

# Newly Seen & Evergreen

## An Update on European Copyright Law

February 8, 2023



# Directive (EU) 2019/790 – "DSM Directive"

## Key content

- Adds copyright **exceptions** (out of commerce works in museums, text and data mining, reproduction of public domain visual arts);
- Adds transparency, disclosure, reporting and remuneration obligations to **benefit authors**;
- Updates **liability** regime for **UGC** platforms (Art. 17) – "communication to the public" / "making available"

# Communication / Making available to the public

**Before the DSM Directive (and still in the UK):** CJEU C-682/18 & C-683/18, 22 June 2021 (Google / Cyando)

"The operator of a video-sharing platform or a file-hosting and -sharing platform, on which users can illegally make protected content available to the public, does not make a 'communication to the public' of that content, within the meaning of that provision, unless it contributes, beyond merely making that platform available, to giving access to such content to the public in breach of copyright."

**Encrypted Fragments in P2P Networks:** C-597/19, 17 June 2021 (Telenet)

"The uploading, from the terminal equipment of a user of a peer-to-peer network to such equipment of other users of that network, of pieces, previously downloaded by that user, of a media file containing a protected work, even though those pieces are usable in themselves only as from a certain download rate, constitutes making available to the public within the meaning of that provision."

## Art. 17 / UGC Liability

### Online content-sharing service providers

- are considered to perform an act of communication when they **provide access** to copyright-protected works or other protected subject matter;
- are required to use best efforts to obtain licenses for copyrighted material shared by their users (these extend to users for non-commercial use);
- are liable for copyright infringements committed by their users **unless** they can demonstrate that they
  - made **best efforts** to **obtain** a license,
  - made **best efforts** to ensure the **unavailability** of the protected work, and
  - **acted expeditiously** to remove infringing material when notified.

# Exceptions

- No "Fair Use", instead many specific and narrowly tailored exceptions
- Art. 17 system takes exceptions into account
- National implementation in Germany even lets users flag content accordingly (plus *de minimis* use deemed legal unless proven otherwise)

## Exceptions (best of)

- **Citation**
- **Parody**
- **Freedom of Panorama**
- **Private Copy**

# Freedom of Panorama

## Directive 2001/29, Art. 5 (3) (h)

Member States **may** provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases: [...] use of works, such as works of architecture or sculpture, made to be located permanently in public places;

## Germany, s. 59 Copyright Act

It is **permitted** to reproduce, distribute and publicly reproduce works that are permanently located on public ways, streets or squares by means of painting or graphics, by photograph or by film.

## France, art. 122-5 (11) Intellectual Property Code

[T]he author may not prohibit reproductions and representations of **architectural works and sculptures** permanently placed on the public highway, made by natural persons, **excluding any commercial use.**

# Private Copy

## Cloud Service as Private Copy

CJEU C-433/20 - 24 Mar. 2022 (Austro Mechana) confirms that private copy exception applies to cloud server

## "Online VCR"

German case law confirms "online VCR" services are possible, as long as each user triggers their own copying and a separate copy is stored for each user.



# Exhaustion: UsedSoft and Video Games

**UsedSoft** (3 Jul. 2012, C-128/11) - the doctrine of exhaustion of distribution rights in European copyright law allowed the second-hand resale of copies of software programs.

**Nintendo** (3 Jan. 2014, C-355/12) "videogames, such as those at issue in the main proceedings, constitute complex matter comprising **not only a computer program but also graphic and sound elements**, which, although encrypted in computer language, have a unique creative value which cannot be reduced to that encryption."

**Higher Regional Court of Berlin** - The extensive interpretation of the doctrine of exhaustion retained in the UsedSoft case did not apply to any services connected to distribution platforms, and the UsedSoft extension of the doctrine of exhaustion to intangible copies **does not apply to computer games**.

**Tom Kabinet** (19 Dec. 2019 C-263/18) " the supply to the public, by downloading for permanent use, of an e-book is covered by the concept of 'communication to the public' and, more specifically, by that of 'making available to the public of [authors'] works" [reproduction right]

**CA Paris** (21 Oct. 2022, No 20/15768) " only Directive 2001/29 is applicable to video games (...), the exhaustion of rights rule does not apply in this case, as the making available of dematerialized video games falls under the concept of communication to the public and not the distribution right."

# Portability

**Legal Mechanism**: providers must always be able to offer their services to subscribers who are **temporarily** in another EU country. This is achieved by making the provision, access, and use of the services **deemed to occur in the subscriber's home country**.

"Temporarily" present in a Member State?

*Being present in a Member State other than the Member State of residence for a limited period of time*

For purposes such as leisure, travel, business trips or learning mobility.

# Thank you



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