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New European Copyright Directive: Fundamental Shift From U.S. Policy

Enforceability for U.S. Companies, Required Licensing Agreements, Take Down Policies, Preparing for Compliance

WEDNESDAY, JULY 10, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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The New Copyright Directive 2019/790 of17 April 2019 Commercial Use Copyrighted Content Licensing Requirements Between OSPs and Content Creators

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Existing EU Legal Framework = Fragmented – EU want to harmonise copyright law within the single digital market

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By encouraging the development of creativity, innovation and competition via copyright protection

The European Directive that sets the grounding for the 2019 Directive is the Copyright Directive Harmonisation of certain aspects of copyright (Directive 2001/29/EC):

- It does not deal with a borderless Internet.
- The copyright exceptions in the areas of education, research and preservation of cultural heritage, were not properly adapted to the digital environment which limited the possibilities for users (e.g. educational establishments, research institutions, libraries) to benefit from the potential of new technologies.
- It does not address the economic imbalance between the OSPs and rightsholders in relation to fair payment for copyrighted content in the online environment.

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Overview of The 2019 Directive

General Observations

- Two activities covered - 1 – Non-Commercial Activity; and – 2 - Commercial activity.
- The subject matter is all digital services including online video, photographs, gaming, all audiovisual works.
- It changes the existing commercial activity law on – (1) user generated content removal i.e. the procedure to remove copyrighted content and (2) remuneration for content = licensing.
- There are 32 Articles divided into 5 Titles. Title IV Measures to achieve a well-functioning marketplace – is the focus of my presentation.
- Each member state has two years to implement the Directive.
- The first crucial deadline for implementation is 7 June 2021

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Implementation EU Copyright

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- Implementation across Europe is difficult to foresee.
- The Directive is clear that both clarities in EU copyright law and respect for European culture is paramount and mentions both transparency and culture multiple times throughout the Directive.

  However, moral rights and economic rights are treated differently across Europe.
- Italy, France, Germany have similar legislation.
- The *UK has a law based on copyright, slightly different from the US (influence of EU context) (fair dealing) * UK likely to leave the EU on 31 October 2019.
- Most of the Eastern European countries have adopted EU laws.

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Exceptions and Limitations

The Directive seeks to adapt Limitations and Exceptions to the new modes of communication that are defining the digital age: including - video on demand; e-books and other modern methods of electronic communication.

Under the current regime, a museum that sets up a new exhibit of a story about contemporary art told entirely through smartphone photos would not be permissible without an additional license, or a critical academic treatise is only available in electronic format, and there will be no access without a permit.

Under the 2001 law, the following uses were suffering from fettered access due to among other things the cross-border nature of the Internet:

1. Text and Data Mining
2. Scientific research
3. Cultural research
4. Library and archive use
5. Educational use/teaching

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What does the 2019 do?

- The 2019 Directive shifts the pendulum of regulation of copyright in the digital age within the EU in favour of the rightsholder.
- There are two types of rightsholders:
  1. Publisher (in case of right transfer);
  2. And author (one or more).
- It clarifies the status for copyright content as the responsibility of the OSPs whether such content is uploaded with or without the consent of the copyright holder.
- Title IV – seeks to provide rightsholders with greater control of the use of their copyright content part of which is their ability to negotiate with OSPs fair value licences for their works.
- Article 15, 16, 17, 18, 19, 20, 21, and 22 deal with the new licensing requirements for OSPs for commercial use of copyright content, which is the focus of my presentation.

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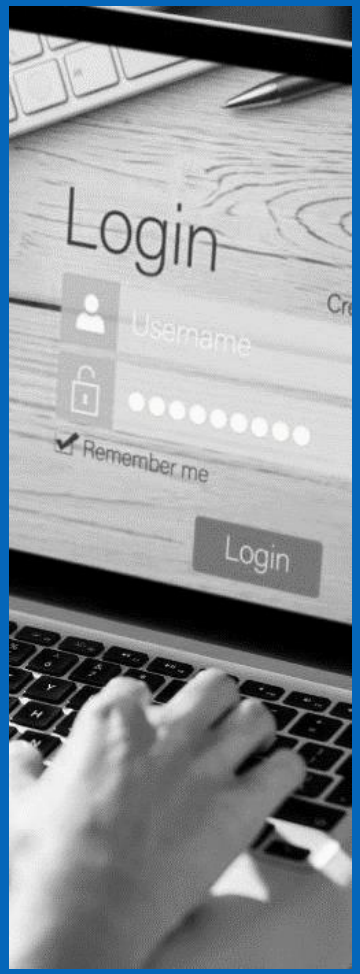
Article 15 and16 – Copyright Licence



- Article 15: extend Internet reproduction rights of copyright content to press publishers for commercial use.
- The definition of the press publishers seems to identify mainstream media.
- OSPs may not publish more than tiny snippets of a press publication without a contractual license or employment agreements.
- Any licence must be non-exclusive.
- The actual authors of the papers must share in the publishers' revenue.
- The rights shall expire after two years from 1 January of the year following the date of the press publication.
- Publishers are entitled to a share of the non-commercial license fee when they are the legal and beneficial owner of rights

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Article 17 - Copyright Licence

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- Article 17 concerns the use of protected content by OSPs.
- The aim is to improve licensing practice by requiring Member states to put in place negotiating mechanisms to facilitate licence negotiations between OSPs and content creators on so called digital or electronic media namely - digital films, sports events, eBooks, video games and music works.

The following matters are worthy of note:

1. OSP's must get communication license from the rightsholder.
2. OSPs cannot unilaterally decide the terms of licensing agreements with individual rightsholders, e.g. there is no fixed license fee.
3. Electronic communications services are exempt (excluded services include - ISPs, B2B Cloud Services and cloud services; open source software development sites and not for profit encyclopedia sites like Wikipedia). – Art 17.4

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Article 17 - Copyright Licence Cont

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4. Assessment of whether OSP gives access to sufficient user-generated content is on a case by case basis, but large technology firms will be covered.

5. The provisions might not catch smaller sites if they qualify under all three of the following criteria (1) They turnover less than 10 million Euro a year; (2) have less than 5million users a month; and (3) have been trading for less than three years. - Art 17.5

6. EU hosting safe harbour under Art14(1) Directive 2001/29/EC no longer applies. – Art 17.2

- OSPs must inform users in their terms and conditions that they can use copyrighted works on OSP platforms under exceptions or limitations to copyright law. - Art 17.9.
- As part of transparency obligations, OSPs agreeing to copyright Licences must provide license related information to the rights holder. - Art19.
- No presumption in favour of OSPs that users have cleared relevant rights.

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Article 18 - Copyright Licence

- Protection for authors and performers for remuneration – does not apply to end-user for non-commercial purposes.
- Remuneration of the author should be appropriate and proportionate to the actual or potential economic value of the licensed or transferred rights taking into account the authors or performers contribution to the overall work or other subject-matters such as market practices or the actual exploitation of the work.
- Lump sum payment is permissible but not the norm – must be exceptional.
- Licensing can be implemented through collective bargaining. - Art 18.2.
- Authors may request information to assess the economic value of rights from OSPs. - Art 19

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Article 19 - Cont

- Authors faced lack of transparency.
- Author may request information to assess economic value of rights from OSP.
- Sharing of information by OSPs must be up-to-date, relevant and comprehensive covering all sources of relevant revenue.
- Information must be provided on all modes of exploitation and on all revenue streams worldwide with appropriate regularity in the sector but at-least annually.
- Information must be provided in a comprehensible manner to the author performer allowing for effective assessment of the economic value of the rights.
- Exploitation related information must be provided from sub-licensees where applicable.

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Article 19 - Cont

- Authors and performers can request additional relevant information directly from sub-licensees if OSPs do not provide sufficient information.
- Transparency obligations must be industry specific. So responsibilities in the gaming industry may be different from the music, publishing or audiovisual sectors.
- Collective bargaining should be used as an option to reach an agreement.
- A transitional period is required to enable the adaptation of existing reporting practices to the new transparency obligations.
- Agreements for the license or transfer of rights of authors and performers shall be subject to the transparency obligations above as from 7 June 2022 (transitional period) – Art 27.
- It is not necessary to apply transparency obligations on collective management organisations, i.e. PRS; PPL; CLA; PLS...

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Articles

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Article 20
Copyright Licence

- In the event that a contract of long duration changes in economic value over time so that the value of the rights become significantly higher than the initial estimate an adjustment mechanism should be provided.
- All relevant revenue should be taken into account including merchandising revenue to determine whether remuneration is low.

Article 21
ADR

- ADR must be available to deal with remuneration and transparency disputes
- Transparency, contract adjustment mechanisms, and ADR are mandatory you can't contract out of them.

Article 22
Right of Revocation

- If rights are not exploited by licensee after expiration of a fixed period those rights are revoked reverting back to the rightsholder.

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Action

- Art 18 will require the updating of the terms and conditions of businesses in the audio-visual industry.
- So video games; digital music; online video – live streaming and on-demand; social media industries.
- The idea of “fair remuneration in contracts of authors and performers” and the transparency obligations in Art 18 and 19 will oblige all digital media companies that acquired or are acquiring rights on digital media platforms to ensure that their contracts comply.

How each member state will deal with enforcement of a breach of the local laws is uncertain, but the most likely is that they will set up an independent regulatory body or empower an existing collective licensing agency to take charge of upholding digital media copyright.

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Action

- What “fair remuneration in contracts” would look like would depend on what is the prevailing market rate for that particular type of copyright work.
- The Directive complements the proposed regulation on the portability of legal content within the EU. The revised Audio Visual Media and Services Directive, and the communication on online platforms.
- There is no general obligation to monitor platforms but there is ample guidance on what type of processes would mange any risk of liability for unlawful content.

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Harmonisation of OSP Liability in Copyright!

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More 'Clarity and Transparency'

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Thank you for your attention!

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New European Copyright Directive: Fundamental Shift from U.S. Policy

Art. 17: Content Sharing

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July 10, 2019

New European Copyright Directive

Article 17 (formerly Art. 13): *Use of protected content by online sharing service providers*

ARTICLE 17 (FORMERLY ARTICLE 13): SECTION 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 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 authorization from the rightsholders... for instance by concluding a licensing agreement, ***in order to communicate to the public or make available to the public works or other subject matter***.

ARTICLE 17 (FORMERLY ARTICLE 13): SECTION 2

Member States shall provide that, where an online content-sharing service provider obtains an authorisation, for instance by concluding a licensing agreement, that ***authorisation shall also cover acts carried out by users*** *of the services falling within the scope of Article 3 of Directive 2001/29/EC* ***when they are not acting on a commercial basis or where their activity does not generate significant revenues***.

ARTICLE 17 (FORMERLY ARTICLE 13): SECTION 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 laid down in 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***.

The first subparagraph of this paragraph shall not affect the possible application of Article 14(1) of Directive 2000/31/EC to those service providers for purposes falling outside the scope of this Directive.

ARTICLE 17 (FORMERLY ARTICLE 13): SECTION 4

If no authorisation is granted, online content-sharing ***service providers shall be liable for unauthorised acts of communication to the public***, including making available 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 from the rightholders, ***to disable access to, or to remove from, their websites the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b).***

ARTICLE 17 (FORMERLY ARTICLE 13): SECTION 5

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

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

b) The ***availability of suitable and effective means and their cost*** for service providers.

ARTICLE 17 (FORMERLY ARTICLE 13): SECTION 6

Member States shall provide that, in respect of 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***, calculated in accordance with Commission Recommendation 2003/361/EC1, the conditions under the liability regime set out in paragraph 4 are limited to compliance with point (a) of paragraph 4 and to acting expeditiously, upon receiving a sufficiently substantiated notice, to disable access to the notified works or other subject matter or to remove those works or other subject matter from their websites.

Where the average number of monthly unique visitors of such service providers exceeds 5 million, calculated on the basis of the previous 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.

ARTICLE 17 (FORMERLY ARTICLE 13): SECTION 7

The cooperation between online content-sharing 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 other subject matter are covered by an exception or limitation.

Member States shall ensure that users in each Member State are able to rely on any of the following existing exceptions or 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.

ARTICLE 17 (FORMERLY ARTICLE 13): SECTION 8

The application of this Article shall not lead to any general monitoring obligation.

Member States shall provide that ***online content-sharing service providers 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***.

ARTICLE 17 (FORMERLY ARTICLE 13): SECTION 9

Member States shall provide that online content-sharing service providers 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.***

Where rightholders request to have access to their specific works or other subject matter disabled or those works or other subject matter removed, they shall duly justify the reasons for their requests. Complaints submitted under the mechanism provided for in the first subparagraph shall be processed without undue delay, and decisions to disable access to or remove 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 and related rights.

This Directive shall in no way affect legitimate uses, such as uses under exceptions or limitations provided for in Union law, and ***shall not lead to any identification of individual users nor to the processing of personal data***, except in accordance with Directive 2002/58/EC and Regulation (EU) 2016/679.

Online content-sharing service providers shall ***inform their users in their terms and conditions that they can use works and other subject matter under exceptions or limitations*** to copyright and related rights provided for in Union law.

ARTICLE 17 (FORMERLY ARTICLE 13): SECTION 10

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

New European Copyright Directive

Consequences of Failing to Comply with Article 17 (formerly Art. 13)

New European Copyright Directive

Article 17: Pros and Cons

Practical Implementation and The Filter Issue

- Each member state will have to pass laws that implement the directive and can elect to interpret the directive narrowly or broadly.
  - While one country may require a specific tool, others may not.
  - How will “best efforts” be interpreted?
  - A logistical nightmare for lawmakers and service providers?
  - May potentially incentivize forum shopping.
- Advocates for Article 17 say filters are not required, but, according to opponents, they have not been able to explain how providers can comply with Article 17 without using filters.
  - Some have argued that online services will not need to filter if they license the catalogues of all major entertainment companies, but, of course, major entertainment companies don’t hold every copyright in the world.
  - Opponents worry that content filters could be used to facilitate censorship.
- Overblocking concerns
  - Article 17 requires that the member states’ laws include protecting users from false takedowns, but does not entitle users to any compensation if their legitimate posts are blocked.
  - Largest providers will likely need to screen and rule on millions of appeals per day.

Stifling Concerns

- Proponents argue that the directive (and Article 17) will incentivize creation because creators know they will be compensated for their work.

- To the contrary, opponents argue that the threat of liability under Article 17 will have a chilling effect on speech.
  - Because it would be impossible (or exceedingly expensive) for service providers to screen each posting for copyright protected works, rather than face potential liability for every posting, they may choose to restrict the number and type of messages posted.
  - Looking back at GDPR, some services chose to merely block European users rather than comply with the law... similar risk with Article 17?

- The death of the meme (in Europe)?
  - Many memes would fall within the “fair use” exceptions identified by the Article, but opponents argue that even the most sophisticated filters are not equipped to tell whether or not a use is quotation, criticism, parody, etc.
  - Current filters also struggle with “incidental use”.

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New European Copyright Directive

Article 17 vs. U.S. Law

ARTICLE 17 VS. § 230 OF THE COMMUNICATIONS DECENCY ACT

- "**No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider**." 47 U.S.C. § 230(c)(1)

- Protects online intermediaries that host or republish speech from certain laws that might otherwise be used to hold them legally responsible for others' actions.

- Exceptions for certain criminal and intellectual property claims, but creates a broad protection that, in proponents' views, has allowed free speech online to flourish.

ARTICLE 17 VS. THE DIGITAL MILLENNIUM COPYRIGHT ACT ("DMCA")

DMCA	Article 17
Allows upload of content, then if removed, can challenge allegation of infringement	Does not allow potentially infringing content to be uploaded in the first place
Protects platforms against liability for user content, so long as compliant with safe harbor provisions	Intended to hold platforms accountable
Policing burden on rights holder	Policing burden on platforms

THANK YOU

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WHAT U.S. BUSINESSES NEED TO KNOW ABOUT THE DIRECTIVE ON COPYRIGHT AND RELATED RIGHTS IN THE DIGITAL SINGLE MARKET

MARCY L. SPERRY
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07.10.19

VIVID IP

WHEN ARE U.S. COMPANIES LIABLE?

- DSM Directive focuses on improving rights of publishers/content creators in EU member states
  - Directive does not specifically address non-member countries and their liability
- Instead emphasizes the updated digital rights afforded to creators that reside in their states
  - Each member country will be responsible for upholding their respective content creator's rights
- US companies that have digital platforms in EU member states (Google, Mozilla, Reddit, YouTube, etc.) will be responsible for holding the rights of content creators in the EU
  - Failure to comply could result in fines and possible litigation
  - "Punishment" will be determined by individual member states by 2-year implementation mark

ARTICLE 15

- News publishers afforded right to negotiate licensing agreement with news aggregators
  - **Does not apply to acts of hyperlinking (initially huge concern)**
  - **Does not apply to "the use of individual words or very short extracts of a press publication."**
    - Problem with ambiguity: there is no definition of "very short extracts"
      - Different countries could implement differently
      - Google news "snippets" should be permissible
- Overarching difference between US copyright law and EU copyright law– EU Copyright Directive is not law and will be implemented differently in the different member countries
  - Businesses should be aware of these differences (once they're implemented) and should be familiar with each country and the differences between countries

ARTICLE 11

- "protection of press publications concerning digital uses"
- Provisions to avoid news aggregators from abusing the sharing snippets by requiring them to pay licensing fees for snippets and excerpts.
  - does not extend to persons who post hyperlinks of news articles on their social media.

ARTICLE 17

- Companies fully liable for content uploaded to their platforms
  - Encourages licensing agreements
  - Potential for upload filters
    - some uploaded material (memes or GIFs) are now specifically excluded from the directive.
- YouTube uses Content ID system (Google invested over $100million)
  - Filters copyrighted material, sometimes wrongfully so
- Article 17 requires that platforms "make best efforts" to:
  - Obtain an authorization (in whatever form the content creator deems appropriate, usually in the form of a licensing agreement)
  - Unavailability of unauthorized content
  - Act quickly to remove unauthorized content and prevent future unauthorized uploads
    - Ambiguous phrase "make best efforts"
    - Unilateral copyright directive will not result in unilateral implementation of laws across countries

ARTICLE 19

- "transparency provision"
- Contracting party receiving rights in protected works (Licensee/Assignee) MUST provide complete statistics to authors/performers regarding the exploitation of their works
  - Modes of exploitation
  - All revenues generated
  - Remuneration due on revenues
- Information must be provided AT LEAST once a year
- Obligations extend to sub-licensees

STRATEGIES

- In connection with Articles 15 and 17
  - Invest in filter technology (like YouTube Content ID)
    - Con: Expensive
    - Con: Not precise technology, could result in filtration mistakes
  - Anticipate potential uploaded material and "make best efforts" to acquire licenses from publishers
    - Ambiguous wording of "make best efforts"– will need to understand how individual countries will choose to interpret
  - Hyperlink!
    - Although "short extracts" of press publications will be allowed, ambiguous wording and potential for non-unilateral implementation
      - Avoid possible fines/litigation by allowing hyperlinks to news publications ONLY with the ability for users to add their OWN unique caption relating to the content
- In connection with Article 19
  - Platforms that post music uploads are familiar with the terms in Article 19
  - News aggregating platforms will need to invest in new accounting technology and hire individuals (royalty experts/auditors) experienced in managing these kinds of financial issues

EXCEPTIONS

- Liability exceptions made for platforms that meet ALL of the following criteria:
  - **Less than three years old**
  - **Revenue less than 10 million euros**
  - **Less than 5 million monthly users**

- Another possible strategy for smaller companies less than three years old: **limit monthly users**
  - Subject to less stringent standards, temporary fix until revenue becomes sufficiently large or business has existed for **3** years