

# Copyright directive : Germany favors platforms over culture

Publié le 03 décembre 2020 à 15h52 par Isabelle Szczepanski



**Germany's copyright directive transposal project sides with platforms, by reducing their obligations when pirated content is downloaded. In doing so, it goes beyond the text adopted by the European institutions and makes it impossible to licence certain types of content, explained representatives of music, audiovisual, cinema, photography, publishing, of the press, sport, and cinema in a letter to the government, that we publish.**

The German transposal of the EU copyright directive is a very tense affair for right holders. The Directive was written in their favor, as MEP Axel Voss recently recalled at an event hosted by Gesac. He is politically close to Angela Merkel, and was rapporteur for the text in the

European Parliament. But the German Ministry of Justice, in the hands not of Angela Merkel's CDU, but of the social democrat party SPD, was convinced by the arguments of opponents of copyright, and prepared a project that reduces the obligations of platforms towards right holders, while seemingly protecting platforms' users. For cultural reasons, it would be frowned upon for rights holders to launch an explicit communication campaign against the German government's policy. This explains why none of them has complained publicly against the proposal. European cultural organizations have just quietly filled this void, by sending a letter to the German government, that we publish.

## **Not in accordance with European and international law**

*"We are writing to you to express our serious concerns regarding the draft law on the implementation of the DSM Copyright Directive ('the Directive') which was presented on 23 November 2020 and is currently being coordinated within the German Government and regarding Article 17 (the 'value gap' provision) in particular", says the letter signed, among others, by the European Publishers Council, IMPALA, the IFPI, the Motion Picture Association, CEPIC and even News Media Europe. Their reproval is strong. They believe that, as it is written, the German draft "contains numerous provisions which are not in conformity with the directive or with European and international law."*

## **De minimis**

One of the main problems with the German project is the introduction of a so-called "de minimis" provision, which means that German law, if it follows this preparatory work, would not allow rights holders to enforce their copyright on platforms for certain durations or lengths of works, or for certain file sizes. However, explains the letter, this type of condition *"is not included or foreseen in the Directive. It proposes a mechanism for disabling automatic content recognition of 'presumably permitted uses' by using purely quantitative thresholds (20 seconds, 1,000 characters, 250 kilobytes, 50% of a work) combined with the condition of 'added other content' and with the burden of proof completely shifted to right holders."* The rights holders stress that *"such a mechanism would constitute a limitation to the exercise of exclusive rights, would create qualifiers which are unsuitable without specific context. It would not meet the 'three-step test' enshrined in both EU and international law."* Right holders add that such a provision, if adopted, could lead platforms to circumvent their obligations vis-à-vis authors. They also give specific examples,

including the fact that "the proposed approach would destroy the rapidly growing licensing market for short form music content", and that "1,000 characters can represent half and up to the entirety of a press article."

### Commission and Council, silent, for now

According to our information, this *de minimis* condition is also of great concern to the European Commission. It would consider that such a provision would be contrary to European law, which could, if necessary, lead to an infringement action against Germany before the ECJ. However, it is too early for the Commission to officially take the floor on this matter. At this stage, it is only a matter of national preparatory work, in which the European institutions cannot participate. To intervene in this debate, the Commission will have to wait for Germany to notify the adopted law, and act accordingly. The Council of the EU could warn Germany against the approach adopted ... But it probably will not do so. Not only is Germany the president of this institution until the end of December, but also, in the EU, Germany is preponderant, and few countries will dare to criticize it openly. The rights holders are therefore quite lonely. They still have a few weeks to influence the German government.

### Letter from right holders to Germany :

### European right holders' letter on the German draft law implementing article 17 of the Copyright directive EL



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