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Article 17 at the Intersection of EU Copyright Law and Platform Regulation

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1. INTRODUCTION

The Directive on copyright in the Digital Single Market (hereinafter: DSM Directive)¹ with its 86 recitals and 32 articles constitutes a major regulatory overhaul of European copyright legislation in light of the “[r]apid technological developments continue to transform the way works and other subject matter are created, produced, distributed and exploited.”² It addresses a broad variety of issues ranging from certain exceptions and limitations such as text- and datamining, cross-border teaching activities and the preservation of cultural heritage, to licensing practices in relation to out-of-commerce works. It also introduces a new ancillary right for press publishers akin to previously introduced systems in, for example, Germany and Spain, addresses extended collective licensing and the remuneration of authors and performers.

The focus of this article, however, regards “certain uses of protected content by online services”. Already 19 years ago, i.e. before the rise of tech giants and gatekeeper platforms like Facebook, YouTube, Twitter, and others, the European legislator wisely noted that “[i]n the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities.”³ The InfoSoc Directive’s recital continues that therefore “[i]n many cases such intermediaries are best placed to bring such infringing activities to an end.” The DSM Directive establishes a novel regime for certain platforms and the use of copyright-protected content in Article 17. In essence, the core of this provision is *not* about substantive copyright but rather the exploitation market for copyright-protected works. It constitutes a

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[†] This article is based on my presentation entitled “Auf dem Weg zum Digitalen Binnenmarkt: wie das europäische Urheberrecht die Haftung der Intermediäre verändert” prepared for the annual congress of Deutsch-Nordischer Juristen Verein (DNJV) in November 2019 in Trier, Germany. The research for this article is also part of the reCreating Europe project, which has received funding from the European Union’s Horizon 2020 research and innovation programme under grant agreement No 870626. Cut-off date for information collection for this article has been March 2020.

¹ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, [2019] L 130 92–125 (hereinafter: DSM Directive).

² Recital 3 of Directive (EU) 2019/790.

³ Recital 59 of Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, [2001] L 167 10–19 (hereinafter: InfoSoc Directive).

copyright sector-specific carve-out from the established intermediary liability rules and principles of EU Internet law. In this contribution, I first revisit the current intermediary liability regime. Then, I turn towards the mechanism of Article 17 of the DSM Directive, before looking at further tendencies in the regulation of intermediaries, and notably platforms, and conclude with a broader perspectivation of the issue.

2. COPYRIGHT’S PROBLEM WITH THE E-COMMERCE DIRECTIVE

The context of Article 17 of the DSM Directive is related to the subject of copyright, or more specifically copyright-protected works, but its workings have in fact relatively little to do with *substantive* copyright. Rather, this “copyright solution” finds its basis in EU Internet law and more specifically the E-Commerce Directive’s⁴ liability exemptions. For the purpose of this article, it is important to recall that the E-Commerce Directive merely harmonises liability *exemptions* for certain situations for intermediaries, namely mere conduit (i.e. the transmission of information, Article 12 E-Commerce Directive), caching (i.e. the intermediate storage to accelerate data transmission in form of e.g. proxy-caching, Article 13 E-Commerce Directive) and hosting services (i.e. the storage of information Article 14 E-Commerce Directive).⁵ The question of (secondary) *liability*, on the other hand, is in the absence of specific secondary EU legislation dependent on the Member States’ national concepts and traditions.⁶

The E-Commerce Directive was proposed back in 1998⁷ and adopted in 2000, i.e. roughly one year before the adoption of the InfoSoc Directive in 2001. Since then, the Internet and its actors have undergone substantial developments and over the years, the European Commission and the Parliament have revisited the E-Commerce Directive. In 2016, for example, the European Commission deemed the Directive still fit-for-purpose. In 2017, the European Parliament pointed out aspects where clarification is desirable. At the same time, the CJEU had to weigh in on the interpretation, especially Article 14 of the E-Commerce Directive of the liability exemption rules –often in IP-related cases– numerous times over the years. Articles 12 to 15 of the E-Commerce Directive address intermediary liability exemptions of information society

⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, [2000] OJ L 178 1–16 (hereinafter: E-Commerce Directive).

⁵ Notably, the E-Commerce Directive does not operate with the notion “intermediary”. Instead, its scope comprises information society service providers (ISSPs), defined autonomously in Article 1(1) lit. b of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services [2015] OJ L 241, pp. 1–15 (Technical Standards Directive) as: “any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.” A definition for intermediary, which can be argued to be a slightly broader genus, is for example provided by the OECD: “Internet intermediaries bring together or facilitate transactions between third parties on the Internet. They give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties.”

⁶ See, however, also the CJEU’s case law integrating traditional secondary liability rules in the InfoSoc’s communication to the public concept in Art. 3(1).

⁷ European Commission, Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market, 18 November 1998, COM (1998) 586 final.

service providers in a horizontal manner, covering every form or illegal activity by the user.⁸ Importantly, recital 42 stipulates a key characteristic of the passive and intermediary role that leads to the qualification under a liability exemption:⁹ the activity falling under the liability exemption is “of a *mere technical, automatic and passive nature*, which implies that the information society service provider (ISSP) has neither knowledge of nor control over the information which is transmitted or stored.”¹⁰ For the purpose of this article, I focus on Article 14 of the E-Commerce Directive on hosting, which reads in paragraph 1:

“Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.”¹¹

In other words, it provides a liability exemption for *inter alia* hosting platforms¹² under two conditions namely that a platform firstly does not have “actual knowledge” of the illegal activity or information and, secondly, acts expeditiously to remove that content once it has obtained

⁸ On the rationale for intermediary liability, see e.g. Giovanni Sartor, *Providers Liability: From the eCommerce Directive to the future*, European Parliament's Committee on the Internal Market and Consumer Protection (IMCO), IP/A/IMCO/2017-07, October 2017 p.10–12. The E-Commerce Directive's liability exemption rules are inspired by the corresponding U.S.-American Section 512 of the Digital Millennium Copyright Act, which was introduced in 1998, but notably covers liability in a horizontal fashion and is not restricted to copyright-protected material.

⁹ This is established in the case law of the Court of Justice, see e.g. *Coöperatieve Vereniging SNB-REACT U.A. v Deepak Mehta*, C-521/17, ECLI:EU:C:2018:639, para. 47; *Mc Fadden*, C-484/14, EU:C:2016:689, para. 62; *L'Oréal and Others*, C-324/09, EU:C:2011:474, para. 113; *Google France and Google*, C-236/08 to C-238/08, EU:C:2010:159, para. 113. The applicability of recital 42 in the context of Article 14, however, is not uncontested. In his opinion in the case C-324/09 – *L'Oréal v eBay*, for example, AG Jääskinen “share[s] the doubts expressed by eBay as to whether this recital 42 at all concerns hosting referred to in Article 14” (para. 139) and finds that “(...) the limitation of liability of a hosting provider should not be conditioned and limited by attaching it to recital 42” (para. 142), see Opinion of Advocate General Jääskinen, C-324/09 *L'Oréal v eBay*, ECLI:EU:C:2010:757, paras. 138–142. See also critique in the literature e.g. Riordan, J. (2016). *The liability of internet intermediaries*. Oxford University Press, p. 402; Stalla-Bourdillon, S., “Internet Intermediaries as Responsible Actors? Why It Is Time to Rethink the e-Commerce Directive as Well...” (July 1, 2016). In: L. Floridi and M. Taddeo, *The Responsibilities of Online Service Providers*, Springer, 2016. Available at SSRN: <<https://ssrn.com/abstract=2808031>>, p. 13; Bridy, A., *The Price of Closing the 'Value Gap': How the Music Industry Hacked EU Copyright Reform* (June 30, 2019). *Vanderbilt Journal of Entertainment & Technology Law*, Forthcoming. Available at SSRN: <<http://dx.doi.org/10.2139/ssrn.3412249>>, p. 115.

¹⁰ Emphasis added.

¹¹ Emphasis added. Article 14(3) reads: “3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.”

¹² See, e.g., on the applicability of Article 14 Directive 2000/31/EC on an “online social networking platform” case C-360/10, *SABAM v Netlog NV* [2012], ECLI:EU:C:2012:85, para. 27.

such knowledge. This forms the basis for notice-and-takedown procedures by online platforms.¹³ Importantly, Article 15 of the E-Commerce Directive stipulates that Member States may not introduce general monitoring obligations¹⁴, which would in effect undermine the very idea behind the liability exemption regime.¹⁵ This provision has, for example, not been transposed in the Danish *e-handelsloven* when implementing the E-Commerce Directive, implicitly assuming that the law complies with the prohibition of general monitoring.¹⁶

But where then, lies copyright's problem with the E-Commerce Directive? When looking at industry reports, the music industry seems to be faring fairly well after the transition into the streaming age and recovery from painful declines in first physical sales and later in pay-per-download revenue.¹⁷ Additionally, record labels have benefited greatly from their stake in fast-growing streaming platforms like Deezer or Spotify, which has IPO'ed at a market valuation of 26.6 Billion USD and presented labels like Sony Music and Warner BMG with a massive windfall.¹⁸ Yet, in the copyright market for music, the existence of the current intermediary liability exemption regime has allegedly led to a "value gap": it has been argued by the music recording industry organisation, International Federation of the Phonographic Industry (IFPI), that advertising-based online platforms that allow for user uploads such as YouTube return significantly less revenue to rights holders than (subscription) streaming services like Spotify.¹⁹

¹³ For an overview on the notice-and-action procedures in EU Member States, see European Commission, *Overview of the legal framework of notice-and-action procedures in Member States*, SMART 2016/0039, Final Report, July 2018.

¹⁴ See, however, Art. 15(2) and recital 47 Directive 2000/31/EC, clarifying that "(...) this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation." There exists generally relatively scarce case law on Article 15 Directive 2000/31/EC, but see e.g. in relation to Internet access (C-360/10 – *Scarlet v SABAM* [2012], ECLI:EU:C:2012:85) and in relation to hosting (C-70/10 – *SABAM v Netlog* [2011] ECLI:EU:C:2011:771 and most recently C-18/18 – *Eva Glawischnig-Piesczek v Facebook* [2019] ECLI:EU:C:2019:821).

¹⁵ See e.g. Kuczerawy, A., "EU proposal for a Directive on Copyright in the Digital Single Market: Compatibility of Article 13 with the EU intermediary liability regime", (2019), Available at SSRN: <<https://ssrn.com/abstract=3309099>>, p. 5, with reference to OECD, Directorate for Science, Technology and Industry, Committee for Information, Computer and Communication Policy, *The Role of Internet Intermediaries In Advancing Public Policy Objectives, Forging partnerships for advancing public policy objectives for the Internet economy*, Part II, 22 June 2011, p. 15.

¹⁶ Given that Art. 15 of the E-Commerce Directive also is of importance e.g. in relation to the scope of preliminary injunctions, this is not entirely convincing.

¹⁷ Collective management organisations (CMOs) have reported record income from streaming over recent years. In a longer timeline, however, it is revealed that the income has not reached previous heights yet.

¹⁸ Reportedly Sony BMG received 6%, Universal 5%, Warner Music Group 4% and Merlin 1% of Spotify shares in 2008. In 2018, for example, Sony Music sold approximately 50% of its shares for around USD 750 Million, see Ingham, T., 'Here's exactly how many shares the major labels and Merlin bought in Spotify – and what those stakes are worth now', 14 May 2018, MusicBusiness Worldwide, <<https://www.musicbusinessworldwide.com/heres-exactly-how-many-shares-the-major-labels-and-merlin-bought-in-spotify-and-what-we-think-those-stakes-are-worth-now/>>

¹⁹ IFPI, *Global Music Report 2017, Annual State of the Industry*, 2017, p. 25, arguing that Youtube pays out 1/20 of what Spotify pays out to rights holders for the same amount of music. The issue has also been raised in commissioned research, see Liebowitz, S., *Economic Analysis of Safe Harbor Provisions* (prepared for CISAC, February 27, 2018). In the Norwegian context, see Eidsvold-Tøien, I. et al., *Hva nå - Digitaliseringens innvirkning på norsk musikkbransje*, Centre for Creative Industries 2019, Rapport nr. 1 2019, available at: <<https://www.bi.no/globalassets/forskning/centre-for-creative-industries/publications/musikkutredning.pdf>>; Critically see also Colangelo, G. and Maggolino, M., "ISPs' Copyright Liability in the EU Digital Single Market Strategy", *International Journal of Law and Information Technology*, 2018, Forthcoming, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3087812>; Frosio, G., "To Filter or Not to Filter? That Is the Question in EU Copyright Reform" (2017),

Interestingly, only in 2020, YouTube publicly made available its annual advertising revenue of a staggering 15 Billion USD (which amounts approximately 10 percent of Google annual revenue)²⁰, of which around 8.5 Billion USD are reportedly used for content acquisition. Already in December 2015, the Commission noted in a Communication that a “growing concern about whether the current EU copyright rules make sure that the value generated by some of the new forms of online content distribution is fairly shared, especially where right holders cannot set licensing terms and negotiate on a fair basis with potential users”²¹ and observed “a growing debate on the scope of [E-Commerce Directive’s liability] exemption and its application to the fast- evolving roles and activities of new players, and on whether these go beyond simple hosting or mere conduit of content.”²² In the Commission’s Impact Assessment accompanying the Proposal for the Directive, the problem is described stating that “[r]ightholders have no or limited control over the use and the remuneration for the use of their content by services storing and giving access to large amounts of protected content uploaded by their users.”²³ The Impact Assessment further notes that “while some of the providers of these services have de facto become major actors of online content distribution and have substantial number of users and significant market valuations rightholders are not necessarily able to enter into agreements with them for the use of their content.”²⁴ Given that one of the largest players, YouTube, has entered into agreements with CMOs and rights holders, however, the issue appears rather to be related to unsatisfactory outcomes in negotiations between rights holders and platforms.²⁵ In essence, the “copyright problem” is an issue related to the pay-out of large online platforms that allow for user uploads (read: YouTube) to organised music rights holders (i.e. music labels and CMOs).

In order to solve the issue, the Commission only identified two policy options besides the baseline-scenario of no policy intervention: firstly, the facilitation of stakeholder dialogues between rights holders and online services “which store and give access to large amounts of content uploaded by their users“, which was deemed unsatisfactory because it “could only result in best practices, which would not be binding for service providers and would therefore not be sufficient to lead to improvements on market practices.”²⁶ Secondly, to introduce an “obligation on online services which store and give access to large amounts of content uploaded by their

36(2) *Cardozo Arts & Entertainment Law Journal*, 2018, 131 with further references, available at: <<https://ssrn.com/abstract=3058680>>.

²⁰ See Alexander, J., “Creators finally know how much money YouTube makes, and they want more of it”, 4 February 2020, *The Verge*, <<https://www.theverge.com/2020/2/4/21121370/youtube-advertising-revenue-creators-demonetization-earnings-google>>. Already previously, however, in 2015 Youtube commented to pay out 3 Billion USD to rights holders, see Music Business Worldwide, “Youtube and Google Play have paid out \$3Bn to record industry... says Google”, 17 November 2015, *Music Business Worldwide*, <<https://www.musicbusinessworldwide.com/youtube-and-google-play-have-paid-out-3bn-to-record-industry/>>

²¹ European Commission, *Communication, A Digital Single Market Strategy for Europe*, Brussels, 6.5.2015, COM(2015) 192 final, p. 9.

²² *Ibid.*, p. 10.

²³ European Commission, Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, Brussels, 14.9.2016 SWD(2016) 301 final, Part 1, p. 137.

²⁴ *Ibid.*, p. 138. In a following footnote, the Impact Assessment refers to reported examples of “reported failures to obtain licences with services like Dailymotion, Vimeo or Myspace” in the music sector and for images the services “Pinterest, Flickr and Tumblr”, see *ibid.*, p. 139.

²⁵ See e.g. in the context of the Danish CMO, KODA, “Millioner af YouTube-streams udløser få penge”, KODA, 18 March 2015, <<https://www.koda.dk/om-koda/nyheder/millioner-af-youtube-streams-udloser-fa-penge>>

²⁶ See European Commission, Commission Staff Working Document, part 1, p. 145 and p. 155.

users to put in place appropriate technologies and increase transparency vis-à-vis rightholders”.²⁷ The latter option 2 was chosen.

3. THE HISTORY OF THE DSM DIRECTIVE

The European Commission held a public consultation on the review of EU copyright rules between 5 December 2013 and 5 March 2014 covering a wide range of topics such as “territoriality in the Internal Market, harmonisation, limitations and exceptions to copyright in the digital age; fragmentation of the EU copyright market; and how to improve the effectiveness and efficiency of enforcement while underpinning its legitimacy in the wider context of copyright reform”.²⁸ The public consultation generated more than 9,500 replies, most of which from civil society.²⁹

Already in this consultation some authors, in particular music composers, called for “clear liability rules for intermediaries or to remove anonymity on the internet.”³⁰ Collective management organisations (CMOs) chimed in, arguing “that enforcement is hindered in many other ways, e.g. because of the liability regime of intermediaries which is contained in the E-Commerce Directive” and that notice-and-action procedures should be more effective and efficient “particularly for the prevention of further infringements.”³¹ Similarly, publishers, producers and broadcasters took a stance on the “crucial role [of] middleman” and “that ISPs, search engines, social networks and cloud services should have liability for the new dangers they have created and that hosting service providers should be responsible for what happens under the umbrella of anonymity”.³² Going even further, some respondents claimed that “today there are many technologies for regulating the Internet and that the safe harbour as it stands is no longer justified.”³³ This wish list stands in stark contrast to consumers’ perspective, who “do not favour further involvement of intermediaries, neither through a modification of the liability regime provided for in the E-Commerce Directive nor through the use of injunctions that would require internet service providers (ISPs) to monitor content and prevent future infringement.”³⁴ Besides the opposition to the application of filtering technologies for the enforcement of IP rights, consumers commented that the “current civil enforcement framework is biased towards the interests of rightholders and there is a need for more balanced copyright rules that can be understood (and followed) easily by all stakeholders.”³⁵

²⁷ See *ibid.*, p. 146.

²⁸ See European Commission, *Report on the responses to the Public Consultation on the Review of the EU Copyright Rules*, Directorate General Internal Market and Services Directorate D – Intellectual property D1 – Copyright, July 2014, p. 3.

²⁹ See *ibid.* See also Schwemer, S. F. (2019). *Licensing and access to content in the European Union: regulation between copyright and competition law* (Vol. 49). Cambridge University Press, pp. 12–13.

³⁰ See European Commission, *Report on the responses to the Public Consultation on the Review of the EU Copyright Rules*, Directorate General Internal Market and Services Directorate D – Intellectual property D1 – Copyright, July 2014, p. 84.

³¹ See *ibid.*, p. 85.

³² See *ibid.*, p. 87.

³³ See *ibid.*, p. 83. Interestingly, some newspaper publishers argued that “ISPs’ roles should not go as far as controlling the press content (which they would see as censorship) since this would pose a threat to digital press freedom.”

³⁴ See *ibid.*, p. 83.

³⁵ See *ibid.*, p. 83.

Based on this input, the European Commission announced its strategy for a Digital Single Market³⁶ in early May 2015, followed by a Communication of 9 December 2015 “Towards a modern, more European copyright framework”³⁷, where it was noted that it is necessary “to adapt and supplement the existing Union copyright framework, while keeping a high level of protection of copyright and related rights”³⁸ in some areas. In parallel, in June 2015, also the European Parliament called-upon the Commission in a resolution on the InfoSoc Directive “to consider solutions for the displacement of value from content to services” and stressed “need to adjust the definition of the status of intermediary in the current digital environment”.³⁹ On 14 September 2016, the Commission presented its Proposal for a Directive on copyright in the Digital Single Market⁴⁰ together with a proposal for a Regulation regarding certain online transmissions of broadcasting organisations⁴¹ and proposals related to the implementation of the Marrakesh Treaty in relation to access to copyright-protected works by visually impaired.⁴²

The Commission’s proposal attracted immediate and widespread interest and criticism from, for example, civil society and large parts of academia, while being applauded by rights holders organisations.⁴³ The following legislative process, too, turned out to be turbulent to say the least.⁴⁴ By way of example, the European Parliament introduced a provision on the “Use of protected content by information society services providing automated image referencing”⁴⁵ and a section on the “Protection of sport event organizers”⁴⁶. Neither had been part of the Commission’s Proposal from September 2016 and were later been briefly explained as “a mistake” by the responsible rapporteur of the European Parliament.⁴⁷ Generally, there appears to have been

³⁶ European Commission, *Communication, A Digital Single Market Strategy for Europe*, Brussels, 6.5.2015, COM(2015) 192 final.

³⁷ European Commission, *Communication, Towards a modern, more European copyright framework*, Brussels, 9.12.2015 COM(2015) 626 final.

³⁸ Recital 3 of Directive 2019/790 (EU).

³⁹ European Parliament, European Parliament resolution of 9 July 2015 on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (2014/2256(INI)), point 66.

⁴⁰ European Commission, Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM(2016)593.

⁴¹ European Commission, Proposal for a Regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions, COM(2016)594.

⁴² European Commission, Proposal for a Regulation on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled, COM(2016)595 and Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society - COM(2016)596.

⁴³ See below.

⁴⁴ See the excellent timeline available at CREATE: <<https://www.create.ac.uk/policy-responses/eu-copyright-reform/#timeline>>

⁴⁵ Article 13b of European Parliament (12 September 2018) *Provisional*.

⁴⁶ *Chapter 1 a*, Article 12a of European Parliament (12 September 2018) *Provisional*.

⁴⁷ Livni, E., “The man behind the EU’s copyright law is ‘surprised’ by what’s in the proposal”, 13 September 2018, Quartz, <<https://qz.com/1389385/article-11-and-article-13-axel-voss-is-surprised-by-eu-copyright-law/>>

a clear interest by some stakeholders to push the DSM Directive to adoption before the end of the legislative cycle and elections for the European Parliament in May 2019.⁴⁸

In the Council, the Bulgarian presidency published its mandate to start negotiations with the European Parliament with a view to reaching a first reading agreement on 25 May 2018, which was notably not supported by Germany, France, the Netherlands, Slovenia, Hungary and Belgium.⁴⁹ Already before that, in September 2017, several Member States (Belgium, Czech Republic, Finland, Hungary and the Netherlands) asked the legal service of the Council for an assessment of the proposed Article 13’s compatibility with the Charter of Fundamental Rights⁵⁰ as well as its clarifications on Articles 14 and 15 of the E-Commerce Directive and Article 3(1) of the InfoSoc Directive.⁵¹ On 20 June 2018, the European Parliament’s Committee on Legal Affairs (JURI) approved its text, which was as –fast track– basis for negotiations rejected in the plenary vote of the Parliament on 5 July 2018 under the impression of widespread public protests.⁵² Following the summer break, on 12 September 2018 the European Parliament adopted its revised negotiation position on the Directive with 438 votes to 226, with 39 abstentions.⁵³ Shortly after, triilogue negotiations started on 2 October 2018 and several triilogue meetings held in late 2018 under the Austrian Presidency. Reaching a compromise in the triilogue proved difficult, too, and “in a second and last attempt” the presidency invited to a sixth political triilogue in February 2019 with suggestions for possible compromises.⁵⁴ In February 2019, triilogue negotiations took place and on 26 March 2019 the Directive was approved in Parliament in first reading with 348 to 274 votes.⁵⁵ Shortly after, on 17 April 2019 the DSM Directive was also approved in the Council by the Agriculture and Fisheries configuration by a qualified majority; in this Council vote, however, the Netherlands, Luxemburg, Poland, Italy, Finland and Sweden voted against the Directive, while Belgium, Estonia and Slovenia

⁴⁸ Also other secondary legislation has been interrupted by European elections, e.g. InfoSoc Directive, proposed in 1998 and adopted in 2001, as well as the E-Commerce Directive, proposed in 1998 and adopted in 2000, with elections in 1999.

⁴⁹ Council of the European Union, “Copyright rules for the digital environment: Council agrees its position”, press release, 25 May 2018, <<https://www.consilium.europa.eu/en/press/press-releases/2018/05/25/copyright-rules-for-the-digital-environment-council-agrees-its-position/>>

⁵⁰ Charter of Fundamental Rights of the European Union, *OJ C 326, 26.10.2012, p. 391–407*.

⁵¹ Council of the European Union, Note from General Secretariat of the Council to Delegations, *Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market - Questions by the Belgian, Czech, Finnish, Hungarian and Dutch delegations to the Council Legal Service regarding Article 13 and Recital 38*, Brussels, 13 September 2017, 12127/17 LIMITE.

⁵² European Parliament, “Parliament to review copyright rules in September”, press release, Ref.: 20180628IPR06809, 5 July 2018, <<https://www.europarl.europa.eu/news/en/press-room/20180628IPR06809/parliament-to-review-copyright-rules-in-september>>

⁵³ European Parliament, “Parliament adopts its position on digital copyright rules”, press release, 12 September 2018, <<https://www.europarl.europa.eu/news/en/press-room/20180906IPR12103/parliament-adopts-its-position-on-digital-copyright-rules>>

⁵⁴ See Council of the European Union, Note, from Presidency to Permanent Representatives Committee, Subject, Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, Brussels 4 February 2019, 5893/19 LIMITE.

⁵⁵ Interestingly, 13 MEPs asked after a vote leading up to the final vote regarding final amendments notably in relation to Article 17, 13 MEPs for their vote to be recorded differently, see Hern, A., “MEPs accidentally vote wrong way on copyright law”, *The Guardian*, 27 March 2019, <<https://www.theguardian.com/media/2019/mar/27/mep-errors-mean-european-copyright-law-may-not-have-passed>>

abstained from voting.⁵⁶ Germany, while voting for the Directive in the Council, issued a 4-page long statement on its interpretation of Article 17 of the DSM Directive in connection with its vote.⁵⁷ This voting behaviour underlines the complexity of the DSM Directive and its issues related to Article 17: in the large majority of legislative acts, the Council votes for a legislative tool unanimously. One month later, on 17 May 2019 the Directive was published in the Official Journal and Member States have until 7 June 2021 for national implementation. Interestingly, the United Kingdom supported the Directive but announced that it would not implement it after Brexit.⁵⁸ Shortly after the publication, on 29 May 2019, the Republic of Poland brought a direct action for the annulment of certain parts of Article 17 against the Parliament and the Council under Article 263 TFEU.⁵⁹

4. A “COPYRIGHT” SOLUTION TO A COPYRIGHT-MARKET PROBLEM?

The Commission’s proposal for a Directive from 14 September 2019 envisioned in Article 13 on the “*Use of protected content by information society service providers storing and giving access to large amounts of works and other subject-matter uploaded by their users*” the explicit use of measures to enforce licensing agreements notably stating as example “the use of effective content recognition technologies.”⁶⁰ The chosen policy option was meant to “put in place appropriate technologies and fosters the conclusion of agreements with rightholders.”⁶¹ Against the background of the widespread criticism, the provision has evolved significantly during the legislative process both in the Parliament and the Council and is now enshrined in Article 17 of the DSM Directive.

⁵⁶ See Council vote results available at: <<https://data.consilium.europa.eu/doc/document/ST-8612-2019-INIT/en/pdf>>

⁵⁷ See Council of the European Union, Statement by Germany, (5 April 2019), point 9, p. 5, <https://data.consilium.europa.eu/doc/document/ST-7986-2019-ADD-1/en/pdf>. In Germany, there have been intense debates in the Government and society about the Directive. The coalition agreement between the governing parties explicitly foresaw a negative position on upload filters and the responsible Minister for Justice, Katharina Barley, had been opposed to the reliance on such technologies but gave in against the background of the political situation (see *Süddeutsche Zeitung*, “Barley will Urheberrechtsreform zustimmen”, 5 April 2019, <<https://www.sueddeutsche.de/digital/uploadfilter-urheberrecht-barley-1.4397567>>). According to newspaper reports, the French interest in a strong copyright protection and the German interest in the gas pipeline Nord Stream 2 might explain the German position on the controversial Art. 15 and 17 of Directive (EU) 2019/790 (*Frankfurter Allgemeine Zeitung*, “Altmaier opfert Start-ups im Urheberrecht”, 25 March 2019, <<https://zeitung.faz.net/faz/wirtschaft/2019-03-26/f30a5870c08cc1e1b4524c1be19d1faf/>>).

⁵⁸ See Vincent, J., “The UK won’t implement EU’s controversial copyright directive after Brexit”, *The Verge*, 27 January 2020, <<https://www.theverge.com/2020/1/27/21083295/eu-copyright-directive-uk-brex-it-no-implementation>>

⁵⁹ C-401/19 – *Poland v Commission*. See below.

⁶⁰ Article 13(1) of the Draft Directive reads: “1. Information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users shall, in cooperation with rightholders, take measures to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter or to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers. Those measures, such as the use of effective content recognition technologies, shall be appropriate and proportionate. The service providers shall provide rightholders with adequate information on the functioning and the deployment of the measures, as well as, when relevant, adequate reporting on the recognition and use of the works and other subject-matter.”

⁶¹ Policy option 2, see European Commission, Proposal for a Directive on copyright in the Digital Single Market, COM/2016/0593 final - 2016/0280 (COD), Explanatory Memorandum, p. 8.

a) The scope of Article 17

The scope of the provision has been subject to significant changes. The Commission’s proposal just addressed the broad genus of information society service providers (ISSPs) “that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users”.⁶² Article 17 of the DSM Directive, on the other hand, addresses “online content-sharing service providers” (OCSSPs), which are defined in Article 2(6) para. 1 of the Directive as “a provider of an information society service of which the 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.”

In other words, OCSSPs are one specific subset of an information society service provider (ISSP).⁶³ The definition does not provide additional details on what is to be understood as “main purpose” and neither specifies “large amounts” of protected works. Recital 63 of the DSM Directive provides some interpretation help by noting that the criteria of giving “access to a large amount of copyright-protected content” should be evaluated on a case-by-case basis and be based on “a combination of elements, such as the audience of the service and the number of files of copyright-protected content uploaded by the users of the service.”⁶⁴ It is also not quite clear, when such service has one of the *main purposes* to store and give access to copyright protected works; nothing in the Directive precludes non-artistic or other than musical works, meaning that e.g. reviews or other text, images or graphics, code etc. would qualify as such work. In other words, most elements on websites constitute copyright-protected works and if they are uploaded by users, potentially drag the ISSP into the category of OCSSP. The criterion relating to the organisation and promotion for profit-making purposes seems to be inspired by the CJEU’s case law in e.g. C-324/09 – *L’Oréal v eBay*.⁶⁵ Following the grammatical structure of the sentence, also the profit-making criterion seems to relate to the promotion of the *uploaded content* itself; given that already the definition of the broader category ISSP (of which OCSSPs are a subcategory) in the Technical Standards Directive contains a broad reference to “normally provided for remuneration”,⁶⁶ the profit-making reference in the DSM Directive must either have a more specific meaning or might simply be redundant. It makes, in any case, little sense to assume that the promotion of *the uploaded content* is meant. Rather, given the legislative history of Article 17, it seems likely that the legislator simply refers to the connection between the uploaded content and the profit-making purposes, e.g. when the uploaded content is exploited e.g. by advertisements in connection with a video. The DSM Directive also remains silent on the criterion related to the *organisation* of content and the standard for such

⁶² Article 13(1) Directive proposal.

⁶³ On the notion, see above.

⁶⁴ The Impact Assessment noted that the assessment of “large amounts” should be “made on the basis of a combination of factors including the number of users and visitors and the amount of content uploaded over a certain period of time”, but irrespective of the size of the OCSSP, “which can also be an SME”. See European Commission, Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, Brussels, 14.9.2016 SWD(2016) 301 final, Part 1, p. 1346.

⁶⁵ C-324/09 – *L’Oréal SA and Others v eBay International AG and Others* [2011], ECLI:EU:C:2011:474 paras. 89 f.

⁶⁶ See e.g. discussion in case C-484/14 – *McFadden* [2016], ECLI:EU:C:2016:689, paras. 34–43.

assessment; probably, however, automated or curated playlists or even lists of categories are examples of such organisation.

Even though the genus of OCSSPs is more restricted than the broader ISSP notion, it still has a potential broad reach far beyond the initially identified problem within the music vertical. Article 2(6) para. 2 enumerates in a non-exhaustive manner (“such as”) several services that could fall under the definition provided for in Article 2(6) para. 1, but are explicitly excepted from the scope of the Directive, namely:⁶⁷ “not-for-profit online encyclopedias, not-for-profit educational and scientific repositories, open source software-developing and-sharing platforms, providers of electronic communications services as defined in Directive (EU) 2018/1972 [Electronic Communications Code⁶⁸], online marketplaces, business-to-business cloud services and cloud services that allow users to upload content for their own use (...).”⁶⁹ Whereas the wording at first glance is held relatively neutral, it is noteworthy that all these services are offered by major actors such as Wikipedia, SSRN or ArXiv, Github, eBay, Dropbox iCloud etc.

Furthermore, recital 62 contains an explanation that the definition of such OCSSP “should target only online services that play an important role on the online content market by competing with other online content services, such as online audio and video streaming services, for the same audiences.” This specification is highly unclear and difficult to locate in the definition in Article 2(6). Is the assessment of the *important role* in the market and competition to be assessed through the lense of competition law? Against the background of the “value gap” (see above), one interpretation relates to the relation between free advertising-based streaming services like YouTube vis-à-vis the subscription-based model of Spotify. The Directive offers little guidance, however, as to how to evaluate whether services compete for the same audiences. It is also noteworthy that neither Article 17 nor the Commission’s proposed Article 13 address specific copyright-markets. Whereas the information collection seems to relate primarily to the online music market and to a minor extent the audiovisual and images market, the provision does not differentiate between different forms of content. In other words: the copyright-protected content addressed in the definition of an Article 2(6) can be related to musical works, audiovisual works, texts, pictures, photographs, code and any other copyright-protected subject-matter.

b) Core mechanics part 1: direct liability for user uploads

Firstly, Article 17(1) states that “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.” Given this clarification on whether OCSSPs perform a copyright-relevant action by their hosting service, “[a]n online content-sharing service provider shall therefore obtain an authorisation from the

⁶⁷ Read in conjunction with recital 62 of Directive (EU) 2019/790, these services are understood to services “that have a main purpose other than that of enabling users to upload and share a large amount of copyright-protected content with the purpose of obtaining profit from that activity.”

⁶⁸ Such electronic communications services are e.g. internet access services and interpersonal communications services, provided they do not exercise editorial control over the content submitted, see Article 2(4) of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, [2018] OJ L 321, 36–214.

⁶⁹ See also recital 62 of Directive (EU) 2019/790.

rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, 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.⁷⁰

In other words, Article 17(1) DSM Directive establishes *direct liability* of OCSSPs in certain situations for uploads by their users. Already in its Communication from December 2015 “Towards a modern, more European copyright framework”, the European Commission highlighted the “definition of the rights of communication to the public and of making available” as important aspect in relation to a “well-functioning marketplace for copyright”.⁷¹ Thoughts along the line that the making available by a hosting provider of user-uploaded content may fall within the scope of Article 3(1) of the InfoSoc Directive have also been floated by the CJEU in case C-610/15 – *Stichting Brein v Ziggo*⁷² regarding The Pirate Bay and in case C-527/15 – *Filmspelers*.⁷³ According to the CJEU’s case law, the communication to the public requires an “individual assessment”⁷⁴, where “several complementary criteria”(para. 25) need to be taken into account, namely firstly “the indispensable role played by the user and the deliberate nature of his intervention” (para. 26). The question of whether an OCSSP’s conduct qualifies as act of communication within the meaning of Article 3(1) of the InfoSoc Directive is also one aspect of a currently pending reference for a preliminary ruling by the German *Bundesgerichtshof* case before the CJEU, which was lodged 6 November 2018.⁷⁵ The case C-682/18 – *Youtube*⁷⁶ relates to the availability of musical works from an album and private tour recordings on Youtube in November 2008.⁷⁷ The CJEU was inter alia asked to assess whether Youtube’s conduct constitutes an act of communication within the meaning of Article 3(1) of the InfoSoc Directive. In

⁷⁰ See also recital 64 of Directive (EU) 2019/790.

⁷¹ European Commission, *Communication, Towards a modern, more European copyright framework*, Brussels, 9.12.2015 COM(2015) 626 final. p. 9.

⁷² C-610/15 – *Stichting Brein v Ziggo* [2017], ECLI:EU:C:2017:456; see also Opinion of AG Szpunar, in case C-610/15, *Stichting Brein v Ziggo*, ECLI:EU:C:2017:99, paras. 28–54.

⁷³ See also Rosati, E., ‘The CJEU Pirate Bay Judgment and Its Impact on the Liability of Online Platforms’ (July 21, 2017). European Intellectual Property Review, Forthcoming. Available at SSRN: <<https://ssrn.com/abstract=3006591>>, p. 16. See also similarly the interpretation by the Legal Service of the Council, Council of the European Union, *Contribution of the Legal Service to Working Party on Intellectual Property*, Brussels 11 October 2017, 13140/17 LIMITE, para. 27, p. 18. More broadly on the judicial development on the communication to the public concept, see also Quintais, J., “Untangling the hyperlinking web: In search of the online right of communication to the public”, 21 *J. World Intell. Prop.* 5-6 (2018), pp. 385–420.

⁷⁴ C-610/15 – *Stichting Brein v Ziggo*, para. 23; see also C-527/15 – *Stichting Brein v Jack Frederik Willems* (“*Filmspelers*”) [2017], ECLI:EU:C:2017:300, para. 26; C-160/15 – *GS Media* [2016], EU:C:2016:644, para. 29; C-403/08 and C-429/08 – *Football Association Premier League and Others* [2011], EU:C:2011:631, paras. 184–185; C-306/05 – *SGAE* [2006] EU:C:2006:764, paras. 33–34.

⁷⁵ See also the currently pending case Case C-683/18 – *Elsevier*, lodged on 6 November 2018, regarding a shared hosting service, where the referring *Bundesgerichtshof* inter alia asks whether “the operator of a shared hosting service via which files containing content protected by copyright are made publicly accessible by users without the consent of the rightholders” carries out an act of communication. In yet another related request for a preliminary ruling by the Austrian *Oberster Gerichtshof*, too, the question of whether YouTube’s conduct qualifies as act of communication to the public within the meaning of Article 3(1) InfoSoc Directive becomes relevant, see C-500/19 – *Puls 4 TV GmbH & Co. KG v YouTube LLC and Google Austria GmbH*, Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice, paras. 6–7.

⁷⁶ C-682/18 – *LF v Google LLC, Youtube Inc., Youtube LLC, Google Germany GmbH*, (“*Youtube*”), Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice.

⁷⁷ See C-682/18 – *Youtube*, Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice, Brief summary of the facts and procedure, paras. 1–8. At the time of this writing, AG Saugmandsgaard Øe has yet to issue his opinion in the case.

the brief summary of the basis for the request for the preliminary ruling it was by the court dealing with the appeal noted, that “[i]t is doubtful whether (...) the activity of [Youtube] constitutes an act of communication within the meaning of Article 3(1) of Directive 2001/29.”⁷⁸ Regarding the indispensable role, it was with reference to case C-610/15 – *Stitching Brein v Ziggo* noted that “the assumption of an indispensable role does not preclude the possibility that [YouTube] does not post content on its platform itself, but rather enables third parties, through the provision of the video portal, to make content that may include copyright infringing content available to users of the portal”⁷⁹ that also “involves a commercial interest”. Given that the posting of videos takes place automatically, Youtube is argued to “not have any knowledge of the availability of copyright-infringing content up to the point at which it was notified by the copyright holder.”⁸⁰ In the assessment, there is also put weight on the fact that Youtube in its terms of service as well as during the upload process “informs users that the posting of copyright-infringing content is not permitted” and “also provides tools with which copyright holders can take action against the availability of copyright-infringing content.”⁸¹ Based on this assessment, “[t]he present Chamber takes the view that the assumption of an indispensable role is therefore conceivable, at best, if, after becoming aware of the availability of copyright-infringing content, [Youtube] did not expeditiously delete it or did not expeditiously disable access to it.”⁸² Similarly, in the context of the DSM Directive also delegations of several Member States were uncertain whether proposal for the Directive sufficiently takes into account the very context-specific notion of “providing access” in C-610/15 – *Stitching Brein v Ziggo*.⁸³ The *Association Littéraire et Artistique Internationale (ALAI)*, on the other hand, is arguing fiercely for a communication to the public within the meaning of Article 3(1) InfoSoc Directive, and noted in an opinion drawing upon the CJEU’s findings in the *Pirate Bay* case C-610/15 – *Stitching Brein*, that Youtube is “is even more closely implicated in the act of communication to the public because the works are actually *uploaded* to the platform on which the users make copyright protected content available.”⁸⁴ The CJEU could follow the *Filmspeler* and *Stichting Brein v Ziggo* line, which, however, are substantially distinct from the *Youtube* case in that in the latter does not participate in targeted facilitation of copyright-infringing activities by third parties. Despite the outcome of the currently pending cases, compared to the Commission’s proposal from September 2016 in any case, Article 17(1) of the DSM Directive stands much clearer.⁸⁵

⁷⁸ C-682/18 – *Youtube*, Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice, para. 15.

⁷⁹ C-682/18 – *Youtube*, Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice, para. 16.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ Council of the European Union, Note from General Secretariat of the Council to Delegations, *Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market - Questions by the Belgian, Czech, Finnish, Hungarian and Dutch delegations to the Council Legal Service regarding Article 13 and Recital 38*, Brussels, 13 September 2017, 12127/17 LIMITE, p. 10.

⁸⁴ Association Littéraire et Artistique Internationale (ALAI), *OPINION in respect of some of the questions from the Federal Court of Justice of Germany for preliminary ruling by the CJEU, Case C-682/18 (YouTube)*, 25 February 2019, p. 3.

⁸⁵ Already the European Council (25 May 2018) Agreed negotiating mandate ST 9134 2018 INIT and the European Parliament (12 September 2018) provisional text both contained this clarification. In the Commission’s original Proposal for a Directive from September 2016, recital 38 para. 1, noted that “Where information society service providers store and provide access to the public to copyright protected works or other subject-matter uploaded by

Taking licensing as the default starting point, Article 17(2) of the DSM Directive contains an extension effect of licensing agreements between OCSSPs and rights holders to the “acts carried out by users (...) when they are not acting on a commercial basis or where their activity does not generate significant revenues.”⁸⁶ This, compared to current regime, implies a strengthening of users, who otherwise would legal uncertainty of whether to license copyright-protected works in addition to the practical challenges involved.⁸⁷ YouTube has a large community of professional, semi-professional and amateur YouTuber’s and in this context the threshold for “significant revenues” is unclear.

c) Core mechanics part 2: The old safe harbour is dead. Long live the new safe harbour!

Article 17(3) para. 1 of the DSM Directive constitutes a centrepiece of the new regime. Introduced during the legislative process by the Council⁸⁸, it declares the hosting provider liability exemption in Article 14(1) of the E-Commerce Directive dead for the situations covered by the DSM Directive.⁸⁹ Compared to this, the proposal for a Directive by the European Commission was much less clear on the provisions relation to the E-Commerce Directive.⁹⁰ Without such liability exemption, however, affected platforms are unlikely to be able to continue to offer the option for user uploads without extensive moderation. In Article 17(4) of Directive 2019/790 (EU), instead, a new gradual system of liability exemptions is introduced for the instances in which no authorisation is granted by rights holders. According to this, “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”⁹¹ satisfy three cumulative conditions:

their users, *thereby going beyond the mere provision of physical facilities and performing an act of communication to the public*, they are obliged to conclude licensing agreements with rightholders, unless they are eligible for the liability exemption“ (emphasis added). Furthermore, it noted that “[i]n respect of Article 14, it is necessary to verify whether the service provider plays an active role, including by optimising the presentation of the uploaded works or subject-matter or promoting them, irrespective of the nature of the means used therefor.” See also Stallabourdillon, S. et al., “A Brief Exegesis of the Proposed Copyright Directive”, 30 November 2016, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2875296>, p. 7.

⁸⁶ The relevant provision is almost the exact wording of the European Parliament (12 September 2018) *provisional text*, but was not contained in the European Council (25 May 2018) Agreed negotiating mandate ST 9134 2018 INIT.

⁸⁷ More broadly on the complexities of licensing and access, see Schwemer, S.F. (2019), *Licensing and Access to Content in the European Union*, Cambridge University Press. In the context of the public consultation on copyright regarding user-generated content, “A significant number of respondents in this category state that they experienced problems when seeking to disseminate user generated content (UGC) online“, see European Commission, Report on the responses to the Public Consultation on the Review of the EU Copyright Rules, Directorate General Internal Market and Services Directorate D – Intellectual property, D1 – Copyright, July 2014, p. 67–69.

⁸⁸ Art. 13(3) of European Council (25 May 2018) Agreed negotiating mandate ST 9134 2018 INIT.

⁸⁹ Article 17(3) para. 2 Directive 2019/790 (EU) continues to declare that the *possible* application of the hosting intermediary liability exemption to the affected providers for purposes falling outside the scope of the Directive remains unaffected by Article 17(3) para. 1. The specification of “possible” application was only introduced as a compromise late in the political dialogue in February 2019.

⁹⁰ In fact, the Legal Service of the Council noted that “clarifications on (...) Article 13 (...) and its relationship with the e-commerce Directive” were necessary, see Council of the European Union, *Contribution of the Legal Service to Working Party on Intellectual Property*, Brussels 11 October 2017, 13140/17 LIMITE, para. 29, p. 19.

⁹¹ Emphasis added.

Firstly, according to Article 17(4) lit. a, the OCSSP needs to demonstrate that it has “made *best efforts* to obtain an authorisation”⁹², in other words, best efforts to obtain a license from right holders. The DSM Directive refrains from bringing examples of such efforts. Logically, in any case, it should encompass something akin to a duty to reach out to right holders with a view to obtain licenses. Given the enormous amount of copyright-protected works and that there exists no registration requirement for copyright⁹³ as well as the absence of well-established rights and rights holders databases, however, identifying and subsequently contacting rights holders can be a challenging exercise especially in less-organised copyright markets and amount to significant transactions costs.⁹⁴ Recital 62 comments that “the liability exemption mechanism provided for in this Directive should not apply to service providers the main purpose of which is to engage in or to facilitate copyright piracy”, however, without a corresponding section in the provision, which makes it at first glance difficult to locate in Article 17 DSM Directive. Structurally, however, if an OCSSP has as main purpose to facilitate piracy, it would logically not satisfy the criterion of best efforts to obtain a license in the first place. Thus, this aspect can be read as yet another limit or specification of Article 17(4) lit. a of the Directive. It is also unclear, whether Article 17(4) lit a. implies some obligation to contract with rights holder, for example in the scenario of a right holder demanding unreasonable licensing conditions. There is, however, little in the text or the recital that would support such a duty to contract.⁹⁵ Rather, also with the Directive’s goal in title IV to “achieve a well-functioning marketplace for copyright” in mind, in such situation simply no licensing agreement would be reached and the OCSSP would have to comply with Article 17(4) lit. b and lit. c of the Directive. The provision requires best efforts to obtain a license as initial burden on the OCSSP as opposed to a successful licensing agreement. Licensing is the clear default route envisioned by the Directive (underlined both by Article 17(1) and Article 17(4) lit. b) and therefore, as noted by Germany, “[w]orkable solutions for obtaining licences must be found”.⁹⁶ In this context, Germany points to copyright-intrinsic solutions besides “‘traditional’ individual licensing” such as “exceptions and limitations, possibly combined with remuneration rights; the option of converting exclusive rights into remuneration rights; the obligation to conclude contracts on reasonable terms; and the involvement of associations of creative artists such as collecting societies”.⁹⁷ [transaction costs – Posner/Schwemer] A further examination of potential licensing solutions is necessary but outside the scope of this article. Suffice it here to note that those solutions may well be found or developed in national copyright legislation.

⁹² Emphasis added.

⁹³ Cf. e.g. Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979).

⁹⁴ The very existence of the Orphan Works Directive (Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works [2012], OJ L 299 5–12), for example, exemplifies the issue. Also the establishment rights databases such as the Global Repertoire Database (GRD) and others in the traditionally well-organised field of musical works has not been very successful. See Schwemer, S.F. (2019). *Licensing and access to content in the European Union* (Cambridge University Press), <https://doi.org/10.1017/9781108653213>, pp. 68–73.

⁹⁵ See also Statement by Germany in the Council, noting that “[f]or all other uses platforms should acquire licences, if available relatively easily and for a fair tariff” [emphasis added], see Council of the European Union, Statement by Germany, (5 April 2019), point 9, p. 5, <<https://data.consilium.europa.eu/doc/document/ST-7986-2019-ADD-1/en/pdf>>

⁹⁶ *Ibid.*, point 10, p. 6.

⁹⁷ *Ibid.*, point 11, p. 6.

Secondly, according to Article 17(4) lit. b, the OCSSP needs to demonstrate that it has “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.”⁹⁸ This part constitutes the most controversial part of the novel Article 17(4) liability exemption regime and its implications will be discussed in detail below. It builds on the train of thought contained in the Commission’s proposal from September 2016 that information society service providers –even if eligible for the liability exemption– “should take appropriate and proportionate measures to ensure protection of works or other subject-matter, such as implementing effective technologies.”⁹⁹ Given the absence of well-established rights and rights holders databases, it is already from a purely practical perspective necessary that rights holders provide “relevant and necessary information”. In this regard Germany, in its statement accompanying its Council vote, noted that the “EU should encourage the development of open-source technologies with open interfaces (APIs)” in order to “prevent market-dominant platforms from further consolidating their market power by means of their established filtering technology”.¹⁰⁰ Furthermore, it identifies the risk of a “de facto copyright register in the hands of dominant platforms” and suggests as means of mitigation “public, transparent notification procedures”.¹⁰¹ More questionable, is what the legislator had in mind when referring to “high industry standards of professional diligence”. Suffice it here to note, that the Directive remains relatively silent on what constitutes such standard. Instead Article 17(10) of the DSM Directive sets out for a stakeholder dialogue facilitated by the European Commission and Member States in order “to discuss best practices for cooperation between online content-sharing service providers and rightholders”.¹⁰² Based on the outcome of this dialogue and the input from OCSSPs, rights holders, users’ organisations and other relevant stakeholders, the Commission is supposed to issue guidance on the Article 17(4).¹⁰³

Finally, and “in any event”, according to Article 17(4) lit. c., the OCSSP needs to demonstrate to have “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).”¹⁰⁴ This criterion continues in the notice-and-action vein of Article 14 of the E-Commerce Directive but alters its principle in one substantial way: instead of a notice-and-takedown, it mandates a notice-and-staydown mechanism.¹⁰⁵

⁹⁸ Emphasis added.

⁹⁹ Recital 38 of the Commission’s proposal.

¹⁰⁰ Council of the European Union, Statement by Germany, (5 April 2019), point 5, p. 4.

¹⁰¹ *Ibid.*

¹⁰² Already the Commission’s proposal for a Directive foresaw stakeholder dialogues as central to define best practices “such as appropriate and proportionate content recognition technologies, taking into account, among others, the nature of the services, the availability of the technologies and their effectiveness in light of technological developments”, see Article 13(3) Proposal for Directive.

¹⁰³ A first meeting took place on 15 October 2019 regarding music, games and software, and a second meeting on audiovisual content, sports, books and other subject matter. On progress, see Keller, P., “Article 17 stakeholder dialogue: What we have learned so far – Part 1”, Kluwer Copyright Blog, 13 January 2020, <<http://copyrightblog.kluweriplaw.com/2020/01/13/article-17-stakeholder-dialogue-what-we-have-learned-so-far-part-1/>>

¹⁰⁴ Emphasis added.

¹⁰⁵ On the issue of notice and stay-down in relation to freedom of expression, see e.g. Urban, J., et al., “Notice and Takedown in Everyday Practice”, UC Berkeley Public Law Research Paper No. 2755628 (2016); Romero-Moreno,

The three cumulative criteria (Article 17(4) lit. a–c DSM Directive) are not meant to create a rigid regime but rather open for a flexible assessment of specific circumstances, which however comes at the cost of legal certainty: Firstly, the “best effort” element for the first two criteria of the Article 17-exemption regime constitutes a key evaluate element, which is not further defined in the Directive (see, however, Article 17(10) DSM Directive). It is, for example, unclear whether such efforts are to be assessed from a subjective or an objective standard. Furthermore, it has been pointed out that the translations into the official languages vary significantly ranging from “greater efforts” in Spanish, to “best efforts” in English, “greatest efforts” in the Italian, to “all efforts” in the German official version.¹⁰⁶ This undoubtedly increases legal uncertainty and is to the detriment of a harmonized European regime in the 27 Member States. Secondly, according to Article 17(5) of the DSM Directive several elements shall be part of the assessment when determining whether an OCSSP complies with the obligations in order to benefit from liability exemption provided for in Article 17(4): a first group of elements relates to the specific OCSSP, namely its type, audience, size of the service and type of works or other subject matter uploaded by the users. A second group of elements relates to the broader and more general “availability of suitable and effective means and their cost for service providers.” Additionally, recital 66 –comprising of a staggering 858 words– supplements that “account should be taken of whether the service provider has taken all the steps that would be taken by a diligent operator to achieve the result of preventing the availability of unauthorized works (...) taking into account best industry practices and the effectiveness of the steps taken (...) as well as the principle of proportionality”. Thus, even if an online platform falls under the scope of Article 17, the specific circumstances both in relation to the platform itself and the broader industry standards as well as the proportionality of the “means”, will have to be taken into account. Importantly, given that there is no specific reference to Article 17(4) lit. a or lit. b exclusively, this “specific circumstances test” is also to be applied in relation to the notice-and-staydown mechanism contained in Article 17(4) lit. c. This could be, for example, of relevance for online discussion fora, startups or small or medium-sized OCSSPs, which cannot benefit from a softer liability exemption regime once they have been operating for more than three years.¹⁰⁷

F., “Notice and staydown’ and social media: amending Article 13 of the Proposed Directive on Copyright”, *International Review of Law, Computers & Technology* (2019), 33:2, pp. 194 f.

¹⁰⁶ Rosati, E., “DSM Directive Series #5: Does the DSM Directive mean the same thing in all language versions? The case of 'best efforts' in Article 17(4)(a)”, *The IP Kat*, 22 May 2019, <<http://ipkitten.blogspot.com/2019/05/dsm-directive-series-5-does-dsm.html>>

¹⁰⁷ Article 17(6) Directive 2019/790 (EU) provides for a softer graduate liability exemption regime, whereafter “new” OCSSPs only (1) need to prove best efforts to obtain a license and (2) act 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”. In other words, best efforts to license and a notice-and-takedown akin to the existing system in Article 14(2) of the E-Commerce Directive. When the “average number of monthly unique visitors of such service providers exceeds 5 million”, however, the OCSSP “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. In other words, such service needs to comply with Article 17(4) lit. a and lit c. In order to benefit from this system, however, such “new” service must have been available for less than three years and have an annual turnover below EUR 10 million. Thus, effectively only very new services will be able to benefit from this eased liability exemption regime even though the respective criteria have been described as covering micro and small sized enterprises (SMEs) during the legislative process. Germany, in its statement accompanying its vote in the Council, for example underlined that it aims to clarify that services like blogs and online fora as well as messenger services like WhatsApp fall out of the scope of Article 17. See Council of the European Union, Statement by Germany, (5 April 2019), point 6, p. 4.

The question still remains, however, whether this will lead to a situation that differs much from the current state of affairs: the relevant platforms (i.e. OCSSPs like Youtube) would only be able to rely on the hosting liability exemption in Article 14 of the E-Commerce Directive under certain requirements. Thus, already today if such OCSSP is not covered by a liability exemption, licensing is the only available –default– route to make copyright protected content available. The CJEU has looked at the criteria of passiveness in two rulings namely C-324/09 – *L’Oréal v eBay*¹⁰⁸ and joined cases C-236/08 to C-238/08 *Google Adwords*.¹⁰⁹ Based on this rationale it could, for example, be questioned whether an automated playlist or auto-play function qualify the respective service as “active”. The Commission’s originally proposed Article 13 from September 2016 did not directly address its relation to the E-Commerce Directive but contained a clarification in recital 38 para. 2 noting that “[i]n respect of Article 14, it is necessary to verify whether the service provider plays an active role, including by optimising the presentation of the uploaded works or subject-matter or promoting them, irrespective of the nature of the means used therefor.” This perspective is based on the CJEU’s jurisprudence in C-324/09 – *L’Oréal v eBay*¹¹⁰ but has been criticised in the literature for missing the specific circumstances and the general requirements of knowledge and control.¹¹¹ This is also one of the central aspects of two pending recent requests for preliminary rulings in C-682/18 – *Youtube* and C-500/19 – *Puls 4 TV* which will be explored in depth below. At least from this perspective, Article 17(1) of the DSM Directive seems to fit the CJEU’s logic. Still, for OCCPs it is turning things upside down by establishing *primary* liability, thereby drilling the first hole into the traditional approach of a secondary liability assessment coupled with an assessment of the liability exemptions of the E-Commerce Directive notably in the context of the passivity of the intermediary.

d) User rights, quo vadis?

From a users’ perspective, Articles 17(7) and 17(9) of the DSM Directive contain the central balancing of interests in the three-way relationship between rights holders, OCSPs and users, which were introduced during the legislative process.¹¹² Already in the public consultation on the Review of the EU Copyright Rules from 2014, end users and consumers were noted to favour a legislative intervention, e.g. “by making relevant existing exceptions (parody, quotation and incidental use and private copying are mentioned) mandatory across all Member States or by introducing a new exception to cover transformative uses.”¹¹³ Copyright authors,

¹⁰⁸ C-324/09 – *L’Oréal SA and Others v eBay International AG and Others* [2011], ECLI:EU:C:2011:474, paras. 113 ff.

¹⁰⁹ C-238/08 – *Google Adwords* [2010], ECLI:EU:C:2008:389, paras. 115 ff.

¹¹⁰ C-324/09 – *L’Oréal SA and Others v eBay International AG and Others* [2011], ECLI:EU:C:2011:474, paras. 113 ff.

¹¹¹ See Senftleben, M. et al., “The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet”, 2018, *European Intellectual Property Review* 40 (3), pp. 153–154.

¹¹² For a detailed analysis in light of the existing case law by the CJEU, see Schwemer, S.F. and Schovsbo, J. (2020), “What is Left of User Rights? – Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime”, in P. Torremans, *Intellectual Property Law and Human Rights* (4th edition), Wolters Kluwer, 2020 (forthcoming), available at SSRN: <<http://dx.doi.org/10.2139/ssrn.3507542>>

¹¹³ See European Commission, *Report on the responses to the Public Consultation on the Review of the EU Copyright Rules*, Directorate General Internal Market and Services Directorate D – Intellectual property D1 – Copyright, July 2014, p. 68. The responses also included calls for the introduction of a European fair use principle, which “would allow flexibility and be future-proof”. Intermediaries, distributors and other service providers

performers and their organisations, on the other hand, argued that “that [user-generated content] is flourishing in the EU and there is no evidence that legislative intervention in this area would be needed.”¹¹⁴

Firstly, Article 17(7) para. 1 of the DSM Directive stipulates that “[t]he 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.” Secondly, going even further, Article 17(7) para. 2 of the Directive harmonizes certain exceptions and limitations for the user-upload scenario of Article 17 namely (a) quotation, criticism, review and (b) use for the purpose of caricature, parody or pastiche. Additionally, and in the somewhat odd context of Article 17(9) on dispute resolution mechanisms, it is again stipulated *inter alia* that the Directive “shall in no way affect legitimate uses, such as uses under exceptions or limitations provided for in Union law (...)” and furthermore that OCSSPs need to “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.”¹¹⁵

In the logic of the European Commission, the risk of over-removal as consequence of fears by an OCSSP of being held liable was in the original proposal mitigated by not changing the liability exemption regime of the E-Commerce Directive.¹¹⁶ Given the significant change of this aspect during the legislative process, another means of mitigation has been necessary. This reflection on limitations and exceptions is to be understood as a significant theoretical strengthening of *user rights*.¹¹⁷ It explicitly prohibits platforms to take-down copyright-protected content that is covered by a limitation or exception. Or more precisely, it prohibits the “cooperation between online content-sharing service providers and rightholders” to lead to such result. This cooperation is not further specified in the Directive but appears to relate to the Article 17-mechanism as a whole.¹¹⁸ It is not apparent that the burden of this is just placed on OCSSPs. From the wording and context in the Article, it rather seems plausible that this obligation

joined the call of users pointing towards solutions “(...) like the introduction of limitations for certain types of re-use, or full new exceptions and the clarification of existing exceptions, like those on parody or criticism”, see *ibid.*, p. 71.

¹¹⁴ See *European Commission, Report on the responses to the Public Consultation on the Review of the EU Copyright Rules*, Directorate General Internal Market and Services Directorate D – Intellectual property, D1 – Copyright, July 2014, p. 69.

¹¹⁵ Generally, there exist only a few instances of secondary legislation addressing the content of terms of service in relation to copyright, but see e.g. recital 15 of Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market, [2017] OJ L 168 1–11.

¹¹⁶ European Commission, Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, Brussels, 14.9.2016 SWD(2016) 301 final, Part 1, p. 154.

¹¹⁷ See on this point in detail Schwemer, S.F. and Schovsbo, J., “What is Left of User Rights? – Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime” (December 20, 2019). Forthcoming in Paul Torremans (ed), *Intellectual Property Law and Human Rights*, 4th edition (Wolters Kluwer, 2020).

¹¹⁸ This reading is supported e.g. by recitals 66 and 70 of Directive (EU) 2019/790, which also comment on the collaboration between rights holders and OCSSPs, e.g. in recital 66: “The steps taken by online content-sharing service providers in cooperation with rightholders should not lead to the prevention of the availability of non-infringing content, including works or other protected subject matter the use of which is covered by a licensing agreement, or an exception or limitation to copyright and related rights.”

indeed is put both on OCSSPs *and* rights holders. In the relation between OCSSP and user, this could be interpreted as a “stay-up” obligation (and in its flipside a right-to-get-reinstated in cases of wrong takedown) that also trumps the respective terms of service (ToS), which for example might contain a clause reserving the OCSSP’s right to takedown content as it sees fit. One could also raise the question, whether this “stay-up” obligation is restricted to takedowns for copyright infringement or goes beyond copyright. Recital 66 of the DSM Directive notes that “[s]teps taken by such service providers should (...) not affect users who are using the online content-sharing services in order to lawfully upload and access information on such services.” A specific work might be taken down for several reasons. If, for example, a parody is covered by the respective exception and is otherwise not illegal but conflicts e.g. with the OCSSP’s community guidelines. Given the specific context within the DSM Directive, however, it is more convincing that this “stay-up” obligation refers only the copyright-aspect of the work in question. Also the effect of these *user rights* towards rights holders is not quite clear. If one takes e.g. a look at Article 17 (4) lit. c, it appears only logical “a sufficiently substantiated notice from the rightholders”, for example, must live up to the standard set out in Article 17(7) already for consistency reasons. In other words, a notice that wrongfully identifies a work as copyright infringement could not be qualified as “sufficiently substantiated”. Thus, the burden of assessing whether a specific work is covered by a limitation or exception is also on rights holders. Given that copyright notices are notoriously known for high false positive rates,¹¹⁹ i.e. situations where content is wrongly identified as infringing and removed, this is a right step to theoretically alleviate that problem in the specific Article 17 context. Yet, the Directive fails to provide guidance on legal remedies for failure to comply with Article 17(7) either on the OCSSP’s or the rights holder’s side. A different question is, of course, whether and how an OCSSP can *practically* comply with the duties set out in Article 17(4) lit. b vis-à-vis the duties set out in Article 17(7) and (9) against the backdrop of highly difficult and context-dependent assessments of whether a work is covered by an exception or limitation or not.¹²⁰

Maybe against this background, a second leg of user rights –already contained in a minor version in the Commission’s proposal¹²¹– relates to an “institutionalized system of checks and balances in form of procedural safeguards” in the form of procedural safeguard and redress mechanisms, which are foreseen at (1) the platform level, (2) the out-of-court level¹²² and (3) the judicial authority or court level.¹²³ Article 17(9) of the DSM Directive stipulates firstly that

¹¹⁹ See overview on empirical evidence on over-removal by Keller, D., “Empirical Evidence of ‘Over-Removal’ by Internet Companies under Intermediary Liability Laws”, The Center for Internet and Society, Stanford Law School (12 October 2015, last updated 14 September 2018), <<http://cyberlaw.stanford.edu/blog/2015/10/empirical-evidence-over-removal-internet-companies-under-intermediary-liability-laws>> and The Lumen database at <<https://lumendatabase.org>>

¹²⁰ Whereas the Directive harmonises certain specific limitations and exceptions, there may exist additional differences in national regimes which further complicate that assessment (e.g. freedom of panorama provided for in Germany Austria but not in France, Italy or Sweden).

¹²¹ See Article 13(2) of the Proposal for Directive on Copyright in the Digital Single Market.

¹²² “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.”

¹²³ Schwemer, S.F. and Schovsbo, J., “What is Left of User Rights? – Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime” (December 20, 2019). Forthcoming in Paul Torremans (ed), *Intellectual Property Law and Human Rights*, 4th edition (Wolters Kluwer, 2020).

an OCSSP needs to “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.”¹²⁴ The idea of an counter-notice¹²⁵ is not contained in the current liability exemption regime of the E-Commerce Directive and has been described as “attempt is to be welcomed (...) strengthening the enforcement of user rights vis- à-vis content moderation practices by large online platforms.”¹²⁶ In this connection, Article 17(9) para. 2 of the DSM Directive further defines that complaints firstly have to be processed “without undue delay”¹²⁷ and secondly that “decisions to disable access to or remove uploaded content shall be subject to *human review*”.¹²⁸ This latter point is of special interest for the interpretation of Article 17, because it implies that indeed “everything leading up to a dispute can be processed by the platform in an automated fashion by algorithms”.¹²⁹ A similar reference to such *human* review or intervention has also been suggested by the Commission in relation to proactive measures in Commission Recommendation (EU) 2018/334 on measures to effectively tackle illegal content online¹³⁰ and introduced in the context of automated individual decision-making in Article 22(3) of the GDPR.¹³¹ Furthermore, in connection to the Directive also puts a duty on rightsholders to “duly justify the reasons for their requests”.¹³² One the one hand, this mitigates the risk of wrongful or abusive notices, but it has been pointed out that “[t]he underlying legal assessment [by the OCSSP] (...) is likely to be cautious and defensive”.¹³³ Conceptually it appears that not only the copyright-internalized system of checks and balances with limitations and exceptions but also the “somewhat externalised system of procedural safeguards” are seen as means of mitigating negative impact on fundamental rights.¹³⁴

¹²⁴ Emphasis added.

¹²⁵ It is addressed in e.g. recitals 20–21 of Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online, C/2018/1177, *OJ L 63, 6.3.2018, p. 50–61*.

¹²⁶ Schwemer, S.F. and Schovsbo, J., “What is Left of User Rights? – Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime” (December 20, 2019). Forthcoming in Paul Torremans (ed), *Intellectual Property Law and Human Rights*, 4th edition (Wolters Kluwer, 2020), p. 14. The E-Commerce Directive relies to an extensive extent on codes of conduct, see Article 16(1) lit. a Directive 2000/31/EC.

¹²⁷ The elastic timeframe has been criticised e.g. by Senftleben, M., “Bermuda Triangle – Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market”, (April 4, 2019), <<https://ssrn.com/abstract=3367219>>, p. 9.

¹²⁸ Emphasis added.

¹²⁹ Schwemer, S.F. and Schovsbo, J., “What is Left of User Rights? – Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime” (December 20, 2019). Forthcoming in Paul Torremans (ed), *Intellectual Property Law and Human Rights*, 4th edition (Wolters Kluwer, 2020), p. 12.

¹³⁰ Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online, 6.3.2018, [2018] L 63/50, points 20 and 27.

¹³¹ Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) OJ L 119/1–88.

¹³² Article 17(9) para. 2 Directive (EU) 2019/790. See also above.

¹³³ Senftleben, M., “Bermuda Triangle – Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market”, (April 4, 2019), p. 9.

¹³⁴ Schwemer, S.F. and Schovsbo, J., “What is Left of User Rights? – Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime” (December 20, 2019). Forthcoming in Paul Torremans (ed), *Intellectual Property Law and Human Rights*, 4th edition (Wolters Kluwer, 2020), p. 14, pointing towards further evidence from the 2016 impact assessment and Germany’s statement in the Council.

e) So long, and thanks for all the fish

The initial proposal by the Commission attracted widespread criticism.¹³⁵ In some Member States, large demonstrations against the proposed Article 13 attracted thousands of citizens. The co-founder of the popular Danish wine-scanning app Vivino, which gives users the possibility to upload pictures wine labels as well as wine reviews, for example, critically commented during the legislative process that “[c]ontent filters for user uploads are a bad idea, we have 600 million user uploads. We need the current liability regime of the E-Commerce Directive.”¹³⁶ Interestingly, the Danish Parliament, for example, did have concerns with the Commission’s proposed Article 13-regime.¹³⁷ In March 2019, when the legal text of Article 17 looked much like it does now, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, for example, noted that the provision “appears destined to drive internet platforms toward monitoring and restriction of user-generated content even at the point of upload. Such sweeping pressure for pre-publication filtering is neither a necessary nor proportionate response to copyright infringement online.”¹³⁸

Much of the harsh critique on the proposed solution is justified. From a legal perspective, the Commission’s proposed Article 13 was more than difficult to reconcile with the CJEU’s interpretation of the prohibition of general monitoring in Article 15 of the E-Commerce Directive in, for example, *SABAM v Netlog*. The Impact Assessment accompanying the Proposal for the Directive from September 2016, for example, provides detailed information on and examples of content identification technologies.¹³⁹ Still, the Legal Service of the Council held that the proposed text would not “necessarily” prescribe filtering systems given that content recognition technologies were only used as example (“such as”).¹⁴⁰ Given the substantive changes in the

¹³⁵ See e.g. High level joint letter, Brussels September 9th 2016 signed by i.a. Allied for Startups, EDiMA, CCIA, EF,; cdt, Wikimedia and others; petition signed by more than 5 million citizens <<https://www.change.org/p/european-parliament-stop-the-censorship-machinery-save-the-internet>>; academic critique e.g. Stalla-Bourdillon, S., et.al., “Open Letter to the European Commission - On the Importance of Preserving the Consistency and Integrity of the EU Acquis Relating to Content Monitoring within the Information Society” (September 30, 2016), <<https://ssrn.com/abstract=2850483>>; Senftleben M., et al., “The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform”, 40 E.I.P.R. 3 (2018), pp. 149–163; Angelopoulos, C., “On Online Platforms and the Commission's New Proposal for a Directive on Copyright in the Digital Single Market”, (January 2017), <<https://ssrn.com/abstract=2947800>>; Quintais, J., et al., “Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations From European Academics”, (November 11, 2019), <<https://ssrn.com/abstract=3484968>>.

¹³⁶ See tweet by Allied4Startups, 24 April 2018, <<https://twitter.com/Allied4Startups/status/989396601989947393?s=20>>

¹³⁷ See Erik Christensen and Orla Hav, *Political opinion on Commission proposal for reform of EU copyright rules addressed to Vice President and Commissioner for Digital Single Market Adrus Ansip*, 11 May 2017, noting “The Committees find that the proposal for Article 13 and accompanying Recital 38 constitute a balanced solution with a view to ensuring that competition in the internal market is not distorted.”

¹³⁸ UNHR, “EU must align copyright reform with international human rights standards, says expert” (11 March 2019), <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24298&LangID=E>>

¹³⁹ Commission Staff Working Document, *Impact Assessment on the modernisation of EU copyright rules Accompanying the document Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market and Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes*, , Brussels, 14.9.2016 SWD(2016) 301 final PART 3/3.

¹⁴⁰ Council of the European Union, *Contribution of the Legal Service to Working Party on Intellectual Property*, Brussels 11 October 2017, 13140/17 LIMITE.

law making process, Article 17 of the DSM Directive indeed does not put an *ex lege* obligation on affected OCSSPs to rely on content recognition technologies¹⁴¹, but “given the practical infeasibility of handling the large number of user uploads, the difficulty to identify previously blocked content without technical means, and the reference to ‘high industry standards’, the use of such algorithmic solutions is likely, akin to a *de facto* imposition.”¹⁴² Germany, in its Statement accompanying its Council vote, for example, noted that it assumes that the stakeholder dialogue on Article 17 “is based on a spirit (...) of preventing ‘upload filters’ wherever possible”.¹⁴³ Politicians have acknowledged that “upload filters” might not be avoidable¹⁴⁴ and first national proposals for implementation appear to promote filtering technologies.¹⁴⁵ Also in the academic literature it is commented that for compliance with Article 17, OCSSPs “will be required to implement filtering tools in order to avoid the DSM’s direct liability regime.”¹⁴⁶ A German report from December 2019, for example, comes to the conclusion that the duty to license leads to a proactive control of all content on a platform and is in contradiction with the jurisprudence of the CJEU in relation to the prohibition of general monitoring.¹⁴⁷ Perplexingly, some rights holders were enraged when the new liability exemption regime of Article 17(4) Directive (EU) 2019/790 was introduced in the legislative process noting that it would constitute a setback compared to the liability concepts developed by German courts and the CJEU, completely refusing Article 17 as a result.¹⁴⁸

The reasons for this criticism can roughly be put into two groups: firstly, practical concerns that compliance with Article 17 *de facto* requires the introduction of automation or algorithmic solutions, which can be undesirable for a variety of reasons. The question of whether automation or algorithms can perform the intricate legal analysis within copyright when assessing limitations and exceptions or fair use is contested¹⁴⁹, but some scholars argue that it is the only

¹⁴¹ MEP Axel Voss, rapporteur on the file for the European Parliament, e.g. tweeted in August 2018 that “The new proposal for #copyrightdirective does not foresee any measures/”upload filters”... Now I expect everyone who was against the previous proposal because of this to support the new proposal.”, <<https://twitter.com/AxelVoss-MdEP/status/1035553180141203457>>

¹⁴² Schwemer, S.F. and Schovsbo, J., “What is Left of User Rights? – Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime” (December 20, 2019). Forthcoming in Paul Torremans (ed), *Intellectual Property Law and Human Rights*, 4th edition (Wolters Kluwer, 2020), p. 5.

¹⁴³ Council of the European Union, Statement by Germany, (5 April 2019), point 4, p. 3.

¹⁴⁴ Masnick, M., “EU Commissioner Gunther Oettinger Admits: Sites Need Filters To Comply With Article 13”, Techdirt, 3 April 2019, <<https://www.techdirt.com/articles/20190329/15501341902/eu-commissioner-gunther-oettinger-admits-sites-need-filters-to-comply-with-article-13.shtml>>

¹⁴⁵ See Masnick, M., “After Insisting That EU Copyright Directive Didn’t Require Filters, France Immediately Starts Promoting Filters”, Techdirt, 28 May 2019, <<https://www.techdirt.com/articles/20190327/17141241885/after-insisting-that-eu-copyright-directive-didnt-require-filters-france-immediately-starts-promoting-filters.shtml>>

¹⁴⁶ Spoerri, T. (2019), “On Upload-Filters and other Competitive Advantages for Big Tech Companies under Article 17 of the Directive on Copyright in the Digital Single Market”, 10 (2019) JIPITEC 173, p. 1.

¹⁴⁷ Spindler, G. (2019), *Gutachten zur Urheberrechtsrichtlinie (DSM-RL), Europarechtliche Vereinbarkeit (Artikel 17), Vorschläge zur nationalen Umsetzung und zur Stärkung der Urheberinnen und Urheber*, commissioned by Fraktion BÜNDNIS90/DIE GRÜNEN im deutschen Bundestag (14 December 2019).

¹⁴⁸ See non-paper by Bertelsmann, available at <<https://juliareda.eu/wp-content/uploads/2019/02/Bertelsmann-EU-Urheberrecht-Positionspapier.pdf>>

¹⁴⁹ See e.g. already Burk D. and Cohen, J. (2000), “Fair Use Infrastructure for Copyright Management Systems” (2000) Georgetown Public Law Research Paper 239731/2000, <<https://ssrn.com/abstract=239731>>

practical approach in light of the scale of enforcement.¹⁵⁰ Already in the public consultation from 2014, for example, intermediaries pointed to the “inherent limits on distinguishing between uses falling under an applicable exception and uses that are potentially infringing, which can lead to the take-down of legitimate content or to undue remuneration”.¹⁵¹ Also the Impact Assessment by the Commission acknowledges the risk for false-positives, especially in the context of transformative uses.¹⁵² Many have also raised concerns that Article 17 further manifests the regulatory power of large gatekeeper platforms in the age of “surveillance capitalism”.¹⁵³ Secondly, the related legal concerns regarding the compatibility of Article 17 with notably Article 15 of the E-Commerce Directive as well as fundamental rights.¹⁵⁴ In any case, however, –whether requiring automation or algorithmic solutions or not– Article 17 of the DSM Directive constitutes a substantial shift in copyright enforcement and the broader internet law principles from *reactive* to *proactive*.

Already on 24 May 2019, the Republic of Poland brought as privileged actor a direct action according to Article 263 TFEU to annul Article 17(4) lit. b and Article 17(4) lit. c *in fine* relating to the stay-down obligation.¹⁵⁵ Direct actions, according to Article 263(2) TFEU, can be brought on four grounds, namely lack of competence, infringement of procedure, infringement of Treaties or any rule of law, or misuse of powers. The essence of the case has been described as “that the transposition of those provisions by the Member States will result in a disproportionate limitation of the right to freedom of expression and information guaranteed by Article 11 of the Charter of Fundamental Rights of the European Union.”¹⁵⁶ Poland argues in this context that “the obligations on the [OCCSPs] foreseen in the contested provisions will necessarily have as a result the *introduction of preventive control mechanisms* which, in the

¹⁵⁰ See e.g. Elkin-Koren, E., “Fair Use by Design” (2017) 64 UCLA L Rev 22 (2017), 68; Martin Husovec, M., “The Promises of Algorithmic Copyright Enforcement: Takedown or Staydown? Which is Superior? And Why?” (2019) Columbia J of Law & the Arts (forthcoming).

¹⁵¹ See European Commission, *Report on the responses to the Public Consultation on the Review of the EU Copyright Rules*, Directorate General Internal Market and Services Directorate D – Intellectual property D1 – Copyright, July 2014, p. 71.

¹⁵² European Commission, Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, Brussels, 14.9.2016 SWD(2016) 301 final, Part 1, p. 140–141.

¹⁵³ Coined by Zuboff, S. (2019), *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*. PublicAffairs.

¹⁵⁴ There is also an important intersection to data protection, which however, is not explored in detail in this article, see e.g. Art. 17(9) para. 2 Directive (EU) 2019/790 “(...) 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.” Already in C-360/10 – *Sabam v Netlog*, the CJEU found that filtering systems can interfere with the users’ right to personal data protection. The Council’s Legal Service in this connection notes that in the Directive there is “no requirement whatsoever to check other data related to the uploaded content, such as the identity or IP address of individual ‘uploaders’ or the date, time or location of their upload”, see Council of the European Union, *Contribution of the Legal Service to Working Party on Intellectual Property*, Brussels 11 October 2017, 13140/17 LIMITE, para. 20, p. 14. Recently, Glawischnig-Piesczek, the CJEU has in C-18/18 – *Glawischnig-Piesczek v Facebook*¹⁵⁴ taken its stance on some related issues regarding the blocking of *identical* future and *similar* infringements, see also below.

¹⁵⁵ Case C-401/19, *Republic of Poland v European Parliament and Council of the European Union* (2019/C 270/24), OJ C 270/22; “Article 17(4)(b) and Article 17(4)(c), *in fine* (i.e. the part containing the following wording: ‘and made best efforts to prevent their future uploads in accordance with point (b)’)”

¹⁵⁶ Council of the European Union, Information note, From: Legal Service, To: Permanent Representatives Committee (Part 1), Subject: Case brought before the Court of Justice - Case C-401/19 (Republic of Poland v European Parliament and Council of the European Union), Brussels, 30 July 2019 (OR. en) 11541/19, Interinstitutional File: 2016/0280 (COD), point 2.

view of the applicant, undermine the essence of the right to freedom of expression and information and which do not comply with the requirement that limitations imposed on that right be proportionate.¹⁵⁷ Interestingly, Poland did not invoke the freedom to conduct business in Article 16 of the Charter but focused on user rights exclusively. Generally, direct actions are brought relatively rarely by a Member State and the reliance on Charter-grounds in this proceeding is especially noteworthy. On a procedural note, it seems that none of the Member States that abstained or voted against the Directive in the Council have intervened on behalf of Poland, whereas France and Spain are intervening on the defendant’s side. The deadline for presenting the Council’s defence was 6 August 2019. At the time of this writing AG Campos Sánchez-Bordona has yet to issue his opinion in the case.

Article 15 of the E-Commerce Directive prohibits *Member States* from mandating general monitoring obligations. Given the historical background of the DSM Directive as well as the uncertainty as to how to achieve the goals set out in Article 17(4) lit. b, it seems that proactive technological measures, i.e. content recognition algorithms are the implicit means that the legislator had in mind. Article 17(8) para. 1 of the DSM Directive notes in a, at first glance, rather declaratory fashion that “[t]he application of this Article shall not lead to any general monitoring obligation.”¹⁵⁸ At a closer look, however, the implications of Article 17(8) are much more grave: not only does it prohibit *Member States* to mandate general monitoring obligations, it clearly focuses on the “application” of Article 17 of the DSM Directive. In other words, OCSSPs themselves are restricted from applying measures that constitute a general monitoring obligation. As seen above, online platforms have in some instances voluntarily employed monitoring mechanisms, which is not prohibited by Article 15 of the E-Commerce Directive.¹⁵⁹ Article 17(4) lit. b refers as noted above explicitly to “high industry standards of professional diligence”. Given that some of the large OCSSPs already had content recognition technologies in place for more than a decade, it is difficult to reconcile these two perspectives. It clearly runs counter to the lawmaker’s idea that these pre-existing models, like e.g. YouTube’s ContentID¹⁶⁰, should be rendered unlawful with the Directive. Then, however, the logical result is

¹⁵⁷ *Ibid.* Emphasis added.

¹⁵⁸ Interestingly without reference to Article 15 E-Commerce Directive, compared to Article 17(3) explicit reference to Article 14 E-Commerce Directive.

¹⁵⁹ Related to this is the question, whether intermediaries when voluntarily engaging in such behaviour –sometimes referred to as “good Samaritan” action– and thus having gained “actual knowledge of illegal activity or information” lose their liability exemption, if firstly not acting expeditiously according to Article 14(1) lit. b E-Commerce Directive and secondly are not considered passive. Recommendation (EU) 2018/334 stipulates in recital 26, for example, reiterates that “in its Communication of 28 September 2017 on tackling illegal content online, the Commission has set out its view that taking such voluntary proactive measures does not automatically lead to the hosting service provider concerned losing the benefit of the liability exemption provided for in Article 14 of Directive 2000/31/EC.”. In a similar vein, also the Commission’s Proposal for a Regulation on preventing the dissemination of terrorist content online, Brussels, 12 September 2018, COM(2018) 640 final, stipulates in recital 5 that proactive measures “should not in themselves lead to that service provider losing the benefit of the liability exemption provided for in that provision”. In the literature, it has been debated whether implementation of voluntary measures gradually influence the standard of liability by erosion, for example when the de facto practice of such measures changes the diligent economic operator concept, see Riis, T., & Schwemer, S. F. (2018). “Leaving the European Safe Harbor, Sailing towards Algorithmic Content Regulation”. Forthcoming in *Journal of Internet Law*, 2019-64, available at SSRN <http://dx.doi.org/10.2139/ssrn.3300159>, p. 11–13.

¹⁶⁰ ContentID relies on digital fingerprinting technology (hashes) to match file uploaded by a user against a database of protected works based on rights holders’ information; see YouTube, *How Content ID Works*, available at: <https://support.google.com/youtube/answer/2797370?hl=en>. See also Annex 12 in European Commission,

that such content recognition technologies in the lawmaker’s perspective, in fact, do not constitute general monitoring. One opening for such a reading could be to rely on the fact Article 17(4) lit. b is restricted to specific works “for which the rightholders have provided the service providers with the relevant and necessary information”. From a conceptual point, such reading overlooks whether it is even technically feasible to perform such check on specific identified works without checking all works that are being uploaded.

On the relationship of the provisions of the DSM Directive to Articles 14 and 15 of the E-Commerce Directive, the Council’s Legal Service noted that there is no hierarchy between secondary legislative acts and is governed “in accordance with the principles of ‘*lex specialis derogat legi generali*’ and ‘*lex posterior derogat legi priori*’”.¹⁶¹ Based on this logic, it deemed the introduction of the measures foreseen in the Article 13 of the Commission’s proposal as “not legally problematic”, and that they could be considered as “a *lex specialis* or as a ‘*monitoring obligation in a specific case*’ and ‘*duty of care*’ for the [OCSSP] concerned”.¹⁶² The Council’s Legal Service seems, however, to avoid the point that also the *lex posterior* or *lex specialis* needs to strike a fair balance between competing fundamental rights. Thus, implicitly this view seems to assume that Article 15 of the E-Commerce Directive, if prohibiting such measures as anticipated by the Directive, fails to strike that balance in the first place and comes with a bias of valuing users’ fundamental rights higher than rights holders’ fundamental rights. In the final Directive, the legislator avoided taking a stance on this conceptual question by clarifying in Article 17(8) par. 1 that “[t]he application of this Article shall not lead to any *general* monitoring obligation”.¹⁶³ This statement must be understood as more than the mere lip service to critics of the Directive. Since *C-70/10 – Scarlet Extended*¹⁶⁴ and *C-360/10 Netlog*¹⁶⁵, we know in the context of injunctions that filtering *all information* of *all users* constitutes a general monitoring obligation and the respective filtering systems do not strike a fair balance¹⁶⁶ between the competing fundamental rights. In relation to the freedom to conduct business by OCSSPs, it has been argued by the Legal Service of the Council, however, that the provision in question is compatible with the CJEU’s findings in *Scarlet Extended* and *Netlog*, because the OCSSP would not have to determine itself whether the content is copyright infringing or not¹⁶⁷ given that the obligation is restricted to works identified by rightsholders.¹⁶⁸ Furthermore, it was noted that Member States will have to make sure that affected OCSSPs can choose the measure¹⁶⁹ and to ensure that that choice is “appropriate and proportionate”

Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, Brussels, 14.9.2016 SWD (2016) 301 final, PART 3/3, pp. 164–174.

¹⁶¹ Council of the European Union, *Contribution of the Legal Service to Working Party on Intellectual Property*, Brussels 11 October 2017, 13140/17 LIMITE, para. 23, p. 16.

¹⁶² Council of the European Union, *Contribution of the Legal Service to Working Party on Intellectual Property*, Brussels 11 October 2017, 13140/17 LIMITE, para. 30, p. 20.

¹⁶³ Emphasis added.

¹⁶⁴ *C-70/10 – Sabam v Scarlet Extended* [2011], ECLI:EU:C:2011:771.

¹⁶⁵ *C-360/10 – Sabam v Netlog* [2012] ECLI:EU:C:2012:85

¹⁶⁶ On the fair balance requirement between different fundamental rights, see *C-275/06 – Promusicae* [2008], ECLI:EU:C:2008:54, paras. 68 and 70, and *C-484/14 – McFadden* [2016], ECLI:EU:C:2016:689, para. 83

¹⁶⁷ See *C-360/10 – Sabam v Netlog* [2012], EU:ECLI:C:2012:85, para. 46.

¹⁶⁸ Council of the European Union, *Contribution of the Legal Service to Working Party on Intellectual Property*, Brussels 11 October 2017, 13140/17 LIMITE, para. 12, p. 10.

¹⁶⁹ Also with reference to *C-314/12 – Telekabel Wien* [2014], EU:ECLI:C:2014:192, paras. 50–52 for “elements such as ‘the resources and abilities available’ to them, the specificities and the needs of their service, as well as their size.”

(notably not a criterion in Article 17 DSM Directive any longer).¹⁷⁰ *L’Oréal v eBay* opened for identical future content of identical future infringement. Recently, the CJEU has in C-18/18 – *Glawischnig-Piesczek v Facebook*¹⁷¹ taken its stance on some related issues regarding the blocking of *identical* future and *similar* infringements. Importantly, the Court notes that this refers only to *similar* infringements that do not “require the host provider to carry out an independent assessment of the content”.¹⁷²

On the freedom of expression and information of *users* and the risk of false-positives by imprecise filtering systems, already the Impact Assessment commented on the negative effect “in cases where the services limit user uploaded content in an unjustified manner (...) or when the technologies fail to identify the content correctly”¹⁷³ and suggests that “[t]his negative impact should be mitigated by the fact that the services would be obliged to put in place the necessary procedural safeguards for users” which are optimistically argued to “in the majority of cases already exist in the related context of notice and take down requests.”¹⁷⁴ Also the Legal Service of the Council concurred that “in case the envisaged measures fail to identify precisely the protected content which is uploaded, the freedom of expression or information of users that benefit either from an exception or a limitation to copyright protection (...), or from the fact that a work has fallen in the public domain, will be affected in an unjustified manner”.¹⁷⁵ The interesting aspect, however, is how the Legal Service argues that the conflict between the fundamental right to intellectual property by rightsholders enshrined in Article 17(2) of the Charter, on the one side, and the right of freedom of expression and information of users in Article 11 of the Charter, on the other side, can be addressed: complaint and redress mechanisms.¹⁷⁶ Unfortunately, the Legal Service refrains from further elaborating on this balancing exercise and just notes that *complaint and redress mechanisms* are the appropriate means given that –according to the Commission’s Impact Assessment– “the current practice, where right holders ask to take down each individual uploaded protected content ‘*which can be infringed thousands of times*’ (...) ‘*leads to significant costs for them and appears insufficient given the large scale of uploads*’”.¹⁷⁷ In other words, the alleged costs for takedowns –which against the background of existing automated systems like ContentID in lack of empirical evidence does not seem entirely convincing– alone are sufficient to accept the infringement of users’ rights like limitations and exceptions (in themselves the result of a balancing between competing fundamental rights) and reduced to a complaint and redress mechanism. Even more worrying, the Impact Assessment notes that the solution “would not lead to significant increases in unjustified cases of prevented uploads compared to the current situation”.¹⁷⁸ With the notable difference, one might add, that this reduction of limitations and exceptions (as part of

¹⁷⁰ Council of the European Union, *Contribution of the Legal Service to Working Party on Intellectual Property*, Brussels 11 October 2017, 13140/17 LIMITE, para. 12, p. 11.

¹⁷¹ C-18/18 – *Eva Glawischnig-Piesczek v Facebook Ireland Limited* [2019], ECLI:EU:C:2019:821.

¹⁷² *Ibid.*, para. 46 *in fine*.

¹⁷³ See European Commission, Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, Brussels, 14.9.2016 SWD(2016) 301 final, Part 1, p. 153–154.

¹⁷⁴ See *ibid.*, p. 154.

¹⁷⁵ Council of the European Union, *Contribution of the Legal Service to Working Party on Intellectual Property*, Brussels 11 October 2017, 13140/17 LIMITE, para. 15, p. 13.

¹⁷⁶ *Ibid.*, para. 16–17, p. 13.

¹⁷⁷ *Ibid.*, para. 17, p. 13.

¹⁷⁸ See European Commission, Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, Brussels, 14.9.2016 SWD(2016) 301 final, Part 1, p. 54.

substantive copyright law) to procedural redress mechanisms is mandated by secondary legislation in the context of Article 17 of the DSM Directive. If we switch to a consumer protection angle, for one second, it is surprising that the lawmaker has not identified the existing practice with its inherent risk of false positives as an issue in the first place. Instead it throws the towel in the ring.

5. CHANGE OF PERSPECTIVES: A QUICK LOOK BEYOND COPYRIGHT CONTENT

The European lawmaker has, as seen above, created a sector-specific carve-out from the established intermediary liability exemption rules in the E-Commerce Directive. Article 17 of the DSM Directive fits in some broader recent policy and legislative developments related a shift towards proactive measures.

In September 2017, one year after the proposal for the DSM Directive, the Commission published its Communication “Tackling Illegal Content Online. Towards an enhanced responsibility of online platforms”¹⁷⁹ announcing “a set of guidelines and principles for online platforms to step up the fight against illegal content online in cooperation with national authorities, Member States and other relevant stakeholders” aiming at the implementation of “good practices for preventing, detecting, removing and disabling access to illegal content so as to ensure the effective removal of illegal content, increased transparency and the protection of fundamental rights online”.¹⁸⁰ In connection to copyright, it notes that the EU “has already responded to the challenge of illegal content online”.¹⁸¹ One central trajectory in the vein of the DSM Directive relates to online platforms that “in light of their central role and capabilities and their associated responsibilities, [should] adopt effective *proactive measures* to detect and remove illegal content online and not only limit themselves to reacting to notices which they receive.”¹⁸² As a direct follow-up on the Communication, already on 1 March 2018, the Commission issued its non-binding Recommendation (EU) 2018/334 on measures to effectively tackle illegal content online.¹⁸³ In chapter 2, point 18, for example, it encourages hosting service providers (i.e. ISSPs falling under Article 14 of the E-Commerce Directive) to “to take, where appropriate, proportionate and specific *proactive measures* in respect of illegal content”.¹⁸⁴ Notably, points 19 and 20 stipulate a variety of safeguards such a diligent and proportionate approach in relation to notices and counter-notices as well as accurate and well-founded decisions including human oversight. Proactive measure in relation to terrorist content, addressed in chapter 3 of Recommendation (EU) 2018/334 are subject to fewer safeguards; in other words, the Commission has fewer concerns that call for safeguards in relation to terrorist content compared to other illegal content.

¹⁷⁹ European Commission, Communication, Tackling Illegal Content Online, Towards an enhanced responsibility of online platforms, Brussels, 28.9.2017 COM(2017) 555 final.

¹⁸⁰ *Ibid.*, p. 3.

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*, p. 10, emphasis added. The adjective “proactive” is mentioned an impressive 16 times in the Communication.

¹⁸³ Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online, C/2018/1177, *OJ L 63, 6.3.2018, p. 50–61*.

¹⁸⁴ Emphasis added.

In his State of the Union speech former President of the European Commission, Jean-Claude Juncker, noted positive results but deemed overall progress not sufficient. Only a few months after the Recommendation and two years after the proposal for the DSM Directive, on 12 September 2018 the Commission presented its proposal for a Regulation on preventing the dissemination of terrorist content online.¹⁸⁵ It proposes a duty of care for hosting service providers (Article 3) and proactive measures in Article 6, which “shall be effective and proportionate, taking into account the risk and level of exposure to terrorist content, the fundamental rights of the users, and the fundamental importance of the freedom of expression and information in an open and democratic society.” Additionally Article 6(2) of the proposal puts these proactive measures in the context of automated tools and notes specifically the prevention of re-uploads, i.e. stay-downs, as well as the detection, identification and expeditious removal of terrorist content. Additionally, Article 8 of the proposal stipulates transparency obligations e.g. requiring “a meaningful explanation of the functioning of proactive measures including the use of automated tools” in the hosting providers terms of service. The proposal is fiercely debated in the European institutions and has been criticized by many stakeholders but it is in the context of Article 17 of the DSM Directive primarily noteworthy that concerns related to freedom of expression and information seem to be of higher importance in the enforcement of terrorist content than in relation to copyright protected works.¹⁸⁶ In Article 17 there exists, for example, no transparency requirement regarding “best practices” and stay-down mechanisms. Furthermore, “best efforts” according to Article 17(4) lit. b of the Directive are not to the same degree of facultative character (subject to a proportionality assessment), but obligatory as soon as an OCSSP falls under the scope of the Article 17-regime. Against the background of the grave harm for society by terrorist content vis-à-vis the commercial harm by copyright-infringing content, which can be dealt with by the courts via damages, this seems skewed and makes for a conceptually inconsistent Internet content regulation framework in the future. This is, unless the various flexibilities in the Article 17-regime are interpreted and implemented broadly in national law.

Following the specific sector- or content-related initiatives, the current Commission announced its plans to take a look at the horizontal rules of the E-Commerce Directive in a REFIT and propose a Digital Services Act by the end of 2020.¹⁸⁷ A leaked concept note from June 2019 by DG Connect points towards a broad variety of areas that could be touched upon in such a legislative proposal.¹⁸⁸ Specifically in the context of the intermediary liability exemption regime, it has pointed towards replacing the active/passive hosts concept with “more appropriate concepts reflecting the technical reality of today's services, building rather on notions such as editorial functions, actual knowledge and the degree of control.”¹⁸⁹ In relation to the prohibition of general monitoring and automated filtering, it notes that the “prohibition of general monitoring obligations should be maintained as another foundational cornerstone of Internet

¹⁸⁵ Proposal for a Regulation on preventing the dissemination of terrorist content online, Brussels, 12.9.2018 COM(2018) 640 final.

¹⁸⁶ As noted in Riis, T., & Schwemer, S. F. (2018). “Leaving the European Safe Harbor, Sailing towards Algorithmic Content Regulation”, forthcoming in *Journal of Internet Law*, 2019-64.

¹⁸⁷ See European Commission, *Commission Work Programme 2020. A Union that strives for more*, Brussels, 29.1.2020 COM(2020) 37 final, p. 4.

¹⁸⁸ *Digital Services Act note*, DG Connect, June 2019, made available by Netzpolitik at <<https://cdn.netzpolitik.org/wp-upload/2019/07/Digital-Services-Act-note-DG-Connect-June-2019.pdf>>

¹⁸⁹ *Ibid.*, p. 5.

regulation, specific provisions governing algorithms for automated filtering technologies - where these are used- should be considered, to provide the necessary transparency and accountability of automated content moderation systems.”¹⁹⁰

6. CONCLUDING REMARKS

The DSM Directive is an important upgrade to the EU copyright legislation. From a conceptual perspective it is disastrous though that necessary debates on the update of *substantive* copyright rules have been completely overshadowed by Article 17.¹⁹¹ There has been intense lobbying by rightsholders, on the one side, and much critique from technology startups, civil society and other stakeholders, on the other side. Scholars have been attacked for their research on the topic and critique of the proposed solution. In an extremely polarised environment, the European Parliament and the Council rushed the Directive in a first reading before the European election, potentially to the detriment of a more coherent solution to the –real– problem regarding the influence of large online platforms and well-intended goal to ensure fair remuneration of copyright holders by large platforms. After this legislative drama, it would be ironic if the CJEU finds that the existing regime would have already provided a satisfactory balance in the pending cases C-682/18 – *Youtube* and C-500/19 – *Puls 4 TV*.¹⁹² Then there might in fact not have been a necessity for this legislative intervention on the issue in the first place and legislative intervention could have focussed on finetuning e.g. the efficiency of the notice-and-action system or transparency requirements on OCSSPs. It also remains to be seen, whether the legislative solution even solves the core problem of (music) rights holders, which has –given existing models like YouTube’s ContentID– not been related to the identification and automated takedown of content but the dissatisfaction with the results of existing licensing deals, i.e. negotiation power.

As seen, it is not only the DSM Directive that heralds the arrival of EU internet law 2.0 with a new reality of platform regulation. The role of intermediaries has evolved substantially through self-regulation, jurisprudence, and new sector-specific regulation like the DSM Directive or the proposed terrorist content Regulation. Proactive measures constitute a significant change of the traditional world view spearheaded –once more– by copyright law. The traditional E-Commerce regime seems to be eroding and it is high time to revisit the fundamentals of EU internet law and adapt it to the new landscape. For the sake of a consistent and robust legal framework, we can only hope that the legislator in this endeavor will keep a cooler head than with the DSM Directive and work towards solutions that strike the right balance for many decades of the Digital Single Market to come.¹⁹³

¹⁹⁰ *Ibid.*

¹⁹¹ In fact, many of the visions of the Communication from 2015 have not even been addressed.

¹⁹² Actually, the Commission noted in its Impact Assessment predating the references for preliminary rulings that “whereas it is possible that the CJEU will bring clarity to the question of whether an uploaded content service is responsible for acts of communication to the public and/or can benefit from the hosting provider status under the ECD, this cannot be predicted as it is entirely dependent on referrals by national courts.”, see European Commission, Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, Brussels, 14.9.2016 SWD(2016) 301 final, Part 1, p. 144.

¹⁹³ Even though the Commission has yet to launch a consultation on the E-Commerce Directive and potentially a proposal for the Digital Services Act is only anticipated for the end of 2020, stakeholders have already positioned

Recital 3 of the DSM Directive recalls that “[r]elevant legislation needs to be future-proof so as not to restrict technological development” and that “legal uncertainty remains, for both rightholders and users, as regards certain uses, including cross-border uses, of works and other subject matter in the digital environment.” Mostly, Article 17 itself, turned the Directive into a messy one. Large parts of Article 17 have nothing to do with substantive copyright law but are home in the arena of internet law. The Article 17-regime solves legal uncertainty in one place for rightsholders, while creating lots of legal uncertainty in another for intermediaries and users. Intermediaries or OCSSPs, as commercial actors, have an interest in avoiding legal conflicts and litigation, raising the concern of systematic automated over-enforcement when taking down “as much as possible” vis-à-vis “as much as necessary”. The filtering of content has been practiced by platforms already before the DSM Directive, which also has an impact on the industry standard which plays into the assessment of Article 17(4) lit. b and lit. c of the DSM Directive. Considering that limitations and exceptions to copyright law are intricate and complicated, we can only wish good luck to algorithms with performing a task that keeps legal scholars busy. It is now up for the Member States to find back to the right balance when implementing the Directive until June 2021, minimise jurisdictional issues and fragmentation among the 27 Member States¹⁹⁴, and to ensure that copyright litigators and scholars are not the only winning parties in the quest for a well-functioning copyright market in the Digital Single Market.

themselves in countless position papers, see e.g. Fanta, A., “Rightholders lobby Berlin to tighten liability for tech firms”, Netzpolitik.org, 6 February 2020, <<https://netzpolitik.org/2020/rightholders-lobby-berlin-to-tighten-liability-for-tech-firms/>>

¹⁹⁴ Also Germany in its Statement accompanying its vote in the Council expressed its expectation of the stakeholder dialogue in Article 17(10) noted that it “assumes that uniform implementation throughout the Union will be agreed on (...) because fragmentary implementation with 27 national variants would not be compatible with the principles of a European Digital Single Market”, see Council of the European Union, Statement by Germany, (5 April 2019), point 4, p. 3.