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Impact of the Directive on Copyright in the Digital Single Market on Libraries and Repositories

Czech Scientific Foundation– Project GA17-22474S

**Adapting Exceptions and Limitations to Copyright, Neighbouring Rights and Sui Generis Database Rights to Digital
Network Environment**

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M A S A R Y K O V A
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Directive on copyright in the digital single market

DSM directive

- 14. 9. 2016 – introduced
- 26. 3. 2019 – passed EP
- 17. 4. 2019 – signed by the chairman EP and Council
- 17. 5. 2019 – published in OJ
- 7. 6. 2021 – transposition term
- Longest EU copyright act

DSMD Overview

- Title I GENERAL PROVISIONS
- Title II MEASURES TO ADAPT EXCEPTIONS AND LIMITATIONS TO THE DIGITAL AND CROSS-BORDER ENVIRONMENT
- Title III MEASURES TO IMPROVE LICENSING PRACTICES AND ENSURE WIDER ACCESS TO CONTENT
- Title IV MEASURES TO ACHIEVE A WELL-FUNCTIONING MARKETPLACE FOR COPYRIGHT
-

Application of DSMD on GL repositories

- Definition? Is it applicable? What is a GL repository?
- Art. 2 para. 3 DSMD: „*cultural heritage institution*“ means a *publicly accessible library or museum, an archive or a film or audio heritage institution;*

Application of DSMD on GL repositories

- Definition? Is it applicable? What is a GL repository?
- Art. 2 para. 1 DSMD: (1) | ‘research organisation’ means a university, including its libraries, a research institute or any other entity, the primary goal of which is to conduct scientific research or to carry out educational activities involving also the conduct of scientific research:
 - (a) on a not-for-profit basis or by reinvesting all the profits in its scientific research; or
 - (b) pursuant to a public interest mission recognised by a Member State; | in such a way that the access to the results generated by such scientific research cannot be enjoyed on a preferential basis by an undertaking that exercises a decisive influence upon such organisation;

Art. 14 – Works of visual art in the public domain

Art. 14 – Works of visual art in the public domain

– „Member States shall provide that, when the term of protection of a **work of visual art** has expired, any material resulting from an act of reproduction of that work is not subject to copyright or related rights, unless the material resulting from that act of reproduction is original in the sense that it is the author's own intellectual creation.“

Recital 53 – Works of visual art in the public domain

- *„The expiry of the term of protection of a work entails the entry of that work into the public domain and the expiry of the rights that Union copyright law provides in relation to that work. In the field of visual arts, the circulation of faithful reproductions of works in the public domain contributes to the access to and promotion of culture, and the access to cultural heritage. In the digital environment, the protection of such reproductions through copyright or related **rights is inconsistent with the expiry of the copyright protection of works.** [...] All of that should not prevent cultural heritage institutions from selling reproductions, such as postcards.“*

Art. 14 - commentary

- Effort to avoid reappropriation
- Problem of the „photography“ – „truthful“ = non-original
 - Protection of original photographs – Art. 6 Term Directive (Sec. 2 para. 2 CCA) + (*Infopaq*)
 - „author's own intellectual creation“, „free and creative choices“, „personal touch“
- Misleading communication regarding
 - *„For instance, anybody will be able to copy, use and share online photos of paintings, sculptures and works of art in the public domain when they find them in the internet and reuse them, including for commercial purposes or to upload them in Wikipedia.“*
 - Questions and Answers – European Parliament's vote in favour of modernised rules fit for digital age; 26. 3. 2019; https://europa.eu/rapid/press-release_MEMO-19-1849_en.htm

Art. 15 – Protection of press publications concerning online uses

Art. 15 para. 1 DSMD – Protection of press publications concerning online uses

- *publishers of press publications [...] for the online use of their press publications by information society service providers.*
- *The protection granted shall not apply to:*
 - *acts of hyperlinking*
 - *in respect of the use of individual words or very short extracts of a press publication*
- 2 years

Art. 2 para. 4 DSMD – press publication

- **‘press publication’** means a collection composed mainly of literary works of a journalistic nature, but which can also include other works or other subject matter, and which:
 - (a) constitutes an individual item within a periodical or regularly updated publication under a single title, such as a newspaper or a general or special interest magazine;
 - (b) has the purpose of providing the general public with information related to news or other topics; and
 - (c) is published in any media under the initiative, editorial responsibility and control of a service provider.
- Periodicals that are published for scientific or academic purposes, such as scientific journals, are not press publications for the purposes of this Directive;

Commentary

- Protection against „news aggregators“
- GL is not a press publication
- GL generally does not have to be concerned

Art. 17 – Use of protected content by online content-sharing service providers

Current regulation of platform liability

- 2000/31/EC – e-commerce directive
 - ISP is not liable if: does not know (actual knowledge) or should have known (constructive knowledge) and acts expeditiously to remove the infringing content
 - In CZ– act no. 408/2004 Sb. – inversed logic of regulation
- GL repository
 - Using the GL itself?
 - Is it an ISP? (Contract with the GL producer)

Art. 17 para. 1 DSMD

- *„online content-sharing service provider performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users.“*
- Licensing X Filtration approach

Art. 2 para. 6 DSMD

— „‘online content-sharing service provider’ means a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes.“

Art. 2 para. 6 DSMD

– „Providers of services, such as not-for-profit online encyclopedias, **not-for-profit educational and scientific repositories**, open source software-developing and-sharing platforms, providers of electronic communications services as defined in Directive (EU) 2018/1972, online marketplaces, business-to-business cloud services and cloud services that allow users to upload content for their own use, are not ‘online content-sharing service providers’ within the meaning of this Directive.“

Rec. 62 use of protected content by online services

- „Certain information society services, as part of their normal use, are designed to give access to the public to copyright-protected content or other subject matter **uploaded by their users**. The definition of an online content-sharing service provider laid down in this Directive should target only online services that play an important role on the online content market by **competing with other online content services, such as online audio and video streaming services, for the same audiences**.

Rec. 62 use of protected content by online services

– „...such services should not include services that have **a main purpose other** than that of enabling users to upload and share a large amount of copyright-protected content with the purpose of obtaining profit from that activity.

Rec. 62 use of protected content by online services

– „... *Providers of services such as open source software development and sharing platforms, **not-for-profit scientific or educational repositories as well as not-for-profit online encyclopedias** should also be excluded from the definition of online content-sharing service provider.“*

Commentary

- Controversial
- Inversion základních principů odpovědnosti a autorského práva
- Collision with fundamental rights
- GL – generally not applicable
 - GL repository – exception

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Conclusion

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- Directive on Copyright in the Digital Single Market
 - Rather exceptions and publications
- Art. 14 – Works of visual art in the public domain – OK
- Art. 15 – Protection of press publications concerning online uses – OK
- Art. 17 – Use of protected content by online content-sharing service providers – OK

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Thank you for your attention!

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