FORSCHUNGSSTELLE FÜR
GEISTIGES EIGENTUM,
GEMEINFREIHEIT UND
WETTBEWERB

UNIVERSITÄT
BAYREUTH

# The German Implementation of Art. 17 DSM-Directive

## Possible Benefits of a Procedural Approach

**Michael Grünberger, VvA 30/10/2020**





Foto: Michael Grünberger

# Agenda

## Art. 17 Implementation in Germany

1. Current State
2. Overview
3. Innovations



# 1. Current State

- 24/6/2020: Discussion Draft released by the BMJV
- 2/9/2020: BMJV finalized the Draft Bill (not yet coordinated within the government ministries, leaked on 7/10/20, officially distributed on 13/10/20)
- TBA: Cabinet Bill submitted to the Bundesrat/Bundestag

Bundesministerium
der Justiz und
für Verbraucherschutz

# Agenda

## Art. 17 Implementation in Germany

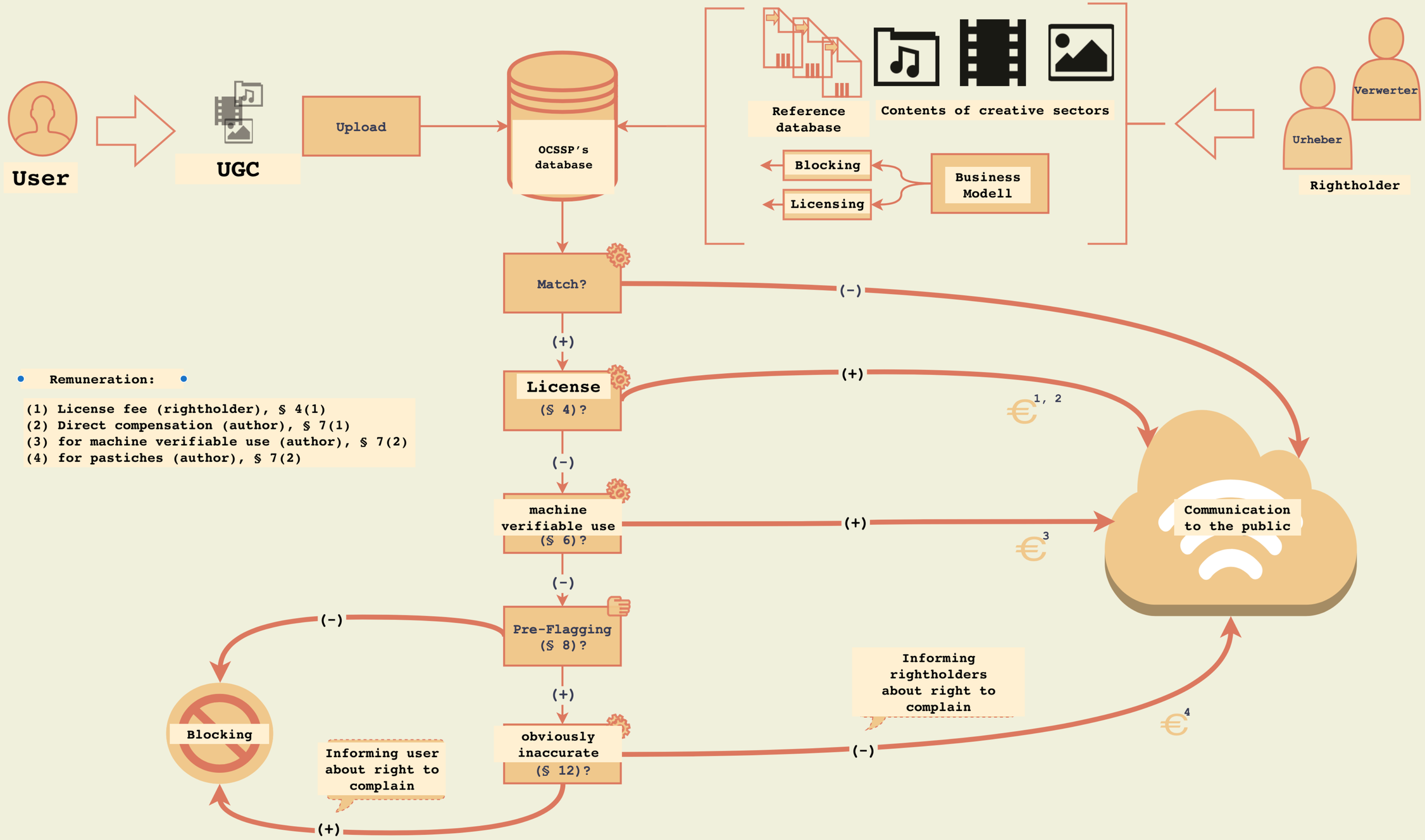
1. Current State
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3. Innovations



# 2. Overview

## #1: Implementation of Art. 17 and (4) DSM-Directive

- **OCSSP itself communicates subject matter to the public**, even if the subject matter is uploaded by its users (§ 1(1) UrhDaG)
- **OCSSP is required to make the best efforts to obtain a license** for the communication to the public (§ 4(1)(1) UrhDaG)
  - **Procedural elements to limit transaction (search) costs** (§ 4(1)(2) UrhDaG)
  - Licensing offer must meet certain **substantive criteria** (§ 4(2) UrhDaG)
- OCSSP is **not liable** for its communication to the public (§ 1(2) UrhDaG), if
  - it **meets the procedural and substantive licensing requirements** (§ 4 UrhDaG)
  - it **disables access** if certain **procedural requirements are met** (§ 10 UrhDaG)
  - if it **removes** and **prevents** future **access** under the **same procedural requirements** (§ 11 UrhDaG)


User
UGC
Upload
OCSSP's database
Reference database
Contents of creative sectors
Blocking
Licensing
Business Modell
Urheber
Verwerter
Rightholder
Match?
(-)
(+)
License
(§ 4)?
(+)
1, 2
(-)
machine verifiable use
(§ 6)?
(+)
3
(-)
Pre-Flagging
(§ 8)?
(-)
Blocking
(+)
Informing user about right to complain
obviously inaccurate
(§ 12)?
(-)
Informing rightholders about right to complain
4
Communication to the public
Remuneration:
(1) License fee (rightholder), § 4(1)
(2) Direct compensation (author), § 7(1)
(3) for machine verifiable use (author), § 7(2)
(4) for pastiches (author), § 7(2)

# Agenda

## Art. 17 Implementation in Germany

1. Current State
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# 3. Innovations

## #1: Elements to efficiently distribute search costs

- **Procedural elements to limit transaction (search) costs** (§ 4(1)(2) UrhDaG)
  - OCSSP is **required to actively approach** (German) collecting societies (relevance for ECL)
  - OCSSP does not have a duty to  to actively search for license offers of individual rights holders: **right holders are required to approach** OCSSP!
  - OCSSP is **legally required to enter into licensing agreements** („Kontrahierungszwang“)
    - Licensing offer must meet **substantive criteria** (§ 4(2) UrhDaG)
      - must **cover OCSSP’s typical content, substantial repertoire** and have **reasonable conditions**
- **Compliance with EU law**
  - **ALAI:** *„principle of obtaining an authorisation from right holders must not be restricted“* **Seriously?**
  - adequate **allocation of the transaction costs** among the parties based on the specific usage scenario on such platforms (**„cheapest cost avoider**“)
  - **positive side effect**: incentivising the exercise of exclusive rights through collecting societies for specific sectors
  - **best efforts-requirement** in light of the principle of **proportionality**



# 3. Innovations

## #2: Upload filters & principle of proportionality (Art. 17(5) Directive)

- **Upload filters** („It Who Must Not Be Named“)
  - **no duty to disable access** for **start-up** OCSSP (user/month < 5 Mio)
  - **presumption in favour of small OCSSP** (annual turnover < 1 Mio)
    - *„Typically, service providers in this category will not need to use automated filtering technologies.“*
  - **regular OCSSP**
    - Upload filters not explicitly mentioned in the draft bill, in accordance with German protocol note
    - However, OCSSP are ***legally*** **required** to disable access by using filtering technologies
- OCSSP has a **duty to inform** right holders how the **blocking** and **removal procedures** work (§ 20(2) UrhDaG)



# 3. Innovations

## #3: Procedural elements to handle the infringement analysis | 1

- **Procedural steps** before take down & stay down of an uploaded work
  - **Right holder's notice** combined with **relevant and necessary information; pre- or post-upload** (§ 10(1) UrhDaG)
    - **Repeated abuse** must be sanctioned by **excluding right holder temporarily** from submitting notice (§ 19(1) UrhDaG)
  - User's **(pre-)flagging of content as lawful use** (§ 8(2)(1) UrhDaG)
    - OCSSP's **duty to inform the user** at the upload process (§ 8(1) UrhDaG)
      - **Topic:** right holder's blocking requirement; lawful uses and pre-flagging possibility
    - **Repeated abuse** must be sanctioned by **excluding user temporarily** from (pre-)flagging (§ 19(3) UrhDaG)
  - **(Pre-)flagging has no impact, if** it is **obviously inaccurate** (§ 12(1)(1) UrhDaG
    - **Presumption of inaccuracy** if the uploaded content (except photographs) corresponds to at least 90 % with the information provided by the right holder (§ 12(1)(2) and (3) UrhDaG)

# 3. Innovations

## #3: Procedural elements to handle the infringement analysis | 2

- **Effects to OCSSP's liability**
  - OCSSP is **not liable** if the **(pre-)flagging** is, in fact, **accurate**
  - OCSSP is **liable**, if the **(pre-)flagging** is **obviously inaccurate**
  - If the **(pre-)flagging is not obviously inaccurate**, but, upon examination, **eventually turns out to be inaccurate**,
    - OCSSP's **liability exemption terminates** at the **end of the complaint mechanism** (§ 16(1)(2) UrhDaG)
    - the **non-enforceable exclusive right metamorphoses into a liability rule**
      - OCSSP is required to **pay an equitable remuneration** to authors and performers (only)
      - Claims may only be asserted through a **collecting society**
- **Compatibility** with EU law?
  - **ALAI**: „*Art 17 (7) and (9) provides for an ex ante blocking/ex post redress mechanism.*"
  - **Solution** is appropriate instrument to **address trilateral conflict** and an **effective governance-of-technology-tool**
    - It re-enables the user to claim her subjective rights (CEJU) against the application of (relative) unintelligent filtering technologies
- Effects to **OCSSP's contractual duties regarding its users?**

# 3. Innovations

## #4: Equitable Remuneration for Creatives

- **Direct compensation for licensed use (§ 7(1) UrhDaG)**
  - **Beneficiaries:** creatives only
  - **OCSSP** has to pay the creatives (**through collecting societies**) equitable remuneration
- **Compliant with EU law?**
  - Art. 18(2) DSM Directive
  - modelled after Art. 5 Rental & Lending Rights Directive
  - Consequence of the author-centric narrative of EU copyright law



# 3. Innovations

## #5: Machine verifiable usage | 1

- **User's communication to the public is statutorily authorised**
  - User **mustn't act on a commercial basis** or generating **significant revenues**
  - **Covered subject matter**:
    - regarding video and audiofiles (< 20 sec)
    - texts (< 1000 characters)
    - picture files (< 250 KB)
  - **Priority:** licensing contracts and general exceptions
  - **Extension to OCSSP** (§ 9(2) UrhDaG
  - **Subject to equitable remuneration** (§ 7(2) UrhDaG)
- **Compliant with EU law?**
  - Art. 17 DSM Directive as a **new sui generis legal regime**?
  - Art. 17 DSM Directive as sector specific **lex specialis** with **subsidiary application** of the InfoSoc Directive?
  - Applicability of **Art. 3, 5 InfoSoc Directive to the user's action?**
  - *„**ALAI** considers that § 6 of the German Discussion Draft, which proposes new exceptions for UGC content that are not permitted by EU law, is not compatible with EU law".*



# 3. Innovations

## #5: Machine verifiable usage | 2

- **Procedural solution to a substantive problem**
  - The (required) use of filter technologies reverses the „**burden of action**“ in favour of right holders and to the detriment of users, who now must act to enforce their exceptions and limitations
  - **Governance of technology**:
    - Potential of overblocking by right-holder friendly technology must be compensated with a user-friendly technology design
- **Compliant with EU law**
  - **Conception** as exception/limitation is **misguided**
  - **Balancing** is **mandated** by Art. 8, 11, 16 and 17 Charter
    - Liability rule instead of property right meets the **proportionality test**
  - Allowing certain machine verifiable usage **complies with prohibition of general monitoring requirement** (Art. 17(8) DSM Directive, Art. 15 E-Commerce Directive)

verbraucherzentrale
Bundesverband

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**LEITLINIEN ZUR NATIONALEN UM-SETZUNG DES ART. 17 DSM-RL AUS VERBRAUCHERSICHT**

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