

## UNDERSTANDING ARTICLE 17 OF THE EU DIRECTIVE ON COPYRIGHT IN THE DIGITAL SINGLE MARKET – CENTRAL FEATURES OF THE NEW REGULATORY APPROACH TO ONLINE CONTENT-SHARING PLATFORMS\*\*\*

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*With the Directive on Copyright in the Digital Single Market of 17 April 2019 (“DSM Directive” or “DSMD”),<sup>1</sup> the EU has adopted an ambitious legislative package which EU Member States must transpose into national law by 7 June 2021.<sup>2</sup> One of the central — and most controversial<sup>3</sup> —*

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<sup>1</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 Apr. 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC;2001/29/EC, OFFICIAL J.EUR. COMMUNITIES 2019 L 130, 92.

<sup>2</sup> DSMD art. 29(1).

<sup>3</sup> As to the debate during the legislative process (at the time concerning Article 13 of the proposed new copyright legislation), see Martin R.F. Senftleben et al *The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform*, 40 EUR. INTELL. PROP. REV. 149 (2018); Christina Angelopoulos, *On Online Platforms and the Commission’s New Proposal for a Directive on Copyright in the Digital Single Market* (2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2947800](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947800); Giancarlo F. Frozio, *From Horizontal to Vertical: An Intermediary Liability Earthquake in Europe*, 12 OXFORD J. INTELL. PROP. & PRAC. 565-75 (2017); Giancarlo F. Frozio, *Reforming Intermediary Liability in the Platform Economy: A European Digital Single Market Strategy*, 112 Nw. U. L. REV.19 (2017); MODERNISATION OF THE EU COPYRIGHT RULES – POSITION STATEMENT OF THE MAX PLANCK INSTITUTE FOR INNOVATION AND COMPETITION (Reto M. Hilty & Valentina. Moscon eds., 2017) (Max Planck Institute for Innovation and Competition Research Paper No. 17-12); Reto M. Hilty & Valentina. Moscon, *Contributions by the Max Planck Institute for Innovation and Competition in Response to the Questions Raised by the Authorities of Belgium, the Czech Republic, Finland, Hungary, Ireland and the Netherlands to the Council Legal Service Regarding Article 13 and Recital 38 of the Proposal for a Directive on Copyright in the Digital Single Market*, <http://www.ip.mpg.de>; CREATE et al., *Open Letter to Members of the European Parliament and the Council of the European Union*, <http://www.create.ac.uk/policy-responses/eu-copy->

*provisions of the new legislation is Article 17 DSMD. This provision has the potential to bring about a climate change in the regulation of online platforms that host user-generated content (“UGC”). More specifically, it entails a remarkable departure from traditional notice-and-takedown liability shields that reflect a presumption of non-infringement. Article 17 DSMD sets forth content moderation obligations that are likely to culminate in the employment of upfront content filtering tools to ensure that unauthorized protected content does not populate online content-sharing platforms.<sup>4</sup> Instead of presuming that uploaded content does not amount to infringement unless copyright owners take action and provide proof, the default position of filtering systems is that every upload is suspicious and that copyright owners are entitled to ex ante control over the sharing of information online.<sup>5</sup>*

The following discussion will shed light on several core aspects of Article 17 DSMD. After a short exploration of the “value gap” debate underlying the new content moderation obligations (following section 1), the analysis will first deal with the field of application of Article 17 DSMD (section 2). The new legislation only concerns a specific type of platforms, namely platforms that can be qualified as online content-sharing service providers (“OCSSPs”).<sup>6</sup> After this clarification, section 3 examines the licensing and content moderation duties which OCSSPs must fulfil in accordance with Article 17(1) and (4) DSMD. Section 4 focuses on the copyright limitations mentioned in Article 17(7) DSMD that support the creation and dissemination of transformative UGC, such as parodies and pastiches. It also discusses the appropriate configuration of complaint and redress mechanisms set forth in Article 17(9) DSMD that seek to reduce the risk of unjustified content removals. Section 5 addresses the possibility of implementing direct remuneration claims for authors and performers. Finally, section 6 includes the private international law aspect of applicable law — an impact factor that is often overlooked in the debate.

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right-reform; Eleanora Rosati, *Why a Reform of Hosting Providers’ Safe Harbour is Unnecessary Under EU Copyright Law* (2016), CREATE Working Paper 2016/11 (Aug. 2016), <https://ssrn.com/abstract=2830440>; Sophie Stalla-Bourdillon 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* (2016), <https://ssrn.com/abstract=2850483>.

<sup>4</sup> DSMD art. 17(4)(b) .

<sup>5</sup> Cf. Niva Elkin-Koren, *Fair Use by Design*, 64 UCLA L. REV. 1082, 1093 (2017).

<sup>6</sup> See DSMD art. 2(6) (definition).

## I. VALUE GAP ARGUMENT

Content uploaded by users is a core element of many internet platforms. With the opportunity to upload photos, films, music, texts and computer programs, formerly passive users have become active contributors to (audio-)visual content portals, wikis, online marketplaces, discussion and news fora, social networking sites, virtual worlds and academic paper repositories.<sup>7</sup> Today's Internet users upload a myriad of literary and artistic works every day.<sup>8</sup> A delicate question arising from this user-involvement concerns copyright infringement. Uploaded content may consist of self-created works and public domain material. However, it may also include unauthorized takings of third-party material that enjoys copyright protection. As uploaded content has become a mass phenomenon and a key factor in the evolution of the modern, participative web,<sup>9</sup> this problem raises complex issues and requires the reconciliation of divergent interests: users, platform providers and copyright holders are central stakeholders.<sup>10</sup>

In the legislative process leading to the adoption of the DSM Directive, the so-called "value gap" argument featured prominently in the debate on uploaded content. The argument rests on the policy objective to ensure the payment of adequate remuneration for the online distribution

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<sup>7</sup> See the overview of UGC application that is provided in OECD, 12 Apr. 2007, Participative Web: User-Created Content (Doc. DSTI/ICCP/IE (2006)7/Final, <https://www.oecd.org/sti/38393115.pdf>).

<sup>8</sup> For example, statistics relating to the online platform YouTube report over one billion users uploading 300 hours of video content every minute. Cf. YOUTUBE, <https://www.youtube.com/intl/en-GB/yt/about/press>; YOUTUBE, <https://www.statisticbrain.com/youtube-statistics>.

<sup>9</sup> As to the use and discussion of this term, see OECD, *supra* note 7.

<sup>10</sup> As to the debate on uploaded content and the need for the reconciliation of divergent interests in this area, see Martin R.F. Senftleben, *Breathing Space for Cloud-Based Business Models – Exploring the Matrix of Copyright Limitations Safe Harbours and Injunctions*, 4 J. INTELL. PROP., INFO. TECH. & E-COMMERCE L. 87 (2013); S.D. Jamar, *Crafting Copyright Law to Encourage and Protect User-Generated Content in the Internet Social Networking Context*, 19 WIDENER LJ. 843 (2010); Natali Helberger et. al., *Legal Aspects of User Created Content* (Amsterdam: Institute for Information Law 2009); Mary W.S. Wong, *Transformative User-Generated Content in Copyright Law: Infringing Derivative Works or Fair Use?*, 11 VAND. J. ENT. & TECH. L. 1075 (2009); Edward Lee, *Warming Up to User-Generated Content*, 2008 UNIV. ILL. L. REV. 1459 (2008); Branwen Buckley, *SueTube: Web 2.0 and Copyright Infringement*, 31 COLUM. J.L. & ARTS 235 (2008); T.W. Bell, *The Specter of Copyism v. Blockheaded Authors: How User-Generated Content Affects Copyright Policy*, 10 VAND. J. ENT. & TECH. L. 841 (2008); Steven Hechter, *User-Generated Content and the Future of Copyright: Part One – Investiture of Ownership*, 10 VAND. J. ENT. & TECH. L. 863 (2008); Greg Lastowka, *User-Generated Content and Virtual Worlds*, 10 VAND. J. ENT. & TECH. L. 893 (2008).

of copyrighted content.<sup>11</sup> Traditionally, EU legislation in the field of e-commerce shielded online content-sharing platforms from liability for copyright infringement by offering a “safe harbour” for hosting: as long as the platform provider was not actively involved in the posting of content, she only was obliged to take immediate action and remove content when a rights holder informed her in a sufficiently precise and substantiated manner about infringing content (notice-and-takedown).<sup>12</sup> The safe harbour system was based on the assumption that a general monitoring obligation would be too heavy a burden for platform providers. Without the safe harbour, the liability risk would thwart the creation of internet platforms depending on third party content and frustrate the development of e-commerce.<sup>13</sup> In its 2015 communication “Towards a modern, more European copyright framework,” however, the European Commission held the view that the safe harbour for hosting allowed platforms to generate income without sharing profits with producers of creative content.<sup>14</sup> The value gap argument was born.

In line with this argument, the Commission’s proposal for new copyright legislation — the template for the DSM Directive that has now entered into force — sought to render the liability shield inapplicable when

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<sup>11</sup> For an overview and discussion of the invocation of this argument during the legislative process, see Giancarlo Frosio, *Reforming the C-DSM Reform: A User-Based Copyright Theory for Commonplace Creativity*, 51 INT’L REV. INTELL. PROP. & COMPETITION L. 709 (2020). For an overview of the discussion on uploaded content prior to the current copyright reform proposals in the EU, see JEAN-PAUL TRIAILLE ET AL., STUDY ON THE APPLICATION OF DIRECTIVE 2001/29/EC ON COPYRIGHT AND RELATED RIGHTS IN THE INFORMATION SOCIETY 457-519 (2013) (Study prepared by De Wolf & Partners in collaboration with the Centre de Recherche Information, Droit et Société (CRIDS), University of Namur, on behalf of the European Commission (DG Markt), Brussels)).

<sup>12</sup> E-Commerce Directive 2000/31/EC of 8 June 2000 art. 14(1). Cf. CJEU, 23 Mar. 2010, case C-236/08, Google and Google France, para. 114-118; CJEU, 12 July 2011, case C-324/09, L’Oréal/eBay, para. 120-122. For a comparison of U,S, and EU approaches in this area, see Miguel Peguera, *The DMCA Safe Harbour and Their European Counterparts: A Comparative Analysis of Some Common Problems*, 32 COLUM. J.L. & ARTS 481 (2009). For further commentary on the EU provisions, see Stefan Kulk, *Internet Intermediaries and Copyright Law – Towards a Future-Proof EU Legal Framework* (2018); CHRISTINA ANGELOPOULOS, EUROPEAN INTERMEDIARY LIABILITY IN COPYRIGHT: A TORT-BASED ANALYSIS (2016); MARTIN HUSOVEC, INJUNCTIONS AGAINST INTERMEDIARIES IN THE EUROPEAN UNION – ACCOUNTABLE BUT NOT LIABLE? (2017); Senftleben, *Breathing Space*, *supra* note 10.

<sup>13</sup> E-Commerce Directive 2000/31/EC of 8 June 2000 art. 15(1).

<sup>14</sup> European Comm’n, *Towards a Modern, More European Copyright Framework*, Doc. COM (2015) 626 final, 9-10 (Dec. 2015).

content uploads concern copyrighted works.<sup>15</sup> The underlying strategy was simple: deprived of the safe harbour for hosting and exposed to direct liability for infringing user uploads, platform providers would have to embark on licensing and filtering of content posted by users. With the erosion of the legal certainty resulting from the traditional liability privilege, a platform provider seeking to avoid liability risks would enter into agreements with copyright owners. The initial Commission proposal already contemplated that these agreements with right holders would bring filtering obligations in their wake. The Commission referred to the deployment of “effective content recognition technologies.”<sup>16</sup> Algorithmic enforcement measures, thus, played a central role in the EU copyright reform agenda from the outset. The value gap argument and the intention to generate new revenue streams for copyright owners served as a vehicle to present content filtering obligations as necessary evil that had to be accepted. Despite the early focus on algorithmic enforcement, an unequivocal filtering obligation is sought in vain in the legislative text that evolved from the EU copyright reform. Instead of openly embracing automated copyright enforcement, Article 17 DSMD establishes a complex matrix of obligations to license and filter UGC while seeking to safeguard freedom of expression. As the following analysis will show, providers of content-sharing platforms falling under the new legislation — OCSSPs — can either obtain an authorization from copyright holders to offer uploaded content on their platforms or take measures to prevent the availability of infringing content from the outset.<sup>17</sup>

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<sup>15</sup> European Comm’n, Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market (DSM Directive), Doc. COM (2016) 593 final, art. 13 (Sept. 14, 2016). Prior to this formal proposal of copyright legislation seeking to neutralize the safe harbour for hosting, the French High Council for Literary and Artistic Property had published a research paper prepared by Professor Pierre Sirinelli, José-Anne Benazeraf and Alexandra Bensamoun on 3 November 2015. The researchers had been asked to propose changes to current EU legislation “enabling the effective enforcement of copyright and related rights in the digital environment, particularly on platforms which disseminate protected content.” They arrived at the conclusion that a provision should be added to current EU copyright legislation making it clear that “information society service providers that give access to the public to copyright works and/or subject-matter, including through the use of automated tools, do not benefit from the limitation set out [in the safe harbour for hosting of the E-Commerce Directive 2000/31/EC].” See High Council for Literary and Artistic Property of the French Ministry of Culture and Communication, *Mission to Link Directives 2000/31 and 2001/29 – Report and Proposals* 11 (Nov.15, 2015).

<sup>16</sup> Proposal for a DSM Directive art. 13(1), *supra* note 15.

<sup>17</sup> DSMD art. 17(1).

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## II. DEFINITION OF OCSSP – ARTICLE 2(6) DSMD

Article 2(6) DSMD clarifies that the OCSSP concept underlying Article 17 DSMD covers providers 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.”<sup>18</sup> This definition reflects the value gap concern. It targets content-sharing platforms, such as YouTube and Dailymotion,<sup>19</sup> with the potential to enter into competition with other providers of content services, such as traditional broadcasting organizations, Netflix and Spotify. Given the focus on platforms with a large volume of content uploads, the definition allows EU Member States to introduce certain nuances with regard to *de minimis* activities. The reference to “a large amount of copyright-protected works or other subject matter” indicates that not each and every online platform with certain sharing features is automatically subject to the new liability regime following from Article 17 DSMD. By contrast, Recital 63 DSMD points in the direction of a fine-grained assessment “made on a case-by-case basis” — an assessment that “should take account of 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.”

As to the breadth of *de minimis* exclusions, Recital 62 DSMD confirms that the OCSSP definition is intended to 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.” The Recital also underlines that online platforms fall outside the scope of the OCSSP concept if they 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.” Article 2(6) DSMD specifies in this regard that “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, online marketplaces, business-to-business cloud services and cloud services that allow users to upload content for their own use, are not ‘online content-sharing service providers’ within the meaning of this Directive.”

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<sup>18</sup> As to the anchorage of these activity requirements in earlier CJEU jurisprudence, see, in particular, CJEU, 12 July 2011, case C-324/09, *L’Oréal/eBay Int’l*, ECLI:EU:C:2011:474, para. 31, 89-97 and 113-116. Cf. Senftleben et al., *supra* note 3, at 153-54; Frosio, *supra* note 11, 717.

<sup>19</sup> Cf. Frosio, *supra* note 11, at 718.

In addition, Article 17(6) DSMD addresses a concern that played an important role in the debate on the new regulatory model. Arguably, an obligation to introduce “effective content recognition technologies,”<sup>20</sup> as contemplated in draft versions of Article 17 DSMD during the legislative process, remain quite expensive for small and medium-sized businesses, particularly for start-ups.<sup>21</sup> A big player may already have a content recognition system in place or be able to benefit from economy of scale when developing content moderation mechanisms. A smaller service provider, by contrast, may have to make a substantial investment to establish a new content screening system for a lower number of uploads. Seeking to avoid disproportionate burdens, Article 17(6) DSMD provides a privilege for start-up platforms which have been available to the public in the EU for less than three years and which have an annual turnover below 10 million

Further questions arise from the substantive requirement of organizing and promoting user-uploaded works or other protected subject matter for profit-making purposes. Which degree of organization and promotion activities is required? Is it sufficient to offer a general website infrastructure that allows users to organize content more or less independently? Is the integration of a search tool sufficient? Or does the requirement of content organization imply that an OCSSP must provide a fixed framework of categories and be actively involved in the consistent organization of protected material in accordance with its own organization principle? If the latter, stricter standard is applied, social media services, such as Facebook, may fall outside the OCSSP definition because they leave a considerable degree of organization options and duties to their users.<sup>22</sup> Similar questions arise from the promotion requirement. Is it necessary to promote specific forms of content that can be found on an online platform? Or does it suffice to promote more generally interactive features of the platform that enable users to upload content?<sup>23</sup> Again, the stricter standard focusing on the promotion of concrete forms of content may lead

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<sup>20</sup> Proposal for a DSM Directive art/ 12(1), *supra* note 15.

<sup>21</sup> Senftleben et al., *supra* note 3, at 151-52; E. Engstrom/N. Feamster, *The Limits of Filtering: A Look at the Functionality & Shortcomings of Content Detection Tools* 26 (Mar. 2017), <http://www.engine.is/events/category/the-limits-of-filtering-a-look-at-the-functionality-shortcomings-of-content-detection-tools>. Cf. Martin R.F. Senftleben, *Copyright Reform, GS Media and Innovation Climate in the EU – Euphonious Chord or Dissonant Cacophony?*, *TIJDSCHRIFT VOOR AUTEURS-, MEDIA- & INFORMATIERECHT* 130-33 (2016), <https://ssrn.com/abstract=2865258>.

<sup>22</sup> However, see Frosio, *supra* note 11, at 718, who refers to Facebook as an example of an online service provider falling within the scope of the OCSSP concept.

<sup>23</sup> For an approach pointing in this direction, see Gerald Spindler, *The Liability System of Art. 17 DSMD and National Implementation – Contravening Prohibition of General Monitoring Duties?*, 10 *J. INTELL. PROP. INFO. TECH. & E-COMMERCE*

to an OCSSP concept that does not cover social media services which may advertise their social media functions without announcing specific content. Implementing Article 2(6) and 17 DSMD in their national law, EU Member States, thus, have some room to manoeuvre.

Quite clearly, however, online sharing services that refrain from organizing and promoting the materials uploaded by their users can escape the new content moderation obligations following from Article 17 DSMD. There are numerous simple sharing services which offer users the mere function of uploading materials for the download by specific other users, without any focus on pirated content, and without specific search functions or recommendations of suitable contents etc. For these simple upload-and-sharing services, the DSM Directive does not require any of the proactive duties of care laid down in Article 17 DSMD. Since the level of control and advantages taken from uploaded content are less intensive for those services than for OCSSPs, the traditional safe harbour rules for hosting services following from Article 14 E-Commerce Directive and the ban of general monitoring obligations in Article 15 E-Commerce Directive remain applicable without restrictions of any kind.<sup>24</sup> The CJEU will have an opportunity to develop a tailor-made regime for this type of simple sharing services in the currently pending case *Elsevier/Cyando*.<sup>25</sup>

### III. DUTIES OF OCSSPS – ARTICLE 17(1) AND (4) DSMD

Article 17(1) DSMD represents an innovative concept of an exclusive right: OCSSPs perform an act of communication to the public or an act of making available to the public when they give the public access to copyright-protected works or other protected subject matter uploaded by its users. Under EU copyright law, “communication to the public” and “making available to the public” are restricted acts that fall under the control of the copyright holder.<sup>26</sup> Stating that the offer of access to user-uploaded content amounts to communication to the public or making available to the public, Article 17(1) DSMD thus subjects the activities of

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L. 346 (2019) (rejecting an interpretation requiring the promotion of concrete content).

<sup>24</sup> Cf. CJEU, 23 Mar. 2010, case C-236/08, *Google and Google France*, para. 114-118; CJEU, 12 July 2011, case C-324/09, *L’Oréal/eBay*, paras. 120-122; CJEU, 16 Feb. 2012, case C-360/10, *Sabam/Netlog*, para. 45-51. For commentary, see Kulk, *supra* note 12; C. ANGELOPOULOS, *supra* note 12; HUSOVEC, *supra* note 12; Senftleben, *Breathing Space*, *supra* note 10.

<sup>25</sup> See the pending prejudicial questions in CJEU, case C-683/18; Opinion of Advocate General Saugmandsgaard Oe, 16 July 2020, joined cases C-682/18 and C-683/18, *YouTube and Cyando*, ECLI:EU:C:2020:586.

<sup>26</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 art. 3, on the harmonisation of certain aspects of copyright and related rights in the information society (*OJ* 2001 L 167, 10)



OCSSPs to authorization by copyright holders. OCSSPs are not merely secondarily liable for the infringements committed by their users but directly liable.<sup>27</sup> However, OCSSPs may be exempted from liability if they fulfil the duties of care explicitly stated in Article 17(4) DSMD. These duties of care are integrated in the scope of the exclusive right itself.<sup>28</sup> The CJEU has paved the way for such a concept of the right of communication to the public in several decisions.<sup>29</sup> It is nevertheless a remarkable deviation from the traditional way of tailoring exclusive rights. The following sections explain the interplay between the exclusive right of the rightholder and the necessary efforts of the OCSSP to obtain a license (section 3.1). The analysis also provides guidance on the required use of filtering technology or other efforts to ensure the unavailability of works not licensed (section 3.2) and explores the notice-and-take-down and notice-and-stay-down measures required by Article 17 DSMD (section 3.3).

#### A. *Efforts to Obtain a License According to Article 17(1) and (4)(a) DSMD*

Article 17(1)(2) DSMD seems to state the obvious. OCSSPs shall obtain an authorization from rightholders if they want to avoid being held liable. However, the rights and duties of the rightholder and the OCSSP are more nuanced if Article 17(1) and 17(4)(a) are considered together. According to Article 17(4)(a), an OCSSP is exempted from liability if it makes best efforts to obtain an authorization from the rightholder (and also complies with the other conditions laid down in lit. (b) and (c)). It may therefore suffice to make best efforts to obtain a license to avoid liability. This may appear as a contradiction to Article 17(1) at first glance, but it seems reasonable as long as Article 17(1) and 17(4)(a) are interpreted as expressions of the same duty of the OCSSP.<sup>30</sup>

If conceptualized as expressions of the same duty of the OCSSP, Article 17(1) and 17(4)(a) may be applied as a cascade of different rules for

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<sup>27</sup> Frosio, *supra* note 11, at 719-20.

<sup>28</sup> For a more detailed discussion of this configuration of the new exclusive right and its nature, see Martin Husovec & João Pedro Quintais, *How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms* 10-20, <https://ssrn.com/abstract=3463011>.

<sup>29</sup> CJEU, 8 Sept. 2016, C-160/15, *GS Media*; CJEU, 26 Apr. 2017, C-527/15, *Film-speler*; CJEU, 14 June 2017, C-610/15, *The Pirate Bay*.

<sup>30</sup> See Timm Pravemann, *Art. 17 der Richtlinie zum Urheberrecht im digitalen Binnenmarkt - Eine Analyse der neuen europäischen Haftungsregelung für Diensteanbieter für das Teilen von Online-Inhalten, Gewerblicher Rechtsschutz und Urheberrecht* 783, 786 (2019); Martin Senftleben, *Bermuda Triangle: Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market*, 41 *EUR. INTELL. PROP. REV.* 480 (2019); Frosio, *supra* note 11, 721-22.

different scenarios. The same may be said about the further nuances in Article 17(4)(b) and (c). Obviously, OCSSPs are in compliance with Article 17(1) if they have concluded a license agreement with the rightholders, which today is a common practice for all contents that are “monetized” over OCSSP platforms.

Article 17(4)(a) is applicable if the OCSSP has not (yet) concluded a license agreement. In this case, an OCSSP may be exempted from liability — and as a consequence keep protected materials on its platform without authorization<sup>31</sup> — if and as long as it makes best efforts to obtain a license. This raises the question of what “best efforts” means in this regard. One extreme position would be that the OCSSP must proactively search for each and every item of protected material and its rightholder and offer adequate license conditions.<sup>32</sup> Such an interpretation would entail a general monitoring obligation for all uploaded content,<sup>33</sup> and conflict with Article 17(8) DSM, Article 15 E-Commerce Directive and the fundamental freedom of OCSSPs to conduct a business pursuant to Article 16 of the Charter of Fundamental Rights of the European Union (“Charter” or “CFR”).<sup>34</sup> Moreover, the danger of overblocking would be serious.<sup>35</sup> The other extreme position would be to oblige the rightholders always to take

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<sup>31</sup> Thomas Dreier, *Die Schlacht ist geschlagen – Ein Überblick zum Ergebnis des Copyright Package der EU-Kommission*, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT 771, 776 (2019).

<sup>32</sup> See, e.g., the position paper by different rightholders associations during the legislative process, Europe’s Creators, Cultural and Creative Industries’ Call to the European Council of 12.4.2018, [https://www.ifpi.org/downloads/EU\\_Creators\\_Cultural\\_and\\_Creative\\_Industries\\_Call\\_to\\_European\\_Council.pdf](https://www.ifpi.org/downloads/EU_Creators_Cultural_and_Creative_Industries_Call_to_European_Council.pdf)

<sup>33</sup> Franz Hofmann, *Die Plattformverantwortlichkeit nach dem neuen europäischen Urheberrecht – Much Ado About Nothing?*, ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT 617, 621 (2019).

<sup>34</sup> CJEU, 16 Feb. 2017, C-360/10, Sabam/Netlog.

<sup>35</sup> For a discussion of the risk of content overblocking, see Maayan Perel & Niva Elkin-Koren, *Accountability in Algorithmic Copyright Enforcement*, 19 STAN. TECH. L. REV. 473, 490-91 (2016). For empirical studies confirming the risk of over-blocking in respect of traditional notice-and-take-down systems, see Sharon Bar-Ziv & Niva Elkin-Koren, *Behind the Scenes of Online Copyright Enforcement: Empirical Evidence on Notice & Takedown*, 50 CONN. L. REV. 3, 37 (2017) (“Overall, the N&TD regime has become fertile ground for illegitimate censorship and removal of potentially legitimate materials.”); Jennifer M. Urban, Joe Karaganis & Brianna L. Schofield, *Notice and Takedown in Everyday Practice 2* (Mar. 2017), (UC Berkeley Public Law and Legal Theory Research Paper Series, Version 2, <https://ssrn.com/abstract=2755628> (“About 30% of takedown requests were potentially problematic. In one in twentyfive cases, targeted content did not match the identified infringed work, suggesting that 4.5 million requests in the entire six-month data set were fundamentally flawed. Another 19% of the requests raised questions about whether they had sufficiently identified the allegedly infringed work or the allegedly infringing material.”

the first step and inform the OCSSP that protected material is available without a license (or even offer a license).<sup>36</sup> This would lead to an interpretation of “best efforts” which would allow OCSSPs merely to react to rightholders.

Navigating between these poles, legislators and judges should avoid extreme positions and define pragmatic approaches, which balance the interests of both stakeholders.<sup>37</sup> A possible middle ground could be that OCSSPs must contact publicly known rightholders proactively and offer negotiations on licensing terms. This would comprise collective management organizations (“CMOs”) but also major individual rightholders, which are known in the market for the respective rights/content (e.g. music, film, photographs, games, etc.).<sup>38</sup> In respect of such publicly known rightholders, it seems bearable for OCSSPs to operate proactively. Such negotiations are already the daily business of OCSSPs. Once the OCSSP has offered serious negotiations on license agreements, it should be up to the rightholder to provide the OCSSP with the necessary information on the repertoire owned or represented by the rightholder. To arrive at an appropriate distribution of duties during the pre-contractual negotiation phase, the guidelines can serve as a reference point which the CJEU gave in *Huawei/ZTE* with regard to the FRAND requirement in standard essential patent cases.<sup>39</sup> In this regard, it should be clear that, different from the scenario in *Huawei/ZTE*, the duty to negotiate of the OCSSP under Article 17(4)(a) DSM does not depend on a dominant position; also the right holder is under no obligation to conclude a license contract. Nevertheless, the guidelines developed in *Huawei/ZTE* for negotiations in good faith may still serve as a blueprint for negotiations under Article 17(4)(a).

However, if the protected material and the respective rightholder are not publicly known, e.g. if the rights are held by small or medium-sized companies or by individual authors without a collective representation, “best efforts” should not require extensive monitoring and search activi-

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<sup>36</sup> Judith Steinbrecher, *Die EU-Urheberrechtsrichtlinie aus Sicht der Digitalwirtschaft - Zeit für Augenmaß und faktenbasierte Gesetzgebung*, MULTIMEDIA UND RECHT 639, 642 (2019).

<sup>37</sup> Compare Dreier, *supra* note 26, at 776; Opinion of the German Association for Intellectual Property and Copyright Law (GRUR) of 5.9, at 62 (2019). [http://www.grur.org/uploads/tx\\_gstatement/2019-09-05-GRUR-Stellungnahme\\_zur\\_DSM-\\_und\\_zur\\_Online\\_SatCab-RL\\_endg.pdf](http://www.grur.org/uploads/tx_gstatement/2019-09-05-GRUR-Stellungnahme_zur_DSM-_und_zur_Online_SatCab-RL_endg.pdf) [GRUR Opinion].

<sup>38</sup> The German draft of Act adapting copyright law to the requirements of the Digital Single Market of June 24, 2020 obliges OCSSPs only to contact proactively CMOs, whereas all other rightholders must take the first step, see Copyright Service Provider Act § 4(1) (Draft), see [https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/DiskE\\_II\\_Anpassung%20Urheberrecht\\_digitaler\\_Binnenmarkt.html?nn=6705022](https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/DiskE_II_Anpassung%20Urheberrecht_digitaler_Binnenmarkt.html?nn=6705022).

<sup>39</sup> CJEU, 16 July 2015, case C-170/13, *Huawei/ZTE*, paras. 63-69.

ties. For those materials, it must suffice for the OCSSP to react immediately to a notice by the rightholder.<sup>40</sup> Before such a notice, the OCSSP can remain passive. This will incentivize smaller rightholders to seek representation by CMOs or other collective entities. Also, Article 12 DSMD may play a role in this regard. Under specific circumstances, this provision of the new copyright legislation allows CMOs to offer licensing deals “with an extended effect” — in the sense of covering not only copyright holders who are members of the CMO but also outsiders who do not avail themselves of the opt-out mechanism prescribed in Article 12(3)(c) DSMD.<sup>41</sup> The two approaches under Article 17(4)(a) should not be applied in a schematic way as a principle (OCSSP must always be active) and an exception (rightholders must never be active unless there are exceptional circumstances) but rather on a case-by-case basis.<sup>42</sup>

To sum up, the cascade of licensing duties under Article 17(1) and 17(4)(a) DSMD should be analyzed according to the following scheme:

- 1) Article 17(1): license agreement concluded, no further best efforts required under Article 17(4)(a);
- 2) Article 17(4)(a): no license agreement concluded, obviously protected materials and publicly known: OCSSP must actively contact these known rightholders and offer serious negotiations on licensing terms;
- 3) Article 17(4)(a): no license agreement concluded: OCSSP can remain passive until rightholders (including CMOs) give notice but must react immediately after receiving such notice.

This testing scheme offers a useful starting point for the analysis. Courts should also take into account, according to Article 17(5), “the type, the audience and the size of the service and the type of works or other subject matter uploaded by the users of the service” but also criteria like the degree of specialization of the OCSSP in kinds of content, the collective organization or fragmentation of rights etc.<sup>43</sup> In any case, all mea-

<sup>40</sup> See Recital 66 para. 2; see also Matthias Leistner, *European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive Compared to Secondary Liability of Content Platforms in the U.S.*, 26 INTELL. PROP. J. 123-214 (2020).

<sup>41</sup> For a more detailed discussion of this new feature of the DSM Directive, see Eur. Copyright Soc’y, Comment of the European Copyright Society on the Implementation of the Extended Collective Licensing Rules (arts. 8 and 12) of the Directive (EU) 2019/790 on Copyright in the Digital Single Market, <https://europeancopyrightsociety.org/opinions>.

<sup>42</sup> Otherwise the maxim “*exceptiones sunt strictissimae interpretationis*” would be applied with unwanted results; *contra* GRUR Opinion, *supra* note 31, at 54 et seq.

<sup>43</sup> *Compare* Opinion of the German Society for musical performing and mechanical reproduction rights (GEMA) of 6.9.2019, at 46 et seq., [https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Stellungnahmen/2019/Downloads/090619\\_Stellungnahme\\_GEMA\\_EU-Richtlinien\\_Urheberrecht.pdf?\\_\\_blob=publicationFile&v=3](https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Stellungnahmen/2019/Downloads/090619_Stellungnahme_GEMA_EU-Richtlinien_Urheberrecht.pdf?__blob=publicationFile&v=3) (GEMA Opinion).

asures required from OCSSPs and rightholders must respect the principle of proportionality.

It also seems important to encourage OCSSPs and rightholders to take part in the stake holder dialogues foreseen in Article 17(10) DSMD and develop best practices on a national level with regard to the “best efforts” prescribed by Article 17(4)DSMD. These domestic best practices may include framework agreements, such as agreements between OCSSPs and CMOs. However, they should not undermine the development of pan-European standards. By contrast, national solutions should contribute to the identification of best practices and foster their broader application across EU Member States.

*B. Best Efforts to Ensure the Unavailability of Works According to Article 17(4)(b) DSMD*

Even though filtering technologies have been at the heart of the European debate about Article 17 and the DSMD at large, the notion of “filter,” “filtering” or “upload-filter” is not used in the text of the DSMD, neither in the regulatory part nor in the exceptionally long Recitals 61-71 on Article 17. Instead, Article 17(4)(b) DSMD uses generic, technology-neutral language. For being exempted from liability, OCSSPs must demonstrate:

that they have (. . .) (b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information.

This neutral language, however, can hardly disguise the fact that all parties involved in the legislative process had filtering technologies in mind when the provision was drafted, most obviously the famous Content-ID technology used by Google/YouTube.<sup>44</sup> Today, it is common knowledge that the major platforms covered by Article 17 DSDM already make extensive use of such filtering technologies under the current rules. In this regard, especially in light of the user rights in Article 17(7) and 17(9) DSMD, certain aspects of the provisions may even be welcomed as a juridification of a practice of some OCSSPs which have suffered an adequate regulatory framework to date — and adequate safeguards against excessive use of filtering technology.

With regard to the risk of excessive filtering, EU primary law, in particular the Charter of Fundamental Rights, sets direct limits to measures which EU legislators may impose on content platform providers. The CJEU has stated explicitly that in transposing EU directives and imple-

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<sup>44</sup> See *How Content ID Works*, YOUTUBE, <https://support.google.com/youtube/answer/2797370> (last visited Dec. 19, 2020).

menting transposing measures, “Member States must . . . take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order.”<sup>45</sup> The application of filtering technology to a social media platform hosting UGC occupied centre stage in *Sabam/Netlog*. The case concerned Netlog’s social networking platform, which offered every subscriber the opportunity to acquire a globally available “profile” space that could be filled with photos, texts, video clips etc.<sup>46</sup> Claiming that users make unauthorized use of music and films belonging to its repertoire, the collecting society Sabam sought to obtain an injunction obliging Netlog to install a system for filtering the information uploaded to Netlog’s servers. As a preventive measure and at Netlog’s expense, this system would have applied indiscriminately to all users for an unlimited period and would have been capable of identifying electronic files containing music and films from the Sabam repertoire. In case of a match, the system would prevent relevant files from being made available to the public.<sup>47</sup>

Hence, the *Sabam/Netlog* case offered the CJEU the chance to provide guidance on a filtering system that could become a standard measure under Article 17(4)(b) DSMD. However, the CJEU did not arrive at the conclusion that such a filtering system could be deemed permissible. Instead, the Court saw a serious infringement of fundamental rights.<sup>48</sup> The CJEU concluded that the filtering system would encroach upon Netlog’s freedom to conduct a business.<sup>49</sup> The Court also found that the filtering system would violate the fundamental rights of Netlog’s users, namely their right to the protection of their personal data and their freedom to receive or impart information, as safeguarded by Articles 8 and 11 CFR respectively.<sup>50</sup>

In the light of this case law, it becomes clear why Article 17(4)(b) DSMD refrains from establishing a global, generic content moderation obligation and, instead, only requires “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” (emphasis added). Confining the filtering obligation to “specific” content items that enjoy protection, the drafters of Article 17(4)(b) DSMD sought to escape the verdict of an infringement of fundamental

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<sup>45</sup> CJEU, case C-275/06, *Productores de Música de España (Promusicae)/Telefónica de España SAU*, para. 68.

<sup>46</sup> CJEU, 16 Feb. 2012, case C-360/10, *Sabam/Netlog*, paras. 16-18.

<sup>47</sup> *Id.* para. 26; 36-37.

<sup>48</sup> *Id.* paras. 41-45.

<sup>49</sup> *Id.* paras. 46-47.

<sup>50</sup> *Id.* paras. 48-51.

rights that may arise from a more general content screening obligation. Article 17(8) DSMD confirms that a general monitoring obligation is not intended. The success of this strategy seems to depend on the way in which the content industry makes use of the new regulatory approach. If a copyright holder makes a specific selection of works when sending information to OCSSPs in line with Article 17(4)(b) DSMD, the final result may indeed be a content filtering system that remains limited to specific pieces of content. However, it seems more realistic to assume that OCSSPs will receive long lists of all works which copyright holders have in their repertoire. Adding up all “specific works and other subject matter” included in such extensive right holder notifications, it may become apparent that Article 17(4)(b) DSMD de facto culminates in a comprehensive filtering obligation that corresponds with the filtering measures which the CJEU prohibited in *Sabam/Netlog*.<sup>51</sup> In this case, EU Member States and the CJEU would have to take appropriate countermeasures to prune back excessive ramifications of the general filtering practice that has evolved.

Considering the impact of fundamental rights and the final wording of Article 17(4)(b) DSMD, it seems advisable to implement a technology-neutral provision in the national law of EU Member States which may include filtering technologies as long as they represent the best efforts and a high industry standard of professional diligence, but which also allows courts to oblige OCSSPs to use different technical (or other) means once they are available on the market. As the technological development stands today, it would be incompatible with Article 17(4)(b) to ban filtering technologies.<sup>52</sup> Vice versa, it seems advisable to abstain from designating filtering technologies as the only possible way to comply with Article 17(4)(b). The more precisely filtering technologies are capable of spotting infringing materials on OCSSPs, the less problematic they are. By contrast, the more “false positives” they produce, the more significant their impact on the fundamental rights of users and the public at large will be.<sup>53</sup> Article 17 DSMD tries to mitigate the risk of overblocking filtering technologies by different means, especially by the rules on the preservation of legally uploaded content under Article 17(7) and the procedural safeguards in the form of complaint and redress mechanisms for users under Article 17(9). These balancing tools will be discussed in more detail in section 3.

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<sup>51</sup> Senftleben, *Bermuda Triangle*, *supra* note 30 at 484; Frosio, *supra* note 1 at 724-26.

<sup>52</sup> See also Gerald Spindler, Report Commissioned by the Parliamentary Group of the German Greens 44 (Dec/ 14.2019), [https://www.gruene-bundestag.de/fileadmin/media/gruenebundestag\\_de/themen\\_az/netzpolitik/pdf/Gutachten\\_Urheberrechtsrichtlinie\\_01.pdf](https://www.gruene-bundestag.de/fileadmin/media/gruenebundestag_de/themen_az/netzpolitik/pdf/Gutachten_Urheberrechtsrichtlinie_01.pdf) (Spindler Report).

<sup>53</sup> Pravemann, *supra* note 25, at 787.

As already pointed out, filtering or other technical solutions are only required insofar as the rightholder has provided the OCSSP with the relevant and necessary information. Any filtering must be restricted to those specific content items. It can be assumed that the preservation rules and procedural safeguards of Article 17(7) and 17(9) DSMD will incentivize OCSSPs to limit the number of “false positives” as much as possible. But the significance of this effect will depend on how active users — or user organizations and NGOs — will use the procedural safeguards of Article 17(9) which again depends on the implementation of the harmonized legal framework into the national law of EU Member States.

As Article 17(5) DSMD clarifies, the closer determination of “industry standards of professional diligence” and “best efforts” expected from OCSSPs will depend both on the “availability of suitable and effective means and their cost for service providers” and on the “the type, the audience and the size of the service and the type of works or other subject matter uploaded.” Following these guidelines, smaller OCSSPs with diverse forms of uploaded content should not be required to meet the same standards as bigger, specialized platforms.<sup>54</sup> In the case of smaller OCSSPs, simple title-based filtering may suffice as a starting point, if more sophisticated ways of content identification are beyond reach in light of the volume of platform activities and diversity of materials, and if smaller OCSSPs do not have the chance of reducing costs by pooling resources and developing more sophisticated systems in collaboration with others.<sup>55</sup> As a superficial mode of identifying potentially infringing material, however, title-based filtering should be supplemented with safeguards against overblocking, such as easy access to complaint-and-redress mechanisms that allow users to signal problematic content removals immediately under Article 17(9) DSMD. For derivative works a manual review may be required before blocking content.<sup>56</sup>

Also, the quality of the information provided by the rightholder will play an important role. For both parties, the principle of proportionality must be respected. If the proportionality test is applied effectively, it can also serve as a vehicle to prevent the requirements of Article 17(4)(b) DSMD from further strengthening the dominant market position of existing major platforms.<sup>57</sup> In this regard, the number of notified works and

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<sup>54</sup> René Houareau, *Die EU-Urheberrechtsrichtlinie aus Sicht der Musikindustrie - Plattform-Haftung, Lizenzpflicht und Harmonisierung – auf dem Weg zu einem resilienten Markt*, MULTIMEDIA UND RECHT 2019, 635, 637 (2019).

<sup>55</sup> GEMA Opinion, *supra* note 37 at 47.

<sup>56</sup> *Id.* at 48.

<sup>57</sup> Torsten J. Gerpott, Artikel 17 der neuen EU-Urheberrechtsrichtlinie: Fluch oder Segen? – Einordnung des Streits um “Upload-Filter” auf Online-Sharing-Plattformen, *Multimedia und Recht* 420, 423 (2019).



the diversity of platform content are not the only relevant parameters. In addition, the volume of uploads must be factored into the equation. An OCSSP receiving, on average, 1 million uploads every second can spread a 1 million \_ investment in a filtering system more broadly (1 \_ per upload) than an OCSSP receiving only 100.000 uploads per second (10 \_ per upload). However, the effectiveness of the proportionality test as a tool to level out these differences depends to a large extent on the interpretation of Article 17(4)(b) by the courts and finally the CJEU.

### C. Notice-and-Take-Down According to Article 17(4)(c) DSMD

OCSSPs have to comply with all three obligations listed in Article 17(4)(a) to (c) DSMD to be exempted from liability. They must therefore — besides best efforts to obtain authorization (a) and best efforts to ensure unavailability of certain works (b) — also (c) demonstrate that they 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).

Lit. (c) takes up the known concept of “notice-and-take-down” and supplements it with a “notice-and-stay-down” principle.<sup>58</sup> OCSSPs must not only disable access to the specific content notified by the rightholder but they must also take measures to prevent their future uploads which again will be achieved, at least for the time being, by use of filtering technologies. In this regard, the crucial question arises whether EU Member States will clarify the extent of this stay-down obligation in their national laws, e.g., whether the global reference to “the notified works or other subject matter” in Article 17(4)(c) DSMD still leaves room for confining the stay-down obligation to repeated uploads by the same user of the identical material, as discussed by the CJEU in *L’Oréal/eBay*,<sup>59</sup> or whether it also implies an obligation to prevent uploads by other users and perhaps even of slightly modified material. Without such a clarification, circumvention strategies by users would be unduly facilitated.<sup>60</sup> In this regard, it should be noted that the CJEU recently held in a case concerning defamatory statements on a social media platform, that Article 15 E-Commerce-Directive “does not preclude a court of a Member State from ordering a host provider to remove information which it stores, the content of which is identical to the content of information which was previously declared to

<sup>58</sup> See CJEU, 12 July 2011, C-324/09, *L’Oréal/eBay*, para. 144.

<sup>59</sup> *Id.* para. 141 (pointed in this direction by referring to “further infringements of that kind by the same seller . . .”).

<sup>60</sup> GRUR Opinion, *supra* note 31, at 61.

be unlawful, or to block access to that information, irrespective of who requested the storage of that information.”<sup>61</sup> Such an order seems to offer an alternative reference point for the implementation of Article 17(4)(c) DSMD into national law.<sup>62</sup> It is an open question, however, whether an approach developed with a view to defamation cases can readily be extended to cases concerning copyright infringement.

#### IV. *USE PRIVILEGES AND COMPLAINT AND REDRESS MECHANISMS – ARTICLE 17(7) AND (9) DSMD*

Article 17 DSMD concerns not only the new licensing and filtering duties that have been discussed in the preceding section. The provision also concerns certain measures to preserve breathing space for forms of UGC that may be qualified as “transformative” in the light of the creative input which the user added to pre-existing third-party content. Article 17(7) DSMD underlines the need to safeguard copyright limitations for creative remix activities, in particular use for the purposes of “quotation, criticism and review,” and “caricature, parody and pastiche.”<sup>63</sup> As these use privileges enhance freedom of expression and information, they are important counterbalances to the new licensing and filtering obligations (following section 4.1).<sup>64</sup> Against this background, the implementation of the DSM Directive offers the chance of developing not only content moderation duties but also an adequate limitation infrastructure that safeguards competing fundamental rights. In particular, the reference to “pastiche” can play an important role in this regard (section 4.2). If a broad limitation infrastructure for UGC — based on the open-ended concept of “pastiche” — is combined with the payment of equitable remuneration, Article 17(7) DSMD will also generate new revenue streams that support the general policy objective of the new EU legislation to close the value gap (section 4.3). Even though platform providers will still have to distinguish between permissible pastiche and prohibited piracy, the intro-

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<sup>61</sup> CJEU, 3 October 2019, C-18/18, Eva Glawischnig-Piesczek/Facebook Ireland, Ruling.

<sup>62</sup> See, e.g., French Projet de Loi of 5.12.2019, MICE1927829L/Bleue-1, at 28 et seq.

<sup>63</sup> DSMD art. 17(5).

<sup>64</sup> P.B. Hugenholtz & Martin R.F. Senftleben, Fair Use in Europe. In Search of Flexibilities, 29-30 (2011), 29-30 (2011) (Amsterdam: Institute for Information Law/VU Centre for Law and Governance). For a discussion of new UGC use privileges under the umbrella of EU copyright law, see Jean-Paul Triaille et al., Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society 522-27; 531-34 (2013) (Study prepared by De Wolf & Partners in collaboration with the Centre de Recherche Information, Droit et Société (CRIDS), University of Namur, on behalf of the European Commission (DG Markt), Brussels: European Union).

duction of new use privileges for UGC is a gateway to the development of content identification tools that follow a different filtering logic. Instead of focusing on traces of protected third-party content that may render user uploads impermissible, a filtering system looking for quotations, parodies and pastiches focuses on creative user input that may justify the upload (section 4.4). In addition, Article 17(9) DSMD supplements the guarantee of certain use privileges in Article 17(7) DSMD with a complaint and redress mechanism that may also play an important role for creative users in the EU (section 4.5).

#### A. *Impact of Freedom of Expression*

Article 17(7) DSMD leaves little doubt that the use of algorithmic enforcement measures must not erode areas of freedom that support the creation and dissemination of transformative amateur productions that are uploaded to platforms of OCSSPs:

The cooperation between online content-sharing service providers and rightholders shall not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation.

Member States shall ensure that users in each Member State are able to rely on any of the following existing exceptions or limitations when uploading and making available content generated by users on online content-sharing services:

- (a) quotation, criticism, review;
- (b) use for the purpose of caricature, parody or pastiche.

Use of the formulation “shall not result in the prevention” and “shall ensure that users . . . are able” give copyright limitations for “quotation, criticism, review” and “caricature, parody or pastiche” an elevated status. In Article 5(3)(d) and (k) of the Information Society Directive 2001/29/EC (ISD),<sup>65</sup> these use privileges were only listed as limitation prototypes which EU Member States are free to introduce (or maintain) at the national level. The adoption of a quotation right and an exemption of caricature, parody or pastiche remained optional. Article 17(7) DSMD, however, converts these use privileges into mandatory breathing space for transformative UGC.<sup>66</sup> This metamorphosis makes copyright limitations in this category particularly robust: they “shall” survive the application of

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<sup>65</sup> 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 arts. 5(3)(d), (k) (*OJ* 2001 L 167, 10).

<sup>66</sup> Cf. João Quintais et al., *Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from*

automated filtering tools. In case national legislation does not already provide for the exemption of “quotation, criticism, review” and “caricature, parody or pastiche”, the use of “shall” in Article 17(7) imposes a legal obligation on EU Member States to introduce these use privileges.<sup>67</sup> The reference to “existing” exceptions or limitations must not be misunderstood in the sense of pre-existing national quotation and parody rules. By contrast, it only reflects the fact that these are long-standing EU limitation prototypes that belong to the “existing” canon of permissible use privileges laid down in Article 5 ISD.<sup>68</sup> This solution also makes sense from the perspective of harmonization in the internal market. Only if all Member States provide for these use privileges in the context of UGC uploads, can filtering systems be applied across territorial borders and can OCSSPs apply the same system configuration and standard of review throughout the EU. This, in turn, ensures that EU citizens enjoy the same freedom of transformative use and a shared UGC experience regardless of territorial borders.

In implementing Article 17(7) DSMD, Member States can benefit from guidance which the CJEU has already provided with regard to the concepts of “quotation” and “parody.” In *Painer*, the CJEU underlined the need for an interpretation of the quotation right following from Article 5(3)(d) ISD that enables its effectiveness and safeguards its purpose.<sup>69</sup> The Court clarified that Article 5(3)(d) ISD was “intended to strike a fair balance between the right of freedom of expression of users of a work or other protected subject-matter and the reproduction right conferred on authors.”<sup>70</sup> In its more recent decision in *Pelham*, the CJEU clarified that an essential characteristic of a quotation was:

[T]he use, by a user other than the copyright holder, of a work or, more generally, of an extract from a work for the purposes of illustrating an assertion, of defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user, since the user of a

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*European Academics*, 10 J. INTELL. PROP., INFO. TECH. & ELEC. COMMERCE L. 277, 278, para. 11 (2020).

<sup>67</sup> For an article favoring a mandatory nature of exceptions and limitations in the form of user’s rights, in particular when justified by fundamental rights such as freedom of expression, see the previous Opinion of the European Copyright Society: Christophe Geiger et al., *Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union, Opinion on the Judgment of the CJEU in Case C-201/13, Deckmyn*, 46 INT’L REV. INTELL. PROP. & COMPETITION L. 93, 97, para. 22 (2015).

<sup>68</sup> *Id.* at 279, paras. 14-15.

<sup>69</sup> CJEU, 1 Dec. 2011, case C-145/10, *Painer*, para. 132-133.

<sup>70</sup> *Id.* para. 134.

protected work wishing to rely on the quotation exception must therefore have the intention of entering into ‘dialogue’ with that work . . .<sup>71</sup>

With regard to the parody exemption in Article 5(3)(k) ISD, the CJEU provided guidance in *Deckmyn*. As in its earlier *Painer* decision, the Court underlined the need to ensure the effectiveness of the parody exemption<sup>72</sup> as a means to balance copyright protection against freedom of expression.<sup>73</sup>

As these decisions demonstrate, the fundamental guarantee of freedom of expression plays a crucial role.<sup>74</sup> Relying on Article 11 CFR and Article 10 of the European Convention on Human Rights (“ECHR”), the CJEU interpreted the quotation right and the parody exemption less strictly than limitations without a comparably strong freedom of speech underpinning.<sup>75</sup> The court emphasized the need to achieve a “fair balance” between, in particular, “the rights and interests of authors on the one hand, and the rights of users of protected subject-matter on the

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<sup>71</sup> CJEU, 29 July 2019, case C-476/17, *Pelham*, para. 71. As to the background of this decision, see Lionel Bently et al., *Sound Sampling, a Permitted Use Under EU Copyright Law? Opinion of the European Copyright Society in Relation to the Pending Reference Before the CJEU in Case C-476/17, Pelham GmbH v. Hütter*, 50 INT’L REV. INTELL. PROP. & COMPETITION L. 467, 486-87 (2019); for a critique of the dialogue requirement, see Tanya Aplin & Lionel Bently, *Displacing the Dominance of the Three-Step Test: The Role of Global, Mandatory Fair Use, in COMPARATIVE ASPECTS OF LIMITATIONS AND EXCEPTIONS IN COPYRIGHT LAW 6-8* (Wee Loon Ng/Haochen Sun & Shyam Balganeshe eds., 2018) (forthcoming), <https://ssrn.com/abstract=3119056>; Lionel Bently & Tanya Aplin, *Whatever Became of Global Mandatory Fair Use? A Case Study in Dysfunctional Pluralism, in IS INTELLECTUAL PROPERTY PLURALISM FUNCTIONAL?* 8-36, (Susy Frankel ed., 2019).

<sup>72</sup> CJEU, 3 Sept. 2014, case C-201/13, *Deckmyn*, para. 22-23. For a detailed comment on this ruling, see ECS, *supra* note 35.

<sup>73</sup> CJEU, case C-201/13, para. 25-27.

<sup>74</sup> For a discussion of the status quo reached in balancing copyright protection against freedom of expression, see Christophe Geiger & Elena Izyumenko, *Freedom of Expression as an External Limitation to Copyright Law in the EU: The Advocate General of the CJEU Shows the Way*, 41 EUR. INTELL. PROP. REV. 131, 133-36 (2019)).

<sup>75</sup> As to the influence of freedom of speech guarantees on copyright law in the EU, see Christophe Geiger & Elena Izyumenko, *Copyright on the Human Rights’ Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression*, 45 INT’L REV. INTELL. PROP. & COMPETITION L. 316 (2014); Christophe Geiger, *Constitutionalising’ Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union*, 37 INT’L REV. INTELL. PROP. & COMPETITION L. 371 (2006); DROIT D’AUTEUR ET LIBERTÉ D’EXPRESSION (Alain Strowel, François Tulkens & Dirk Voorhoof eds., 2006); P. Bernt Hugenholtz, *Copyright and Freedom of Expression in Europe, in The Commodification of Information 239* (Niva Elkin-Koren & Neil Weinstock Netanel eds., 2002).

other.”<sup>76</sup> The court thus referred to quotations and parodies as user “rights” rather than mere user “interests.” In *Funke Medien* and *Spiegel Online*, the court explicitly confirmed the status of user rights by pointing out that, “although Article 5 of Directive 2001/29 is expressly entitled ‘Exceptions and limitations,’ it should be noted that those exceptions or limitations do themselves confer rights on the users of works or of other subject matter.”<sup>77</sup>

The CJEU’s line of reasoning stemming from quotation and parody cases sheds light on a common denominator of the copyright limitations listed in Article 17(7): these user rights strike a balance between copyright protection and freedom of expression. This rationale is particularly relevant to transformative UGC. As long as UGC is the result of creative efforts that add value to underlying source material,<sup>78</sup> user-generated remixes and mash-ups of third party content can be qualified as a specific form of transformative use falling under Article 11 CFR and Article 10 ECHR.<sup>79</sup>

### B. Cultivation of the Concept of “Pastiche”

Bearing this insight in mind, it can be of particular importance to consider not only the well-established concepts of “quotation” and “parody” but also the less developed concept of “pastiche.” In *Deckmyn* and *Pelham*, the CJEU established the rule that the meaning of limitation concepts in EU copyright law had to be determined by considering the usual meaning of those concepts in everyday language, while also taking into account the legislative context in which they occur and the purposes of the rules of which they are part.<sup>80</sup> The Merriam-Webster English Dictionary defines “pastiche” as “a literary, artistic, musical, or architectural work that imitates the style of previous work.”<sup>81</sup> It also refers to a “musical,

<sup>76</sup> CJEU, 1 Dec. 2011, case C-145/10, *Painer*, para. 132; CJEU, 3 Sept. 2014, case C-201/13, *Deckmyn*, para. 26; see also CJEU, 29 July 2019, case C-476/17, *Pelham*, para. 32, 37 and 59.

<sup>77</sup> CJEU, 29 July 2019, case C-516/17, *Spiegel Online*, para. 54; CJEU, 29 July 2019, case C-469/17, para. 70; for a more detailed discussion of this point, see Christophe Geiger & E. Izyumenko, *The Constitutionalization of Intellectual Property Law in the EU and the Funke Medien, Pelham and Spiegel Online Decisions of the CJEU: Progress, but Still Some Way to Go!*, 51 INT’L REV. INTELL. PROP. & COMPETITION L. 282, 292-98 (2020).

<sup>78</sup> OECD, 12 Apr. 2007, Participative Web: User-Created Content, Doc. DSTI/ICCP/IE(2006)7/Final, available at: <https://www.oecd.org/sti/38393115.pdf>, 8.

<sup>79</sup> FLORIAN PÖTZLBERGER, *KREATIVES REMIXING: MUSIK IM SPANNUNGSFELD VON URHEBERRECHT UND KUNSTFREIHEIT* (2018).

<sup>80</sup> CJEU, 3 Sept. 2014, case C-201/13, *Deckmyn*, para. 19; CJEU, 29 July 2019, case C-476/17, *Pelham*, para. 70.

<sup>81</sup> Pastiche, MERRIAM-WEBSTER ENGLISH DICTIONARY, <https://www.merriam-webster.com/dictionary/pastiche> (last visited Dec. 20, 2020).

literary, or artistic composition made up of selections from different works.”<sup>82</sup> Similarly, the Collins English Dictionary describes a “pastiche” as “a work of art that imitates the style of another artist or period” and “a work of art that mixes styles, materials, etc.”<sup>83</sup>

Evidently, the aspect of mixing pre-existing materials and using portions of different works is of particular importance to UGC. In many cases, the remix of pre-existing works in UGC leads to a new creation that “mixes styles, materials etc.” and, in fact, is “made up of selections from different works.” Hence, the usual meaning of “pastiche” encompasses forms of UGC that mix different source materials and combine selected parts of pre-existing works. Against this background, “pastiche” can be an important reference point for lawmakers seeking to offer additional freedom for creative platform users who express themselves in transformative UGC — additional room that goes beyond the long-standing concepts of “quotation” and “parody.”<sup>84</sup>

Until now, EU Member States have not made effective use of this option to regulate UGC. Implementing Article 17(7) DSMD, they could take a fresh look at the concept of “pastiche” and clarify that the exemption of pastiches is intended to offer room for UGC.<sup>85</sup> In this clarification

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<sup>82</sup> *Id.*

<sup>83</sup> Pastiche, COLLINS ENGLISH DICTIONARY, <https://www.collinsdictionary.com/dictionary/english/pastiche> (last visited Dec. 20, 2020)

<sup>84</sup> Cf. Emily Hudson, *The Pastiche Exception in Copyright Law: A Case of Mashed-up Drafting?*, INTELL. PROP. Q. 346 (2017). This detailed analysis, which confirms that the elastic, flexible meaning of the term “pastiche” is capable of encompassing “the utilisation or assemblage of pre-existing works in new works.” *Id.* at 363; in the same sense Florian Pötzlberger, *Pastiche 2.0: Remixing im Lichte des Unionsrechts*, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT 675, 681 (2018); see also JOÃO P. QUINTAIS, COPYRIGHT IN THE AGE OF ONLINE ACCESS – ALTERNATIVE COMPENSATION SYSTEMS IN EU LAW 235 (2017) (pointing out that the concept of “pastiche” can be understood to go beyond a mere imitation of style). In line with the results of the study tabled by Triaille et al., *supra* note 57, at 534-41; Quintais, *supra* at 237, nonetheless expresses a preference for legislative reform. As to the need for a new limitation infrastructure for UGC, see Frosio, *supra* note 11, at 739-40.

<sup>85</sup> For instance, see the German draft “Act adapting copyright law to the requirements of the Digital Single Market” of 24 June 2020, *supra* note 32, which introduces the concept of pastiche in § 51a German Copyright Act and refers in the explanatory memorandum explicitly to UGC. See also the draft for the changes to the Copyright Act (in German only) *Diskussionsentwurf [Stand: 24. Juni 2020] des Bundesministeriums der Justiz und für Verbraucherschutz* 64, [https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/DiskE\\_II\\_Anpassung%20Urheberrecht\\_digitaler\\_Binnenmarkt.pdf?\\_\\_blob=publicationFile&v=2](https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/DiskE_II_Anpassung%20Urheberrecht_digitaler_Binnenmarkt.pdf?__blob=publicationFile&v=2). As to guidelines for a sufficiently flexible application of the pastiche exemption in the light of the underlying guarantee of free expression, see Hudson, *supra* note 77, at 362-64.

process, Member States have several options depending on the scope of the UGC exemption which they consider appropriate:

- with regard to UGC that constitutes a “genuine” mix of styles and materials in the sense of an artistic “pastiche” that sufficiently plays with all underlying source materials, a mere clarification may suffice that the exemption of “pastiche” is intended to offer breathing space for UGC. This focus on “genuine” pastiche cases, however, may fail to cover widespread forms, such as funny animal videos with unmodified, copyrighted music in the background. As the music is not part of a transformative mix with other forms or styles of music, under Article 17(1) and (4) DSMD. The animal video as such, however, attests to the creative efforts of the uploading user. Against this background, of Article 17(1) and (4) DSMD may appear too harsh in the light of the described need to reconcile copyright protection with freedom of expression and information — in this case, the freedom of expression of amateur creators;
- (2) alternatively, the concept of “pastiche” could be broadened to encompass not only uncontroversial pastiche scenarios with of mixing pre-existing content, such as of a self-created animal video with protected third-party music. this scenario with a “non-genuine” form of it seems worth considering to introduce — with regard to this extension of the scope of the “pastiche” concept — an obligation for OCSSPs to pay equitable remuneration. In this alternative scenario, the remuneration would thus not follow from licensing deals under Article 17(1) and (4) DSMD. Instead, the remuneration would follow from statutory remuneration rules that are administered by CMOs and lead to the distribution of remuneration payments in accordance with applicable repartitioning schemes.

### C. *Payment of Equitable Remuneration*

As to the introduction of an appropriate remuneration mechanism in the latter scenario of “non-genuine” forms of pastiche, it is important to point out that the combination of use privileges with the payment of equitable remuneration is not an anomaly in the European copyright tradition. In a 1999 case concerning the Technical Information Library Hanover, the German Federal Supreme Court, for example, permitted the library’s practice of copying and dispatching scientific articles on request by single persons and industrial undertakings even though this practice came close to a publisher’s activities.<sup>86</sup> To ensure the payment of equitable remuneration, the Court deduced a payment obligation from the three-step test in international copyright law and permitted the continuation of the service on the condition that equitable remuneration be paid.<sup>87</sup>

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<sup>86</sup> German Federal Court of Justice, 25 Feb. 1999, case I ZR 118/96, “TIB Hanover,” *Juristenzeitung* 1999, 1000.

<sup>87</sup> German Federal Court of Justice, 25 Feb. 1999, case I ZR 118/96. at 1005-07.



Under harmonized EU copyright law, the CJEU adopted a similar approach. In *Technische Universität Darmstadt*, the Court recognized an “ancillary right,”<sup>88</sup> allowing libraries to digitize books in their holdings for the purpose of making these digital copies available via dedicated reading terminals on the library premises. To counterbalance the creation of this broad use privilege, the Court deemed it necessary — in light of the three-step test in Article 5(5) ISD — to insist on the payment of equitable remuneration. Discussing compliance of German legislation with this requirement, the Court was satisfied that the conditions of the three-step test were met because German libraries had to pay adequate remuneration for the act of making works available on dedicated terminals after digitization.<sup>89</sup>

Hence, it is not unusual in the EU to establish an obligation to pay equitable remuneration with regard to use privileges that have a broad scope. The courts derive the obligation to pay equitable remuneration from the three-step test in international and EU copyright law.<sup>90</sup> Considering this practice, there can be little doubt that EU Member States that already provide for an exemption for pastiches (based on Article 5(3)(k) ISD), or that introduce such an exemption in implementing the DSM Directive, could supplement this user right with an obligation to pay equitable remuneration for “non-genuine” forms of pastiches, such as the aforementioned animal video with unaltered background music. In this way, it becomes possible to broaden the scope of the pastiche exemption and cover not only “genuine” but also “non-genuine” forms of mixing different source materials in UGC.<sup>91</sup> OCSSPs could use advertising revenue

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<sup>88</sup> CJEU, 11 Sept. 2014, case C-117/13, *Technische Universität Darmstadt*, para. 48.

<sup>89</sup> *Id.* para. 48.

<sup>90</sup> See BC art. 9(2); TRIPs art. 13; WCT art 10 (at the international level); Article 5(5) ISD art. 5(5) (in EU copyright law). For a more detailed analysis in the light of the three-step test, see Martin R.F. Senftleben, *User-Generated Content – Towards a New Use Privilege in EU Copyright Law*, in RESEARCH HANDBOOK ON IP AND DIGITAL TECHNOLOGIES (Tanya Aplin ed., 2020), 136-162; Christophe Geiger, Daniel Gervais & Martom.R.F. Senftleben, *The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law*, 29 AM. U. INT'L L. REV. 581 (2014).

<sup>91</sup> Admittedly, this solution leads to the dilemma that a creative form of use is subjected to the obligation to pay equitable remuneration. Traditionally, this has not been the case, cf. Reto M. Hilty & Martin R.F. Senftleben, *Rückschnitt durch Differenzierung? – Wege zur Reduktion dysfunktionaler Effekte des Urheberrechts auf Kreativ- und Angebotsmärkte*, in VOM MAGNETTONBAND ZU SOCIAL MEDIA – FESTSCHRIFT 50 JAHRE URHEBERRECHTSGESETZ (URHG) 317, 328-29 (Thomas Dreier & Reto M. Hilty eds., 2015). However, for a broader concept of a general use privilege for creative reuse (not limited to UGC), see Christophe Geiger, *Freedom of Artistic Creativity and Copyright Law: A Compatible Combination?*, 8 UC

to finance the remuneration payments. As a result, users would remain free to create and upload creative content mash-ups and remixes, even if they contain unaltered third-party components, such as background music. OCSSPs, however, would be obliged to pay equitable remuneration for the dissemination of UGC that falls within the scope of the new, broadened category of “non-genuine” pastiche.<sup>92</sup>

A remunerated UGC privilege would have the advantage of creating a continuous revenue stream for authors and performers.<sup>93</sup> While licensing and filtering agreements between copyright owners and OCSSPs may predominantly benefit the content industry (as to the option of introducing direct remuneration claims of authors and performers, see section 5 below), the repartitioning scheme of collecting societies receiving UGC levy payments could ensure that authors and performers obtain a substantial part of the UGC remuneration, even if they have transferred their copyright and neighbouring rights to exploiters of their works and performances.<sup>94</sup>

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IRVINE L. REV. 8 (2018), 413, 443-54 (2018); Christophe Geiger, *Statutory Licenses as Enabler of Creative Uses*, in REMUNERATION OF COPYRIGHT OWNERS – REGULATORY CHALLENGES OF NEW BUSINESS MODELS 305, 308-18 (Kung-Chung Liu/Reto M. Hilty eds., 2017); Christophe Geiger, *Promoting Creativity through Copyright Limitations, Reflections on the Concept of Exclusivity in Copyright Law*, 12 VAND. J. ENT. & TECH. L. 515, 541-44 (2010)) (proposings a remunerated statutory limitation for commercial creative uses, administrated by an independent regulation authority which could solve ex post disputes between original and derivative creators on the price to be paid for the transformative use via mediation).

<sup>92</sup> Cf. Matthias Leistner, *Copyright Law on The Internet in Need of Reform: Hyperlinks, Online Platforms and Aggregators*, 12 J. INTELL. PROP. L. & PRAC. 146-49 (2017); *Id.*, *supra* note 40, at 145-155; Matthias Leistner & Axel Metzger, *Wie sich das Problem illegaler Musikknutzung lösen lässt*, FRANKFURTER ALLGEMEINE ZEITUNG (Jan. 4, 2017), <http://www.faz.net/aktuell/feuilleton/medien/gema-youtube-wie-sich-urheberrechts-streit-schlichten-liesse-14601949-p2.html>; Hilty & Senftleben, *Bermuda Triangle*, *supra* note 84, at 327-28.

<sup>93</sup> Cf. Senftleben, *Bermuda Triangle*, *supra* note 30, 488-90; Frosio, *supra* note 11, at 734-35.

<sup>94</sup> In the context of repartitioning schemes of collecting societies, the individual creator has a relatively strong position. As to national case law explicitly stating that a remuneration right leads to an improvement of the income situation of the individual creator (and may be preferable over an exclusive right to prohibit use for this reason), see German Federal Court of Justice, 11 July 2002, case I ZR 255/00, *Elektronischer Presspiegel* 14-15; for a discussion of the individual creator's entitlement to income from the payment of equitable remuneration, see Guido Westkamp, *The 'Three-Step Test' and Copyright Limitations in Europe: European Copyright Law Between Approximation and National Decision Making*, J. COPYRIGHT SOC'Y 55-59 (2008); Quintais, *supra* note 77, at 335-36, 340-41, 347-49, 356-57; *Opinion on Reprobel*, EUROPEAN COPYRIGHT SOCIETY (Sept. 5, 2015), <https://europeancopyrightsociety.org/opinion-on-reprobel>.

#### D. Reverse Filtering Logic

Quite clearly, Article 17(7) DSMD does not entail a full immunity from filtering obligations. Even if an OCSSP decides to focus on permitted quotations, parodies and pastiches, it will still be necessary to introduce algorithmic enforcement measures to separate the wheat from the chaff. The platform provider will have to distinguish between permissible pastiche and prohibited piracy. Nonetheless, the robust use privileges for UGC in Article 17(7) DSMD offer important impulses for the development of content identification systems that seek to find creative input that renders the upload permissible instead of focusing on third-party content that makes the upload problematic.<sup>95</sup>

Hence, the exemption of quotations, parodies and pastiches paves the way for a markedly different approach to the assessment of content. Instead of focusing on traces of protected third-party content in UGC (and starting points for blocking content), it becomes critical to establish whether the user has added sufficient own creativity to arrive at a permissible form of UGC. Admittedly, it remains to be seen whether (and how) this reverse filtering logic can be implemented in practice.<sup>96</sup> It is conceivable, for instance, that users could upload not only their final pastiche but also a file containing exclusively the self-created material which they have combined with protected third-party content. In the case of separable input (the funny animal video on the one hand, the added background music on the other), the user creation can be included as a separate content item in the identification system. In this way, the system could be made “aware” that UGC contains different types of creative input.<sup>97</sup> Accordingly, it could factor this “insight” into the equation when calculating the ratio of own content to third party content. In addition, the potential of artificial intelligence and self-learning algorithms must not be underestimated. Filtering machines may be able to learn from decisions on content permissibility taken by humans. As a result, algorithmic content screening could become more sophisticated. It may lead to content identification

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<sup>95</sup> Cf. Elkin-Koren, *supra* note 5, at 1093-96.

<sup>96</sup> For critical comments on the ability of automated systems to distinguish between an infringing copy and a permissible quotation, parody or pastiche, see the contribution of Peter K. Yu; Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. TELECOMMUNICATIONS & HIGH TECH. L. 101, 110-11 (2007); Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 41 HARV. J.L. & TECH. 56 (2001).

<sup>97</sup> As to the creation of digital reference files in content identification systems, see Maayan Perel & Niva Elkin-Koren, *Accountability in Algorithmic Copyright Enforcement*, 19 STAN. TECH. L. REV. 473, 513-14 (2016); Lauren G. Gallo, *The (Im)possibility of “Standard Technical Measures” for UGC Websites*, 34 COLUM. J.L. & ARTS 283, 296 (2011).

systems that are capable of deciding easy cases and flagging difficult cases which could then be subject to human review.<sup>98</sup>

### E. Procedural Safeguards

Article 17(9) DSMD supplements the safeguards for creative user involvement laid down in Article 17(7) DSMD by offering procedural remedies. It provides for an “effective and expeditious complaint and redress mechanism” for users who are confronted with unjustified content blocking. Complaints shall be processed “without undue delay.” The content industry must “duly justify the reasons for their requests” vis-à-vis content blocking and removal. In the light of this substantiation of the filtering request, OCSSPs will have to take a final decision on the status of the upload at issue.

For this procedural safeguard to work well in practice, a high degree of efficiency and reliability is crucial. Evidence from the application of the counternotice system in the U.S.<sup>99</sup> shows quite clearly that users are unlikely to file complaints in the first place.<sup>100</sup> If users must wait a relatively long time for a final result, it is foreseeable that the complaint and redress mechanism will be incapable of safeguarding freedom of expression. In the context of UGC, it is often crucial to react quickly to current news and film, book and music releases. If the complaint and redress mechanism finally establish that a lawful content remix or mash-up has been blocked, the significance of an affected quotation, parody or pastiche may already have passed.<sup>101</sup>

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<sup>98</sup> Elkin-Koren, *supra* note 5, at 1096-98.

<sup>99</sup> As to this feature of the notice-and-takedown system in U.S. copyright law, see Miquel Peguera, *The DMCA Safe Harbour and Their European Counterparts: A Comparative Analysis of Some Common Problems*, 32 COLUM. J.L. & ARTS 481 (2009).

<sup>100</sup> See Jennifer M. Urban & Laura Quilter, *Efficient Process or “Chilling Effects”?* *Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621 (2006) (showing, among other things, that 30% of DMCA takedown notices were legally dubious, and that 57% of DMCA notices were filed against competitors). While the DMCA offers the opportunity to file counter-notices and rebut unjustified takedown requests, Urban and Quilter find that instances in which this mechanism is used are relatively rare; however, *cf.* also the critical comments on the methodology used for the study and a potential self-selection bias arising from the way in which the analyzed notices have been collected by Frederick W. Mostert & Martin B. Schwimmer, *Notice and Takedown for Trademarks*, 101 TRADEMARK REP. 249, 259-60 (2011).

<sup>101</sup> Apart from the time aspect, complaint systems may also be implemented in a way that discourages widespread use. *Cf.* Perel & Elkin-Koren, *supra* note 89, at 507-08, 514. In addition, the question arises whether users filing complaints are exposed to copyright infringement claims in case the user-generated quotation, par-

Against this background, it is advisable to make the submission of a complaint against content filtering as simple as possible. If users must fill in a complicated form and add lengthy explanations to substantiate their request, Article 17(9) DSMD will remain a dead letter. To avoid this loss of an important safeguard against excessive algorithmic enforcement, the blocking of UGC should automatically lead to the opening of a dialogue box with a menu of standardized complaint options, such as “The content blocking is unjustified because my upload is a permissible pastiche,” “my upload is a permissible parody,” “is a permissible quotation” etc. The user should then be able to launch the complaint by simply clicking the box with the applicable argument supporting the review request.<sup>102</sup> Ideally, this click should lead to the appearance of the contested content on the platform. As copyright owners will seek to minimize the period of online availability of allegedly infringing content, this appearance ensures that they avoid delays in the review process and “duly justify the reasons for their requests.” In addition, it is important to pave the way for complaint and redress mechanisms that also allow collective and concerted reactions, in particular based on initiatives taken by consumer organizations and NGOs.

Obviously, the crux of this regulatory model lies in the question of liability for the appearance of potentially infringing content until a final decision is taken on the status of the content item at issue. As Article 17(9) DSMD also gives users access to impartial out-of-court settlement mechanisms and, if this does not help, access to the courts, the period of uncertainty about the status of the content may be quite long. If OCSSPs are liable for harm flowing from content availability during this period, they will eschew the introduction of the described regulatory model. To solve this dilemma and allow the appearance of contested UGC directly after the uploading user has launched a complaint, platforms must not be exposed to liability for content which, in the end, is found to infringe copyright. Therefore, a liability shield should be available at least when an OCSSP can demonstrate that it has checked whether the user has not simply clicked one of the complaint buttons to play the system and make content available which, evidently, is mere piracy and very far from constituting a permissible quotation, parody or pastiche.<sup>103</sup> If these checks and balances are in place, however, the contested UGC should become available on the OCSSP platform. Otherwise, the potentially lengthy procedure for clarifying the status of the UGC at issue may frus-

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ody or pastiche at issue (which the user believes to be legitimate) finally proves to amount to copyright infringement. *Cf.* Elkin-Koren, *supra* note 5, at 1092.

<sup>102</sup> *Cf.* Quintais et al., *supra* note 59, at 280, para. 24. .

<sup>103</sup> *Cf. id.* at 280-81, para. 27-28.

trate the goal to safeguard freedom of expression and information which, as explained above, underlies the user rights of Article 17(7) DSMD.

## V. DIRECT REMUNERATION CLAIMS

Considering the described configuration of Article 17 DSMD, it becomes apparent, as already pointed out above, that EU legislation primarily seeks to close the value gap by imposing obligations on OCSSPs to enter into licensing agreements with the creative industry. This solution based on negotiations between different industry groups, however, raises the question whether individual creators will be able to benefit from expected new revenue streams as well. Arguably, a regulatory model relying on industry negotiations implies the risk of overlooking the interests of individual authors. It may fail to ensure that an appropriate share of the licensing income accruing from Article 17 DSMD ends up in the pockets of the creators who made the literary and artistic works at issue. To solve this dilemma, EU Members States may consider implementing direct remuneration claims for authors and performing artists which guarantee that the creative persons receive a fair share of the expected additional revenues obtained by rightholders under Article 17 DSMD. As explained, the DSM Directive does not foresee such claims. However, it tries to strengthen the position of authors and performers by contractual means under Article 18 to 23 DSMD.<sup>104</sup> Experiences with existing national legislation in this area show that it is doubtful whether these contractual means will suffice to redirect the revenue streams at least partly to the creative workers.<sup>105</sup> Nonetheless, they can be seen as a first step in the right direction.

In this vein, the German Government declared in its Protocol Declaration on Article 17 DSMD<sup>106</sup> that it would examine the possibility of such direct remuneration claims. This approach also fits well into the system of direct remuneration claims that already exists in the EU *acquis communautaire* and in national copyright legislation, especially the unwaivable right to equitable remuneration in Article 5 Rental right and lending right Directive 2006/115/EC. Hence, it should be noted that Arti-

<sup>104</sup> For a more detailed discussion of these provisions, see Eur. Copyright Soc'y, *Comment of the European Copyright Society Addressing Selected Aspects of the Implementation of Articles 18 to 22 of the Directive (EU) 2019/790 on Copyright in the Digital Single Market* (2020), <https://europeancopyrightsociety.org/opinions>.

<sup>105</sup> See, e.g. Martin R.F. Senftleben, *More Money for Creators and More Support for Copyright in Society - Fair Remuneration Rights in Germany and the Netherlands*, 41 COLUM. J.L. & ARTS 413-33 (2018).

<sup>106</sup> Statement by the Federal Republic of Germany on the DSMD; in particular on Article 17 of the Directive of 15.4.2019, [https://www.bmjv.de/SharedDocs/Pressemittelungen/DE/2019/041519\\_Erklaerung\\_Richtlinie\\_Urheberrecht.html](https://www.bmjv.de/SharedDocs/Pressemittelungen/DE/2019/041519_Erklaerung_Richtlinie_Urheberrecht.html).

cle 17 DSMD does not preclude such direct remuneration claims.<sup>107</sup> Rather, the provision is neutral with regard to the allocation of rights. However, to avoid individual claims raised by single authors or performers, direct remuneration claims should be administrated by CMOs. The German draft for implementation of Article 17 follows this approach.<sup>108</sup>

## VI. APPLICABLE LAW

A topic of high practical importance for OCSSPs which has hardly been addressed during the legislative process or in academic writing is private international law.<sup>109</sup> Which law applies to the different rights and duties under Article 17 DSMD? Can OCSSPs comply with one legislation implementing Article 17 DSMD or do they have to comply with 27 different national rules? The question may sound strange for lawyers outside the EU who may presuppose that the EU has one uniform copyright regime. But even though the EU has handed down not less than thirteen Directives and two Regulations since its first instrument in the field in 1991, jurisdictions in the EU still differ to a significant extent. According to the territoriality principle, which is still the prevalent doctrine in international copyright law in the EU and beyond, each EU member state regulates copyright law in accordance with its national cultural and economic policies but within the limits of the European Treaties, Regulations and Directives. This territorial approach to copyright implies that copyright issues are governed by the law of the state for which protection is sought. This so called *lex loci protectionis* principle is mostly applied as an unwritten principle of copyright law.<sup>110</sup> However, in 2007 the principle has been codified in Article 8(1) Rome II-Regulation:

<sup>107</sup> *Contra* Houareau, *supra* note 47, at 636.

<sup>108</sup> The German draft “Act adapting copyright law to the requirements of the Digital Single Market” of June 24, 2020, *supra* note 32, § 7(1).

<sup>109</sup> *But see* Spindler Report, *supra* note 45, at 70-72.

<sup>110</sup> The Berne Convention refers on several occasions to the “law of the country where protection is claimed”, see Articles 5(2), 6*bis*(2), 6*bis*(3), 7(8), 10*bis*(1), 14*bis*(2)(a), 18(2). These references are interpreted by courts and commentators as expression of the *lex loci protectionis* principle, see e.g. BGH GRUR 1992, 697, 698 – ALF; Cour Cass. Propriétés Intellectuelles 2013, 306 – Fabrice X/ABC News Intercontinental; Josef Drexl, in MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, INTERNATIONALES IMMATERIALGÜTERRECHT nn. 70-74, (7th ed. 2018); JAMES J. FAWCETT & PAUL TORREMANS, INTELLECTUAL PROPERTY AND PRIVATE INTERNATIONAL LAW nn. 12.01 et seq. (2d ed. 2011); Toshiyuki Kono & Paulius Jurèys, in INTELLECTUAL PROPERTY AND PRIVATE INTERNATIONAL LAW 15-19 (Toshiyuki Kono ed., 2012); AXEL METZGER, PERSPEKTIVEN DES INTERNATIONALEN URHEBERRECHTS – ZWISCHEN TERRITORIALITÄT UND UBIQUITÄT 929, 932 (2010); DARIO MOURA VICENTE, RECUEIL DES COURS 335 n.119 (2008); SIERD SCHAAFSMA, INTELLECTUELE EIGENDOM IN HET CONFLICTENRECHT n. 1144 et seq. (2009)

The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed.

According to the prevalent interpretation of this provision, rightholders would have to plead copyright infringement against OCSSPs in each of the countries for which they seek protection.<sup>111</sup> If they claim protection for multiple countries, the laws of these multiple countries would apply (“mosaic approach”) irrespective of the fact that available content may not be substantially used in each of those countries. The effect of such a literal application of Article 8(1) Rome II would be that OCSSPs would either apply geoblocking technology to comply with the requirements of the different member states or comply with the strictest regime all over Europe. Both approaches seem detrimental for the further development of a rich and diverse European landscape of information and cultural expression and also for the internal market of the European Union.

Against this background, two possible solutions should be considered when implementing Article 17 into national law. First, legislatures could take up academic proposals for concentration of cases of ubiquitous infringement on the Internet under one applicable law.<sup>112</sup> Such proposals have been developed with a specific focus on platforms held liable for infringements committed by users. For those platforms, it is hardly foreseeable which battlegrounds will be chosen by the rightholder. Here, it should be possible to apply the one law to the multi-state infringement, being the law with the closest connection. However, if an EU member state would apply such an approach, it would in the end be up to the CJEU to decide upon the issue of compatibility with Article 8(1) Rome II. Second, it is questionable whether all issues regulated in Article 17 DSMD are to be characterized as questions of copyright infringement in the sense of Articles 8, 15 Rome II. One may argue that at least the procedural safeguards of Article 17(9) DSMD are not covered by Articles 8, 15 Rome II which would give implementing member states more flexibility, especially to apply the country-of-origin principle, which would lead to the EU-wide application of the law of state where the OCSSPs has been established.<sup>113</sup>

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<sup>111</sup> See Axel Metzger, *Commentary on Article 8 Rome II*, in *EUROPEAN COMMENTARIES ON PRIVATE INTERNATIONAL LAW: ROME II REGULATION* art. 8, N° 23-32 (Ulrich Magnus & Peter Mankowski 2019),

<sup>112</sup> See *CLIP-Principles art. 3:604*, *CONFLICT OF LAWS IN INTELLECTUAL PROPERTY - THE CLIP PRINCIPLES AND COMMENTARY* (European Max Planck Group on Conflict of Laws in Intellectual Property eds., 2013).

<sup>113</sup> EU Member states are under no obligation according to the E-Commerce-Directive 2000/31/EC to apply the country of origin principle to intellectual property, see Article 3(2) and Annex to the Directive art. 3(2).



## VII. CONCLUSION

With Article 17 DSMD, the European legislature has taken a new direction regarding copyright conflicts triggered by UGC and other content uploaded by users of sharing platforms. Instead of the long-time prevailing combination of safe-harbour and notice-and-take-down rules, Article 17 introduces a novel regime of direct liability for OCSSPs who, however, may be exempted from liability if they fulfil certain duties of care including the use of filtering technology. Equally important, users will henceforth be armed with statutory complaint and redress mechanisms against OCSSPs blocking content privileged under copyright limitations and exceptions, such as quotation, parody and pastiche. Whether this new approach will turn out to be a forward-looking model for EU member states (and maybe beyond) or whether this new path will lead directly into a dead end with massive filtering and little revenues for authors and performers, will to a large extent depend on the concrete implementation of Article 17 into national law and the legal practice arising on the basis of the new rules.

In this regard, EU member states and other legislatures taking Article 17 DSMD as a source of inspiration should make it clear that OCSSPs that do not organize and promote the materials uploaded by their users are not liable for copyright infringement in accordance with Article 17 DSMD. Moreover, legislatures should clarify the cascade of duties under Article 17(1) and 17(4) DSMD that has been developed above. In particular, legislatures are well advised to implement a technology-neutral provision which may include filtering technologies as long as they represent best efforts and high industry standards of professional diligence, but which also allows courts to oblige OCSSPs to use different technical (or other) means once they are available on the market.

In implementing the complaint and redress mechanisms for users under Article 17(7) DSMD, legislatures should use the full potential of the concepts of “quotation,” “parody” and “pastiche” with regard to UGC and strike a balance between copyright protection and freedom of expression. The submission of complaints against content filtering based on Article 17(9) DSMD should be as simple as possible. In addition, legislatures should consider implementing direct remuneration claims for authors and performing artists which guarantee that individual creators receive a fair share of the expected additional revenues obtained by right holders under Article 17 DSMD.

Finally, questions of private international law should not be neglected. It would be desirable to overcome the traditional territorial approach of copyright law with regard to the new liability rules for OCSSPs, at least within the EU. All in all, Article 17 DSMD leaves remarkable room for manoeuvre for national legislatures and legal practice. It re-

mains to be hoped that these flexibilities will be utilized with the necessary considerations of the vital interests and fundamental rights of all parties involved.