DSM-direktivet - fågel, fisk eller mittemellan?

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Direktiv om upphovsrätt på den digitala inre marknaden

- Bakgrund
  - **Utvecklingen av digital teknik** har förändrat det sätt på vilket verk och andra skyddade alster **skapas**, **produceras**, **distribueras** och **används**.
  - **Nya användningsområden** har tillkommit liksom nya **aktörer** och nya **affärsmodeller**.
  - I den digitala miljön har **gränsöverskridande användning** också intensifierats och det har uppstått nya möjligheter för konsumenterna att få tillgång till upphovsrättsskyddat innehåll.

  - **”Även om målen och principerna i EU:s rambestämmelser för upphovsrätt fortfarande i grunden är bra finns det ett behov av att anpassa dem till dessa nya realiteter. Åtgärder på EU-nivå behövs också för att undvika en fragmentering av den inre marknaden.”**

Bakgrund (forts.)

- **Mellan 2013 och 2016** genomförde **Kommissionen** en **översyn av de befintliga upphovsrättsliga reglerna** i syfte att ”säkerställa att upphovsrättslig och upphovsrättsrelaterad praxis förblir ändamålsenlig i den nya digitala miljön”.

- **Maj 2015** – Kommissionen presenterar sin **Strategi för den digitala inre marknaden**:
  - Det finns behov av att **minska skillnaderna mellan nationella upphovsrättssystem** och göra det möjligt för användare att i större utsträckning få online-tillgång till verk i hela EU.
  - **Förbättra gränsöverskridande tillgång** till upphovsrättsskyddade innehållstjänster, underlätta nya användningsområden inom forskning och utbildning och **klargöra onlinetjänsternas roll** för distributionen av verk och andra alster.

- **December 2015 –** Kommissionen presenterade sitt meddelande **Mot en modernare och mer europeisk ram för upphovsrätten**.
  - Riktade åtgärder och en långsiktig vision för modernisering av EU:s upphovsrättsbestämmelser.

- **14 september 2016** – Kommissionen presenterade sitt **Förslag** till **Europaparlamentets och rådets direktiv om upphovsrätt på den digitala inre marknaden**

Processen

- **Rådet förslag beslutades den 25 maj 2018** (efter långdragna förhandlingar och utan att nå enighet)
- Europaparlamentets behandling i olika utskott, byte av rapportör T. Comodini -> A. Voss
- **Europaparlament sommaren/hösten 2018**
- **Trilog-överenskommelse februari 2019** (Rådet, JURI-utskottet, Kommissionen)
- **Gemensamt uttalande** av Nederländerna, Luxemburg, Polen, Italien och Finland
- **Återstår:** Omröstning i plenum, formellt beslut av rådet (val till EP)

- **Lobbying**, protester, ”fake news”, ”astroturfing”, ”mob/bots”
- **Komplexa frågor**. Olika problembild. Olika bedömningar av konsekvenserna. Låsning kring valda lösningar. Debatten handlar delvis om något annat än de konkreta förslagen.

DSM-direktivet

- Artikel 1 – Syfte och tillämpningsområde
- Artikel 2 – Definitioner
- Artikel 3 – 6: Åtgärder för att anpassa undantag och inskränkningar till en digital och gränsöverskridande miljö
- Artikel 7 – 10: Åtgärder för att förbättra licensieringspraxis och säkerställa bredare tillgång till innehåll
- **Artikel 11 – 16: Åtgärder för att uppnå en välfungerande marknadsplats för upphovsrätt**
- Artikel 17 – 24: Slutbestämmelser

Förhållande till äldre reglering

- Utgångspunkten är att äldre direktiv inte påverkas (artikel 1.2)
- Undantag: Ändringar i artikel 17
- Jfr dock även artikel 13
- Enligt artikel 17 a får medlemsstater ha mer långtgående undantag av sådant slag som regleras i direktivet, så länge dessa undantag inte strider mot infosoc-direktivet

Åtgärder för att anpassa undantag och inskränkningar till en digital och gränsöverskridande miljö

- Artikel 3 – **Text and data mining** for the purposes of **scientific research**
- Artikel 3a – Exceptions or limitations for **text and data mining**
- Artikel 4 – Use of works and other subject-matter in digital and cross-border **teaching activities**
  - Koppling mellan möjlighet att införa undantag/inskr. och förekomst av kollektiv licensiering
- Artikel 5 – **Preservation of cultural heritage**
- Artikel 6 – **Common provisions**
  - ”Any contractual provisions contrary to the exceptions provided for in Articles 3, 4 and 5 shall be unenforceable.”

Åtgärder för att förbättra licensieringspraxis och säkerställa bredare tillgång till innehåll

- Artikel 7 – **Use of out-of-commerce works by cultural heritage institutions**
  - Koppling mellan möjlighet att införa undantag/inskr. och förekomst av kollektiv licensiering
- Artikel 8 – **Cross-border uses**
- Artikel 8a – Publicity measures
- Artikel 9 – Stakeholder dialogue
- Artikel 9a – **Collective licensing with an extended effect**
  - Formellt erkännande på EU-nivå av den nordiska avtalslicensmodellen
- Artikel 10 – Access to an availability of audiovisual works on video-on-demand platforms (**Negotiation mechanism**)
- Article 10b – Works of visual art in the public domain

Artikel 11 – Skydd av presspublikationer vid digital användning

Bakgrund

- ”Pressutgivare ställs inför svårigheter när det gäller att licensiera sina publikationer online och att erhålla en **skälig andel av det värde** som de skapar.
- …. Detta kan inverka på **medborgarnas tillgång till information**.”

Skydd av presspublikationer vid digital användning

- Artikel 2(4) – definition av **”press publication”**

‘press publication’ means a collection composed mainly of literary works of a journalistic nature which:

(a) may also include other works or subject matter;

(b) 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;

(c) **has the purpose of providing the general public with information related to news or other topics; and**

(d) is published in any media under the initiative, editorial responsibility and control of a service provider.

Periodicals which are published for scientific or academic purposes, such as scientific journals, shall not be considered as press publications for the purposes of this Directive.

Artikel 11 - Skydd av presspublikationer vid digital användning

1. **Member States shall provide publishers of press publications established in a Member State with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC for the online use of their press publications by information society service providers. These rights shall not apply to private or non-commercial uses of press publications carried out by individual users.**

   The protection granted under the first subparagraph shall **not apply to acts of hyperlinking**.

   The rights referred to in the first subparagraph shall **not apply in respect of uses of individual words or very short extracts of a press publication**.

   [**Information society service** = "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services" – artikel 1.1.b i direktiv 2015/1535]

- 3. **Articles 5 to 8 of Directive 2001/29/EC** and Directives 2012/28/EU and (EU) 2017/1564 **shall apply mutatis mutandis** in respect of the rights referred to in paragraph 1.

- 4. The rights referred to in paragraph 1 shall **expire 2 years after the publication of the press publication**. This term shall be calculated from the first day of January of the year following the date of publication.

- Paragraph 1 **shall not apply to press publications first published before [entry into force of the Directive**].

- 4a. Member States shall provide that the authors of the works incorporated in a press publication receive an appropriate share of the revenues that press publishers receive for the use of their press publications by information society service providers.

Artikel 12 – Claims to fair compensation

- Member States may provide that where an author has transferred or licensed a right to a publisher, such a transfer or a licence constitutes a sufficient legal basis for the publisher to be entitled to a share of the compensation for the uses of the work made under an exception or limitation to the transferred or licensed right.

Artikel 13 – Use of protected content by online content sharing service providers

Bakgrund

- ”Plattformar” har förändrat kommunikationslandskapet.
- Motiv till artikeln: ”value gap” = pengar
- Men samtidigt en större, mer principiell fråga om ansvar för möjliggörande av andras kommunikation/yttranden
- Doktrin, Europadomstolen, EU-domstolen
- Befintlig reglering av ”plattformar” ansvar för användargenererat material
- Pågående mål

Definition, artikel 2 (5)

'**online content sharing service provider**' means a provider of an information society service whose 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.

Providers of services such as not-for profit online encyclopedias, not-for profit educational and scientific repositories, open source software developing and sharing platforms, electronic communication service providers as defined in Directive 2018/1972 establishing the European Electronic Communication Code, online marketplaces and business-to business cloud services and cloud services which allow users to upload content for their own use shall not be considered online content sharing service providers within the meaning of this Directive.

Artikel 13

1. Member States shall provide that 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.

An online content sharing service provider shall therefore obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, for instance by concluding a licencing agreement, in order to communicate or make available to the public works or other subject matter.

Artikel 13

2. Member States shall provide that when an authorisation has been obtained, including via a licensing agreement, by an online content sharing service provider, this authorisation shall also cover acts carried out by users of the services falling within Article 3 of Directive 2001/29/EC when they are not acting on a commercial basis or their activity does not generate significant revenues.

Artikel 13

3. When an online content sharing service provider performs an act of communication to the public or an act of making available to the public, under the conditions established under this Directive, the limitation of liability established in Article 14(1) of Directive 2000/31/EC shall not apply to the situations covered by this Article. This shall not affect the possible application of Article 14(1) of Directive 2000/31/EC to these service providers for purposes falling outside the scope of this Directive.

Artikel 13

4. If no authorisation is granted, online content sharing service providers shall be liable for unauthorised acts of communication to the public of copyright protected works and other subject matter, unless the service providers demonstrate that they have:

(a) made best efforts to obtain an authorisation, **and**

(b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information, **and** in any event

(c) acted expeditiously, upon receiving a sufficiently substantiated notice by the rightholders, to remove from their websites or to disable access to the notified works and subject matters, and made best efforts to prevent their future uploads in accordance with paragraph (b).

Artikel 13

4a. In determining whether the service has complied with its obligations under paragraph 4 and in the light of the principle of proportionality the following should, among others be taken into account:

(a) the type, the audience and the size of services and the type of works or other subject matter uploaded by the users;

(b) the availability of suitable and effective means and their cost for service providers.

Artikel 13

4aa. Member States shall provide that when new online content sharing service providers whose services have been available to the public in the Union for less than three years and which have an annual turnover below EUR 10 million within the meaning of the Commission Recommendation 2003/361/EC, the conditions applicable to them under the liability regime set out in paragraph 4 are limited to the compliance with the point (a) of paragraph 4 and to acting expeditiously, upon receiving a sufficiently substantiated notice, to remove the notified works and subject matters from its website or to disable access to them.

Where the average number of monthly unique visitors of these service providers exceeds 5 million, calculated on the basis of the last calendar year, they shall also demonstrate that they have made best efforts to prevent further uploads of the notified works and other subject matter for which the rightholders have provided relevant and necessary information.

Artikel 13

5. The cooperation between online content service providers and rightholders shall not result in the prevention of the availability of works or other subject matter uploaded by users which do not infringe copyright and related rights, including where such works or subject matter are covered by an exception or limitation.

Member States shall ensure that users in all Member States are able to rely on the following existing exceptions and limitations when uploading and making available content generated by users on online content sharing services:

(a) quotation, criticism, review;

(b) use for the purpose of caricature, parody or pastiche.

Artikel 13

7. The application of the provisions in this article shall not lead to any general monitoring obligation.

Member States shall provide that online content sharing service providers shall provide rightholders, at their request, with adequate information on the functioning of their practices with regard to the cooperation referred to in paragraph 4 and, where licensing agreements are concluded between service providers and rightholders, information on the use of content covered by the agreements.

Artikel 13

8. Member States shall provide that an online sharing service provider puts in place an effective and expeditious complaint and redress mechanism that is available to users of the service in case of disputes over the removal of or disabling access to works or other subject matter uploaded by them.

When rightholders request to remove or disable access to their specific works or other subject matter, they shall duly justify the reasons for their requests. Complaints submitted under this mechanism shall be processed without undue delay and decisions to remove or disable access to uploaded content shall be subject to human review.

Member States shall also ensure that out-of-court redress mechanisms are available for the settlement of disputes. Such mechanisms shall enable disputes to be settled impartially and shall not deprive the user of the legal protection afforded by national law, without prejudice to the rights of users to have recourse to efficient judicial remedies. In particular, Member States shall ensure that users have access to a court or another relevant judicial authority to assert the use of an exception or limitation to copyright rules.

Artikel 13

This Directive shall in no way affect legitimate uses, such as uses under exceptions and limitations provided for in Union law, and shall not lead to any identification of individual users nor to the processing of their personal data, in accordance with Directive 95/46/EC, Directive 2002/58/EC and the General Data Protection Regulation.

Online content sharing service providers shall inform the users in their terms and conditions about the possibility for them to use works and other subject matter under exceptions or limitations to copyright and related rights provided for in Union law.

Artikel 13

9. As of *[date of entry into force of this Directive]* the Commission in cooperation with the Member States shall organise stakeholder dialogues to discuss best practices for the cooperation between the online content sharing service providers and rightholders. The Commission shall, in consultation with online content sharing service providers, rightholders, users associations and other relevant stakeholders and taking into account the results of the stakeholder dialogues, issue guidance on the application of Article 13 in particular regarding cooperation referred to in paragraph 4. When discussing the best practices, special account shall be taken, among others, of the need to balance the fundamental rights and the use of exceptions and limitations. For the purpose of this stakeholders dialogue, users associations shall have access to adequate information from online content sharing service providers on the functioning of their practices with regard to paragraph 4.

Artiklar -14–16a: Skälig ersättning i upphovsmäns och utövande konstnärers avtal

Skälig ersättning i upphovsmäns och utövande konstnärers avtal – bakgrund

- The exclusive rights provided by copyright law only turn into **financial reward**, and thus **incentives** to creators, through a contract with a third party to exploit protected material.

- With the emergence of digital technology the production and distribution of copyright protected content is rapidly shifting from the physical to the online domain.
- Content is now offered digitally via a wide range of different business models, such as 'on-demand' streaming, 'near-on-demand', for download-to-own, download-to-rent, webcasting etc.
- **These emerging modes of content distribution pose challenges to the rights of authors and performers to receive adequate or fair remuneration for the use (exploitation) of their creative content.**

Skälig ersättning i upphovsmäns och utövande konstnärers avtal – bakgrund

- **Imperfect information** refers to a situation in which the value of a relevant economic variable is uncertain.
  - E.g. the market success of the author's work cannot be known by either party ex ante.

- **Asymmetric information** refers to a situation in which one party to a transaction has relevant information, whereas the other does not.
  - E.g. the author has less information than the exploiter on the effort and investments the exploiter will make in order to maximise the economic exploitation of the author's content.
  - Also, the exploiter is likely to have superior information on the current market conditions and sales.

- **Both imperfect information and asymmetric information will affect the perceived expected value of the authors' content and the level of remuneration.**

Skälig ersättning i upphovsmäns och utövande konstnärers avtal – bakgrund

- The type of remuneration mechanism agreed between the author and the economic right exploiter can determine the extent to which the risk of imperfect and asymmetric information is shared between the two parties.
  - **Upfront** (ex-ante) payment.
  - **Lump-sum** (ex-post) payments.
  - **Proportional** remuneration payments (royalties).

Skälig ersättning i upphovsmäns och utövande konstnärers avtal

- Artikel -14 – **Principle of appropriate and proportionate remuneration**

1. Member States shall ensure that when authors and performers license or **transfer their exclusive rights** for the exploitation of their works or other subject matter they are entitled to receive **appropriate and proportionate** remuneration.

2. In the implementation of this principle into national law, Member States shall be free to use different mechanisms and take into account the **principle of contractual freedom** and a **fair balance of rights and interests**.

Skälig ersättning i upphovsmäns och utövande konstnärers avtal

- Skäl 39y
  - "**A lump sum payment can also constitute proportionate remuneration** but it should not be the rule. Member States should have the possibility, taking into account the specificities of each sector, to define specific cases for the application of lump sums."

Skälig ersättning i upphovsmäns och utövande konstnärers avtal

- Artikel 14 – **Transparency** obligation
- Artikel 15 – **Contract adjustment** mechanism
  - ”[E]ntitled to claim additiona, appropriate and fair remuneration froom the party whom they entered into a contract for the exploitation of the rights of their successors in title, **when the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues** and derived from the exploitation of the works or performances.”
- Artikel 16 – **Dispute resolution** procedure
- Artikel 16a – **Right of revocation**

Artikel 17 – 24: Slutbestämmelser

Reflektioner