4-21-2022 11:25 AM

3A Copyright Law Session. EU Copyright Developments

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TWENTY-NINTH ANNUAL CONFERENCE
INTERNATIONAL INTELLECTUAL PROPERTY
LAW & POLICY

Thursday, April 21, 2022 – 11:25 a.m.

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

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Eleonora Rosati
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The DSM Directive 3 Years On: State of Play

Ursula Feindor-Schmidt
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A New Cooperative Approach Between Rightsholders and Platforms

Lauri Rechardt
International Federation of the Phonographic Industry (IFPI), London
DSA, Perils of One-Size-Fits-All Liability Privileges

Panelists:

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STAN MCCOY: All right. Thanks very much. I'm Stan McCoy. I'll be your moderator for this session. We appreciate you all joining us for this talk about EU copyright developments. I'm just going to throw up a slide, and while I do that, acknowledge gratefully Marco Giorello's comments already in the first session this morning, where he talked a little bit about the big picture of EU copyright policies. I will duplicate just a little bit of that by way of introduction. We have, as a reflection back on 2021 in the year that was in EU copyright, we now see the DSM Copyright Directive having been implemented in roughly half of EU member states. You see the list of them out there on the screen.

We also had the Commission's Article 17 implementation guidance coming out on the 4th of June 2021, which was just a couple of days before the DSM Copyright Directive implementation deadline of the 7th of June. June was a busy month in EU copyright, because we also had the Court of Justice decision in the long-awaited YouTube case coming out on the 22nd of June, in which the court helpfully aligned itself with the legislative trends. In the meantime, in the EU institutions, there was substantial progress on the Digital Services Act and the Digital Markets Act, both of which can be seen as having implications in certain ways that will be discussed in more details in a few moments, particularly as it relates to the Digital Services Act. We also have had reports on application of the CRM Directive and on ECL as called for in Article 12.6 of the DSM Copyright Directive that came out in November.

We had the opening of an audiovisual stakeholder dialogue on geoblocking. Looking ahead to 2022, it's already been mentioned that the long-awaited Polish challenge on Article 17, the ruling will be coming out next week. We also are watching institutional negotiations that are ongoing on a number of interesting files. The Digital Services Act, very prominent among them, but there's also not to be forgotten the NIS2 Directive, the information security instrument that deals head-on with the problem of WHOIS transparency of interest to many copyright and trademark owners. There's also an A.I. Act that is probably more relevant to the next panel. We won't dwell on it too much here. There's also an interesting questionnaire that's been circulated by the French presidency, highlighting some EU copyright effectiveness issue.

There's a report overdue at this point on the implementation of the portability regulation. There's a review of the Term Directive. There are studies that have just been published on copyright infrastructure and AI issues. There's an examination of IP ownership issues, the closing of the audiovisual stakeholder dialogue on geoblocking. On top of all of that, the Commission needs to move forward with implementation of the Beijing Treaty. Even that's not a comprehensive list, Lauri can tell you that there are some music remuneration issues that are pending out there. There's the potential to deal with IP and databases on the horizon. A lot of issues out there on the horizon, we will only scratch the surface of them, but we will start off our discussion with a look back on DSM and a look forward on DSA, courtesy of Eleonora Rosati, professor at the at the University of Sweden.

Then we will move on to presentations from Ursula and from Lauri, who will look at other specific aspects of the DSA. Then we'll open the floor to our

panelists, Jerker and Martin who will lend their perspective to the discussion. Hopefully, we'll have a fun and vivid back and forth. With that introduction, I pass the floor to Eleonora to give us her introduction to the subject matter. Thank you very much, Eleonora for being with us today.

ELEONORA ROSATI: Thank you, Stan. Hello everyone. I would like to start, of course, by thanking you and Fordham for inviting me. In the few minutes of my disposal, I will try to indeed the recap where we are nearly one year after the expiry of the deadline for national transpositions of the Directive. I would like to divide my talk into three parts. The first one is indeed the detail where we are. The second part will be about trying to identify what is clearly wrong in some national transpositions of the Directive, and what is really open to interpretation because it is objectively ambiguous in the Directive itself. Then I would like to conclude by looking into what's next and anticipating some of the topics that will be discussed in much greater detail by my fellow panelists.

As you were outlining, Stan, indeed there are many Member States that have yet to complete the transposition processes. Checking yesterday, the website of the European Commission, it seems that there are 16 Member States that have undertaken some transposition initiatives. Indeed, that does not mean there are 16 national transpositions, because some of these, as it was apparent from your slide, are still partial transpositions.

There are many missing for a variety of reasons that also as Marco Giorello outlined earlier today. I will say that a big reason is COVID, yes, institutional delays, but it's also the pending Polish challenge at Article 17. For sure, this is the official reason given by some Member States, including Nordic countries like Sweden for delaying the transposition of the Directive. That is testimony also to the controversy that surrounds the transposition itself and notably one of the most discussed provisions of the Directive, that is Article 17.

What is the main issue with the DSM Directive? First of all, it is an ambitious piece of legislation that was perhaps born with some problems. It is the fact that it is a Directive. It is something that historically has given the false impression to Member States that they enjoy much more freedom than what they actually had. It is a piece of legislation that is ambiguous even within its own body. That is so because there are some parts of it that seek to harmonize a lot, and yes, I can make a reference to the new exceptions that are mandatory, but also the exceptions in Article 17 that are mandatory for Member States to implement. There is a push towards harmonization, for sure. Then there are provisions that really harmonize very little, and that is the case of the contracts of authors and performers.

Then there are provisions that leave the choice to Member States, whether to do or not to do something. That is for instance Article 12 and extended collective licenses. Then of course, in the Directive, there are also measures that seek to react to case law of the Court of Justice, either by codifying it. That is, for sure, the case of Article 14 and the protection available to simple reproductions of public domain artworks. Then there are provisions that seek to erase that case law. That is for sure the provision as it has been dubbed in Article 16 of the directive. What we can see from the transposition measures that have been already adopted

is a patchwork. This is for sure since the message that the long sort digital single market is a long time away, and probably it will be for the Court of Justice to try and indeed achieve this harmonization that was at the basis of the directive itself. There are already some transpositions that I believe clearly send the wrong message, because they are incorrect in light of existing case law of the Court of Justice and what has happened in the past. Here, I'm thinking in particular about those Member States that have thought of providing statutory definitions of concepts that the Directive does not define. One case for all: Article 15, the press publisher's right. There is an exclusion there for very short extracts, but the directive does not define what that is. I think it is clear that that should be a case-by-case assessment. Those Member States that instead have defined in the legislation what a very short extract is I think will have problems going forward. Of a similar nature is what has happened in some Member States in relation to Article 17. The minimum exclusions that have animated significantly the German transposition discussion, also there I see similar problems.

Then another point of contention is what someone referred to as an 'administrivization' of copyright, that is the increasing involvement of administrative authorities that also Marco Giorello pointed out in his talk. For instance, if we look at Italian transposition, the increasing role of the Italian Communication Authority with regard to both Article 15 and Article 17. For Article 15, in particular, this involvement of the Communication Authority transforms what should be a right to decide whether to license or not the use of press content into a right to simply receive remuneration.

Already from some national transpositions, there are for sure some problems going ahead, including referrals to the Court of Justice in-the-making and likely the Court of Justice case law already indicating that what has happened already now is incorrect. Then there are parts of the directive that are objectively ambiguous and have given rise to diverging approaches at the national level. Here I'm thinking, for instance, about the discussion in Article 17 around ex ante and ex post the blocking of content. I think you could argue both ways, the directive is not a clear cut in one sense or another, but for sure, these divergent approaches that we've seen being adopted at the national level require geoblocking on the side of platforms and fail to fulfill the objective of creating a digital single market. A similar point of ambiguity is the exclusion for acts of hyperlinking in Article 15.

Coming to a conclusion, what's next? I think that we're all eagerly awaiting next week's judgment of the Court of Justice in the Polish challenge and another significant point of discussion will be the Digital Services Act. This interestingly enough is presented as legislation that leaves unaffected copyright rules.

It is clear to everyone that the eventual shape of this regulation, not a directive but a regulation, will have a clear impact on the interpretation and application in particular Article 17 of the DSM directive. These of course, raise a big discussion that is going on in Europe right now, and it is the relationship between these different legislations, what is lex specialis and what is instead the lex generalis. I would say that this is a conflict that is also inherent to the DSM Directive itself. Let's think about Article 17. We have already seen discussions

regarding the right of communication that is provided for therein. Is it the same right as found in the rest of the EU framework or is it a different right, a special right? Who is and who is not an online content sharing service provider, so that those who are regulated by Article 17 and those who are not are subject to the pre-existing framework?

To conclude and exhaust the time at my disposal, I think that the life of the DSM directive has just begun. Clearly, it didn't end when it was adopted. The national transposition discourse shows that the level of debate is still very much an intense one. Going forward, the prediction is that the Court of Justice will be called upon to try and realize the overarching objective of establishing a digital single market that right now is certainly lacking. With that, I conclude, and thank you for your attention.

STAN MCCOY: Thank you very much, Eleonora. I'm going to take the opportunity to remind everyone that the Q&A feature is there and we're keeping one eye on that, and we'll be happy to respond to questions that you want to throw in there for anyone on the panel. Seeing none at the moment, I'll take the opportunity to ask you, Eleonora, what does your crystal ball tell you about that Court of Justice ruling next week in the polish challenge? There are several paths to a bad result there. Which path will the Court of Justice follow?

ELEONORA ROSATI: I don't think that the Court of Justice will invalidate Article 17, if even the advocate general despite all is a critical remark came to this conclusion. I don't see this happening. If I had to make a bold bet, I would say that the Court of Justice certainly will not go into the level of detail as the advocate general. It will deliver what I think will be a rather concise judgment, which will give some guidance about the fine-tuning and the details will be a matter for the subsequent referrals that I'm sure will keep flourishing in the years to come.

STAN MCCOY: Excellent. What questions do our other panelists or speakers have for Eleonora? Any at this stage? Eleonora, how worried are you? How much erosion has there been of exclusive rights in this DSM copyright directive? Is it a small erosion at the margins, a little more collective management, a little less like you were saying on press publishers, or is this a fundamental you moving away from core principles?

ELEONORA ROSATI: I'm never worried, that is not in my nature, but I would say that certainly, there are interesting experiments that the DSM Directive has carried out. Even more interesting ones at the national level, I find for instance, the Italian transpositions of Article 15 concerning because of the freedom that the Italian legislature thought of having. It has been prompted by the initial failure of the French press publishers' right, which now seems to go back onthe right direction, because the competition authority has stepped in. The Italian legislator wanted to avoid the problem that for instance happened in Germany with the press publishers right pre-DSM directive.

The instrument chosen I will say is totally questionable, and I'm sure that it will be challenged sooner rather than later. I also find that having these statutory definitions, the minimum exclusions, and these undue transformations of rights but also departures from the EU text is nothing new. It has happened all the time

in EU copyright history. The result has been that the Court of Justice has had to step in and tell many national legislators that what they did was wrong. If we think back about the Infosoc Directive and we look at how it was transposed into national law, we had really a patchwork of laws that prompted the Court of Justice to intervent.

Just to give some examples, the Dutch, the Spanish, the Italians, their private copping exception were held incompatible with EU law. This is likely to happen also with the DSM directive. It is the instrument itself that has been chosen, that is a directive, that lends its side to reopening the entire discussion at the national level when it comes to transposition of measures agreed on the EU level.

STAN MCCOY: Good news for the pocketbooks of all the EU copyright lawyers listening in. We have one who's taking the floor next, that's Ursula Feindor-Schmidt of Lausen Rechtsanwälte in Munich. Over to you, Ursula.

URSULA FEINDOR-SCHMIDT: Thank you for inviting me. I would like to pick up on Eleonora's outline and would like to drill into more detail into the concepts of communication to the public liability and possible safe harbor application resulting from, on the one hand, Article 3 Infosoc specified by the YouTube and uploaded case, and on the other hand, Article 17 DSM and its national implementations. I would like to spend some thought on the relationship of such concepts and its interdependence. As a recap, the central question the court had to decide in the YouTube and uploaded case was whether a video-sharing platform, here: YouTube and a file-sharing platform, here: uploaded.net are communicating the content that was initially uploaded by their users to the public under Article 3 Infosoc themselves.

The Court repeats its well-known language on several complimentary criteria that have to be taken into account and emphasizes again the criteria of the indispensable role and the deliberate nature of its intervention. The criterion of the indispensable role is easily confirmed by the Court. However, the criterion of the deliberate nature of its intervention has always been the problematic one as it is a subjective element that has to be determined by drawing conclusions from objective factors characterizing the situation, allowing an assumption on the subjective element.

Here, the decision establishes four new groups of relevant aspects. First of all, a general knowledge of the operator of illegal sharing and no appropriate technological measures that have been taken. The second is the participation in selecting protected content that is shared illegally. The third is the provision of tools for illegal sharing. Fourth, the promotion of such sharing, for example, by adopting a financial model that encourages users to illegal uploads.

In addition, the Court also holds that it would certainly also be a relevant factor if the main or predominant use of the platform consists of content made available to the public illegally. However, the Court makes clear in its wording that a certain percentage is not a precondition of a deliberate action. The decision, interestingly, also provides guidance for factors which are not decisive for or against a liability under Article 3 Infosoc. Those are terms of use which prohibit copyright infringements. Second, an automatic process where the last decision is

with the user. Third, the creation of rankings and rubics. Fourth, the promotion for profit.

If you look at those factors, it is remarkable that it is basically those factors which define an online content sharing service provider, an OCSSP, according to Article 17 of the DSM, which here does lead to a communication to the public under Article 17 and to a liability in case certain obligations are not met. A communication to the public under Article 17 is defined for services that have their main purpose in storage and making available to the public a large amount of copyright protected content uploaded by third parties, which organize such content and which advertise such content for profit.

This means the new law, in theory, facilitates the determination of a communication to the public as a subjective element is not required here. On the other hand, it provides a possibility to escape liability and basically creates a new safe harbor for platforms which follow a specific set of obligations which go hand in hand with obligations by rights holders.

Now, how do those concepts fit into the overall liability system? I've tried to categorize the concepts that result from the YouTube decision and from Article 17. First of all, we have (on the “good” side) the well-known intermediary service providers, which are merely technical, automatic and passive in nature. Here in this case, we don't have a communication to the public according to Article 3. We therefore don't have a liability, and the safe harbor provisions, according to 14 e-Commerce directive applies.

On the “bad” side of the platforms, we have piracy platforms where, in case they fulfill the criteria of an OCSSP, we have a communication to the public already according to Article 17, but also now according to the YouTube decision under Article 3 Infosoc. We have a clear liability and no safe harbor that is applicable. In the middle, we have those OCSSP platforms. There, we have a communication to the public that is set by Article 17, and the liability is dependent on the fact whether the obligations are met or not. Only if the obligations are met, the safe harbor, which is now provided under Article 17, applies.

For platforms which do fulfill OCSSP criteria, we have an exemption for platforms like Wikipedia, like online marketplaces, which excludes the application of Article 17 to those platforms, although they fulfill the criteria. With those platforms, we have to ask ourselves and review the fact whether they still do have a communication to the public under Article 3. This determines the liability and also whether safe harbor under Article 14 E-Commerce or DSA applies.

Then on the other side, we have platforms which do not fulfill the OCSSP criteria but where we can prove a deliberate action. In this occasion, we do not have a communication to the public determined by Article 17, but by Article 3 Infosoc we have a clear liability. In those cases, as the European Court of Justice said in the YouTube decision, we neither have a safe harbor application of Article 14 E-Commerce nor under the Article 17 DSM.

What about services that fulfill one or more of the factors, which lead to a liability under Article 3 Infosoc and at the same time fall under the definition of an OCSSP? Would those also be able to escape liability by fulfilling the

obligations under Article 17 even if they induce users to upload protected content to make it available in an infringing way? Here, the wording in the recitals of the DSM, as well as the reasons for the German implementation, suggests that the new law might at least not be conclusive. It speaks about lex specialis but only in some respect. There might be room for liability according to Article 3 Infosoc.

I think this is really interesting for right holders, because as a matter of fact, why should the liability of platforms which fulfill the criteria set out by the European Court of Justice in YouTube and uploaded and which even organize and promote the content for profit and benefit from it, why should they benefit from the Article 17 liability exception?

However, as a practical matter and for lawyers, I think the right holders, as well as the platforms, might not be clear in which category the platform in question is falling as functionalities are changed easily with such platforms and could be turned on and turned off. The categories might also change over time. This might make it necessary to find a new approach when addressing and enforcing infringement zone platforms.

In case the OCSSP criteria are fulfilled, rights holders as well as platforms will both have to work towards each other at least as a parallel approach as otherwise a court might find that the platform falls under the Article 17 exception unless a further deliberate nature of communication to the public can be proven.

STAN MCCOY: Can we just ask you to wrap up in the next few seconds?

URSULA FEINDOR-SCHMIDT: Yes. That's it already. Thank you.

STAN MCCOY: Excellent. That's a great taxonomy to help us understand the different categories. I think with that, since I know we have Lauri from IFPI chomping at the bit to give his perspective on very similar questions related to liability, why don't I just ask Ursula to unshare her screen? And we'll pass the floor to you, Lauri.

LAURI RECHARDT: Thanks, Stan. I'll say a few words about the DSA. I'll start at the very general level. The point is that it sounded super promising. As Eleanor said, it's a regulation. Directly applicable law in the EU. No wiggle room at national level, no national implementation is needed, at least not in theory. Second, it promised to rewrite and update the same harbor rules and also add new obligations.

I quote, "Due diligence, obligations for a transparent and safe online environment." Further, because the DSA will set the rules for the world's largest single market, it will have directly or indirectly an effect on the operations of online intermediaries, including those established outside the EU but that will service consumers in the EU.

I said, sounded good in terms of increasing legal certainty, updating the conditions for safe harbors and increasing transparency and accountability in a general way. What we are seeing now is at least from the perspective of copyright holders, is that the DSA that we are now on the table fails to meet, if you will, the noble goals set out in the proposal.

Now what is true obviously as always much will depend on the practical application of the regulation, but you look at the text and it's difficult to see how that could improve the situation of copyright holders. If there are any

improvements, they will be marginal at best. The interesting points I'm making here is that if you look at the reasons why it fails, again, from the copyright or perspective, the meaningfully update the EU intermediary liability rules, are first of all, the horizontal nature of the instrument. Second, what seems to be a very conscious policy choice for the EU legislators.

Now first on the horizontal nature of the instrument. It is true that I think at the outside it makes it very difficult to find a balance. That's fair for the different scenarios covered by the DSA between if you will, the different fundamental rights at play, the user's rights, freedom, expression, access to information.

Then if you hold the third parties whose rights are being infringed, in private rights as well as rights in intellectual property and obviously the third party being the platforms, the intermediaries and their rights to conduct business. Why I say that? To put it very simply, you have a horizontal instrument like the DSA, and the starting point is that all information, all infringements can be dealt the same.

In reality, obviously that is not the case. It's notorious that it will be very difficult in many cases to determine whether, say, a post is defamatory, or amounts to hate speech, but that's not the case in the vast majority of copyright infringement, which are clear-cut. Interesting enough by the way, I think you've all seen the YouTube's recent transparency report according to which 0.5% of the 722 million copyright actions taken on the basis of the content ID were contested.

At least, the IFTI experiences that even of those contested, if you will, content that has been with respect to which countenances have been sent, the countenances are actually in the end well-founded. Furthermore, you look at the different scenarios and the volume of infringements very significantly, between the different categories of rights and interesting law.

While some type of infringements are typically one-off, IFTI alone is sending no desist with respect to corporate infringement of sound recording rights in the millions. Considering all the reference, all these relevant differences, it's very clear that it will be difficult for a one size fits all horizontal approach to produce a fair and effective outcomes in all the instances covered, which means that policy choices are required

I think from the copyright owner's perspective, unfortunately you could say that the DSA has optimized the liability framework to protect the users' rights in cases where the illegality of the activity may be difficult to determine or at least not readily established. In brackets, by the way, this also then will actually, if you will promote the platform's interest, because content will subsequently, it will be more likely to stay up than taken down.

As a result, the DSA from our point of view fails to adapt and update the EU intermediary liability rules as to effectively protect the rights of right owners. You could say that in some respects, the copyright holders have become the collateral damage of the EU legislature's chosen policy. That's where we are now. Now if I may spend a couple of minutes more just to say what do we believe should have been in a reasonable, if you will, adaptation and update of the EU [crosstalk].

STAN MCCOY: You've predicted my question precisely, Lauri.

LAURI RECHARDT: Thank you. Thank you. First, I would argue as a minimum, there should be a clear express recognition that hosting search providers must provide a notice stay down in appropriate cases and that is needed to address the whack-a-mole situation that the right owners are currently in.

Second, there should be clear guidelines for workable processes for swift handling and notices at scale. Third, obligation on all intermediaries and not only on marketplaces, to put in place robust, know your business customer checks, as well as written infringement policies. I would say that the absence of express recognition of a stay down obligation is particularly unfortunate, considering that the technologies that would allow that are already widely used and commercially available.

Also, if you look at the UK's law, in particular L'Oréal, actually it already establishes that near removal of infringing content is not enough. They should also take action to prevent future infringements. Now, interesting enough in the DSA in Articles 34 and 35, there is a reference that the member states that supports industry standards and codes of conduct, which in time arguably could be used as a hook to develop good practices, which would lead to stay down.

Having said that, that does not clearly address the immediate need for more effective processes. For the KYBC, I think it's a simple point, it can't be right that the infringers are allowed to operate under the clock of anonymity, and more importantly that platforms are not required to verify the true identities of their customers.

That's to say, to be fair, do good things first of all some of the wackiest ideas seem to have been dropped in the trial, including the idea of show-horning search engines into the caching service provider safe harbor. Second, in Article 19 of the DSA, there is the obligation of platforms to put in place trusted flagger schemes, which could be developed if meaningfully implemented into something that could help the current situation.

Bizarrely though, small platforms, regardless of how much infringing content they carry are excluded from this application. To finish, will the DSA spell the disaster, a disaster for the right owners? No. I don't think so. Is it the last opportunity to update meaningfully the intermediate liability framework in the EU. Yes. Unfortunately, that seems to be the case.

STAN MCCOY: Lauri, I call those small business exclusions, the taco truck exception to IP rides. Just like, if you had a law on physical property that said it's okay for a taco truck to park itself on your front lawn, because it's a small business. We need to do a special favor for them and you weren't using your lawn that day anyway. I want to get Martin Schaefer and Jerker Ryden into the conversation here, Martin from Boehmert and Boehmert. Maybe we can turn to you first and ask for your perspective on the liability discussion that both Ursula and Lauri have teed up for us so nicely now.

MARTIN SCHAEFER: Yes. Thank you. Thank you very much, Stan. Well, the topic is so broad that I really need to focus and I would like to pick up one issue that Lauri mentioned. That is one that has always been underestimated, I suppose, in the current discussion, both in the DSA and in the Article 17

implementation process. That is the anonymity of the uploading user at the German model.

I really have to say, that's my personal perspective, that made, how shall I say, an improper-- put an improper influence on the implementation process in Europe because I cannot believe it's a coincidence that the recommendation of the commission where it launched 7 days before the expiry of the implementation deadline and just the day after the German parliament had passed their implementation law. It was like a coverup operation for the German to do things that I do not think are in line with the requirements of the directive, but never mind.

One of the things in the German implementation is that there are numerous means to safeguard the proper use of the instruments provided there to balance the interest of the various stakeholders, the interest of the uploading user against those of the right holders. The problem is that rights holders are subject to severe penalties if they misuse. At first glance it seems to be balanced because the uploading users as well, but the nice thing about an uploading user who is staying in anonymity is that after three or so attempts to upload content that is not supposed to be online, the sanctions go without any effect because this user will simply reregister in anonymity and start all over again, and he can go on doing that all the time.

If we don't get to a point where we accept that at some point in the process of whatever a procedure we apply there must be a mean to identify the person who is really acting. The whole thing will always stay unbalanced. I think this is a very important point as we are dealing with an atomized situation where hundreds of thousands of users are uploading on the platforms we are talking about, and if we don't get hold of what they're doing by making them personally liable at some point-- I understand the idea of anonymity. I've fully agreed that must be protected to a certain degree, but we also need protection against those who misuse that for massive illegal activities. [silence] Thank you.

STAN MCCOY: Great. Thank you, Martin. I don’t want to get you focused too much at this point, Jerker, on the collective rights management and ECL components of the recent legislation, but I know that's something that you're particularly interested in. Can you give us your reflections on that, particularly as it relates to some of the broader phenomena that Eleonora was talking about in her opening?

JERKER RYDÉN: I'm happy to do so. Thank you, Stan. I gave you my main points, but listening to my dear colleagues' wisdom, I think I should adjust my main points. I think it boils down to something that the EU cannot be harmonized, and that's the challenge, and that's caused by attitude and culture. As Nora outlined, there's much emphasis on collective licensing solutions. The missing piece is flexible attitude and an appropriate approach to collective licensing. You have a north-south dilemma because there's a different attitude to collective solutions, more of the individualized approach, southbound, and collective solutions more developed northbound.

Article 17, but also other articles in the Directive like out of commerce works, depends on well functioning collective management organizations, but

what if they can't provide a collective solution due to lack of mandate or simply not willing to licence? Article 9 provide a fallback exception but that is the only one in the Directive. I think that Article 17 ultimately cannot function without a collective licence, because the service providers need one to be able to show best efforts. What's best effort? That's in the eye of the beholder. There's no mechanism prescribed by The EU Commission in respective article, with the exception for out of commerce works. I suppose it's for each member states to provide a solution, be it the stakeholders, CMOs, or perhaps the national legislator.

In Article 12 you have, I think, the missing piece although the EU Commission have addressed the problem indirectly by introducing extended collective licensing in Article 12 with no reference to this article in e.g., Article 15. Extended collective licensing will be elaborated on in a study commissioned by the copyright unit under Article 12.6, i.e., collective licensing in the digital realm. Still, it is not mandatory for member states to transposition Article 12. The Directive does not elaborate on how extended collective licensing should be introduce in member states to achieve the objectives of the Directive. To put is simple - the solution is not harmonized. Platforms should renumerate the right holders, but where are the means, the mechanism? If that's left to member states, the means are not harmonized, there's something missing and you end up with a not so harmonized internal market.

I think that's the main problem that still has to be solved. So how should the EU Commission follow up the Directive? Should it be a top-down approach by an additional directive or a regulation or should it be soft law? You have an example of soft law transpositioned in the Directive, i.e. Article 8 to 11, which started with the MOU on out of commerce books and learned journals and a recommendation issued by the EU Commission 2011. Some member states transpositioned the soft law and it went well, but in France, it went not so well, a court case and ultimately it had to be regulated in the Directive. So what about Article 15 and 17? Will member states introduce extended collective licensing? But even if they do, they cannot themselves harmonize the Internal Market. And then there is Article 4. What if stakeholders opt out Article 4. No text data mining, or will member states find a solution in the form of extended collective licensing? I think here you have a challenge which has not been addressed at all.

STAN MCCOY: It's interesting because Eleonora was also talking about this challenge of not so harmonized harmonization. I wonder if you have a perspective on this that you'd like to add into the discussion, Eleonora.

ELEONORA ROSATI: That I think is something that shows the heterogenous content of the directive itself, that indeed one might wonder whether there was even a single vision for this digital single market because the provisions are very different from each other. The degree of harmonization is indeed different across the text of the directive. This is testimony to the fact that indeed it was it difficult to harmonize anything in the directive.

If we look and we compare the original Commission's proposal with the final text, it is evident that all these discussions that took place found their way in the directive. It is already something that the directive was adopted in the end. We

have the text that we have to work with. It is a pity from my perspective that now member states are trying to disrupt the level of harmonization that with so much difficulty was agreed on the EU level.

STAN MCCOY: Thanks. Jerker, back to you. You're on mute.

JERKER RYDÉN: My comment is actually regarding Article 4. The US Copyright Association, the US Patent and Trademark Office and the US Copyright Office organized a webinar on artificial intelligence. It was articulated, I believe, by many panelists, that there's a need for a mechanism to mitigate possible negative impact of AI created works on the marketplace. In the EU, I don't believe we have had that discussion, how to mitigate negative impact of AI, probably because we have these two exceptions.

Article 3 is very straightforward. It is well defined, I think, narrowed down to scientific research and no opt out. Article 4 is AI for any and all, Pandora's box if you will, "And then what?" Yes, and then what? It will probably result in mass opt outs, and then what? AI for none? That's a big issue. I would be interested to see, since it's very much technology driven, if EU and the United States could find some common ground? I posed that question to the US and EU policy makers in the morning session and they said, "Well, we do coordinate." That's my big question, how is this going to end?

STAN MCCOY: [chuckles] Lauri, you wanted to get into the discussion.

LAURI RECHARDT: Actually, I thought I would just jump in something you said, and relates also to something to Eleonora and Ursula had said regarding Article 17. Just to remind ourselves that even with 17 or AI obligation to use past efforts to obtain licenses, Article 17 is not about being paid, it grants an exclusive right which grants the right owner the authority to license or not. That's very clear. It's not about how to manage the right to remuneration, [chuckles] it is about exclusive rights.

That relates to something, Eleonora, that you raised about the nature of Article 17 whether it creates a new right. I thought that that question has been settled, it doesn't. It's Article 3, copyright directive, that's the right that's involved and that also then comes back, Ursula, to your point four. I think it settles the question that you posed there which is if a platform qualifies as an OCSSP and it follows that it falls under, it's not a specific right but it is a generous liability, if you will, regime and that's what covers the liability of an OCSSP five-year platform that meets requirements in Article 6.

STAN MCCOY: Let me put the same question to you that I put to Eleonora, then. Are you fundamentally worried about the erosion of exclusive rights through things like the way that some member states are interpreting Article 17?

LAURI RECHARDT: Oh, absolutely. I mean, look, again-- and I apologize, but coming from an admittedly very narrow perspective of the recording industry, we are an industry that has been growing now seven years straight and that transformation is based on the individual licensing of exclusive rights. That's the way forward, not the erosion of the exclusive rights and creating remuneration rights that can't be licensed on market terms.

STAN MCCOY: Thanks. Let's have quick comments from Ursula and then Martin.

URSULA FEINDOR-SCHMIDT: Well, my worries would be that the whole system is getting so complex and that the European Court of Justice is going to have to decide so many questions, and we all know how long it takes to get through to the European Court of Justice. It's not going to be fast, in any case. It's really hard for the right holders to get to their rights in time, in a relevant time where they can make use of the rights granted.

STAN MCCOY: Good point. Martin, over to you.

MARTIN SCHAEFER: Yes, thank you. Well, again, with my German perspective, I can only underline that this danger of transforming a licensable right into a mere guaranteed remuneration is imminent. The German implementation is a model of how it can go wrong in this respect. Because it is driven by the idea of granting remuneration to the creative community and where the limitations of the binding requirements of the directive were obeyed and it is still steered into a direction where it makes collective administration, how shall I say? Very tempting because the obstacles for exercising the right individually are pretty high.

I fear that this is a process that is now there to stay and I do doubt that this is in the best interest of all including the creators. One always has to see that we are acting here in a field primarily where investing in copyright protected matter is an investment in something that isn't risky. If you take a risk and if you are not able to negotiate freely, this will effectively oblige you to pay even for the non-successful product. It will thus limit your ability to invest in things of which you are unable to say whether they will become successful. I think this is something that is grossly misunderstood and underestimated in the current legislative process and that's one of the big, big dangers that jeopardizes the functioning markets.

STAN MCCOY: I saw you had your hand up for a moment, Eleonora, so I'm going to take that as an invitation to go to you and ask you if you think that Martin's concern is well founded.

ELEONORA ROSATI: Certainly, I just lowered it because I was conscious of the time. I apologize for that.

STAN MCCOY: Well, considering that we started about 12 minutes after our appointed time, I think we're entitled to go to 45 after. Our panel minder will tell me if I'm out of bounds by doing that. Go ahead, Eleonora.

[crosstalk]

ELEONORA ROSATI: No, certainly, no. I share the concerns that Martin has just expressed and I would like also to follow up on Ursula's point, regarding the time that it takes to get clarity on these controversial points, to get the case decided by the court of justice and I would just like to recall that the referral system is not an obligation for lower courts, it is just an obligation for courts of last resort. It might be indeed years before a referral is actually made. To this effect, I would just like in one quick comment make a reference to something that has nothing to do with the internet, with the DSM directive, and it is a copyright protection of designs.

There has been case law of the Court of Justice setting forward a uniform approach and still we have conferences of national judges in which speakers proudly say, "We don't agree with what the Court of Justice has told us we should do, we keep following all the national approaches." When this is the attitude, it's not just a commercial problem, it is also a legal problem that is likely due to last for years without a satisfactory resolution for any of the stakeholders involved.

STAN MCCOY: Thank you, Eleonora. We had a question in the Q&A from Tim about KYBC. I think we can suffice to say that there's been a relative lack of ambition on that point that I think underlay some of the comments from both Lauri and Martin on the ability to identify infringers. All these questions about AI are going to be the subject of the next panel. It's a good opportunity for us to wrap up with an infomercial for the next panel on AI issues where you can delve in with some of the best experts on all of that.

I see that we are now at 45 minutes after the hour, so we've probably pushed it about as far as we reasonably can. I'm glad we've had a lively discussion and everybody's gotten to come in and play their part. Lauri and Jerker, and me, for that matter, might have to agree to disagree to some extent about where the line is between collective rights management and exclusive rights. I'm sure that's a conversation that we can continue in future years of the Fordham EU Copyright Developments panel discussion.

It falls to me just to thank all of you, panelists and speakers for your brilliant contributions today and for a fun and lively discussion that I hope has helped everyone involved to understand a little more deeply what's happened and what's happening in EU copyright. Thank you very much.

ELEONORA ROSATI: Thank you.