

# The German Implementation of Art. 17 DSM-Directive

## Possible Benefits of a Procedural Approach





# 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

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## Art. 17 Implementation in Germany

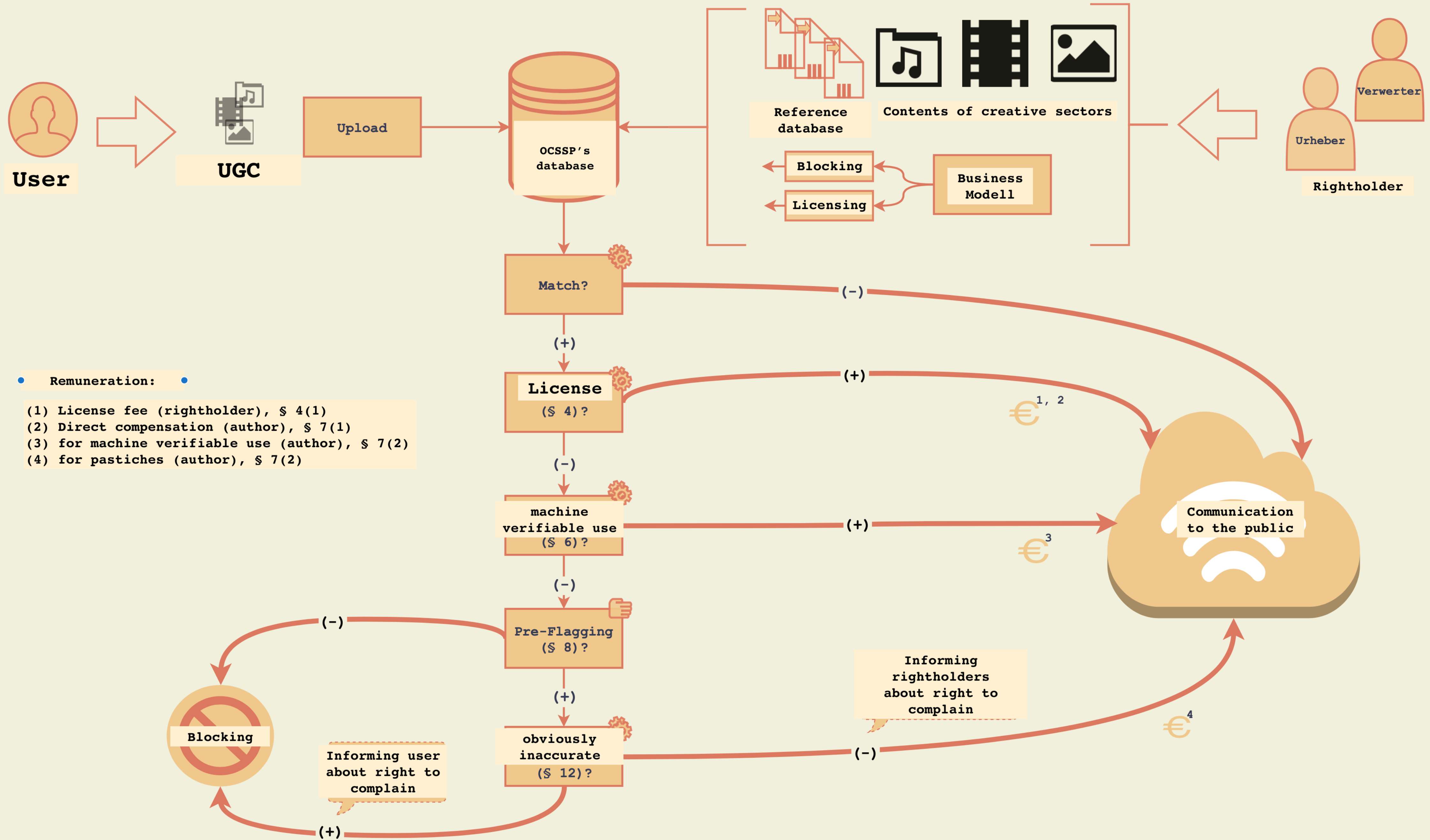
1. Current State
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# 2. Overview

## #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)



• **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)



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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 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)

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