

Internal Morality of Article 17 DSMD

《单一数字市场版权指令》第17条的内 在道德性

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Responsibility and liability exemption of OCSSP

在线内容分享服务提供者（OCSSP）的责任与免责

- Obtain an authorisation from the rightholders (eg. License agreement) para 1
- 获得权利人的授权（例如：许可协议）第1款
- When no authorisation, liable unless (para 4)
- 无授权时，需承担责任，除非满足下列条件（第4款）
 - (a) made **best efforts** to obtain an authorisation, and
 - (a) 为获取授权做出过**最大努力**，以及
 - (b) in accordance with **high industry standards** of professional diligence, **best efforts** to ensure the unavailability of the protected work specified/notified by the rightholder
 - (b) 根据**较高行业标准**的专业注意义务，**尽最大努力**，保证被权利持有人指明/通知的受保护作品不被获得
 - acted **expeditiously**, upon receiving notice, to **disable** access to, or to **remove** from their websites, the notified works, **and** made best efforts to prevent their future uploads
 - 收到通知后，**迅速**采取行动，**停止**对被通知作品的访问，或者将其从网站上**移除**，**并**尽最大努力防止其被再次上传

Who is targeted? 目标对象?

- ‘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 DSMD)
- “在线内容共享服务提供商”指的是满足下列条件的信息社会服务提供商：以营利为目的进行业务组织和推广，主要业务（或其中之一）是存储**大量**受版权保护的作品或由其用户上传的其他受保护内容，并向公众提供对应访问权限。（《单一数字市场版权指令》第2条）
- an **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. (Art 17 paragraph 1 DSMD)
- 当**在线内容共享服务提供商**向公众提供受版权保护作品或由其用户上传的其他受保护内容的访问权限时，根据该指令，该服务提供商就发挥**向公众传播的作用**或者**向公众提供数据的作用**（《单一数字市场版权指令》第17条第1款）

NOT affect the concept of communication to the public or of making available to the public elsewhere under Union law, NOR does it affect the possible application of Article 3(1) and (2) (InfoSoc Directive) (Recital 64 DSMD)

不影响欧盟其他法律项下向公众传播或者向公众提供信息的概念，也不影响《信息社会指令》第3(1)条和第3(2)条的可能适用性（《单一数字市场版权指令》引言第64条）

Who are exempted from what?

何人可享受何种豁免?

- Providers of services, such as not-for-profit online encyclopaedias, 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. (Art 2 DSMD)
- 非营利性在线百科、非营利性教育科学资料库、开源软件开发与共享平台、满足(EU)2018/1972指令定义的电子通信服务提供者、在线市场、B2B云服务, 以及允许用户上传自用内容的云服务等服务提供商都不属于本指令所定义的“在线内容共享服务提供商” (《单一数字市场版权指令》第2条)
- Only need New online content-sharing service providers the services of which have been available to the public in the Union for less than three years and which have an annual turnover below EUR 10 million
- 只需要新的在线内容共享服务提供商——其所提供的服务进入欧盟市场尚不足三年且年度营业额低于1000万欧元
 - to act expeditiously, upon receiving notice, to disable access to, or to remove from their websites, the notified works
 - 在收到通知后, 迅速采取行动, 停止对被通知作品的访问, 或者将其从网站上移除, 并尽最大努力防止这些作品再次被上传。

BUT

- **Staying down:** new services the average number of monthly unique visitors of such service providers exceeds 5 million need to comply
- **保持删除:** 每月独立访客平均数超过500万的新服务, 对应的服务提供商不享受豁免。

Excepted use (Para 7)

例外使用 (第7款)

- (a) quotation, criticism, review;
- (a) 引用、评论、评审;
- (b) use for the purpose of caricature, parody or pastiche.
- (b) 用于讽刺、恶搞或集锦等目的

User's rights 用户的权利

- Para 2: authorisation shall also cover acts carried out by users of the services ...when they are not acting on a commercial basis or where their activity does not generate significant revenues.
- 第2款：当用户不以商业为目的或者当用户的活动不产生明显收入时.....授权范围也应包括用户所开展的活动.....
- Para 9: put in place an effective and expeditious complaint and redress mechanism that is available to users of their services in the event of disputes over the disabling of access to, or the removal of, works or other subject matter uploaded by them.
- 第9款：建立面向用户的一套有效、便捷的投诉与纠正机制，以便禁用或移除作品或用户上传的其他内容而产生争议时，用户可以诉诸该机制。
- Decisions to disable access to or remove uploaded content shall be subject to human review + out of court redress mechanisms
- 针对禁止访问或者移除上传内容的决定，应建立人员审查和庭外纠正机制。

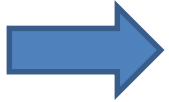



Regulations under Art 17 第17条项下的规定

Regulation: intentional attempts to manage risk or alter behavior in order to achieve some pre-specified goal, can be pursued by

规定：为实现预定目标而有意试图管理风险或者改变行为的，可能受到下列各方的起诉：

- State or 国家, 或者
- Non-state actors and entities (K Yeun 2018)
- 非国家行为人和实体 (K Yeun 2018)

- Art 17: two layers
- 第17条：两层

- Legal regulation: states  online content-sharing service provider (OCSSP)
- 法律规定：政府  OCSSP
- Algorithmic regulation: OCSSP  users of OCSSP
- 算法规定：OCSSP  OCSSP的用户

Lon Fuller: inner morality

L. 富勒：内在道德性

- Eight desiderata of legality 合法性的八个要件
 - 1.Generality 一般性
 - 2.Promulgation 公布性
 - 3.Non-retroactivity 非溯及性
 - 4.Clarity 清晰性
 - 5.Non-contradiction 非矛盾性
 - 6.Possibility of compliance 合规可能性
 - 7.Constancy 稳定性
 - 8.Congruence between declared rules and official actions 官方行动与所公布规定之间的一致性

a necessary prerequisite for a purported law-system to be effective
法律体系有效的必要前提

Principle 1. Generality

原则1：一般性

Algorithmic regulation for staying down

为保持删除而实施的算法规定

(OCSSP should make best efforts to prevent **their** future uploads)

(OCSSP应尽最大努力防止**侵权作品**被再次上传)

Do algorithms need to target and profile individuals/users (via IP address) who repeatedly upload infringing content?

算法需要定向并识别反复上传侵权内容的个人/用户（通过IP地址）吗？

- False positive (if the accuracy of filtering technology is low)
- 假阳性（如果过滤技术的准确性较低）
- Ad hominem (if targeting on users) :
- 针对个人（如果进行用户定向）
 - their rights of being notified, and the opportunities to change their behaviours
 - 个人的被告知权利，及获得行为改变机会的权利

Principle 2: Promulgation

原则2：公布

Best efforts to ensure the unavailability of the protected work (filter) + stay down requirement (previously Art 13)

尽最大努力确保受保护作品不可用 (过滤) + 保持删除 (前述第13条)

- Transparency in relation to the use of Filtering Technology (Regulator: OCSSP, Regulatee: user)
- 过滤技术使用的透明性 (监管者: OCSSP; 被监管者: 用户)
- Openness of authorising the use of the technology (participation of users)
- 技术使用授权的公开性 (用户参与)
- **Users: Understand how it operates**
- **用户：了解技术的运行方式**

Do the public have sufficient understanding of the black box of filtering technology?

公众对过滤技术的黑盒子是否有充分的认识?

- German Protocol:* 德国方案: *
 - Should encourage the development of open-source technologies with open interfaces (APIs). (guarantees transparency, open interfaces ensure interoperability and standardisation.)*
 - 应鼓励开发包含API的开源技术 (保证透明性, 以开放接口保障互操作性和标准化水平。)*
 - Public, transparent notification procedures*
 - 公开、透明的通知程序*

Principle 4: Clarity

原则4：清晰性

The law's rules should be understandable by those who have to comply with them (Reed 2010)

法条应加以清晰表述，使须遵守法律的相关人员能够理解 (Reed 2010)

- Art 17 criticism: lack legal clarity (through the lenses of end users)
- 对第17条的评论：缺乏法律清晰性（以终端用户的视角来看）
- Complexity obscure the achievement of the normative goals
- 复杂度过高，导致试图实现的规范性目标含混不清
- Volume of requirement 数量规定
 - Structure (within itself and its interlocking with other legislation) E.g. The relation between Art 17 and Art 3 InfoSoc?
 - 数量规定的构成（自身构成及与其他立法的关联）如，第17条与《信息社会指令》第3条之间的关系？
- Vague wording 措辞模糊
 - Best effort, expeditiously, a large amount. 最大努力、迅速、大量
- Who to catch? 适用对象？
 - Past Art 13 "[i]nformation society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users".
 - 既往第13条规定“信息社会服务提供商存储大量作品或其用户上传的其他内容，并向公众提供这些作品和内容的访问权限”。
 - Now Art 17 an 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.
 - 现在第17条规定：当在线内容共享服务提供商向公众提供受版权保护作品或其用户上传的其他受保护内容的访问权限时，根据本指令，该服务提供商发挥了向公众传播或者向公众提供信息的作用。

Who to catch? 适用对象是谁?

Art 2 (6) DSMD

《单一数字市场版权保护指令》第2(6)条

- ‘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.
- “在线内容共享服务提供商”指的是满足下列条件的信息社会服务提供商，其主要业务（或其中之一）是存储大量受版权保护的作品或其用户上传的其他受保护内容，并向公众提供对应访问权限，以营利为目的组织和推广这些作品或内容。
- 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.
- 下列服务提供商，比如非营利性在线百科、非营利性教育科学资料库、开源软件开发和贡献平台、(EU)2018/1972指令汇总定义的电子通信服务提供商、在线市场、B2B云服务、以及允许用户上传自用内容的云服务，都不属于本指令所定义的“在线内容共享服务提供商”。

German Protocol

德国方案

- Aimed solely at those market-dominant platforms which make large quantities of copyright-protected uploads accessible and which base their commercial business model on such a practice, i.e. services such as YouTube or Facebook
- 仅针对市场主导型平台，该类平台提供大量受版权保护上传作品的访问权限，且以此建基其业务模式（如YouTube或Facebook）
- Suggest exception to Wikipedia, university repositories, blogs and forums, software platforms such as Github, special-interest offers without any connection to the creative industry, messenger services such as WhatsApp, sales portals or cloud services
- 建议剔除维基百科、大学资料库、博客、论坛、Github等软件平台、与创意行业无关联的小众服务、WhatsApp等信息服务、销售门户网站或云服务。

Principle 5: Non-contradiction

原则5：非矛盾性

Where laws and regulations consists of a mass of technical detail the scope for internal contradiction is greatly increased (Reed 2010)

包含大量技术细节的法律规范，其内部矛盾的范围会显著增加 (Reed 2010)

Consistency: Art 17 DSMD

一致性：《单一数字市场版权保护指令》第17条

- vs Art 15 Ecommerce directive , Art 3 InfoSoc, Art 16 EU CFR
- 对比：《商务指令》第15条、《信息社会指令》第3条、《欧盟基本权利宪章》第16条
- vs CJEU Jurisprudence:
- 对比：欧盟法院法理：
 - Communication to the public: Svensson, GS Media, Brein (Filmspeler), Brein (Pirate Bay): (new public), act of communication + knowledge /profit motive (however recital 64)
 - 向公众传播：Svensson、GS Media、Brein (Filmspeler)、Brein (Pirate Bay)：传播行为+知识/利润动机（然而，查看引言第64条）
 - General Monitoring: Sabam v Netlog; Scarlet v Sabam; McFadden,
 - 一般监控：Sabam v Netlog; Scarlet v Sabam; McFadden
- However, Art 1 2) DSMD: “this Directive shall leave intact and shall in no way affect existing rules”
- 然而，《单一数字市场版权指令》第1条第(2)款：“本指令不破坏也不以任何方式影响现有规则...”

Principle 7: Constancy

原则7：稳定性

- Art 17: quantitative measurement of new OCSSP who can enjoy additional exemptions
- 第17条：对可享受附加豁免的新OCSSP进行的量化测量
- For ensuring the unavailability of the protected work : *a new OCSSP with market entry less than 3 year + an annual turnover below EUR 10 million*
 - 确保受保护作品不可用：进入市场不足3年的新OCSSP+年营业额低于1000万欧元
 - For staying down: + *with the average number of monthly unique visitors of such service providers exceeds 5 million*
 - 保持删除：+该服务提供商的月独立访客平均数超过500万
- The rapid change of social, technological and business context requires frequent amendment
- 社会、技术和商业环境的快速变化要求对指令进行频繁的修正
 - Burdens of updating on the OCSSP: obligation + operation
 - 更新OCSSP的负担：义务+操作
 - Attitude to the law, (respect)
 - 对法律的态度（及遵守）
 - Legality of the law (in case of the consequent penalty/punishment)
 - 法律的合法性（发生结果性处罚/惩罚的情况下）

Principle 8: Congruence between declared rules and official actions

原则8：官方行动与所公布的规则之间的一致性

Officials administering the rules in accordance with the declared rules

官员依据所公布的规则进行管理

Algorithmic regulation: Technology should faithfully follow the rules as intended (the challenge to coding)

算法规定：技术应按照开发初衷，忠实地遵守规则（编程方面的挑战）

- Algorithmic regulation by OCSSP
- OCSSP的算法规定
 - The accuracy of filtering technology to spot excepted use: parody etc..
 - 过滤技术发现例外使用（如：恶搞）的准确度

The spirit of congruence

一致性的精神

Regulators and their enforcement agents should operate in a way that accords with the expectations of regulatees as reasonably formed on the basis of the regulatory signals. (Brownsword 2016)

监管者与其执法代理人的工作方式应符合被监管者根据监管信号合理形成的预期
(布朗斯沃德, 2016)

- Art 17 complaint and redress mechanism: Guilty until proven innocent?
- 第17条的投诉与纠正机制：有罪推定？
- German protocol: Each permanent ‘stay down’ mechanism (‘uploadfilter’) must comply with the principle of **proportionality**. Procedural guarantees, in particular, could be considered, for example when **users notify** that they are lawfully uploading content from third parties. In these cases the deletion could not be performed automatically, but only after a check by a person. At the same time, the **proprietaryship** of any content that has to be removed should be sufficiently proven, unless the information comes from a ‘trusted flagger’. In all events the platforms must guarantee easy access to a complaint mechanism for solving contentious cases effectively and as rapidly as possible
- 德国方案：每种永久的“保持删除”机制（‘上传过滤器’）必须遵守**等比**原则。尤其应考虑程序性保障，比如当**用户通报**其合法上传来自第三方的内容时。在这些情况下，不能实施自动删除，而必须经过人工审查。同时，除非信息来自于‘受信标记人’，否则应充分证明必须移除的内容的**所有权**。平台必须始终保证投诉机制的可及性，以便有效并尽快解决诉讼案件。

Is Art 17 bad law?

第17条是恶法吗?

- Improvement (Art 13) on clarity, contradiction
- 在清晰性和矛盾性方面需作出改善 (第13条)
- Remaining problems
- 其余问题
- Art 17: stakeholder dialogues
- 第17条：利益相关者对话
 - shall organise stakeholder dialogues to discuss best practices for cooperation between online content-sharing service providers and rightholders.
 - 应组织利益相关者开展对话，讨论在线内容共享服务提供商与权利持有人之间合作的最佳做法。

Internal Morality Limitation

内在道德的局限性

- From the perspective of the ability of the law subjects to comply with the rules set
- 从法律主体的合规能力角度出发
- Ethically neutral, not about the substantive aim/content
- 道德中立，不涉及实质性目标/内容
- However, observing these desiderata makes it less likely that truly bad law would be adopted.
- 但是，遵守这些要件，可以大大降低“真”恶法被付诸应用的概率

Without legal certainty, it is impossible to build the DSM.
缺乏法律确定性，就不可能建立起单一数字市场

THANKS 谢谢

+

YOUR QUESTIONS? 问答