How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms

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Abstract

How can the EU Member States license Article 17 of the new Directive on copyright and related rights in the Digital Single Market? This is the central question that this presentation addresses. To answer it, we first analyse the nature of the right included in Article 17. We argue that the nature of the right has a number of serious consequences for its licensing.

First, it determines whether the right is mandated by public international law, and hence what licensing modalities are allowed under the 1994 WTO TRIPS Agreement and 1996 WIPO treaties. Second, it clarifies what other conditions European Union law itself imposes on the newly established right and its implementation into national law. These restraints shape the margin of discretion of EU Member States. Third, it may imply changes to existing licensing practices, including the need for collective rights management organisations to obtain new mandates. Fourth, it influences how Member States can incorporate users' rights into the legal framework. We argue that Article 17 is a special or sui generis right.

We identify how this right fits the existing international and EU law, and explain why the Member States have a broad margin of discretion when implementing the corresponding licensing regimes. Perhaps most importantly, and counter-intuitively, we show that the legal arguments against Article 17 licensing via modalities of statutory licensing and mandatory collective management schemes are weaker than one might initially think.