just a preview of what is going to happen also in other member states.

For the years to come, first of all, we need to see our member states transpose the Directive. This is something that is yet to be finalized and is largely to occur, I think, for many member states well into '22, if not beyond that. Then there will of course be litigation before national courts and almost unavoidable referrals to the Court of Justice of the European Union.

On a final note, what we are seeing being discussed in Europe is something that, of course, is not limited to the European experience. Just three examples of this. First one, what we have seen in Australia for press publishers is something that reflected concerns similar to those voiced by European press publishers. Second example, Singapore is currently considering legislation in relation to text and data mining. Third example, last summer, the Section 512 study of the U.S. Copyright Office looked with interest at the European discussion around Article 17.⁸ In conclusion, this DSM Directive is a gift that keeps on giving. We will be accompanied by discussions about what it means and what kind of obligations it sets for years to come, a bit like the InfoSoc Directive, which has been with us now for 20 years. Thank you very much.

⁸ U.S. COPYRIGHT OFF., SECTION 512 OF TITLE 17: A REPORT OF THE REGISTER OF COPYRIGHTS (May 2020), <https://www.copyright.gov/policy/section512/section-512-full-report.pdf>.

TED SHAPIRO: Thank you, Eleonora. You referred, of course, to the swirl of conflict and complexity in particular around Article 17 of the Directive, the fight over the Commission's guidance, and of course the two pending cases before the Court of Justice. On top of that, of course, we have member state implementation. That is proving to be, of course, just a transfer of the controversy and conflict if you look at just the difference between France and Germany.

In that respect, I would like to ask Silke to comment on how that is going in Germany. My understanding is that the German government is confused and is implementing a protocol statement that they made at the time of the adoption of the DSM Copyright Directive, rather than the Directive itself. Could you perhaps explain where that confusion is coming from?

SILKE VON LEWINSKI: Yes. Thank you, Ted, and hello to everybody. When the Directive was adopted, the German government made a certain declaration for the protocol stating that when implementing the Directive, it wanted to avoid as far as possible any over-blocking, and in particular the use of so-called upload filters, which are not even mentioned in the Directive, but which have been a buzzword in the lobbying period during the Directive's discussion in Germany.

As you may know, we have had many demonstrations in the streets, often of kids who were mainly pushed by social media, which told them that with Article 17, the internet would be dead and users' possibilities to express themselves on platforms would be very limited, also due to over-blocking. There was a big pressure on politicians to react, and that's what they did by this declaration, which, however, is a unilateral declaration and of course does not modify the Directive, and in any case does not allow any member state, or Germany especially, to go beyond what is permitted or prescribed by the Directive.

In some respects, it is at least doubtful whether the proposal on the table fulfills the conditions of Article 17 as laid down in the Directive. Notably, a first discussion draft was issued last year even in English, which shows that the government probably wanted to have it spread also to inspire other member states for their implementation. It is quite inventive. As opposed to the French approach, which more or less literally transposes Article 17, it has created a whole new draft act outside of the Copyright Act. It is quite long and very detailed, which may be good for legal security, especially as regards the complaint and redress procedure. However, it is also quite complex and there are still some issues that are doubtful.

In particular, there was a lot of criticism because it introduced new exceptions and limitations not permitted by the Directive or under other EU law. The argument for doing so arguably without violating EU law was that, as the draft stated, the right under Article 17 would not be the regular right of communication to the public as set out in the InfoSoc Directive with its exhaustive list of exceptions, but it would be a sui generis right of communication to the public for which new exceptions could be devised. However, this idea seems to me a product of too much imagination because there is only one communication or making available right regulated in the InfoSoc Directive, like that under, and in line with, the international treaties. The DSM Directive did not want to change the communication right, but just stipulated — and this was the new aspect — that the defined service providers themselves perform an act of communication to the public when they do what has

been described as the activity of an upload platform such as YouTube. The specific aspect of Article 17 is thus the stipulation of direct or primary rather than secondary liability of those service providers, but not the communication right itself, so I don't see any justification to introduce additional exceptions and limitations.

The criticism on this and other points was so strong that, after all, the governmental bill — which came out late, after long disputes between the ministry, which is led by a social democrat politician, and the coalition party of our government, the Christian Democrats, who had not been involved from the outset — brought about some changes. Therefore, today these additional exceptions as such are no longer proposed, but they still re-appear in a slightly changed and disguised way inside the complaint and redress procedure.

TED SHAPIRO: Thanks, Silke. I think we'll have to come back to it because we're out of time for the discussion part of this section. In sum, the proposed German implementation is still 10 times more complex than Article 17 itself. The minor tweaks made before the release of the official draft seem to be adding complexity, but not fixing the problems.

I think that means that we now need to jump to our next presentation, which is to be done by Jan Nordemann, from the Nordemann Law Firm. There's about 20 Nordemanns in that firm, based in Berlin. Jan is going to talk about another section of the DSM Copyright Directive on author and performer remuneration.

JAN NORDEMANN: Thanks, Ted. Great to be on this panel and to talk a little bit about the new mandatory EU rules on author remuneration in the DSM Directive. Let's start with a little overview. Of course, as I'm German, this is to confirm the old rule that Germans can never start with a joke when they present, but they always have to start with a table of contents. That's what I also do here just to conform to the rule.

There are, what I think, four major provisions in the Copyright Contract Law Rules of the DSM Directive. This is, first of all, Article 18, as you can see on the upper left-hand side here, the Principle of Appropriate and Proportionate Remuneration. Then you have on the right-hand upper side, the Transparency Obligation About the Use of the Work, Article 19 DSM Directive. I will go into detail later about this. Then on the lower left-hand side, you see Article 20, the Contract Adjustment Mechanism for Best Seller Scenarios, at least that would be my headline for Article 20. Then you have Article 23, the Specific Ban on Contractual Overrides for Article 19 and Article 20 for the Transparency Obligation and for the Contract Adjustment for Best Seller Scenarios. Article 23 is what makes these provisions mandatory, of course.

What is behind this, what did the EU Legislators think, you can see that, in particular, in Recital 72 of the DSM Directive: authors and performers tend to be in the weaker contractual position when they grant a license or transfer their rights for the purpose of exploitation and return for remuneration. The EU Legislators thought that authors and performers need some protection and need regulation in Copyright Contract Law in their favor.

Let's look at the transparency obligation of Article 19, which you see here as it was put into effect. You have for authors and performers a right to at least once a year get information on the exploitation of their works and performances, of

course, from the parties to whom they have licensed or transferred their rights or their successors in title. This information is in particular regarding modes of exploitation and all revenues generated. There's a little limitation stating that you should take into account the specificities of each sector. As you can already take from this wording, this will mean a lot of work for producers, publishers and all who use and exploit copyright-protected works and performances. Some safeguards apply. According to Article 19, there's a general proportionality requirement. No transparency obligation applies if the administrative burden is disproportionate. Also, no transparency obligation applies if there was no significant contribution by the author or performer. As you see, you probably have a lot of question marks already, a lot of issues to discuss.

Let's go into Article 20 and the Contract Adjustment Mechanism for Best Seller Scenarios. As you can see here from the wording that is on the screen, authors and performers are entitled to claim additional, appropriate and fair remuneration, when the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances. I will translate "disproportionately low" into "best seller scenario" because usually in case of lump sum payments there's no longer proportionality between what the author or performer has got and remuneration and proceeds the producer or publisher receives. Collective bargaining agreements prevail. That is important. That's a push, of course, for collective bargaining agreements. What is also important, there's a duty to implement this bestseller provision into the EU member states' laws. Every EU member state will have bestseller provision in the future if all comply with a deadline for June 2021.

The Germans, as Ted mentioned in his introduction, are, regarding the copyright remuneration rules, a little bit ahead because we know in Germany these kinds of rules. They were introduced into German law two decades ago already, in 2002. There's a best seller provision, Article 32a of the German Copyright Act.⁹ In particular, it covers bestseller scenarios if the lump sum remuneration that an author received or a performer received is combined with a long selling success, then the remuneration may get out of proportion. There's extensive practice in Germany about the best seller provision. There are collective bargaining agreements in place, several, and there's also various court litigation in the past and also currently ongoing, for example, in the film area, by cameramen, screenplay writers or dubbing artists.

Let me show you one case that is quite famous in Germany, and maybe you've heard about it also outside Germany. That's the *Das Boot* case.¹⁰ It's a bestseller case about a 1981 motion picture which was called *Das Boot*, or *The Boat*. The film follows a World War II German submarine on their Atlantic patrols. The chief cameraman sued for more money. The chief cameraman is considered under German law an author. The chief cameraman had received a one-time lump sum of circa 100,000 Euros in the 1980s. This remuneration was considered fair for

⁹ Urheberrechtsgesetz [UrhG] [Act on Copyright and Related Rights], Sept. 9, 1965, Bundesgesetzblatt [BGBl] at I, 2014, as amended 2018 (Ger.).

¹⁰ BGH, Apr. 4, 2021, I ZR 9/18, <https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2021/2021075.html>.

the short-term theatrical, home entertainment and TV use, but because of the long selling success, it then turned out to be disproportionate, at least that was held by the German courts, and the German courts held that the cameraman was entitled to a change of contract and to additional remuneration.

What are the takeaways from the new remuneration rules in Europe? I think they mean a heavy change of the contractual remuneration between authors and performers and producers, publishers, etc., in Europe, in particular in those countries where no such rules exist yet. Implementation, that's also my guess, will vary across Europe because some of the rules are rather unclear and leave a lot of room for implementation. Contractual freedom will be definitely limited, as you can see already from the bestseller provision. Also, the old Roman law rule *pacta sunt servanda*¹¹ may no longer apply. Collective bargaining agreements will take a more prominent role in Europe. I think that's for sure as well. There will be bestseller litigation across EU member states, in all EU member states because it's a must-have, the bestseller provision in all EU member states. There are many, many unresolved legal issues, including, just to name two, international application of these remuneration rules and the transparency obligation and proportionality, as I mentioned earlier.

To share some German experiences in Germany, it took 10 to 20 years before the dust settled on these provisions. That means, of course, these author and performer remuneration rules are bad news for publishers and producers who will face additional costs due to transparency and may also face additional payments. They may be good news for authors and performers, but I think what is definitely for sure is they're good news for lawyers because it's an employment program for lawyers. Thanks. That's all for me for the moment.

TED SHAPIRO: Thank you very much, Jan. A very useful presentation. Of course, we could spend a whole session just discussing that. It's clear that the goals of this legislation are quite important. It's just the difficulty of when a legislator intervenes to regulate this kind of thing, how it can work, the compromises that get made, and of course, the possibility of litigation to fight over how it should work.

You pointed out that given the flexibility in these provisions, we're going to have a lot of different approaches in the member states. There are different safeguards that people can put in place. They are taking into account the flexibilities of different systems for different sectors. That's going to mean differences across the EU. Giuseppe, you have pointed to this legislation, and you've raised some issues.

I was wondering, how do you think that member states will interpret this? We know that Germany has a fair amount of experience in this area. It has to be said that, apart from really the UK and Ireland, most member states had most of these things in various different ways. Of course, they're now at the EU level. How will member states interpret these obligations, and will other EU-wide regulations have an impact on this pursuit of fairness? What do you think?

GIUSEPPE MAZZIOTTI: Thank you, Ted, for your question. Thank you to the organizers of this conference for having invited me to join this panel, which I'm enjoying very much.

¹¹ Latin for agreements must be kept.

I think this is just a small piece of legislation if we compare it to the much bigger picture that is coming out, when it comes to fairness and transparency, on access to data and transparency rights, as a general rule. It is becoming clear for those who follow the policymaking process in Brussels, especially the Digital Services Act or the Digital Markets Act,¹² that Europe has a vision of the largest exploiters of copyright works that will progressively transform their platforms into a sort of public service. This concept, at a much bigger scale, contemplates that platforms provide access to data and, to a certain extent, trade secrets that the whole computer industry is based upon. It's not a contradiction, in my view. I think the power and responsibility that member states have been given under the Copyright Directive is a consequence of the principle of subsidiarity that the EU law is based upon.

This idea is that, as Jan emphasized very well, there will be a reinforced role of collective bargaining. Obviously, collective bargaining is a genuinely local thing because what is appropriate in terms of remuneration will have to be determined at a local level and in accordance with rules, as Ted said, that are likely to diverge from member state to member state. I'm speaking from Dublin, and I represent Trinity College Dublin. For Ireland, this approach is shocking, obviously. Legislation that is being prepared is totally alien to the tradition of common law countries, and Ireland is — they don't have anything comparable to what Germany, France, and Italy have.

What is being mandated, as Jan said, is a sort of infrastructure where collective rights managers in each single sector will be the protagonist of this price or tariff setting mechanism on a sector-by-sector basis. I believe that the most interesting implementations will come also from the bigger picture of platform regulation that I referred to.

I would say the complexities that we will have at the national level will be mitigated by the activity of the Court of Justice, as Eleonora said. The Court will help define concepts that, for now, are rather abstract. It seems obvious to me that, in spite of the Directive provisions, we won't have the same kind and level of remuneration, for example, in Bulgaria or Romania and in Denmark or Ireland, because licensing fees will have to be adapted also to the economic value of a certain work, especially online, and to consumers' willingness to pay. I believe that especially non-European observers should pay attention to possible amendments to the Digital Services Act and the Digital Markets Act, because it's where these abstract principles of fairness and transparency will become concretely enforceable.

TED SHAPIRO: Giuseppe, we've used up the time for this. I'm just conscious that Jan and I have both pointed out some of the downsides. Silke, I'll give you 30 seconds to say something about what you think about this, if you want to quickly comment on the extent to which you believe that Articles 18 to 23 can work beneficially across the member States.

SILKE VON LEWINSKI: Well, Jan has already pointed out the experience we have had in Germany. I think, in essence, authors often don't really have the

¹² Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM (2020) 842 final (Dec. 15, 2020).

possibility to negotiate good conditions unless they can do so collectively in one or the other way, such as for example under German law by setting certain standards, on what is an equitable remuneration. However, implementing rules in some member states may be not very effective, especially where they do not show an element of collectivity. In Germany, Articles 18 to 23 may improve some things a little bit, but they are not the big breakthrough there.

TED SHAPIRO: Thank you very much. We're now going to move to the — I see there's one question in the chat. Jan, I've got one quick question for you that says, would it be possible to insulate lump sum payments applying globally? If challenged in the EU, the global lump sum shall be cut from 100K to 50K or 10K, like a set-off? Great question, which poses a million complexities.

JAN NORDEMANN: I'll do my very best. I think this is a "Yes." If the lump sum is for global use, you will have to distribute the lump sum per territory. There's quite extensive case law in Germany on how to distribute lump sums, not only territory-wise but also timewise, different modes of use. This is indeed one of these questions which are employment programs for lawyers.

TED SHAPIRO: You mentioned the issue of the international application and the extent to which, for example, this could impact contracts between US producers and US authors, which raises a whole number of complex issues. I even wonder about companies that distribute and produce across the entire EU, how they figure out which laws are applicable to which things. That's going to be complex, but okay, we'll have to move on from author/performer remuneration to our next speaker who is Jerker Rydén. He is going to talk about his absolute favorite thing that he talks about every year, except for last year, but of course he couldn't, and that is on extended collective licensing, the panacea for the world's ills. Jerker, the floor is yours.

JERKER RYDÉN: Well, thank you very much Ted. Due to some technical problem, I don't have access to my slides. I am so sorry for that.

The backdrop to Article 15 could be described as a crossroad of different kinds of legislation. Ultimately, I think it about the fourth pillar of democracy: the sustainability of a free and an independent news media. It's been under heavy pressure from these big tech giants, and the bottom line is the advertisement business. Google, Facebook etc. have been very much damaging to the business model of press publishers.

What the commission has recognized is the need to provide news media corporations with a related right so they can effectively benefit from the reuse of news media, which is taking place on these platforms. The aim is not to protect works; it's like the protection of a database or a catalog. The purpose of Article 15 is to protect the investment made by news media corporations. Will that make the day? Well, that is yet to be seen.

Article 15 provides news media with a two-year protection and they have to share the revenue they receive with authors. Obviously, it is ultimately about how to recoup the investment protected by Article 15. The key is to find the efficient way to recoup the investment. I would say, it's a combination of how you make this work, i.e., efficient collective licensing, and also find a way to share the revenue with authors.

Authors and press publishers do sit in the same boat. What is required is an ecosystem consisting of the related right (Article 15) and efficient collective licensing. Possibly, it could also relate to the new transparency rules.

As far as sharing the revenue, press publishers are faced with a challenge – to establish a business model underpinned by the press publishers right and a requirement to share the revenue with the authors (Article 15). I assume, to be able to approach this effectively press publishers will have to work together with the authors. Otherwise, they will be in a relatively weak position in relation to the platforms. Press publishers themselves need to work collectively, and jointly with authors, to gain leverage in negotiations with platforms. Extended Collective Licensing (ECL) - Article 12 of the DSM Directive¹³ - provide the mechanism for such a business model. The reason I mentioned ECL is that collective licensing is the only way forward to manage the rights and also to provide legal certainty, which platforms will demand to enter into a license agreement.

In the Nordic countries CMOs represents not only authors, but also press publishers. By approaching platforms through a CMO press publishers could benefit from an existing organization i.e., no need to set up a CMO on their own. Another advantage with the CMO is that press publishers and authors could use the CMO as a forum to discuss and negotiate a viable business model.

ECL could play a role two ways. First of all, it's a streamlined, one-stop-shop, and secondly it provides legal certainty, which I think would be attractive to Facebook and Google and other platforms.

One thing, obviously, is that in some cases, the market value of the press publishers' right, could also be related to cross border use. Article 12 says that the extended effect of the ECL is confined to the territory of the member state, but as described in the opinion published by ALAI¹⁴ in 2016 and as I have provided practical evidence of in ECL pilots with Finland and Malawi, ECL can be used across borders.

At the end of the day, will Article 15 be a game-changer? Will it change the market for advertisement? Will press publishers be able to compete with these big tech giants and attract more advertisement? The answer is probably no. I believe the overall effect on that marketplace for advertisement will be zero, but with efficient licensing mechanisms press publishers could work collectively and jointly with authors and create an ecosystem which will enable them to recoup their investments.

Another point that I think is relevant to mention is that Article 12 (ECL), which is not mandatory for Member States to transpose, could actually be transposed by many more Member States because ECL is needed for press publishers to recoup their investment. ECL is required to fill out what is missing in Article 15, i.e., a viable collective licensing mechanism providing legal certainty for mass use. And this is true for other articles in the DSM Directive as well - Articles 3, 4, 5 and 17 - which in some instances require an ECL Article 3 and 4 require the user to have lawful access to works. In some instances, lawful access may be provided under an exception or limitation, but in some instances it may not

¹³ Council Directive 2019/790, art. 12, 2019 O.J. (L 130) (EC).

¹⁴ Association Littéraire et Artistique Internationale.

and a license is needed, and in many cases an ECL. The same argument can be made for Article 17. I understand this is an ongoing discussion among CMOs and some have an ambition to provide a solution to enable these articles to function as intended.

ECL is not a panacea, not to be “prescribed” for any and all needs for a license, but only for certain cases. And I would like to stress that ECL is about right holders collectively opting into the contract in the first place. A contract is required and all categories of rights holders concerned to opt-in. The ECL agreements I have negotiated on the behalf of the National Library of Sweden have as parties all categories of right holders concerned. Since they opt-in, they take an active part in the agreement.

I think overall one can see ECL as the means for all right holders concerned to be adequately remunerated and the means to establish viable business models for mass use, and in respect to Article 15, to enable press publishers to recoup their investments, authors to be compensated and platforms legal certainty.

I think I’m now within the time limit. Thank you for listening and finally, great to see you all, unfortunately, not the ones in the audience, only the colleagues, but nevertheless, great to see you. Thank you.

TED SHAPIRO: Thank you very much Jerker. It’s the perennial argument over ECL. I always understood it as opt-out. Article 12 refers to opt-out not opt-in. The difficulty with applying Article 12 to Article 17 is, of course, Article 17 may have more of a cross-border nature, whereas Article 12 is limited to member state territories, but certainly there has to be a role for extended collective licensing and servicing exceptions. I believe it would be a disaster if it applied in the area of Article 17.

Let’s stay on Article 15 and the implementation of Article 15 and the press publishers’ right. Eleonora referred to the competition law push that was given to get things going in France. I’ve been wondering about the flip side of it: what happens if four or five big publishers sit in a room and pool their rights; whether there’s an antitrust issue on that side. But let’s compare Article 15 and the way that it’s being dealt with in Europe to the experience Down Under. Fiona, can you tell us a little bit about what’s going on? There’s been a fair amount of this in the European and American press. Tell us a little bit about how you see this contrasting to what’s been going on in Australia.

FIONA PHILLIPS: Thanks Ted. What’s happening is actually interesting in the sense that we actually in Australia have a very extensive use of copyright licensing and have our very own statutory licensing regime, but that is not the approach that has been taken with press publishers. I think that the approach in Australia has some pluses and minuses. One is, actually, that some deals have actually in the last month been done between Google and Facebook and some major media players, but there are also some downsides.

Just to give some context, people will have seen that Australia recently had its access to news via Facebook switched off, without any warning, and it happened to coincide with the week that vaccines were beginning to be rolled out here. For example, the Australian Medical Association’s Facebook site suddenly disappeared. The background to our approach is that this issue is being looked at

from a competition perspective. I spoke at the conference a couple of years ago about our competition regulator's inquiry into digital platforms. That inquiry actually came through a political process.

The lens of inquiry really was just about Google and Facebook and the impact on public interest news, on journalism, and the advertising market that went along with that. One of the many recommendations that came out of the inquiry was the establishment of a media bargaining code. They tried to do it voluntarily. Then when it was clear that that wasn't going anywhere, the Government announced that it was planning to decree a mandatory bargaining code. As you will have seen, both Google and Facebook threatened to withdraw from the market. In the end, the legislation has passed and deals have been done, but I think there are a couple of issues that are worth noting.

One is, because it's political and it comes from a competition perspective, the focus is just on Google and Facebook. It's not looking holistically at digital platforms. The second thing is that the code applies to media businesses. They have to hit a certain economic threshold of about \$150,000 per annum, just from news content to be captured. Query who will be in and who will not have access at this stage. Preemptively, Google and Facebook have entered into deals with some of the major players, for example, NewsCorp and some of the major broadcasters.

Thirdly, and I think from a copyright perspective one of the things that is troubling is that there's no mechanism to remunerate the underlying rights-holders in that news content.

In summary, there are some pluses in that, because there is this threat of actually being forced to go to arbitration, there is a large stick to be applied, which has had some effect, but there are some limitations in terms of the coverage dealing holistically with digital platforms with news content and with remunerating creators.

TED SHAPIRO: Thanks, Fiona. It starts to sound like you need a combination of copyright and competition law, a little bit along the lines of what was happening in France.

Meanwhile in the Q&A, questions came and got answered. A question came up about whether the German implementation that Silke referred to, based on the sui generis nature, was compliant with the Directive. Eleonora answered that she did not think it was. Jan seconded her motion, and Giuseppe wants to praise Article 17 for having made the Polish government act as a human rights advocate. I do find it pretty ironic that the case in defense of certain fundamental rights, or at least purportedly in defense of certain fundamental rights, was brought by the semi-totalitarian regime, but that's where we are.

We still have some more time for questions. If anyone has one in the audience — We have seven minutes left.

JAN NORDEMANN: A quick remark on Article 15, the related right of press publishers. There are also some German experiences with this because we had such related right before it got annulled by the CJEU some years ago. There may be an antitrust issue because Google in Germany tried to evade and avoid this related exclusive right by forcing the publishers into non-paid licenses. That's what happened in France as well. That's something the DSM Directive doesn't address.

I just wanted to point out that you may need the help of competition law (antitrust law), in order to put this into place against the really big ones, i.e., in particular Google.

TED SHAPIRO: Would you have expected the DSM Copyright Directive to address this issue?

JAN NORDEMANN: Well, you could address this under copyright law, if you would just choose to only allow mandatory collective licensing. Then the issue goes away, but of course, there are good reasons that the DSM Directive did not do this and leaves that to individual licensing in the end. Of course, with the option to run it, as Jerker had said, through ECL, or whatever other licensing scheme, but there may be the issue of Google's request for non-paid licenses — I don't know if the fight is over because Google and France have settled the competition law case, but at least you probably need to expect some more cases.

That said, just maybe to give a little more detail, it may be an abuse of a dominant position in that case a dominant search engine like Google, with a threat of listing light the press publishers, as we call it in Germany, or even delisting them, at least to a limited extent, that forces them into non-paid licenses. That's the issue, that may be an abuse of a dominant position. That's something that needs to be addressed before this starts to work, this related right.

TED SHAPIRO: Yes, we see this trend that there's a combination between copyright and competition law to deal with this issue. I guess it's disturbing to me that the answer has to be mandatory collective licensing because I don't see how that incentivizes folks to invest in content. I saw Silke, when you were raising your hand, I think you wanted to make a comment on this point.

SILKE VON LEWINSKI: Thank you. Just to follow up on Jan. Yes, it seems you cannot always rely on antitrust authorities or on existing competition law. While I agree with the French one, which found that, in this case, Google's behavior was likely to be an abuse of a dominant position, the German cartel office — the authority for antitrust law — did not find sufficient evidence of abuse of a dominant position towards the German publishers from whom Google did not want to acquire remunerated licenses.

I would agree that, in such situations where you have an internet giant on one hand, and rights-owners who have an exclusive right but do not get the option to grant a remunerated license under an agreement on the other, there is a problem related to a dominant position. Copyright alone does not help you in this situation. You need, in addition, suitable competition rules and authorities in order to rebalance the bargaining power between the two parties.

TED SHAPIRO: Well, I guess we have a bit of a consensus in this area. We're running out of time so what I would like to do is to flip again, quickly to Article 17. We have the pending Polish case, and we know that the Advocate General's opinion is coming out on 15 July. We all know what he's going to say because he already wrote the decision for YouTube, so we know. Let's skip over the Advocate General and pretend that he's a candle in the wind. Quick predictions on what the outcome will be from the Court of Justice in the Poland versus EU case. Eleonora, you go first.

ELEONORA ROSATI: My bet is that the court will say that Article 17 is valid, but if I can add another prediction, I don't think that the Court of Justice will say anything in YouTube/Uploaded.

TED SHAPIRO: Okay, Jan. Your turn.

JAN NORDEMANN: My guess is also that it will stand. Article 17 will stand, but the court will again re-emphasize that you need to balance all the rights involved.

TED SHAPIRO: Surprising to me that no one is pointing out what the Commission said. Silke?

SILKE VON LEWINSKI: I'd rather say that my hope is that it will decide that Article 17 stands because that's what I think the law is. I do not see any infringement of fundamental rights. They have been balanced quite well in the text of Article 17, but you never know what the Court of Justice will hold.

TED SHAPIRO: Our time is up. Giuseppe, real quick.

GIUSEPPE MAZZIOTTI: I think that Poland will be unsuccessful at the very end and, if I can add a very quick remark, I think the regulations the EU is likely to pass, i.e. the DMA and DSA, will help resolve the competition concerns that you referred to regarding news publishers. It's clear to me that those rights and infrastructural changes in the way platforms are organized might protect or restore competition, if and when they enter into force.

TED SHAPIRO: Jerker, any final comment? Do you have a prediction on the Polish case?

JERKER RYDÉN: It's not really my area of practice at all. I was asked to talk about press publishers because I have experience of negotiating public private partnerships with press publishers in which context ECL played an instrumental role to enable the collaboration between the parties and facilitate the mass-digitizing of newspapers in the library's collection and enable both parties to make use of the result based on ECL-agreements. I think that Article 15 is a very niche solution, very narrow. The conclusion is that, if it's going to be applied based on ECL, that it could be a wake-up call for some member states that ECL could be used for special cases when you cannot solve it otherwise.

As I mentioned ECL could be required in respect of Article 3, 4, 5 and 17 in certain cases, and cross-border use is possible as described in the opinion on ECL published by ALAI and as I have provided evidence of in ECL-pilots. ECL shouldn't be in an EU regulation. There's no one-size-fits-all solution. ECL in my view has to develop gradually, organically, in the member states in respect of their legal traditions, and what they are accustomed to.

TED SHAPIRO: Okay, thank you very much. Let's keep it niche. Finally, Fiona. Obviously, you're not an expert on Article 17, but what do you think about it vis a vis Australia?

FIONA PHILLIPS: What do I think about it? Well, I think Article 17 is a really interesting option and would be far preferable to what we have. I won't offer a prediction for what the CJEU is going to say, but I would hope it would uphold the validity of the Article.

TED SHAPIRO: Okay, thank you. There you have it, folks. I've consulted the future and it remains only to wish you all peace, love, and copyright, and hopefully see you next year in New York City.