

**FEMR/FORENINGEN FOR ENTERTAINMENT- & MEDIERET
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**EU 2019 Copyright Reform:
Implementation Status, Trends and Perspectives
PART I**

Introduction / Agenda

EU legislative process started in 2016, preceded by public consultations, impact assessment, etc.

“Digital technologies have radically changed the way creative content is produced, distributed and accessed. Copyright ensures that authors, composers, artists, film makers and other creators receive recognition, payment and protection for their works. It rewards creativity and stimulates investment in the creative sector. Thirty-three sectors of the EU economy are considered [copyright intensive](#), accounting directly for over 7 million jobs, or 3% of employment in the EU.” (European Commission)

“EU actions have led to more harmonised protection of rightholders, lower transaction costs and greater choice for users of content, [. . .].” (European Commission)

The result arrived at in 2019:

[Directive 2019/789 TV & Radio Programmes Directive \(SatCabII\)](#)

[Directive 2019/790 Copyright in the Digital Single Market Directive](#)

My task today:

1. Overall status of implementation of the two Directives
2. National implementation choices as regards **value gap, educational use exception and ECL enabling provision**

Status Implementation TV & Radio Programmes Directive

[Directive 2019/789 TV & Radio Programmes Directive](#) – implementation deadline 7 June 2021. 6 Member States have completed implementation (DK, France, Germany, Hungary, Malta, and The Netherlands).

Main features:

- Application of country-of-origin principle to certain programmes included in certain ancillary online services.
- Mandatory collective exercise of cross-border retransmission rights beyond cable retransmission (satellite, IPTV, mobile, or internet retransmission) in a ‘managed environment’+ optional application to national retransmission (Art. 7).
- Clearance rules for ‘direct injection’ broadcasting, leaving a certain transposition discretion to Member States.

Trends/choices in implementation:

- Verbatim transposition (more or less) as regards country-of-origin principle and retransmission – direct injection provision implemented more varied as a function of local legal traditions, existing national rules and case law . . .

Status Implementation Copyright in the DSM Directive

[Directive 2019/790 Copyright in the DSM Directive](#) – implementation deadline 7 June 2021. 6 Member States reported to have fully or partially completed implementation (DK, France, Germany, Hungary, Malta, and The Netherlands).

Main/select features:

- New/mandatory copyright exceptions with cross-border reach
- Provisions on use/licensing of out-of-commerce works
- Enabling provision for national extended collective licensing schemes
- Press publishers' rights
- Value gap provision
- Provisions on authors' and performers' remuneration in exploitation contracts

... and a number of other elements ...

Status Implementation Art. 17 Value Gap

Main features:

- Art. 17 + Recitals 61–71:
 - Online Content Sharing Service Providers (OCSSPs) perform an act of communication to the public (CTTP) and are not eligible for the general EU hosting liability privilege (Art. 14 of the E-Commerce Directive).
 - Consequently, OSCCPs must either get authorisation from relevant right holders, or depending on their “age, wealth and popularity”, demonstrate **best efforts** to filter, takedown and/or ensure staydown of pre-notified unauthorised content.
 - The “cooperation” between right holders and OCSSPs must not result in the ‘prevention of availability’ of non-infringing content, including content covered by exceptions.
 - Users must be able to rely on quotation and caricature exceptions.
 - Complaint/redress mechanism in case of ‘disabling access to or removal’ of content.

Trends/choices in implementation:

- Mostly verbatim transposition (DK, France, Hungary, Malta, Netherlands).
- More elaborate/‘innovative’ (Germany: what can be blocked/removed when?; introduction of ‘new’ concepts of de minimis exception and “presumably legal” content).

Other Relevant Developments Art. 17 Value Gap

Commission Guidance

- Art. 17(10) requires the Commission to issue guidance on the application of Art. 17.
- Confirmation key principles (lex specialis, freedom to license or not (Recital 61)).
- Legitimate uses should be considered at the moment of upload (blocking of ‘manifestly infringing’ content only), pre-flagging of time-sensitive content, content stay-down during redress mechanism.

YouTube/Cyando Cases (C-682/18 and C-683/18)

- ‘communication to the public’ does not take place unless the platform contributes, beyond merely making its platform/services available, to giving access to protected content.
- an operator of a platform/service is not eligible for the liability exemption if it plays an active role of such a kind as to give it knowledge of or control over the content uploaded to its platform/service. This is the case when the platform communicates the content in question to the public.
- ‘specific knowledge’ concept.

AG Øe’s opinion in Poland v. EU Parliament and EU Council (C-401/19)

- Art. 17 is compatible with freedom of expression and information.
- Blocking and filtering should be limited to ‘identical or equivalent’ matches only.
- Postscript questions compatibility of Commission Guidance with AG opinion as regards the possibility for right holders to ‘ earmark’ content the unauthorized uploading of which ‘could cause significant economic harm to them’.

Exception for use of copyright materials in an educational context (Art. 5)

Main features:

- Exception for use of copyright works in educational context (reproduction and making available) + digital use and distance learning, including cross-border (legal fiction/country-of-origin principle).
- Compensation at MS discretion.
- Carve-out for educational materials.
- ‘Suitable licenses’ can disapply the exception under certain conditions (Art. 5.2).

Trends/choices in implementation:

- Mostly verbatim transposition.
- Some MS have made use of licensing override option in Art. 5.2, other not as a function of national traditions/practices.
- Compensation as a function of national traditions/practices.

Extended Collective Licensing Enabling Provision (Art. 12)

Main features:

- *"as far as the use on their national territory is concerned" - "subject to ... safeguards" and provided it "is only applied within well-defined areas of use, where obtaining authorisations from rightholders on an individual basis is typically onerous and impractical to a degree that makes the required licensing transaction unlikely, due to the nature of the use or of the types of works or other subject matter concerned and that such licensing mechanism safeguards the legitimate interests of rightholders".*
- MS reporting requirements to the European Commission (Art. 12.5).
- Upcoming Commission report on the use of ECLs in the EU accompanied "if appropriate, by a legislative proposal, including as regards the cross-border effect of such national schemes".

Trends/choices in implementation:

- Mostly verbatim transposition, in some cases specifically stressing opt-out (referencing cases where individual licensing is preferred by right holder(s)) and referencing publicity measures.

Conclusions and Future Perspectives

- National implementation process continues following national legislative traditions and adapting also to existing national rules and jurisprudence.
- Procedures against Member States have been launched by the European Commission: [21 MS on TV & Radio Programmes Directive](#) and [23 MS on Copyright Directive](#).
- Both Directives have built-in review process for 2025/2026.
- Developments around Art. 17 indicate further ‘divergence of views’ at both national and EU level . . . and more litigation can be expected.
- The EU liability conversation continues in the proposed [EU Digital Services Act](#).
- The European Commission continues work relevant to the [Collective Rights Management Directive](#) (built-in review) and mapping of extended collective licensing regimes at national level before transposition of the Copyright in the DSM Directive (Art. 12).

Thank you!



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Questions / Comments / Suggestions Welcome 😊

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