

Title: *The Challenge of Balancing Competing Fundamental Rights in Online Enforcement of Copyright: A Study on Copyright in the Digital Single Market Directive*

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Abstract

With the increasing use of the internet and online platforms, online copyright infringement has become a significant issue for the rightholders, platforms and governments worldwide. To tackle this issue, different jurisdictions adopted different approaches to online copyright enforcement, such as legislative-led, private-led or a combination of these government and voluntary systems, voluntary reactive systems being the most commonly used. However, as the platforms evolved and their services changed from the time that the legislation, such as Digital Millennium Copyright Act in the US and E-Commerce Directive in the EU, a growing need for up-to-date rules that can keep up with the technology has arisen. This triggered the policy reform actions in the EU, which resulted in the Directive on Copyright in the Digital Single Market (CDSMD) in 2019. However, the compatibility of the Directive's "best efforts" requirements in Article 17 with fundamental rights, namely with Articles 7, 8, 11, 16 and 47 of the Charter of Fundamental Rights of the European Union (Charter), as well as Articles 6, 8 and 10 of European Convention on Human Rights (ECHR), constitutes the most significant concern regarding the new regime that the CDSMD introduces.

The purpose of this study is two-fold: Firstly, to critically assess to what extent would the implementation of Article 17 of the CDSMD be compatible with users' right to privacy, data protection, freedom of information and an effective remedy and a fair trial under the Charter and the ECHR; as well as online content-sharing service providers' (OCSSPs) freedom to conduct a business under Article 16 of the Charter. Secondly, if Article 17 were to violate the Charter and Convention, to suggest and appraise a number of procedural safeguards and possible amendments to ensure Article 17 compatibility with Articles 7, 8, 11, 16 and 47 of the Charter, as well as Articles 6, 8 and 10 of ECHR. Thus, this study examines the incompatibilities of Article 17's obligations and critically examines the safeguards introduced by the CDSMD to suggest recommendations and procedural safeguards for the national implementations that would ensure the Article's interference with aforementioned fundamental rights is limited and, therefore, its implementation is fundamental right-compliant.

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List of Abbreviations

- ACR: Automated content recognition
- CDSMD: Copyright in the Digital Single Market Directive
- Charter: Charter of Fundamental Rights of The European Union
- CJEU: Court of Justice of the European Union
- CTTP: Communication to the public
- DMCA: Digital Millennium Copyright Act
- DSA: Digital Services Act
- E&Ls: Copyright exceptions and limitations
- ECD: The E-Commerce Directive
- ECHR: The European Convention on Human Rights
- ECtHR: European Court of Human Rights
- EU: European Union
- IPR: Intellectual Property Right
- OCSSP: Online Content-Sharing Service Provider
- TFEU: Treaty on the Functioning of the European Union
- UGC: User-generated content
- VLOP: Very Large Online Platform

Chapter 1: Introduction

1.1 Introduction

The internet dramatically changed the world as we know it, especially communications and the ways of sharing and obtaining information. Although the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) have not explicitly accepted the right to internet access as a human right as it would allow users to force states to provide such access, they have protected the exercise of fundamental rights on the internet.¹ Both ECtHR and CJEU protect the enjoyment of internet access and online content against instances of interference by invoking the freedom of expression and information. While securing its irreplicable place in our lives, the transformative power of information and communication also technologies affected intellectual property rights, especially copyright. The means of creating and accessing copyright-protected works evolved in line with the technology. While contributing to the creation of different types of works, technology also enables users to access and enjoy works in different ways. Especially the rapid growth of the internet and access to it revolutionised the way of accessing and enjoying copyright-protected works such as music, films, books, and games.²

The traditional approach of consuming these works, namely, buying physical copies, has slowly been replaced by digital means such as streaming and downloading; more Europeans read, watch, and listen to content online and on several mobile devices.³ The COVID-19 pandemic increased the importance of the internet dramatically as people search for new ways to connect, stay informed, and be entertained.⁴ In line with this, the use of online platforms, especially user-generated content platforms, surged to record levels. Most

¹ European Parliament. Directorate General for Parliamentary Research Services., *Internet Access as a Fundamental Right: Exploring Aspects of Connectivity*. (Publications Office 2021) <<https://data.europa.eu/doi/10.2861/261938>> accessed 28 October 2022.; *Ahmet Yildirim v Turkey* App. no.3111/10 (ECtHR, 18 December 2021), para 30; *Cengiz and Others v Turkey* App nos 48226/10 and 14027/11 (ECtHR, 12 December 2015); *Jankovskis v. Lithuania*, App. no. 21575/08 (ECtHR, 17 January 2017)

² European Commission, 'Towards a Modern, More European Copyright Framework: Commission Takes First Steps and Sets out Its Vision to Make It Happen | Shaping Europe's Digital Future' <<https://digital-strategy.ec.europa.eu/en/news/towards-modern-more-european-copyright-framework-commission-takes-first-steps-and-sets-out-its>> accessed 28 October 2022.

³ European Commission, 'Factsheet - Creating a Digital Single Market Bringing down barriers to unlock online opportunities' <https://ec.europa.eu/newsroom/dae/document.cfm?action=display&doc_id=12586> accessed 28 October 2022.

⁴ Global reports estimate that total Internet traffic grew by 40 to 60% during the spring 2020 global lockdown period. See 'Keeping the Internet up and Running in Times of Crisis' (*OECD*) <<https://www.oecd.org/coronavirus/policy-responses/keeping-the-internet-up-and-running-in-times-of-crisis-4017c4c9/>> accessed 15 March 2021.

importantly, users are not only consuming but creating and broadcasting their content, too.⁵ These platforms became the primary source for users to express their creativity and ideas and share information and news.⁶ Every day, more and more people around the world exercise their freedom of expression and right to impart information online and contribute to the diverse culture of the internet.

However, this shift to the online world brought some challenges for copyright law. With the increasing use of the internet and online platforms, online copyright infringement has become a significant issue for the rightholders, platforms and governments worldwide.⁷ In time, as infringers abuse the various services on the Internet, the dialogue about the role of internet intermediaries in online copyright enforcement increased.⁸ The ecosystem in which online infringement of copyright takes place includes different actors such as internet service providers, individual subscribers to this service who download, upload, or share the infringing file; different types of online content providers, including peer-to-peer systems and file hosting sites which enable these acts of individual subscribers and social media platforms which host user-generated content.⁹ While these intermediaries do not undertake the infringing act, because of the acts of mere conduit, caching, and hosting they perform, they can be subject to secondary liability for their users' acts.

Different jurisdictions adopted different approaches to online copyright enforcement to deal with increasing online infringements of copyright, such as legislative-led, private-led or a combination of these government and voluntary systems, voluntary reactive systems being the most commonly used.¹⁰ Regarding the policy implementation for online enforcement of copyright, the US was the first country with its 1998 Digital Millennium Copyright Act

⁵ Ofcom, 'Online Nation – 2020 Report' (2020) <https://www.ofcom.org.uk/data/assets/pdf_file/0027/196407/online-nation-2020-report.pdf>.

⁶ *ibid.*

⁷ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: Towards a renewed consensus on the enforcement of Intellectual Property Rights: An EU Action Plan (COM(2014) 392 final of 1 July 2014).

⁸ Office for Harmonization in the Internal Market, Europol and Eurojust, 'Infringements of Intellectual Property Rights on the Internet' (2014) <https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/Knowledge-building-events/Infringements%20of%20Intellectual%20Property%20Rights%20on%20the%20Internet_en.pdf> accessed 5 November 2022.

⁹ The Intellectual Property Office, 'International Comparison of Approaches to Online Copyright Infringement: Final Report' (2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/549462/International_Comparison_of_Approaches_to_Online_Copyright_Infringement.pdf> accessed 5 November 2022.

¹⁰ *ibid.* p.19-20.

(DMCA), which introduced “notice and takedown” and “safe harbors.”¹¹ With the introduction of notice and takedown, rightholders are provided with a mechanism that allows them to act against platforms that infringe copyright in a much easier, quick and inexpensive manner compared to injunctions. Moreover, “safe harbors” were introduced by the Online Copyright Infringement Liability Limitation Act to provide exemptions for the liability of intermediary service providers.¹² This special liability regime also has been established in the EU with E-Commerce Directive, creating a set of safe harbours for internet intermediaries whose activities fall within the hosting, caching or mere conduit.¹³

As the platforms evolved and their services changed from the time when the E-Commerce Directive was first drafted, the application of safe harbours became more ambiguous. Thus, in time, the voluntary copyright enforcement systems of intermediaries, especially hosting platforms, shifted from reactive to proactive and preventive because of the fear of liability stemming from the lack of legal certainty around safe harbour rules. Consequently, preventive filtering, the most debated voluntary copyright enforcement measure, has become a popular practice amongst online platforms.¹⁴ Many leading social media platforms implemented upload filters, and some even developed their own content recognition technologies.¹⁵ However, the voluntary practice of introducing filtering measures by private companies brought problems with compatibility with EU legislation such as the Charter and E-Commerce Directive, established case law of ECtHR and CJEU and general principles of EU law, such as the principle of proportionality. In a series of decisions, both ECtHR and CJEU underlined the disproportionate nature of these filtering measures and their incompatibilities with the Charter.¹⁶

¹¹ US Digital Millennium Copyright Act of 1998 (‘DMCA’).

¹² US Digital Millennium Copyright Act, 17 USC § 512.

¹³ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (hereinafter: E-Commerce Directive) OJ L 178, 17.7.2000, p. 1–16.

¹⁴ Jennifer M Urban, Joe Karaganis and Brianna Schofield, ‘Notice and Takedown in Everyday Practice’ (UC Berkeley 2017) UC Berkeley Public Law Research Paper ID 2755628 <<https://papers.ssrn.com/abstract=2755628>> accessed 14 July 2022.

¹⁵ For the examples of self-developed filtering systems, See ‘How Content ID Works - YouTube Help’ (YouTube Help) <<https://support.google.com/youtube/answer/2797370/how-content-id-works#zippy=%2Cwhat-options-are-available-to-copyright-owners%2Cwho-can-use-content-id>> accessed 10 October 2022.; ‘Copyright Management | Facebook’ <<https://rightsmanager.fb.com/>> accessed 10 October 2022.

¹⁶ C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) (Scarlet Extended)*, [2011] EU:C:2011:771; C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV (Netlog)* [2012] EU:C:2012:85.; C-484/14, *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH* [2016] EU:C:2016:689.

However, in line with the growing position and importance of the platforms, the pressure regarding their contribution to the online enforcement of copyright has grown, and the approach shifted to the strict liability of intermediaries with strong enforcement of copyright. The combination of this with the growing need for up-to-date rules that can keep up with the technology triggered the policy reform actions in the EU.¹⁷ The Digital Single Market strategy of the EU resulted in two important legislations for the intermediaries, namely the Directive on Copyright in the Digital Single Market and Digital Services Act.

The calls for reform of the EU copyright rules have been answered with the Directive on Copyright in the Digital Single Market (CDSMD) in 2019.¹⁸ Article 17 of the CDSMD lays down filter obligations to prevent future copyright infringements for online content-sharing service providers (OCSSPs).¹⁹ According to the Article, user content must be reviewed by OCSSPs before it can be uploaded and made available to the public to meet the “best efforts” standards set by the Article.²⁰ As the exception of the liability provided by the safe harbours of the E-Commerce Directive²¹ shall no longer apply to the OCSSPs anymore, according to Article 17, online content-sharing service providers should obtain authorisation from the rightholders for the making available of copyright content uploaded by users of their service to avoid liability. If a licence is not concluded, these services must demonstrate that they have made their “best efforts” to obtain an authorisation (Article 17(4)(a)); to ensure the unavailability of specific works and other subject matter (Article 17(4)(b)); to prevent of future infringing uploads (Article 17(4)(c)).

By looking at the primary and secondary sources concerning Article 17, the compatibility of the Article’s “best efforts” requirements with fundamental rights, namely with Articles 7, 8, 11, 16 and 47 of the Charter, as well as Articles 6, 8 and 10 of ECHR, constitutes the most significant concern regarding this Article. All the obligations of the Article, licensing, filtering, notice and takedown and notice and stay down, carry a significant risk of interfering with the fundamental rights of users and OCSSPs as it can disproportionately limit the

¹⁷ European Commission, “Public Consultation on the Review of EU Copyright Rules” (2013); European Commission, “Towards a modern, more European copyright framework”, COM(2015) 626 final (9.12.2015)

¹⁸ Directive 2019/790/EU of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130/92. (hereinafter: CDSMD).

¹⁹ Article 17(4) of CDSMD, p.120.

²⁰ *ibid.*

²¹ Article 14 of the E-Commerce Directive.

practice and enjoyment of these rights. The real-life examples of these interferences with these fundamental rights by the voluntary practice of these obligations provide preliminary evidence for this argument. While licensing obligations can impact users' freedom of expression and OCSSPs' right to conduct a business, the list of fundamental rights that are in danger with the filtering obligations include freedom of expression and right to information, right to privacy and protection of personal data, right to an effective remedy and a fair trial of users and right to conduct a business of OCSSPs. The notice and takedown and notice and stay down practices can interfere with users' freedom of expression, right to an effective remedy and a fair trial, as well as OCSSPs' right to conduct a business.

To reach the fundamental right-compliant implementation of Article 17, this study first assesses Article 17's compatibility by examining its impact on each fundamental right. It analyses all aspects of Article 17 and focuses on striking a fair balance between competing fundamental rights of rightholders, users and OCSSPs. Then, by drawing the areas to focus from this analysis, it investigates and generates the ways to tackle the problems caused by the obligations of Article 17. Thus, this study examines the incompatibilities of Article 17's obligations and parallelly critically examines the safeguards introduced by the CDSMD to suggest recommendations and procedural safeguards for the national implementations that would ensure the Article's interference with aforementioned fundamental rights is limited and, therefore, the implementation is fundamental right-compliant.

Thus, while introducing new rules for intermediary liability and copyright enforcement, in addition to long-standing challenges with these concepts since E-Commerce, CDSMD also introduces new challenges and brings important questions about the future of the EU's Digital Single Market and the internet. This study aims to shed light on this future by analysing the new rules to provide solutions to tackle these challenges and ensure an online environment which efficiently accommodates different fundamental rights.

1.2 Aims and Research Questions

The purpose of this study is two-fold: Firstly, to critically assess to what extent would the implementation of Article 17 of the EU Directive on Copyright in the Digital Single Market - Article 17(1) to 17(10) - be compatible with users' right to privacy, data protection, freedom of information and an effective remedy and a fair trial under the Charter and the ECHR; as well as OCSSPs' freedom to conduct a business under Article 16 of the Charter. Secondly, if Article 17 were to violate the Charter and Convention, to suggest and appraise a number of procedural safeguards and possible amendments to ensure Article 17 compatibility with Articles 7, 8, 11, 16 and 47 of the Charter, as well as Articles 6, 8 and 10 of ECHR.

This study, to find the fundamental right-compliant way to implement Article 17 of Copyright in the Digital Single Market Directive, examines the ways of making the Article's safeguard sufficient to reach the "fair balance" between competing fundamental rights. This analysis focuses on ensuring the fair balance between competing fundamental rights of rightholders, users and platforms enshrined in the Charter and ECHR. These fundamental rights are, namely, rightholders' right to intellectual property (Article 17(2) of the Charter), users' freedom of expression and information (Article 11 of the Charter and Article 10 of ECHR), respect for private life (right to privacy) and protection of personal data (data protection) (Articles 7 and 8 of the Charter, Article 8 of ECHR), an effective remedy and a fair trial (Article 47 of the Charter and Articles 13, Article 6 of ECHR) and platforms' right to conduct a business (Article 16 of the Charter) and freedom of expression (Article 11 of the Charter and Article 10 of ECHR).

The ideal implementation should ensure that it efficiently satisfies the EU law's guarantees regarding fundamental rights in practice. In order to achieve this aim, first, the compatibility of Article 17 of the CDSMD with the aforementioned fundamental rights, with a special focus on the freedom of expression and information, will be assessed. While analysing every obligation under Article 17(4) and assessing their compatibility with the aforementioned fundamental rights, the focus will be on filtering obligations. The fact that filtering practices are historically known for their interferences with fundamental rights recognised by the ECtHR and CJEU in many decisions, therefore, being the most problematic obligation in the context of fundamental rights protection, constitutes the reason for this focus.

Secondly, as the impact of Article 17 would depend on its implementation, this study will provide recommendations for the efficient implementation of safeguards within the Article, namely Articles 17(5)-(10). Most importantly, it suggests procedural safeguards to ensure that the obligations under Article 17(4)(b) and (c), which require the employment of automated content recognition systems, can be implemented in a way which is compatible with various fundamental rights such as, freedom of expression and information, right to a fair trial and right to conduct a business and capable of striking a fair balance between the competing fundamental rights of rightholders, users and platforms. Most importantly, this study designs an implementation model with a unique filtering system which ensures compliance with the aforementioned fundamental rights.

This project has great significance since the implementation of the new rules gives the Member States a one-of-a-kind chance to tackle long-standing issues with striking a fair balance between competing fundamental rights in the online enforcement of copyright. In addition to national implementations of CDSMD, this comprehensive study conducted throughout the whole timeline of the CDSMD and Digital Services Act will also help with finding ways to make any future online copyright enforcement measure fundamental right compliant and more efficient for reaching the appropriate balance between fundamental rights. So, this project could contribute to the discussions of the Digital Services Act by extending the knowledge regarding the problems with online platforms, especially with the extensive analysis of automated decision-making of upload filters and recommendations that it provides.

Thus, this study's contribution to theory will rest on the assessment of Article 17's compliance with fundamental rights and the recommendations for the fundamental right-compliant implementation of the Article. Article 17 provisions must be measured against the benchmark of Articles 7, 8, 11, 16 and 47 of the Charter, as well as Articles 6, 8 and 10 of ECHR. If Article 17 of the CDSMD or its implementation does not adhere to these standards, it is arguable that it might be unlawful. This can be summarised in the following research questions.

1.2.1 Research Questions

The central research question of this research is: How Article 17 of the EU Directive on Copyright in the Digital Single Market could be implemented in a way which is compatible with Articles 7, 8, 11, 16 and 47 of the Charter, as well as Articles 6, 8 and 10 of ECHR?

Related to this core question, to critically examine the extent of the compatibility of Article 17 of the CDSMD with the aforementioned articles of the Charter and the ECHR and to define the issues that implementation needs to tackle, the following questions will be examined:

- Whether and to what extent Article 17 interferes with the fundamental rights of users, namely, freedom of expression and impart information, right to privacy, data protection and right to a fair trial? (Articles 11, 7, 8 and 47 of the Charter, Articles 10 and 6, 8 of ECHR) This question will be answered in Chapter 3.
- To what extent the safeguards provided in Article 17 for the users (Article 17(7), Article 17(8), Article 17(9) and Article 17(10)) can be considered as providing sufficient guarantees to protect the fundamental rights of users, therefore ensuring the Article 17 is compatible with Articles 7, 8, 11, and 47 of the Charter, as well as Articles 6, 8 and 10 of ECHR? This question will be answered in Chapter 3.
- To what extent is Article 17 interfering with the fundamental rights of online content-sharing service providers, namely, the right to conduct a business (Article 16)? This question will be answered in Chapter 4.
- To what extent the safeguards provided in Article 17 for the OCSSPs (Article 17(5), Article 17(6), Article 17(8) and Article 17(10)) can be considered as providing sufficient guarantees to protect the right to conduct a business of OCSSPs, therefore ensuring the Article 17 is compatible with Article 16 of the Charter? This question will be answered in Chapter 4.

Then, in Chapter 5, to suggest and appraise recommendations for national implementations, these questions will be addressed and answered:

- How Article 17 of the CDSMD could be implemented in a way that is compatible with the fundamental rights of users, namely, freedom of expression and impart information, right to privacy, data protection and right to a fair trial (Articles 11, 7, 8

and 47 of the Charter, Articles 10 and 6, 8 of ECHR) and fundamental rights namely, right to conduct a business of OCSSPs (Article 11 of the Charter)?

- What recommendations that can member states follow while implementing Article 17 into their national law to ensure that the safeguards within Article, Articles 17(5)-(10) are efficiently transposed, so the implementation achieves the “fair balance” between the fundamental rights of users, OCSSPs and rightsholders, thus, the compliance with aforementioned fundamental rights?
- Which procedural safeguards can be adopted by Member States to ensure the fundamental right-compliant implementation of Article 17?

1.3 Methodology and Design

1.3.1 Introduction

In practice, legal research projects rarely adopt a refined version of just one theoretical or methodological perspective. In reality, it is common for research to draw from a number of different methodologies; the early chapters often draw from doctrinal (blackletter) analysis, while the final chapters focus on reform analysis.²² Thus, following this hybrid methodology, the first part of the dissertation examines Article 17 and its compatibility with the Charter and ECHR adopting doctrinal legal research methodology, and the second part, by conducting reform analysis, provides recommendations for the implementation of Article 17 to improve the parts that found incompatible in practice.

The doctrinal legal research methodology is one of the fundamental methodologies of legal research. This methodology identifies underlying legal principles on which legal decisions are based, and most importantly, it focuses on what the law is; and how it can be most effectively analysed.²³ The purpose of this method is to gather, organise, and describe the law, provide commentary on the sources used, and then identify and describe the underlying

²² Tamara Hervey, Rob Cryer & Bal Sokhi-Bulle, Legal Research Methodologies in European Union & International Law: Research Notes (Part 1) Tamara Hervey, Rob Cryer & Bal Sokhi-Bulle, *Journal of Contemporary European Research* Vol. 3, no. 2.

²³ Paul Chynoweth, ‘Legal Research’ in A. Knight and L. Ruddock (eds) *Advanced Research Methods in the Built Environment* (Wiley Blackwell 2008) 29.

theme or system.²⁴ Thus, in the early chapters, this study focuses on the letter and the effective analysis of Article 17. However, as it investigates an area where the law is developing, this study looks beyond pure doctrinal analysis by examining and challenging the application and impact of the law.²⁵ The examination of CDSMD mainly relies on critical analysis of primary sources of law, but, in some parts, it goes beyond the pure doctrinal methodology by considering the social and political aspects of this Directive and the potential effects of this legislation on society, users and platforms to achieve the required understanding of the law to develop implementation recommendations.

Therefore, a detailed critical analysis of primary and secondary sources, with a particular focus on the case law of CJEU and ECtHR, has been provided to constitute a base for the reform analysis. The legal meaning of Article 17 and its underlying principles have been discussed, and the decision-making under the EU's rules of online enforcement of copyright has been analysed by focusing on the case law interpretation of the regulations. Through this analysis, uncertainties of the law have been identified, and in addition to identifying the criticisms of the law, more criticism has been brought regarding the law to provide recommendations and resolutions regarding the identified problems.

This study is an example of secondary research; it uses existing data to answer the research questions.²⁶ Thus, all data collected originates from primary and secondary sources of law; no fieldwork, interviews, or further empirical data was required. The primary resources that this study is based on are the EU legislation which includes the Convention, Charter, Regulations, Directives, Policy Documents, and case law of ECtHR, CJEU including AG Opinions, and case law of national courts of the Member States, Commission's reports and consultations. In addition to EU legislation, US Case law and policy documents have also been analysed. However, it is important to note the special attention that has been paid to the case law of CJEU as the study relied on critical analysis of the case law of CJEU for its findings.

The secondary sources of this study comprise academic scholarship from law and other disciplines, such as media and technology, including empirical research conducted by others. The relevant secondary sources examined include academic literature, books, journal articles,

²⁴ Maggie Kiel-Morse, 'Research Guides: Legal Dissertation: Research and Writing Guide: Home' <<https://law.indiana.libguides.com/dissertationguide/home>> accessed 7 July 2022.

²⁵ Ibid.

²⁶ David W Stewart, *Secondary Research: Information Sources and Methods* (Sage Publications 1984).

reports, presentations, letters, and opinions, including suggested implementation mechanisms of Article 17 in the literature. However, the secondary resources are not limited to these; in addition to academic scholarship, this study has analysed publications by Member State governments, NGOs, civil society, human rights and user rights organisations, online platforms and other stakeholders. To keep up with the rapid changes within the technology and news about CDSMD, especially regarding the national implementation actions, blog posts from reputable IP blogs and news from reputable legal and tech news sites have been examined, which constitute an important secondary source for this work. It is important to note that most of the sources from which this research draws its critical analysis are in the public domain. In order to gather these primary and secondary sources, this study used legal search engines (LexisNexis, Westlaw, i-law) and the Herts online library.

The in-depth analysis of systematic literature review and critical analysis of case law of CJEU and ECtHR guide this study to define the underlying problems and shortcomings with online copyright enforcement, which can be used to identify the ideal implementation of Article 17 that successfully strikes the fair balance between competing fundamental rights. Thus, the study examines the background of the related notions, such as safe harbours and injunctions, side-by-side with the relevant case analysis and explores problems with the application of these principles to achieve comprehensive findings. While examining Article 17, it assesses its impact on various fundamental rights and its compatibility with the Charter and ECHR. In addition to that, the study includes the examination of the available national implementations, as well as the recommendations from academics. As a result of this systematic investigation, recommendations for an effective regulatory approach for striking a balance between the rights and interests of rightholders and online intermediaries have been made. These include delivering implementation recommendations, including procedural safeguards for the fundamental rights compliant implementation of Article 17, based on the study's extensive critical analysis.

1.3.2 Thesis Design

Regarding the design, this dissertation follows *the compromise model*, a model that is accepted as ideal for humanities and social sciences.²⁷

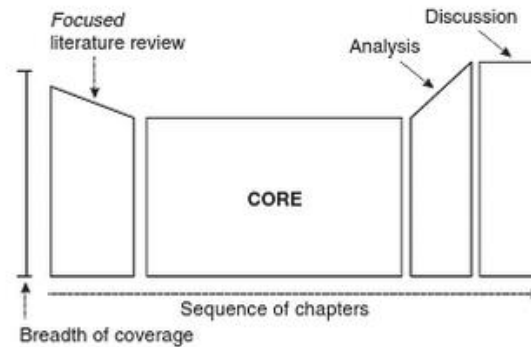


Figure 1: The compromise model

The compromise model is compromising the two models, namely, “focus down” and “opening out.”²⁸ While the focus down model is undesirable due to its lengthy leading materials, opening out is not very suitable for the secondary research as it requires starting the applied analysis at 30 pages of the start, without providing enough background information and review of the literature. Therefore, the compromise model brings the strengths of both models together and follows a balanced approach to the thesis design. This model seeks to form a strong theoretical or broad-view chapter by saving much of the theory discussion and literature discussion to handle at the end of the argument.²⁹

This model requires lead-in materials to be limited to the first two chapters, which are followed by the core chapters and concluding the dissertation with a long chapter of analysis and discussion.³⁰ The literature review aims to provide areas that readers “need to know” to

²⁷ Patrick Dunleavy, *Authoring a PhD: How to Plan, Draft, Write and Finish a Doctoral Thesis or Dissertation* (Macmillan Education UK 2003) <<http://ebookcentral.proquest.com/lib/herts/detail.action?docID=296462>> accessed 10 August 2021.

²⁸ Patrick Dunleavy, *Authoring a PhD: How to Plan, Draft, Write and Finish a Doctoral Thesis or Dissertation* (Macmillan Education UK 2003) <<http://ebookcentral.proquest.com/lib/herts/detail.action?docID=296462>> accessed 10 November 2022.

²⁹ *ibid.* 63.

³⁰ Patrick Dunleavy, *Authoring a PhD: How to Plan, Draft, Write and Finish a Doctoral Thesis or Dissertation* (Macmillan Education UK 2003) <<http://ebookcentral.proquest.com/lib/herts/detail.action?docID=296462>> accessed 10 November 2022. 62.

be able to appreciate the research contribution of this work.³¹ This gives the readers an appropriate amount of time to warm up to the main themes and questions, as well as any background or set-up material they need to comprehend.³² In this way, readers can come into contact with the study's original work sooner than the classical approach of "focus down", which is the traditional design that many law dissertations follow. However, contrary to this traditional approach, the compromise model aims to ensure a better appreciation of how the study's results interlock with the relevant previous research by keeping the lead-in materials to the first two chapters.

The core chapters that follow the literature review and background knowledge examine the compatibility of Article 17 with different fundamental rights by discussing various problems that impact users' and platforms' fundamental rights. This examination has been undertaken to put forward relevant recommendations that help to tackle these problems for the implementation of Article 17. These concluding materials will focus on bringing together and integrating the conclusions from the core chapters, which investigate the impact of Article 17 on different fundamental rights and then do a more limited opening out from the results of the analysis back into the wider literature, including the very recent reforms under the EU Digital Single Market strategy such as Digital Services Act.

1.4 Thesis structure

This dissertation consists of six chapters. These chapters namely the introduction, literature review, Impact of Article 17 CDSMD on users' fundamental rights, Impact of Article 17 CDSMD on OCSSPs' fundamental rights, Fundamental right-compliant Implementation of Article 17 CDSMD and Conclusion.

This chapter, the introduction, constitutes an overview of the thesis by including research aims and questions, methodology, and the study's contribution to the literature. This chapter also includes introductory information regarding the online enforcement of copyright. In addition to that, this chapter delivers a layout and explains the design of the thesis.

³¹ *ibid.*

³² *ibid.*

Chapter 2 starts with clarifying the theoretical framework for this research. This chapter includes a review of the key primary and secondary sources relevant to the topic in order to identify the conflicts and gaps within the literature. To provide necessary background information, it provides a detailed account for the liability regime of intermediaries prior to the CDSMD. It investigates different fundamental rights and reviews main concepts such as safe harbours, the notion of fair balance and proportionality and accordingly identifies the gap regarding the importance of balancing fundamental rights. Then, it provides an Article 17-focused literature review by examining Article 17 of CDSMD and reviewing the literature on Article 17 of CDSMD to provide information regarding its legislative history and obligations to assess the compatibility with fundamental rights.

Chapter 3 analyses the impact of Article 17 on users' fundamental rights and examines its compatibility with different fundamental rights. These are freedom of expression and information, the right to privacy and protection of personal data, and the right to an effective remedy and a fair trial. It includes an in-depth analysis of the identified issues caused by Article 17's impact and their effects on fundamental rights. In addition to that, it examines various concepts related to Article 17 with different case studies to develop the suggested safeguards that could aid the negative impact of Article 17 on the users' fundamental rights. This critical assessment also includes some recommendations for the implementation of these obligations that provide a basis for the safeguards suggested in Chapter 5, which aims to eliminate and, where eliminating is not possible, minimise the identified negative impact on fundamental rights.

Chapter 4 focuses on Article 17's impact on the platforms by examining its compatibility with the freedom to conduct a business. This chapter includes a critical analysis of the impact of Article 17's obligations on OCSSPs. It demonstrates how different obligations of Article 17, such as licensing, filtering, notice and takedown and notice and stay down, can interfere with OCSSPs' operations and their right to conduct a business. It discusses the complexity and cost of implementing filtering technologies as well as other main concepts, such as proportionality and transparency obligations, in-depth. This critical assessment includes recommendations that would complement the safeguards suggested in Chapter 5 to minimise or eliminate the identified negative impact within this chapter.

Chapter 5 includes recommendations for the implementation of Article 17 of the CDSMD to tackle the long-standing issues with striking the “fair balance” between competing fundamental rights. It suggests a number of procedural safeguards, both *ex-ante* and *ex-post* (preventive and corrective), to ensure that Article 17 can be implemented in a way that is compatible with fundamental rights examined within the previous chapters. These suggested procedural safeguards include a specialised filtering system which explained in detail and supported with relevant legal and practical justifications to reflect how it would work in practice.

The conclusion aims to summarise and open up the thesis, especially with the discussion of suggested procedural safeguards. It includes implications for future practice and future research directions in addition to a brief discussion on the research limitations. This final chapter highlights the significance of the findings and finishes the thesis with concluding remarks.

Chapter 2: Literature review

2.1 Introduction

This literature review provides a comprehensive review of the literature around Article 17 and the fundamental rights that are linked to this Article. It investigates how the law has been interpreted and described by the Courts (CJEU, ECtHR, Member State national courts and US Courts) and academics in addition to providing essential definitions and concepts for the critical analysis of Article 17.

This literature review starts by outlining the theoretical framework for the argument of thesis which includes a justification on why fundamental rights are at the centre of this research and explanation of the overall scope of the dissertation. It continues with background information regarding intermediary liability and online copyright enforcement prior to CDSMD which includes a detailed examination of communication to the public, safe harbours including the problems with this regime. Thus, it identifies issues within online copyright enforcement in order to strengthen the study's analysis regarding the compatibility of Article 17 of CDSMD with the EU law of fundamental rights.

The examination of Article 17 covers the full timeline of this Article which starts from its proposal stage to national implementations and in addition to that, as DSA is a relevant reform activity in the digital single market, this chapter explores the relationship between CDSMD and DSA. Thus, the chapter continues by explaining the legislative history of the CDSMD, a detailed analysis of its obligations and safeguards in addition to the key national implementations of Article 17 and current research and criticism on Article 17. Thus, it provides a comprehensive review of the literature around Article 17 and the fundamental rights that are linked to this Article.

This chapter investigates how the law has been interpreted and described by the Courts (CJEU, ECtHR, Member State national courts and US Courts) and academics in addition to providing essential definitions and concepts for the critical analysis of Article 17. Most significantly, the chapter explores important concepts of EU law, such as fair balance, proportionality and examines the fundamental rights affected by this Article to provide background information and a foundation for the compatibility assessment of Article 17 with these fundamental rights at issue. The analysis of each right identifies a research gap in

existing literature, and then these gaps will be linked to the project's aim, which is developing an ideal implementation of Article 17 that respects fundamental rights.

2.1.1 The Theoretical Framework

Before outlining the framework for this research, it is important to note that within legal scholarship, the academic embedding of a research project often takes the form of a summary of the current state of positive law which includes primary and secondary resources of law.³³ However, how the researchers relate to various points of view in their academic discipline and how they assess the literature is less clear; legal researchers often leave them largely implicit in their writings.³⁴

The nature of the research questions of this project, which assess the legal scenario and offer a solution to a legal problem, requires the framework to provide the basis for the evaluation or solution in addition to how to link the project to the literature or provide the concepts and the basis for the assessment and the solution. As a result, unlike the social science projects, which supply the conceptual underpinnings for the research and provide a context for the study based on prior empirical research, this study builds its own framework from which its analysis of the research problem is generated.

As can be seen from the aims and the research questions, this study focuses on a number of interconnected phenomena. In order to achieve the aim of this study, which is providing a implementation of Article 17 of CDSMD with Convention³⁵ and Charter of Fundamental Rights of EU³⁶, it examines these phenomena in detail. The first phenomenon has been the increasing attention to copyright protection and stricter intermediary liability, including legislative. First with the growing popularity of injunctions amongst rightholders, and voluntary preventive measures amongst platforms, then, the legislative actions, CDSMD being the most significant and current example that captures this shift.

³³ Sanne Taekema, 'Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice' [2018] *Law and Method* <<http://www.bjutijdschriften.nl/doi/10.5553/REM/000031>> accessed 3 July 2023.

³⁴ Hutchinson & Duncan 2012, p. 107.

³⁵ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (hereinafter: ECHR).

³⁶ Charter of Fundamental Rights of the European Union [2012] OJ C 326, 26.10.2012, p. 391–407. (hereinafter: 'Charter').

The enforcement practice of injunctions has gained popularity in recent years to enforce intellectual property rights.³⁷ European Union law requires³⁸ Member States to provide injunctions against intermediaries whose services are used by a third party to infringe intellectual property rights; the plaintiffs can apply for injunctions against intermediaries, the internet access providers, who are not liable under tort law.³⁹ With the rise of the internet, rightholders gained new tools against intermediaries such as de-indexing, freezing orders and, most popular ones against hosting platforms, blocking and filtering injunctions.

According to Article 8(3) of the Information Society Directive, when intermediaries' services are used by a third party to infringe a copyright or related right, rightholders can request injunctions against them as these intermediaries are best placed to end the infringing activities of third parties. Enforcement Directive provides the same guarantee regarding the availability of injunctions for rightholders in the case of an infringement of intellectual property rights under the third sentence of Article 11. E-Commerce Directive ensures that its safe harbour regime does not affect the possibility of injunctions of different kinds, such as court or administrative orders requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it.⁴⁰

The safe harbour regime constitutes an important concept that contributes to the research question of this study as the safe harbour regime contributed to the problems with fair balancing and inspired the reform regarding copyright in the EU.⁴¹ This regime puts the “knowledge” of the platform at the core of their liability and provides them protection from, third parties, in this case, users of these hosting platforms' illegal acts.⁴²

³⁷ Martin Husovec, *Injunctions against Intermediaries in the European Union: Accountable but Not Liable?* (Cambridge University Press 2017).; Dr Alpina Roy and Althaf Marsoof, 'The blocking injunction: a comparative and critical review of the EU, Singaporean and Australian regimes' (2016) *European Intellectual Property Review* 38 EIPR 2016 9.

³⁸ Recital 59 and Article 8(3) of InfoSoc Directive; Article 11(III) of Enforcement Directive.

³⁹ Martin Husovec, 'CJEU Allowed Website Blocking Injunctions with Some Reservations' (2014) 9 *Journal of Intellectual Property Law & Practice* 631–634.

⁴⁰ Recital 45 of E-Commerce Directive.

⁴¹ European Commission, 9 December 2015, *Towards a modern, more European copyright framework*, Doc. COM(2015) 626 final, pp. 9-10.; European Commission, 14 September 2016, *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, Article 13.

⁴² Article 14 of E-Commerce Directive.

However, the lack of harmonisation resulting from the different implementations of safe harbour provisions by the Member States contributed to the lack of legal certainty and, consequently, the inefficiency of the safe harbours.⁴³ Also, the rise of Web 2.0 has led to the unprecedented millions of uploads of copyright-protected content through countless diverse platforms, which disturbed the effectiveness of safe harbour exemption and the clarity of its application. Therefore, the rapid development of technology and the changes within the nature and acts of platforms raised the question of whether the hosting safe harbour regime successfully kept up with the times. The rise of new types of platforms with hybrid activities which are hard to be categorised under the traditional safe harbour intermediaries' activities resulted in the increased use of injunctions, shift towards the stricter protection of copyright and liability of intermediaries in practice. This wave of stricter protection of copyright through the injunctions created a tension between copyright and competing fundamental rights as these injunctions were exceeding the limits defined in Directives. These are namely, being fair and equitable as well as effective, proportionate and dissuasive and being applied *"in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse."*⁴⁴ They should not be unnecessarily complicated, costly and should not entail unreasonable time limits and unwarranted delays. Lastly, E-Commerce Directive, in its Recital, ensures that its safe harbour regime does not affect the possibility of injunctions of different kinds, such as court or administrative orders requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it.⁴⁵ Notably, E-Commerce Directive states that these injunctions must follow the limits of EU law; they must respect fundamental rights, the principle of proportionality and fair balance and comply with the general monitoring ban.⁴⁶ Where copyright is enforced with these types of injunctions, this enforcement imposes a disproportionate limitation on the exercise of other fundamental rights.

⁴³ Tatiana-Eleni Synodinou, 'Intermediaries' Liability for Online Copyright Infringement in the EU: Evolutions and Confusions' (2015) 31 Computer Law & Security Review 57. ; Christina Angelopoulos, 'Beyond the Safe Harbours: Harmonising Substantive Intermediary Liability for Copyright Infringement in Europe' (2013) 3 Intellectual Property Quarterly 253. 254; Thibault Verbiest, Gerald Spindler and Giovanni Maria Riccio, 'Study on the Liability of Internet Intermediaries' (2007) <<https://papers.ssrn.com/abstract=2575069>> accessed 22 June 2020.

⁴⁴ Article 3 of Enforcement Directive.

⁴⁵ Recital 45 of E-Commerce Directive.

⁴⁶ Recitals 10, 46 and 47 and Article 15(1) of E-Commerce Directive. While amending the E-Commerce, DSA preserved the legal base for injunctions and these limits. See Recitals 3,4, 25 and 28 and Article 7 of DSA.

To deal with this new wave of problems, CJEU has developed various tools, the relevant CJEU framework on injunctions against intermediaries can be collected under five key decisions: the twin judgments in *Scarlet Extended*⁴⁷ and *Netlog*⁴⁸ on the relationship between filtering injunctions and Charter; the ruling in *UPC Telekabel*⁴⁹ regarding the compatibility of blocking injunctions with Charter; *Mc Fadden*,⁵⁰ concerning the limits of injunctions and lastly, *Glawischnig-Piesczek*⁵¹ which opened the doors for worldwide injunctions.

In these cases, CJEU examined the injunctions in the light of the principles of the Union law and assessed their compliance with the Information Society Directive, the Enforcement Directive, the E-Commerce Directive, the Data Protection Directive, the E-Privacy Directive and the Charter of Fundamental Rights. CJEU defined the requirements that injunctions need to meet as being “fair and equitable, not unnecessarily complicated or costly, nor entail unreasonable time-limits”, as well as being “effective and dissuasive.”⁵² For instance, the CJEU found the injunction which requires the platform to implement a filtering system in *SABAM* found the injunction as not respecting the requirement that a fair balance be struck between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other⁵³ and used proportionality to rule out this type of measures under the EU law.⁵⁴ In that way, CJEU clarified that the fundamental rights discourse is central to assessing intermediary liability caused by injunctions and appropriate remedies.⁵⁵ Also, CJEU strengthened its position regarding the preventive measures for IP infringement which require active monitoring of all the data by stating their incompatibility with EU law.

In addition to CJEU, ECtHR also examined the conflict between injunctions and fundamental rights in many cases and applied the principle of proportionality of the EU copyright to

⁴⁷ *Scarlet Extended* (n 16), paras 49-51.

⁴⁸ *Netlog* (n 16), para 47.

⁴⁹ Case C-314/12 *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* (‘UPC Telekabel’), [2014] ECLI:EU:C:2014:192, para 47.

⁵⁰ *Mc Fadden* (n 16), para 87.

⁵¹ *Glawischnig-Piesczek* (n 241), para 46-48.

⁵² Article 3(2) of the Enforcement Directive.

⁵³ *Netlog* (n 16), para 51; *Scarlet Extended* (n 16), para 53.

⁵⁴ Eleonora Rosati, ‘Material, Personal and Geographic Scope of Online Intermediaries’ Removal Obligations beyond *Glawischnig-Piesczek*, C-18/18 and *Defamation*’ (2019) 41 *European Intellectual Property Review* 672.

⁵⁵ Christina Angelopoulos, ‘Are Blocking Injunctions against ISPs Allowed in Europe? Copyright Enforcement in the Post-Telekabel EU Legal Landscape’ (2014) 9 *Journal of Intellectual Property Law & Practice* 812, 814.

lightly regulated areas like online copyright enforcement procedures.⁵⁶ ECtHR's case law underlines the requirement for injunctions which require executing monitoring, filtering and blocking to strike the fair balance under the Convention and Charter to and reminds the courts to be very cautious about the scope of the injunctions and the guarantee of judicial review to prevent possible abuses.⁵⁷ There is reasonable stress on the fair balance and proportionality principles regarding the injunctions, as any restriction on fundamental rights must be in line with permissible limitations as set out in international human rights law.

Most significantly, the landmark decision of *Yildirim v. Turkey* gives guidelines on the steps to be taken to achieve a fair-balanced internet injunction. Judge Albuquerque described the minimum criteria that need to be met by legislation concerning Internet access ban measures to be compatible with the EU law. According to this, the measure must have a definition of categories of persons likely to have their publications blocked and access ban orders, limits regarding the territorial scope and the duration, the indication of interests, compliance with proportionality and necessity principles, definition of the authorities, the procedure, safeguards.⁵⁸

While the stress on the balance within the case law was clear, in practice, enforcement of copyright was getting more complicated. As the application of safe harbours became ambiguous and the use of injunctions increased, to be on the safe side and avoid liability, hosting platforms implemented voluntary preventive measures which includes filtering. However, this self-regulation of platforms introduced new unique problems. These self-regulation actions resulted in different rules being applied to the same situations on different platforms, and the unspecified criteria for blocking and removal of the user uploads further increased the lack of foreseeability and harmonisation and made the puzzling EU online copyright enforcement and disproportionality problems even worse. These voluntary measures raised many issues regarding the principle of horizontal effect and public authorities' duties for preventing third-party interference with the users' fundamental rights, especially the right to freedom of expression, by limiting the deciding powers of platforms

⁵⁶ Peter Teunissen, 'The Balance Puzzle: The ECJ's Method of Proportionality Review for Copyright Injunctions 40. 579-593.' (2018) 40 European Intellectual Property Review, 583.

⁵⁷ *Ahmet Yildirim v Turkey* (n 1).; *Ashby Donald v. France* App No. 36769/08 (ECtHR, 10 January 2013).; *Jankovskis v. Lithuania*, (n 1).

⁵⁸ *Ahmet Yildirim v Turkey* (n 1), Concurring Opinion of Judge Pinto De Albuquerque.

regarding uploaded content.⁵⁹ Therefore, one of the most significant negative outcomes has been acknowledged as their negative impact on fundamental rights and consequently, the fair balance which constitutes the main problem that this study aims to tackle.

Against this background, to satisfy the need for reform, especially regarding safe harbours and preventative tools on platforms, the EU introduced CDSMD, most specifically, Article 17. According to the Article, traditional hosting safe harbour does not apply to online content-sharing service providers, unless they obtain direct authorisation from the rightholders or satisfy the Article's "best efforts" requirements.⁶⁰ This assumption of knowledge of the platform brings the risk of direct liability which motivates these platforms to concentrate on ensuring the unavailability of copyright-protected works and prevent future infringing uploads accordingly to the Article's best efforts standards. This brings the high risk of Article 17 disturbing the balance even further and interfering with competing fundamental rights against copyright, which constitutes another phenomenon that this study focuses on. Thus, to assess the extent of compatibility of Article 17 with fundamental rights, this study, first, critically examines the impact of this article on users' right to privacy, data protection, freedom of information and an effective remedy and a fair trial under the Charter and the ECHR; as well as OCSSPs' freedom to conduct a business under Article 16 of the Charter, which is a right that is often overlooked within the Article 17 debate. Then, suggests that to protect the fair balance and fundamental rights from the negative impact of Article 17's obligations, the fundamental right-complaint implementation of this Article into national laws of Member States is the only answer.

The problems caused by injunctions regarding the fair balancing of competing fundamental rights show the importance of taking the CDSMD's implementation as a chance to achieve the desired balance for online copyright enforcement. It is important for rightholders, online platforms, and other intermediaries to find a way to work together to balance their rights and the rights of internet users. A collaboration that takes every actor of the internet's rights into

⁵⁹ European Parliament. Directorate General for Parliamentary Research Services, *Internet Access as a Fundamental Right: Exploring Aspects of Connectivity*. (Publications Office 2021) <<https://data.europa.eu/doi/10.2861/261938>> accessed 28 October 2022. ; Policy Department for Citizens' Rights and Constitutional Affairs and Directorate-General for Internal Policies, *The Impact of Algorithms for Online Content Filtering or Moderation "Upload Filters"* (2020) STUDY Requested by the JURI committee PE 657.101 [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/657101/IPOL_STU\(2020\)657101_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/657101/IPOL_STU(2020)657101_EN.pdf) > (n 59).

⁶⁰ Article 17 of the CDSMD.

consideration is the only way to have a balanced and suitable foundation for law-making. Therefore, it is important to achieve an implementation that ensures a fair balance between the competing fundamental rights of each actor is guaranteed.

The long-standing tension between copyright and other fundamental rights within the EU framework results from a complex relationship between competing fundamental rights; while copyright can serve as the basis for claiming a monopoly on intellectual creation, it also contributes to the availability and free flow of information. Adding the modern means of exercising fundamental rights, such as the internet, to this already complex picture, balancing the competing fundamental rights becomes more challenging than ever. This increases the risk of new enforcement measures interfering with different fundamental rights, instead of solving the well-documented existing problems of online enforcement of copyright.⁶¹ While applying such measures to guarantee the protection of copyright, the Charter, as the primary source for the EU law, should expressly be recognised.

On this point, it is important to define the reason why fundamental rights are at the centre of this research. To outline why the fundamental rights should be considered within the online enforcement of copyright and, therefore, for the implementation of Article 17, one must examine the significance of the fundamental rights.

⁶¹ Joe Karaganis and Jennifer Urban, 'The Rise of the Robo Notice' (2015) 58 Communications of the ACM 28; Jennifer Urban, Joe Karaganis and Brianna L Schofield, 'Takedown in Two Worlds: An Empirical Analysis' (SocArXiv 2018) preprint <<https://osf.io/mduyn>> accessed 22 November 2021; Jennifer M Urban, Joe Karaganis and Brianna Schofield, 'Notice and Takedown in Everyday Practice' (UC Berkeley 2017) UC Berkeley Public Law Research Paper ID 2755628 <<https://papers.ssrn.com/abstract=2755628>> accessed 14 July 2022; Jennifer M Urban and Laura Quilter, 'Efficient Process or Chilling Effects - Takedown Notices under Section 512 of the Digital Millennium Copyright Act' (2006) 22 Santa Clara High Technology Law Journal 621.; Kris Erickson and Martin Kretschmer, 'Empirical Approaches to Intermediary Liability' in Giancarlo Frosio (ed), *The Oxford Handbook of Intermediary Liability Online* (Oxford University Press 2019) <<https://papers.ssrn.com/abstract=3400230>> accessed 22 April 2021; Kristofer Erickson, 'Evaluating the Impact of Parody on the Exploitation of Copyright Works: An Empirical Study of Music Video Content on YouTube' (Intellectual Property Office 2013) 2013/22 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/309900/ipresearch-parody-report1-150313.pdf>; Kristofer Erickson and Martin Kretschmer, 'Analyzing Copyright Takedown of User-Generated Content on YouTube' (2018) 9 Journal of Intellectual Property, Information Technology and E-Commerce Law 2190; Martin Kretschmer and Kristofer Erickson, 'How Much Do We Know about Notice-and-Takedown? New Study Tracks YouTube Removals' (*Kluwer Copyright Blog*, 12 June 2018) <<http://copyrightblog.kluweriplaw.com/2018/06/12/much-know-notice-takedown-new-study-tracks-youtube-removals/>> accessed 22 June 2020.

One of the fundamental principles upon which the European Union is built is respect for fundamental rights which is an indispensable prerequisite for the Union's legitimacy.⁶² These rights are safeguards or guarantees for individuals, organisations and businesses that are included in EU law. As a result of the Lisbon Treaty's entry into force, all actions taken by EU institutions must explicitly take into account fundamental rights.

The Convention was adopted in 1950; however, it has not been formally incorporated into the Union legal order as the EU has not acceded to the Convention even though Article 6(2) Treaty on European Union (TFEU) constitutes a legal obligation to do so. However, it is important to keep in mind that fundamental rights recognised by the ECHR constitute general principles of the European Union's law in line with Article 6(3) TEU. The rights and freedoms that the Convention guarantees include the right to a fair trial in Article 6, the right to respect for private and family life in Article 8, freedom of expression in Article 10, the right to an effective remedy in Article 13, protection of property in Article 1 of Protocol 1 to the ECHR.

In 2009, with the entry into force of the Treaty of Lisbon, the Charter was given legal effect to provide an enforceable bill of rights for the Union and strengthen the protection of fundamental rights by making those rights more visible in a Charter.⁶³ The preamble states that the Charter is a reaffirmation of rights as they result from the European Convention for the Protection of Human Rights and Fundamental Freedoms case law of the Court of Justice of the European Communities and the European Court of Human Rights.⁶⁴

The Charter constitutes six chapters, including rights, freedoms and principles that built its legal framework. Chapter I (Dignity), Chapter II (Freedoms), and Chapter VI (Justice) correspond to Articles 2-12 of the European Convention, while Chapter IV (Solidarity) reaffirms European Social Charter and Chapter V (Citizens' Rights) contains rights of citizens of the Union. Lastly, Chapter VII provides general provisions regarding the scope of the Charter and the guaranteed rights. The relevant rights in the Charter for this study are Article 7 Right to Privacy, Article 8 Right to Protection of Personal Data, Article 11 Freedom of expression and information, Article 16 Freedom to conduct a business, Article 47 Right to

⁶² Article 2 of the Treaty of European Union.

⁶³ Preamble to the Charter, p 8.

⁶⁴ Preamble to the Charter, p 8.

an effective remedy and a fair trial and Article 52 which defines the scope and interpretation of rights and principles.

The Charter sets the minimum standards for protecting these rights as it states that it shall not prevent Union law from providing more extensive protection while containing rights which correspond to rights guaranteed by the Convention with the same meaning and scope.⁶⁵ Thus, the Charter contains rights which correspond to rights guaranteed by the ECHR.⁶⁶ There are differences regarding the expressions used and the terms employed by the ECHR and Charter, yet these provide guidance for the interpretation of the provisions.⁶⁷ For instance, while the Charter includes a separate right for the protection of personal data in Article 8, ECHR includes the right to respect for private and family life in Article 8. Thus, even though ECHR does not include a data protection right per se, under ECtHR case law, the right to privacy is broad enough to encompass the right to protection of personal data. However, it is important to note that there is an argument in the literature that suggests that the nature of the Charter as a legally enforceable bill of rights for the EU raises the risk of deviations developing between the two instruments.⁶⁸

Regarding its legal status, Article 6(3) TFEU states that the Charter “*shall have the same legal value as the Treaties*”, which has been underlined in a series of decisions by CJEU, too.⁶⁹ Moreover, Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR despite it does not constitute a legal instrument which has been formally incorporated into European Union law. It has been accepted as the freedoms and principles stated in the Charter have the highest level of legal value, referring to the aforementioned general principles, in so far as the former may be identified with the latter, becomes no longer necessary.⁷⁰ Thus, CJEU has been answering questions requiring interpretation of the fundamental rights by focusing on the Charter in light of the Convention and ECtHR case law.

⁶⁵ Article 52(3) of the Charter.

⁶⁶ Article 52(3) of the Charter.

⁶⁷ Chapter VII of Charter.

⁶⁸ Stephen Brittain, ‘The Relationship between the EU Charter of Fundamental Rights and the European Convention on Human Rights: An Originalist Analysis’ [2015] *European Constitutional Law Review* 482.

⁶⁹ Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert* [2010] ECLI:EU:C:2010:662, para. 45; Case C-236/09 *Association Belge des Consommateurs Test-Achats and Others* [2011] ECLI:EU:C:2011:100, para 16.

⁷⁰ Case C-70-10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (Scarlet Extended)* [2012] ECLI:EU:C:2011:255, Opinion of Advocate General Cruz Villalón, para 30.

As this study critically examines CJEU and ECtHR case law as its main primary resource, it is important to clarify the relationship between the Convention and the CJEU and ECtHR and CJEU. One should keep in mind that, the legally binding character of the Charter in 2009 did not deprive the Convention of its role as a source of fundamental rights protection in the EU as explained above. The European Parliament explains that the Treaty of Lisbon has paved the way for EU accession to the ECHR. However, although both the European Parliament and the European Council stress the need for EU accession there is no significant action taken.

Therefore, in *Tele2/Watson* the CJEU found that the negotiated agreement neither provided the Court's exclusive jurisdiction, nor sufficient protection concerning the EU's specific legal arrangements. In his opinion for this case, the AG Saugmandsgaard-Øe, in assessing the relationship between the Convention and the Charter, advised that according to Article 6(3) TEU, human rights as enshrined in the Convention constituted general principles of EU law. However, the AG acknowledged that since the EU had not acceded to the Convention, the latter could not be considered a legal instrument, which had been formally incorporated into the Union's law.⁷¹

However, by pointing out Article 52(3) of the Charter, which states “...*this provision [does] not prevent Union law providing more extensive protection.*”, AG stated that CJEU is entitled, to extend the scope of the provisions of the Charter beyond that of the corresponding provisions of the ECHR, where this is necessary in the context of EU law.⁷² Thus, AG concluded that when it comes to assessing interferences with fundamental rights, it would be inappropriate to impose different criteria on the Member States depending on whether the Convention or the Charter was being examined.⁷³ This outcome is in line with the approach adopted by the Court in *Digital Rights* which has extended the scope of Article 7 and Article 8 of the Charter beyond that of Article 8 of the ECHR. This also shows how the careful alignment of the case law of the Strasbourg and Luxembourg Court is improving,

⁷¹ Joined Cases C-203/15 and C-698/15 *Tele2 Sverige AB v Postoch telestyrelsen (C-203/15) and Secretary of State for the Home Department v Tom Watson* (“Tele2/Watson”) [2016] Opinion of Advocate General Saugmandsgaard Øe, ECLI:EU:C:2016:572, para 76.; Opinion 2/13 of 18 December 2014 ([EU:C:2014:2454](#), paragraph 179), and the judgment of 15 February 2016 in N. ([C-601/15 PPU](#), [EU:C:2016:84](#), paragraph 45.

⁷² *Tele2/Watson* [2016] Opinion of Advocate General Saugmandsgaard Øe, ECLI:EU:C:2016:572, para 78.

⁷³ *Tele2/Watson* [2016] Opinion of Advocate General Saugmandsgaard Øe, ECLI:EU:C:2016:572, para 141.

which is a welcomed shift regarding the harmonisation and the protection of fundamental rights that strengthens the framework for fair balancing of competing fundamental rights.

The relationship between the CJEU and the European Court of Human Rights (ECtHR) is a long-standing and important one. The ECtHR interprets and applies provisions of the ECHR in its decisions which has binding force on High Contracting Parties.⁷⁴ Since the *Hoechst*⁷⁵, where the first reference to the ECtHR took place within a CJEU decision, the case law of the ECtHR maintains its position in the EU legal system, especially for the CJEU, due to the combined effects of Article 6(3) TFEU and Article 52(3) of the Charter.⁷⁶ It is common practice for CJEU to refer to the interpretations of the ECtHR of corresponding Convention rights when dealing with the rights within the Charter, which prevents the development of an unharmonised system of fundamental rights protection caused by the varying interpretations of the Convention by ECtHR and the Charter by CJEU.

The settled case law of CJEU ensures that the rights guaranteed by the Charter must be given their full effect.⁷⁷ However, these rights under the Charter are not absolute, meaning there could be limitations as long as these limitations meet the requirements in Article 52(1) of the Charter. Any possible interference with fundamental rights and freedoms requires an examination of whether that interference is justified in the light of the conditions set out in Article 52(1) of the Charter to demonstrate its compliance with fundamental rights. These are, namely, being provided for by law and ensuring the respect of the essence of those rights and freedoms, and in the light of the principle of proportionality, being necessary and genuinely meeting objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.⁷⁸ The criterion of being provided by law implies that the act which permits the interference with those rights must define the scope of the limitation.⁷⁹ It also includes the assessment of the quality of the law in question, which

⁷⁴ Article 46 of ECHR.

⁷⁵ Joined cases C-46/87 and C-227/88, *Hoechst AG v Commission of the European Communities* [1989] ECLI:EU:C:1989:337.

⁷⁶ Juliane Kokott and Christoph Sobotta, 'Protection of Fundamental Rights in the European Union: On the Relationship between EU Fundamental Rights, the European Convention and National Standards of Protection.' (2015) 34 Yearbook of European Law 60.

⁷⁷ C-617/10 *Åkerberg Fransson* [2013] EU:C:2013:105, para 45.

⁷⁸ Article 52(1) of Charter.

⁷⁹ Case C-401/19 *Republic of Poland v European Parliament and Council of the European Union* ('*Poland v European Parliament*') [2022] ECLI:EU:C:2022:297, para 64; C-311/18 *Facebook Ireland and Schrems* [2020] EU:C:2020:559, para 175.

requires the law to be accessible and foreseeable.⁸⁰ Moreover, this requirement also implied that the law has to be compatible with the rule of law which requires providing protection against the interferences with fundamental rights.⁸¹ It is important to note that a failure to satisfy one condition within Article 52(1), constitutes a violation regardless of conformity with the other two conditions.⁸²

As the focus of this study for the assessment of Article 17 and providing solutions is the third condition, proportionality, it is important to understand the framework around it. In a broad sense, proportionality covers both the necessity and the appropriateness (proportionality *stricto sensu*) according to the settled case law of CJEU.⁸³ The assessment of proportionality in the strict sense constitutes the proportionality test in question, and it requires establishing a balance between the extent and nature of the interference and the objectives pursued by the measure.⁸⁴ The first move towards applying the proportionality criterion into the IP framework was made by the InfoSoc Directive and the Enforcement Directive, which include the requirement of proportionality as well as the effectiveness for the measures, sanctions and remedies against infringements of intellectual property rights.⁸⁵

Thus, assessing the proportionality of legislative measures includes different assessments such as legitimacy, effectiveness and efficiency, interference on fundamental rights and then, a fair balance evaluation.⁸⁶ First, the significance of the aim should be assessed, and the question of whether and to what extent the measure meets this objective should be discussed. Then, the scope, extent and intensity of the measure's interference with fundamental rights should be assessed by describing the impact and, lastly, by comparing the limitation that the measure brings on competing fundamental rights to the measure's aim of protecting

⁸⁰ *Ahmet Yildirim v Turkey* (n 1), para 57; *Dink v. Turkey*, App nos. [2668/07](#), [6102/08](#), [30079/08](#), [7072/09](#) and [7124/09](#) (ECtHR, 14 September 2010) para 114.

⁸¹ *Ahmet Yildirim v Turkey* (n 1), para 59.

⁸² Iain Cameron, *An Introduction to the European Convention on Human Rights* (8th edition, Iustus 2018).

⁸³ Case 11-70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECLI:EU:C:1970:114, paras. 2, 16; Case C-62/14, *Gauweiler (OMT)*, [2015] ECLI:EU:C:2015:400, para. 67.; C-331/88, *Fedesa and others*, [1990] ECLI:EU:C:1990:391, para. 13 ;

⁸⁴ European Data Protection Supervisor, 'EDPS Guidelines on Assessing the Proportionality of Measures That Limit the Fundamental Rights to Privacy and to the Protection of Personal Data' (EDPS 2019) <https://edps.europa.eu/sites/edp/files/publication/19-12-19_edps_proportionality_guidelines2_en.pdf>.

⁸⁵ Recital 58 and Article 8 of InfoSoc; Art 3(2) of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights ('Enforcement Directive'), OJ L 157, 30.4.2004, p. 20.

⁸⁶ European Data Protection Supervisor, 'EDPS Guidelines on Assessing the Proportionality of Measures That Limit the Fundamental Rights to Privacy and to the Protection of Personal Data' (EDPS 2019) <https://edps.europa.eu/sites/edp/files/publication/19-12-19_edps_proportionality_guidelines2_en.pdf>.

copyright, an evaluation of the fair balance between the right to intellectual property and other fundamental rights by reconciling the requirements of the protection of those different rights should take place.⁸⁷ Where the measure is found to be disproportionate, safeguards that ensure protection for the fundamental rights which are being limited and interfered with by the measure must be introduced.⁸⁸ Together with proportionality, the essential but “obscure and amenable”⁸⁹ principle, the fair balancing of competing rights has been placed at the heart of the EU law, which can be seen from the stress on the importance of balancing competing fundamental rights in decisions of CJEU and ECtHR.⁹⁰ That is why the safeguards of Article 17 will be examined accordingly to these important principles and solutions will be made following the proportionality formula.

Thus, the focus of the study reflects the focus within the primary sources of EU law as, in addition to the case law of the EU, the stress on the fundamental rights and fair balancing has been also a significant part of EU Directives such as InfoSoc Directive, E-Commerce Directive, Enforcement Directive and, with a particular significance for this study, CDSMD.

As stated in its Recital, one of the aims of InfoSoc is to help compliance with the fundamental principles of law and especially of property, including intellectual property, freedom of expression and the public interest.⁹¹ Similarly, Enforcement Directive states that it respects fundamental rights and observes the principles of the Charter.⁹² Importantly, it identifies the fair balance that needs to be struck between intellectual property and freedom of expression or protection of personal data as a must.⁹³ E-Commerce Directive underlines the importance of the effective exercise of the freedoms of the internal market and explicitly

⁸⁷ C-283/11, *Sky Österreich GmbH v. Österreichischer Rundfunk* [GC] [2013], ECLI:EU:C:2013:28, para. 60; Case C-275/06, *Productores de Música de España (Promusicae)/Telefónica de España SAU* (*Promusicae*), [2008] ECLI:EU:C:2008:54, paras 65 and 66; *Big Brother Watch and others v United Kingdom*, (ECtHR, 13 September 2018), 2.42.

⁸⁸ C-203/15 and C-698/15, *Tele2 Sverige AB v Postochtelestyrelsenk and Secretary of State for the Home Department v Tom Watson* (*Tele2*) [2016] ECLI:EU:C:2016:970, paras 120-122; C-293/12 and C-594/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources, Minister for Justice, Equality and Law Reform, Commissioner of the Garda Síochána, Ireland*, (*Digital Rights*) [2014] ECLI:EU:C:2014:238, para 68.

⁸⁹ P van Dijk, GJH van Hoof and AW Heringa, *Theory and Practice of the European Convention on Human Rights* (3rd ed, Kluwer Law International 1998). 349.

⁹⁰ *Promusicae* (n 87); Opinion of AG Villalón in *Scarlet Extended* (n 70), para 71.; *Scarlet Extended* (n 16), para 50; *Netlog* (n 16), para. 49; *Scarlet Extended* (n 16), para 50; Opinion of AG Villalón in *Scarlet Extended* (n 70), para 71. C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH* [2013] ECLI:EU:C:2013:781, Opinion of Advocate General Cruz Villalón, para 86.

⁹¹ Recital 3 of InfoSoc

⁹² Recital 32 of Enforcement Directive

⁹³ Recital 2 of Enforcement Directive

mentions Convention by stating that directives covering the supply of information society services must ensure that they are acknowledging freedom of expression as enshrined in Article 10(1) of the Convention.⁹⁴ Then, underlines that the removal or disabling of access to illegal information, which includes copyright-infringing content, has to be undertaken in observance of the principle of freedom of expression.⁹⁵ It also addresses the right to a fair trial by stating that it is necessary to guarantee victims effective access to means of settling disputes.⁹⁶

The main legislative focus of this study, CDSMD, also underlines the importance of consideration of fundamental rights at various points. The stress on the limited nature of copyright protection can be seen by the increased importance of exceptions and limitations with this Directive. The Directive states the importance of allowing users to upload and make available of their content that benefits from quotation, criticism, review, caricature, parody or pastiche exceptions, which became mandatory with this Directive, for the purposes of striking a balance between the fundamental rights laid down in the Charter.⁹⁷ CDSMD respects the fundamental rights and observes the principles of the Charter, therefore, it should be interpreted and applied accordingly.⁹⁸ This stress on fundamental right-compliant interpretation and application supports this study's aim of providing fundamental right-compliant implementation of Article 17. In addition to freedom of expression, CDSMD makes an explicit mention of the right to respect for private and family life and the right to protection of personal data set out in Articles 7 and 8.⁹⁹ Also, another important safeguard which provides users with complaint and redress mechanisms serves to the protection of the right to a fair trial of users against the disproportionate copyright protection caused by Article 17(4)'s obligations.¹⁰⁰ However, it is important to note that, in order to tackle the aforementioned issues arising from the enforcement of copyright within the platform, the right implementation should ensure that these guarantees can and will be enforced in practice, therefore, ensuring the effectiveness in practice is constitutes another aim of this study.

⁹⁴ Recital 9 of E-Commerce Directive

⁹⁵ Recital 46 of E-Commerce Directive

⁹⁶ Recital 52 E Commerce Directive

⁹⁷ Recital 70 CDSMD

⁹⁸ Recital 84 CDSMD

⁹⁹ Recital 85; Article 17(9) of CDSMD

¹⁰⁰ Article 17(9) of CDSMD

In addition to the legislation, the Courts of the EU, CJEU and ECtHR, have been dealing with issues with striking a fair balance between on one hand right to property and on the other the rights to private and family life (Article 7)¹⁰¹ secrecy of communications (Article 7)¹⁰², personal data (Article 8)¹⁰³, freedom of expression and information (Article 11)¹⁰⁴, freedom to conduct a business (Article 16)¹⁰⁵ and right to a fair trial (Article 47).¹⁰⁶

In the early decisions such as *Scarlet Extended*, *Netlog* and *Mc Fadden*, the stress was on the fact that the right to intellectual property is not absolute and that a fair balance has to be struck between copyright and other fundamental rights such as the right to freedom of expression.¹⁰⁷ In its evolving journey regarding balancing rights, CJEU has moved from merely requiring the fair balance to be struck to specifying the way to reach the fair balance between these rights.¹⁰⁸ This evolution of the approach of the CJEU to fair balance has been summarised by Chavannes in three steps: traditional balancing as seen in *Promusicae*, the internal fundamental rights balancing as seen in twin decisions *Scarlet Extended* and *Netlog* (*SABAM cases*), *UCP Telekabel*, and lastly, rejection of external fundamental rights balancing as seen in *Funke Medien*.¹⁰⁹

In *Promusicae*, CJEU laid the foundation for the application of proportionality and fair balance in cases where IP rights compete with other fundamental rights. CJEU stated that the relevant authorities are obliged to achieve a “fair balance” between the rights to respect for private life and rights to protection of personal data of the internet service provider's customers on the one hand and the rightholders' rights to protection of intellectual property and to have an effective remedy on the other.¹¹⁰ CJEU stated that where several fundamental

¹⁰¹ *Promusicae* (n 87); Opinion of AG Villalón in *Scarlet Extended* (n 70), para 71.

¹⁰² Opinion of AG Villalón in *Scarlet Extended* (n 70), para 71.

¹⁰³ *Netlog* (n 16), para. 49; *Scarlet Extended* (n 16), para 50; Opinion of AG Villalón in *Scarlet Extended* (n 70), para 71.

¹⁰⁴ Opinion of AG Villalón in *Scarlet Extended* (n 70); *Netlog* (n 13) para. 50; C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH* [2013] ECLI:EU:C:2013:781, Opinion of Advocate General Cruz Villalón, para 86.

¹⁰⁵ *Scarlet Extended* (n 16), para. 46; *Netlog* (n 16) para. 44; Case C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* (‘UPC Telekabel’), [2014] ECLI:EU:C:2014:192, para 47; Opinion of AG Villalón in *UPC Telekabel* (n 62), para 83.

¹⁰⁶ *Ashby Donald v. France* App No. 36769/08 (ECtHR, 10 January 2013); *Yildirim v. Turkey*, *Altıparmak v. Turkey*; *Jankovskis v. Lithuania*; Christophe Geiger, *The Future of Copyright in Europe: striking a fair balance between protection and access to information* (2010). *Intellectual Property Quarterly* I.P.Q. 2010, 1, 1-14.;

¹⁰⁷ *Scarlet Extended* (n 16), para 49; *Netlog* (n 16), para 50.; C *Mc Fadden* (n 16), paras 83-89.

¹⁰⁸ Stefan Kulk and Frederik Zuiderveen Borgesius, ‘Filtering for Copyright Enforcement in Europe after the Sabam Cases’ (2012) 34 *European Intellectual Property Review* 791.

¹⁰⁹ Remy Chavannes, (Speech at the AIPPI Congress, Cancun, 26 September 2018)

¹¹⁰ *Promusicae* (n 87), paras 65-68.

rights protected under EU law are at stake, it is for the national authorities or courts concerned to ensure that a fair balance is struck between those rights, not just national legislators when implementing EU law.¹¹¹ This marked the era of “rampant” harmonisation for the CJEU, where it incorporated fundamental rights in various cases to shape and expand the EU *acquis*.¹¹² In *L'Oréal*, by recalling their *Promusicae* decision, CJEU held that the copyright enforcement measures imposed on online service providers must strike a fair balance between the various rights and interests.¹¹³

The CJEU practice has represented the increased European sensitivity to fundamental rights, including the right to seek, receive and impart information in early case law.¹¹⁴ In the twin *SABAM* decisions, CJEU concluded that the protection of the right to intellectual property in Article 17 of the Charter is not absolute, and to strike a fair balance, the protection of the other fundamental rights must also be considered.¹¹⁵ In *Scarlet Extended*, Court found the injunction in question, which requires the implementation of a filtering system for the protection of copyright, as disproportionately interfering with users’ freedom to receive or impart information safeguarded by Article 11 since these filtering systems block the lawful content as well as the unlawful ones.¹¹⁶ Lastly, the required measure for the protection of copyright obliged the installation of a complicated, costly, permanent computer system at the platform’s own expense, which would operate unlimited monitoring, therefore, constituted an interference with the freedom to conduct a business enshrined in Article 16 of the Charter.¹¹⁷ That is why Court found the injunction in question as failing to strike a fair balance between the protection of the intellectual property right enjoyed by copyright holders, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other.¹¹⁸ CJEU case law established that this type of preventive measure favours the IPRs over other fundamental rights such as freedom of expression, data protection, and right to a fair trial, and often undermines these competing

¹¹¹ *Promusicae* (n 87), paras 68, 70

¹¹² Caterina Sganga, ‘A Decade of Fair Balance Doctrine, and How to Fix It: Copyright Versus Fundamental Rights Before the CJEU from *Promusicae* to *Funke Medien*, *Pelham* and *Spiegel Online*’ (Social Science Research Network 2019) SSRN Scholarly Paper ID 3414642 <<https://papers.ssrn.com/abstract=3414642>> accessed 22 June 2020.

¹¹³ Case C-324/09 *L'Oréal v eBay* (‘*L'Oréal*’) [2011] EU:C:2011:474, para 143.

¹¹⁴ Christophe Geiger and Franciska Schönherr, ‘Defining the Scope of Protection of Copyright in the EU: The Need to Reconsider the *Acquis* regarding Limitations and Exceptions’, in Tatiana-Eleni Synodinou (ed.), *Codification of European Copyright Law, Challenges and Perspectives*, (Kluwer Law International, 2012);

¹¹⁵ *Scarlet Extended* (n 16), para. 44

¹¹⁶ *Scarlet Extended* (n 16), para. 52; *Netlog* (n 16), para 50.

¹¹⁷ *Scarlet Extended* (n 16), para 49; *Netlog* (n 16), para 47.

¹¹⁸ *Scarlet Extended* (n 16), para. 53; *Netlog* (n 16), para 51.

fundamental rights, therefore carries a significant risk of disturbing the fair balance by failing to respect the essence of these rights and principle of proportionality.¹¹⁹

Similarly, the notion of fair balance has been underlined again in *UPC Telekabel*, where CJEU conducted an assessment in the light of fundamental rights and proportionality. According to the Court, a blocking injunction that orders the platform to block its customers' access to a copyright-infringing website has to strike a balance between copyrights and related rights, which are intellectual property and are therefore protected under Article 17(2) of the Charter, the freedom to conduct a business that internet service providers enjoy under Article 16 of the Charter, and lastly, the freedom of information of internet users, whose protection is ensured by Article 11 of the Charter.¹²⁰ The Court explained the way of reaching the fair balance in accordance with Article 52(1) of the Charter when implementing an injunction: injunction should not unnecessarily deprive internet users of the possibility of lawfully accessing the information available, and they should have the effect of preventing unauthorised access to protected subject-matter or at least seriously discouraging internet users.¹²¹ Then, the Court linked the notion of “fair balance” with the “principle of proportionality” and underlined the flexibility of proportionality.¹²² In this way, the fair balance principle has been identified as the foundation for CJEU to undertake a proportionality analysis.¹²³ In the same year, while balancing the right to privacy with the freedom to receive and impart information and the right to conduct a business, CJEU stated that Articles 7 and 8 of the Charter “override” these rights; however, the Court added that where there is a large public interest in accessing the information such as the role played by the data subject in public life, this general rule should not be applied.¹²⁴

Along with CJEU, the European Court of Human Rights also examined these conflicts in many cases while examining the issues concerning online copyright enforcement

¹¹⁹ *Scarlet Extended* (n 16), para. 52; *Netlog* (n 16), para 50; C-682/18 and C-683/18 *Frank Peterson v Google LLC, YouTube LLC, YouTube Inc., Google Germany GmbH (C-682/18) and Elsevier Inc. v Cyando AG*, Opinion of Advocate General Saugmandsgaard Øe, para 242.

¹²⁰ *UPC Telekabel* (n 49), para 47.

¹²¹ *UPC Telekabel* (n 49), paras 62 and 63

¹²² Christina Angelopoulos, ‘Sketching the Outline of a Ghost: The Fair Balance between Copyright and Fundamental Rights in Intermediary Third Party Liability’ (2015) 17 info 72 <<https://www.emerald.com/insight/content/doi/10.1108/info-05-2015-0028/full/html>> accessed 11 June 2020.

¹²³ Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, 2002) 193.

¹²⁴ C-131/12 *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* [2014] ECLI:EU:C:2014:317 (*‘Google Spain’*), para 81.

measures.¹²⁵ These issues have been discussed in many cases, such as *Yildirim v. Turkey*, *Altiparmak v. Turkey*, and *Jankovskis v. Lithuania*, where ECtHR applied its balancing test in various scenarios that involved limitations on fundamental rights.¹²⁶ Most significantly, the ECtHR satisfied the need for a general framework regarding the fair balance in *Ashby Donald and others v. France*.¹²⁷ In *Ashby Donald*, the Court acknowledged the necessity of a comprehensive balancing test between Article 10 of the Convention and Article 1 of the First Protocol and in contrast to the approach of the InfoSoc and CJEU case law, which puts the copyright in the centre while investigating conflicts between fundamental rights, ECtHR has seen these rights as the point of departure by observing copyright as the exception to freedom of expression.¹²⁸ In this case, by distinguishing cases by the types of expressions that require protection, ECtHR assesses the margin of appreciation in dealing with interferences of freedom of expression and therefore introduces an external balancing act.¹²⁹ Notably, ECtHR underlined the wide margin afforded for the fair balancing of competing private interests or competing convention rights.¹³⁰ In the landmark decision for the restrictions on freedom of expression on the internet, *Yildirim v. Turkey*, Judge Albuquerque described the minimum criteria that need to be met by legislation concerning Internet access ban measures to be compatible with the EU law.¹³¹ The measure must have a definition of categories of persons likely to have their publications blocked and access ban orders, limits regarding the territorial scope and the duration, the indication of interests, compliance with proportionality and necessity principles, definition of the authorities, the procedure, and safeguards.¹³²

However, although there is a rich case law considering the fundamental rights and fair balancing of competing rights, both EU and Member States' national level, it is mostly unclear how to enforce this in practice. Especially, the increasing use of the term 'user rights'

¹²⁵ Peter Teunissen, 'The Balance Puzzle: The ECJ's Method of Proportionality Review for Copyright Injunctions 40. 579-593.' (2018) 40 *European Intellectual Property Review*, 583.

¹²⁶ *Ahmet Yildirim v. Turkey* (n 1); *Ashby Donald v. France* (n 57); *Altiparmak v. Turkey* (n 1); *Jankovskis v. Lithuania* (n 1).

¹²⁷ Stijn van Deursen and Thom Snijders, 'The Court of Justice at the Crossroads: Clarifying the Role for Fundamental Rights in the EU Copyright Framework' (2018) 49 *IIC - International Review of Intellectual Property and Competition Law* 1080, 1090.

¹²⁸ Christophe Geiger and Elena Izyumenko, 'Shaping Intellectual Property Rights Through Human Rights Adjudication: The Example of the European Court of Human Rights' (2020) 46 *Mitchell Hamline Law Review* <<https://papers.ssrn.com/abstract=3613591>> accessed 22 June 2020. 324.

¹²⁹ Stijn van Deursen and Thom Snijders (n 127).

¹³⁰ *Ashby Donald v. France* (n 57) para 40.; *Delfi v Estonia* App no 64569/09 (ECtHR, 16 June 2015), para 139.

¹³¹ *Ahmet Yildirim v Turkey*, (n 1).

¹³² *Ahmet Yildirim v Turkey* (n 1), Concurring Opinion of Judge Pinto De Albuquerque.

for copyright exceptions and limitations (E&L) within the InfoSoc Directive by the CJEU, without an explanation of their enforceability, intensified the discussion regarding the copyright versus competing fundamental rights.¹³³

The role of exceptions and limitations in striking the balance between copyright and other fundamental rights is an important one. EU law has an exhaustive list of exceptions and limitations within the InfoSoc Directive which helps with fair balancing while dealing with the complicated relationship between copyright and other fundamental rights.¹³⁴ These exceptions and limitations reflect the three-step test within international copyright conventions such as TRIPS Agreement, WIPO treaties on Copyright, and Berne Convention. According to this test, where reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the rightholder, in special cases, reproduction of such works should be allowed.¹³⁵ EU copyright law embraces the three-step test as a regulatory instrument.¹³⁶ Article 5(5) InfoSoc embodies this test and constructs an important tool for fair balancing between copyright and other fundamental rights.

The CDSMD also stressed the importance of copyright exceptions and limitations for user-generated content and introduced an obligation for the platforms to enable users to benefit from these exceptions.¹³⁷ This sparked the discussion in the literature regarding the status of exceptions as rights rather than defences again.¹³⁸ Prior to CDSMD, the discussion regarding this essential concept for the protection of freedom of expression was also intense. The court identified these as an important tool for ensuring a fair balance between copyright protection

¹³³ C-469/17, *Funke Medien NRW GmbH v Bundesrepublik Deutschland* ('*Funke Medien*') [2019], [70]; C-516/17, *Spiegel Online GmbH v Volker Beck* ('*Spiegel Online*') [2019], [54].; Sebastian Felix Schwemer and Jens Schovsbo, 'What Is Left of User Rights? – Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime' in Paul Torremans (ed), *Intellectual Property Law and Human Rights* (4th edn, Wolters Kluwer 2020) <<https://papers.ssrn.com/abstract=3507542>> accessed 22 June 2020.

¹³⁴ Article 5 of InfoSoc Directive, p.16; Recital 31 of the InfoSoc Directive regarding the notion of "fair balance." Noting that CDSMD made quotation, criticism, review and caricature, parody or pastiche mandatory for Member States to implement. See Article 17(7)(a) and (b) of CDSMD.

¹³⁵ Article 9.2 of the Berne Convention.; Article 5(5) InfoSoc Directive

¹³⁶ Martin Senfleben, 'Copyright, Limitations and the Three-Step Test. An Analysis of the Three-Step Test in International and EC Copyright Law' (PhD thesis, University of Amsterdam 2004) <<https://hdl.handle.net/11245/1.224623>>. 245

¹³⁷ Recital 70 CDSMD; Article 17(7) CDSMD

¹³⁸ Tito Rendas, 'Are Copyright-Permitted Uses "Exceptions", "Limitations" or "User Rights"? The Special Case of Article 17 CDSM Directive' (2022) 17 *Journal of Intellectual Property Law & Practice* 54.

and freedom of expression.¹³⁹ However, in *Funke Medien*, the three-step test has been used as a tool to limit the scope of the E&Ls.¹⁴⁰ These E&Ls have been used as the internal balancing tool by rejecting the external balancing of fundamental rights, and CJEU stressed the high level of protection for authors' copyright over freedom of expression and press.¹⁴¹ While underlying the central position of exception and limitations for the application of fundamental rights in copyright cases and entitling them as "user rights", Court stressed the limited interpretation of the exception and limitations and the broad interpretation of copyright that authors enjoy.¹⁴² This decision has been read as CJEU putting the interests of rightholders ahead by applying the traditional hierarchal view.¹⁴³ However, by prioritising the copyright and strictly restricting the interpretations of exceptions and limitations, CJEU makes it difficult for exceptions and limitations to fulfil their function to secure a fair balance and ensure the protection of user rights. Also, this approach contrasts with ECtHR case law which stresses the derogability of copyright and the possibility of overriding interest of a fundamental right or freedom.¹⁴⁴

Therefore, the question of whether and how fundamental rights can serve as autonomous grounds for limiting copyright remains to be investigated. Therefore, this study also discusses copyright exceptions and limitations and attempts to clarify the role of fundamental rights in this context. It follows the argument which suggests that these E&Ls can constitute rights for users¹⁴⁵ by focusing on arguments outside the basic rooted assumptions such as 'author-centeredness of copyright' as this unnecessarily limits the interpretations and flexibility of copyright, therefore making it challenging to adapt it to modern times.¹⁴⁶

Thus, there are still uncertainties and a lack of guidance related to the notion of the fair balance between fundamental rights and the current balancing exercises, even though the principle of striking a balance between the different interests involved is reflected in the very

¹³⁹ Case C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others*, ('Painer')[2011] ECLI:EU:C:2011:798 paras. 132–137.; Case C-201/13 *Johan Deckmyn v Helena Vandersteen and Others* [2014] ECLI:EU:C:2014:2132, paras 21-24.

¹⁴⁰ Sebastian Felix Schwemer and Jens Schovsbo (n 133).

¹⁴¹ Case C-469/17, *Funke Medien NRW GmbH v Bundesrepublik Deutschland*, ('Funke Medien')[2019] ECLI:EU:C:2019:623.

¹⁴² *ibid.* paras. 70-71, 89.

¹⁴³ Sebastian Felix Schwemer and Jens Schovsbo (n 133), 11.

¹⁴⁴ *Ashby Donald v. France* App No. 36769/08 (ECtHR, 10 January 2013) para 40.

¹⁴⁵ Tito Rendas, (n 138).

¹⁴⁶ Sebastian Felix Schwemer and Jens Schovsbo (n 133), 8.

essence of copyright.¹⁴⁷ As can be seen from above, the relationship between fundamental rights and intellectual property law is the subject of a substantial body of literature; however, the role of fundamental rights within European Union intellectual property law has not yet been completely explored.¹⁴⁸ The conflict between constitutional and intellectual property rights has developed throughout time, but despite increasing awareness of the importance of fundamental rights, the law, including the EU's latest copyright reform CDSMD, has been unsuccessful in reflecting this awareness and, therefore, failed to answer the modern needs of society.

This aforementioned application of fundamental rights as external rules is something that the implementation and enforcement of CDSMD can benefit from as the current problems with online copyright enforcement show that giving more protection over copyright such as filtering obligations is not the solution. According to the Gibling and Doctorow giving more protection over copyright is like “*giving more lunch money to your bullied kid.*”¹⁴⁹ This would not solve the cause of the problem, on the contrary, it would make it worse, as the bullies, powerful buyers such as big record companies and big tech platforms, will steal also the extra money that you give.

Unfortunately, the long-awaited copyright reform of the EU, CDSMD, is in favour of giving more money. As it follows this trend towards stricter protection of copyright, with the obligations for copyright protection that it introduces, CDSMD has the risk of importing deep-rooted current imbalances. Therefore, to correct the current imbalance caused by the excessive use of copyright, which is contrary to its functions, an implementation which respects limits drawn by fundamental rights as the external is the only way to prevent this from happening. That is why this study will look at the problems raised by Article 17 of CDSMD “*through the prism of fundamental rights.*”¹⁵⁰

¹⁴⁷ Christophe Geiger, *The Future of Copyright in Europe: striking a fair balance between protection and access to information* (2010). *Intellectual Property Quarterly* I.P.Q. 2010, 1, 1-14.

¹⁴⁸ Christophe Geiger, “‘Constitutionalising’ Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union” [2006] *International Review of Intellectual Property and Competition Law* 371; Tuomas Mylly, *Intellectual Property and the European Economic Constitutional Law: The Trouble with Private Information Power* (IPR University Center 2009).

¹⁴⁹ Rebecca Gibling and Cory Doctorow, *Chokepoint Capitalism: How Big Tech and Big Content Captured Creative Labour Markets, and How We’ll Win Them Back* (Scribe Publications 2022).

¹⁵⁰ Christophe Geiger, ‘Fundamental rights, a safeguard for the coherence of intellectual property law?’ January 2004 IIC - *International Review of Intellectual Property and Competition Law* 35(3):268-280.

As can be seen from the above outline of the relevant theoretical framework, the significance of fundamental rights for individuals, organisations and businesses that are included in EU law suggests that any reform should give due importance to these rights and ensure that they are effective. Thus, this study addresses the relationship between copyright and aforementioned fundamental rights in order to ensure that the law strikes a fair balance between competing rights and interests within the scope of online enforcement of copyright and ensures that the freedom of expression, right to conduct a business, right to a fair trial, right to privacy are protected against the overenforcement of copyright as the right to intellectual property.

The principle of striking this fair balance between the different interests involved is reflected in the very essence of copyright. Ensuring the proportionality of the obligations that would be introduced with the new reform, namely CDSMD, and guaranteeing the proportional balancing of fundamental rights within this Directive and subsequently, its implementations is a must. Therefore, just like any legislative measure, Article 17 must also be subject to the proportionality test to ensure its compatibility with the Charter. This would require different assessments such as legitimacy, effectiveness and efficiency, interference on fundamental rights, and a fair balance evaluation.¹⁵¹ Where the outcome of the assessment of proportionality is negative, safeguards that ensure protection for the fundamental rights that are being limited by Article 17 must be introduced.¹⁵²

As the compatibility of Article 17 with the first two steps of Article 52(1) of the Charter, namely being provided by law and pursuing a legitimate aim which is the protection of copyright, is clear, this study will focus on the proportionality step when examining Article 17. This requires providing a detailed account of safeguards included within the Article. The analysis of Article 17 in the light of proportionality enables this study to further explore the link between copyright enforcement and fundamental rights. Then, in light of an extensive critical analysis of relevant primary and secondary sources, also enables this study to

¹⁵¹ Giovanni BUTTARELLI, 'Opinion of the European Data Protection Supervisor on the Proposal for a Council Decision on the Conclusion of the Anti-Counterfeiting Trade Agreement between the European Union and Its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America' (2012).

¹⁵² *Tele2* (n 88), paras 120-122; *Digital Rights* (n 88), para 68.

determine the fundamental right-compliant implementation of this Article which includes procedural safeguards proposals.

This study, to be able to provide effective and global solutions, examines the pre-CDSMD regime on online platforms in addition to the complete timeline of CDSMD by predominantly focusing on EU law and where it is relevant, US law, especially regarding platform regulation. It is important to note that, this study is not intended to be a comprehensive analysis of fundamental rights, it merely uses fundamental rights as an external balancing tool in line with the CJEU case law. This study aims to contribute to IP law and platform regulation by providing a better understanding of online copyright enforcement and exploring the role of fundamental rights in this context. This includes examining the impact of the enforcement obligations on fundamental rights and the relationship between copyright and other fundamental rights. After determining the importance of fundamental rights, this study proposes a series of safeguards for the fundamental right-compliant implementation of Article 17.

2.2 Intermediary Liability Prior to CDSMD

To understand how the need for reform on copyright rules developed and how the filtering obligations evolved, it is important to examine the law which regulates the relationship between platforms and copyright before the CDSMD. Therefore, this background will examine the framework of intermediary liability regarding copyright infringements prior to CDSMD by focusing on the InfoSoc Directive, E-Commerce Directive and rich case law of CJEU regarding communication to the public, safe harbour provisions, and filtering and blocking injunctions.

2.2.1 Safe Harbours

Depending on the nature of the infringing act, copyright infringement can be primary or secondary, which would result, respectively, direct and indirect liability. While primary infringement requires direct involvement, namely, doing the infringing act by the infringer,

secondary infringement occurs when someone is assisting or facilitating the infringing act, which is subject to additional subjective, such as intention, and objective, such as duties of care, factors. As visible actors with stronger financial standing compared to their users, intermediaries have become tempting targets for legal action regarding the infringing acts of their users.¹⁵³ In the online world, the liability of the intermediaries regarding the copyright infringements by the third party which took place within their service arises from the unauthorised acts of communication to the public (CTTP).¹⁵⁴ CTTP gives authors the exclusive right to communicate their works to the public and should be interpreted broadly.¹⁵⁵ The concept of “communication to the public” has been evolving for the intermediaries.¹⁵⁶ Regarding user-generated content platforms, Court made it clear that the right of communication to the public also covers digital matters like hyperlinking to copyright-infringing content with *GS Media*¹⁵⁷ and operating a platform on which copyright-infringing content is shared with *The Pirate Bay decision*.¹⁵⁸ However, there is a consensus in the literature on the fact that identifying hosting providers, especially UGC platforms, as “communicating to the public” has never been a clear conclusion under EU law.¹⁵⁹

As online intermediaries have limited knowledge of the data they transmit, store, or host, therefore, their infringing nature, following a strict liability found to be problematic.¹⁶⁰ Thus, to ensure the desired level of efficiency on the internet and the growth of digital innovation, legislators prescribed the limitation of the liability of the intermediaries in the cases of

¹⁵³ Ian J Lloyd, *Information Technology Law* (Ninth edition, Oxford University Press 2020).

¹⁵⁴ Articles 11, 11ter, 14 of the Berne Convention for the Protection of Literary and Artistic Works; Article 8 of World Intellectual Property Organisation Copyright Treaty. This Article also introduced the "right of making available to the public" as another exclusive right which covers the communication of works through the Internet.

¹⁵⁵ InfoSoc Directive.

¹⁵⁶ C-160/15 *GS Media BV v Sanoma Media Netherlands BV and Others*, (*'GS Media'*), [2016], EU:C:2016:644, para 34.; Case C-306/05, *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*. [2006] ECLI:EU:C:2006:764, (SGAE), paras 36-38; Case C-466/12 *Nils Svensson and Others v Retriever Sverige AB*, (*'Svensson'*), [2014] EU:C:2014:76, para 21; C-527/15 *Stichting Brein v Jack Frederik Willems (Filmspeler)* [2017] EU:C:2017:300, para 45; C-610/15 *Stichting Brein v Ziggo BV and XS4All Internet BV* [2017] EU:C:2017:456, para 27, 42.

¹⁵⁷ *GS Media* (n 156), para 27.

¹⁵⁸ *The Pirate Bay* (n 156), para 19.

¹⁵⁹ Giancarlo Frosio, 'Thou Shalt Not Link: How Communication to the Public Affects Internet Architecture' (2019); Christina Angelopoulos, 'EU Copyright Reform: Outside the Safe Harbours, Intermediary Liability Capsizes into Incoherence' (*Kluwer Copyright Blog*, 6 October 2016) <<http://copyrightblog.kluweriplaw.com/2016/10/06/eu-copyright-reform-outside-safe-harbours-intermediary-liability-capsizes-incoherence/>> accessed 28 October 2020.

¹⁶⁰ Commission Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market, COM(1998) 586 final, 18 November 1998, p. 12

infringements as a safeguard for the protection of innocent parties' fundamental rights.¹⁶¹ For intermediaries, especially for user-generated content platforms, it is not easy or practical for the hosts to control every upload by users. Most hosts do not approve content before they are uploaded to their server. In the pre-CDSMD framework, these intermediaries mostly have been considered secondary infringers, and where they meet certain characteristics of the special liability regime under the E-Commerce Directive, they are not liable but accountable.¹⁶²

The E-Commerce Directive (ECD) includes a separate liability regime for the intermediaries, which reflects the US Digital Millennium Copyright Act 1998 (DMCA)'s "safe harbors." In the United States, safe harbours are principally dealt with under section 512 of the DMCA and section 230 of the Communications Decency Act.¹⁶³ DMCA created these "safe harbors" to regulate the exposure of online service providers to secondary infringement claims for the actions of their users and to provide legal certainty for the internet.¹⁶⁴ Under s.512, online service providers received a series of exemptions on copyright liability as long as they met certain conditions. Under the title "limitations on liability relating to material online", the Act provides an exemption for four different types of online service providers: where a service provider is transmitting, routing, or providing connections for the material (transitory digital network communication), it can benefit from the s.512 (a) which constitute "mere conduit" exemption. s.512 (b) provides a "catching" exemption for the service providers who perform system catching, intermediate and temporary storage of material. Regarding the information residing on systems or networks at the direction of users, the storage of this material is covered by the 'hosting' exemption in s.512 (c). Lastly, for search engines, s.512 (d) includes an exemption for their acts of referring or linking users to an online location containing infringing material. These exemptions are combined with s.512 (i) and (m), which prevent requiring service providers to go beyond the standard technical measures by obliging them to monitor or affirmatively seek facts indicating infringing activity to be able to benefit from these exemptions.

¹⁶¹ First Report on the application of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, COM(2003) 702 final, p. 13-14.

¹⁶² Martin Husovec (n 37).

¹⁶³ The Digital Millennium Copyright Act of 1998, 17 USC § 512(m); Communication Decency Act [1996] 47 USC §230.

¹⁶⁴ Evan Engstrom and Nick Feamster, 'The Limits of Filtering: A Look at the Functionality and Shortcomings of Content Detection Tools' (Engine 2017) <<http://www.engine.is/the-limits-of-filtering/>>.

The ECD, by reflecting DMCA, also created a set of “safe harbours” for online intermediaries whose activities fall within the hosting (Article 14), caching (Article 13) or mere conduit (Article 12).¹⁶⁵ ECD provides pan-EU harmonised rules to create a legal framework to ensure the development and free movement of information society services between Member States.¹⁶⁶ To ensure this objective, it limits the liability of these intermediaries under civil, criminal and administrative law when they satisfy the safe harbour requirements. However, these limitations do not affect the application of injunctions of different kinds, such as orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal, blocking, or filtering injunctions.¹⁶⁷

Article 12, which is titled “mere conduit”, requires the Member States to ensure the service provider is not liable for the information transmitted; Article 13 requires the exemption for the automatic, intermediate and temporary storage of the information provided by the recipients of the service and provides the caching exemption and lastly, Article 14 covers the storage of information provided by the recipients of the service which constitute hosting exemption.¹⁶⁸ The general monitoring ban in Article 15 limits the obligations that can be imposed on these services more broadly by ensuring that Member States cannot impose a general obligation to monitor the information or actively seek facts or circumstances indicating illegal activity.¹⁶⁹

Just like DMCA’s “safe harbors,” ECD safe harbours do not give automatic immunities to service providers just because their services fall within the scope of the definition of the services described in the Articles; these liability protections are subject to certain conditions. For instance, mere conduit exemption requires the service provider not to initiate or select the receiver of the transmission and not to select or modify the information contained in the transmission¹⁷⁰, while caching exemption requires the provider not to modify the information

¹⁶⁵ Articles 12-14 of E-Commerce Directive. As Digital Services Act (DSA) entered into force as of the date of 16 November 2022, Articles 12-15 in the E-Commerce Directive has been deleted. However, DSA maintains the liability exemptions of such providers. This will be examined in detail in Chapter 2.3.3.

¹⁶⁶ Recitals 5-9 of E-Commerce Directive.

¹⁶⁷ Recital 45 of E-Commerce Directive.

¹⁶⁸ Articles 12-14 of E-Commerce Directive.

¹⁶⁹ Article 15(1) of E-Commerce Directive.

¹⁷⁰ Article 12 of E-Commerce Directive.

and interfere with the lawful use of technology but to comply with conditions on access to the information and rules regarding the updating of the information.¹⁷¹ In addition to this, it requires providers to act expeditiously to remove or disable access upon obtaining actual knowledge regarding the removal of the transmission source, which also applies to the hosting providers.¹⁷² In addition to these, ECD allows Member States to establish specific requirements that must be fulfilled expeditiously prior to the removal or disabling of information.¹⁷³

As hosting platforms have their own significance for this study as the main subject of Article 17 of CDSMD, hosting providers' exemption will be examined under a separate title in more detail.

2.2.1.1 Hosting Providers' Safe Harbour and Notice and Takedown Regime

Section 512 (c), DMCA hosting exemption, applies where the service provider does not have actual knowledge regarding the infringing material on their service, and it is not aware of facts or circumstances from which infringing activity is apparent.¹⁷⁴ Where the service obtains such knowledge, it has to cooperate with rightholders to remove infringing content or disable the access 'expeditiously.'¹⁷⁵ This establishes the formal notification procedure, known as notice and takedown, which introduces an additional immunity condition for the hosting service provider. The "takedown" can be the removal of the infringing content or disabling access to the infringing information. In practice, upon receiving the "notice," the intermediary assesses the credibility and accuracy of the complaint and consequently removes the upload or blocks access to it.

DMCA's notice and takedown mechanism allow rightholders to send takedown requests to these services, which must be expeditiously acknowledged while enabling the targets of notifications to challenge those requests through a counter-notice system by the hosting service.¹⁷⁶ Unless the rightholder who sent the notice files an action regarding the infringing activity, the counter-notice obliges the hosting service to replace the removed material and ceases disabling access to it not less than 10, nor more than 14, business days following

¹⁷¹ Article 13 of E-Commerce Directive.

¹⁷² Articles 13-14 of E-Commerce Directive.

¹⁷³ Recital 46 of E-Commerce Directive.

¹⁷⁴ Section 512 (c)(1)(A)(i) and (ii) of DMCA.

¹⁷⁵ Section 512 (c)(1)(A)(iii) of DMCA.

¹⁷⁶ Section 512 (g) of DMCA.

receipt of the counter notice.¹⁷⁷ DMCA provides details regarding the elements of the notification of ‘notice and takedown’ and counter-notice and sanctions in cases of misuse.¹⁷⁸

In time, the notice and takedown regime of DMCA became the leading system in practice for the removal of infringing content.¹⁷⁹ However, many issues have been reported regarding the notice and takedown system, such as their efficiency, accuracy rates, lengthy process times, and problems caused by the imbalance of powers between platforms and users, such as the abuse of this system by rightholders.¹⁸⁰ These problems were also acknowledged by the US Copyright Office in their extensive report released after the twenty-plus years since section 512 went into effect, where they pointed out the problems with effectiveness and capability to achieve the desired balance between different rights and interests.¹⁸¹ However, it is important to note that the report has no significant reform proposals for Section 512; it aims “to fine-tune” some parts to better balance the interests of copyright holders and online service providers.¹⁸²

In Europe, Article 14(1) of ECD establishes a liability exemption for “hosting activities.” Hosting providers, as their classic definition pictured by Article 14 of E-Commerce, store data provided by their users.¹⁸³ Under Article 14(1) of ECD, they are not liable for the information stored at the request of a recipient of the service. However, hosting safe harbours impose liability on these providers based on knowledge. Similar to DMCA hosting exemption, the applicability of ECD hosting exemption depends on the lack of actual knowledge and where this knowledge is obtained, taking action to end the infringing activity. According to Recital 46 and Article 14 of E-Commerce, they can only benefit from the liability exemption when they are not aware of facts or circumstances from which the illegal activity or information is apparent or when they do not have actual knowledge of illegal activity or information. Moreover, when the service providers fail to expeditiously remove or

¹⁷⁷ Section 512 (g) of DMCA.

¹⁷⁸ Section 512 (c)(3) of DMCA.

¹⁷⁹ Kristofer Erickson and Martin Kretschmer, ‘Analyzing Copyright Takedown of User-Generated Content on YouTube’ (2018) 9 Journal of Intellectual Property, Information Technology and E-Commerce Law 2190. 2

¹⁸⁰ Jennifer M Urban, Joe Karaganis and Brianna Schofield (n 14). These problems will be examined in detail in Chapter 4.

¹⁸¹ United States Copyright Office, ‘Section 512 of Title 17 A Report of the Register of Copyrights’ (United States Copyright Office 2020).

¹⁸² *ibid.* p.7.

¹⁸³ Article 14(1) of the E-Commerce Directive, p.13. “*Where an information society service is provided that consists of the storage of information provided by a recipient of the service...*”

disable access to such information once they are aware of it, the liability exemption will no longer apply.¹⁸⁴

As can be seen from these requirements, the notice and takedown mechanism of the DMCA is implied but not directly provided under Article 14 to provide an opportunity for rightholders to directly request a remedy from the intermediary regarding their users' infringement.¹⁸⁵ However, unlike DMCA, E-Commerce Directive does not harmonise the elements of the safe harbour protection, such as actual knowledge, nor establishes procedures for these; instead, it provides general limits for Member States to comply while designing their notice and takedown system.¹⁸⁶ Notably, Recital 46 assigns the principle of freedom of expression as the principle to observe for the removal or disabling of access.¹⁸⁷ As a result of having no harmonised notice and takedown procedure under E-Commerce, different practices of notice and takedown have been developed by different Member States.

As acknowledged by the Commission, “...*different approaches in the legislation and case law emerging from the Member States and the resulting legal uncertainty...*” resulted in an inharmonious and undesirable system regarding the intermediary liability.¹⁸⁸ Some Member States have deviated from the wording exclusively for Article 14 of E-Commerce, resulting in inconsistent approaches at the level of national case law.¹⁸⁹ Different national implementations attribute different meanings to the same concepts, causing inconsistencies within the liability regime of intermediaries.¹⁹⁰

Most importantly, the rapid development of technology and the changes within the nature of platforms raised the question of whether the safe harbour regime successfully kept up with the times and resulted in mixed views in the literature. Academics such as Bridy¹⁹¹, Reda¹⁹²,

¹⁸⁴ Article 14(1)(b); Recital 46 of the E-Commerce Directive, p 6.

¹⁸⁵ Aleksandra Kuczerawy, From ‘Notice and Take Down’ to ‘Notice and Stay Down’: Risks and Safeguards for Freedom of Expression [2019] [in: Giancarlo Frosio (ed), *The Oxford Handbook of Intermediary Liability Online*, forthcoming, 2019].

¹⁸⁶ Husovec (n 37), p.53

¹⁸⁷ Recital 46 of E-Commerce Directive.

¹⁸⁸ European Commission, ‘First Report on the application of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)’ COM/2003/0702 final.

¹⁸⁹ Eleonora Rosati, ‘Why a Reform of Hosting Providers’ Safe Harbour Is Unnecessary Under EU Copyright Law’ (2016) 2016/11. 8.

¹⁹⁰ *Bredbandsbolaget v The Pirate Bay*, T15142-14 (27 November 2015).

¹⁹¹ Annemarie Bridy, *The Price of Closing the 'Value Gap': How the Music Industry Hacked EU Copyright Reform* (2019). *Vanderbilt Journal of Entertainment & Technology Law*, 22, 323-358.

¹⁹² Felix Reda, ‘Written Testimony for the Hearing on “Copyright Law in Foreign Jurisdictions: How Are Other Countries Handling Digital Piracy?”’ (2020).

Engstrom and Feamster¹⁹³ argued that the safe harbour regime is still adequate; it is continuing to foster the growth of the internet by benefiting the users and creators. They defended that the limited liability system of safe harbours succeeded in striking a fair balance between the interests of rightsholders, online intermediaries and users. It has been argued that safe harbours are one of the essentials of the internet as they make creative expression and cultural participation possible for the public, and they are also essential for the wide selection of service providers that keep the internet culture diverse – not just “internet giants.”¹⁹⁴

On the other hand, academics such as Friedmann argued that the safe harbour provisions were neither effective nor efficient, as seen from the case law.¹⁹⁵ It is not surprising that these safeguard policies fail to meet the needs of intermediaries, rightholders and users as they were drafted when social media was just an inexperienced sensation and electronic commerce was observed as "embryonic and fragile."¹⁹⁶ It has been argued that safe harbour's protections are not functioning flawlessly anymore¹⁹⁷ and failing to meet their aim of stimulating growth and innovation within the internet.¹⁹⁸ As new and improved services have been developed, the application of safe harbour rules has become ambiguous, and the need to distinguish the hosting platforms by their content for determining their liabilities becomes even more critical. In this regard, that distinction has been drawn between user-generated platforms, such as YouTube, Dailymotion and Vimeo, and stream services, such as Spotify or Netflix. While the latter requires the consent of copyright holders to operate legally, the business model of the former revolves around a significant amount of data uploaded by users, which gives the name user-generated content.¹⁹⁹

One of the most problematic outcomes of the ambiguity around hosting safe harbour is voluntary preventive measures by the hosting providers. As safe harbours do not take away the possibility for the platforms to be ordered to remove third-party content and prevent the

¹⁹³ Evan Engstrom and Nick Feamster (n 164).

¹⁹⁴ Annemarie Bridy (n 191).

¹⁹⁵ Danny Friedmann, 'Sinking the Safe Harbour with the Legal Certainty of Strict Liability in Sight' (2014) 9 *Journal of Intellectual Property Law & Practice* 148 <<https://academic.oup.com/jiplp/article-lookup/doi/10.1093/jiplp/jpt227>> accessed 13 July 2020. 148.

¹⁹⁶ Andrew Wyckoff and Alessandra Colecchia, 'The Economic and Social Impact of Electronic Commerce', OECD (1998) 12.

¹⁹⁷ Martin B Robins, 'A Good Idea at the Time: Recent Digital Millennium Copyright Act 512(c) Safe Harbor Jurisprudence--Analysis and Critique of Current Applications and Implications' (2019) 15 *Tulane Journal of Technology & Intellectual Property*.

¹⁹⁸ Aleksandra Kuczerawy (n 185) 1.

¹⁹⁹ Christina Angelopoulos (n 159).

alleged infringements from re-occurring in the future via injunctions, rightholders have increasingly used these injunctions against intermediaries. This increased the liability concerns of hosting platforms have put holes in their safe harbour shield and resulted in so-called ‘DMCA plus’ practices, which enforce copyright through self-regulation.²⁰⁰ Thus, in time, although there is no requirement for the preventive enforcement of the copyright within DMCA and ECD for benefiting safe harbours, platforms covered by DMCA and ECD started to adopt technological measures such as preventive filtering to ensure their exemption from liability that could arise from the availability of infringing content on their platform.

In the US, *MGM Studios v. Grokster*, which was accepted as a sequel to the landmark *Napster case*,²⁰¹ has significance regarding this shift.²⁰² The file-sharing software on a peer-to-peer network that the respondent provided was being used by users to infringe copyright by sharing and downloading copyright-protected works. By applying secondary liability doctrines, the US Supreme Court determined the “only practical alternative” as going against the software distributor for secondary liability.²⁰³ These software companies were not merely passive or neutral; they were aware of the illegal file sharing, even encouraged their users to commit these acts, and were profiting from the direct infringements of their users.²⁰⁴ It is important to note that the fact that there was no attempt to develop filtering tools from these software providers accepted as evidence which underscores their intentional facilitation of their users’ infringement, therefore, played a role in assessing the DMCA safe harbor protection for the respondent.²⁰⁵ In conclusion, companies which provided software enabling file-sharing on a peer-to-peer network were held to be liable for copyright infringements committed by users of the software as they were “...*distributing a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, going beyond mere distribution with knowledge of third-party action...*”²⁰⁶

²⁰⁰ Annemarie Bridy, *Copyright’s Digital Deputies: DMCA-Plus Enforcement by Internet Intermediaries*, in RESEARCH HANDBOOK ON ELECTRONIC COMMERCE LAW (John Rothchild ed., 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2628827

²⁰¹ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th. Cir., 2001)

²⁰² *MGM Studios, Inc. v. Grokster, Ltd.*, [545 US 913 \(2005\)](#).

²⁰³ *ibid.*

²⁰⁴ *MGM Studios, Inc. v. Grokster, Ltd.*, pp,10-24.

²⁰⁵ *MGM Studios, Inc. v. Grokster, Ltd.*, pp, 20-23.

²⁰⁶ *MGM Studios, Inc. v. Grokster, Ltd.*, pp,10-24.

This shift is reflected in the case law of CJEU when assessing the applicability of hosting safe harbours; Frosio suggested that both CJEU and national case law of Member States seem to set apart “bad platforms” from more “neutral” platforms when it comes to deciding whether or not they are responsible from their users’ acts of communication to the public.²⁰⁷ *YouTube and Cyando* is an important decision which has supported this argument. In this case, the importance of the role played by an operator for its eligibility for the exemption from liability under Article 14(1) of E-Commerce has been underlined once more.²⁰⁸ In light of the previous case law, Court stated that where the platforms’ conduct is merely technical, automatic and passive, and it has no knowledge of or control over the stored content, the platform can be accepted as “neutral.”²⁰⁹ CJEU stressed that the wording of Article 14(1) of E-Commerce shows that, in the absence of a clear and precise notification, the fact that the “provider was generally aware that its services are used to engage in some illegal activities” is not enough to trigger platform’s liability which is something that has been underlined by the Recital 27 of the InfoSoc Directive.²¹⁰ Thus, to determine the eligibility for the liability exemption of the platform under Article 14(1), the platform's intervention in illegal communication must be examined by considering all the factors characterising the situation, which can indicate the deliberate nature of its actions.²¹¹ On this point, one should keep in mind that it is rare for platforms to intervene in illegal communication with full knowledge as in the case of *The Pirate Bay*, where the platform allowed their users to locate and share the infringing works and explicitly shared their goal of making copyright protected works available.²¹² In his opinion for the case, AG, referring to *The Pirate Bay* and *MGM Studios v. Grokster*, stated that where an online provider demonstrating an intention to facilitate illegal acts also loses the benefit of the safe harbour exemption.²¹³

The features which help the platform in question, YouTube, to be identified as neutral have been clarified by the Court; these include not intervening with the creation or selection of the

²⁰⁷ Giancarlo Frosio, ‘Reforming the C-DSM Reform: A User-Based Copyright Theory for Commonplace Creativity’ (2020) 51 IIC - International Review of Intellectual Property and Competition Law 709 <<https://doi.org/10.1007/s40319-020-00931-0>> accessed 14 July 2020.

²⁰⁸ *Frank Peterson v Google LLC, YouTube LLC, YouTube Inc., Google Germany GmbH (C-682/18) and Elsevier Inc. v Cyando AG (C-683/18) ('YouTube and Cyando')*, (C-682/18 and C-683/18) [2020] ECLI:EU:C:2020:586, para 106.

²⁰⁹ C-236/08 *Google France SARL and Google Inc. v Louis Vuitton Malletier SA* [2010] ECLI:EU:C:2010:159, paras 112-114, 120; *L'Oréal* (n 113), para 113; *Youtube and Cyando* (n 208), para 106.

²¹⁰ *Youtube and Cyando* (n 208), paras 85-168.

²¹¹ *Youtube and Cyando* (n 208), para 83.

²¹² *The Pirate Bay* (n 156), paras 36,45, 48.

²¹³ *Youtube and Cyando*, Opinion of AG Saugmandsgaard Øe, (n 77), footnote 109.

user uploads, lack of knowledge of the platform operators, lack of control over the access to the information that it stores, an operation that clearly shows the files stored are not originated from the platform, and stated the indexing, recommending and proactive filtering the videos and enabling monetisation do not indicate the active role of YouTube.²¹⁴ Thus, these voluntary measures include automated content recognition systems that enable rightholders to identify the use of their content while helping them to enjoy the revenue generated by advertising placed around their content by allowing monetisation²¹⁵

However, the efficiency of these voluntary preventive measures, opaque operation and the false positives that they generate are reported as important problems in addition to the other issues arising from the self-regulatory nature of these measures.²¹⁶ While aiming for better protection of copyright, these terms and conditions resulted in different rules being applied to the same situations on different platforms, and the unspecified criteria for blocking and removal of the user uploads further increased the lack of foreseeability and harmonisation critically, which became one of the main motivations for the copyright reform in the EU.²¹⁷

The ways for EU law to tackle these problems with the safe harbour regime and overall intermediary liability have been investigated by both the Commission and academics.²¹⁸ The main question was, “does the EU need to do a simple review of the existing enforcement framework, or rather a more profound and broader harmonising action on the side of the EU legislature?”²¹⁹ The EU’s answer to this question was twofold; first, the long-awaited copyright reform, the CDSMD, as one of its main aims is to discard the safe harbour regime’s ineffectiveness and the lack of harmonisation that disrupts the enforcement.²²⁰ Second, the

²¹⁴ *Youtube and Cyando* (n 208), paras 92-96; *Youtube and Cyando*, Opinion of AG Saugmandsgaard Øe, (n 77), para 154-157.

²¹⁵ European Commission, Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules (hereinafter: ‘Impact Assessment’), 14.9.2016 SWD(2016) 301 final, Part 1/3, p. 140.

²¹⁶ *ibid.* part 1/3, p. 140-141.

²¹⁷ *ibid.* p.7.

²¹⁸ Impact Assessment, part 1/3; Christina Angelopoulos (n 159); Matthew Sag, ‘Internet Safe Harbors and the Transformation of Copyright Law’ (2017) 93 *Notre Dame Law Review* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2830184> accessed 28 October 2022.; Eleonora Rosati, ‘Why a Reform of Hosting Providers Safe Harbour Is Unnecessary Under EU Copyright Law’ (2016) 2016/11 CREATE Working Paper 14. <<http://www.ssrn.com/abstract=2830440>> accessed 28 October 2022.

²¹⁹ Eleonora Rosati, ‘Intermediary IP Injunctions in the EU and UK Experiences: When Less (Harmonization) Is More?’ (2017) 12 *Journal of Intellectual Property Law & Practice* 338

²²⁰ European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A Digital Single Market Strategy for Europe’, COM/2015/0192 final, p 7.

Digital Services Act which extended the scope of application but maintained the liability exemptions of ECD for internet intermediaries.²²¹

2.2.1.2 *General Monitoring Ban*

Another important element of the safe harbour regime that needs to be explored in detail is the general monitoring ban. Traditionally, safe harbour legislation provides mere conduit, caching and hosting exemptions for intermediaries, together with the exclusion of general filtering or monitoring obligation.²²² Monitoring refers to the examination of electronically stored or transmitted information by a service provider, which usually involves ascertaining whether they are lawful or meeting other conditions.²²³

Recital 48 of ECD allows the Member States to impose duties of care on host service providers even if they are protected by the hosting safe harbour, to detect and prevent illegal activity, which includes copyright infringements and to impose these duties of care, they must be reasonable and specified by national law.²²⁴ However, Article 15(1) of the E-Commerce Directive prevents Member State courts from imposing general obligations upon service providers to monitor the information or to investigate facts or circumstances denoting unlawful activity, such as uploading unauthorised copyright-protected material when they transmit, cache, or store information.

Then, Recital 47 introduces an exception to the “general monitoring obligation” with monitoring obligations imposed in a “specific case” by stating when they are issued “by national authorities in accordance with national legislation.”²²⁵ However, the interpretation of the specific monitoring obligations must be narrow, meaning that the obligation must include a clear definition of the scope to avoid the obligation of general monitoring. It has been accepted that vague definitions such as the removal of all illegal videos or the removal of all

²²¹ Articles 4, 5 and 6 of Regulation (EU) 2022/2065 of The European Parliament and of The Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (‘DSA’) [2022] OJ L 277/1.

²²² Articles 12-15 of the E-Commerce Directive; Section 512 (i) and (m) of DMCA

²²³ Jaani Riordan, *The Liability of Internet Intermediaries* (First edition, Oxford University Press 2016), [13.14].

²²⁴ Recital 48 of the E-Commerce Directive, p 6.

²²⁵ Recital 47 of the E-Commerce Directive, p 6.

variations in the future oblige the hosting provider to necessarily investigate each and every upload, therefore, constitutes a general monitoring obligation.²²⁶

In brief, Article 15 and Recital 47 of the Directive prohibit the imposition of a general obligation on OCSSPs to monitor the information they store, and any obligation to monitor all content uploaded by users onto a website for the purpose of identifying specific works would constitute a general monitoring obligation. This guarantee regarding the imposition of general monitoring was also confirmed by the CJEU in various cases such as *Scarlet Extended*, *Netlog*, and *L'Oréal*, where the Court stressed that proactive monitoring is prohibited under the EU law and stressed disproportionate interferences of general monitoring practices with various fundamental rights such as users' data protection and right to privacy and platforms' right to conduct a business.²²⁷ The interferences of general monitoring practices with Article 7 and Article 8 were also found disproportionate by ECtHR in a series of decisions.²²⁸

However, what constitutes general monitoring has been a recurring question for CJEU and academics since the adoption of the E-Commerce Directive. Different approaches to general and specific monitoring have been summarised in two different schools, namely basic and basic minus, by Senftleben and Angelopoulos.²²⁹ While the basic interpretation of general monitoring suggests that any obligation to monitor all or most of the information constitutes general monitoring, the latter allows monitoring when the platform is searching for infringements of a specific right, thus, determines the generality of the monitoring according to the subject matter which the monitoring seeks to identify in uploaded content rather than what is being monitored.²³⁰ Examples of the basic approach can be found in the early case law of the CJEU, such as *L'Oréal*, which was the first CJEU case that examined the question of general monitoring in the context of a preventive injunction.²³¹ While outlining the

²²⁶ Patrick Van Eecke, 'Online Service Providers and Liability: A Plea for a Balanced Approach' (2011) 48 Common Market L Rev 1455, 1487.; Giancarlo Frosio and Sunimal Mendis, 'Monitoring and Filtering: European Reform or Global Trend?' Centre for International Intellectual Property Studies (CEIPI) Research Paper No. 2019-05 29. 5.

²²⁷ *Scarlet Extended* (n 16), para 51; *Netlog* (n 16), para 49; *Promusicae* (n 87), para 45; These interferences with fundamental rights will be investigated in detail in Chapters 3 & 4 & 5.

²²⁸ *Liberty v United Kingdom* App no. 58243/00 (1 July 2008, ECtHR) 48 E.H.R.R., para 56; *Big Brother Watch* (n 87), paras. 322-323.

²²⁹ Martin Senftleben and Christina Angelopoulos, 'The Odyssey of the Prohibition on General Monitoring Obligations on the Way to the Digital Services Act: Between Article 15 of the E-Commerce Directive and Article 17 of the Directive on Copyright in the Digital Single Market' (CIPIL/IViR 2020) SSRN Scholarly Paper ID 3717022 <<https://papers.ssrn.com/abstract=3717022>> accessed 9 November 2020.

²³⁰ *ibid.*

²³¹ *L'Oréal* (n 113).

measures for preventing future infringements, CJEU pointed out how defining the border between general monitoring and specific monitoring is challenging and stated that active monitoring of all the data is excluded by Article 15 of the ECD.²³² The CJEU's interpretation of Recital 47 defined specific monitoring as monitoring targeted at a specific infringing activity rather than all incidents that include the notified work.²³³ In order to ensure that monitoring obliged by the injunction is not general, monitoring should be targeted at the same person in respect of the same right.²³⁴ Thus, national measures requiring a platform to actively monitor all the data of each of its customers to prevent any future infringement of intellectual property rights were found incompatible with Article 15 of ECD and the overall objectives of the Enforcement Directive.²³⁵

In twin cases of *SABAM*, the injunction in question required installing a filtering system to prevent copyright infringement of musical and audio-visual works in the SABAM's repertoire.²³⁶ As this type of filtering involves monitoring that would cover all the communications from all the users for an unlimited time, it was found to violate the general monitoring ban.²³⁷ In his opinion for the case, it has been clarified by AG Villalón Cruz that technically, it is not possible for filtering technologies to not actively monitor all content by all the users of the platform, including legitimate uploads.²³⁸ Thus, the prior notice, which should include the specific works, was not limited enough to ensure the monitoring of this filter is specific as it contained a repertoire. This was the CJEU's approach, even where the notified work was only a single pre-identified phonogram.²³⁹ In *Mc Fadden*, Court stated that preventive filtering requires monitoring all of the information transmitted and therefore, it is a measure that is excluded by the general monitoring ban.²⁴⁰

However, *Glawischnig-Piesczek* marked the shift in CJEU's approach to general monitoring. The Court stated that Article 15 of ECD does not prohibit a court from ordering a platform to search for and remove all the equivalent content as well as content identical and similar to that found illegal when the knowledge has been provided by a notification made by the

²³² *L'Oréal* (n 113), para 139.

²³³ *ibid.* paras 140-142

²³⁴ *ibid.* para 141.

²³⁵ *ibid.* para 139.

²³⁶ *Scarlet Extended* (n 16), para 23; *Netlog* (n 16), para 21.

²³⁷ *Netlog* (n 16), para 39

²³⁸ *Scarlet Extended*, Opinion of AG Cruz Villalón in (n 70), para. 46.

²³⁹ *Mc Fadden* (n 16), paras 25-27.

²⁴⁰ *Mc Fadden* (n 16) para 87.

person concerned or by third parties.²⁴¹ The Court stated that the monitoring for defamatory content of an equivalent nature should not require a platform to carry out general monitoring.²⁴² The Court underlined that where the upload requires an independent assessment of the content to be found unlawful, this type of filtering would require general monitoring; however, as it has been handled by automated search tools and technologies, the search and removal for identical, similar and equivalent content does not constitute general monitoring.²⁴³

However, the Court's decision did not clearly define what constitutes "equivalent content" contrary to the established requirement of removal obligations to be tightly defined.²⁴⁴ On this point, as a fundamental practical problem, Rosati pointed out that when users share a post that has been found initially illegal by adding their criticism, even though the meaning would be different from the initial post, these posts will also be removed or blocked like the illegal post "*just because it is partially identical to the original publication.*"²⁴⁵ Moreover, by its nature, the identification of the "equivalent" content via upload filters would require general monitoring of all the data that the platform stores, which is a practice that previous decisions found incompatible with the general monitoring ban. Thus, despite the Court's emphasis on how this type of injunction does not order the platform to monitor generally²⁴⁶, general monitoring seems technically inevitable in practice.

Thus, contrary to previous case law, this broad category of content (identical, similar and equivalent) has been accepted as specific enough to ensure compliance with the general monitoring ban.²⁴⁷ However, it is important to note that this conclusion of the Court was based on the national court's ruling regarding the illegality of the content in question, which makes its application to the obligations arising from platforms' duty of care questionable.²⁴⁸ Similarly, it is important to bear in mind that, unlike the previous cases, this case concerns defamatory content, which differs from copyright-infringing content considerably. An analysis of this decision's extended approach to content removal and general monitoring is

²⁴¹ C-18/18 *Eva Glawischnig-Piesczek v Facebook Ireland Limited* [2019] EU:C:2019:458, para 53.

²⁴² *ibid*, paras 46-47.

²⁴³ *ibid*.

²⁴⁴ Eleonora Rosati, (n 229) 679.

²⁴⁵ *ibid*.

²⁴⁶ *Glawischnig-Piesczek* (n 241), paras 42,46.

²⁴⁷ *Glawischnig-Piesczek* (n 241), paras 35,46.

²⁴⁸ Martin Senftleben and Christina Angelopoulos (n 229) 14.

crucial for the future as it might impact the national implementations of Article 17 of the CDSMD.

However, this shift did not reflect in the following joined cases *YouTube and Cyando*, where CJEU discussed the eligibility of YouTube for the hosting safe harbour exemption under Article 14(1) ECD.²⁴⁹ Court did not refer to *Glawischnig-Piesczek* during the assessment of the general monitoring ban; instead, in line with the early case law, the Court stated that measures requiring implementing a screening system which entails general and permanent monitoring in order to prevent any future infringement of intellectual property rights is incompatible with Article 15(1).²⁵⁰ Nevertheless, CJEU referred to *Glawischnig-Piesczek*'s principles for avoiding general monitoring in the *Poland* case.²⁵¹ This case concerns Article 17's filtering and stay down obligations which, due to their operation, would involve implementing preventive measures which monitor uploads for copyright infringements. CJEU, as the limit for this monitoring, referred to *Glawischnig-Piesczek* and stated that

*"...providers of those services cannot be required to prevent the uploading and making available to the public of content which, in order to be found unlawful, would require an independent assessment of the content by them in the light of the information provided by the rightholders and of any exceptions and limitations to copyright."*²⁵²

While whether this can be accepted as an acknowledgement from CJEU regarding the shift in the Court's approach to general monitoring is not clear, in his opinion for the case, AG stated that standards for general monitoring had been changed with *Glawischnig-Piesczek*'s.²⁵³ By considering the nature of Article 17's obligations, the recent approach of the Court and the legislator can be read as to be in favour of the latter interpretation of general monitoring, which contrasts with the early approach of CJEU, which follows the wording of Article 15(1) of ECD strictly by enabling platforms to carry out monitoring according to the, not only a court order that proves the illegitimacy of the content, also the rightholder notifications regarding the specific illegality, without the risk of constituting general monitoring.

²⁴⁹ *YouTube and Cyando* (n 208).

²⁵⁰ *ibid.* para, 135.

²⁵¹ *Poland v European Parliament* (n 79).

²⁵² *Poland v European Parliament* (n 79), para 90.

²⁵³ Case C-401/19, *Poland v Parliament and Council* [2021], ECLI:EU:C:2021:613, Opinion of Advocate General Saugmandsgaard Øe, paras 111-115.

The general monitoring ban in Article 15(1) of E-Commerce has been repeated in Article 17(8) of the CDSMD, which simply states that the application of Article 17 should not lead to any general monitoring obligation. Later, the repealing Act for ECD, Digital Services Act, preserved the ban in Article 8 by laying down a ban on active fact-finding obligations for providers as well as on general monitoring.²⁵⁴ Reflecting the Recital 47 of ECD, in its Recital 30, DSA also underlines that the monitoring obligations in a specific case are allowed.²⁵⁵ DSA clarifies that nothing in this Act should be interpreted as a general obligation for providers to take proactive measures in relation to illegal content and underlines the required extra attention regarding the prohibition on imposing general monitoring obligations.²⁵⁶

2.3 The EU Copyright Reform

This section, by building upon the background information that has been provided so far, will focus on the EU's copyright reform, Copyright in the Digital Single Market, with particular attention to Article 17. It will give the reader information regarding Article 17's subject and obligations, with a focus on filtering obligations. It will also pay attention to Article 17's safeguards and underline the potential impact of Article's obligations on various fundamental rights by examining the case law of ECtHR and CJEU and the literature.

As seen from the analysis so far of legal environment regarding the online enforcement of copyright within the platforms prior to CDSMD, as the platforms evolved, a trend towards a stricter intermediary liability developed in time. The ambiguity around safe harbour provisions and the increasing popularity of injunctions resulted in voluntary filtering and blocking being permanent enforcement practices, especially within the big platforms, to avoid liability to ensure their "neutral" status. This enforcement of copyright through self-regulation of platforms resulted in unharmonised and disproportionate enforcement of copyright, disrupting the fair balance between copyright protection and other fundamental rights. Moreover, with the rapid technological developments and changes in the nature of and services that platforms offer, a reform in the field of copyright in the EU became a must.

²⁵⁴ Article 8 of Digital Services Act.

²⁵⁵ Recital 30 of Digital Services Act.

²⁵⁶ Recitals 30, 34, 103 of Digital Services Act.

Against this background, in accordance with the Digital Single Market Strategy, the journey to Copyright in the Digital Single Market Directive has started.²⁵⁷

2.3.1 Directive on Copyright in the Digital Single Market

The Digital Single Market Strategy aims to connect the twenty-eight separate national markets of the EU into a single market. European Commission adopted the Communication on a modern and more European copyright framework in 2015. This Communication contains the main political objectives and areas of action like copyright in the Digital Single Market, ensuring more comprehensive access to content across the EU, adapting exceptions to digital and cross-border environments, achieving a well-functioning marketplace for copyright, and providing an effective and balanced enforcement system.²⁵⁸ According to the 2015 Communication, the “*Digital Single Market is one in which the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition.*”²⁵⁹

This strategy rests on three pillars: better access for consumers and businesses to online goods and services across Europe, creating the right conditions for digital networks and services to flourish and maximising the growth potential of the European digital economy.²⁶⁰ In addition to those, in order to encourage the future generation of content, the Commission further addresses the need to consider measures that would safeguard the fair remuneration of content creators. In the Communication on Online Platforms and the Digital Single Market, Commission also underlined “*a number of specific issues relating to illegal and harmful content and activities online*” and stated that Commission would launch a problem-driven

²⁵⁷ European Commission, Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions Towards A Modern, More European Copyright Framework, 9.12.2015 COM(2015) 626 Final.

²⁵⁸ *ibid.*

²⁵⁹ European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe’ COM (2015) 192 final, 5 June 2015, p. 3-4.

²⁶⁰ European Commission, ‘Shaping the Digital Single Market - Shaping Europe’s Digital Future’ (*Shaping Europe’s digital future - European Commission*, 18 February 2020) <<https://ec.europa.eu/digital-single-market/en/content/european-digital-strategy>> accessed 30 October 2020.

approach regarding those issues.²⁶¹ Interestingly, in Communication, copyright infringements have been put next to harmful content on the internet, which constitutes severe crimes such as terrorist content and child pornography. This bizarre combination of problems with online platforms is identified as a “Trojan horse” by Quintais since it hides the adverse outcomes of the upload filters and proposes them as the appropriate weapon for the war against severe crimes on the internet.²⁶² With those Communications, Digital Single Market Strategy announced the desired steps to be taken “*towards a connected digital single market*” and the plans to reform EU copyright and intermediary liability in the digital environment.²⁶³ However, Digital Single Market Strategy was criticised and found “*shamefully short falling of any meaningful harmonisation of copyright.*”²⁶⁴

The Commission explained the proposal of the Directive on Copyright in the Digital Single Market and its “solutions” to the current problems in the Communication on Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market.²⁶⁵ This communication contained five different legislative measures with three objectives: “(i) ensuring wider online access to content in the EU and reaching new audiences, (ii) adapting certain exceptions to the digital and cross-border environment, and (iii) fostering a well-functioning and fair copyright marketplace.” To achieve a well-functioning marketplace for copyright, Commission promised a better negotiating position to the press alongside the other rightholders with the Directive on Copyright in the Digital Single Market.²⁶⁶

While highlighting the importance of online services, Commission described the so-called value gap as “*a growing concern about the equitable sharing of the value generated by some of the new forms of online content distribution along the value chain.*”²⁶⁷ The value gap can be described as an alleged unfair distribution of revenues generated from the online use of

²⁶¹ European Commission, ‘Communication to the European Parliament, the Council, and the Economic and Social Committee, and the Committee of the Regions, Online Platforms and the Digital Single Market: Opportunities and Challenges for Europe’ COM(2016) 288 Final, 25 May 2016, p. 8.

²⁶² João Pedro Quintais, 'Article 17 And The New EU Rules On Content-Sharing Platforms' (MIPLC Lecture Series, 2020).

²⁶³ European Commission (n 260), para 3.3.

²⁶⁴ Felix Reda, ‘European Commission Fails to Deliver on Digital Single Market Promises’ (*Felix Reda*, 2015) <<https://felixreda.eu/2015/05/digital-single-market/>> accessed 28 October 2020.

²⁶⁵ European Commission, ‘Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions, Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market’ 14 September 2016 COM(2016) 592 final.

²⁶⁶ *ibid.* p 7-8.

²⁶⁷ *ibid.* p 7.

copyright-protected works between the industry actors along the value chain. The idea of the “value gap” was first seen in the music industry’s global reports²⁶⁸, and it has been suggested that it was fabricated by the music industry, initially as a value recognition right in the copyright levy debate.²⁶⁹ According to the notion of value gap, user-generated content platforms are abusing the safe harbour rules to strengthen their negotiating hand while competing with the streaming services, which pay much higher royalties to the music industry and committing to minimum guarantees.

The value gap claim has been criticised by many academics and even by creators for many reasons. As a fundamental defect, the comparison at the heart of the value gap has been defined as “apples to oranges.”²⁷⁰ Bridy explained that this major flaw in the logic of the value gap caused by the asserted equivalence between dedicated streaming services and user-generated content services by the music industry is false since their nature is not the same. The reason for that is there is no need for the protection of the safe harbour since there is no possibility for closed distribution services’ users to decide the content that will be available on their services, unlike the user-generated content platforms, which face uncertain and continuous exposure to copyright claims arising from their users’ illegal activity, not because they are being mistreated.²⁷¹ Hence, the legislation needs to distinguish these hosting platforms for determining their liabilities, and that distinction has to be drawn between user-generated platforms, such as YouTube, Dailymotion and Vimeo, and stream services, such as Spotify or Netflix.

Moreover, there is no empirical evidence for this value gap, as there is no clear evidence of the effects of copyright infringement in the digital environment.²⁷² According to Waldfoegel's studies, since 1960, there is no evidence that consumers have suffered from a withdrawal of creative effort, unlike what rightowners alleged.²⁷³ In line with this, in his well-known report,

²⁶⁸ 'Facts & Stats — IFPI — Representing The Recording Industry Worldwide' (*Ifpi.org*, 2017) <<http://www.ifpi.org/facts-and-stats.php>> accessed 28 July 2017.

²⁶⁹ 'Copyright Reform: Open Letter from European Research Centres' (CREATe, 2017) <<http://bit.ly/2loFISF/>> accessed 30 August 2017, p 6.

²⁷⁰ Annemarie Bridy (n 191), 327.

²⁷¹ *ibid.*

²⁷² Giancarlo Frosio (n 207) 715.

²⁷³ Joel Waldfoegel, 'Copyright Protection, Technological Change, and the Quality of New Products: Evidence from Recorded Music since Napster' (National Bureau of Economic Research 2011) w17503 <<http://www.nber.org/papers/w17503.pdf>> accessed 4 May 2020; Joel Waldfoegel, 'Copyright Research in the Digital Age: Moving from Piracy to the Supply of New Products' (2012) 102 *American Economic Review* 337 <<http://pubs.aeaweb.org/doi/10.1257/aer.102.3.337>> accessed 4 May 2020

Digital Opportunity, Hargreaves underlined the fact that there is no clear evidence of the effects of copyright infringement in the digital environment, including the scale and the nature of it, and stated that copyright policies to tackle piracy should be based on hard and transparent evidence.²⁷⁴ Moreover, IPSOS studies in Germany and the UK have shown that German and British file-sharers are better consumers of culture than internet users who do not download illegally.²⁷⁵ Frosio further explained how this rhetorical notion of value gap lacks adequate support in empirical evidence with the help of official reports and assessments. He stated that this lack of robust evidence had been repeatedly underlined in the Draft Directive's Assessment²⁷⁶ and a Report commissioned by the European Commission delivered in 2015.²⁷⁷ Thus, one can argue that grounding a legislative reform to a notion such as the value gap, which does not have clear evidence or empirical data, clashes with the fundamentals of EU law-making. Following the aim of closing the value gap resulted in an ill-advised regulation and was described as “the wrong answer” to satisfy this aim since they raise serious compatibility concerns with the EU acquis, including the Charter.²⁷⁸

The Directive on Copyright in the Digital Single Market has been seen as part of a larger package aiming to modernise EU copyright rules and achieve a fully functioning Digital Single Market.²⁷⁹ However, the CDSMD found conflicting with its fundamental aim of providing an effective and balanced copyright enforcement system.²⁸⁰ This position created the need to examine the Directive’s shortcomings and its possible effects on fundamental rights and, most importantly, created a knowledge gap in the literature regarding the solutions which minimise the negative impact of the CDSMD on fundamental rights to achieve the right implementation that discards these widely criticised parts of the Directive.

²⁷⁴ Ian Hargreaves, ‘Digital Opportunity: A Review of Intellectual Property and Growth’ (2011), 10.

²⁷⁵ ‘Pirates Are Prime Prospects for Music and Video’ (*Ipsos MORI*, 6 May 2009)

<<https://www.ipsos.com/ipsos-mori/en-uk/pirates-are-prime-prospects-music-and-video>> accessed 28 October 2020.

²⁷⁶ Impact Assessment, p. 136.

²⁷⁷ European Commission, ‘Directorate General for the Internal Market and Services. and ECORYS., ‘Estimating Displacement Rates of Copyrighted Content in the EU: Final Report.’ (Publications Office 2014)

<<https://data.europa.eu/doi/10.2780/26736>> accessed 28 October 2020. 7 However, this report has not been released until 2017. See Felix Reda, ‘What the Commission Found out about Copyright Infringement but “Forgot” to Tell Us’ (*Felix Reda*, 20 September 2017) <<https://felixreda.eu/2017/09/secret-copyright-infringement-study/>> accessed 28 October 2020.

²⁷⁸ Sophie Stalla-Bourdillon, ‘Filtering Obligations and Fundamental Rights: Can the EU Eat the Cake and Have It Too?’ (2017) <https://felixreda.eu/wp-content/uploads/2017/09/2017-09-06_Better-Regulation-for-Copyright-Academics-meet-Policy-Makers_Proceedings.pdf>, 29.

²⁷⁹ European Commission, ‘Communication from the Commission to the European Parliament, the Council, and the Economic and Social Committee, Promoting a Fair, Efficient and Competitive European Copyright-based Economy in the Digital Single Market’ (COM)2016 592 final, 14 September 2016.

²⁸⁰ *ibid.* p.9.

There is no doubt that EU Copyright reform constitutes a big part of the Digital Single Market Strategy. Thus, under this strategy, legislative proposals were presented by the Commission in September 2016 with the objectives of modernising the copyright framework and achieving a well-functioning copyright marketplace. The new Directive on Copyright in the Digital Single Market was agreed upon between the Council of the European Union, the European Parliament and the Commission on 13 February 2019.²⁸¹

The controversial Article 17, which was Article 13 in the proposal, did not receive well by the wide group that includes civil society, academics, journalists, and start-ups, and caused many protests in the different Member States.²⁸² The most significant criticism focused on Article 13's obligation to prevent the availability of copyright-protected works, which would require implementing automated content recognition technologies.²⁸³ These filters have been seen as “privatised censorship”, and their interferences with fundamental rights have been acknowledged as the biggest problem with the Article.²⁸⁴ Even though the Directive, as well as the Impact Assessments, guarantee the appropriate and proportionate practice of the content recognition technologies, there is no evidence to back up these technologies' technical feasibility, and therefore this guarantee.²⁸⁵ Romero Moreno described the reappearance of this guarantee as an attempt to achieve the illusory truth effect and warned

²⁸¹ European Commission, ‘Shaping the Digital Single Market - Shaping Europe’s Digital Future’ (Shaping Europe’s digital future - European Commission, 18 February 2020) <<https://ec.europa.eu/digital-single-market/en/content/european-digital-strategy>> accessed 30 October 2020.

²⁸² Judith Horchert, ‘Lasst Euch Das Internet Kurz Erklären, Bevor Ihr Es Kaputt Macht’ Spiegel (23 March 2019) <<https://www.spiegel.de/netzwelt/netzpolitik/artikel-13-und-uploadfilter-zehntausende-protestieren-gegen-urheberrechtsreform-a-1259360.html>>.; Felix Reda, ‘EU Copyright Reform: Our Fight Was Not in Vain’ (April 2019) <<https://felixreda.eu/2019/04/not-in-vain/>>.

²⁸³ Article 13 of Draft European Copyright Directive: *Information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users shall, in cooperation with rightholders, take measures to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter or to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers. Those measures, such as the use of effective content recognition technologies, shall be appropriate and proportionate. The service providers shall provide rightholders with adequate information on the functioning and the deployment of the measures, as well as, when relevant, adequate reporting on the recognition and use of the works and other subject-matter.*

²⁸⁴ ‘EU Copyright Directive – Privatised Censorship and Filtering of Free Speech’ (*European Digital Rights (EDRi)*, 10 November 2016) <<https://edri.org/our-work/eu-copyright-directive-privatised-censorship-and-filtering-of-free-speech/>> accessed 29 October 2020.; ‘You Can Still Stop #Article13 (Aka #Article17)! #Copyright #CensorshipMachine’ (*#SaveYourInternet*) <<https://saveyourinternet.eu/>> accessed 29 October 2020.

²⁸⁵ Impact Assessment; Evan Engstrom and Nick Feamster (n 164).

that this “illusory truth” would persist unless someone takes the time to explore.²⁸⁶ In addition to filtering obligations, vague terms such as “...service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users” and “effective content recognition technologies” were found to be problematic as well.

In an open letter, fifty-seven signatories representing fundamental rights organisations, including Human Rights Watch and Reporters Without Borders, asked the EU policymakers to remove Article 13 of the Proposal, highlighting the possible effect of the Article's upload filters on the citizens' fundamental rights.²⁸⁷ A large number of academics stated that the Proposal has failed to follow even its own Recitals by failing to strike a fair balance between the competing fundamental rights of the Charter, has strengthened rightholders' exclusive rights, and increased the possibility of misuses of copyright, without providing appropriate protections to balance the opposing rights and interests.²⁸⁸

In conclusion, proposed Article 13 was found incompatible with existing EU law, especially with the E-Commerce Directive and the Charter by the majority of academics and even the members of parliament.²⁸⁹ In addition, it has been described as “inconsistent” due to the clash between its Recitals and Articles and “ambiguous” due to the lack of description regarding its notions and guidance on its procedures.²⁹⁰ As a response to this heavy criticism, Article 13 experienced significant amendments. In the final draft, Article 13 became Article 17 and tried to rule out some criticism that it received during its proposal stage with the amendments. First, it introduced a “start-up” exemption for the Article’s filtering obligations to limit the scope of the online content-sharing service providers’ liability if they are younger than three

²⁸⁶ Felipe Romero Moreno, “Notice and Staydown” and Social Media: Amending Article 13 of the Proposed Directive on Copyright’ (2019) 33 *International Review of Law, Computers & Technology* 187

<<https://www.tandfonline.com/doi/full/10.1080/13600869.2018.1475906>> accessed 12 June 2020. 189

²⁸⁷ European Liberties Platform, ‘Article 13 Open Letter – Monitoring and Filtering of Internet Content Is Unacceptable’ (Liberties.eu, 16 October 2017) <<https://www.liberties.eu/en/news/delete-article-thirteen-open-letter/13194>> accessed 29 October 2020.

²⁸⁸ Sophie Stalla-Bourdillon and others, ‘A Brief Exegesis of the Proposed Copyright Directive’ [2016] SSRN Electronic Journal <<https://www.ssrn.com/abstract=2875296>> accessed 29 October 2020.; Martin Senftleben and others, ‘The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform’ (2018) 40 *European Intellectual Property Review* 149. <<https://www.ssrn.com/abstract=3054967>> accessed 29 October 2020.; Tito Rendas, ‘Form and Substance in the Value Gap Proposal’ (2017) <https://felixreda.eu/wp-content/uploads/2017/09/2017-09-06_Better-Regulation-for-Copyright-Academics-meet-Policy-Makers_Proceedings.pdf>. 45.; Sophie Stalla-Bourdillon, (n 288); Christina Angelopoulos, (n 159).

²⁸⁹ *ibid.*

²⁹⁰ *ibid.*

years and have an annual turnover below EUR 10 million.²⁹¹ However, these liability exception criteria were found not enough nor practical.²⁹² It has been argued that the exceptions for new businesses in the Article are found limited and insufficient to eliminate the risk of disruption of the EU start-ups against leading actors of the Internet like Facebook and YouTube and the effect of these exemptions on the concerns about freedom of expression accepted as none or little.²⁹³

Secondly and most importantly, following the first rejection, safeguards regarding the legitimate content to recognise users' rights and balance these with rightholders' rights have been introduced. While the proposal did not contain a provision on the legitimate uses of works, nor a complaint and redress mechanism dedicated to enabling legitimate uses, subsequent versions of the text included these safeguards.²⁹⁴ Moreover, the following and final versions included the effective and expeditious complaints and redress mechanisms *“to prevent misuses or limitations in the exercise of exceptions and limitations to copyright.”*²⁹⁵ These additional safeguards were accepted as a significant step for the legislative evolution of this provision as these would affect the Article's implementation.²⁹⁶ With these additions, the

²⁹¹ OCSSPs still need to licence the works on their platform and practice notice and takedown. See Article 17(6) of the Directive 2019/790/EU of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130/92.

²⁹² Martin Senftleben, 'Bermuda Triangle – Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market' [2019] SSRN Electronic Journal <<https://www.ssrn.com/abstract=3367219>> accessed 14 July 2020.; Annemarie Bridy (n 191); Giancarlo Frosio, (n 207); João Pedro Quintais, 'The New Copyright Directive: A Tour d'horizon – Part II (of Press Publishers, Upload Filters and the Real Value Gap)' (*Kluwer Copyright Blog*, 17 June 2019) <<http://copyrightblog.kluweriplaw.com/2019/06/17/the-new-copyright-directive-a-tour-dhorizon-part-ii-of-press-publishers-upload-filters-and-the-real-value-gap/>> accessed 23 December 2019.; David Kaye, 'EU Must Align Copyright Reform with International Human Rights Standards, Says Expert' (Geneva, 11 March 2019) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24298&LangID=E>>.

²⁹³ David Abecassis and Alexander Gann, 'The Impact of a Content-Filtering Mandate on Online Service Providers' (2018) <<https://www.analysismason.com/consulting-redirect/reports/the-impact-of-a-content-filtering-june2018/>> accessed 14 July 2020. 3; Thomas Spoerri, 'On Upload-Filters and Other Competitive Advantages for Big Tech Companies under Article 17 of the Directive on Copyright in the Digital Single Market' (2019) 10 *Journal of Intellectual Property, Information Technology and E-Commerce Law* 173. 174

²⁹⁴ The redrafted JURI report by the Parliament included the following: *“Cooperation between online content service providers and right holders shall not lead to preventing the availability of non-infringing works or other protected subject matter, including those covered by an exception or limitation to copyright”*. See European Parliament, 'Amendments adopted by the European Parliament on 12 September 2018 on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market' COM(2016)0593 – C8-0383/2016 – 2016/0280(COD), <https://www.europarl.europa.eu/doceo/document/TA-8-2018-0337_EN.pdf?redirect>.

²⁹⁵ Committee on Legal Affairs 'Document A8-0245/2018 of Report on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market', (29 June 2019), available at https://www.europarl.europa.eu/doceo/document/A-8-2018-0245_EN.html?redirect

²⁹⁶ Case C-401/19, *Poland v Parliament and Council* [2021], ECLI:EU:C:2021:613, Opinion of Advocate General Saugmandsgaard Øe, para 175.

lawmaker has clarified that the measures in Article 17(4) should be implemented in a way that respects the possibility for their users to benefit from exceptions or limitations to copyright.²⁹⁷

During the legislative process, it has been reported that there were many heated discussions about Article 17, and regarding the content moderation measures of Article 17(4), safeguards of Article 17(7) and Article 17 (9) played a key point for resolving these discussions and Article 17 to pass the parliament.²⁹⁸ Article 17(7) has been seen as the insurance of the compulsory guarantee of fundamental rights protection and the fair balance that needs to be struck between opposing fundamental rights. During the lawmaking dialogues, Article 17(7)'s guarantees regarding lawful uses, including copyright exceptions, helped to change the negative stance against the Article.²⁹⁹ Thus, the importance of this section must be respected by ensuring that national implementations allow Article 17(7)'s guarantees to work in practice.

Finally, Article 17 was adopted by the Council in April 2019.³⁰⁰ Regarding the final text of the Directive, in a joint statement by the Netherlands, Luxembourg, Poland, Italy and Finland, the lack of balance between the protection of right holders and the interests of EU citizens and companies was emphasised.³⁰¹ This statement suggested that the Directive fails to deliver adequately on the Digital Single Market Strategy's aims and objectives. The criticism regarding the Article did not stop there; the Republic of Poland challenged Article 17 before the CJEU and claimed that the Directive disproportionately interferes with the right to freedom of expression and information.³⁰² CJEU, in its decision, while finding Article 17 compatible with the Charter, recognised the negative impact of Article 17(4) on the exercise of the right to freedom of expression and information; however, it added that the cautious

²⁹⁷ Council of the European Union, 'Proposal for A Directive of The European Parliament and of The Council on copyright in the Digital Single Market - Agreed negotiating mandate' (25 May 2018) available at <https://www.consilium.europa.eu/media/35373/st09134-en18.pdf>

²⁹⁸ Felix Reda, 'Article 17 CDSM: The Role of Ex-Ante User Rights Safeguards' (Communia Salon 2021/1, 26 January 2021).

²⁹⁹ *ibid.*

³⁰⁰ Directive 2019/790/EU of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130/92.

³⁰¹ Council of the European Union, 'Joint statement by the Netherlands, Luxembourg, Poland, Italy and Finland' 7986/19 ADD, 5 April 2019

³⁰² *Poland v European Parliament* (n 79).

implementation of the safeguards of Article 17 could ensure that the essence of that fundamental right and the principle of proportionality is respected.³⁰³

2.4 Article 17

According to the CDSMD, online content-sharing service providers (OCSSPs) perform an act of communication to the public designed to give access to the public to copyright-protected content or other subject matter uploaded by their users and, therefore, are responsible for the infringing content on their platform.³⁰⁴ In order to avoid liability, OCSSPs should obtain authorisation from the rightholders. An exception to this general principle can be found in Article 17(4), where the article sets out the “best efforts” requirements. In order to meet the best efforts standard, service providers must demonstrate that they have made the best efforts to obtain an authorisation (Article 17(4)(a)) and to ensure the unavailability of specific works and other subject matter (Article 17(4)(b)). In addition to that, where they receive a sufficiently substantiated notice from the rightholders, they must act expeditiously and disable access or remove the notified works or other subject-matter from their websites in addition to prevention of *future* infringing uploads (Article 17(4)(c)). Thus, with Article 17, the imposition of direct liability for copyright infringement is combined with a three-tiered standard of care and due diligence.³⁰⁵

Article 17 added more problems to the already existing challenges of online enforcement of copyright. These can be gathered under three different categories; ambiguous wording, impact on fundamental rights, and, in connection with that, ineffective safeguards.

2.4.1 Online Content-Sharing Service Providers and Communication to the Public

An “online content-sharing service provider” was defined in Article 2(6) as a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject-matter uploaded by its users, which it organises and promotes for profit-making purposes.³⁰⁶

³⁰³ *Poland v European Parliament* (n 79), para 58.

³⁰⁴ Article 17(1) of the CDSMD; Recital 62 of the CDSMD.

³⁰⁵ Giancarlo Frosio, (n 207).

³⁰⁶ Art 2(6) of CDSMD.

The reading of Article 2(6), together with Recitals 61-63, emphasises that the classification of the platforms has to be examined case by case, especially for the positive definitions.

By looking at the definition that the Directive delivered, it can be said that the platform in question has to be an active user-generate-content hosting provider that “*store and give access to the public copyright-protected content uploaded by its users.*” This active status is described by Recital 62 as having an active role in organising the UGC and promoting it for profit-making purposes, which includes “*categorising the content and using targeted promotion within it.*”³⁰⁷ These vague terms, such as organising and promoting, which had not been used by CJEU³⁰⁸, make the assessment of neutrality for platforms even more problematic.

Unsurprisingly, this vagueness resulted in different interpretations in the literature. For instance, the European Copyright Society argues that the Directive's definition leaves room for national legislation to introduce nuances concerning *de minimis* activities, such as structuring and search options to improve the user experience within the limits of Recital.³⁰⁹ Meaning that if a relaxed approach regarding the organisation and promotion of the protected material is followed, the possibility for the social media platforms to fall out of this definition may arise.³¹⁰ However, contrarily, Rosati argues that introducing such exclusions would result in altering the scope of the Article.³¹¹ Also, there is no doubt that when social media platforms get excluded from the scope of OCSSPs, there will be a handful of practical issues. Similarly, there is the question of whether the live stream platforms would fall within the scope of OCSSPs, as the duration of the storage is not the same as the other hosting platforms. Regarding this, Rosati suggests that the duration of the storage is irrelevant under CDSMD as the definition in Article 2(6) is silent regarding whether the storage must fulfil a temporal requirement; therefore, these platforms would also qualify in principle as

³⁰⁷ Recital 62 of CDSMD.

³⁰⁸ Miquel Peguera, ‘The New Copyright Directive: Online Content-Sharing Service Providers Lose ECommerce Directive Immunity and Are Forced to Monitor Content Uploaded by Users (Article 17).’ (*Kluwer Copyright Blog*, 26 September 2019) <<http://copyrightblog.kluweriplaw.com/2019/09/26/the-new-copyright-directive-online-content-sharing-service-providers-lose-ecommerce-directive-immunity-and-are-forced-to-monitor-content-uploaded-by-users-article-17/>> accessed 10 August 2020.

³⁰⁹ Axel Metzger and others, ‘Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market into National Law – Comment of the European Copyright Society’ [2020] SSRN Electronic Journal <<https://www.ssrn.com/abstract=3589323>> accessed 22 June 2020, 2.

³¹⁰ *ibid.* 3.

³¹¹ Eleonora Rosati, ‘Five Considerations for the Transposition and Application of Article 17 of the DSM Directive’ (2021) 16 *Journal of Intellectual Property Law & Practice* 265. 4

OCSSPs.³¹² However, in their Guidance, the Commission states that the concept of “storing” refers to more than temporary content storage.³¹³

While the question of which platforms would fall under this definition remains unclear, by looking at the definition of the “online content-sharing service provider” and the “value gap” motive of the Commission together, platforms such as YouTube and Facebook would most likely fall within the scope of the definition of an OCSSP in Article 2(6).³¹⁴ YouTube was at the heart of the legislative debates forming Article 17, and it is one of the most discussed platforms within all of the online platforms, including in case law. This is mostly because of its popularity and the amount of copyright-protected material it hosts.³¹⁵ Recently, in joined cases *YouTube Inc. and Cyando AG*, CJEU followed the “good” or “bad platform” distinction of CJEU and the fact that YouTube has taken technical precautions such as Content ID to prevent copyright infringement in their platform.³¹⁶ CJEU’s typical approach requires the assessment of the role of the platform, whether the platform’s actions go beyond “mere provision of physical facilities”³¹⁷ and whether they have carried out the necessary checks.³¹⁸ The only decision prior to CDSMD that expressly recognises the direct liability of a platform regarding the right of communication to the public is *The Pirate Bay*, which concerns a pirate website.³¹⁹

However, CDSMD adopted a broader concept of the right of communication that would reach OCSSPs' activities which automatically raises the platforms' liability for their users' act of communication to the public and clarifies that the safe harbour provisions should not apply to these platforms.³²⁰ OCSSPs are subject to direct liability as they are responsible for their users' acts of communication to the public where they fail to meet Article 17's obligations.

³¹² Eleonora Rosati, ‘Does the Duration of the Storage Matter? Live Streaming Providers as “Online Content Sharing Service Providers” under the DSM Directive’ (*The IPKat*) <<https://ipkitten.blogspot.com/2020/05/does-duration-of-storage-matter-live.html>> accessed 12 July 2022.

³¹³ European Commission, ‘Communication From The Commission To The European Parliament And The Council Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market’, 4.6.2021 COM(2021) 288 final. (hereinafter ‘Guidance’).

³¹⁴ Giancarlo Frosio (n 207) 715.

³¹⁵ According to the YouTube's founder Steve Chen, over 70% of the "most viewed/most discussed/top favourites/top-rated" videos has copyright material. See Annsley Merelle Ward, 'Letter From Amerikat I: Viacom V Youtube - The Viacom Appeal' (*Ipkitten.blogspot.co.uk*, 2011) <<http://ipkitten.blogspot.co.uk/2011/01/letter-from-amerikat-i-viacom-v-youtube.html>>.

³¹⁶ *Youtube and Cyando*, (n 208) para 35ff.; This distinction discussed previously in Chapter 2.2.3.1 in detail.

³¹⁷ *Youtube and Cyando*, Opinion of Advocate General Saugmandsgaard Øe (n 77), para. 70

³¹⁸ *GS Media* (n 156), para 51.

³¹⁹ *The Pirate Bay* (n 156).

³²⁰ Recital 65 of CDSMD.

This marks a departure from the previous safe harbours regime as Article 17(1) assesses the liability according to the nature of the platform rather than the platform's knowledge of the infringing activity.

This departure resulted in different interpretations of the nature of the Article in the literature. Husovec and Quintais summarised these interpretations under four main arguments; the first interpretation suggests that Article 17 is *a sub-type of right of communication to the public within international minimum standards*; the second suggests that Article is *a sub-type of right of communication to the public outside international minimum standards*; third interpretation suggests that Article is *a "special" right of communication to the public outside international minimum standards but within the earlier EU copyright acquis* and lastly, fourth interpretation suggests that *Article 17 is a "new sui generis" right of communication to the public outside international minimum standards and outside the earlier EU acquis* which is the interpretation that the authors support.³²¹ However, contrarily, Rosati argues that the right of communication to the public in Article 17 is identical to Article 3(1) of the InfoSoc Directive and provides the same right as found in the rest of the EU copyright *acquis*.³²²

The interpretation which suggests that Article 17 provides a *lex specialis* definition for CTPP found support in the Advocate General Opinion for the *YouTube and Cyando* case, which states that *liability of 'providers' for acts of communication committed by users of their platforms is not simply the consequence of the way in which Article 3 of Directive 2001/29 should always have been understood, but 'arises' from Article 17*.³²³ This interpretation was later supported by the Commission in their Guidance regarding the implementation of Article 17.³²⁴ Thus, under the CDSMD regime notion of CTPP extends beyond the already broad notion of CTPP in Article 3(1) of the InfoSoc Directive.³²⁵

³²¹ Martin Husovec and João Pedro Quintais, 'How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms under the Copyright in the Digital Single Market Directive' (2021) 70 GRUR International 325.

³²² Eleonora Rosati, 'Five Considerations for the Transposition and Application of Article 17 of the DSM Directive' (2021) 16 Journal of Intellectual Property Law & Practice 265.

³²³ *Youtube and Cyando*, Opinion of AG Øe (n 77), para 251.

³²⁴ Guidance (n 289), 5-6.

³²⁵ João Quintais and others, 'Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations From European Academics' (2019) 10 Journal of Intellectual Property, Information Technology and Electronic Commerce Law 277.

This clarification regarding the scope of the OCCSPs of Article 17 is crucial to define the liability regime for platforms and consequently clarify the relationship between E-Commerce's platform regime and the CDSMD's OCCSPs regime since this relationship is important for national implementations. For instance, it has been argued that the national implementations which adopted the exact wording of the Directive can lead to the assumption of exemption from liability for many platforms as they might think that they do not fall within the scope of the OCSSPs; therefore, the regime of Article 17.³²⁶ This further supports the arguments regarding the Directive failing to be clear and foreseeable. CJEU in *Poland* described the Article as “a limited scope for new specific liability mechanism” but did not contribute to the discussions regarding the scope of the OCSSPs.³²⁷ However, the scope of the subject of the Article is not the only problematic element in this picture; Article 17's obligations bring many important questions regarding their relationship with fundamental rights.

2.4.2 Obligations of Article 17 and Their Impact on Fundamental Rights

Due to its comprehensive obligations, much of the debate over Article 17 has focused on the compatibility of Article 17 with fundamental rights.³²⁸ According to Article 17, in order to avoid liability, first, OCSSPs should obtain authorisation from the rightholders for the making available of copyright content uploaded by users of their service. If no authorisation is granted, OCSSPs must demonstrate that they have made their best efforts to obtain an authorisation and to ensure the unavailability of specific works. In addition to these, they must demonstrate that they have expeditiously disabled access to, or removed the notified works and made best efforts to prevent their future uploads.³²⁹ The Directive gives only one example of obtaining the required authorisation: direct licensing from the copyright holder.³³⁰

³²⁶ Felix Reda, Joschka Selinger and Michael Servatius, ‘Article 17 of the Directive on Copyright in the Digital Single Market: A Fundamental Rights Assessment’ (Gesellschaft für Freiheitsrechte 2020) <https://freiheitsrechte.org/home/wp-content/uploads/2020/11/GFF_Article17_Fundamental_Rights.pdf>. 43

³²⁷ *Poland v European Parliament* (n 79), para 30.

³²⁸ The compatibility of Article with ECtHR's three-step test See Felipe Romero Moreno, “‘Upload Filters’ and Human Rights: Implementing Article 17 of the Directive on Copyright in the Digital Single Market” (2020) 34 *International Review of Law, Computers & Technology* 153.; Christophe Geiger and Bernd Justin Jütte, ‘Platform Liability Under Art. 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match’ [2021] *GRUR International* <<https://doi.org/10.1093/grurint/ikab037>> accessed 10 May 2021.; Focusing on the compatibility with freedom of expression See Sebastian Felix Schwemer and Jens Schovsbo (n 133).

³²⁹ Article 17(4) of CDSMD.

³³⁰ Recital 64 of CDSMD.

2.4.2.1 Licensing

Endorsement of the licensing agreements and the development of the licencing market between rightholders and OCSSPs is one of the main aims of the Directive.³³¹ Article 17(1) states that when an OCSSP gives the public access to copyright-protected works or other protected subject-matter uploaded by its users, it performs an act of communication to the public. In addition to that, Article 17(4)(a) states “making best efforts to obtain an authorisation” for the copyright-protected work from the rightholder as one of the obligations for its liability exemption. As a result, OCSSPs should get authorisation to communicate the voluminous and diverse user-generated content that fills their platform and the internet.³³²

There are many interpretations of the definition of the “best efforts” standard; in the context of licenses, this is seen as a duty to negotiate all relevant licenses for certain *repertories*, in particular, to take all the necessary and available collective licenses.³³³ However, academics underlined the fact that obtaining of licenses for all third-party material uploaded by the users on their platforms, even for the users’ non-commercial uploads, would not always be straightforward for the platforms.³³⁴ User-generated content relies heavily on existing digitalised works such as text, images and pictures, music and music videos, and films.³³⁵ Thus, according to the Directive, to avoid direct liability, OCSSPs should obtain licences for a broad spectrum of works that have been used for generating UGC. Even though the content users upload is unpredictable, according to the Directive, the required license should include the whole range of potential posts. As underlined by Angelopoulos and Quintais, obtaining all-embracing licensing deals which would cover the entire possible uploaded content is an extremely challenging task to accomplish, even with recourse to voluntary or extended

³³¹ Recital 61 of the CDSMD.

³³² Article 17(1) of CDSMD, “An online content-sharing service provider shall therefore obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of the InfoSoc Directive, for instance by concluding a licensing agreement, in order to communicate to the public or make available to the public works or other subject matter.”

³³³ Matthias Leistner, ‘European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive Compared to Secondary Liability of Content Platforms in the U.S. – Can We Make the New European System a Global Opportunity Instead of a Local Challenge?’ [2020] *Zeitschrift für Geistiges Eigentum/Intellectual Property Journal* 123, p 26.

³³⁴ Martin Husovec and João Pedro Quintais (n 321); Matthias Leistner (n 333); Frosio, (n 207); Senftleben (n 292).

³³⁵ Bernd Justin Jütte, ‘The EU’s Trouble with Mashups: From Disabling to Enabling a Digital Art Form’ (2014) 5 *JIPITEC* <<http://www.jipitec.eu/issues/jipitec-5-3-2014/4094>>.

collective licensing.³³⁶ Senftleben also pointed out the unavailability of "umbrella licences" in the majority of the Member States considering experiences with licensing packages offered by collecting societies.³³⁷ Collective rights management is not well established for types of content other than online music, which forms only a section of the user-generated content, and there is also a high possibility for the content requiring licenses to have multiple rightholders engaged. Even where an umbrella solution is available, these umbrella licences would be costly and disproportionate for many platforms, especially for start-ups, disturbing their right to conduct a business. Reda described this comprehensive licensing obligation as "an impossible feat" as, for many platforms, it would require including all copyrighted content in the world in the licensing agreements.³³⁸

Moreover, even succeeding in finding all the relevant rightholders does not mean that one can obtain a wide-effect umbrella agreement. This impossibility was underlined during the second multistakeholder dialogue by the representatives of the audio-visual industry, where they stated that they are not interested in widely licensing their works to OCSSPs.³³⁹ It is hard to see comprehensive licensing as an effective and practical solution also because of the unlikelihood of the illegal pirate sites to try to get licenses, and even if they try, it is not likely for rightholders to cooperate with them.³⁴⁰ Similarly, Senftleben underlined the low possibility of licensing "all kinds of mash-ups and remixes including critical statements and biting lampoons" as there will not be many rightholders willing to give authorisation for that kind of content.³⁴¹ Thus, under the Article 17 regime, it is quite likely for the platforms that host UGC to focus on mainstream works and the most significant language groups since obtaining licenses that would make providing access to a wide variety of content would be extremely difficult.³⁴² This argument is especially worthy of note since this shortcoming will

³³⁶ Christina Angelopoulos and João Pedro Quintais, 'Fixing Copyright Reform: A Better Solution to Online Infringement' (2019) 10 JIPITEC 147 <<https://www.jipitec.eu/issues/jipitec-10-2-2019/4913>>. 149; Martin Senftleben (n 292); Giancarlo Frosio (n 207) ; Felix Reda, The Text of Article 13 and the EU Copyright Directive Has Just Been Finalised, (*FELIX REDA*, 13 February 2019), <https://felixreda.eu/2019/02/eu-copyrightfinal-text/>.

³³⁷ Senftleben (n 292) 4.

³³⁸ Felix Reda, The Text of Article 13 and the EU Copyright Directive Has Just Been Finalised, (*FELIX REDA*, 13 February 2019), <https://felixreda.eu/2019/02/eu-copyrightfinal-text/>.

³³⁹ Copyright Stakeholder Dialogues, <https://webcast.ec.europa.eu/copyright-stakeholder-dialogues>.; Paul Keller, 'Article 17 Stakeholder Dialogue (Day 2): Filters, Not Licenses!' (*International Communia Association*, 2019) <<https://www.comunia-association.org/2019/11/11/article-17-stakeholder-dialogue-day-2-filters-not-licenses/>> accessed 11 June 2020.

³⁴⁰ Andy Maxwell, 'Will Piracy-Focused Torrent & Streaming Sites Be Affected by Article 13/17? * TorrentFreak' (*Torrent Freak*, 30 March 2019) <<https://torrentfreak.com/will-piracy-focused-torrent-streaming-sites-be-affected-by-article-13-17-190330/>> accessed 29 October 2020.

³⁴¹ Martin Senftleben, (n 292) 5.

³⁴² *ibid.*

affect content diversity and the online culture while putting the freedom of expression of the users and creators in danger, consequently causing the fading of user-generated content. Where the required umbrella licenses are not or could not be obtained, OCSSPs should licence per amount of infringing content available on the platform. However, this would require monitoring all of the files uploaded on the platform, which is an option that is costly and fundamental rights-intrusive.³⁴³

Hence, this licensing obligation of the Article was found to be bringing the risk of a significant loss of freedom of expression and information and impacts platforms' right to conduct a business with the obligation to seek and enter all-embracing licensing deals. Directive's licensing obligations were criticised by many academics, especially their failure to consider the risk of a substantial loss of freedom of expression and information.³⁴⁴ Erickson described this approach as "license first, ask questions later."³⁴⁵ The need for national implementations of this provision to fully explore legal mechanisms for broad licensing of the uses covered by Article 17 and for legislators and judges to define pragmatic approaches that balance the interests of both stakeholders have been underlined.³⁴⁶ According to Metzger and others, this balanced approach can be ensured if OCSSPs are accepted as not liable where they proactively contact publicly known rightholders for licensing negotiations and stay passive before the notice regarding not publicly known rightholders' work.³⁴⁷

Taking these difficulties into account, it can be said that keeping these licensing agreements "fair and reasonably balanced between both parties" and promoting the growth of the licencing, as stated in the Directive, is a real challenge.³⁴⁸ Thus, under these licensing obligations and the Directive's regime for OCCSPs, there is little choice but to implement automated content recognition tools to prevent the availability of any potentially unauthorised content from appearing on their platform. Therefore, where these licencing agreements are absent, filtering becomes the norm.³⁴⁹

³⁴³ Axel Metzger and others (n 285) 5.

³⁴⁴ (n 328).

³⁴⁵ Kris Erickson, 'The European Copyright Directive: License First, Ask Questions Later | Media@LSE' (*Media LSE*) <<https://blogs.lse.ac.uk/medialse/2019/04/02/the-european-copyright-directive-license-first-ask-questions-later/>> accessed 30 September 2022.

³⁴⁶ João Quintais and others, 'Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations From European Academics' (2019) 10 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 277.

³⁴⁷ Axel Metzger and others (n 285) 5-6.

³⁴⁸ Recital 61 of the CDSMD.

³⁴⁹ Frosio, (n 207).

2.4.2.2 Filtering

The second requirement for the OCSSPs to benefit from Article 17(4)'s exemption regime is making "best efforts to ensure the unavailability of specific works" and other subject matter for which the rightholder provided the service provider with the relevant and necessary information to locate the infringing works.³⁵⁰ The language of the Directive suggests that OCSSPs have to filter all types of content proactively, and it mandates platforms to comply with these requirements by using technical measures without specifying them.³⁵¹ Even though filtering technologies have been at the heart of the European debate of Article 17 and the wording of the article nor Recitals 61-71 does not use the term "upload filters", unlike the proposed version of the Article; instead, the language is generic and technology-natural.³⁵² However, there is an agreement in the literature that suggests that the preventive measures in the Article can only be achieved with an obligation to filter and block these specific works with the use of automated recognition systems.³⁵³ In addition to this consensus, Commission and the CJEU also confirmed the need for technological tools in order to comply with Article 17. Commission's Guidance acknowledged "*the use of technology or particular technological solutions*" as one of the points to consider for determining whether an OCSSP has made its best efforts in line with the Article.³⁵⁴ In *Poland v European Parliament*, CJEU acknowledged that Article 17(b) and (c) require de facto OCSSPs to carry out a prior review of the content that users wish to upload to their platforms operated by automated filtering tools that would undermine freedom of expression of users of those content-sharing services.³⁵⁵ The dangers of these technologies caused intense debates among members of the European Parliament³⁵⁶ and were also discussed in detail in the literature.³⁵⁷ For instance,

³⁵⁰ Article 17(4)(b) of the CDSMD.

³⁵¹ David Abecassis and Alexander Gann, (n 293).

³⁵² Axel Metzger and others (n 285) 7.

³⁵³ Thomas Spoerri (n 293); Giancarlo Frosio (n 207), Natalia E Curto, 'EU Directive on Copyright in the Digital Single Market and ISP Liability: What's Next at International Level?' (2019) SSRN Scholarly Paper ID 3434061 <<https://papers.ssrn.com/abstract=3434061>> accessed 14 July 2020. Martin Senftleben (n 139), Evan Engstrom and Nick Feamster (n 164), 10; Felipe Romero Moreno (n 328) 2.

³⁵⁴ Guidance (n 289), 11-16, 20.

³⁵⁵ *Poland v European Parliament* (n 79), paras, 53-54, 58.

³⁵⁶ Philipp Grüll, 'One Year of EU Copyright Reform: Is the Internet Still Working?' *EURACTIV* (20 April 2020) <<https://www.euractiv.com/section/digital/news/one-year-of-eu-copyright-reform-is-the-internet-still-working/>>. ; DW, 'New EU Copyright Law: Will Upload Filters Destroy the Internet as We Know It?' <<https://www.dw.com/en/new-eu-copyright-law-will-upload-filters-destroy-the-internet-as-we-know-it/a-44354310>>.

³⁵⁷ Felipe Romero Moreno (n 328); Christophe Geiger and Bernd Justin Jütte (n 328); Elliot Harmon, "'Notice-and-Stay-Down' Is Really 'Filter-Everything'" (*Electronic Frontier Foundation*, 21 January 2016) <<https://www.eff.org/deeplinks/2016/01/notice-and-stay-down-really-filter-everything>> accessed 29 October 2020.; Sophie Stalla-Bourdillon (n 288); Natalia E Curto (n 353); Krzysztof Garstka, 'Guiding the Blind

Engstrom and Feamster underlined the characteristic limitations of filtering technologies and how important for policymakers to understand this before considering mandatory content filtering obligations.³⁵⁸

These mechanisms indicate upload filters which are automated content recognition programs that scan data either when it is uploaded online or before it is published on a platform and subsequently verify it according to their criteria.³⁵⁹ The leading type of content recognition technology for upload filters is fingerprinting.³⁶⁰ This technology uses software that inputs the content file into an algorithm representing it as a set of numbers representing its perceptual characteristics, creating a unique fingerprint for the content.³⁶¹ These fingerprints altogether constitute a fingerprint database for checking each piece of content that an end-user attempts to upload to remove or block access to them where there is a match.³⁶²

An algorithm compares fingerprints from its database of copyright-protected material with those of the uploaded data, and in case of an overlap, this algorithm prevents the file from being uploaded. However, as their accuracy depends on various variables, such as the data used to generate fingerprints and the quality threshold for recognition, they overlook or misidentify content.³⁶³ Thus, all upload filters, regardless of how sophisticated they are, are subject to several problems that cause erroneous decision-making, which result in various interferences with different fundamental rights. These can be summarised under three main titles: the technical and operational design of the upload filters and related to this design, their

Bloodhounds: How to Mitigate the Risks Art. 17 of Directive 2019/790 Poses to the Freedom of Expression' (18 October 2019) <<https://papers.ssrn.com/abstract=3471791>> accessed 21 November 2022.

³⁵⁸ Evan Engstrom and Nick Feamster (n 164).

³⁵⁹ 'Upload Filters: A Danger To Free Internet Content?' (*IONOS Digitalguide*, 2019)

<<https://www.ionos.co.uk/digitalguide/websites/digital-law/upload-filters/#:~:text=What%20is%20upload%20filtering%3F,it%20according%20to%20certain%20criteria.>> accessed 15 June 2020.

³⁶⁰ European Commission, 'Annex 12A of Commission Staff Working Document – Impact Assessment on the Modernisation of EU Copyright Rules Accompanying the Document 8 Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market and Proposal for a Regulation of the European Parliament and of the Council Laying Down Rules on the Exercise of Copyright and Related Rights Applicable to Certain Online Transmissions of Broadcasting Organisations and Retransmissions of Television and Radio Programmes' SWD(2016) 301 final, 14 September 2016, p. 164-165.

³⁶¹ European Union Intellectual Property Office., *Automated Content Recognition: Discussion Paper. Phase 1, Existing Technologies and Their Impact on IP*. (Publications Office 2020)

³⁶² Jennifer M Urban, Joe Karaganis and Brianna Schofield (n 14)

³⁶³ European Union Intellectual Property Office, *Automated Content Recognition: Discussion Paper. Phase 1, Existing Technologies and Their Impact on IP*. (Publications Office 2020) <<https://data.europa.eu/doi/10.2814/52085>> accessed 21 July 2022. p.20.; French Ministry of Culture, CSPLA – Hadopi – CNC Mission Report Towards more effectiveness of copyright law on online content sharing platforms: overview of content recognition tools and possible ways forward, January 2020, p. 18.

open-to-abuse nature and their incapability to understand the context, namely their context-blindness.

Firstly, all content recognition technologies, including AI-assisted technologies, have their own shortcomings and limitations affecting their accuracy and effectiveness. As they are based on probabilistic methods, these technologies will always generate errors.³⁶⁴ In these systems, sensitivity can be improved only by worsening specificity, or equivalently, recall can be improved only by reducing precision.³⁶⁵ This means that the price for a reduced false negatives rate is an increased false positives rate with more legitimate content being blocked automatically.

Term	Definition	Calculation
Sensitivity (recall)	Ability to classify positively what is positive (proportion of positive cases that have been correctly classified)	$TP/(TP+FN)$
Specificity	Ability to classify negatively what is negative (proportion of negative cases that have been correctly classified)	$TN/(TN+FP)$
Precision	Ability to classify positively only what is positive (proportion of positively classified cases that are really positive)	$TP/(TP+FP)$
Accuracy	Ability to classify cases correctly (proportion of cases that have been correctly classified)	$(TP+TN)/(TP+TN+FP+FN)$

Table 1: Performance measures for accuracy classifiers for upload filters ³⁶⁶

Moreover, the variety of UGC formats, which include combinations of different media types, pose a challenge for the upload filters and result in excessive filtering where valuable content is made inaccessible by these filters. Taking into consideration that most of the uploads, user-generated content, consist of the combination of several traditional media formats, such as video, audio, image, and text.³⁶⁷ These layers of different multimedia on multiple frames within the UGC increase the difficulty and inaccuracy of the filtering. For instance, GIFs and memes require content recognition tools to undertake analysis of text, image and video on

³⁶⁴ Policy Department for Citizens' Rights and Constitutional Affairs and Directorate-General for Internal Policies (n 59).

³⁶⁵ *ibid.*

³⁶⁶ *ibid.*

³⁶⁷ Cambridge Consultants, 'Use Of AI in Online Content Moderation' (Ofcom 2019) <https://www.ofcom.org.uk/data/assets/pdf_file/0028/157249/cambridge-consultants-ai-content-moderation.pdf>. p.34.

multiple frames, but there is no upload filter available that can detect different types of media at once as different media types require different upload filters that employ media-specific techniques.³⁶⁸ Even where multiple filters for different types of content are being implemented by negatively impacting OCCSPs’ freedom to conduct a business,³⁶⁹ the filters are currently available for user-generated content text submissions or text when it is combined with media suffers from a very high rate of erroneous detections.³⁷⁰

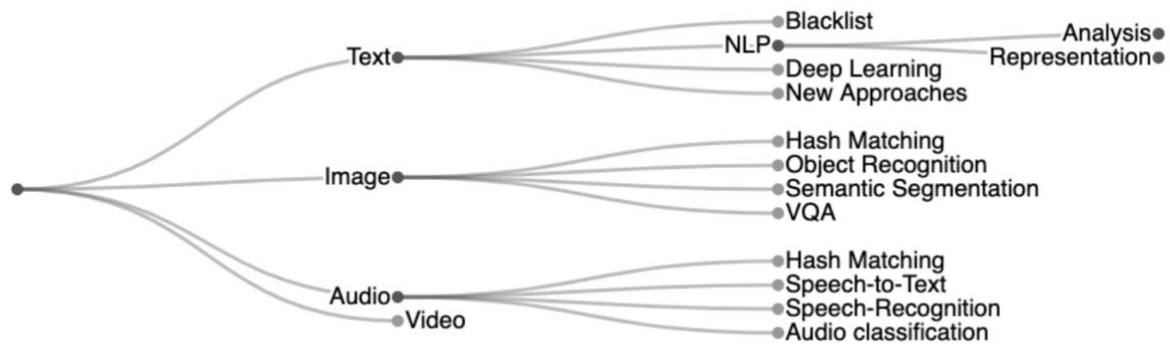


Figure 2: Techniques for different media types³⁷¹

Surely, there is a potential for AI solutions to improve content recognition and analysis.³⁷² These technologies can be used with the combination of fingerprinting and watermarking as the area that this technology can operate autonomously is currently limited to image recognition.³⁷³ However, it is important to keep in mind that AI technologies bring their own characteristic problems. First, they require significant resources, including advanced hardware and staff, to successfully store, process and analysis the large amount of data it needs to operate and ensure the operation and optimisation of the system.³⁷⁴ The training of

³⁶⁸ *ibid.* p.49; Felipe Romero Moreno (n 328), 159.

³⁶⁹ *Netlog* (n 13), para 46 ; *Scarlet Extended* (n 13), para 48; *UPC Telekabel* (n 15), paras. 49-50.

³⁷⁰ David Abecassis and Alexander Gann, (n 293) 7-9.; *Poland v European Parliament*, AG Opinion (n 272), para 67. By noting that there are no available upload filters for software code, game footage, or 3D printing files.

³⁷¹ Policy Department for Citizens’ Rights and Constitutional Affairs and Directorate-General for Internal Policies (n 59).

³⁷² European Union Intellectual Property Office., *Automated Content Recognition: Discussion Paper. Phase 2, IP Enforcement and Management Use Cases.* (Publications Office 2022)

<<https://data.europa.eu/doi/10.2814/952694>> accessed 10 October 2022. 48. However, one should keep in mind that the identification of copyright infringement requires different checks, including the context. This will be examined in detail below.

³⁷³ European Union Intellectual Property Office, *Automated Content Recognition: Discussion Paper. Phase 1, Existing Technologies and Their Impact on IP*. (Publications Office 2020)

<<https://data.europa.eu/doi/10.2814/52085>> accessed 21 July 2022.

³⁷⁴ Mike Bernico, ‘The Data Question’ (*Towards data science*, 18 December 2018)

<<https://towardsdatascience.com/the-data-question-b6a8b60dc934>> accessed 21 November 2022.; Adrian Guan,

these technologies requires vast amounts of data which cannot always be available or possible for every OCSSP to create and maintain.³⁷⁵ Second, while their accuracy levels are not clearly assessable due to limited information available, the dependency of their accuracy on their training data is a well-known shortcoming.³⁷⁶ Depending on their datasets and the training, AI bias can emerge, which traditionally constitutes a big problem regarding AI decision-making that disproportionately limits the freedom of expression of members of racial and linguistic minority groups.³⁷⁷ As AI's learning is faster than humans, parallel to that, its mistakes also take place faster and of greater magnitude than humans.³⁷⁸ Consequently, the impact of upload filters on these rights intensifies with the use of AI-based technologies. Third, regardless of the level of sophistication, they are not capable of distinguishing copyright exceptions and limitations.³⁷⁹ It is unlikely for these technologies to efficiently analyse context and provide reliable and accurate results on a level that they can replace human review. Thus, while these technologies are often promoted as the solution to the shortcomings of the current content recognition, as the problems go beyond the low accuracy level, it is unlikely to limit the interference of preventive measures on fundamental rights, especially freedom of expression, with the adoption of more sophisticated technologies.³⁸⁰

It is important to note that the level of efficiency of upload filters also depends on the objectives pursued. As the sole aim of these technologies rightholder's control over works that are shared online by third parties, the efficiency of the filters is being evaluated merely

Steven H Bayless and Radha Neelakantan, 'Connected Vehicle Insights - Trends in Computer Vision' (ITS America 2012).;

³⁷⁵ Policy Department for Citizens' Rights and Constitutional Affairs and Directorate-General for Internal Policies (n 59). Additionally, the training data which shapes the AI and determines its success raises many copyright and data protection issues. See Dinusha Mendis and others, 'Artificial Intelligence and Intellectual Property: The View of The British and Irish Law, Education and Technology Association (BILETA)' [2020] SSRN Electronic Journal <<https://www.ssrn.com/abstract=3752956>> accessed 21 July 2022.

³⁷⁶ Chen Sun and others, 'Revisiting Unreasonable Effectiveness of Data in Deep Learning Era' (arXiv, 3 August 2017) <<http://arxiv.org/abs/1707.02968>> accessed 21 November 2022.

³⁷⁷ Andrew Myers, 'Rooting Out Anti-Muslim Bias in Popular Language Model GPT-3' (*Stanford HAI*, 22 July 2021) <<https://hai.stanford.edu/news/rooting-out-anti-muslim-bias-popular-language-model-gpt-3>> accessed 4 January 2023.

³⁷⁸ Henry A Kissinger, 'How the Enlightenment Ends' (*The Atlantic*, 15 May 2018) <<https://www.theatlantic.com/magazine/archive/2018/06/henry-kissinger-ai-could-mean-the-end-of-human-history/559124/>> accessed 12 July 2021.

³⁷⁹ Samuel Dodge and Lina Karam, 'A Study and Comparison of Human and Deep Learning Recognition Performance Under Visual Distortions' <<https://arxiv.org/abs/1705.02498>> accessed 21 July 2022.; Dan Hendrycks and Thomas Dietterich, 'Benchmarking Neural Network Robustness to Common Corruptions and Perturbations' <<https://arxiv.org/abs/1903.12261>> accessed 21 July 2022.

³⁸⁰ Emma J Llasó, 'No Amount of "AI" in Content Moderation Will Solve Filtering's Prior-Restraint Problem' (2020) 7 *Big Data & Society* 205395172092068.

by considering how aggressive they are in protecting the interest of rightholders by detecting and blocking works without correctly assessing their infringing nature.³⁸¹ The criterion of effectiveness is the level of detection of the copyright-protected works, notwithstanding the legitimacy of the uses of these works.³⁸² These filters operate a “*mass and suspicion-independent examination of contents*”³⁸³, and this tunnel vision of these filters makes them prone to false identifications regardless of the level of sophistication of their software.

Also, the accuracy and overall success of these technologies highly depend on the reference data, namely, the works uploaded by rightholders to the database used by the platform to create fingerprints for the algorithm. There are no standards and data interoperability across various fingerprinting-based solutions that can prevent data exchange and cause ownership conflicts, improper attribution of intellectual property rights, or duplicate claims.³⁸⁴ There are no requirements regarding the type of information rightholders must provide to the platforms to add the work to their database or include a confirmation phase regarding their ownership. Thus, false positives and over-blocking are not surprising outcomes where the data in these automated systems’ database is provided by the presumed rightholders, and all these systems assume these rightholders’ intellectual property rights are exclusive rights by default even where the subject matter “infringement” is the use of a public domain work.³⁸⁵

Moreover, how these filters and the content management systems work in every different platform is mostly a mystery as OCCSPs are not required to disclose certain types of

³⁸¹ Eugene Weinstein and Pedro Moreno, ‘Music Identification with Weighted Finite-State Transducers’, *2007 IEEE International Conference on Acoustics, Speech and Signal Processing - ICASSP '07* (IEEE 2007) <<https://ieeexplore.ieee.org/document/4217502/>> accessed 27 July 2022.

³⁸² For instance, YouTube suggests that Content ID correctly identifies %99 of all infringing cases; however, by looking at the %99.5 rate of undisputed Content ID claims, the reason for this metric value is most likely to be caused by the lack of effective and user-friendly *ex-post* safeguards such as complaint and redress mechanisms, out of court solutions. See Toni Lester and Dessislava Pachamanova, ‘The Dilemma of False Positives: Making Content ID Algorithms More Conducive to Fostering Innovative Fair Use in Music Creation’ (2017) 24 *UCLA Entertainment Law Review* <<https://escholarship.org/uc/item/1x38s0hj>> accessed 26 July 2022. p.67.

³⁸³ Amélie Pia Heldt, ‘Upload-Filters – Bypassing Classical Concepts of Censorship?’ (2019) 10 *Journal of Intellectual Property, Information Technology and E-Commerce Law* 56.

³⁸⁴ European Commission Directorate General for Communications Networks, Content and Technology and others, *Study on Copyright and New Technologies: Copyright Data Management and Artificial Intelligence* (Publications Office 2022) <<https://data.europa.eu/doi/10.2759/570559>> accessed 10 October 2022.

³⁸⁵ Content ID accommodated the ‘Copyfraud’ trend where big rightholders fraudulently claim copyright on uploads that do not include a work that belongs to them. Rightholders created copies of these works to be able to claim them as their own and take advantage of Content ID’s bias towards rightholders. See Patrick McKay, ‘YouTube Copyfraud & Abuse of the Content ID System’ (23 November 2011) <<http://fairusetube.org/youtube-copyfraud>> accessed 26 July 2022.; Shreya Tewari, ‘Over Thirty Thousand DMCA Notices Reveal an Organized Attempt to Abuse Copyright Law’ (*The Lumen Project*, 22 April 2022) <https://www.lumendatabase.org/blog_entries/over-thirty-thousand-dmca-notices-reveal-an-organized-attempt-to-abuse-copyright-law> accessed 20 July 2022.

information, such as information that can lead to significant vulnerabilities regarding the operation of their automated content management systems.³⁸⁶ Even where they disclose information, this includes cherry-picked information and very limited data about the operational information regarding their technologies and overall content management. Especially AI technologies are very suitable for being applied in a non-transparent manner, which affects users' understanding of how these technologies examine their uploads and decide which would raise incompatibilities with GDPR and the right to a fair trial.³⁸⁷ When these technologies take erroneous actions on legitimate content, they are unable to provide any reasoning for their decisions as their decision-making takes place within a black box.³⁸⁸ These technologies, no matter how sophisticated, are not programmed in ways that facilitate transparency or explanation.³⁸⁹ This inability also creates a suitable environment for the misuse of these technologies.

A related problem to the upload filter's in-favour-of-rightholder design, their open-to-abuse nature, which feeds from the lack of transparency around their operation, constitutes the second reason for upload filters' interferences with fundamental rights. In current content moderation practices, it is easy for rightholders who are granted power on the operation of upload filters to misuse this power and affect the operation and even the development of these filters. This misuse can occur by providing false data or intentionally not correcting the false positives that the algorithm created and bypassing the copyright law by deciding on the potential infringement cases, as they can remove the upload immediately after the match

³⁸⁶ Article 16 of Charter; There might be cases where the operation of the upload filter technology is protected under patent law or trade secrets, especially considering the increasing numbers of big OCSSPs choosing to develop their own systems rather than licensing an available software. See Mark Raymond Pace and Brooks Cash Talley, 'Distributed Content Identification System' <<https://patents.google.com/patent/US6460050B1/en>> accessed 20 September 2022.; Viswanath Sivakumar, Albert Gordo and Manohar Paluri, 'Rosetta: Understanding Text in Images and Videos with Machine Learning' (*Engineering at Meta*, 11 September 2018) <<https://engineering.fb.com/2018/09/11/ai-research/rosetta-understanding-text-in-images-and-videos-with-machine-learning/>> accessed 29 July 2022.; Platforms such as Facebook are known for abusing these rules to avoid compliance with transparency rules. See 'Letter from Acting Director of the Bureau of Consumer Protection Samuel Levine to Facebook' (*Federal Trade Commission*, 5 August 2021) <<https://www.ftc.gov/blog-posts/2021/08/letter-acting-director-bureau-consumer-protection-samuel-levine-facebook>> accessed 20 September 2022.

³⁸⁷ Dr Malte Engeler, 'Copyright Directive: Does the best effort principle comply with GDPR?' (*Telemedicus*) <<http://www.telemedicus.info/article/3402-Copyright-Directive-Does-the-best-effort-principle-comply-with-GDPR.html>> accessed 14 July 2020.; Christoph Schmon, 'Copyright Filters Are On a Collision Course With EU Data Privacy Rules' (*Electronic Frontier Foundation*, 3 March 2020) <<https://www.eff.org/deeplinks/2020/02/upload-filters-are-odds-gdpr>> accessed 31 August 2021.; Felipe Romero Moreno (n 328).

³⁸⁸ Prof. Frederik Zuiderveen Borgesius, 'Discrimination, Artificial Intelligence, and Algorithmic Decision-Making' (Council of Europe 2018).

³⁸⁹ Emma J Llansó, 'No Amount of "AI" in Content Moderation Will Solve Filtering's Prior-Restraint Problem' (2020) 7 *Big Data & Society* 205395172092068.

notifications and reject counter claims.³⁹⁰ There are no effective sanctions against the abuse of these privileged tools in practice; despite YouTube stating that this abuse is subject to disciplinary action, there are serious doubts regarding the enforcement.³⁹¹ In reality, big rightholders usually get away with their fraudulent claims and even keep the advertising revenue from the falsely claimed uploads.³⁹² The effects of this practice can be dramatic as, when left undisputed, the algorithm will continue using the faulty fingerprint as a reference and create more false positives for the uploads, including the work that rightholders fraudulently claimed as theirs while providing reference data for the fingerprint database.³⁹³

On the darker side, these content moderation technologies can be misused beyond the aim of prevention of copyright infringement, such as censorship and reputation management. Where censorship is performed by these mechanisms, especially the filters that employ AI techniques, benefit from the low levels of visibility as users are often unaware of the blocking or deformation regarding the content uploaded or consumed. That is why academics and human rights organisations argue that these technologies are the new censorship tools that bypass classical concepts of censorship.³⁹⁴ This transformation of upload filters into censorship tools can arise from abuses of platforms and in addition to the rightholders who

³⁹⁰ Timothy B Lee, 'UMG Claims "Right to Block or Remove" YouTube Videos It Doesn't Own' (*Ars Technica*, 16 December 2011) <<https://arstechnica.com/tech-policy/news/2011/12/umg-we-have-the-right-to-block-or-remove-youtube-videos.ars>> accessed 26 July 2022.; Mike Masnick, 'An Explanation For Why UMG May Be Right That It Can Pull Down MegaUpload's Video [Updated]' (*Techdirt*, 16 December 2011) <<https://www.techdirt.com/2011/12/16/explanation-why-umg-may-be-right-that-it-can-pull-down-megauploads-video/>> accessed 26 July 2022.; Andy Baio, 'Copyright Kings Are Judge, Jury and Executioner on YouTube' *Wired* <<https://www.wired.com/2012/02/opinion-baiodmcayoutube/>> accessed 26 July 2022.; For instance, a company claimed copyright on an original song uploaded to YouTube by the band that holds the copyright. See Mike Masnick, 'How Rumblefish Ended Up Claiming Copyright On A Song Uploaded By The Band Who Actually Held The Copyright' (*Techdirt*, 25 April 2012) <<https://www.techdirt.com/2012/04/25/how-rumblefish-ended-up-claiming-copyright-song-uploaded-band-who-actually-held-copyright/>> accessed 27 July 2022.

³⁹¹ Patrick McKay, 'YouTube Copyfraud & Abuse of the Content ID System' (23 November 2011) <<http://fairusetube.org/youtube-copyfraud>> accessed 26 July 2022. YouTube, in their help page, which is the only official source of information regarding their copyright management tools, merely acknowledges that "misuse of Content ID can have serious consequences for YouTube and creators" without specifying any sanctions or penalties. See YouTube, 'Overview of Copyright Management Tools - YouTube Help' <https://support.google.com/youtube/answer/9245819?hl=en&ref_topic=9282364#zippy=%2Ccontent-id> accessed 27 July 2022.

³⁹² David Kravets, 'Rogues Falsely Claim Copyright on YouTube Videos to Hijack Ad Dollars' *Wired* <<https://www.wired.com/2011/11/youtube-filter-profiting/>> accessed 26 July 2022.

³⁹³ Ben Depoorter and Robert Walker, 'Copyright False Positives' (Social Science Research Network 2013) SSRN Scholarly Paper ID 2337684 <<https://papers.ssrn.com/abstract=2337684>> accessed 23 December 2019.

³⁹⁴ Amélie Pia Heldt (n 383); You Can Still Stop #Article13 (Aka #Article17)! #Copyright #CensorshipMachine' (*#SaveYourInternet*) <<https://saveyourinternet.eu/>> accessed 29 October 2020.; 'EU Copyright Directive – Privatised Censorship and Filtering of Free Speech' (*European Digital Rights (EDRi)*, 10 November 2016) <<https://edri.org/our-work/eu-copyright-directive-privatised-censorship-and-filtering-of-free-speech/>> accessed 29 October 2020.

are, in some cases, the governments. There are many different examples of the misuse of content moderation systems; malicious actors use copyright claims to remove content for other arbitrary reasons unrelated to copyright.³⁹⁵ Parties who wish to repress dissenting speech, harm the content creator, or manage their reputation online can use copyright infringement claims to force intermediaries to remove the content they want to be put down and accomplish their personal goals via copyright enforcement tools.³⁹⁶ The practice of using copyright enforcement to silence criticism and suppress and remove information has even its own name in literature, copyright silencing, and it is becoming common practice for ill-intentioned actors that some cases not even hold the copyright on the content that request to be blocked or removed.³⁹⁷

Another example of this misuse with serious consequences is the use of these technologies to censor and avoid accountability for instances of misconduct by law enforcement and the “weaponization” of these technologies by them. It has been reported that police forces had started playing copyright-protected music on their phones when they realised that their misconduct was being recorded by activists to misuse the copyright enforcement tools to prevent the availability of these videos online.³⁹⁸ Even worse, governments are also misusing

³⁹⁵ Kristofer Erickson and Martin Kretschmer (n 61).

³⁹⁶ Joseph M Miller, ‘Fair Use through the Lenz of Section 512(c) of the DMCA: A Preemptive Defense to a Premature Remedy’ (2010) 95 Iowa L. Rev. 1697; Andy Chalk, ‘Pewdiepie Warns against DMCA Abuse after YouTube Accepts Copyright Claim against Him’ (*PC Gamer*, 15 September 2017) <<https://www.pcgamer.com/uk/pewdiepie-warns-against-dmca-abuse-after-youtube-accepts-copyright-claim-against-him/>> accessed 17 June 2021.; Shoshana Wodinsky, ‘YouTube’s Copyright Strikes Have Become a Tool for Extortion’ (*The Verge*, 11 February 2019) <<https://www.theverge.com/2019/2/11/18220032/youtube-copystrike-blackmail-three-strikes-copyright-violation>> accessed 29 October 2020. Even more concerning, there are also examples of this misuse to provide illegal financial gain by blackmailing creators. See Tom Gerken, ‘YouTube’s Copyright Claim System Abused by Extorters’ *BBC News* (14 February 2019) <<https://www.bbc.co.uk/news/technology-47227937>> accessed 29 October 2020; Lindsay Dodgson, ‘YouTube Channels Are Being Held Hostage with False Copyright Claims, but the Platform’s Hands Are Tied’ (*Insider*) <<https://www.insider.com/youtubers-channels-are-being-held-hostage-with-fake-copyright-claims-2020-6>> accessed 29 October 2020;; Shreya Tewari, ‘Copyright Law as the Tool of Choice for Censorship and Reputation Management’ (*Lumen Database*, 17 January 2022) <https://lumendatabase.org/blog_entries/copyright-as-the-tool-of-choice-for-censorship-and-reputation-management> accessed 2 August 2022.

³⁹⁷ Cathay Smith, ‘Copyright Silencing’ (22 September 2020) <<https://papers.ssrn.com/abstract=3697578>> accessed 3 August 2022.; For examples of this See Reid McCarter, ‘Jerry Doesn’t Want You to Watch a Vic Berger Video Making Fun of Them; Here’s That Vic Berger Video’ (*The A.V. Club*) <<https://www.avclub.com/fuck-jerry-doesnt-want-you-to-watch-a-vic-berger-video-1832362353>> accessed 17 June 2021.; Kate Cox, ‘Dr. Drew Apologizes for Being a COVID-19 Denier after Copyright Silliness’ (*Ars Technica*, 6 April 2020) <<https://arstechnica.com/tech-policy/2020/04/dr-drew-coronavirus-supercut-restored-to-youtube-after-copyright-takedown/>> accessed 3 August 2022.

³⁹⁸ ‘US Officer Plays Taylor Swift Song to Try to Block Video’ *BBC News* (2 July 2021) <<https://www.bbc.com/news/technology-57698858>> accessed 9 July 2021; Dexter Thomas, ‘New Video Shows Beverly Hills Cops Playing Beatles to Trigger Instagram Copyright Filter’ (*VICE*, 2 December 2021)

copyright enforcement tools to practice censorship; there are many examples of governments using content moderation systems as a weapon to remove politically objectionable content. In a recent example, by enforcing its power as a big rightsholder, Turkey's state-owned public broadcaster TRT abused YouTube's copyright policy that grants powerful copyright enforcement tools and used these as an alternative method of censorship to silence channels that are critical of the government on YouTube.³⁹⁹ As can be seen from the many examples in practice, the open-to-abuse nature of these filters combined with their opaque operation results in serious interferences with fundamental rights.

Lastly, the highly debated shortcoming of the filters that result in erroneous decisions that interfere with freedom of expression is their context-blindness.⁴⁰⁰ Even the most sophisticated content moderation systems that operate with AI technologies, both AI-based or enhanced, are still suffering from the incapability of understanding the content and are not capable of paying regard to "*widespread variation of language cues, meaning and linguistic and cultural particularities.*"⁴⁰¹ As upload filters are not reliable for accurately identifying potentially infringing content, these filters, which are employed by the platforms that host users' creations and expressions, filter out not only the infringing content but also the content that is legal, including content that benefits from E&L.⁴⁰² This misidentification result in over-blocking and consequently this practice affects the expressive rights of Internet users as the content in question form part of communications that are worthy of protection under Art.10 of ECHR and Art.11 of the Charter.⁴⁰³

The understanding of the context of the use of copyright-protected work, including for E&Ls, is almost impossible to reduce to a set of instructions that could be applied by an automated

<<https://www.vice.com/en/article/bvxa7q/new-video-shows-beverly-hills-cops-playing-beatles-to-trigger-instagram-copyright-filter>> accessed 9 July 2021.; Mike Masnick, Copyright Blocks Interview Of Protesters Because Marvin Gaye's "Let's Get It On" Was Playing In The Background' (*Techdirt*, 3 June 2020) <<https://www.techdirt.com/2020/06/03/copyright-blocks-interview-protesters-because-marvin-gayes-lets-get-it-was-playing-background/>> accessed 26 July 2022.

³⁹⁹ TM, 'Turkish Gov't Uses TRT as a Weapon to Spread Its Censorship to YouTube | Turkish Minute' <<https://turkishminute.com/2020/12/23/turkish-govt-use-trt-as-weapon-to-spread-its-censorship-to-youtube/>> accessed 1 April 2021.

⁴⁰⁰ Felix Reda, Joschka Selinger and Michael Servatius (n 326).

⁴⁰¹ David Kaye, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (UN 2018) U.N. Doc. A/73/348 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/270/42/pdf/N1827042.pdf?OpenElement>> accessed 30 June 2021.

⁴⁰² *Poland v European Parliament*, AG Opinion (n 272), para 142.

⁴⁰³ *Scarlet Extended* (n 16), para 52; *Netlog* (n 16), para 50; *Poland v European Parliament*, AG Opinion (n 272), para 141.

process as it would require traits exclusive to humans, such as understanding humour.⁴⁰⁴ The detection of statutory copyright exceptions such as parody, quotation, review or criticism is highly dependent on knowledge about the circumstances of the upload. So, it requires a high degree of intellectual judgment that no available technology can undertake.⁴⁰⁵ For example, fingerprinting technologies can analyse the length of the quotation, but the length of an extract is not a legal criterion, only an indication to determine whether a use is legitimate.⁴⁰⁶ As these filters do not understand why the user included the work into their uploads and perform blocking without considering the portion of the use of the copyright-protected work, any upload including a copyright-protected work surrounded with a commentary, which can constitute a review or criticism, would be stuck off the nets of upload filters. For instance, regarding songs, they block the upload when they detect even a couple of seconds of the copyright-protected song within the upload, and developers are constantly trying to improve this recognition speed.⁴⁰⁷ This increases the risk of over-blocking and depriving users of space for expression and creation permitted by E&Ls.⁴⁰⁸ For parody, things get even more complicated as humour is not something that can be programmed into the algorithms. In AG Villalón's words, "*a parody is a copy and a creation at the same time*" by its very nature.⁴⁰⁹ However, the algorithms of upload filters are able only to identify the existing work that has been evoked within the parody, not the "expression of humour or mockery." Even the most developed algorithm was found to lack sufficient understanding of the world at large to identify humour⁴¹⁰, which is the most important and abstract concept for the identification of parody.

⁴⁰⁴ Ben Depoorter and Robert Walker (n 393); Dan L Burk and Julie E Cohen, 'Fair Use Infrastructure for Copyright Management Systems' (2000) Georgetown Public Law Research Paper No. 239731.

⁴⁰⁵ Evan Engstrom and Nick Feamster (n 164), p.18

⁴⁰⁶ Guidance (n 289).

⁴⁰⁷ The widely-used upload filter, Audible Magic, can identify clips as short as 5 seconds. See Audible Magic, 'Audible Magic's Content Identification' <https://www.audiblemagic.com/wp-content/uploads/2019/08/B_F_Core-Technology_012720.pdf> accessed 5 August 2022.; Eugene Weinstein and Pedro Moreno, 'Music Identification with Weighted Finite-State Transducers', 2007 IEEE International Conference on Acoustics, Speech and Signal Processing - ICASSP '07 (IEEE 2007) <<https://ieeexplore.ieee.org/document/4217502/>> accessed 27 July 2022.; Fred von Lohmann, 'YouTube's Content ID (C)ensorship Problem Illustrated' (Electronic Frontier Foundation, 2 March 2010) <<https://www.eff.org/deeplinks/2010/03/youtubes-content-id-c-ensorship-problem>> accessed 27 July 2022.

⁴⁰⁸ *Poland v European Parliament* (n 272), AG Opinion, para 148.

⁴⁰⁹ Case C-201/13 *Johan Deckmyn and Vrijheidsfonds VZW* [2014] EU:C:2014:458, Opinion of Advocate General Cruz Villalón, paras 49-50.

⁴¹⁰ Assessing humour is way beyond the capabilities of both currently available algorithms and the technologies that will be developed in the near future. See Davide Bacciu, Vincenzo Gervasi and Giuseppe Prencipe, 'LOL: An Investigation into Cybernetic Humor, or: Can Machines Laugh?' 3:6 <<http://drops.dagstuhl.de/opus/volltexte/2016/5882/>> accessed 8 June 2021.

Thus, as identifying copyright exceptions and limitations requires highly fact-dependent considerations on a case-by-case basis, employing automatic systems incapable of delivering this examination for content filtering and moderation will harm the protection of copyright exceptions and, therefore, user rights. Where the aim of content filtering should be preventing and limiting infringing content while allowing and facilitating the delivery of legal content and free interaction, filtering systems are not able to fulfil this obligation as they are fallible and subjective.⁴¹¹ That is why, by referring to the clear and precise limit that EU legislature laid down regarding the use of automatic recognition and filtering tools, CJEU explicitly excluded filtering systems that are not capable of distinguishing legitimate uses and *ex-ante* block user uploads including the ones which benefit from copyright exceptions and limitations.⁴¹² However, despite the safeguards within the Article that protects legitimate uses⁴¹³, by looking at the context-blindness of upload filters, it is not always easy to ensure the effective enforcement of these safeguards.

Thus, in the light of these problems of upload filters' that result in erroneous decision-making and over-blocking, the efficiency of the safeguards, therefore, the compatibility of the Article with fundamental rights, becomes questionable. By taking into consideration of cost and efficiency concerns of the industry, it is likely for Article's filtering approach to trigger over-blocking, over-removal and even content censorship.⁴¹⁴ Therefore, these interferences of these filtering measures with various fundamental rights of users, such as freedom of expression, protection of personal data, and respect for private life, in addition to OCSSPs' right to conduct a business, become inevitable with the new regime of Article 17.

Academics recommended different types of filtering procedures to eliminate the criticised parts of Article 17(4)'s filtering obligations with the national implementations. Romero Moreno specifically underlined the importance of an implementation that respects human rights and suggested a system to eliminate the negative outcomes on the fundamental rights of the upload filters.⁴¹⁵ He suggested "*a hierarchical identification technique*" for the filtering of the upload filters to be limited to only commercial-scale copyright infringement, ensuring an implementation that is less data processor-intrusive. Leistner suggested a "trusted

⁴¹¹ Policy Department for Citizens' Rights and Constitutional Affairs and Directorate-General for Internal Policies (n 59).

⁴¹² *Poland v European Parliament* (n 79), paras 86-87.

⁴¹³ Recital 70 and Article 17(7) and (9) of CDSMD.

⁴¹⁴ Martin Senftleben, (n 292).

⁴¹⁵ Felipe Romero Moreno, (n 328).

users” system in which these users can flag their uploads as covered by copyright exceptions that will be subject to a quantitative algorithmic check, and if their claim of copyright exception turns out to be plausible, this will pave the way to a delayed takedown.⁴¹⁶ However, requiring the implementation of an algorithmic system into their platform might increase the economic burden on platforms. Most importantly, just like upload filters, this quantitative algorithmic check would be subject to problems with distinguishing legal uses of copyright-protected work from uses that constitute infringement, as numerical standards can be deceptive for the assessment of copyright exceptions or fair use. The same use may fall within the sphere of a copyright exception, while in another context, it fails to benefit from any copyright exceptions and limitations. To tackle this shortcoming of algorithmic tools, this system introduces trusted rightholders and trusted users, who are the uploaders, as agents. However, granting the power of avoiding the blocking of their upload to these actors without any independent checks creates a system which is open to abuse. Many examples of this misuse were reported under classic notice and takedown, including the abuse of the new tools that big platforms such as YouTube granted to big rightholders.⁴¹⁷

Although there is a strong agreement on the fact that the implementation must ensure that the safeguards within the Article can be realistically applied to the practice to offer efficient protection for the different fundamental rights against the upload filters’ interferences⁴¹⁸, there are not many studies in the literature that comprehensively explore the impact of the filtering on various rights from the perspectives of different actors such as OCSSPs and users and also suggest procedural safeguards in light with the CJEU’s clarifications regarding Article 17 in *Poland* case. Therefore, this study examines the complete timeline of Article 17 by considering all the features of the Article to provide recommendations for the fundamental right-compliant implementation of Article 17 and, most specifically, suggests a filtering mechanism to fill the gap regarding the procedural systems that helps filters become more suitable to achieve this outcome and ensure the Article 17(7)’s guarantee.

⁴¹⁶ Matthias Leistner (n 333).

⁴¹⁷ Jennifer M Urban, Joe Karaganis and Brianna Schofield (n 14).

⁴¹⁸ Christophe Geiger and Bernd Justin Jütte (n 328); Sebastian Felix Schwemer and Jens Schovsbo (n 133); João Quintais and others (n 322); João Pedro Quintais and others (n 325).

2.4.2.3 Notice and Takedown and Stay Down

Article 17(4)(c) embraces the “notice and takedown” mechanism and states that OCSSPs have to show that they 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. The article goes further; according to the reading of 17(4)(c), OCSSPs must adopt effective “notice and stay down” mechanisms based on information provided by the rightholder to prevent future uploads. This notice and stay down mechanism goes beyond the traditional notice and takedown and requires additional measures from the OCSSPs; they must prevent the reappearing of the infringing content in addition to the removal of the content. Thus, it is clear that the notice and stay down mechanism also requires implementing and operating filtering tools to prevent future uploads in addition to removal of the infringing upload that the rightholders notified the platform about initially.

According to the Article, OCSSPs should actively attempt to locate as much illegal content as possible instead of waiting for the report of the unlawful content, which requires operating broad filtering that conflicts with the main principles of EU law.⁴¹⁹ This requirement of actively searching for content is turning the established “notice and takedown” principle on its head.⁴²⁰ According to the notice and takedown principle established under E-Commerce Directive, platforms should “act expeditiously” to remove or disable access upon obtaining knowledge about the infringing content. However, as mentioned previously, while examining the CTPP in CDSMD, Article 17 assumes that OCSSPs have that knowledge and replaces the obligation to “act upon knowledge” with upload filters. Under the ECD regime, this assumption was found incompatible with EU law as it would render safe harbours ineffective by requiring any provider hosting information to carry out such processing.⁴²¹

In addition to that, the replacement of the well-settled obligation of “acting upon knowledge” with upload filters by the Article is questionable as the imbalance of powers causes many

⁴¹⁹ Christina Angelopoulos and others, ‘Study of Fundamental Rights Limitations for Online Enforcement through Self-Regulation’ (Institute for Information Law (IViR) 2015) Research Reports or Papers <<https://www.ivir.nl/publicaties/download/1796>> accessed 14 July 2020. 9.

⁴²⁰ Malte Engeler (n 387).

⁴²¹ *Youtube and Cyando*, Opinion of Advocate General Saugmandsgaard Øe (n 77), para 178.

problems even under the established notice and takedown regime.⁴²² Even where the rightholders are required to provide a notice for the platform's action regarding the allegedly infringing content, this system results in over-removal and interferes with the users' fundamental rights due to the rightholders' misuse of these systems.⁴²³ Moreover, notice and takedown mechanisms require intermediaries to deliver a decision that affects competing fundamental rights. This usually results in negative consequences for the users' as their fundamental rights, especially their freedom of expression and information, get affected by the decisions made by the intermediaries, which are private companies that do not prioritise user rights over intellectual property protection.⁴²⁴ Thus, academics such as Erickson and Kretschmer warned policymakers not to lightly grant additional powers to platforms and rightholders by pointing out the problems with the unbalanced power of the notice and takedown regime and their impact on users' fundamental rights.⁴²⁵ However, by looking at Article 17(4)(b) and (c), one can say that these warnings are mostly overlooked by the legislature.

The strict obligation of preventing the availability of works within the Article was found to be likely to encourage OCSSPs to adopt filtering systems that would monitor all the content in order to filter infringing uploads for unlimited time since there is no other practical way for OCSSPs to meet their obligations and qualify for the Directive's "new safe harbour" in Article 17(4)(b) and (c).⁴²⁶ It has been argued by Frosio and Mendis that, in practical terms, Article 17 implicitly requires general monitoring of the content by requiring OCSSPs to make their 'best efforts' to ensure the unavailability of specific unauthorised content over services provided by them.⁴²⁷ Given the mass volume of uploaded content, it would be impossible to carry out such a check in advance manually; therefore, to avoid liability, platforms would apply content recognition technologies to both infringing and non-infringing content, which

⁴²²Jennifer M Urban, Joe Karaganis and Brianna Schofield, (n 14); Jennifer Urban, Joe Karaganis and Brianna L Schofield, 'Takedown in Two Worlds: An Empirical Analysis' (SocArXiv 2018) preprint <<https://osf.io/mduyn>> accessed 22 November 2021.

⁴²³ Jennifer M Urban, Joe Karaganis and Brianna Schofield (n 14); Shreya Tewari, 'Over Thirty Thousand DMCA Notices Reveal an Organized Attempt to Abuse Copyright Law' (The Lumen Project, 22 April 2022) <https://www.lumendatabase.org/blog_entries/over-thirty-thousand-dmca-notices-reveal-an-organized-attempt-to-abuse-copyright-law> accessed 20 July 2022; Joe Karaganis and Jennifer Urban, 'The Rise of the Robo Notice' (2015) 58 Communications of the ACM 28.

⁴²⁴ Jennifer M Urban, Joe Karaganis and Brianna Schofield (n 14)

⁴²⁵ Kristofer Erickson and Martin Kretschmer (n 61).

⁴²⁶ Senftleben (n 292).

⁴²⁷ Especially considering the required high-level duty of care, it is likely for many OCSSPs to engage in general monitoring as a safeguard against costly copyright infringement suits. See Giancarlo Frosio and Sunimal Mendis, (n 180) 25.

would require such monitoring that includes all data uploaded and brings incompatibilities with general monitoring ban and data protection.⁴²⁸ Thus, the preventive duty of blocking future uploads of infringing content on the platform without any previous real-life example of the infringement under Article 17(4)(c) makes it technically impossible for OCSSPs to carry out specific monitoring according to the pre-*Glawischnig-Piesczek* case law.⁴²⁹ According to the established case law, in order to distinguish general from specific monitoring obligations, both the scope and the number of infringements that can be rationally expected to be identified must be sufficiently narrow; it must be clear which materials constitute an infringement, and most importantly, specific monitoring obligations must be interpreted narrowly.⁴³⁰

In line with this argument, Romero Moreno underlined the fact that Article 17 is neither limited in scope nor in time nor in the specific type of uploaders to be profiled.⁴³¹ Also, as suggested by Montagnani and Trapova, the potential limit for this monitoring within the Article, ‘works or other subject-matter identified by rightholders’, is not clear enough to draw the line between a monitoring obligation of ‘general nature’ and one of ‘specific nature.’⁴³² Senftleben and Angelopoulos also argued that the extent of the new notice and stay down mechanism is not clear from the wording of Article 17(4)(c), as ‘the notified works’ specification is failing to limit the monitoring sufficiently.⁴³³ Thus, it has been highly suggested in the literature that proactive monitoring and filtering mechanisms of Article 17(4)(b) and (c) to result in general monitoring, which would conflict with Article 17(8), Article 15 of the E-Commerce Directive and CJEU case law and also interfere with various fundamental rights.

⁴²⁸ *YouTube and Cyando*, Opinion of Advocate General Saugmandsgaard Øe, (n 77), para 242.

⁴²⁹ CJEU made it clear that active monitoring of all data uploaded by users in order to prevent any future infringements would be precluded by EU law. See *L'Oréal* (n 113), para 139; *Scarlet Extended* (n 16) paras 36-37; *Netlog* (n 16), paras 34-35; *Mc Fadden* (n 16), para 87.

⁴³⁰ Examined in Chapter 2.2.3.3; *L'Oréal* (n 113), para 139; *Scarlet Extended* (n 16) paras 36-37; *Netlog* (n 16), paras 34-35; *Mc Fadden* (n 16), para 87; Patrick Van Eecke, ‘Online Service Providers and Liability: A Plea for a Balanced Approach’ (2011) 48 *Common Market Law Review* 1455, 1486.

⁴³¹ Felipe Romero Moreno (n 328), 168.

⁴³² Maria Lillà Montagnani and Alina Yordanova Trapova, ‘Safe Harbours in Deep Waters: A New Emerging Liability Regime for Internet Intermediaries in the Digital Single Market’ (2018) 26 *International Journal of Law and Information Technology* 294 <<https://academic.oup.com/ijlit/article/26/4/294/5126431>> accessed 22 June 2020. 303.

⁴³³ Martin Senftleben and Christina Angelopoulos (n 229).

However, in *Glawischnig-Piesczek*, CJEU stated that Article 15 of ECD does not prohibit a court from ordering an intermediary to seek out and remove all content identical to that found illegal in relation to all users of its platform, as well as content similar and equivalent to the illegal content and their future re-uploads.⁴³⁴ This practice would be compatible with the general monitoring ban as long as the monitoring for illegal content of an equivalent nature does not require a platform to carry out an independent assessment of the illegality of the content.⁴³⁵ CJEU applied this “identical or equivalent” content by analogy in *Poland*, where Court answered questions regarding Article 17(4)(b) and (c)’s compatibility with the Charter.⁴³⁶ Court suggests that the scope of monitoring is defined as platforms are only obliged to filter the works that rightholders notified.⁴³⁷ However, many academics found the applicability of *Glawischnig-Piesczek*, which concerns defamatory posts, to the field of copyright problematic.⁴³⁸

Even where the incompatibility problems with general monitoring are accepted as resolved with the recent approach of CJEU regarding the general monitoring ban, the stay down obligation within the Article requires a monitoring and filtering operation that interferes with different fundamental rights and brings incompatibilities with the Charter. The operation of permanent stay down mechanisms impacts users’ right to the protection of personal data and respect for private life and their freedom of expression and platforms’ conduct a business. CJEU found a filtering obligation that filters all uploaded or existing content incompatible with EU law as it performs general monitoring and, by identifying, systematically analysing and processing the profile information, infringes users’ right to protection of their personal data, which is safeguarded by Article 8 of the Charter.⁴³⁹ Moreover, where this monitored content includes private communications and information, these filters interfere with respect for private life which is enshrined in Article 7 of the Charter.⁴⁴⁰ The information contained by social network profiles is acknowledged as protected personal data as they allow those users

⁴³⁴ *Glawischnig-Piesczek* (n 241); Case C-18/18, *Eva Glawischnig-Piesczek v Facebook Ireland Limited*, Opinion of Advocate General Szpunar [2019] ECLI:EU:C:2019:458.

⁴³⁵ *Glawischnig-Piesczek* (n 241), paras, 46-47

⁴³⁶ *Poland v European Parliament* (n 79).

⁴³⁷ *ibid.* para 89.

⁴³⁸ Martin Senftleben and Christina Angelopoulos (n 229).; Daphne Keller, ‘Facebook Filters, Fundamental Rights, and the CJEU’s *Glawischnig-Piesczek* Ruling’ (2020) 69 *GRUR International* 616.; João Pedro Quintais and others (n 325). Examined in detail in Chapter 2.2.3.3.

⁴³⁹ *Scarlet Extended* (n 16); *Netlog* (n 16) paras, 49-51.

⁴⁴⁰ Felipe Romero-Moreno, “‘Notice and staydown’ and social media: amending Article 13 of the Proposed Directive on Copyright”, *International Review of Law, Computers & Technology*, 33(2), pp. 187–210. Available at: <https://doi.org/10.1080/13600869.2018.1475906>.

to be identified⁴⁴¹ as well as their IP address which makes it possible for internet services to identify the person.⁴⁴² Thus, where the monitoring goes beyond metadata and allows the acquisition of knowledge of the content of electronic communications, there will be a serious breach of the right to respect for private life.⁴⁴³ Moreover, requiring OCSSPs to employ infinite and all-embracing monitoring would impact their right to conduct a business by imposing this expensive operation which would also impact their users' satisfaction as customers.⁴⁴⁴ Thus, the obligation of making the best efforts to prevent *future* uploads in Article 17(4)(c) is intensifying the problems with automated content recognition tools and adding new ones to the already crowded list of problems caused by notice and takedown systems despite the dangerous outcomes of the mandatory content filtering reminded by many times by the academics, policymakers continued to ignore the inherent limitations of filtering technologies and their adverse effects on fundamental rights online.⁴⁴⁵ However, the outcomes of this notice and stay down mechanism remain to be seen how the Directive will be implemented into national legislation. For that reason, this study suggests that the impact on users' fundamental rights can be minimised with the right implementation, which prioritises safeguards.

2.4.3 Safeguards of Article 17

In light of the above discussion regarding the impact of Article 17(4)'s liability regime on fundamental rights, the importance of the safeguards of Article 17 is crucial to ensure this negative impact of the Article is limited and proportionate. As the enforcement of Article 17 would limit the exercise of various fundamental rights, it is crucial for this limitation to have its own limits, meaning it must be proportionate and necessary.⁴⁴⁶ As this study's contribution will rest on Article 17's implementation that is compatible with the Charter and ECHR Articles 7, 8, 11, 16 and 47 Charter, as well as Articles 6, 8 and 10 ECHR, the safeguards require special attention to measure the Article against the benchmark of these fundamental rights.

⁴⁴¹ *Netlog* (n 16), para 49.; *Scarlet Extended* (n 16), para 51.

⁴⁴² *Digital Rights* (n 88), para. 26; *Tele2* (n 88).

⁴⁴³ *Digital Rights* (n 88), para. 39.

⁴⁴⁴ *Scarlet Extended* (n 16) para 46; *Netlog* (n 16), para 44; *Mc Fadden* (n 16), para 82.

⁴⁴⁵ Evan Engstrom and Nick Feamster, (n 164) 32.

⁴⁴⁶ Article 52(1) of the Charter.

The significance of safeguards has been acknowledged by CJEU in the *Poland* case, where the Poland Government argued that as Article 17 does not contain safeguards to ensure that the essence of that fundamental right and the principle of proportionality are respected, Article 17(4)(b) and the second part of paragraph (c) should be annulled.⁴⁴⁷ CJEU brought forward the safeguards of Article 17 as the primary reason that justifies and limits the impact of the liability regime introduced in Article 17 on freedom of expression.⁴⁴⁸ Also, there is an argument in literature that provided safeguards within the Article can be accepted as an acknowledgement by the lawmaker of the inevitability of over-enforcement, such as removal or blocking of the legitimate content, making ensuring the existence of robust safeguards within the implementations even more essential.⁴⁴⁹

These safeguards can be found in Article 17(5) to (10) of CDSMD. First, Article 17(5) provides the elements for the OCSSPs' liability in the light of the principle of proportionality and Article 17(6) further supports the proportionality for the obligations in Article 17(4)(b) by providing an exemption for start-ups. Second, the second paragraph of Article 17(7) states that copyright exceptions shall be respected, and OCSSPs shall not result in the prevention of the availability of non-infringing works, including the ones covered by a copyright exception or limitation.⁴⁵⁰ As an important safeguard for freedom of expression, Article 17(7) constitutes an "obligation of result", which is a stronger legal norm than Article 17 (4)'s "obligation of best efforts," and clarifies that ensuring the availability of legitimate works prevails the duty of preventing the availability of specific works.⁴⁵¹

This safeguard provides a special regime for certain copyright exceptions and limitations and converts caricature, parody or pastiche into mandatory copyright exceptions.⁴⁵² The importance of these exceptions and limitations for freedom of expression and freedom of the arts and for the fair balance between competing fundamental rights of users and rightholders have been underlined by the CJEU by accepting those in Article 17(7) as user 'rights' not mere defences.⁴⁵³ Thus, Article 17(7) requires ensuring that legitimate content, including the

⁴⁴⁷ *Poland v European Parliament* (n 79).

⁴⁴⁸ *Poland v European Parliament* (n 79), para 60; *Facebook Ireland and Schrems* (n 79), para 175.

⁴⁴⁹ Felix Reda, Joschka Selinger and Michael Servatius (n 326).

⁴⁵⁰ Article 17(7) of the CDSMD.

⁴⁵¹ *Poland v European Parliament* (n 79), para 78; Guidance (n 289), p.2.

⁴⁵² Article 17(7) of the CDSMD.

⁴⁵³ *Poland v European Parliament* (n 79), paras 86-88.

content that benefits from copyright exceptions and limitations, is not to be prevented by the measures that have been taken in compliance with Article 17(4), such as upload filters.

However, the article does not make clear how the Member States shall ensure this protection. Despite the established case law of CJEU regarding the incompatibility of upload filters which fail to distinguish adequately between unlawful content and lawful content with freedom of expression and the fair balance,⁴⁵⁴ all available technologies suffer from shortcomings explained previously, including the inability to understand the context of the upload and determine if an exception covers a use or not.⁴⁵⁵ These filters' effectiveness and accuracy would likely be also affected negatively by the lack of harmonisation on the EU level regarding copyright exceptions and limitations. Although Article 17(7) obliges platforms and the Member States to consider the collateral effect of the filtering measures they implement and not only focus on the goal of preventing infringing uploads from going online while implementing the Article,⁴⁵⁶ this safeguard is likely to suffer from practical problems that make this consideration challenging, even impossible. Thus, taking the negative impact of the upload filters on various fundamental rights into account, Schwemer and Schovsbo argued that CDSMD recognises and safeguards the users' rights on paper.⁴⁵⁷

The fact that implementing a system that would not respect these exceptions would conflict with Article 17 and perhaps the entire Directive has also been recognised in the *Poland* decision.⁴⁵⁸ However, by rejecting the upload filters that filter and block lawful content when uploading as the measures that may be taken to satisfy the obligations laid down in Article 17 point (b) and point (c), CJEU did not clarify this situation as there are no available upload filters which do not suffer from this flaw.⁴⁵⁹ Quintais suggested that the Court's emphasis on the requirement to respect E&Ls can be read as a requirement to limit automated *ex-ante* filtering only to the manifestly infringing uploads.⁴⁶⁰ This argument can find support in CJEU's clarification in the decision, which states that the measures to satisfy Article 17(4) should be strictly targeted and should not affect the users' fundamental rights who are

⁴⁵⁴ *L'Oréal* (n 113), para 139; *Scarlet Extended* (n 16), paras, 49-51.; *Netlog* (n 16), para 47.; *Mc Fadden* (n 16), para 87.

⁴⁵⁵ Examined in detail in Chapter 2.

⁴⁵⁶ *Poland v European Parliament* (n 272), AG Opinion, para 191-193.

⁴⁵⁷ Sebastian Felix Schwemer and Jens Schovsbo (n 133).

⁴⁵⁸ *Poland v European Parliament* (n 79), paras 76ff.

⁴⁵⁹ *ibid.* para 85.

⁴⁶⁰ João Pedro Quintais, 'Between Filters and Fundamental Rights' (*Verfassungsblog*) <<https://verfassungsblog.de/filters-poland/>>.

lawfully using OCSSP's services by sharing content which does not infringe copyright which is in line with previous case law.⁴⁶¹

Another safeguard, Article 17(9), together with Recital 70, requires effective and expeditious complaint and redress mechanisms regarding the disabling of access to or the proactive removal of the user-generated content by the upload filters irrespective of the fairness of their use subject to human review.⁴⁶² In order to protect users who rely on E&Ls, and ensure control over-blocking of legitimate content, this safeguard has great significance. The vagueness of the human review obligation for the decisions regarding the removal of the content, in combination with the lack of substantial procedural safeguards, is recognised as inefficient in guaranteeing the independence of these decisions.⁴⁶³ Especially for the platforms that host a significant number of user-generated content, ensuring a prompt, case-by-case human review seems to be an impossible mission in addition to being extremely disproportionate. Thus, it remains to be seen on which level these mechanisms would meet the expectations of effectiveness in practice, as the volume of requests will be high in addition to the cost of the task. However, a parallel can be drawn from the US application of the counter-notice system, which shows the ineffectiveness of this safeguard in the absence of a high degree of efficiency and reliability.⁴⁶⁴

Studies showed that while section 512 of DMCA offers the opportunity to file counter-notice, instances in which this mechanism is used are relatively rare.⁴⁶⁵ Furthermore, leaving the important task of responding to complaints to OCSSPs as private companies which are not qualified to replace courts of law constitutes an "inappropriate transfer of juridical authority to the private sector."⁴⁶⁶ In addition to in-platform and out-of-court redress mechanisms, the

⁴⁶¹ *Poland v European Parliament* (n 79), paras 80-81.

⁴⁶² CDSMD.

⁴⁶³ Bernd Justin Jütte and Christophe Geiger, 'Regulating Freedom of Expression on Online Platforms? Poland's Action to Annul Article 17 of the Directive on Copyright in the Digital Single Market Directive' (*European Law Blog*, 3 February 2021) <<https://europeanlawblog.eu/2021/02/03/regulating-freedom-of-expression-on-online-platforms-polands-action-to-annul-article-17-of-the-directive-on-copyright-in-the-digital-single-market-directive/>> accessed 3 February 2021.

⁴⁶⁴ Axel Metzger and others (n 285) 17.

⁴⁶⁵ Jennifer M Urban and Laura Quilter, 'Efficient Process or Chilling Effects - Takedown Notices under Section 512 of the Digital Millennium Copyright Act' (2006) 22 Santa Clara High Technology Law Journal 621.

⁴⁶⁶ European Commission 'Summary of the results of the Public Consultation on the future of electronic commerce in the Internal Market and the implementation of the Directive on electronic commerce (2000/31/EC)' (2010) <https://ec.europa.eu/information_society/newsroom/image/document/2017-4/consultation_summary_report_en_2010_42070.pdf> accessed 30 October 2020.

Directive ensures that users can state the use of an exception or limitation in court to deal with erroneous removal or blocking.⁴⁶⁷ However, the efficiency of this safeguard as a remedy is questionable as it constitutes a heavy burden on most creators of user-generated content, which is the backbone of the OCSSPs, as litigation will usually be too costly for those creators, and unsurprisingly most of them will choose not to use the article's redress mechanism.⁴⁶⁸

Moreover, Article 17(9) guarantees that there will be no identification of individual users or processing of personal data. However, as explained previously, upload filters involve identification, systematic analysis and processing of information of users.⁴⁶⁹ Therefore, this inspection interferes with personal data protection, privacy and confidentiality of communications.⁴⁷⁰ Although this safeguard ensures that any identification of individual users and processing of personal data would not take place, how to achieve this in practice remains an important question; there is no information for less data processor-intrusive implementation within the CDSMD.⁴⁷¹ Moreover, in addition to users' data protection, this operation of content recognition systems risks the application of another safeguard, Article 17 (8), which states that the application of Article 17 shall not lead to any general monitoring obligation. Also, it is important to note that where the safeguards in Article 17(5)-(10) fail to protect various fundamental rights, they would also fail to provide the required level of protection for the right to a fair trial. Academics such as Griffins warned about the possible change in the significance of fair trial rights regarding enforcement of IPR by considering the increased pressure from rightholders and policymakers for more powerful enforcement tools.⁴⁷² As this change already happened with the new directive, the combination of required high-level enforcement of the CDSMD with its ineffective safeguards would result in the Article interfering with the right to fair trial too.

Lastly, Article 17 (10) requires the Commission to organise stakeholder dialogues to discuss best practices, taking special account of the need to balance fundamental rights and the use of exceptions and limitations.⁴⁷³ In light of these dialogues, Commission should issue guidance

⁴⁶⁷ Recital 70 of the CDSMD.

⁴⁶⁸ Giancarlo Frosio, *Reconciling Copyright with Cumulative Creativity: The Third Paradigm* (Edward Elgar Publishing 2018). 220-225.

⁴⁶⁹ *Scarlet Extended* (n 16), para 51; *Netlog* (n 16), para 49.

⁴⁷⁰ *Scarlet Extended*, Opinion of AG Cruz Villalón (n 70).

⁴⁷¹ Felipe Romero Moreno (n 328) 168.

⁴⁷² Jonathan Griffiths, 'Constitutionalising or Harmonising? The Court of Justice, the Right to Property and European Copyright Law' (2013) 38 *European Copyright Law* 65. 454.

⁴⁷³ Article 17 (10) of CDSMD.

on the application of Article 17, in particular, of the cooperation between online content-sharing service providers and rightholders required by Article 17(4).⁴⁷⁴ As the efficiency and conformity with fundamental rights of the Commission's guidance have been criticised,⁴⁷⁵ an updated guidance would be helpful for the fundamental right compliant implementation of the Article, especially the obligations under Article 17(4).

By looking at this picture, one can say that there is a high risk of the safeguards being inefficient in practice, and together with the high-level enforcement introduced by the CDSMD, this inefficiency greatly endangers the protection of fundamental rights. Without efficient safeguards, upload filters can evaporate fundamental rights protection under the directive's strict liability regime.⁴⁷⁶ The generic obligation of striking the fair balance of competing rights and interests within the Directive is accepted as inefficient in stopping the Article from strengthening rightholders' exclusive rights and freedom of contract and resulting in increasing the occasions of possible misuses of copyright as the Article fails to provide suitable tools to prevent them and to counterbalance the opposing rights and interests.⁴⁷⁷ As the validity of the Article depends on the sufficient application of the safeguards, it is essential that these safeguards in Article 17(5)-(10) be implemented strictly, in a way that provides tight control over the scope of the limits on freedom of expression and effective remedies to prevent any abuse of power.⁴⁷⁸ This study suggests that this is the only way for Member States to achieve fundamental right-compliant national regulation. While Article 17 (5)-(10) constitute essential safeguards for the many fundamental rights, they also ensure Article 17's compatibility with the Charter, therefore, its validity.⁴⁷⁹ The lack of efficient application of these safeguards can put the validity of Article 17's regime on shaky ground.

⁴⁷⁴ Article 17 (10) of CDSMD.

⁴⁷⁵ *Poland v European Parliament*, AG Opinion (n 272), para 223.

⁴⁷⁶ Sebastian Felix Schwemer and Jens Schovsbo (n 133).

⁴⁷⁷ Gustavo Ghidini, *Rethinking Intellectual Property: Balancing Conflicts of Interests in the Constitutional Paradigm* (Edward Elgar Publishing 2018).

⁴⁷⁸ *Poland v European Parliament* (n 79), para 64; *Yildirim v. Turkey* (n 1) para 47 and 64; *Association Ekin v. France*, App no. [39288/98](#), ECHR 2001-VIII, para 58; *Editorial Board of Pravoye Delo and Shtetel v. Ukraine*, App no. [33014/05](#), ECHR 2011, para 55; *RTBF v. Belgium*, App no. [50084/06](#) (ECtHR, 29 March 2011), para 114.

⁴⁷⁹ *Poland v European Parliament* (n 79), paras 84ff.

2.4.4 Implementation of Article 17

Regarding the implementation of Article 17, European Commission delivered its guidance just a few days before the implementation deadline in 2021 to “*support a correct and coherent transposition*” of the article by adding that it would need updating in the future in accordance with the judgment of the CJEU in *Poland v European Parliament*,⁴⁸⁰ which delivered almost after a year from its release.⁴⁸¹

One of the most critical points that Guidance made clear was the hierarchy between the obligation to prevent the availability of specific works and the obligation to ensure lawful uses. Article 17(7) is an “obligation of result”, which is a stronger legal norm than Article 17(4)’s “obligation of best efforts”; therefore, it is clear that ensuring the availability of legitimate works prevails over the duty of preventing the availability of specific works.⁴⁸² In line with that, Guidance suggested that the automated blocking should be limited to manifestly infringing uploads, and other uploads should go online. This concept of ‘manifestly infringing’ uploads found support in the AG opinion for the Poland case and CJEU’s decision in the *Poland* case.⁴⁸³

Even though it underlined the importance of the application of Article 17(4) in compliance with the safeguards within Article 17(7) and (9), there is no effective solution for the important problems caused by “*the inherent limitations of the use of content recognition tools, in particular their inability to identify the application of exceptions and limitations to copyright.*”⁴⁸⁴ However, a point that the Commission clarified was the validity of word-to-word implementations. Commission underlined that this type of literal implementation is insufficient as they lack definite and concrete safeguards against automated blocking of legitimate uses.⁴⁸⁵ While its impact on national implementations cannot be ignored, it is important to note that Guidance is a non-binding document which includes recommendations for the Member States.⁴⁸⁶ However, the same does not apply to the CJEU’s decision in *Poland v European Parliament*.

⁴⁸⁰ *Poland v European Parliament* (n 79).

⁴⁸¹ Guidance (n 289).

⁴⁸² *ibid.* p.20.

⁴⁸³ *Poland v European Parliament*, AG Opinion (n 272), paras 198, 201; *Poland v European Parliament* (n 79), paras 80-81.

⁴⁸⁴ *Poland v European Parliament*, AG Opinion (n 272), para 166.

⁴⁸⁵ Guidance (n 289), p.20.

⁴⁸⁶ Article 288 and 290 of Treaty on the Functioning of the European Union.

In its action brought in 2019, Poland Government argued that the obligations in Article 17(4)(b) and the second part of paragraph (c) requires platforms to perform *ex-ante* review and filtering that would disproportionately affect freedom of expression and information enshrined in Article 11 of the Charter of Fundamental Rights, and therefore, should be annulled.⁴⁸⁷ While acknowledging the interference of Article 17(4), CJEU stated that the safeguards, Article 17 (5)-(10), prevent Article 17(4) from imposing a disproportionate restriction on the right to freedom of expression and information of users of OCSSPs.⁴⁸⁸ In line with Guidance, it also confirmed the hierarchy between Article 17(7) and Article 17(4), clarifying that the obligation of result in Article 17(7) has greater importance than the obligation of ‘best efforts.’⁴⁸⁹ Moreover, CJEU hinted at the acknowledgement of the classification of “manifestly infringing” content in AG’s opinion⁴⁹⁰ and the Guidance⁴⁹¹ by stating Article 17 does not oblige platforms to block uploads in cases where a detecting the unlawfulness of the content “*would require an independent assessment.*”⁴⁹²

CJEU underlined the importance of limiting the filtering that OCSSPs operate and limits the suitable tools to implement to comply with Article 17 to those that do not filter and block lawful content when uploading in line with Article 17(7).⁴⁹³ While within the decision, there is no specification in terms of limits to content; however, AG opinion provides detailed guidance regarding the limitation of filtering and states that the rights of users under Article 17(7) of the Directive, which provides protection for the legitimate uses such as exceptions and limitations, must be taken into account *ex-ante*, and not only *ex-post* and therefore all transformative uses of works should be excluded from the automatic preventive blocking to limit the instances of over-blocking.⁴⁹⁴ However, to what extent this part of the decision would help Member States with the national implementations or OCSSPs regarding the choice of measures to satisfy both Article 17(4)(b)-(c) and Article 17(7) remains unanswered.

For the implementation, Court stated that “*EU measure must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a*

⁴⁸⁷ *Poland v European Parliament* (n 79).

⁴⁸⁸ *ibid.* paras 84-97.

⁴⁸⁹ *ibid.* para 78.

⁴⁹⁰ *Poland v European Parliament*, AG Opinion (n 272), paras 198, 201.

⁴⁹¹ Guidance (n 289), p.20.

⁴⁹² *Poland v European Parliament* (n 79), para 90.

⁴⁹³ *ibid.* para 85.

⁴⁹⁴ *Poland v European Parliament*, AG Opinion, (n 272), para 206.

whole and, in particular, with the provisions of the Charter.”⁴⁹⁵ Some academics argued that this supports the argument suggesting that the implementation should go beyond just being consistent with the wording and confirming the necessity of *ex-ante* safeguards in order to strike a fair balance between competing fundamental rights.⁴⁹⁶

Thus, Guidance, AG opinion and the CJEU decision underlined the importance of safeguards and clarified that the careful application of these is the key to the fundamental right-compliant implementation of Article 17, which also ensures the validity of Article.⁴⁹⁷ It has been established that an EU measure must be interpreted in a way that does not interfere with the Charter and primary law as a whole.⁴⁹⁸ Therefore, Article 17(4) needs to be implemented in a way that respects Article 17(5), (6), (7), (8) and (9) to ensure the fair balance between the rights and interests of authors and other rightholders, on the one hand, and of users on the other.

To protect the fundamental rights from the upload filters’ negative impact, a focus on the safeguards is a must for the implementation. As pointed out by many academics, these safeguards should include measures that would minimise the risk of over-blocking and false positives in addition to the effective complaint and redress mechanisms.⁴⁹⁹ Most researchers agree that since safeguards of *ex-post* nature are not able to ensure the respect of user rights, to ensure the application of Article 17(4)’s obligations in line with the Charter, especially, Article 11, national transpositions need to implement *ex-ante* safeguards.⁵⁰⁰ Thus, this study, in line with established case law and the considerable amount of research in the literature,

⁴⁹⁵ *Poland v European Parliament* (n 79), para 70.

⁴⁹⁶ João Pedro Quintais, ‘Article 17 Survives, but Freedom of Expression Safeguards Are Key: C-401/19 - Poland v Parliament and Council’ (*Kluwer Copyright Blog*, 26 April 2022) <<http://copyrightblog.kluweriplaw.com/2022/04/26/article-17-survives-but-freedom-of-expression-safeguards-are-key-c-401-19-poland-v-parliament-and-council/>> accessed 9 May 2022.; Christophe Geiger and Bernd Justin Jütte, ‘Op-Ed: “The Future of Content Moderation in the EU after the Court of Justice’s Ruling Upholding the Validity of Article 17 CDSM Directive (Case C-401/19)”’ (*EU Law Live*, 23 May 2022) <<https://eulawlive.com/op-ed-the-future-of-content-moderation-in-the-eu-after-the-court-of-justices-ruling-upholding-the-validity-of-article-17-cdsm-directive-case-c-401-19-by-christophe-geiger/>> accessed 14 September 2022.

⁴⁹⁷ *Poland v European Parliament* (n 79), paras, 85-95.

⁴⁹⁸ C-391/16, C-77/17 and C-78/17, *M and Others (Revocation of refugee status)* [2019] EU:C:2019:403 para 77; *Poland v European Parliament* (n 79), para 70.

⁴⁹⁹ Matthias Leistner (n 333); Axel Metzger and others (n 285); Sebastian Felix Schwemer and Jens Schovsbo (n 133); Martin Husovec and João Pedro Quintais, ‘Too Small to Matter? On the Copyright Directive’s Bias in Favour of Big Right-Holders’ in Tuomas Mylly and Jonathan Griffiths (eds), *Global Intellectual Property Protection and New Constitutionalism. Hedging Exclusive Rights* (Oxford University Press 2021)

<<https://papers.ssrn.com/abstract=3835930>> accessed 27 September 2022.; João Pedro Quintais and others (n 325); Felix Reda, Joschka Selinger and Michael Servatius (n 326).

⁵⁰⁰ *ibid.*

proposes a filtering system that triggers the automated blocking only in the cases of manifestly infringing uploads and provides pre-flagging to ensure users have *ex-ante* tools for copyright exceptions and limitations.

The available national implementations vary regarding the approach they follow for the implementation of Article 17; while some followed a strict word-to-word implementation, some, by considering the efficient implementation of safeguards to ensure compliance with fundamental rights, went the extra mile and introduced a detailed implementation and the rest fell between these two approaches. These Member States are grouped into three tiers by Quintais.⁵⁰¹ Germany and Sweden, with their above-the-average detailed implementation which focuses on user rights, constitute group one. For instance, German implementation introduces a pre-flagging mechanism prior to the upload that enables users to benefit from copyright exceptions and limitations efficiently.⁵⁰² The second group, which includes Estonia, France and The Netherlands, follows an implementation model that is less detailed than the first group. Some of the details these countries provided are the specification of “large amount” and broader transparency obligations in French implementation.⁵⁰³ Lastly, the verbatim group, consisting of Denmark, Hungary, Ireland and Italy, follows a restrictive approach to the implementation of Article 17’s new regime by implementing the Article word by word.

However, it is important to note that most of the Member States did not have the chance to benefit from critical material such as Commission’s Guidance, AG Opinion and the decision in the *Poland* case as these were delivered too close to or after the implementation deadline. Therefore, a consideration in light of the information and clarification delivered with Guidance, AG Opinion and Poland ruling, which can lead to a compulsory update for the national implementations in line with the Poland decision, is a must. Thus, this study aims to provide a guide for the national implementations which require updating in addition to the upcoming national implementations with its recommendations, including procedural

⁵⁰¹ João Pedro Quintais and others (n 325). 182.

⁵⁰² Act on the Copyright Liability of Online Content Sharing Service Providers (Urheberrechts-Diensteanbieter-Gesetz – UrhDaG)*’ <https://www.gesetze-im-internet.de/englisch_urhdag/englisch_urhdag.html> (hereinafter ‘UrhDaG’) A detailed examination of German implementation can be found in Appendix A

⁵⁰³ Art. L. 137-2. I Code de la propriété intellectuelle (IPC). A detailed examination of French implementation can be found in Appendix A.

safeguards that it appraises, to ensure Article 17 compatibility with Articles 7, 8, 11, 16 and 47 Charter, as well as Articles 6, 8 and 10 ECHR.

2.5 Digital Services Act and CDSMD

As an important related regulatory action, in December 2020 Commission proposed the Digital Services Act package, which includes a Regulation on a Single Market For Digital Services (Digital Services Act) and agreement on this proposal was reached on 23 April 2022.⁵⁰⁴ On 4 October 2022, the Council adopted the DSA, and the Act was published in the Official Journal on 27 October 2022.⁵⁰⁵ DSA amends a key directive for the online platforms as intermediaries, the E-Commerce Directive, and building on the key principles set out in the ECD, it aims

*“(i) maintaining a safe online environment, (ii) improving conditions for innovative cross-border digital services, (iii) empowering users and protecting their fundamental rights online, and (iv) establishing an effective supervision of digital services and cooperation between authorities.”*⁵⁰⁶

As an important difference, DSA applies to ‘online search engines’ in addition to the ‘mere conduit’, ‘caching’ and ‘hosting’ services which constitute a more extended application scope than E-Commerce Directive. It maintains the liability rules for providers of intermediary services set out in the ECD, yet it introduces strong obligations regarding fundamental rights and transparency. The new hosting exemption can be found in Article 6, which restates Article 14 of ECD hosting safe harbour. However, it further specifies the cases where this exemption shall not be applied. According to the Article 6(2) and (3), where the recipient of the service is acting under the authority or the control of the provider and to the liability

⁵⁰⁴ European Commission, ‘The Digital Services Act Package | Shaping Europe’s Digital Future’

<<https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>> accessed 22 September 2022.

⁵⁰⁵ According to its Article 93, DSA will enter into force on 16 November 2022 and will be directly applicable from 17 February 2024, with an exception for the Article 24(2), (3) and (6), Article 33(3) to (6), Article 37(7), Article 40(13), Article 43 and Sections 4, 5 and 6 of Chapter IV which will apply from 16 November 2022 See European Commission, Regulation (EU) 2022/2065 of The European Parliament And of The Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (‘DSA’) [2022] OJ L 277/1, p. 1 – 102.

⁵⁰⁶ European Commission, Proposal for a Regulation (EU) 2022/2065 of The European Parliament And of The Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (‘DSA’) COM(2020) 825 final.

under consumer protection law of online platforms that allow consumers to conclude distance contracts with traders, this exemption from liability will not be applied.

Similarly, Article 8 maintains the general monitoring ban of Article 15 of ECD by laying down a prohibition of general monitoring or active fact-finding, and regarding the specific monitoring, DSA Recital 30 repeats Recital 47 of ECD by stating that while providers of intermediary services should not be subject to a monitoring obligation with respect to obligations of a general nature, this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation. As can be seen, safe harbours and general monitoring ban are preserved as a restatement within the DSA, ensuring the applicability of relevant case law on ECD to the DSA safe harbours and general monitoring ban.

Notably, for the CDSMD discussion, DSA introduces procedural obligations for online platforms to tackle illegal activities, which include copyright infringement. Chapter III of the 5-chapter Act sets out the due diligence obligations for intermediary services and more specified different obligations for hosting services, online platforms and very large online platforms to ensure a transparent and safe online environment. Section 1 includes the obligation to establish a single point of contact to facilitate direct communication with Member States' authorities, the Commission and the Board (Articles 11, 12, 13). Moreover, all providers of intermediary services must set out in their terms and conditions any restrictions that they may impose on the use of their services and act responsibly in applying and enforcing those restrictions (Article 14). Lastly, this section with Article 15 introduces transparency reporting obligations in relation to the removal and the disabling of information considered to be illegal content or contrary to the provider's terms and conditions in Article 13, which is likely to be applicable to operations under Article 17(4) of CDSMD.

Section 2 lays down obligations applicable to providers of hosting services. In particular, it obliges hosting services to place mechanisms to allow third parties to notify the presence of allegedly illegal content (Article 16). According to this "notice and action" mechanism, if such a provider decides to remove or disable access to specific information provided by a recipient of the service, it imposes the obligation to provide that recipient with a statement of reasons (Article 17) in contrast to the less detailed and fragile obligation of providing "relevant and necessary information" of Article 17(4)(b) of CDSMD.

Section 3 lays down the additional obligations for online platforms by excluding micro or small companies (Article 19). Article 20 introduces an obligation to provide an internal complaint-handling system in respect of decisions taken in relation to allegedly illegal content or information incompatible with their terms and conditions and also obliges online platforms to engage with certified out-of-court dispute settlement bodies to resolve any dispute with users of their services similar to Article 17(9) of CDSMD (Article 21) This section explains one of the most distinguishable concepts of the DSA, trusted flaggers as a status that can be awarded by the Digital Services Coordinator in Article 22 and further clarifies that their notices enjoy priority when using the notice and action mechanism. The application of this priority to the notifications by the trusted flaggers in the context of Article 17(4) of CDSMD is arguable. Then, DSA sets out the measures online platforms are to adopt against misuse of this status (Article 23). This sanction has the potential of being applied in the context of Article 17 for the misuse of the notice and takedown mechanisms by rightholders and the complaint and redress mechanisms by users.⁵⁰⁷

Lastly, it includes reporting and transparency duties for online platforms; according to Article 24, these platforms are obliged to publish reports on their activities relating to the removal and disabling of information considered to be illegal content or contrary to their terms and conditions. These reports would include the removal of copyright-infringing content and depending on how the data is presented by the platform, it might help shed light on the operation of the upload filters which have been implemented by OCSSPs to comply with Article 17(4) of CDSMD.

Article 25 lays down rules regarding the online interface design and organisation, obliging them not to design interfaces that would manipulate users or impact their decisions, such as pop-ups which interfere with user experience or making terminating a service more difficult than subscribing to it. This might find an application to Article 17 CDSMD's upload filters and complaint and redress mechanisms' design by obliging them to be more user-friendly. Article 26 regulates advertising on online platforms and requires platforms to ensure the recipients of the service are able to identify certain elements, such as the fact that the information is an advertisement and the person on whose behalf the advertisement is presented. Article 27 introduces another important rule for the users and their experience,

⁵⁰⁷ Eleonora Rosati, 'The Digital Services Act and Copyright Enforcement: The Case of Article 17 of the DSM Directive' (European Audiovisual Observatory 2021), 72.

which requires transparency regarding the recommender systems of the platforms. According to the Article, platforms should disclose the main parameters used in their recommender systems and, at the very least, the criteria that are most significant in determining the recommendations and the related reasons for those parameters, which can constitute a model for the transparency rules for upload filters.

Section 5 lays down additional obligations for very large online platforms to manage systemic risks and further transparency duties, which are identified as online platforms and online search engines which have a number of average monthly active recipients of the service in the Union equal to or higher than 45 million in Article 33. This section also has the potential to complement the safeguards that need to be placed for the fundamental right-compliant implementation of Article 17 of CDSMD, as it requires them to conduct risk assessments on the systemic risks brought about by or relating to the functioning and use of their services (Article 34) and to take reasonable and effective measures aimed at mitigating those risks (Article 35). These, in practice, would require them to place effective procedural measures to limit false positives generated by automated content recognition and management tools. This result is obliged by the safeguard in Article 17(7) of CDSMD regarding automated operations of OCSSPs to filter the copyright-infringing content, but DSA introduces wider and more demanding obligations regarding the functioning and use of services for very large online platforms (VLOPs).

Also, further transparency can be achieved regarding recommender systems and online advertising for these platforms with Articles 38 and 39, which brings additional duties in addition to the duties in Articles 27 and 28 for VLOPs. Another provision that would help clarify the operation of content moderation within these large platforms is Article 40, which paves the way for vetted researchers to access data from VLOPs, which could ease the challenges of researching automated content recognition systems. Lastly, by requiring reports to be published every six months, which should be publicly available, DSA aims to achieve an optimal level of transparency regarding the operations of these platforms.

To ensure the effective application of these additional obligations for VLOPs, Chapter IV, while regulating the overall implementation and enforcement, in its section 4, introduces additional enforcement rules and means to ensure the compliance of these platforms and search engines. As an important power which could serve to ensure transparency for the users in the context of Article 17(4), Commission can order VLOPs to provide access to, and

explanations relating to, its databases and algorithms to monitor the effective implementation and compliance with DSA.⁵⁰⁸ Considering the fact that DSA obliges platforms to respect users' fundamental rights, for instance, requiring them to act in a diligent, objective and proportionate manner in applying and enforcing the restrictions (Article 14), there is a potential for VLOPs to be monitored for their compliance with Charter. Lastly, the teeth of the regulation can be found at the end of Section 4 of Chapter IV. According to Article 74, where a VLOP infringes the relevant provisions, it fails to comply with a decision ordering interim measures or a commitment made binding by a decision, intentionally or negligently, Commission may impose fines. These might provide a model for Member States for the non-compliance of OCSSPs regarding Article 17, including its safeguards.

Thus, the main areas that the CDSMD and DSA intersect are platform liability, notice and takedown and stay down (notice and action in DSA), in-platform appeal and out-of-court dispute solutions, trusted flaggers and transparency rules. Therefore, it is important to consider relevant sections of DSA while applying CDSMD since there is an intersection between these two pieces of legislation regarding online copyright enforcement. DSA complements existing sector-specific legislation, which applies as *lex specialis* and underlines that it is without prejudice to the rules laid down by Union law on copyright and related rights.⁵⁰⁹ However, DSA underlines the possibility of application of the Act in respect of issues that are not or are not fully addressed by those other acts or where Member States have the margin of discretion.⁵¹⁰ This intersection may bring forth the issue of being obliged to follow different rules, one being more specific than the other, regarding the same concepts or mechanisms that are applicable to OCSSPs, which fall into the scope of very large online platforms (VLOPs).⁵¹¹

For instance, this issue can arise from the notice and takedown of CDSMD and the notice and action of DSA, which both require a notification to trigger the liability, while the latter contains more specific rules surrounding the notification.⁵¹² Rosati argues that the *lex specialis* will need to be supplemented by the *lex generalis* where notice and takedown and

⁵⁰⁸ Article 72 of DSA.

⁵⁰⁹ Article 15 (c) and Recitals 9, 10, 11 of DSA.

⁵¹⁰ Recital 9 of DSA.

⁵¹¹ Article 25 of DSA defines VLOP as online platforms with “a number of average monthly active recipients of the service in the Union equal to or higher than 45 million.”

⁵¹² Alexander Peukert and others, ‘European Copyright Society – Comment on Copyright and the Digital Services Act Proposal’ (2022) 53 IIC - International Review of Intellectual Property and Competition Law 358.

notice and action intersect; however, when it comes to notice and stay down, which is unique to CDSMD, the *lex specialis* character of Article 17 means that the *lex generalis* will not find application.⁵¹³ Similarly, very large online platforms of DSA are under the obligation of detailed transparency provisions in Articles 29-33, which would apply with respect to copyright content moderation of OCSSPs. This might oblige these platforms to provide detailed information regarding the legitimate uses of content on the platform under DSA by filling the gap of CDSMD, which requires information only on the functioning of upload filters and the use of content covered by the licensing agreements with Article 17(8).⁵¹⁴

Moreover, DSA includes a wide selection of actions under “content moderation” obligations that require adopting automated tools similar to Article 17(4) CDSM.⁵¹⁵ As underlined by CJEU, the fundamental right-compliant use of automated tools requires their impact on fundamental rights to be strictly limited.⁵¹⁶ However, it has been argued that DSA fails to provide limits to these acts that require the operation of automated tools, which increases the risk of impacting users’ fundamental rights.⁵¹⁷ Therefore, one can say that the limits provided by Article 17, the safeguards in Article 17(5)-(10), might provide these limits where applicable, which makes the efficient implementation of safeguards even more important.

Thus, even though it is clear that Article 17 of CDSMD is *lex specialis* to the DSA as CDSMD regulates a more specialised area, copyright infringements, one should keep in mind that certain Articles of the DSA would come into play and influence how the CDSMD, especially Article 17, is interpreted and applied.⁵¹⁸ Rosati suggests that to answer the questions of when, to whom and how to apply the regime of Article 17 of CDSMD, DSA rules will be of great relevance.⁵¹⁹ Quintais and Schwemer argue that as the DSA regulates matters that are not covered or given a margin of discretion to the Member States by Article 17, it will be applicable to the OCSSPs of CDSMD.⁵²⁰ Thus, the intersections between two regulations will affect the practical applications of Article 17 of CDSMD as, in some cases, DSA rules can be applied to decide whether Article 17 is applicable, to shape the content of

⁵¹³ Eleonora Rosati (n 483).

⁵¹⁴ Alexander Peukert and others (n 512).

⁵¹⁵ Art. 2(p) of DSA.

⁵¹⁶ *Poland v European Parliament* (n 79).

⁵¹⁷ Alexander Peukert and others (n 512).

⁵¹⁸ Eleonora Rosati (n 483) 59-60.

⁵¹⁹ *ibid.* 60.

⁵²⁰ João Quintais and Sebastian Felix Schwemer, ‘The Interplay between the Digital Services Act and Sector Regulation: How Special Is Copyright?’ (2022) *European Journal of Risk Regulation* Forthcoming <<https://papers.ssrn.com/abstract=3841606>> accessed 10 February 2022.

its obligations or the application of the *lex specialis* regime rather than the *lex generalis* one.⁵²¹

2.6 Conclusion

This chapter examined the pre-CDSMD regime for hosting platforms and their liability for their users' copyright infringement by explaining main concepts, the liability exemptions for these platforms when their users perform acts of communication to the public, and intermediary injunctions as commonly used enforcement practices. Also, it stressed the importance of balancing fundamental rights while introducing copyright enforcement obligations for platforms, taking injunctions as the sample. While providing this examination, pointed out the parts that this old regime fell short which created the need for reform regarding the copyright rules on the internet to keep up with ever-changing platforms and the content that they host. Then it summarised the legislative history of the CDSMD with a focus on Article 17 by underlining the issue of the impact of this article on different fundamental rights. This chapter also examined the importance of balancing fundamental rights in EU law and the notion of fair balance and proportionality to stress the need for an evaluation of the compatibility of Article 17.

Article mandates the Member States to provide that online content-sharing service providers make 'best efforts' to obtain licences, ensure the unavailability of copyright-protected works⁵²² and prevent future copyright infringements to avoid liability.⁵²³ Article 17 *de facto* concludes in a broad filtering obligation that interferes with different fundamental rights of users' such as freedom of expression (Article 11), data protection and privacy (Articles 8 and 7, respectively), freedom to conduct a business (Article 16) and the right to a fair trial (Article 47). As Article 17 constitutes a limitation on the exercise of the aforementioned fundamental rights, to be fundamental rights compatible, it must meet the criteria in the Charter and ECHR.⁵²⁴ Specific attention should be paid to proportionality which covers necessity and appropriateness. In fundamental right-compatible legislation, the observance of the criterion

⁵²¹ Eleonora Rosati, (n 483) 74.

⁵²² Art. 17(4)(b) of the CDSMD.

⁵²³ Art. 17(4)(c) of the CDSMD.

⁵²⁴ Provided for/prescribed by law, respect the essence of the right, proportionality. See Article 52(1) Charter; Article 8 (2), 10(2) of ECHR; See Chapter 2.2.2.

of proportionality is a must, as it provides for a fair balancing of the competing fundamental rights and interests while ensuring that the essence of the affected fundamental right is respected.⁵²⁵ Moreover, the importance of proportionality underlined by the CJEU in *Poland* exclusively for Article 17, where the compatibility of the Article with the Charter is tied to the appropriate safeguards that respect the fundamental rights and fair balance which should be provided by the national implementations.⁵²⁶ Due to its particular importance for the fundamental rights compliance of the Article, this study pays special attention to proportionality assessment.

Thus, this study will focus on Article 17 and its impact on different fundamental rights of each side of copyright enforcement, namely, users, rightholders and platforms. There is still a gap regarding the ideal implementation of Article 17, which respects fundamental rights and strikes a fair balance between competing rights and interests with efficient safeguards that it puts forward. Also, a timeless guideline that offers recommendations and solutions for essential problems regarding the enforcement of rights on online platforms is still a crucial need for a fundamental-rights-compatible implementation of the regulations, including the Digital Services Act.

Therefore, to fill the gap in the literature regarding recommendations for fundamental right-compatible implementation of Article 17, this study identifies the Article's obligations' interference with the aforementioned fundamental rights of users and OCSSPs and then proposes remedies that include safeguards to ensure these interferences are limited in terms of the scope and nature, so they are proportionate with respect to the aims pursued which is the protection of copyright as a property right, therefore, compatible with Charter and ECHR.⁵²⁷

Thus, the purpose of this study is two-fold: firstly, to critically assess to what extent would Article 17 of the CDSMD be compatible with users' right to privacy, data protection, freedom of information and an effective remedy and a fair trial under the Charter and the ECHR; as well as OCSSPs' freedom to conduct a business under Article 16 of the Charter. Secondly, if

⁵²⁵ *Yildirim v Turkey*, Concurring Opinion of Judge Albuquerque (n 1); Article 52 (1) of the Charter, Article 3 of the Enforcement Directive, Recital 31 of the InfoSoc Directive; See Chapter 2.2.2.

⁵²⁶ *Poland v European Parliament* (n 79), paras 98-99.

⁵²⁷ Article 52(1) of Charter. For detailed information See Chapter 2.2.2.

Article 17 were to violate the Charter and Convention, to suggest and appraise a number of procedural safeguards and possible amendments to ensure Article 17 compatibility with Articles 7, 8, 11, 16 and 47 Charter, as well as Articles 6, 8 and 10 ECHR to fill the gap in the literature regarding recommendations for fundamental right-compatible implementation of the Article.

Chapter 3: Impact of Article 17 CDSMD on Internet Users' Fundamental Rights

3.1 Introduction

Article 17 includes content moderation obligations for OCSSPs to prevent current and future copyright infringements that would largely impact fundamental rights. The employment of automated content recognition systems to meet Article 17's requirements brings some serious problems regarding compatibility with fundamental rights. A quick estimation of what would happen in practice with the new regime of Article 17 would reveal the dangerous aftermath of the implementation of these obligations. Perhaps, the most affected group in this picture is the users.

Article 17's licensing and filtering obligations for the OCSSPs would affect the users' fundamental rights, namely, freedom of expression and right to information, right to privacy and protection of personal data, user's right to an effective remedy and a fair trial. On top of that, in cases where they are deprived of their revenue as a result of wrongful identification, their protection of intellectual property will also be affected. If licencing agreements are not concluded, platforms must ensure the unavailability of specific works and other subject matter and prevention of future infringing uploads according to Article 17(4)(b) and (c). Compliance with these sections requires platforms to filter all types of content proactively, which is only possible by using technical measures. The agreement in the literature regarding the requirement to use automated tools is also confirmed by Commission's Guidance⁵²⁸ and, most importantly, by the CJEU.⁵²⁹ Considering the challenges with licencing agreements and

⁵²⁸ Guidance (n 289).

⁵²⁹ *Poland v European Parliament* (n 79), para 73.

the established self-regulation practices of platforms prior to the Directive, OCSSPs will prefer implementing automated content recognition systems to avoid liability.

While the Directive gives platforms enough motivation to perform over-enforcement, the sufficiency of safeguards within the Directive to ensure users' fundamental rights is questionable.⁵³⁰ The combination of insufficient safeguards with the obligations to implement technologies that undermine different fundamental rights within the Article brought many problems to the table and intensified the discussions regarding the filtering obligations' possible effects on users' fundamental rights, especially on freedom of expression and information. Any disproportionate enforcement action arising from these obligations can negatively affect the rights and freedoms protected by the Charter.⁵³¹ The combination of heavy obligations for enforcement without robust safeguards for user rights upsets the delicate balance between IP protection and users' fundamental rights by disproportionately interfering with the users' rights and freedoms and thus bringing the risk of incompatibility of Article 17 with the Charter.

Both the CJEU⁵³² and the ECtHR⁵³³ have repeatedly underlined that the fundamental rights of users cannot be ignored.⁵³⁴ The requirement of the protection of intellectual property to not hamper freedom of expression, the free movement of information, or the protection of personal data on the Internet has been constantly stressed.⁵³⁵ Especially big online platforms such as YouTube, where a large number of people using to share their creations online, are recognised as having a special significance as numerous users exercise their rights guaranteed by the Charter, such as freedom of the arts, which is closely linked to freedom of expression, through these platforms.⁵³⁶ The insufficient requirements regarding transparency within the Directive, in combination with the extensive content monitoring performed by the OCSSPs,

⁵³⁰ Despite CJEU finding Article 17(5)-(10) as safeguards that ensure the fair balancing between freedom of expression and the right to intellectual property, it also acknowledged that this desired result depends on strict implementation of the safeguards. See *Poland v European Parliament* (n 79).

⁵³¹ Charter of Fundamental Rights of the European Union [2012] *OJ C 326*, 26.10.2012, p. 391–407.

⁵³² *GS Media* (n 156), para 45; *Scarlet Extended* (n 16); *Netlog* (n 16); *Poland v European Parliament* (n 79).

⁵³³ *Ahmet Yildirim v. Turkey* (n 1), para 54; *Cengiz and Others v. Turkey* (n 1), para 49; *Ashby Donald and Others v. France* (n 57), para 34.

⁵³⁴ *Youtube and Cyando*, Opinion of Saugmandsgaard Øe (n 77), para 241.

⁵³⁵ Recital 2 of Enforcement Directive.

⁵³⁶ *Ashby Donald and Others v. France* (n 57), para. 34; *Cengiz and Others v. Turkey* (n 1), paras 51-52. See also C-345/17, *Sergejs Buivids* [2019] EU:C:2019:122, paras 56-57.

harm users' data protection, and insufficient safeguards and inefficient complaint and redress mechanisms are affecting the users' right to a fair trial.

Thus, this chapter describes the Article's obligations' interference with the users' fundamental rights and then assesses the compatibility of the Charter with a focus on proportionality.⁵³⁷ To assess the impact of Article 17 on users' fundamental rights, it examines the licensing and filtering obligations and provides a detailed account of the adverse outcomes of automated content moderation. It examines the efficiency of the safeguards of the Article to assess its proportionality, thus the compatibility of the obligations that limit freedom of expression, data protection and right to privacy, right to a fair trial of users. It will discuss the implications of the interferences of the Article's measures with fundamental rights combined with insufficient safeguards. In this way, this chapter aims to explore the main areas on which the recommendations for fundamental right-compliant implementation need to focus.

3.2 Compatibility of Article 17 with Freedom of Expression

OCSSPs enable users to exercise their fundamental rights, especially freedom of expression and association, and that is why it is crucial for measures regarding content moderation to be proportionate and fair balanced. As one of the most affected user rights under Article 17's regime, the right to freedom of expression and to impart information, enshrined in Article 10 of the Convention and Article 11 of the Charter, protects the core elements of the internet; creativity and diversity. This right includes the right to impart information and ideas without interference by public authority, and the restrictions on this right must be prescribed by law and necessary. It has been confirmed by the ECtHR that Internet publications and online exchange of information and ideas fall within the scope of Article 10, and the ECtHR's general principles concerning freedom of expression do apply to the Internet.⁵³⁸ The importance of the internet for the practice of freedom of expression was acknowledged by the ECtHR in *Times Newspapers Ltd v. the United Kingdom*, where the Court stressed the

⁵³⁷ Proportionality constitutes a key consideration for fair balancing of competing fundamental rights of users and rightholders, namely, in one hand, right to property including intellectual property (Article 17(2)) and, on the other, freedom of expression (Article 11), data protection and privacy (Articles 8 and 7 respectively) and the right to a fair trial (Article 47); See Article 52 (1) of the Charter, Article 3 of the Enforcement Directive, Recital 31 of the InfoSoc Directive.

⁵³⁸ *K.U. v. Finland*, App. no. [2872/02](#), (ECtHR, 2008), para 49; *Ahmet Yildirim v Turkey* (n 1), para 48; *Delfi AS v. Estonia* (n 130), para 131; *Ashby Donald and Others v. France* (n 57), para 34.

accessibility and capacity of the internet regarding the information that can be stored and communicated, which enhances the access to information and news.⁵³⁹ As the Internet is the ecosystem of the freedom of expression and the modern means of imparting information, its specific nature has been considered by the Court to provide an accurate interpretation of the Convention in light of present conditions.⁵⁴⁰ The CJEU also confirmed that “*the sharing of information on the internet via online content-sharing platforms falls within the scope of Article 10 ECHR and Article 11 of the Charter.*”⁵⁴¹ The Court observed that under Article 11 of the Charter, everyone has the right to freedom of expression, which includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.⁵⁴²

Moreover, ECtHR case law puts a special emphasis on the publications that deal with topical issues as it acknowledges news as a perishable commodity which could be deprived of its interest and value due to any delay of its publication.⁵⁴³ Considering the fact that most of the UGC concern topical issues and recent events, requirements for ensuring careful scrutiny and effective judicial review have been placed by ECtHR case law regarding the filtering and blocking of communications on the internet. Thus, in line with case law, UGC, which contains comments on matters of general interest or political issues, namely “citizen journalism”⁵⁴⁴, should enjoy a high level of protection, meaning that restrictions on this content do not enjoy a wide margin of appreciation by the Member State.⁵⁴⁵ Likewise, UGC, which can benefit from copyright exceptions, is also covered by the protection of freedom of expression. For instance, ECtHR stresses that the free discussion of issues of public concern,

⁵³⁹ *Times Newspapers Ltd v. the United Kingdom* App nos. [3002/03](#) and [23676/03](#) (ECtHR, 2009) para. 27.

⁵⁴⁰ European Court of Human Rights, ‘Internet: Case-Law of the European Court of Human Rights’ (RESEARCH DIVISION 2015) <https://www.echr.coe.int/documents/research_report_internet_eng.pdf>.

⁵⁴¹ *Poland v European Parliament* (n 79), para 45.

⁵⁴² Court also clarified the fact that the rights guaranteed in Article 11 thereof have the same meaning and scope as those guaranteed in Article 10 ECHR in accordance with the explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17) and Article 52(3) of the Charter. See *Poland v Parliament* (n 79), para 44.

⁵⁴³ European Court of Human Rights (n 540).

⁵⁴⁴ Shayne Bowman and Chris Willis, ‘We Media: How Audiences Are Shaping the Future of News and Information’ (The American Press Institute 2003) <https://sodacity.net/system/files/Willis-and-Bowman_We-Media-Ch1.pdf>.

⁵⁴⁵ *Axel Springer AG v. Germany* App no. 39954/08 (ECtHR, 7 February 2012), para 90; *Morice v. France* App no. 29369/10 (ECtHR, 23 April 2015), para 125.

which constitutes an essential component of a democratic society, can be greatly aided by the expressions which benefit from the art of satire.⁵⁴⁶

At this point, it is important to consider the nature of these interfering measures as according to the European standards, general blocking or filtering measures can be only introduced if the conditions of Article 10 (2) of the Convention are fulfilled and if the filtering is about a specific content that has been decided as illegal by a competent national authority and if it is proportionate and necessary in a democratic society.⁵⁴⁷ One might argue that these rules apply to blocking and filtering by the State. However, although these measures will be implemented by private entities, in practice, Article 17's regime, which requires nationwide general blocking or filtering measures, can have the same effect as institutional control and censorship, which is a content moderation method practised by authoritarian states.⁵⁴⁸ As stated by AG Saugmandsgaard Øe, the control carried out by a private entity according to the instructions and under the supervision of a public authority can have the same effect as institutional control, therefore blurring the lines between preventive control and institutional censorship.⁵⁴⁹ Moreover, in some cases, Member States accepted as being under positive obligations to protect rights, including taking steps in relation to the actions of OCSSPs.⁵⁵⁰ Thus, as it can be seen from this case-law analysis, regarding the relationship between freedom of expression and intellectual property rights, ECtHR's stress is on balancing the possibly conflicting interests with particular attention on the necessity and proportionality of the interference with freedom of expression protected by the Convention.⁵⁵¹

That is why, although the freedom of expression is not guaranteed in an unlimited manner and should be balanced against the right to intellectual property, which falls under Article 1

⁵⁴⁶ *Kuliś and Różycki v. Poland* App.no. 27209/03 (ECtHR, 6 October 2009); European Court of Human Rights (n 540).

⁵⁴⁷ Recommendation CM/Rec(2008)6 of the Committee of Ministers to member States on measures to promote the respect for freedom of expression and information with regard to Internet filters; Also see: Declaration of the Committee of Ministers on human rights and the rule of law in the Information Society and Declaration on freedom of communication on the Internet (Declaration of 28 May 2003)

⁵⁴⁸ *Delfi v Estonia*, Joint Dissenting Opinion of Judges Sajó and Tsotsoria (n 130), paras 1-3; Marcin Rojszczak, 'Online Content Filtering in EU Law – A Coherent Framework or Jigsaw Puzzle?' (2022) 47 *Computer Law & Security Review* 105739.; David Kaye, 'A New Constitution for Content Moderation' (OneZero, 25 June 2019) <<https://onezero.medium.com/a-new-constitution-for-content-moderation-6249af611bdf>> accessed 22 August 2022.; Kyle Langvardt, 'Regulating Online Content Moderation' (2017) 106 *The Georgetown Law Journal* <<https://www.ssrn.com/abstract=3024739>> accessed 22 August 2022.

⁵⁴⁹ *Poland v European Parliament*, Advocate General Saugmandsgaard Øe (n 272), para 77.

⁵⁵⁰ *Mouvement Raëlien Suisse v. Switzerland*, App no 16354/06 (ECtHR, 13 July 2012), para 50; *López Ostra v. Spain* App No. 16798/90 (ECtHR, 9th December 1994), para 51 ; *Manole v Moldova* App no 13936/02 (ECtHR, 17 September 2009); *Murphy v Ireland* App no. 44179/98 (ECtHR, 10 July 2003).

⁵⁵¹ European Court of Human Rights (n 540) p.40.

of Protocol No. 1 to the Convention and Article 17(2) of the Charter, a fair in the context of copyright enforcement balance should be ensured between freedom of expression and other competing fundamental right or rights⁵⁵², the restrictions on the freedom of expression must be proportionate and cause the least possible prejudice to the right to avoid causing chilling effects on freedom of expression.⁵⁵³ Therefore, the limitations on the online practice of freedom of expression must enjoy the same special attention and strict application. There is not much space for national courts to use their discretion regarding the restraints as the assessment necessity and fair balancing are surrounded by the principles of ECtHR and CJEU. This tight legal framework (*cadre légal particulièrement strict*) regarding the freedom of expression has been established within the case law of ECtHR, and it requires ensuring tight control over the scope of bans, most careful scrutiny by the courts and, consequently, the exercise of special restraint.⁵⁵⁴ Most importantly, while introducing any limitation on the right, effective judicial review to prevent any abuse of power must be ensured.⁵⁵⁵

Thus, against this background, there is no doubt that freedom of expression plays a crucial role in a democratic society, and many societies hold this right as the core cultural value.⁵⁵⁶ This approach also makes creativity a fundamental matter to the community. Moreover, freedom of expression includes freedom to receive or impart information which is the primary purpose that the internet serves. Because of the importance of the internet regarding communication and the users' participation in democracy and the expression of ideas and opinions, access to the internet, it has been accepted that freedom of expression includes the right to access the internet.⁵⁵⁷ This right has a cordial relation to copyright exceptions and limitations, which have been accepted as "user rights."⁵⁵⁸

However, the case law also shows that automated systems of OCSSPs may limit users' access to the internet, erroneously remove or block their lawful communications, and directly impact

⁵⁵² Article 10(2) of the Convention; Article 52 of the Charter.

⁵⁵³ *Morice v. France* (n 521), para 127; *Mouvement Raëlien Suisse v. Switzerland*, App no 16354/06 (ECtHR, 13 July 2012), para 75.

⁵⁵⁴ *Ahmet Yildirim v Turkey*, Concurring Opinion Of Judge Pinto De Albuquerque (n 1); *TBF v. Belgium*, App no. [50084/06](#), (ECtHR, 2011), para 115; *Observer and Guardian v. the United Kingdom*, Application No. 13585/88 (ECtHR, 26 November 1991), para 60.

⁵⁵⁵ *Ahmet Yildirim v Turkey*, Concurring Opinion of Judge Pinto De Albuquerque (n 1); *Editorial Board of Pravoye Delo and Shtekel v. Ukraine* App no. 33014/05 (ECtHR, 5 May 2011), para 55.

⁵⁵⁶ *Handyside v. the United Kingdom*, (ECtHR, 7 December 1976), Series A no. 24

⁵⁵⁷ Council of Europe, Declaration on freedom of communication on the Internet (*Adopted by the Committee of Ministers on 28 May 2003 at the 840th meeting of the Ministers' Deputies*) available at: <

<https://rm.coe.int/16805dfbd5>>; French Constitutional Council, Decision no 2009-580 DC of 10 June 2009

⁵⁵⁸ *Poland v European Parliament* (n 79), paras 87-88.

users' freedom of expression and receive and impart information.⁵⁵⁹ Now that under Article 17's regime, the use of automated tools such as upload filters are inevitable for the OCSSPs, the limitation on the exercise of the right to freedom of expression and information also becomes inevitable.⁵⁶⁰ The significant collateral effect of the filtering measures on freedom of expression must be considered when employing such technologies to comply with Article 17(4)'s obligations.⁵⁶¹ Not just automated content recognition systems, Article 17's licensing obligations, too, can potentially have an adverse impact on users' freedom of expression.

3.2.1 Compatibility of Article's Licensing Obligations with Freedom of Expression

According to the Article, for the OCSSPs to avoid liability that may cause by their users' acts of communication to the public, they need to obtain authorisation for all the content that their users may upload. However, the only example within the Directive regarding obtaining authorisation is direct licensing from the copyright holder. While the motive behind this is the primary goal of this Directive is to promote licensing, there are many problems and impracticalities with this system, too, especially the significant negative impact on the users' freedom of expression.⁵⁶²

Over the years, both the number of internet users and the ways of using the internet increased. The content traffic on the internet is now extremely heavy; most of this traffic comes from the OCSSPs, especially on the platforms which host user-generated content.⁵⁶³ In a minute, hundreds of thousands of hours of content are being created and consumed. Every minute, users upload 500 hours of video on YouTube, post 350 million tweets on Twitter, and upload over 70.000 million photos to Instagram.⁵⁶⁴ While the content on the internet, especially user-generated content, includes countless copyright-protected works, Article 17 requires

⁵⁵⁹ *L'Oréal* (n 113), para 19; *Scarlet Extended* (n 16), para 49.; *Netlog* (n 16), para 50; *Mc Fadden* (n 16), paras 83-89; *Poland v European Parliament* (n 79), paras 53-54.; European Commission Staff Working Document, Impact Assessment Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC and 2002/22/EC and Regulations (EC) No 1211/2009 and (EU) No 531/2012, SWD (2013) 331 final.

⁵⁶⁰ *Poland v European Parliament* (n 79), para 58.

⁵⁶¹ *Poland v European Parliament*, Opinion of Advocate General Saugmandsgaard Øe (n 272), paras 191-193.

⁵⁶² Challenges that impact other fundamental rights examined in Chapter 3 and Chapter 4.

⁵⁶³ 'Web Visitor Traffic to UGC Websites 2022' (*Statista*) <<https://www.statista.com/statistics/1328702/web-visitor-traffic-top-websites-ugc/>> accessed 18 November 2022.

⁵⁶⁴ Jeff Schultz, 'How Much Data Is Created on the Internet Each Day?' (*Micro Focus Blog*, 2019) <<https://blog.microfocus.com/how-much-data-is-created-on-the-internet-each-day/>> accessed 7 May 2021.

platforms to obtain licenses that would cover all third-party material uploaded by the users on their platforms.⁵⁶⁵ Regarding the extent of the required licensing agreements, Article 17(2) states that licenses taken accordingly to the Directive shall only cover private acts of a user of the OCSSPs where their activity does not generate significant revenues. This leaves the user protection entirely depending on the extent of the licensing agreement in situations where obtaining authorisation is troublesome, and the way for that is unclear.⁵⁶⁶ Also, in this picture, the future of the semi-professional or professional platform creators is unknown since the required licences will not cover their activities, and the Directive does not mention how they negotiate their licences.

However, in practice, the possibility of covering all private acts by users with licenses would be quite low, and even where licences are obtained, fragmented licensing arrangements would affect users' freedom of expression. The backbone of these platforms, user-generated content, uses copyright-protected material. Users express themselves by using works from a very wide-ranging collection, adding their creative efforts to have multimedia productions distributed online through different platforms. While this exercise of the right to freedom of expression and impart information is the main function of these platforms, as previously discussed, the availability of all-embracing umbrella licenses that would cover all UGC within the EU is not likely.⁵⁶⁷ This is caused by various reasons, such as the unwillingness of the rightholders to licence their works, problems with collective management and fragmentations within the collecting society landscape in the EU.⁵⁶⁸ Thus, the possible scenario is the platforms with limited licenses to offer their users only a limited selection of widely available works. Consequently, the creations of users would be limited to the available works that rightholders agreed to give authorisation. Unsurprisingly, these works would be very limited, considering that many of the rightholders already stated that they are not interested in widely licensing their works to the OCSSPs.⁵⁶⁹ It is hard to imagine for

⁵⁶⁵ Article 17(1) and (4)(a).

⁵⁶⁶ Matthias Leistner (n 333).

⁵⁶⁷ Examined in Chapter 2; Jütte (n 335), 22.; Christina Angelopoulos and João Pedro Quintais, 'Fixing Copyright Reform: A Better Solution to Online Infringement' (2019) 10 JIPITEC 147 <<https://www.jipitec.eu/issues/jipitec-10-2-2019/4913>>. 149; Martin Senftleben (n 292); Giancarlo Frosio (n 207).

⁵⁶⁸ Senftleben (n 292), 3-4.

⁵⁶⁹ Copyright Stakeholder Dialogues, <https://webcast.ec.europa.eu/copyright-stakeholder-dialogues>; Paul Keller, 'Article 17 Stakeholder Dialogue (Day 2): Filters, Not Licenses!' (*International Communia Association*, 2019) <<https://www.communia-association.org/2019/11/11/article-17-stakeholder-dialogue-day-2-filters-not-licenses/>> accessed 11 June 2020.

rightholders to grant licenses for all kinds of user-generated content; for instance, there would not be many copyright holders who would want to grant licences for content that is newly released or would include users' criticism.⁵⁷⁰

This limitation on the variety of the works would affect the diversity of the content, ideas, and culture and turn platforms into dull places with similar content that includes the same licensed works. Small artists and creators who want to promote their work via user-generated content would have a hard time as the platforms tend to get licences from the big and well-established record and production companies. Even in the cases that this availability is ensured by a copyright collecting society, most of these societies focus on a certain type of copyright, in most cases music, which is often limited to the country or region that they operate. For content other than music, such as videos, photos, texts, and video games, which constitute the majority of content online, there are no central licensing bodies, making it impossible for platforms to obtain all the necessary rights.⁵⁷¹ Also, there are not many platforms that can obtain and afford these all-embracing licensing deals; thus, in practice, it is more likely for the majority of the platforms to focus on the works that are being communicated on their platform the most, which would jeopardise the diversity of the internet.

With a limited selection of works they can communicate and platforms they can use, users would have their rights to freedom of expression and impart information restricted disproportionately. Also, EU citizens will no longer be able to take an active part in the creation of online content since they will not be able to enjoy the freedom of uploading their works which includes all kinds of pre-existing material such as criticisms, parodies, and remixes.⁵⁷² As a result of platforms focusing on mainstream works, the possibility of EU citizens to express themselves to a wider audience and learn about the views and expressions of users with diverse social, cultural and ethnic backgrounds will be reduced.⁵⁷³ Predictably,

⁵⁷⁰ Senftleben (n 292) 4.

⁵⁷¹ Till Kreutzer, 'The EU Copyright Directive and Its Potential Impact on Cultural Diversity on the Internet – Part I' (*Kluwer Copyright Blog*, 22 January 2020) <<http://copyrightblog.kluweriplaw.com/2020/01/22/the-eu-copyright-directive-and-its-potential-impact-on-cultural-diversity-on-the-internet-part-i/>> accessed 13 November 2020.

⁵⁷² Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (The Penguin Press 2008).

⁵⁷³ Neil W Netanel, 'Market Hierarchy and Copyright in Our System of Free Expression' (2000) 53 *Vanderbilt Law Review* 1879.; Sean Pager, 'Making Copyright Work for Creative Upstarts' (2015) 22 *George Mason Law Review* 521.

in this environment, the minority culture, marginal views, and amateur works will be excluded, perhaps censored, and in time, will be extinguished online.⁵⁷⁴ This will also result in a global monoculture on the internet and even impact users' motives to create, as most of the UGC is based on existing works.⁵⁷⁵

Therefore, the licensing obligation of the Article brings a limitation for the rightsholders on the platforms that can host their works, for users on the platforms in which they can legally communicate works and lastly, for the platforms regarding the works that can offer to their users. Moreover, under the new regime, old problems will remain. For example, the gaps in ownership data constitute a long-existing issue, especially within the music industry; licences are often issued without complete and accurate lists of the rights and works.⁵⁷⁶ In addition to the unsolved problems of the past, there will be additional new problems as the licensing obligation of Article 17 creates a situation where the users' protection of freedom of expression and imparting information depends on the extent of the licensing deals as well as the ability of the platforms to obtain extensive authorisation.

Any restriction or loss on the users' right to freedom of expression and impart information would affect the diverse culture of the internet as well as the creativity and innovation online. This puts the decentralisation that the internet introduced regarding copyright, which empowered creativity and diversity, at risk and affects the exercise of freedom of expression.⁵⁷⁷ Considering the wide protection that freedom of expression enjoys, justifying this interference in the light of the conditions set out in Article 52(1) of the Charter as this practice would be challenging as meeting the objectives of general interest and proportionality of the obligation would be challenging.⁵⁷⁸

⁵⁷⁴ Senftleben (n 292) 5.

⁵⁷⁵ Fiona Macmillan, 'Cultural Diversity, Copyright, and International Trade' in Victor Ginsburgh and CD Throsby (eds), *Handbook of the economics of art and culture* (1st ed, Elsevier North-Holland 2014) <<https://eprints.bbk.ac.uk/id/eprint/8992/1/8992.pdf>>. Ragnhild Brøvig-Hanssen and Ellis Jones, 'Remix's Retreat? Content Moderation, Copyright Law and Mashup Music' [2021] *New Media & Society* 146144482110260.

⁵⁷⁶ Digital, Culture, Media and Sport Committee, 'Written Evidence Submitted by YouTube' <<https://committees.parliament.uk/writtenevidence/15322/html/>> accessed 7 July 2021.

⁵⁷⁷ Sean Pager, 'Does Copyright Help or Harm Cultural Diversity in the Digital Age?' [2018] *Kritika Kultura* <<https://journals.ateneo.edu/ojs/index.php/kk/article/view/KK2019.03219/2824>> accessed 25 July 2022.

⁵⁷⁸ *Digital Rights Ireland* (n 88), para 37; *Tele2* (n 88), para, 100.

Thus, the limited selection works for users to communicate caused by challenges with obtaining the required licensing deals limits the exercise of freedom of expression and information. At some points, this interference with freedom of expression of the licencing measure under Article 17 for the protection of copyright might be disproportionate. While licences bring these challenges, the only other option under the Article for platforms to avoid liability is filtering, which would have an even more significant negative impact on their right to freedom of expression and information.

3.2.2 Compatibility of Article 17(4)'s Filtering Obligations with Freedom of Expression

Article 17(4) introduces a “block-first-ask-questions-later (or never)” regime, which poses significant dangers to the protection of users’ fundamental rights with its preventive enforcement obligations.⁵⁷⁹ As acknowledged by CJEU, this liability regime implies a restriction on the users’ ability to exercise their right to freedom of expression and information.⁵⁸⁰ Therefore, the enforcement obligations under Article 17(4)(b) and (c) can result in an unbalanced practice as the measures that OCSSPs need to employ are known for their interferences with freedom of expression and information.⁵⁸¹ That is why Articles 17(5)-(10) are placed as safeguards by the lawmaker to ensure that the principle of proportionality and the essence of freedom of expression are respected in line with Article 52(1) of the Charter. Article 17 (7) requires ensuring protection for legitimate content, including the content that benefits from mandatory E&Ls, and Article 17(9) also requires the adopted measures for copyright protection to not affect legitimate uses and placing effective and expeditious complaint and redress mechanisms for the erroneous blockings and removals of legitimate content. These safeguards are essential to achieve a fair balance between the right to intellectual property and the right to freedom of expression, information and arts under the Charter.⁵⁸² Moreover, it has been acknowledged that the failure to implement Article’s safeguards efficiently would bring the failure to satisfy best efforts standards.⁵⁸³ However,

⁵⁷⁹ The term “block-first-ask-questions-later (or never)” inspired by Kris Erickson, ‘The European Copyright Directive: License First, Ask Questions Later | Media@LSE’ <<https://blogs.lse.ac.uk/medialse/2019/04/02/the-european-copyright-directive-license-first-ask-questions-later/>> accessed 30 September 2021.

⁵⁸⁰ *Poland v European Parliament* (n 79), para 58.

⁵⁸¹ *Scarlet Extended* (n 16), paras 50-51; *Poland v European Parliament* (n 79), para 86

⁵⁸² Recital 70 of the CDSMD.

⁵⁸³ *Guidance* (n 289), p.3 ; *Poland v European Parliament* (n 79).

ensuring the effectiveness of these safeguards regarding providing sufficient guarantees to effectively limit the interference of upload filters on freedom of expression is very challenging.

The required content control is only possible with automated moderation, and this preventive filtering and blocking of the works required by Article 17(4) take place automatically without any human intervention, such as moderators undertaking the human review in practice as the only human within the process is the initial programmer of the software. The earliest human inclusion occurs *ex-post*, after the automated decision and action of filter take place, regarding the decisions to disable access to or remove uploaded content. Thus, where these automatic tools are employed by the platforms, all uploaded content by the users is automatically directed to the content recognition software, which filters the content according to its algorithm, which is subject to a variety of problems that cause erroneous decision-making that interferes with freedom of expression.⁵⁸⁴ Therefore, this proactive copyright enforcement via upload filters can clash with the important safeguards of the Article and pose significant risks to the protection of users' rights, especially their freedom of expression.⁵⁸⁵ Considering the increasing significance of online platforms for users to practice their freedom of expression and information, as these are the places where the public forms their opinion regarding current affairs, the impact of preventive filtering on users' freedom of expression should be examined in detail to assess the compatibility of the filtering obligations with the Charter.

3.2.2.1 *The Interferences of Upload Filters with Freedom of Expression*

As suggested by the Commission and confirmed by CJEU in the Poland case, Article 17(7), the obligation of result, which ensures the availability of legitimate uses, has greater importance than the obligation of 'best efforts' in Article 17(4) which requires ensuring the unavailability of infringing works.⁵⁸⁶ The significance of the compliant application of Article 17(4)'s filtering obligations with Article 17(7) was underlined by AG Saugmandsgaard Øe as well by stating that despite the technology used by the platforms, the assessment of whether a

⁵⁸⁴ Examined in detailed in Chapter 2.

⁵⁸⁵ *Scarlet Extended* (n 16); *Netlog* (n 16); *Poland v European Parliament* (n 79).

⁵⁸⁶ *Poland v European Parliament* (n 79), para 78; *Poland v European Parliament*, AG Opinion (n 272), para 165; *Guidance* (n 289), p.2-3.

service provider has made its ‘best efforts’ under Article 17(4)(b) and the second part of (c) will be evaluated according to the level of respect for the legitimate uses.⁵⁸⁷ Moreover, the Court stated that automated systems that to be implemented to satisfy the best effort standards must comply with the requirements of Article 17, which includes safeguards for freedom of expression and the fair balance between this right and the right to intellectual property; thus, must not filter and block lawful content when uploading.⁵⁸⁸

However, as discussed previously, upload filters perform automatic decision-making regarding the uses of the copyrighted work within the uploaded content, and for that reason, these filters, notwithstanding the method they use, suffer from erroneous decision-making, which causes over-blocking of legitimate content.⁵⁸⁹ They often block and remove legitimate content, such as uploads that include works that fall within the public domain⁵⁹⁰, works posted online free of charge by the concerned authors, and works that benefit from statutory exceptions to copyright.⁵⁹¹ This incorrect blocking or removal of lawful content is called false positives, and they severely affect the freedom of expression and information of both speakers and the recipients of the information.⁵⁹² Therefore, the Charter’s freedom of expression and information which incorporates the freedom of artistic expression is affected by erroneous copyright enforcement decisions of these filters.⁵⁹³ This tendency of filters to result in false positives and perform over-enforcement is explained by several underlying reasons: the design of the filters, including the poor data quality in their fingerprint databases, open-to-abuse nature, including the transparency problems and lastly, their context-blindness.⁵⁹⁴

Firstly, all content recognition technologies, including AI-assisted technologies, have their own characteristic shortcomings and limitations that affect their accuracy and effectiveness.

⁵⁸⁷ *Guidance* (n 289); *Poland v European Parliament*, AG Opinion (n 272), para 207.

⁵⁸⁸ *Poland v European Parliament*, (n 79), para 85; *Poland v European Parliament*, AG Opinion (n 272), paras 164-165, 191-193.

⁵⁸⁹ David Abecassis and Alexander Gann (n 293).; Policy Department for Citizens’ Rights and Constitutional Affairs and Directorate-General for Internal Policies (n 59); Jennifer M Urban, Joe Karaganis and Brianna Schofield, (n 14); Jennifer Urban, Joe Karaganis and Brianna L Schofield (n 422); Kristofer Erickson and Martin Kretschmer (n 61).

⁵⁹⁰ Copia Institute, ‘Content Moderation Case Study: NASA Footage Taken Down By YouTube Moderation (2012)’ (Techdirt, 7 April 2021) <<https://www.techdirt.com/2021/04/07/content-moderation-case-study-nasa-footage-taken-down-youtube-moderation-2012/>> accessed 25 July 2022.

⁵⁹¹ Ben Depoorter and Robert Walker (n 393).

⁵⁹² *Scarlet Extended* (n 16), para 52; *Netlog* (n 16), para 50; *Poland v European Parliament* (n 79), para 86.

⁵⁹³ *Poland v European Parliament*, AG Opinion (n 272), para 187.

⁵⁹⁴ For detailed examination of upload filters: See Chapter 2.3.2.2.2.

Also, as the main aim of upload filters is to increase the rightholders' control over works that are shared online by third parties and protect copyright, they often upset the balance between freedom of expression and information of the users and the IP protection of rightholders by exceeding what is necessary and prescribed under the regulatory framework.⁵⁹⁵ As a related problem, the success of these filters depends on the reference databases with no standards regarding the ownership of works and interoperability. Thus, the CDSMD regime, especially its reliance on the industry, would only worsen the impact on users as adopting filtering tools that lead to excessive content blocking appears to be the safe option for platforms that seek to avoid liability.⁵⁹⁶ Article 17, by referring to "high industry standards of professional diligence"⁵⁹⁷, relies on industry cooperation to prevent excessive blocking and removal, which is concerning taking into consideration that the common practice on platforms shows that platforms prefer over-blocking and rightholders prefer over-claiming.⁵⁹⁸ In a situation where the platforms feel the pressure of the "regulatory environment that incentivises over-moderation"⁵⁹⁹, these mechanisms go further and often adopt a conscious policy of "prophylactic self-censorship" that blocks any content that could bring liability on the OCSSPs.⁶⁰⁰ While every prospect of liability can cause chilling effects on the freedom of expression, this safe play by OCSSPs would lead to severe censorship and harm the freedom of expression and free internet adversely. Thus, this practice results in over-blocking and over-claiming enabled by these tools, which directly affects the right to freedom of expression, despite the stress on the incompatible nature of this practice of preventively blocking legitimate uploads with EU law.⁶⁰¹

Second, when this design, which merely focuses on detecting copyright-protected works, combined with the lack of transparency regarding their operation, results in upload filters being open to misuse and abuse. The impact of these misuses intensifies with the privileged

⁵⁹⁵ Annemarie Bridy (n 191).; Sabine Jacques and others, 'The Impact On Cultural Diversity Of Automated Anti-Piracy Systems As Copyright Enforcement Mechanisms: An Empirical Study Of Youtube's Content ID Digital Fingerprinting Technology' <<http://rgdoi.net/10.13140/RG.2.2.14443.54560>> accessed 14 July 2020. 3.

⁵⁹⁶ Sharon Bar-Ziv and Niva Elkin-Koren, 'Behind the Scenes of Online Copyright Enforcement: Empirical Evidence on Notice & Takedown' (2018) 50 Connecticut Law Review <<https://papers.ssrn.com/abstract=3214214>> accessed 14 July 2020.

⁵⁹⁷ Article 17(4)(b) of the CDSMD.

⁵⁹⁸ Annemarie Bridy (n 191), p.17; TJ Gerpott, 'Artikel 17 Der EU-Urheberrechtsrichtlinie 2019 – Zum Kontext Des Streits Um „Upload-Filter“ Aufgrund Geänderter Verantwortlichkeitsregeln Für Online- Sharing- Plattformen' (2019) 22 MultiMedia und Recht 420.

⁵⁹⁹ David Kaye (n 377).

⁶⁰⁰ Sonia K Katyal, 'The New Surveillance' (2003) 54 Case Western Law Review 297 <<https://scholarlycommons.law.case.edu/caselrev/vol54/iss2/4>>.

⁶⁰¹ *Poland v European Parliament* (n 79), para 93; *L'Oreal* (n 113), para 131; *UPC Telekabel* (n 49), para 63.

copyright enforcement tools that some big platforms grant to their preferred rightholders and disturbs proportionality and fair balancing of competing rights severely. Even worse for the protection of freedom of expression, this open-to-abuse nature of these technologies result in malicious actors, including governments using these copyright enforcement tools as censorship tool and even as a weapon to cover their wrongdoings by oppressing users' expressions and interfere with the right to impart information regarding the current events. More sophisticated techniques, such as deep packet inspection, unlock more subtle censorship methods as the content can be edited rather than just being blocked and goes way beyond the goal of preventing copyright infringements.⁶⁰² Especially regarding the AI filters, the combination of the lack of tools for their accountability with their opaque and dynamic operation helps them evade traditional checks and balances secured by law.⁶⁰³ Thus, in such cases, users' freedom of expression and information would be harmed irreparably.⁶⁰⁴

This picture is unlikely to change with Article 17, considering that it requires the prevention of future uploads of the allegedly infringing uploads by OCSSPs and the fact that it paves the way to unrestricted monitoring, filtering and abusive takedown and stay down notifications. Thus, in the absence of protection for freedom of expression prior to filtering and rules that regulate the accountability of rightholders and OCSSPs when they abuse the copyright enforcement tools by providing erroneous ownership of copyright-protected work data or sending duplicative, unnecessary or ill-intended notices, Article 17's regime becomes more threatening from the users' fundamental rights perspective. Whether or how far Article 17(9) can change this picture and prevent abuse with the human review and effective redress mechanisms safeguards is open to debate as it only provides this safeguard after the automated decision-making takes place. The common practice shows that the required human review is not taking place even on the platform that employs the biggest human review

⁶⁰² Ben Wagner, 'Deep Packet Inspection and Internet Censorship: International Convergence on an "Integrated Technology of Control"' (Global Voices Advocacy 2009) <<https://papers.ssrn.com/abstract=2621410>> accessed 12 July 2021.

⁶⁰³ Niva Elkin-Koren, 'Contesting Algorithms: Restoring the Public Interest in Content Filtering by Artificial Intelligence' (2020) 7 *Big Data & Society*. Available at <https://journals-sagepub-com.ezproxy.herts.ac.uk/doi/10.1177/2053951720932296?icid=int.sj-full-text.similar-articles.2>

⁶⁰⁴ *Observer and Guardian v. the United Kingdom*, (n 554), para 60; *Ahmet Yildirim v. Turkey* (n 1), para 47; *Poland v European Parliament*, AG Opinion (n 272), para 188.

teams⁶⁰⁵; it has been reported that ‘Content ID largely works on auto-pilot.’⁶⁰⁶ In future, the quality of these reports will be increased with the DSA’s advanced transparency and reporting duties regarding how platforms operate their content moderation practices.⁶⁰⁷ However, for now, the only way to be informed about these erroneous actions of upload filters is the extreme examples that make it to the news, tech blogs, or non-profit digital rights organisations, but these examples constitute only a very small percentage of over blocking that takes place on the platforms. It is important to note that while Article 17(8) introduces a reporting duty for OCSSPs to provide rightholders information on their enforcement practices, there is no such requirement to inform users.⁶⁰⁸ Without sufficient transparency, there will be no public concern, therefore, pressure on these platforms to improve their systems in a way that respects freedom of expression.

Third, and the most significant reason for the erroneous decision-making of upload filters, is their incapacity of understanding the context of the uploads, therefore, the lawful uses of the copyright-protected works, including the E&Ls. Where they block legitimate uses, they cause over-blocking of legitimate content, which is an outcome that is excluded by Articles 17(7) and (9) due to its negative impact on the freedom of expression. However, by looking at the operation of available upload filters, the interruption of the legal uses of users is inevitable. Despite the stress on the important role of the E&Ls regarding the protection of the right to freedom of expression of users and ensuring the fair balance between the competing rights and interests of rightholders and users by the Court⁶⁰⁹ and the academics⁶¹⁰, these filtering systems can drastically restrict the E&Ls regime in the online world and infringe the freedom of expression of creators and take away the users’ freedom of information.

⁶⁰⁵ Rachel Kraus, ‘YouTube Puts Human Content Moderators Back to Work’ (*Mashable*, 20 September 2020) <<https://mashable.com/article/youtube-human-content-moderation>> accessed 27 July 2022.

⁶⁰⁶ David Kravets, ‘Rogues Falsely Claim Copyright on YouTube Videos to Hijack Ad Dollars’ *Wired* <<https://www.wired.com/2011/11/youtube-filter-profiting/>> accessed 26 July 2022.

⁶⁰⁷ DSA expected to provide another layer of liability regarding transparency as OCSSPs can find themselves in a situation that not disclosing such information result in non-compliance which might also trigger liability under tort and competition law. See Chapter III of Digital Services Act, p. 48.

⁶⁰⁸ Article 17(8) of CDSMD.

⁶⁰⁹ *Delfi AS v. Estonia* (n 130), para 131; *Ashby Donald and Others v. France* (n 57), para 34; *Deckmyn* (n 139), paras 26-27, 35; *Funke Medien* (n 133); Case C-476/17, *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben* [2019] ECLI:EU:C:2019:624; Case C-516/17, *Spiegel Online GmbH v Volker Beck*, ECLI:EU:C:2019:625.; *Painer* (n 139), para 132.

⁶¹⁰ Sebastian Felix Schwemer and Jens Schovsbo (n 133), p. 569-589.

Through user-generated content, every day, more people are using these platforms to be part of the democratic society by commenting on matters of general interest, sporting issues or performing artists and political debates, which freedom of expression offers its highest level of protection.⁶¹¹ A significant amount of this user-generated content includes the uses that benefit from E&Ls, which are user “rights” rather than mere user “interests”⁶¹², especially quotation and parody.⁶¹³ CJEU, by incorporating the fundamental rights’ standards into its interpretations of copyright exceptions and limitations, pointed out that the protection of exceptions can cover some unorthodox uses.⁶¹⁴ Parody is described as a central component of internet dialect as it is pervasive in a participatory culture which is the foundation of many big platforms and the primary motivation for many creators and users.⁶¹⁵ Thus, E&Ls lay at the intersection of user-generated content and the exercise of freedom of expression as they are “legal enablers”⁶¹⁶ for users to include copyright-protected work in the expressive and transformative content they upload to online platforms.

However, while the protection of freedom of expression of users is dependent on the level of success of the enforcement of E&Ls online closely and required by the safeguards Article 17 (7) and (9), ensuring this effective enforcement is challenging in practice due to context-blindness of upload filters. Any content that would benefit from a statutory copyright exception within Article 17(7) requires borrowing a portion of copyright-protected work. The transformative works of users would also get caught in the nets of upload filters due to a match of the transformed copyright-protected work within the upload, which is a new generated work by the user, interfering with the user’s freedom of expression by blocking their legal expressions.⁶¹⁷ Especially when it comes to “memes” that usually benefit from

⁶¹¹ *Axel Springer AG v. Germany* App no. 39954/08 (ECtHR, 7 February 2012), para 90.

⁶¹² *Poland v European Parliament* (n 79), para 87.

⁶¹³ A study of Intellectual Property Office revealed that music video parody is a highly significant consumer activity. See Kristofer Erickson, ‘Evaluating the Impact of Parody on the Exploitation of Copyright Works: An Empirical Study of Music Video Content on YouTube’ (Intellectual Property Office 2013) 2013/22 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/309900/ipresearch-parody-report1-150313.pdf>.

⁶¹⁴ *Pelham* (n 133), para 35; *Spiegel Online* (n 133), para 84; [C 516/17](#) *Spiegel Online GmbH v Volker Beck*, AG Opinion, para 48.

⁶¹⁵ Lillian Boxman-Shabtai, ‘The Practice of Parodying: YouTube as a Hybrid Field of Cultural Production’ (2019) 41 *Media, Culture & Society* 3 <<http://journals.sagepub.com/doi/10.1177/0163443718772180>> accessed 18 May 2021.

⁶¹⁶ Martin Husovec and João Quintais (n 475).

⁶¹⁷ The best scenario would be, where platforms offer monetising, content to stay on the platform, and the creator to be deprived of the revenue. However, one must bear in mind that there is a limited number of platforms that offer monetising through advertisement therefore in most cases, the content in question will be completely blocked from being accessed.

copyright exceptions, such as parody and pastiche, identifying the legal use is an impossible task for any content recognition technology. This complex and contextual content requires the reviewer to consider many different aspects and requires contextual awareness of current events, political views, cultural beliefs and most importantly, the internet culture.⁶¹⁸ The understanding of the internet culture constitutes a related challenge, as just as any culture, the internet culture is also fluid, evolves over time and is variable depending on the location and user groups. There is no available automated content moderation system with the required cultural understanding and emotional intelligence that can overcome this complex challenge.⁶¹⁹ In this way, the algorithms of the upload filters undermine the nature of the works that benefit from copyright exceptions such as parody, as they are incapable of detecting the context-dependent differences from the original works within the new creations. Therefore, the practice of upload filters disproportionately interferes with creator users' freedom of expression and arts and, by blocking the availability of their creations, with other users' freedom to impart information.

This practice of over-blocking is likely to cause chilling effects on freedom of expression by disrupting the receiving and imparting of information and ideas and even alienating and cutting off users.⁶²⁰ It is likely that users whose lawful uploads get blocked due to inaccurate filtering to get frustrated and stop using the platform, create content and express themselves online.⁶²¹ Avoiding potential liability could be another reason for an average user to stop using the platform. Due to erroneous enforcement actions of filters, they will be informed by the platform that their legitimate content is found infringing copyright; given the fact that the language of these notifications is usually confusing and intimidating and the in-platform complaint and redress mechanisms are not user-friendly, this fear might make the innocent users stop creating content and expressing themselves entirely.

In relation to that, in-platform penalties that OCSSPs impose on the users' accounts where a copyright infringement erroneously detected by the automated systems are likely to lead to

⁶¹⁸ Cambridge Consultants (n 367) 33.

⁶¹⁹ While there are developments in understanding memes, current research acknowledges the many challenges with achieving this result. See Viswanath Sivakumar, Albert Gordo and Manohar Paluri, 'Rosetta: Understanding Text in Images and Videos with Machine Learning' (Engineering at Meta, 11 September 2018) <<https://engineering.fb.com/2018/09/11/ai-research/rosetta-understanding-text-in-images-and-videos-with-machine-learning/>> accessed 29 July 2022.

⁶²⁰ *Digital Rights Ireland Ltd v Minister for Communications* [2013] ECLI:EU:C:2013:845, Opinion of Advocate General Cruz Villalón, para. 52.

⁶²¹ Impact Assessment, p.141; Ben Depoorter and Robert Walker (n 393).

chilling effects. Therefore, the users, creative world, and culture on the internet would pay the price as the upload filters' incorrect blocking and removal of lawful content severely affect the freedom of expression and information of both speakers and the recipients of the information.⁶²²

Article 17(7) and Article 17(9) introduces the duty of ensuring the uploads that include legitimate uses, including the ones which benefit from E&Ls not to be subject to de facto prior automated blocking; however, the possibility of a practical implementation as well as the scope of this obligation is uncertain. The examination of this study on upload filters shows that excluding measures which filter and block lawful content when uploading, in practice, would require excluding all available filtering technologies.⁶²³ Thus, in practice, Article 17's safeguards for freedom of expression are being bypassed by the operation of upload filters. Therefore, where implemented verbatim, Articles 17(7) and (9) fail to provide effective guarantees for users' freedom of expression against intrusive filtering⁶²⁴ and become only on-paper safeguards.⁶²⁵

Therefore, the upload filters bring an interference with freedom of expression that is extensive and intrusive. This intense nature of the limitation on the exercise of freedom of expression causes the measure to fail to strike a fair balance between the right to intellectual property and freedom of expression, hence, being disproportionate. Thus, introducing safeguards which could make filtering proportionate becomes the only way to ensure compliance with the Charter. It has been accepted that the requirements of Article 17(4)(b) and (c) and Article 17(7) must be satisfied "simultaneously"⁶²⁶ as the best effort standards include the obligation of implementing measures that respect safeguards of the Article, therefore, the fundamental rights.⁶²⁷ The effective application of these safeguards is recognised as an essential factor for the validity of Article 17, thus making implementing the

⁶²² It has been reported that the practice of Content ID is discouraging users and creators of the platform to benefit from statutory copyright exceptions and limitations, and therefore, control the content that users can access. See Katharine Trendacosta, 'Unfiltered: How YouTube's Content ID Discourages Fair Use and Dictates What We See Online' (*Electronic Frontier Foundation*, 10 December 2020) <<https://www.eff.org/wp/unfiltered-how-youtubes-content-id-discourages-fair-use-and-dictates-what-we-see-online>> accessed 19 August 2022.

⁶²³ *Poland v European Parliament* (n 79), para 85.

⁶²⁴ *Poland v European Parliament*, AG Opinion (n 272), para 180; *Axel Metzger and others* (n 285) 16.

⁶²⁵ It has been established that Article 17(4) and (7) must be read in the light of the third subparagraph of Article 17(9) which states that 'the directive shall in no way affect legitimate uses.' See Guidance (n 289); *Poland v European Parliament*, AG Opinion (n 272), para 173.

⁶²⁶ *Poland v European Parliament*, AG Opinion (n 272), para 170.

⁶²⁷ Guidance (n 289), p.14; *Poland v European Parliament* (n 79), para 99ff.

forenamed safeguards in a way that enables them to have tight control over the scope of the limits on freedom of expression and effective remedies a must.⁶²⁸

The efficiency assessment of the Article’s safeguards shows that there is a need for detailed *ex-ante* safeguards that would help automated content recognition operate in a fundamental rights-compliant way. It is clear that only “restoring” the legitimate content via complaint and redress is not enough to fulfil Article 17(7) guarantees, and users, too, just like rightholders, should be able to benefit from *ex-ante* protections regarding their uploads. Thus, this study suggests that achieving the fundamental right compatible implementation of filtering systems is not a straightforward task, and it would most likely require Member States to specify further procedural safeguards to ensure that Article 17(7) and (9) is effectively implemented.⁶²⁹ Therefore, especially to ensure the result of the obligation in Article 17(7), the result of legitimate uses being unaffected by the filters, implementations must include safeguards, including procedural safeguards that help with tackling the technical challenges of upload filters that make effective application of the safeguards for freedom of expression challenging. This, in practice, may require limiting this preventive filtering to ensure that the legitimate uses are unaffected. In the absence of the effective implementation of these safeguards, the interferences of filtering obligations of Article 17 with freedom of expression and the limits of the Article’s regime on practice on the right becomes disproportionate, disturbing the compatibility of the Article with the Charter.

3.3 Compatibility of Article 17 with the Right to Data Protection and Right to Privacy

As a measure that limits rights guaranteed by the Charter, the obligations under Article 17(b) and (c) should strike a fair balance between, on the one hand, IP protection and, on the other, the right to privacy in Article 7 and right to protection of personal data in Article 8 of Charter. In light of the proportionality principle, the measures of Article 17(4) have to be effective, their level of intrusiveness must be minimum, and where the measure is disproportionate, the safeguards which could make the measure proportionate should be

⁶²⁸ *Poland v European Parliament* (n 79), para 64; *Ahmet Yildirim v. Turkey* (n 1), paras. 47 and 64; *Association Ekin v. France*, App no. [39288/98](#), (ECtHR, 2001), para 58; Editorial Board of *Pravoye Delo and Shtekel v. Ukraine*, App no. [33014/05](#), (ECtHR, 2011), para 55; *RTBF v. Belgium* (n 478), para 114.

⁶²⁹ Recommendations will be provided in Chapter 5.

introduced.⁶³⁰ The safeguard in Article 17(9) states that the Directive shall not lead to any identification of individual users or the processing of personal data.⁶³¹

Article 7 of the Charter guarantees the right to respect for private life, while Article 8 of the Charter the right to protection of personal data. These fundamental rights benefit from high-standard protection, and they form part of the core values of the Union.⁶³² While not being an autonomous right amongst the various fundamental rights, the protection of personal data has significant importance because of its role in enabling the enjoyment of the right to respect for private and family life, as guaranteed by Article 8 of the Convention.⁶³³ The essential object of Article 8 of the Convention is to protect individuals against arbitrary interference by public authorities or by private bodies to whom responsibilities have been delegated by the State. This right imposes negative and positive obligations to the State, meaning, while avoiding any interference with this right, Member States might need to ensure the protection actively.⁶³⁴

The significant risks to the protection of natural persons' data introduced by the internet, in particular, online platforms, have been underlined various times.⁶³⁵ OCSSPs, especially social media platforms, host many different types of communications and all types of data, such as traffic, location, voice samples, and photography. Even the elements that indirectly enable identifying a person, such as a dynamic Internet Protocol(IP) address, can count as personal data.⁶³⁶ Therefore, ensuring data protection and the right to privacy within these platforms is of particular importance.⁶³⁷ Moreover, with the recent General Data Protection Regulation (GDPR)⁶³⁸, the importance of protecting the personal data of the individuals within the *EU acquis* has been underlined once more, and data protection has become an essential part of

⁶³⁰ Article 52(1) of the Charter.

⁶³¹ Article 28 of CDSMD also ensures that the processing of personal data carried out within the framework of this Directive shall be carried out in compliance with Directive 2002/58/EC and Regulation (EU) 2016/679.

⁶³² Article 2 of Treaty on the Functioning of the European Union OJ C 202 7.6.2016, p. 13.

⁶³³ *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* App no. 931/13 (ECtHR, 27 June 2017), para. 137; *Z v. Finland*, App no 22009/93 (ECtHR, 25 February 1997) para, 95.

⁶³⁴ *Bărbulescu v Romania* App no. 61496/08 (ECtHR, 5 September 2017), para 108.

⁶³⁵ Recital 9 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 188; *Digital Rights* (n 88), para, 27; *Tele2* (n 88), para, 99.

⁶³⁶ *Benedik v. Slovenia*, App no (ECtHR, 2018), paras, 107-108; *Scarlet Extended* (n 16), para 26.

⁶³⁷ *Digital Rights* (n 88), para, 37; *Tele2* (n 88), para, 100.

⁶³⁸ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, ('hereinafter: GDPR') p. 1–88.

EU policy-making.⁶³⁹ Accordingly, the CDSMD also guarantees the protection of these fundamental rights firstly with Article 17(8), which includes the general monitoring ban and secondly with Article 17 (9), which explicitly requires the Directive to *not lead to any identification of individual users nor to the processing of personal data*.⁶⁴⁰ As the process of uploading content, monitoring and filtering for the infringing content and operation of complaint and redress mechanisms obliged by Article 17 inevitably require processing personal data, all actors involved need to respect these freedoms and comply with the provisions of the GDPR and ensure that this processing is necessary, proportionate and data subjects can fully exercise their rights.⁶⁴¹

However, upload filters have been found in severe conflict with the right to privacy and users' right to protection of personal data; both CJEU and ECtHR underlined the severity of the interferences with these rights in many decisions as they often have a far-reaching impact on the users.⁶⁴² In addition to the legislative requirements for balancing these rights against the IPR protection, the importance of the consideration of the rights of the individuals, in particular, their data protection and privacy, while balancing interests has been underlined by both the CJEU and ECtHR in a series of decisions.⁶⁴³ This consideration was carried out by the CJEU in *Promusicae* and *Bonnier Audio*, and the Court stressed the requirement of ensuring the fair balance between the protection of intellectual property rights enjoyed by copyright holders and the protection of personal data enjoyed by internet subscribers or users.⁶⁴⁴ In line with that, it has been pointed out that under EU law, Member States do not have an obligation of imposing an obligation to disclose to private persons personal data for copyright infringements prosecutions.⁶⁴⁵ Thus, in various decisions, CJEU made it clear that limits on personal data protection must be strictly necessary, in addition to being proportionate when IPRs are enforced via upload filters.⁶⁴⁶ Thus, the legislation and the case

⁶³⁹ European Data Protection Supervisor (n 151), p.3.

⁶⁴⁰ CDSMD.

⁶⁴¹ Giovanni Buttarelli, 'EDPS Comments on the Proposal for a Directive on Copyright | European Data Protection Supervisor' <https://edps.europa.eu/data-protection/our-work/publications/comments/edps-comments-proposal-directive-copyright_en> accessed 3 August 2022.

⁶⁴² *Digital Rights* (n 88); *Tele2* (n 88); C-73/07 *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy* [2008] ECLI:EU:C:2008:727 para 56; Case C-473/12 *IPI v Geoffrey Englebert* [2013] ECLI:EU:C:2013:715, para 39.

⁶⁴³ *Sky Österreich* (n 87), para. 60; *Promusicae* (n 87), paras 65 and 66 and C-544/10, *Deutsches Weintor* [2012] ECLI:EU:C:2012:526, para. 47; *Big Brother Watch* (n 87), 2.42.

⁶⁴⁴ *Promusicae* (n 87), para 70; C-461/10 *Bonnier Audio AB and Others v Perfect Communication Sweden AB* [2012] ECLI:EU:C:2012:219, para 52.

⁶⁴⁵ *Promusicae* (n 87), paragraphs 54, 55; *Bonnier Audio* (n 620), para 55.

⁶⁴⁶ *Promusicae* (n 87), para 64; C-461/10 *Bonnier Audio* (n 620), para 55.

law indicate that restrictions on these rights should be applied very strictly, only when it is necessary to prevent harm to the essence of the right to property.

However, the operation of automatic content moderation systems involves far-reaching data collection and general monitoring of people's online activities.⁶⁴⁷ Thus, OCSSPs' automated prevention actions on infringing content pose a significant threat to users' right to privacy and data protection. These disproportionate effects of these systems were also highlighted by the CJEU in *Scarlet and Netlog*, where the Court stated that when these measures, in this case, Deep Packet Inspection (DPI) technology, perform identification, systematic analysis and processing of information of the users' profiles, which is protected personal data as they allow users to be identified, this practice of disproportionate filtering and monitoring harms users' right to protection of personal data.⁶⁴⁸ The act of identifying users, which corresponds to the allocation of IP addresses by an access provider recognised as "clearly disproportionate",⁶⁴⁹ and in conjunction with this, the Court stressed the dangers of the disproportionate effects of automated filtering on data protection and privacy as it can lead to the identification of the individual users.⁶⁵⁰ Then, Court found the practice of content moderation in question interfering with Articles 7 and 8 of the Charter disproportionately as the filtering system is infringing users' right to protection of their personal data is safeguarded by Article 8 of the Charter by identifying, systematically analysing and processing the profile information.⁶⁵¹ This filtering involves the active observation of all content and identification of users' IP addresses which are accepted as protected personal data since they allow those users to be precisely identified.⁶⁵² ECtHR is even more strict and critical of these types of measures, as they often interfere with the right to respect for private life by monitoring the traffic data instead of the content of communications, and often underlines the importance of proportionality even where the interference with Article 7 and

⁶⁴⁷ *Scarlet Extended* (n 16), paras 50-51; *Netlog* (n 16), paras 49-50; Giovanni Buttarelli, 'EDPS Comments on the Proposal for a Directive on Copyright | European Data Protection Supervisor' <https://edps.europa.eu/data-protection/our-work/publications/comments/edps-comments-proposal-directive-copyright_en> accessed 3 August 2022. p.5.

⁶⁴⁸ *Scarlet Extended* (n 16), paras 50-51; *Netlog* (n 16), paras 49-50.

⁶⁴⁹ *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH* [2016] ECLI:EU:C:2016:170, Opinion of AG Szpunar, para 142.

⁶⁵⁰ *Promusicae* (n 87), para 45; Case C-101/01 *Lindqvist* [2003] EU:C:2003:596, para 24.

⁶⁵¹ *Netlog* (n 16), para 49; *Scarlet Extended* (n 16), para 51.

⁶⁵² *ibid.*

Article 8 was due to measures for preventing serious crimes such as organised crime and terrorism.⁶⁵³

Automated filtering includes monitoring, detection, identification of users, and the enforcement and blocking of the content or disconnection of infringer users, all under the control of the OCSSP that implemented it. In contrast with traditional shallow packet filtering, which only analyses the packet header, DPI, works on the fingerprinting model and analyses all the content of data packets, including their headers and the data protocol structures passing through the network, and compares this content against the rules to determine what to do with these packets in real-time.⁶⁵⁴ This technology is widely in use globally by both state and non-state actors as they facilitate practices such as intrusively monitoring, controlling, and changing their users' data packets in real or near-real-time.⁶⁵⁵ The lack of transparency regarding these operations is worsening the interferences with fundamental rights; despite the fact that since the 2000s, the use of DPI technology has become a mainstream and pervasive practice across the Internet, users are entirely uninformed regarding this now common practice and its complications.⁶⁵⁶ This technology has the potential of becoming “communicative bottlenecks” through which users' acts must pass before reaching the global internet, and this position enables DPI to develop comprehensive profiles of users, often by interfering with their data protection and privacy rights.⁶⁵⁷ In such cases, the level of harm that this systematic processing of data brings to users cannot be justified with the benefit of protecting rightholders' right to intellectual property, which results in interferences with the fair balance, too. There are numerous risks that upload filters pose to the user's data protection and right to privacy.

By definition, the identical application of these content recognition technologies to both infringing and non-infringing content would require such monitoring that includes all

⁶⁵³ *Liberty v United Kingdom* (n 182), para 56; *S. and Marper v United Kingdom* (App no. 30562/04) (ECtHR, 4 December 2008), para 104–105. *Big Brother Watch* (n 87), paras. 322-323.

⁶⁵⁴ Chris Brook, 'What Is Deep Packet Inspection? How It Works, Use Cases for DPI, and More' (*Digital Guardian*, 20 March 2018) <<https://digitalguardian.com/blog/what-deep-packet-inspection-how-it-works-use-cases-dpi-and-more>> accessed 12 July 2021.; Milton Mueller, Andreas Kuehn and Stephanie Michelle Santoso, 'Policing the Network: Using DPI for Copyright Enforcement' (2012) 9 *Surveillance & Society* 348. p.351.

⁶⁵⁵ Christopher Parsons, 'The Politics of Deep Packet Inspection: What Drives Surveillance By Internet Service Providers?' (Dissertation, University of Victoria 2013) <https://christopher-parsons.com/wp-content/uploads/2017/08/Parsons_Christopher_PhD_2013.pdf>.

⁶⁵⁶ Nate Anderson, 'Deep Packet Inspection Meets 'Net Neutrality, CALEA' (*Ars Technica*, 26 July 2007) <<https://arstechnica.com/gadgets/2007/07/deep-packet-inspection-meets-net-neutrality/>> accessed 12 July 2021.

⁶⁵⁷ Christopher Parsons (n 655).

uploaded data. In order to meet the required effective removal or prevention of infringing content, upload filters have to undertake a systematic, universal and progressive examination.⁶⁵⁸ The algorithm of these filters can use the data they collected to make a wide range of decisions, including categorising the users who repetitively upload infringing content to establish a list of blacklisted users. Where identification of the uploader users takes place, this would directly affect users' right to privacy and data protection, which is considered disproportionate compared to the benefit that filtering out potentially infringing content may provide.⁶⁵⁹

Furthermore, the surveillance of these filters is not limited in duration, content and profiles.⁶⁶⁰ Considering the fact that OCSSPs are required to prevent potential infringements in the future, the filtering required in Article 17(4) would include monitoring which surveys of all the uploads from all the users by ignoring the limits for the scope of monitoring, namely, *ratione temporis*, *ratione materiae* and *ratione personae*.⁶⁶¹ The available filtering technologies monitor all data 24/7, in the background, automatically.⁶⁶² Although, Article 17 states that these filters will monitor for “*specific works or other subject matter*” for which the rightholders will have already communicated the “*relevant and necessary information*”⁶⁶³, these concepts fall short of ensuring limited monitoring. In reality, it is not likely for rightholders to provide specific references for the upload filters' databases; in practice, rightholders prefer sending their whole repertoire to the platforms which fail to constitute “specific works.”⁶⁶⁴ The argument of these content recognition systems to perform only

⁶⁵⁸ *Scarlet Extended*, Opinion of AG Cruz Villalón (n 70), para 48.

⁶⁵⁹ *Digital Rights* (n 88), para 65; Case C-343/09 *Afton Chemical v Secretary of State for Transport* [2010] ECLI:EU:C:2010:419, para 45; Joined Cases C-581/10 and C-629/10 *Nelson and Others v Deutsche Lufthansa AG* [2012] ECLI:EU:C:2012:657, para 71; C-283/11, *Sky Österreich* (n 87), para 50; Policy Department for Citizens' Rights and Constitutional Affairs and Directorate-General for Internal Policies, (n 59). This accepted to be the case even where surveillance held by the state and the illegal content in question was serving more serious crimes than copyright infringement. See *Big Brother Watch and others v United Kingdom*, (n 87), 2.42; *Digital Rights* (n 88), para 46.

⁶⁶⁰ For instance, one of the most commonly used filters amongst world's largest social media platforms, Audible Magic, highlights their technology's proven up time of 99.7%. See Audible Magic, 'AUDIBLE MAGIC'S CONTENT IDENTIFICATION' <https://www.audiblemagic.com/wp-content/uploads/2019/08/B_F_Core-Technology_012720.pdf> accessed 5 August 2022.

⁶⁶¹ *Scarlet Extended*, Opinion of AG Cruz Villalón (n 70), paras 53-59

⁶⁶² European Commission, 'Annex I - Gestdem 2017/405' Ref. Ares(2017)4763782, 04 September 2017. <<https://www.asktheeu.org/en/request/4465/response/14429/attach/5/Annex%20I%20Gestdem%202017%20405%20v3.pdf>>. p. 51

⁶⁶³ Article 17(4) of CDSM Directive

⁶⁶⁴ "...when restricting monitoring of the content supplied by rightholders, these lists of content will be so comprehensive that in fact a general monitoring of all content does occur." See Gerald Spindler, 'The Liability System of Art. 17 DSMD and National Implementation – Contravening Prohibition of General Monitoring Duties?' (2020) 10 JIPITEC <<https://www.jipitec.eu/issues/jipitec-10-3-2019/5041>>. 356

specific monitoring “strains credulity,” considering the leader software in the field, Audible Magic, already has 10 million files and is growing at the rate of 300,000 files per month in its reference database.⁶⁶⁵ Also, even filtering that is specific to notified works would require identifying data that helps locate the content and differentiate it from other material, if not the processing of the content itself, meaning that the filter, to match the uploads with the notified works by the rightholder, must monitor all the data.⁶⁶⁶ Thus, by monitoring all data from all customers for any future infringement of copyright for an unlimited time, the implementation of upload filters, parallel to its interferences with data protection and privacy, can conflict with the general monitoring ban, which forbids general obligations upon service providers to monitor the information or investigate facts or circumstances denoting unauthorised uploads.⁶⁶⁷

As an outcome of this far-reaching monitoring, upload filters can occasionally filter private communications as these systems screen every piece of user upload, invading users’ privacy and data protection. Not every profile in OCSSPs, especially social media platforms, is public, which take away the assumption of the intention of making the upload publicly available.⁶⁶⁸ At this point, it is important to underline the broad approach regarding the situations in that an individual is reasonably entitled to expect protection of their private life that ECtHR follows.⁶⁶⁹ However, in practice, this does not stop OCSSPs from operating filtering on private uploads or communications as well. For instance, Facebook’s rights management tool even allows rightholders to view the matching segments even if the video was posted privately and chooses to monitor or block.⁶⁷⁰ In addition to private uploads, the case of unlisted uploads on YouTube constitutes an interesting example of this. When a user uploads a video and makes it unlisted, the upload is not online in a traditional sense; it does not show in users’ profiles, search results, related videos and recommendations, nor can it be

⁶⁶⁵ Annemarie Bridy (n 191).

⁶⁶⁶ Christina Angelopoulos, ‘Sketching the Outline of a Ghost: The Fair Balance between Copyright and Fundamental Rights in Intermediary Third Party Liability’ (2015) 17 info 72.

⁶⁶⁷ Article 8 of DSA; Article 17 (8) and Recital 66 of CDSMD.

⁶⁶⁸ More than %75 users have private social media accounts See S Dixon, ‘U.S. Social Media User Account Privacy 2018 | Statista’ (*Statista*, 28 April 2022) <<https://www.statista.com/statistics/934874/users-have-private-social-media-account-usa/>> accessed 12 August 2022.

⁶⁶⁹ *Perry v. the United Kingdom* App no 63737/00 (ECtHR, 17 July 2003), para 37-38; *Benedik v. Slovenia* App no 62357/14 (ECtHR, 24 April 2018), para 116; Even public data when it has been collected and stored in a systematic manner can interfere with right to private life See *P.G. and J.H. v. the United Kingdom* App no 44787/98 (ECtHR, 25 September 2001), para 57; *Peck v. the United Kingdom* App no 44647/98 (ECtHR, 28 January 2003), paras 58-59.

⁶⁷⁰ Meta, ‘Disputes in Rights Manager’ (*Meta Business Help Centre*) <<https://www.facebook.com/business/help/212149709664331>> accessed 17 August 2022.

commented on.⁶⁷¹ In order to enable the availability of the upload, the user needs to send the upload link, which is initially available to the uploader user exclusively. However, both in private and unlisted videos, the automated filtering and blocking take place before the act of communication to the public takes place, and there is a high chance that this act will never happen as these videos are mostly unlisted due to privacy concerns, i.e. aimed at an individual or family.⁶⁷² Despite the fact that the work in the upload is not “communicated to a public”, which requires more than a *de minimis* number of unrelated persons according to the case law⁶⁷³, the lack of deliberate nature of the user’s intervention⁶⁷⁴ and the profit-making nature of the communication,⁶⁷⁵ these uploads are also a part of platforms monitoring, filtering and blocking practices.⁶⁷⁶ Thus, despite the nature of the users’ actions do not require such *ex-ante* enforcement of copyright, platforms via their all-embracing upload filters, by filtering and blocking these uploads, disproportionately interfere with users’ right to privacy and data protection. What is even worse is that these activities, which are highly invasive of the individuals’ private sphere and interfere with users’ right to privacy, data protection and the confidentiality of their communications, are typically operated in an undercover manner by OCSSPs.⁶⁷⁷ Therefore, in the light of the proportionality test, it can be seen that these wide and intense monitoring and filtering measures of Article 17(4) interfere with the right to privacy and data protection in a way that disturbs the fair balance between the right to IP and right to privacy and data protection and in the absence of effective safeguards, the measures become disproportionate.⁶⁷⁸ Despite Article 17(9) states that the Directive shall not lead to any identification of individual users nor to the processing of personal data, the effective

⁶⁷¹ ‘Change Video Privacy Settings - Computer - YouTube Help’ <<https://support.google.com/youtube/answer/157177?hl=en&co=GENIE.Platform%3DDesktop#zippy=%2Cunlisted-videos>> accessed 24 October 2022.

⁶⁷² ‘Unlisted Videos’ (*Unlisted Videos*) <<https://unlistedvideos.com/>> accessed 24 October 2022.

⁶⁷³ *Rafael Hoteles* (n 156), para 38; *Svensson* (n 156) paras 16, 21; *GS Media* (n 156), para 36; *Filmspelers* (n 156), para 45; C-263/18 *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v Tom Kabinet Internet BV and Others* [2019] EU:C:2019:1111 para 67.

⁶⁷⁴ *Rafael Hoteles* (n 156), paras 42-47.

⁶⁷⁵ C-403/08 and C-429/08 *Football Association Premier League and Others v QC Leisure and Others* [2011] EU:C:2011:631, para 204; C-135/10 *Societa Consortile Fonografici (SCF) v Del Corso* [2012] EU:C:2012:140, para 88; C-162/10, *Phonographic Performance (Ireland) v Ireland*, [2012] EU:C:2012:141, para 36.

⁶⁷⁶ ‘Is It Possible Copyright Claim or Copyright Strike with Private or Unlisted Videos? - YouTube Community’ <<https://support.google.com/youtube/thread/9041143/is-it-possible-copyright-claim-or-copyright-strike-with-private-or-unlisted-videos?hl=en>> accessed 24 October 2022.

⁶⁷⁷ Giovanni BUTTARELLI, ‘Opinion of the European Data Protection Supervisor on the Proposal for a Council Decision on the Conclusion of the Anti-Counterfeiting Trade Agreement between the European Union and Its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America’ (2012). 5, 16.

⁶⁷⁸ European Data Protection Supervisor (n 151) 14.

application of this safeguard for the protection of Articles 7 and 8 of the Charter is disrupted by the monitoring and filtering of Article 17(4)(b) and (c).

A related point to keep in mind is that in addition to the adverse effects on data protection, this type of monitoring, which includes systemically implemented profiling, can negatively affect users' other freedoms, such as freedom of expression, by creating chilling effects. It is really common in cases where the right to freedom of expression is "inextricably linked" to the right to protection of privacy.⁶⁷⁹ Especially in the cases of mass surveillance, these rights "*function in a wholly complimentary fashion, each reinforcing the other.*"⁶⁸⁰ This was also underlined in the *Tele2*⁶⁸¹ and *Digital Rights*⁶⁸² decisions, where the Court also touched upon this usually overlooked area when it comes to examining the impact of upload filters on data protection and the right to privacy. Court pointed out the importance of the right to information and stated that where the monitoring occurs without users' knowledge, they will feel that their private lives are the subject of constant surveillance. This type of monitoring creates a "*vague feeling of surveillance*" as the users are unsure of the data retention period.⁶⁸³ Consequently, as this feeling "*has a decisive influence on the exercise of freedom of expression and information*", it would cause chilling effects on the users of these platforms.⁶⁸⁴ Moreover, these systems can execute unlawful profiling and discrimination⁶⁸⁵ and can be subject to the misuse of data for political manipulation, which would directly disrupt the core of the EU, democracy.⁶⁸⁶ As well as freedom of expression, the interferences

⁶⁷⁹ European Data Protection Supervisor (n 151) 24; *Digital Rights* (n 88); *Tele2* (n 88).

⁶⁸⁰ Christopher Docksey, 'Four Fundamental Rights: Finding the Balance' (2016) 6 *International Data Privacy Law* 195 <<https://doi.org/10.1093/idpl/ipw014>> accessed 29 June 2021. p. 203.

⁶⁸¹ *Tele2* (n 88), para 100; *Digital Rights* (n 88), para 37.

⁶⁸² *Digital Rights* (n 88).

⁶⁸³ *Digital Rights*, Opinion of Advocate General Cruz Villalón (n 620), para 72.

⁶⁸⁴ *Digital Rights*, Opinion of Advocate General Cruz Villalón (n 620), para 52. "*The collection of such data establishes the conditions for surveillance which, although carried out only retrospectively when the data are used, none the less constitutes a permanent threat throughout the data retention period to the right of citizens of the Union to confidentiality in their private lives. Affirmingly, the CJEU stated that "...the fact that data are retained and subsequently used without the subscriber or registered user being informed is likely to generate in the minds of the persons concerned the feeling that their private lives are the subject of constant surveillance.*" See *Digital Rights* (n 88), para. 37.

⁶⁸⁵ *Digital Rights* (n 88), para 37; *Digital Rights* (n 620), Opinion of Advocate General Cruz Villalón, paras 52, 72.; H.J. Pandit, D. Lewis, *Ease and Ethics of User Profiling in Black Mirror*, 2018, available at: <https://dl.acm.org/citation.cfm?id=3191614>, p. 1582.

⁶⁸⁶ ICO, "*Democracy disrupted? Personal information and political influence*", 11 July 2018, available at: <https://ico.org.uk/media/2259369/democracy-disrupted-110718.pdf>;

Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: *Action Plan against Disinformation* (JOIN(2018) 36 final), available at: <https://ec.europa.eu/digital-single-market/en/news/action-plan-against-disinformation>

with data protection are linked to the interferences of the right to a fair trial. As underlined by the CJEU, where legislation fails to provide individuals, in this case, users, opportunities to pursue legal remedies in order to have access to their personal data, it also fails to provide an effective remedy in addition to being incompatible with Article 45(1) of the GDPR.⁶⁸⁷

Moreover, this wide-range collection and analysis of personal data by upload filters are classified as a fully automated decision with a significant effect on the user.⁶⁸⁸ As clarified by the Article 22 of the GDPR, users have the right not to be subject to automated individual decision-making and automated profiling.⁶⁸⁹ As the required measures under Article 17(4)(b) and (c) filter and collect personal data while operating, such as IP addresses, it falls within this scope. However, as required by the CDSMD, where suitable measures to safeguard the data subject's rights and freedoms and legitimate interests are laid down, an exemption to Article 22 of GDPR arises.⁶⁹⁰ Thus, where the question of whether these safeguards for Articles 7 and 8 provided within the Directive is answered affirmatively, Article 17's upload filters' decision-making can benefit from this exemption.

However, as argued before, considering the functioning of upload filters, the effective application of the Article's safeguards that ensure the protection of users' rights and freedoms is not easy. For instance, Article 17(9), together with Recital 70 of the CDSMD, states that human involvement is required regarding the complaints, which serves the goal of "recovering" rather than preventing the negative impacts on fundamental rights. However, as argued previously, these interferences and limitations often affect the essence of the users' data protection and privacy rights, making any recovery impossible. Moreover, other than this human review requirement as the remedy for disabled or removed uploads, there is no clear requirement within the Directive that would meet the requirement for placing "*suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, at least*

Communication from the commission to the European parliament, the Council, the European economic and social committee and the Committee of the regions on "Securing free and fair European elections", available at: https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-free-fair-elections-communication-637_en.pdf.

⁶⁸⁷ *Facebook Ireland and Schrems* (n 79), para 187; C-362/14 *Maximilian Schrems v Data Protection Commissioner* [2015] EU:C:2015:650, para 95.

⁶⁸⁸ Information Commissioner's Office, 'Automated Decision-Making and Profiling' (19 May 2021) <<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/automated-decision-making-and-profiling/>> accessed 25 June 2021.

⁶⁸⁹ Article 4(4) of GDPR defines profiling as "any form of automated processing of personal data to evaluate, analyse or predict certain aspects relating to a natural person."

⁶⁹⁰ Article 22(2)(b) of GDPR.

the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision”⁶⁹¹ in an *ex-ante* sense, prior to the fully automated decision of the upload filter. However, it has been acknowledged that placing merely *ex-post* safeguards “*would not be enough for the transposition and application of Article 17(7)*”⁶⁹²

Where these automated decisions take place, according to Article 13(2)(f), users have the right to have meaningful information about the decision regarding their uploads and in addition to the envisaged consequences of the decision.⁶⁹³ Also, under Article 15(1)(h), in automated decision-making cases, users have the right to access “the meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.”⁶⁹⁴ Users, as the subjects of the automated decisions, should be qualified to call these algorithms to account regarding their uploads, the processing of their personal data and profiling. At the very least, users should be able to understand the operation of the algorithms.⁶⁹⁵ However, upload filters’ decision-making is taking place within a black box as they are automated enforcement systems with opaque algorithms making these guarantees technically impossible. Moreover, CDSMD fails to suggest limited data retention via upload filters to what is strictly necessary.⁶⁹⁶ Thus, in the absence of sufficient guarantees of the effective protection of their personal data against the risk of misuse, the protection of users’ data is destined to exist on paper.

Therefore, the analysis of the EU *acquis* reveals that the current technologies that need to be employed under Article 17 can disproportionately interfere with the users’ right to data protection and privacy as they feature processing and profiling, which results in the Member States facing an impossible implementation mission. Therefore, by looking at these far-reaching outcomes, it is important not to underestimate the effects of the measures that

⁶⁹¹ Article 22 (3) of the GDPR.

⁶⁹² Guidance (n 289).

⁶⁹³ Article 13(2)(f) of GDPR.

⁶⁹⁴ Article 15(1)(h) of GDPR.

⁶⁹⁵ Ben Wagner, ‘Algorithmic Accountability: Towards Accountable Systems’ in Giancarlo Frosio (ed), Ben Wagner, *Oxford Handbook of Online Intermediary Liability* (Oxford University Press 2020)

<<http://oxfordhandbooks.com/view/10.1093/oxfordhb/9780198837138.001.0001/oxfordhb-9780198837138-e-35>> accessed 1 July 2021.

⁶⁹⁶ “*In order to satisfy the requirements set out in the preceding paragraph of the present judgment, that national legislation must, first, lay down clear and precise rules governing the scope and application of such a data retention measure and imposing minimum safeguards, so that the persons whose data has been retained have sufficient guarantees of the effective protection of their personal data against the risk of misuse. That legislation must, in particular, indicate in what circumstances and under which conditions a data retention measure may, as a preventive measure, be adopted, thereby ensuring that such a measure is limited to what is strictly necessary*” See *Tele2* (n 88), para 109.

impact data protection online.⁶⁹⁷ While the measures under Article 17 indicate an intrusive and extensive interference on Articles 7 and 8 of the Charter, there is no effective limit on potential data protection harm by the filtering measures of Article 17(4)(b) and (c) for users as individuals and society as a whole. There is no explanation for “less data processor-intrusive”⁶⁹⁸ implementation within the CDSMD, nor in the implementation guidance of Article 17 despite the well-established principle of EU law, which requires the limits on the protection of personal data to be strictly necessary.⁶⁹⁹

Thus, by assessing the impact of automated content moderation on Articles 7 and 8 of the Charter, this chapter shows that the required operation under Article 17 is not sufficiently limited in scope as the content moderation includes all users and neither in duration nor amount of data and this automated decision making can contradict with GDPR too in the absence of effective safeguards. Consequently, this lack of data protection affects other fundamental rights, and the far-reaching consequences that impact other fundamental rights intensify the disproportionality of the measure since, compared to the harm on different fundamental rights, the benefit of preventing the infringing content falls short of constituting a justification for the interference.⁷⁰⁰ As the outcome of the assessment of proportionality is negative, the efficiency of the Article’s safeguards, specifically sections (8) and (9), has to be implemented in a way that they sufficiently limit the monitoring and provide effective protection of users’ personal data against the risk of misuse to ensure that the Article 17’s interference is limited; hence, the Article is compatible with Charter.⁷⁰¹

3.4 Compatibility of Article 17 with the Right to an Effective Remedy and a Fair Trial

The protection of the right to a fair trial is guaranteed by Article 47 of the Charter and Article 6 of the Convention and enshrined as a general principle of Union law by the ECtHR and CJEU. It contains various procedural guarantees regarding access to the remedy,

⁶⁹⁷ *Digital Rights* (n 88) para 55; *Marper v. the United Kingdom* (n 653), para 103; *M. K. v. France*, App no. 19522/09 (ECtHR, 18 April 2013), para 35.

⁶⁹⁸ *Romero-Moreno* (n 328), p.168

⁶⁹⁹ *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy* (n 618), para 56; *IPI v Geoffrey Englebert* (n 618), para 39; *Digital Rights* (n 88), para. 52; *Szabo and Vissy v. Hungary* Application no. 37138/14 (ECtHR, 13 May 2014), para 73.

⁷⁰⁰ Policy Department for Citizens’ Rights and Constitutional Affairs and Directorate-General for Internal Policies (n 59).

⁷⁰¹ *Tele2* (n 88).

independence and impartiality of the progress, equality of arms, the right to a reasoned decision, reasonable duration and timely enforcement. Article 47 also protects the right to an effective remedy, which, while being strongly linked to the right to a fair trial, is a guarantee in its own right, and unlike the Charter, EU Convention has a separate Article to protect only this guarantee.⁷⁰² This right applies regardless of the character of the legislation governing the “dispute”, the parties’ status, and the nature of the authority with jurisdiction in the matter.⁷⁰³ Most importantly, this right is strongly linked with other provisions of the Convention and Charter, therefore, requires a wide interpretation to provide the guaranteed protection of all rights and freedoms.⁷⁰⁴ For instance, the violations of the right to fair trial caused by the lack of effective and “adequate safeguards” also brings the breach of freedom of expression as without the safeguards against abuse, the limitations on the right to freedom of expression are recognised as failing to satisfy the principle of being necessary in a democratic society.⁷⁰⁵ The utmost importance of this right has been emphasised by the ECtHR as being one of the fundamental principles of any democratic society, and the Court underlined the fact that there is no justification for interpreting this right restrictively.⁷⁰⁶ In contrast, this right has the potential of imposing stronger limits than the test of proportionality on other fundamental rights, in this case, the right to intellectual property. Especially when the removal or blocking decisions of OCSSPs are applied EU-wide, Article 47 acts as a minimum procedural standard and might bring some level of homogeneity.⁷⁰⁷ Thus, compliance with this right in the context of CDSMD is twofold; first, the initial decision-making by the OCSSPs and the appeals.

To ensure a fundamental rights-compliant implementation of Article 17, Article 17(9), which ensures the implementation of effective appeal tools, plays an important role. There are many

⁷⁰² Article 13 of the Convention.

⁷⁰³ European Court of Human Rights, ‘Guide on Article 6 of the European Convention on Human Rights’ (2021) <https://www.echr.coe.int/documents/guide_art_6_eng.pdf> accessed 17 February 2022.; *Micallef v. Malta* [GC], App no. [17056/06](#), (ECHR, 2009) [74]; *Bochan v. Ukraine* (No. 2) App no. [.22251/08](#) (ECtHR, 5 February 2015) para 43.

⁷⁰⁴ *Stec and Others v. the United Kingdom* (dec.) [GC], App nos. [65731/01](#) and [65900/01](#), paras 47-48, *Magyar Helsinki Bizottság v Hungary* App no [18030/11](#) (8 November 2016, ECtHR), paras 120; *Mihalache v. Romania* App no [54012/10](#) (GC, 8 July 2019), para 92.

⁷⁰⁵ *Ślomka v. Poland*, App no. [68924/12](#) (ECtHR, 6 December 2018), paras 69-70.

⁷⁰⁶ *Stanev v. Bulgaria* [GC], Application no. [36760/06](#) (ECtHR, 17 January 2012), para 231; *Airey v. Ireland*, Application no. [6289/73](#) (ECtHR, 9 October 1979), para 24; *Pretto and Others v. Italy*, Application no. [7984/77](#) (ECtHR, 8 December 1983), para 21; *Moreira de Azevedo v. Portugal*, Application no. [11296/84](#) (ECtHR, 23 October 1990), para 66.

⁷⁰⁷ Saulius Lukas Kalėda, ‘The Role of the Principle of Effective Judicial Protection in Relation to Website Blocking Injunctions’ (2017) 8 JIPITEC 216.

different scenarios within the online enforcement of copyright that providing users with a complaint and redress mechanism is strictly mandatory to ensure a fair balance between competing fundamental rights. The previous sections explored the negative effects of the measures that OCSSPs are obliged to implement according to Article 17(4) on users' freedom of expression and information, data protection and right to privacy caused by various problems such as inaccuracy and over-blocking issues of upload filters⁷⁰⁸ and the abuse direct takedown tools.⁷⁰⁹ The combination of these problems with the inadequate safeguards that fail to offer an effective appeal for the erroneous decision of platforms creates an environment surrounded by serious concerns regarding the enforcement of the users' right to an effective remedy and a fair trial. Therefore, to tackle these important problems and reach a fundamental right-compliant implementation that respects Article 47 as well as other fundamental rights of the Charter, Article 17(9) plays a critical role.⁷¹⁰ Article 17(9) requires effective and expeditious complaint and redress mechanisms for the blocking and removal disputes and ensures that these complaints should be subject to human review and processed without undue delay.⁷¹¹ In addition to this in-platform measure, Member States must ensure the out-of-court redress mechanisms that should allow disputes to be settled impartially and judicial remedies for users to assert the use of an exception or limitation to copyright and related rights.⁷¹²

Following the guarantees of Article 17(9), in the context of online enforcement of copyright within the platforms, the right to access to remedy for users initially shows itself as the access to complain and redress mechanisms. Accordingly, these mechanisms should be independent, equal and provide sufficiently reasoned and timely decisions.⁷¹³ Therefore, users whose fundamental rights and freedoms are affected by automated content moderation should be able to access an effective redress mechanism in order to fulfil the guarantees generated from the right to an effective remedy and a fair trial. As explained in the previous sections, these measures, with the filtering and monitoring they perform, can affect users' freedom of expression and impart information, freedom of arts, data protection and privacy rights. In such cases, ensuring easy access to practical dispute resolution tools is essential for

⁷⁰⁸ See Chapter 3.

⁷⁰⁹ See Chapter 4.

⁷¹⁰ *Poland v European Parliament* (n 79), para 94.

⁷¹¹ Recital 70 and Article 17(9) of CDSMD.

⁷¹² *ibid.*

⁷¹³ Article 6 of the Convention; Article 47 of the Charter; Concurring Opinion of Judge Pinto De Albuquerque in *Yildirim v. Turkey* (n 1).

exercising the right to an effective remedy.⁷¹⁴ Through these resolution tools, users should be able to effectively seek compensation for the harm caused by the limitations on their fundamental rights, especially when their use of copyright exceptions and limitations is at stake.⁷¹⁵

While the Directive is silent regarding the operational details of these mechanisms, most of the complaint and redress mechanisms in practice follow the DMCA's "counter-notice" mechanism.⁷¹⁶ This mechanism enables, after receiving the notification regarding the blocking of the upload filter or removal due to takedown notice, the user to submit a counter notice via the platform for the rightholder that claims that their work has been used unlawfully within the upload by the user.⁷¹⁷ Then, the rightholder has ten days to file a suit or take no action, which results in restoring the upload. In most user-generated content platforms such as YouTube, rightholder, after receiving the in-platform dispute regarding their automated content ID claim, which enables them to block or restrict the video, reviews the dispute and can release or reinstate their claim, submit a takedown request or let the claim expire by not responding to the dispute in 30 days.⁷¹⁸ If the rightholder chooses to reinstate the claim, the user can appeal this decision; however, the review is being undertaken by the rightholder again. If the rightholder chooses to reinstate their claim during the appeal, only then the DMCA process begins as they need to submit a takedown request which the user can submit a counter-notification. Similarly, Facebook and Instagram also allow users to submit a dispute regarding the blocking placed by the rightholder on the content that matched their reference files that the platform's upload filter has detected according to their customised

⁷¹⁴ Recommendation CM/Rec(2008)6 of the Committee of Ministers to member States of 26 March 2008 on measures to promote the respect for freedom of expression and information with regard to Internet filters [2008] states that guarantee that nationwide general blocking or filtering measures are only introduced by the State if the conditions of Article 10, paragraph 2, of the European Convention on Human Rights are fulfilled. Such action by the State should only be taken if the filtering concerns specific and clearly identifiable content, a competent national authority has taken a decision on its illegality and the decision can be reviewed by an independent and impartial tribunal or regulatory body, in accordance with the requirements of Article 6 of the European Convention on Human Rights. Also see Concurring Opinion of Judge Pinto De Albuquerque in *Yildirim v. Turkey* (n 1).

⁷¹⁵ Recital 70 and Article 17(9) of CDSMD.

⁷¹⁶ Section 512(g) 17 U.S.C.

⁷¹⁷ Section 512(g) 17 U.S.C.

⁷¹⁸ YouTube, 'Dispute a Content ID Claim' (*YouTube Help*)

<https://support.google.com/youtube/answer/2797454?hl=en-GB&ref_topic=9282678#zippy=%2Cwhat-the-claimant-can-do%2Cwhy-does-the-claimant-review-both-the-initial-dispute-and-the-appeal> accessed 17 August 2022.

match rules. When the rightholder receives the dispute, they can uphold the block, release their claim on the video, or submit a takedown request.⁷¹⁹

Most of the research on the complaint and redress mechanisms shows the ineffectiveness of these tools, which brings the risk of being incompatible with the guarantees of Article 47.⁷²⁰ This unpopularity stems from their lack of user-friendly operation and independence and impartiality, lengthy process times, and problems with the timely enforcement of the final decision.⁷²¹ For instance, while users have little to no knowledge of the official DMCA disputes, especially compared to most of the rightholders who have dedicated teams on that, the YouTube appeal mechanism requires users to file official counterclaims to continue to argue their upload's lawfulness.⁷²² Unsurprisingly, the number of uploaders who filed counterclaims against the removals is extremely low, as the average user would find the official procedure intimidating and costly. As platforms serve the rightholders with their automated tools, which assist them in generating automated claims on users' uploads and reviewing their disputes and appeals regarding their claims, users have found no motivation to appeal.⁷²³

Accordingly, these problems raise questions about the compatibility of the in-platform decision-making, especially the appeals via complaint and redress mechanisms, with the institutional and procedural requirements of the right to a fair trial. The institutional requirements include compatibility with the concept of a "tribunal", establishment by law, independence and impartiality, while procedural requirements ensure the fairness of the appeal. Procedural requirements include the principles such as equality of arms, admissibility of evidence, the presumption of innocence and timeliness.⁷²⁴

⁷¹⁹ Meta, 'Disputes in Rights Manager' (*Meta Business Help Centre*)

<<https://www.facebook.com/business/help/212149709664331>> accessed 17 August 2022.

⁷²⁰ The currently available complaint and redress tools are outdated and insufficient; their application rate varies between 0.08% and 0.6% See Annermarie Bridy and Daphne Keller, 'US Copyright Office Section 512 Study [Docket no 2015-7] Comments of Annermarie Bridy and Daphne Keller.' (2017) <https://www-cdn.law.stanford.edu/wp-content/uploads/2017/08/SSRN-id2920871.pdf>.

⁷²¹ Jennifer M Urban, Joe Karaganis and Brianna Schofield (n 14).

⁷²² YouTube, 'Dispute a Content ID Claim' (*YouTube Help*)

<https://support.google.com/youtube/answer/2797454?hl=en-GB&ref_topic=9282678#zippy=%2Cwhat-the-claimant-can-do%2Cwhy-does-the-claimant-review-both-the-initial-dispute-and-the-appeal> accessed 17 August 2022.

⁷²³ YouTube, 'Copyright Claim Basics - YouTube Help' (*YouTube Help*)

<https://support.google.com/youtube/topic/9282678?hl=en-GB&ref_topic=2676339> accessed 17 August 2022.

⁷²⁴ European Court of Human Rights, 'Guide on Article 6 of the European Convention on Human Rights' (2021) <https://www.echr.coe.int/documents/guide_art_6_eng.pdf> accessed 17 February 2022.; Felipe Romero

3.4.1 Compatibility with Institutional Requirements of Right to Fair Trial

Institutional requirements serve the fundamental principles of the rule of law and the separation of powers as distinct fair-trial guarantees.⁷²⁵ According to Article 6 (1) of the Convention, everyone is entitled to a hearing by an independent and impartial tribunal established by law. While a “tribunal” does not have to be a court of law, it must follow the procedural safeguards under Article 6 of the Convention to be considered a “tribunal” established by law.⁷²⁶ In addition to that, it must be independent of the executive and impartial.⁷²⁷ However, as explained previously, complaint and redress mechanisms are in-platform tools designed or implemented by the OCSSPs. According to Article 17(9), rightholders only have to “*duly justify the reasons for their requests*” of blocking and removal, which will result in decisions that would be subject to the human review conducted by the employees of the platform.

It appears that Article 17(9) leaves the final decision to the platform regarding the upload in question. This, amongst other incompatibilities with the right to a fair trial, makes it clear that OCSSPs are unfit for the duty of deciding the upload’s online status. As a body that affects users’ fundamental rights with its decisions, it lacks the required characteristics of tribunals under Article 6, especially independency and impartiality. These two interlinked concepts constitute one of the important institutional requirements of the right to a fair trial and also interact with that of a “tribunal established by law” within the meaning of Article 6 (1).⁷²⁸ While independency is a prerequisite for impartiality, it requires that the necessary personal and institutional independence is ensured, which is a must for impartial decision-making. The obligation of ensuring independence and impartiality is not limited to judiciary actions; safeguards of independence and impartiality must be effectively incorporated into everyday

Moreno, ‘Incompatibility of the Digital Economy Act 2010 Subscriber Appeal Process Provisions with Article 6 of the ECHR’ (2014) 28 *International Review of Law, Computers & Technology* 81.

⁷²⁵ *Guðmundur Andri Ástráðsson v. Iceland* [GC], App no. 26374/18 (ECtHR, 1 December 2020), para 233.

⁷²⁶ *Eminağaoğlu v. Turkey*, App no. 76521/12 (ECtHR, 9 March 2021), paras 99-105; *Guðmundur Andri Ástráðsson v. Iceland* (n 701); *Rolf Gustafson v. Sweden*, App no. 23196/94 (ECtHR, 1 July 1997), para 45.

⁷²⁷ *Le Compte, Van Leuven and De Meyere v. Belgium*, App no. 6878/75 (ECtHR, 23 June 1981), para 55; *Guðmundur Andri Ástráðsson v. Iceland* (n 701), paras 231ff.

⁷²⁸ *Denisov v. Ukraine* [GC], App no. [76639/11](#) (ECtHR, 25 September 2018), paras 61-64; *Guðmundur Andri Ástráðsson v. Iceland* (n 701), paras 231ff.

practices such as in-platform appeal mechanisms.⁷²⁹ However, as private entities that follow rightholders' instructions and protect their benefits as it aligns with theirs, OCSSPs fail to present an appearance of independence and fail to ensure the absence of prejudice or bias.⁷³⁰

Article 17 (9) constitutes a very important safeguard and an instrument for users to enforce their rights, so the implementations should implement this safeguard to the full by making sure that the means are placed in and out of the platform for users to dispute the erroneous decisions regarding their uploads. In light of the institutional requirements of the right to fair balance, one of the things to be guaranteed should be the objectivity of the in-platform disputes.⁷³¹

3.4.2 Compatibility with Procedural Requirements of Right to a Fair Trial

Fairness ensures that all procedural guarantees of Article 6(1) secure the interests of the parties and those of the proper administration of justice and, therefore, achieve the aim of the Convention, which guarantees that the rights are “*practical and effective*” rather than “*theoretical or illusory*.”⁷³² This requirement contains many elements of the right to a fair trial, such as the “equality of arms” principle, which requires striking a fair balance between the parties by providing each of them reasonable opportunity to present their case.⁷³³ This is one of the characteristic requirements of the broader notion of a fair trial and an essential step to provide an effective remedy by balancing the powers within online copyright enforcement.⁷³⁴ ECtHR emphasised this principle in many decisions and stated that even the

⁷²⁹ *Agrokompleks v. Ukraine* Application no. 23465/03, (ECtHR, 6 October 2011), para 136.

⁷³⁰ *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], Applications nos. [55391/13](#), [57728/13](#) and [74041/13](#) (ECtHR, 6 November 2018), paras 144-145. More specifically, it has been established by the ECtHR that where decision making body includes a member who undertakes even secondary duties regarding one of the parties' organisation, there is a legitimate doubt about the independence which seriously affects the confidence which the courts must inspire in a democratic society. See *Campbell and Fell v. The United Kingdom*, Application no. 7819/77 (ECtHR, 28 June 1984) paras 39-40; *Piersack v Belgium* Application no. 8692/79 (ECtHR, 1 October 1982), para 30.

⁷³¹ For detailed discussion See Chapter 5.

⁷³² *Perez v. France* [GC], (Application no. 47287/99) (ECtHR, 12 February 2004), para 80; *Airey v. Ireland* (n), para 24; *Nideröst-Huber v. Switzerland*, Application no. 18990/91 (ECtHR, 18 February 1997), para 30.

⁷³³ *Feldbrugge v. the Netherlands*, Application no. [8562/79](#) (ECtHR, 29 May 1986), para 44; *Kress v. France* [GC], Application no. [39594/98](#) (ECtHR, 7 June 2001), para 72; *Regner v. the Czech Republic* [GC], Application no. [35289/11](#) (ECtHR, 19 September 2017), para 146.

⁷³⁴ Felipe Romero-Moreno, “Notice and Staydown” and Social Media: Amending Article 13 of the Proposed Directive on Copyright’ (2019) 33 *International Review of Law, Computers & Technology* 187. p. 201.

simple impression of imbalance in the defendant's rights indicates an infringement of Article 47 of the Charter.⁷³⁵

Most of the examples of failure to observe the equality of arms principle in case law were caused by when one of the parties had been placed at a clear disadvantage. For instance, this principle was found to have been breached where the opposing party enjoyed significant advantages as regards access to relevant information, occupied a dominant position in the proceedings and influenced the Court's decision-making.⁷³⁶ Similarly, where an opposing party had functions and positions that put them in an advantageous position which makes challenging them adequately and equally difficult, Court found a breach of the principle of equality of arms, therefore, a breach of Article 6(1).⁷³⁷ Thus, this principle requires the guarantee of the balance between rightsholders, platforms and users within the online enforcement. However, the current picture with online copyright enforcement is imbalanced; users as individuals are not equal to OCSSPs nor offered equal opportunities to what rightsholders have. As they are, complaint and redress mechanisms fail to satisfy these institutional requirements of the right to a fair trial, and CDSMD does not provide any obligation that would change this current picture and non-compliance with the guarantees of Article 47 of the Charter effectively.

Upload filters automatically block the content even before it has been uploaded to the platform without allowing users to provide their input regarding the legitimacy of their upload. This removal takes place before the user has the knowledge and the chance to respond. Similarly, the notice and takedown let rightsholders order the removal of the content from the platform before the confirmation of the infringing status of the content. While the Directive is silent regarding the operational details of these mechanisms, most of the complaint and redress mechanisms in practice follow the DMCA's "counter notice" mechanism.⁷³⁸ These takedown notices are sent by rightsholders with a strong knowledge of copyright law, unlike the users who find the counter-notice processes "intimidating and confusing."⁷³⁹ Most of the time, these notifications are sent automatically without a check

⁷³⁵ *Neumeister v Austria* App no 1936/63 (27 May 1966) 1 EHRR 191; *Borgers v Belgium* App no 12005/86 (20 October 1991) 15 EHRR 92; *Brown & Williamson Tobacco Corp. v. Finland*, App. No. 23749/94 (2 December 1997) (Report of the Commission).

⁷³⁶ *Yvon v. France* Application no. [44962/98](#) (ECtHR, 24 April 2003), para 37.

⁷³⁷ *De Haes And Gijssels v. Belgium* (Application no. [19983/92](#)) (ECtHR, 24 February 1997), paras 53-59.

⁷³⁸ Section 512(g) 17 U.S.C. Explained below and in detail in Appendix B.

⁷³⁹ Jennifer M Urban, Joe Karaganis and Brianna Schofield (n 14), p. 118.

regarding the actual ownership of the work, which is allegedly used in an unauthorised manner by the user, which causes a large number of false positives.

The fact that automated systems of OCSSPs operate based on the information that rightholders provide constitutes an important reason which amplifies the inequality of arms. The fact that there is no adequate liability for rightholders who abuse the notice and takedown mechanism is making the situation even worse.⁷⁴⁰ In practice, the risk of receiving a copyright claim is high for users, even for their videos which do not include the use of any copyright-protected work.⁷⁴¹ Nevertheless, according to Article 17, rightholders have to only “*duly justify*”⁷⁴² their requests with “*sufficiently substantiated notices*” from rightholders for OCSSPs to remove the current works and “relevant and necessary information” for the future uploads of the notified works and there is no clarification regarding the elements to be included in the information to be provided by the rightholders within the Directive.⁷⁴³

As examined more in detail previously, big rightholders have access to privileged takedown tools that do not require any assessment of the legitimacy of the upload; it gives the power to block or remove the upload with one click to these rightholders. Moreover, there are platforms’ own policies, such as the “three copyright strike” policy, which results in the termination of the account and removal of all videos where the channel receives three copyright claim notifications known as copyright strikes, that are intensifying the imbalance between users and rightholders.⁷⁴⁴ These tools enable rightholders to remove channels from the platforms and give them the power of the constant threat of permanent invisibility against creators.⁷⁴⁵ On top of this imbalanced distribution of the remedies, platforms often take sides

⁷⁴⁰ An empirical study shows that around seven out of ten requests are “bad requests” which suffers from various errors such as being mistargeted, not following the statutory requirements, or being directed to a video that benefits from a copyright exception. See Jennifer M Urban, Joe Karaganis and Brianna Schofield (n 14), p. 117.

⁷⁴¹ David Kaye and Joanne E Gray, ‘Copyright Gossip: Exploring Copyright Opinions, Theories, and Strategies on YouTube’ (2021) 7 Social Media + Society 205630512110369. p.9

⁷⁴² *When rightholders request the service providers to take action against uploads by users, such as disabling access to or removing content uploaded, such rightholders should duly justify their requests.* See Recital 70 of CDSMD.

⁷⁴³ However, Commission recommends for the notices concerning stay-down requests to contain “*an explanation of the reasons why the notice provider considers that content to be illegal content and a clear indication of the location of that content*” in line with the Commission’s Recommendation on Measures to Effectively Tackle Illegal Content Online. See Guidance (n 289).; European Commission, ‘Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online’ C/2018/1177 OJ L 63, 6.3.2018, p. 50–61. 57.

⁷⁴⁴ ‘Copyright Strike Basics - YouTube Help’ <<https://support.google.com/youtube/answer/2814000?hl=en-GB>> accessed 5 December 2022.

⁷⁴⁵ D Bondy Valdovinos Kaye and Joanne E Gray, ‘Copyright Gossip: Exploring Copyright Opinions, Theories, and Strategies on YouTube’ (2021) 7 Social Media + Society 205630512110369. p.9.

with the rightholders as they have aligned interests as business entities. This clearly puts rightholders at an advantage and in a dominant position that completely affects the decision-making regarding the upload.

On the contrary to this advantageous position granted to rightholders, users have only insufficient tools for their appeals. The fact that these mechanisms are known for their failure to provide users with quick and effective solutions as they do to the rightholders also constitutes one of the factors that discourage users from resorting to these mechanisms.⁷⁴⁶ As examined previously, complaint and redress mechanisms historically suffer from efficiency problems; users are mostly unaware of these mechanisms or find the tools complicated to use.⁷⁴⁷ Thus, in these circumstances, it is hard to say that users have an equal arm regarding defending their rights, especially for remedying over-removal and over-blocking via *ex-post* complaint and redress.

The counter-notices as *ex-post* remedies have several problems regarding their efficiency. First, their *ex-post* nature limits the defences that users can rely on. Furthermore, the complaint and redress mechanisms have lengthy process times, which also conflicts with the reasonable time guarantee of Article 47, another procedural requirement of the right to a fair trial. Being able to restore their lawful uploads in a timely manner has great importance for the users, especially for their rights to an effective remedy, freedom of expression, and even for their right to intellectual property, as in some cases, this delay can cause economic loss to the user.⁷⁴⁸ The duration in Article 17(9) for the OCSSPs to process user complaints is “*without undue delay*”, which is compared to the duty of *expeditiously* removing content upon receiving the rightholders’ notice would fail to sufficiently safeguard the users’ rights in practice.

On this point, the lack of notifying duties for OCSSPs regarding their actions also raises concerns. This absence of any obligation within the Article to notify the user about the

⁷⁴⁶ Jennifer M Urban, Joe Karaganis and Brianna Schofield (n 14).

⁷⁴⁷ Jennifer M Urban and Laura Quilter (2006) ‘Efficient Process or Chilling Effects - Takedown Notices under Section 512 of the Digital Millennium Copyright Act’ Santa Clara High Tech. L.J. 22; Jennifer M Urban, Joe Karaganis and Brianna Schofield (n 14); United States Copyright Office, ‘Section 512 Of Title 17 A Report Of The Register Of Copyrights’ (2020). <https://www.copyright.gov/policy/section512/section-512-full-report.pdf>> accessed 23 September 2020.

⁷⁴⁸ For instance, where the uploaded content includes commentary regarding current events, the harm may not be recoverable. See *Observer and Guardian v. the United Kingdom* (n 554), para 60; *Yildirim v. Turkey* (n 1), para 47.

decision and the reasoning of the decision about their upload and the actions to be undertaken accordingly by the OCSSPs conflicts with the guarantees of Article 47 of the Charter. A timely notification with sufficient information constitutes a crucial step to guarantee users' right to an effective remedy.⁷⁴⁹ Sufficient information should include not only the decision of the OCSSPs but also the possibility of contesting that decision through the submission of a user-friendly counter-notice mechanism that has to process this counter-notice within a reasonable time period.⁷⁵⁰

The procedural requirement fairness also comprises the requirement to provide sufficient reasoning for the decisions that would enable the parties to make effective use of the right of appeal.⁷⁵¹ Thus, in line with the guarantees of the right to a fair trial, algorithmic enforcement itself must be designed in a way that it enables users to have access to the reasoning of its decisions, including the criteria used by the algorithm to ensure respect for the right to an effective remedy and a fair trial.⁷⁵² As the automatically generated decisions regarding the user upload fail to provide any reasoning that would justify the blocking or removal that they operate, this algorithmic enforcement of the copyright required by Article 17(4) brings transparency, accountability, and contestability problems and consequently fails to meet the right to fair trial requirements. These interdependent principles require enforcement tools to disclose their methods and processes adopted while making an automatically generated decision, taking responsibility for this decision, and, perhaps most importantly, in the context of the right to a fair trial, be able to be challenged regarding the outcome of this decision.⁷⁵³ Thus, achieving transparent and accountable automated systems, an important requirement for the right to a fair trial is almost impossible as there are technical, regulatory and organisational challenges in place. For instance, as a technical issue, it is almost impossible to establish reasoning for the decisions of fast-learning neural networks because of their way of

⁷⁴⁹ *Tele2* (n 88), para 100.; *Bărbulescu v. Romania* (n 634), para 133.

⁷⁵⁰ *Guidance* (n 289), p.11.

⁷⁵¹ *De Haes and Gijssels v. Belgium* (n 737), para 53; *Hirvisaari v. Finland*, App no [49684/99](#) (ECtHR, 27 September 2001), para 30.

⁷⁵² Giancarlo Frosio and Christophe Geiger, 'Taking Fundamental Rights Seriously in the Digital Services Act's Platform Liability Regime' (The Center for Internet and Society 2020) <<https://ssrn.com/abstract=3747756> or <http://dx.doi.org/10.2139/ssrn.3747756>>.

⁷⁵³ Council of Europe, Committee of experts on human rights dimensions of automated data processing and different forms of artificial intelligence (MSI-AUT), 'Draft Recommendation of the Committee of Ministers to member States on human rights impacts of algorithmic systems' [12 November 2018] MSI-AUT(2018)06, 6-7 <<https://rm.coe.int/draft-recommendation-on-human-rightsimpacts-of-algorithmic-systems/16808ef256>>; Maayan Perel and Niva Elkin-Koren, 'Accountability in Algorithmic Copyright Enforcement' (2016) 19 *Stan Tech L Rev* 473, 481.

operating.⁷⁵⁴ Trade secrets can also pose an obstacle to the required transparency.⁷⁵⁵ As an organisational challenge, big OCSSPs are known for their refusal to share information regarding counter-notices received and the time needed for taking action.⁷⁵⁶ This lack of transparency, while going against expectations from platforms⁷⁵⁷, also causes problems with estimating the effectiveness of the complaint and redress mechanisms in place. Therefore, problems with transparency constitute a big hole rather than a chink in the armour of the compatibility of automated tools.

For currently available automated enforcement tools meeting these standards is not possible, and neither will be possible in the near future as the technical obstacles regarding machine learning and algorithms explained in the previous chapter will remain.⁷⁵⁸ This makes the efficient implementation of Article 17(9), which ensures the obligations of Article 17 are proportionate, unlikely. Ensuring these standards and ensuring the decision-making in the platform is accompanied by sufficient reasoning with the human review is very challenging, especially considering the high risk of human review for all blocking and removal decisions being unfeasible in practice. Despite the wording of the article, which states that these complaints will be processed ‘without undue delay’, facilitating this human review is a challenging task for OCSSPs that requires significant resources, which only a number of OCSSPs have. Especially for the platforms which host a significant number of user-generated content, ensuring a prompt, case-by-case human review seems to be an impossible mission, in addition to being extremely disproportionate. In addition to many operational challenges, providing a human review to decide if the removed or blocked upload should be restored or not for every challenged decision, in practice, will lengthen the already lengthy process time of complaint and redress mechanism, which would result in incompatibility with right to a

⁷⁵⁴ Giancarlo Frosio, ‘Algorithmic Enforcement Online’ in Paul Torremans (ed), *Intellectual Property and Human Rights* (4th edn, Kluwer Law International 2019) <<https://www.ssrn.com/abstract=3726017>> accessed 6 July 2021.

⁷⁵⁵ While some confidentiality is reasonable, in light with principle of proportionality, leaving the users in the dark concerning the removal or blocking of their lawful communications by these automated systems is not acceptable from fundamental rights perspective.

⁷⁵⁶ Annemarie Bridy and Daphne Keller (n 720).

⁷⁵⁷ Commission, ‘Commission Recommendation of 1.3.2018 on measures to effectively tackle illegal content online’ Brussels, 1.3.2018C(2018) 1177 final. <<https://digital-strategy.ec.europa.eu/en/library/commission-recommendation-measures-effectively-tackle-illegal-content-online>>. p.12.

⁷⁵⁸ Evan Engstrom and Nick Feamster (n 164).

fair trial as the assessment of the reasonable-time requirement obligates the organisation of the system that guarantees the decision will be delivered within a reasonable time.⁷⁵⁹

However, as argued above, the wording “*without undue delay*” is more loosely defined than prompt blocking and removal duty and gives the impression of an “*elastic timeframe*” for the human review and the handling of the complaints.⁷⁶⁰ Thus, there is a high chance for the human review safeguard to fail to function as envisaged by the lawmaker, therefore, fail to guarantee the right to a fair trial. In addition to that, it also fails to deliver the guarantees of freedom of expression and imparting information, as there is a high chance for the upload to lose its value during the processing of the complaint.⁷⁶¹ As this safeguard aims to ensure proportionate filtering and protect the freedom of expression of users, it would also bring the result of breaching the right to a fair trial for the reason of failing to provide effective and adequate safeguards against abuse of freedom of expression.⁷⁶²

Moreover, the objectivity of the complaint and redress, including the human review conducted by the OCSSPs’ employees, raises another issue regarding the fairness of the assessment for the user appeals. The decision-making body’s members would be appointed by the OCSSPs, which historically prioritates rightholders’ interests as it aligns with theirs and the heavy obligations of Article 17(4) to ensure the unavailability of works provided by the rightholders’ comprehensive lists of works. This combination is likely to motivate staff to perform over-blocking. Leaving the important task of responding to complaints to OCSSPs as private companies which are not qualified to replace courts of law constitutes an “*inappropriate transfer of juridical authority to the private sector*”.⁷⁶³ Leaving practical

⁷⁵⁹ Article 6 § 1 of the Convention; European Court of Human Rights, ‘Guide on Article 6 of the European Convention on Human Rights’ (2021) <https://www.echr.coe.int/documents/guide_art_6_eng.pdf> accessed 17 February 2022. The importance of administering justice without delays for the right to fair trial has been continuously underlined by the ECtHR as these delays endanger the effectiveness and credibility of the justice. See *H. v. France*, App no. 10073/82 (ECtHR, 24 October 1989), para 58; *Bottazzi v. Italy* [GC], App no. [34884/97](#), (ECtHR, 28 July 1999) para 22; *Scordino v. Italy (no. 1)* [GC], Application no. [36813/97](#) (ECtHR, 29 March 2006), para 224.

⁷⁶⁰ *Senftleben* (n 292) 9.

⁷⁶¹ *Poland v European Parliament*, AG Opinion (n 272), para 188; Most of the user generated content is about current works and events; especially the ones which benefit from copyright exceptions such as review, parody and pastiche. This discussed in detail above under the impact on freedom of expression.

⁷⁶² *Słomka v. Poland* (n 705), 69-70.

⁷⁶³ European Commission (2010), ‘Summary of the results of the Public Consultation on the future of electronic commerce in the Internal Market and the implementation of the Directive on electronic commerce (2000/31/EC)’ Available at http://ec.europa.eu/internal_market/consultations/docs/2010/ecommerce/summary_report_en.pdf; *Poland v European Parliament*, AG Opinion (n 272).

solutions to private parties alone would bring significant adverse effects on the users' fundamental rights, especially the right to a fair trial and an effective remedy, while profoundly affecting the transparency of the enforcement. It is unlikely for OCSSPs as commercial entities to put their users' fundamental rights protection over their platform's protection from liability. This biased nature of the operation will likely negatively impact the assessment's independence and impartiality, resulting in Article 17(9) failing to satisfy the guarantees of the right to a fair trial. Thus, the effectiveness of the human review alone is questionable as this safeguard constitutes an *ex-post* remedy only, which takes place after the automated decision of the OCSSPs regarding the upload already took place, and the human review has doubts regarding its impartiality and objectiveness.

Thus, by looking at the problems examined within this section, one can say that the traditional complaint and redress mechanisms under Article 17(9) do not satisfy the requirements of the right to a fair trial as they fail to offer the users effective means of appeal and any practical and effective tool to guarantee their fundamental rights. As the above examination reveals that in-platform decision-making is riddled with different challenges that impact users' right to a fair trial, the importance of the requirement in the Article for Member States to ensure that users have access to these other remedies becomes more significant for users to be able to benefit their rights under Article 47 of Charter. With these further redress tools, the procedural flaws within the in-platform redress mechanisms may be remedied with the decision of the court or another body that settles disputes impartially.⁷⁶⁴ Other remedies of Article 17(9) include out-of-court mechanisms and access to a court for asserting the use of an exception or limitation to deal with erroneous removal.⁷⁶⁵ However, the appeal through courts by users to challenge the final decisions of OCSSPs is known for its low application rates.⁷⁶⁶ The litigation path is intimidating the users with its costly, lengthy and complicated operation, which requires a high standard of proof, and the fact that most of the time, the true recovery of their rights is unlikely is making them unattainable.⁷⁶⁷ Thus, the compatibility of this with the right to a fair trial, particularly the assessment of the reasonable time, is questionable, considering that this would be most likely to result in the lawful content losing

⁷⁶⁴ *Obermeier v. Austria*, Application no. 11761/85 (ECtHR, 28 June 1990), para 70.

⁷⁶⁵ Recital 70 of CDSMD.

⁷⁶⁶ Jennifer M Urban, Joe Karaganis and Brianna Schofield (n 14), 46.

⁷⁶⁷ Jennifer M Urban, Joe Karaganis and Brianna Schofield (n 14).

its value during the appeal process, therefore, cause irreversible harm to right to freedom of expression and impart information.

The above discussion shows that the redress mechanisms alone likely to fail to offer effective remedies for users, therefore, failing to comply with Article 47 of the Charter; with the current counter-notice systems, users are often not able to put forward their legitimate defences regarding the erroneous decisions and also fail to provide a remedy regarding the takedown misuses. As these resolution tools fail to provide an effective check on erroneous decisions or excessive removals, they do not fit the requirements of the guarantee of an effective remedy and a fair trial; therefore, they also fail to solve the problems with over-enforcement and rectify the negative impact on the other fundamental rights efficient enough to ensure proportionality. Even though it is clear that the use of algorithmic tools without proper safeguards is most likely to result in the undesirable situation of weak protection of fundamental rights online, safeguards in Article 17 are subject to shortcomings that make the effective protection of fundamental rights and fair balance challenging. This shows, once more, that while endorsing automated enforcement measures which include extensive filtering and monitoring, Article 17 fails to fine-tune the competing interests and strike a fair balance between copyright protection and other fundamental rights.

As Article 17(9) plays an essential role in protecting the right to a fair trial and other fundamental rights of users, such as freedom of expression and the right to privacy, the need for a high degree of efficiency and reliability for this safeguard to work as intended should not be underestimated.⁷⁶⁸ Thus, in order to ensure compliance with the Charter and effectively implement Article 17 (9), the implementation should include various safeguards on different levels of content moderation to make the measure proportionate. National implementations should first require redress mechanisms that ensure human review to be implemented within the platform for users to challenge the OCSSPs' decisions; second, they should ensure the availability of out-of-court redress mechanisms; and lastly, provide court-level appeals on the specialist court or equivalent impartial judicial authority that delivers timely decisions while being realistically affordable.

⁷⁶⁸ Axel Metzger and others (n 285), p.17.

3.5 Conclusion

By looking at the above discussion, the high-level enforcement required by the CDSMD brings a significant risk to the protection of fundamental rights. The enforcement of copyright, especially through the use of automated tools, motivated by the Directive's strict liability regime, limits the exercise of various fundamental rights of the users online disproportionately. While the increased technological capability of automated copyright enforcement tools inspired the shift in online copyright enforcement law and policy, it was important for lawmakers to take this "man versus machine" scenario's implications seriously while updating the regulation.

However, CDSMD gives incentives to OCSSPs to implement these automated copyright enforcement tools without indisputably ensuring the limits on their impact on fundamental rights. Considering the lack of transparency and other issues with these technologies examined above, in practice, the choice of technology, as well as the extent of use, are substantially up to platforms, and therefore, the dangers that this practice poses on fundamental rights are significant. For instance, there is no guarantee that these technologies will stick to their initial installation purpose; they can absorb and integrate some additional functions beyond the purpose of preventing copyright infringements.

Article 17(4)'s obligations open the door to disproportionate interferences with different fundamental rights and, therefore, to incompatibilities with the Charter, various regulations such as DSA and GDPR, and important principles of EU law such as fair balance. The fact that implementing upload filters is the only realistic option to avoid liability for OCSSPs, considering the challenges with licensing, worsens the disproportionate enforcement of copyright performed by the measures. The harms of this over-enforcement on users' fundamental rights are often unrecoverable with the *ex-post* remedies that the Directive offers to users contrary to the *ex-ante* tools that rightholders are equipped with. These problems once more underlined the importance of the national implementation of Article 17 as the only way to ensure a fair balance between fundamental rights and respect to the principle of proportionality is focusing on the efficient safeguards for users' rights during the implementation of the Directive.

In the *Poland* case, where the validity of Article 17 obligations in Article 17(4)(b)-(c) was in question, efficiently implemented safeguards that sufficiently limit the interferences of these obligations on fundamental rights in line with Article 52(1) Charter acknowledged as the way to ensure Article is striking a fair balance between competing fundamental rights, therefore, compatible with the Charter.⁷⁶⁹ However, achieving this in practice remains a significant challenge as it requires the Member States to put detailed and practically enforceable safeguards into their implementation by taking into account the problems with putting Article's safeguards into practice. Thus, the stress on fundamental right-compliant implementation within the decision, together with the explicit statement of the obligation for Member States to interpret the provision in compliance with fundamental rights and the principle of proportionality, can be read as an obligation for Member States to avoid a literal implementation of safeguards and focus on the practical guarantees for the fundamental rights.⁷⁷⁰

In order to ensure proportionality, fair balance and respect to fundamental rights, national implementations should not merely include the safeguards with a literal implementation of the Directive; they should specify concrete safeguards, especially against automated blocking of legitimate content. Moreover, national implementations must include clear sanctions for the failure to implement the safeguards in the Article in a way that sufficiently ensures the guarantees for users' fundamental rights. The effective implementation of necessary safeguards to protect users' fundamental rights and ensure overall transparency regarding online enforcement of copyright should be Member States' priority as the overall assessment largely depends on how the Article's fundamental rights' guarantees are interpreted.⁷⁷¹

Therefore, the main outcome to be drawn from this analysis is that although the obligations of Article 17 interfere with freedom of expression, data protection and right to privacy, and the right to a fair trial, the incompatibilities mentioned above can be resolved by implementing the safeguards effectively, in a way that limits the impact on the fundamental rights at stake and ensures the proportionality. Member states should take the implementation as an

⁷⁶⁹ *Poland v European Parliament* (n 272), paras 84-97.

⁷⁷⁰ *Poland v European Parliament* (n 272), para 99.

⁷⁷¹ Paul Keller, 'CJEU Hearing in the Polish Challenge to Article 17: Not Even the Supporters of the Provision Agree on How It Should Work' (*Kluwer Copyright Blog*, 11 November 2020)

opportunity to ensure more effective protection of the users' rights, especially for their legitimate uses and go further than the traditional approach of formal and procedural safeguards.⁷⁷² First, the incompatibilities with freedom of expression, right to impart information and freedom of arts must be addressed since the scope of the effects of the Article's measures on these rights is quite broad. As stated by the CJEU, Member States, in their implementation of the Article, “*must take into account, ex-ante, respect for users' rights.*”⁷⁷³ To strike a fair balance, there should be *ex-ante* safeguards to ensure the legitimate uses that users can benefit from before the automated filtering, which can effectively prevent loss of freedom of expression, unlike the *ex-post* complaint and redress mechanisms, which are identified as “additional” safeguard to Article 17(7) by the CJEU.⁷⁷⁴

The article's misplaced reliance on the industry for balanced enforcement should be replaced with strong requirements regarding users' fundamental rights protection, especially on users' data protection and privacy, as the disproportionate interference of content monitoring systems cannot be justified with the IP rights protection, and with transparency obligations, especially regarding the complaint mechanisms. Their ineffectiveness also justifies that users also require *ex-ante* tools to protect their fundamental rights, just like rightholders. This seems the only way to fix the inequality between all the actors of copyright enforcement and ensure that there is a fair balance between competing fundamental rights.

A copyright reform “*that undermines the openness and free exchange of information at the heart of the Internet*”⁷⁷⁵ does not constitute a reform; it is rather a deform. Lawmakers' dream of perfect licences with a wide range of standard rules applicable to users EU-wide⁷⁷⁶ has been crushed by the reality of automated content moderation systems. In order to ensure Article 17's compatibility with fundamental rights and to prevent dystopic outcomes of these technologies, the implementation of the Article's safeguards which would ensure strong and

⁷⁷² Maxime Lambrecht, ‘Free Speech by Design – Algorithmic Protection of Exceptions and Limitations in the Copyright DSM Directive’ (2020) 11 JIPITEC 68 <<http://nbn-resolving.de/urn:nbn:de:0009-29-50807>>.

⁷⁷³ Guidance (n 289); *Poland v European Parliament* (n 79), para 85; *Poland v European Parliament*, AG opinion, (n 272) para 193.

⁷⁷⁴ *Poland v European Parliament* (n 79), para 93; *Poland v European Parliament*, AG Opinion (n 272), para 174.

⁷⁷⁵ Laurence H Tribe, “‘Stop Online Piracy Act’ (SOPA) Violates First Amendment.’ (6 December 2011) <<https://www.scribd.com/document/75153093/Tribe-Legis-Memo-on-SOPA-12-6-11-1>> accessed 13 July 2021.

⁷⁷⁶ European Commission, ‘Frequently Asked Questions on Copyright Reform’ (*Shaping Europe's digital future - European Commission*, 22 June 2018) <<https://ec.europa.eu/digital-single-market/en/faq/frequently-asked-questions-copyright-reform>> accessed 18 May 2021.

efficient fundamental rights is the only way out.⁷⁷⁷ Now, the discussion will provide a different perspective by examining the incompatibilities with fundamental rights of OCSSPs to further support the necessity of efficient safeguards.

⁷⁷⁷ See Chapter 5.

Chapter 4: Impact of Article 17 on OCSSPs' Fundamental Rights

4.1 Introduction

On the other side of the online enforcement equation, OCSSPs, as businesses, seek protection regarding their right to conduct a business which is enshrined under Article 16 of the Charter. The right to conduct a business has particular importance in Digital Single Market, especially when it comes to fostering a well-functioning and fair copyright marketplace.⁷⁷⁸ The freedom to conduct a business safeguards the economic and social benefits of the free market and helps with social and economic development by enabling individual aspirations and encouraging entrepreneurship and innovation.⁷⁷⁹ Thus, it is essential for a global industrial and cultural leader such as the EU to provide strong protection for the right to conduct a business in its cultural and creative industries. Especially in the online world, where developments and, in parallel, problems are taking place faster and on a bigger scale, this protection becomes vital. With the fast-paced world of technology, the developments can shift value between the different entities active in the online environment and affect the balance between those who own rights in digital content and those who provide technologies to navigate the Internet.⁷⁸⁰

With the entry into force of the Lisbon Treaty, the right to conduct a business found its place for the first time in a legally binding document of primary law within the EU, namely, the Charter. This right provides the guarantee of freedom for businesses to operate without unnecessary state intervention. Even though the case law has not provided a clear definition of this freedom thus far, according to the case law of CJEU, this right contains the freedom to

⁷⁷⁸ Commission, Communication *Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market* COM(2016)592: This Article is based on CJEU case law which has recognised freedom to exercise an economic or commercial activity. See Case 4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1974] ECR 491, para 14; Case 230-78 *SpA Eridiana and others* [1979] ECR 2749, paras 20 and 31 and freedom of contract See Case 151/78 *Sukkerfabriken Nykøbing* [1979] ECR 1, para 19, C-240/97 *Spain v Commission* [1999] ECR I-6571, para 99 and Article 119(1) and (3) of the Treaty on the Functioning of the European Union, which recognises free competition. This right is to be exercised with respect for Union law and national legislation. It may be subject to the limitations provided for in Article 52(1) of the Charter.

⁷⁷⁹ European Union Agency for Fundamental Rights, 'Freedom to Conduct a Business :Exploring the Dimensions of a Fundamental Right.' (Publications Office 2015) <<https://data.europa.eu/doi/10.2811/486749>> accessed 4 October 2021.

⁷⁸⁰ European Commission, 'Green Paper on Copyright in the Knowledge Economy' (Green Paper) COM(2008) 466 final, 16 July 2008. <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0466:FIN:EN:PDF>> accessed 20 October 2021. p.19.

exercise an economic or commercial activity, the freedom of contract and free competition.⁷⁸¹ The CJEU recognises not only the freedom to pursue an economic or commercial activity but also contractual freedom and the principle of free competition.⁷⁸² Therefore, this right incorporates freedom to operate a business, enterprise and freedom of contract.⁷⁸³ This right applies to “all natural and legal persons”⁷⁸⁴ and covers any lawful profit-making activity, including the complete life-cycle of the business from starting up a company through the whole operation and the closing.⁷⁸⁵ However, in contrast to the freedom of expression that was examined previously, freedom to conduct business is unknown to other international human rights instruments, which causes its “weak” nature⁷⁸⁶, and this brings various challenges. Most importantly, this nature caused a favoured stance regarding IP rights when the freedom to conduct a business was competing with the right to property, and this negatively affected the fair balance that had to be struck.

However, even though it appears to be a “weak right”, this right is recognised as having a strong potential, and this strong potential is reflected in the recent case law.⁷⁸⁷ The number of decisions that conduct a business occupies a prominent role increased from two in 2011 to twelve in three years.⁷⁸⁸ The fate of having a low success for the claims based on the freedom to conduct a business changed with the twin cases of *Scarlet Extended* and *Netlog*. Contrary to the early case law where the CJEU usually preferred to focus on the general principles of

⁷⁸¹ *Nold v. Commission* (n 778); C-441/07 *Commission v. Arosa Company Ltd* [2009] ECLI:EU:C:2009:555, Opinion of the Advocate General Kokott para. 225; C-426/11, *Alemo-Herron v. Parkwood Leisure Ltd.* [2013] ECLI:EU:C:2013:82, Opinion of the Advocate General Cruz Villalón, para. 54.

⁷⁸² *Alemo-Herron v. Parkwood Leisure Ltd.*, Opinion of the Advocate General Cruz Villalón, para. 48.; *Nold* (n 778); *Sukkerfabriken Nykøbin* (n 778), para 19; and *Spain v Commission* (n 778), para 99.

⁷⁸³ Commission, ‘Explanations Relating to The Charter of Fundamental Rights’, 2007/C 303/02, 14.12.2007, p. 23. As described by the CJEU “the freedom to conduct a business includes, inter alia, the right for any business to be able to freely use, within the limits of its liability for its own acts, the economic, technical and financial resources available to it.” *UPC Telekabel* (n 49), para 49.

⁷⁸⁴ Companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making. See Article 54 (2) of TFEU.

⁷⁸⁵ European Union Agency for Fundamental Rights., ‘Freedom to Conduct a Business :Exploring the Dimensions of a Fundamental Right.’ (Publications Office 2015) <<https://data.europa.eu/doi/10.2811/486749>> accessed 4 October 2021.

⁷⁸⁶ Xavier Groussot, Gunnar Thor Petursson and Justin Pierce, ‘Weak Right, Strong Court - The Freedom to Conduct Business and the EU Charter of Fundamental Rights’ in Sionaidh Douglas-Scott and Nicholas Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Edward Elgar 2017) <<https://papers.ssrn.com/abstract=2428181>> accessed 4 October 2021. p. 326-344.

⁷⁸⁷ *ibid.*

⁷⁸⁸ European Union Agency for Fundamental Rights., ‘Freedom to Conduct a Business :Exploring the Dimensions of a Fundamental Right.’ (Publications Office 2015) <<https://data.europa.eu/doi/10.2811/486749>> accessed 4 October 2021.

EU law, such as fair balance and proportionality⁷⁸⁹, in this landmark decision, CJEU held an injunction which obliges the platform to implement a complex, expensive and permanent upload filter systems at their own expense to be in a serious breach of Article 16.⁷⁹⁰

The freedom to conduct a business acts as a limit on the actions of the Union in its legislative and executive role as well as on the actions of the Member States in their application of EU law.⁷⁹¹ However, it is important to keep in mind that the freedom to conduct a business, just like other fundamental rights, is not an absolute right and is subject to limitations under Article 52(1) of the Charter. As is the case with all the fundamental rights of the Charter, a fair balance has to be struck by balancing the freedom to conduct a business against other fundamental rights. The restrictions that serve the purpose of protecting the general interest recognised by the Union or the need to protect the rights and freedoms of others can be placed on the exercise of this freedom. However, any limitation must respect the essence of those rights and freedoms and must be provided for by law, necessary and proportionate.⁷⁹² Another limitation comes from the fact that freedom to conduct a business is not applicable “across the board” as all rights of the Charter. However, the implications of the freedom to conduct a business should not be overlooked as the CJEU has construed ‘implementation by EU Member States’ broadly.⁷⁹³

As this right is a historically overlooked right that creates a research gap within the literature regarding the effects of Article 17’s obligations on the freedom to conduct a business, for the future of the internet, filling this gap has the utmost importance not just for businesses, it is also important for users and rightholders as these platforms constitute intermediaries. For instance, as it has been confirmed by the CJEU that points (b) and (c) of Article 17(4) require platforms to employ automatic recognition and filtering tools, OCSSPs, at minimum, have to consider the impact of this obligation on their operation and overall to their business.⁷⁹⁴

⁷⁸⁹ Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA Ltd et al v Secretary of State for Health et al* ECLI:EU:C:2005:741; Case C-310/04 *Kingdom of Spain v Council of the European Union* [2006] ECLI:EU:C:2006:521.

⁷⁹⁰ *Scarlet Extended* (n 16), para 48.

⁷⁹¹ *Alemo-Herron v. Parkwood Leisure Ltd.*, Opinion of the Advocate General Cruz Villalón (n 781), para. 50.

⁷⁹² Article 52(1) of the Charter.

⁷⁹³ European Union Agency for Fundamental Rights., ‘Freedom to Conduct a Business :Exploring the Dimensions of a Fundamental Right.’ (Publications Office 2015) <<https://data.europa.eu/doi/10.2811/486749>> accessed 4 October 2021. p.11.

⁷⁹⁴ *Poland v European Parliament* (n 79), paras 53-54.

Thus, this chapter aims to identify the interferences with Article 17(4)(b) and (c) on the right to conduct a business to answer the question of to what extent Article 17 can be implemented in a way that is compatible with Article 16 of the Charter. While the freedom to conduct a business applies to all natural and legal persons, the measures imposed by Article 17 concern a subsection of these companies and firms. Therefore, initially, it is important to determine which providers fall under the scope of Article 17's liability regime in order to examine Article 17's impact on the freedom to conduct a business more clearly.

4.2 Impact of the scope of Article 17's obligations on OCSSPs' right to conduct a business

The OCSSPs definition and additional criteria, including the ones for the liability exemption, bring two problems regarding the compatibility with fundamental rights; first, the vague and ambiguous terms bring problems with the foreseeability principle, which requires the law to have a sufficiently precise formulation of the provisions to allow any individual to adjust his conduct accordingly to be in accordance with the law.⁷⁹⁵ Second, the quantity-quality confusion and inefficient safeguards bring problems with the principle of proportionality, which result in many challenges with the realistic application of this principle to practice.

To fall within Article 17's liability regime, first, the platform in question should meet the definition in Article 2(6). This article defines an 'online content-sharing service provider' as a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works for profit-making purposes.⁷⁹⁶ In order to fall within the definition of OCSSP, a platform must have "*storing and giving the public access to copyright protected subject matter*" as one of their main purposes and should play an important role in the online content market, but how this "important role" can be identified is unclear therefore, open to interpretation.⁷⁹⁷ Also, despite the limitations on the scope placed by Recital 62, the OCSSPs definition within Article 2(6)

⁷⁹⁵ *Yildirim v Turkey* (n 1), 57; *RTBF v. Belgium* (n 478), para 103; *Altuğ Taner Akçam v. Turkey*, App no. [27520/07](#), (ECtHR, 25 October 2011), para 87.

⁷⁹⁶ Recital 62 lists the exempt service providers which do not fall into the scope of OCSSPs, these include 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 European Electronic Communications Code, online marketplaces, business-to-business cloud services and cloud services that allow users to upload content for their own use. See Recital 62 of CDSMD.

⁷⁹⁷ Recital 62 of the CDSMD.

has a wider scope. Article 2(6) defines platforms according to the amount of copyright-protected works that they store and give the public access. For example, user-generated content platforms that host large amounts of works other than audio or video, such as news services that allow users to write comments or dating platforms that host their users' photographs, could be subject to these duties if storing these works was accepted as one of the main purposes of these platforms. However, most of the time, the short texts and reference photographs within the news aggregators or the selfies on the dating platforms do not constitute copyright infringements due to E&Ls or simply the fact that being created by the users.⁷⁹⁸

This shows the “quantity-quality” confusion of the Directive once more, which results in equating hosting “large amounts of content” to hosting a large amount of infringing content. This confusion puts smaller OCSSPs with diverse uploaded content or the OCSSPs which are not online audio and video streaming services, under the same requirements as tech giants who play a central role in the online content market, therefore hindering proportionality.⁷⁹⁹ However, according to Recital 63, the concept of ‘large amounts’ should be decided on a case-by-case basis which, together with Recital 62, should help reduce the negative impact of the Directive’s misunderstanding of when a platform hosts large amounts of content it is certain that this content will be largely infringing. These limitations should help limit the scope of the platforms that are liable under Article 17 in a proportionate way. However, if the national implementations ignore the Recitals’ clarifications, there is a risk for these platforms to fall within to scope of the OCSSP and to be obliged to employ costly and complicated automated content recognition tools due to the copyright-protected content on their platform.⁸⁰⁰

Also, even if a platform meets the OCSSPs definition, Article 17(6) provides a limited liability regime for start-ups which meet the criteria. Directive’s “exemption” for the start-ups, Article 17(6), aims to provide a lighter liability regime for start-ups ensuring that the

⁷⁹⁸ Felix Reda, Joschka Selinger and Michael Servatius (n 326) 43; Gerald Spindler, ‘The Liability System of Art. 17 DSMD and National Implementation – Contravening Prohibition of General Monitoring Duties?’ (2020) 10 JIPITEC <<https://www.jipitec.eu/issues/jipitec-10-3-2019/5041>>. 347.

⁷⁹⁹ Giancarlo Frosio (n 207), 728.; Axel Metzger and others (n 285) 8.

⁸⁰⁰ It is important to keep in mind that while the concept of ‘large amounts’ makes the OCSSPs definition vague, in the case of specified assessment factors this limitation would risk stretching or limiting the scope of the OCSSP and eventually being rejected by the CJEU as any specification would bring the risk of disturbing the harmonised application of the Article. See Matthias Leistner, (n 333). 19

burden on these new companies is proportionate⁸⁰¹; however, it is subject to many questions regarding its effectiveness and practicality. The article states that the new online content-sharing service providers which have been available to the public in the Union for less than three years and have an annual turnover below EUR 10 million have to demonstrate that they made the best efforts to obtain an authorisation and act expeditiously, upon receiving a sufficiently substantiated notice, to disable access to the notified works or other subject matter or to remove those works or other subject matter from their websites. This means that these start-ups do not have to comply with Article 17(4)(b) and (c) regarding future uploads. While this exemption may look protective of start-ups, in practice, especially stay down obligations might constitute heavy duties for start-ups that already have to face various financial, strategic, technological, political and economic risks as a fresh formation.

Once more, Article 17(6) reflects the “quantity-quality” confusion of the Directive, which results in being ineffective in protecting the start-ups.⁸⁰² In practice, not many start-ups will be able to benefit from this exception since the criteria within the Article have to be met cumulatively. Also, taking into account the high levels of risks of the rapidly changing online world, it is highly likely for a start-up platform to stay as a start-up even after three years despite the exemption within the Directive. Moreover, there is no guarantee that the level of infringement within these start-ups will reach the level that requires such monitoring and filtering after three years. For instance, the German Ministry of Justice has calculated that an OCSSP with an annual turnover between EUR 1 and 2 million, which does not fall in the scope of the start-up exemption, would have to expect annual compliance costs of no less than EUR 175,000; this would easily drive an OCSSP with a profit margin below 10 per cent out of business as this amount excludes the costs of licenses and complaint and redress tools.⁸⁰³

According to the Article, start-ups still have to make their best efforts to obtain an authorisation following Article 17 (4)(a), and they are obliged to provide notice and takedown services which includes setting up an “effective and expeditious” redress process for the users, and they will be still subject to injunctions. Moreover, when they have more than 5 million monthly unique visitors, they must undertake notice and stay down

⁸⁰¹ Guidance (n 289); Digital Services Act also includes a similar exemption.

⁸⁰² Giancarlo Frosio (n 207), 728.

⁸⁰³ Felix Reda, Joschka Selinger and Michael Servatius (n 326) 48.

obligations, which requires implementing costly upload filters. However, start-ups usually generate only a little or no profit at all; therefore, licensing costs constitute a substantial economic burden on these businesses, especially when the legal uncertainties regarding the scope of the obligation to make best efforts to obtain licenses are taken into account, which is examined above.⁸⁰⁴ It is hard to say that there is an exemption in practice considering that entering umbrella licences is disproportionately costly for start-ups as much as implementing a filtering tool that monitors all the files uploaded on the platform. Therefore, the options that have been presented by the Directive are economically unsustainable for start-ups.⁸⁰⁵ Many start-up organisations stated that the Article is far from constituting a real exemption for start-ups as there is no correlation between the age, turnover or users of the platform and the number of copyright infringements.⁸⁰⁶

Moreover, the costs of licensing, takedown and redress systems and transactions of potential litigation will stand in start-ups' way by adding a significant upfront investment condition to the business plan for the investors. Certainly, this condition would make the start-ups less attractive to the investors, making the competition for them even harder from the very start. Also, these would impact the clarity of the financial forecasts, which is a must for start-up business plans to raise finance from a bank or outside investors.⁸⁰⁷ In addition to these, the lack of guidance regarding the effective and proportionate mitigation measures available for start-ups would also negatively affect their operation.⁸⁰⁸ All these different factors would cause start-ups to have uncertain and risky business plans, making start-ups undesirable in the eyes of investors. Consequently, this will result in a lack of investment and unsuccessful financing, leading to more start-up plans failing and not seeing the light of day and consequently, many OCSSPs, which allow users to experience the internet, to not exist.⁸⁰⁹ In a broad sense, the overall legal uncertainty that Article 17's regime is also likely to make start-ups less appealing to investors in addition to upfront investment requirements.⁸¹⁰ Most

⁸⁰⁴ Felix Reda, Joschka Selinger and Michael Servatius (n 326).

⁸⁰⁵ Giancarlo Frosio (n 207) 729.

⁸⁰⁶ Lenard Koschwitz, 'AFS Open Letter: Why Exemptions Do Not Work For Startups | #AFS' (*alliedforstartups.org*, 21 February 2019) <<https://alliedforstartups.org/2019/02/21/why-exemptions-do-not-work-for-startups/>> accessed 19 October 2021.

⁸⁰⁷ Andrew Atherton, 'Cases of Start-up Financing: An Analysis of New Venture Capitalisation Structures and Patterns' (2012) 18 *International Journal of Entrepreneurial Behavior & Research* 28.

⁸⁰⁸ Lenard Koschwitz, 'Article 13: How Startups Would Be Affected by Such a Copyright Reform' (*EU-Startups*, 17 January 2019) <<https://www.eu-startups.com/2019/01/article-13-how-startups-would-be-affected-by-such-a-copyright-reform/>> accessed 19 October 2021.

⁸⁰⁹ Giancarlo Frosio (n 207).

⁸¹⁰ In a survey that examined investors in the EU, UK and US, the majority of respondents stated that they would be "uncomfortable investing in businesses that would be required by law to run a technological filter on

significantly, there is a high degree of uncertainty around the suitability of the chosen filtering tool to satisfy the requirements of the Article's obligations, including the safeguards. Also, it would be challenging for a start-up to know in advance whether any particular filtering technology would be legally satisfactory as the technology evolves rapidly.⁸¹¹

The importance of OCSSPs, specifically small platforms and start-ups, for the Digital Single Market should be considered when examining the proportionality of the Article's obligations. The significance of the start-ups is undeniable as they are essential actors who historically drive the growth of the internet sector.⁸¹² Also, one should keep in mind that the protection of the right to conduct a business and the application of the principle of proportionality is even more vital for start-ups and small and medium-sized enterprises as even minor interferences with their right to conduct their business are likely to have a relatively more significant impact on them.⁸¹³

Looking at the above challenges that impact OCSSPs' right to conduct a business, one can say that the new regime of the CDSMD affects the full life-cycle of the businesses. Even if a start-up overcomes the problems with the legal uncertainty and finds funding for their businesses, the challenges continue to exist throughout their operation as they would face the high costs of implementing and maintaining the automated content recognition systems to meet the requirements of Article. Thus, the problems caused by the scope of the obligations which contribute to their interference with the right to conduct a business include the problems with the foreseeability of the liability where a platform cannot decide whether it falls within the definition of OCSSPs. Correspondingly, where this ambiguous definition is being stretched within the national implementations by benefiting from the vagueness of the definition, they include the risk of introducing disproportionate obligations to smaller

user-uploaded content" See Matthew C Le Merle, Tallulah J Le Merle and Evan Engstrom, 'The Impact of Internet Regulation on Early Stage Investment' (Fifth Era 2014) <<https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/572a35e0b6aa60fe011dec28/1462384101881/EngineFifthEraCopyrightReport.pdf>>.

⁸¹¹ Evan Engstrom, 'Ending Digital Copyright Act Would Fundamentally Change Internet' (*TheHill*, 28 March 2017) <<https://thehill.com/blogs/pundits-blog/technology/326043-ending-digital-copyright-act-would-fundamentally-change>> accessed 18 October 2021.

⁸¹² *ibid.*

⁸¹³ European Commission, Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (2003) *OJ L 124*, 20.5.2003, p. 36–41. Article 2 defines SMEs as "enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding €50 million, and/or an annual balance sheet total not exceeding €43 million", and a small enterprise as one "which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed €10 million."

platforms by including them into the scope of liability which is designed for the tech giants. In addition, the Article opens the door for disproportionate practices with its safeguards with questionable efficiencies, such as start-up exception, and related challenges that it brings with applying the principle of proportionality.

4.3 Compatibility of Article 17 with the Right to Conduct a Business

With the implementation of the CDSMD, the hosting safe harbour regime will no longer apply to the platforms besides those that do not fall within the definition in Article 2(6). Article 17(3) of the CDSMD clearly states that Article 14 of the ECD, which provides an exemption from liability for hosting services, will not be applicable when an online content-sharing service provider performs an act of communication to the public or an act of making available to the public under the conditions laid down in the Directive.⁸¹⁴ Therefore, this new specific regime introduced by Article 17 contrasts with the previous safe harbour practice that was in place for more than twenty years for hosting platforms and is still in place outside of the EU.⁸¹⁵ Thus, the introduction of this new regime for the platforms is likely to bring a lack of harmonisation as most of the OCSSPs are operating worldwide and disturb the global nature of the worldwide Internet. There is a high chance for this duality to harm the operation of OCSSPs. However, the negative impact will not only be on the individual platforms but also on the Digital Single Market and EU economy, and consequently, the global economy will have to deal with the undesirable aftereffects of this new regime.⁸¹⁶

Moreover, the obligations under Article 17 to avoid liability require platforms to either obtain costly and, in most cases, unobtainable blanket licensing agreements that should cover all the acts of communication to the public of their users or, in the absence of these agreements, implement automated tools that require costly software, hardware, and workforce to control the content uploaded on their platform.⁸¹⁷ Thus, looking at Article 17, one can say that while

⁸¹⁴ Article 6 of DSA. While amending E-Commerce Directive DSA maintains the liability rules for providers of intermediary services set out in the E-Commerce Directive. See Chapter 2.

⁸¹⁵ The notice and takedown mechanisms introduced by section 512 of the DMCA acquired the status of global law 512 of the DMCA; Section 112E, 116AA Australian Copyright Act; Copyright Act, R.S.C., 1985, c. C-42 (Can); Regulations for the Protection of the Right of Communication through the Information Network promulgated by the Decree of the State Council of the People's Republic of China No. 468 of May 18, 2006.

⁸¹⁶ Natalia E Curto (n 353).

⁸¹⁷ Article 17(4) CDSMD.

aiming to close the so-called value gap by focusing on the big tech companies, CDSMD negatively impacted small businesses and innovation within the Digital Single Market.

4.3.1 Compatibility of Article's Licensing Obligations with Right to Conduct a Business

According to the Article, an online content-sharing service provider performs an act of communication to the public or an act of making available to the public when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users, and therefore, they should obtain authorisation from the rightholders.⁸¹⁸ However, as a directive with the aim of fostering the development of the licensing market, CDSMD falls short of delivering provisions that would ensure that licensing would be the centre of the attention of platforms considering the challenges that OCSSPs need to tackle. As examined previously, in practice, obtaining direct licensing from the rightholders for all the acts of platforms' users is not easy nor inexpensive.⁸¹⁹

Firstly, in the light of the best efforts requirement within Article 17 (4)(a), which constitutes a strict standard than simple diligence, OCSSPs are obliged to negotiate all relevant licenses, including but not limited to all the necessary and available collective licenses as there will always be the case of certain individual rightholders of singular works or very small-scale repertoires being left out.⁸²⁰ Therefore, in order to meet the Article's standards, first, OCSSPs should assess the content that they need to obtain licences for. This is a particularly challenging task as they need to guesstimate the categories of content that could be subject to future infringements as well as consider the current content on the platform, especially considering the various forms and different types of works that UGC incorporates. For that reason, platforms check all the content to determine the amount and scope of the licences that must be obtained, which cannot be conducted with a simple check.⁸²¹ It is important to note that this might result in even the start-ups which benefit from the exemption in Article 17(6) implementing filters to comply with licensing obligations.⁸²² Accordingly, to limit this

⁸¹⁸ Article 17(1) CDSMD.

⁸¹⁹ Chapters 2 and 3.

⁸²⁰ Matthias Leistner (n 333).

⁸²¹ Gerald Spindler (n 798) 349.

⁸²² Franz Hofmann, 'Fünfzehn Thesen Zur Plattformhaftung Nach Art. 17 DSM-RL' [2019] GRUR 1219.

extensive scope of content to be licenced, OCSSPs need to undertake risk management in which identifying and assessing risks is more complicated than their usual operation. On this point, it is important to consider that not all OCSSPs that fall in the scope of Article 17 are established large firms that can undertake this risk assessment in the same way. Especially for start-ups, this requirement can be identified as an unwanted burden in their business plan by the investors and affects their chances of finding funding significantly. The scope of the licencing obligation is also problematic as start-ups with limited sources are obliged to comply with the licencing requirements under Article 17(4)(a).⁸²³ Considering the challenges with licencing examined above, it is clear that Article 17's licencing obligations put a disproportionate burden on start-ups with limited resources. In addition to that, the platforms which do not necessarily have large amounts of copyright infringements within their platform also might have to obtain costly blanket licenses from rightsholders whose portfolios are irrelevant to their business models.⁸²⁴

Second, according to this assessment, OCSSPs must take all available licences relevant to the content they calculated within their assessments to cover all the current and future content on their platform.⁸²⁵ In addition to the costs of obtaining all the available relevant licences, one should bear in mind that, Article 17 requires OCSSPs to licence “*copyright-protected works and other subject matter*”, which include not just images, sounds, and videos; this broad scope of works also includes software codes, 3D printing files, written text. However, while the scope of the works that are obliged to be licenced is broad, the availability of licencing agreements is not. Especially for the platforms which significantly host user-generated content, finding and negotiating licences would be extra challenging as OCSSPs should obtain licences for a wide spectrum of works that could be subject to the creation of UGC.

Identifying the rightholder to obtain licences is not always easy, especially the identification of small-scale individual rightholders. On this point, by following the principle of proportionality, Guidance states that OCSSPs should not be expected to proactively seek out

⁸²³ Article 17(6) provides an exemption for only filtering obligations.

⁸²⁴ Felix Reda, Joschka Selinger and Michael Servatius (n 326).

⁸²⁵ Johan Axhamn, ‘The New Copyright Directive: Collective Licensing as a Way to Strike a Fair Balance between Creator and User Interests in Copyright Legislation (Article 12)’ (*Kluwer Copyright Blog*, 25 June 2019) <<http://copyrightblog.kluweriplaw.com/2019/06/25/the-new-copyright-directive-collective-licensing-as-a-way-to-strike-a-fair-balance-between-creator-and-user-interests-in-copyright-legislation-article-12/>> accessed 28 September 2021.

rightholders who are not easily identifiable but identifies seeking out and engaging with rightholders for licences as the assessment criteria for best efforts standards, therefore, for the liability exemption.⁸²⁶ Even where the source for the licence is identified, this does not guarantee the authorisation since Recital 61 states that rightholders should not be obliged to give authorisation or to conclude licensing agreement to prevent any interference with contractual freedom.⁸²⁷ Thus, despite all the efforts of the OCSSP, where the negotiations fail, OCSSP might be liable regarding the past infringements and future ones, thus has no other option but to employ filtering to avoid liability around the subject works of the failed licensing agreement to eliminate any possibility of the availability of that work on the platform.⁸²⁸ The likelihood of this scenario has been proven within the stakeholder dialogues with the statements from rightholders that showed a lack of interest in licencing.⁸²⁹ Moreover, it is unclear what the OCSSPs' liability status would be during these negotiations, which could be lengthy and would negatively impact OCSSPs, especially when the negotiations do not conclude with an agreement. Therefore, where the national implementation fails to provide the application of the principle of proportionality in Article 17 (5) to licensing obligations, these obligations can introduce far-reaching search and negotiating duties and introduce a disproportionate challenge for OCSSPs in practice.

Moreover, due to the duty of leaving contractual freedom unaffected, these rightholders are not under an obligation to provide such licences, and some clearly communicated their lack of interest in widely licensing their works to the OCSSPs.⁸³⁰ Even more worryingly, record labels are aware that by refusing to licence content, they can block the distribution of online music; currently, major record labels are refusing to licence works over long-term contracts, forcing a well-known music streaming service to renegotiate on a monthly basis.⁸³¹ Similarly, as underlined within Chapter 3, it is not likely for rightholders to be willing to grant licences for the uses of their works for biting criticisms and parodies, even though this type of content constitutes the cornerstone of internet culture.⁸³² Although there are initiatives within the

⁸²⁶ Guidance (n 289), p. 9-10.

⁸²⁷ Recital 61 of CDSMD.

⁸²⁸ Guidance (n 289), p.10.

⁸²⁹ Paul Keller, 'Article 17 Stakeholder Dialogue (Day 2): Filters, Not Licenses!' (*International Communia Association*, 11 November 2019) <<https://www.communia-association.org/2019/11/11/article-17-stakeholder-dialogue-day-2-filters-not-licenses/>> accessed 22 June 2020.

⁸³⁰ *ibid.*

⁸³¹ P. Resnikoff, Spotify IPO 'On Hold' as major labels refuse long-term contracts (24 August 2016) available at <http://www.digitalmusicnews.com/2016/08/24/spotify-ipo-hold-short-term-contracts/>

⁸³² Martin Senftleben, (n 292) 5.

Collective Management of Copyright Directive for rightholders to get into the licencing agreements, it is important to bear in mind that such regulation only focuses on providers of online services which make use of musical work.⁸³³ In contrast, the scope of the copyrighted works and other subject matter that OCSSPs need to obtain necessary authorisation is way broader than just musical works.

It is important to note that, despite being presented as a solution for these problems that Article 17 brings,⁸³⁴ collective licences are not without their own challenges. Firstly, the fact that these agreements are not available for every type of content category constitutes a big challenge. Many Member States do not have an organised system where rightholders are represented by collective management organisations, which does not help with the challenge of finding rightholders and negotiating with them. The current situation with the fragmented CMOs and the available licencing packages they offer paint a hopeless picture regarding the availability of EU-wide umbrella licences for OCSSPs.⁸³⁵ The availability of these collective licenses is limited to musical works, which is the only area in which collective rights management is well established, while the content on OCSSPs is diverse, with a focus on audio-visual works.⁸³⁶

A related problem regarding the possibility of umbrella licences is their territoriality. While copyright is territorial, the Internet is not. While the article, in a way, expects platforms to fulfil their users' need for borderless use of all types of content, obtaining multi-territorial licences for digital uses is not possible for any content besides musical within the "highly fragmented" collective management landscape of Europe.⁸³⁷ Umbrella pan-European licences, particularly for user-generated content, are likely to remain a pipe dream; even if a collecting society offers one, it will be confined to the specific repertory for which the collecting society has cross-border rights.⁸³⁸ There are many different challenges that the

⁸³³ Article 16 of Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84/72, 20.3.2014, p. 72–98.

⁸³⁴ Matthias Leistner, (n 333); European Copyright Society, 'Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market into National Law – Comment of the European Copyright Society' (27 April 2020), available at SSRN: <https://ssrn.com/abstract=3589323>

⁸³⁵ Senftleben (n 292).

⁸³⁶ Erica Perry, '2020 Video Marketing and Statistics: What Brands Need to Know' (*Social Media Week*, 30 October 2019) <<https://socialmediaweek.org/blog/2019/10/2020-video-marketing-and-statistics-what-brands-need-to-know/>> accessed 4 October 2022.

⁸³⁷ Senftleben (n 292).; Sebastian Felix Schwemer, *Licensing and Access to Content in the European Union: Regulation between Copyright and Competition Law* (Cambridge University Press 2019).

⁸³⁸ Sebastian Felix Schwemer (n 837).

OCSSPs have to tackle to obtain umbrella licences for the present and future content on their platform. First, there is no statutory rate for licenses that need to be obtained from different collecting rights societies; these licensing fees are subject to negotiations. Second, OCCSPs must clear the performance and communication to the public rights of the content in question, which would require obtaining different licences from different collectives. This fragmentation makes the licencing obligation more laborious, time-consuming and expensive for OCSSPs, especially considering the need to get cross-border licensing.⁸³⁹ Where the required umbrella licenses cannot be obtained, the OCSSPs should licence per amount of infringing content available on the platform, which also requires monitoring all the files uploaded on the platform, which is an option that is costly and even more harmful to the fundamental rights.

Even where the dream of widely available, comprehensive and multi-territorial collective licences comes true, problems with individual licences with small rightholders would remain. Unlike collective licensing agreements regulated by The Collective Management of Copyright Directive⁸⁴⁰, these individual licensing agreements and negotiations are not governed by any specialised EU-level rules that would ensure a balance between rightholders and OCSSP. Also, these licences will only cover the users' private activities that do not generate significant revenues. Thus, in practice, this might require platform creators who generate revenue via their uploads to obtain their own licences. This can leave the "viral" uploads of regular users and uploads that have any financial effects, including out-of-platform revenue out of the licences that OCSSPs obtained for their users' uploads. This introduces a complexity which would affect the liability of the platform. In order to minimise the risk of liability, platforms should ensure that they inform professional and semi-professional creators about the lack of coverage regarding their uploads when informing their users about the available licences for their uploads. On this point, it should also be kept in mind that there are cases where the uploader user has an individual license for the work that is included in their upload. The question of whether this licence covers the OCSSPs' act of communication to the public depends on the approach to follow regarding the OCSSP participation; if the act of hosting is accepted as a second independent infringing act, it can be argued that the user

⁸³⁹ Morten Hviid, Sabine Jacques and Sofia Izquierdo Sanchez, 'Digitalisation And Intermediaries In The Music Industry' <<https://zenodo.org/record/439344>> accessed 28 October 2021.

⁸⁴⁰ Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market Text with EEA relevance (The Collective Management of Copyright) *OJ L 84*, 20.3.2014, p. 72–98.

authorisation would not impact the OCSSP liability.⁸⁴¹ While this approach results in imposing a disproportionate burden on OCSSPs, Recital 69 states that authorisations granted to users will cover the act of communication to the public of the service provider, therefore, will eliminate the obligation of the OCSSP to obtain authorisation as there is only one act of infringement performed by the uploader user. Thus, as the licenses under Article 17(2) would not cover the uses of copyright-protected works by the creators since their uploads earn revenue, this would bring additional problems for OCSSPs, creators and even the rightholders that prefer the ‘monetisation’ option offered by many leading OCSSPs.⁸⁴² However, within the CDSMD, there is no answer to those problems.⁸⁴³

Despite being addressed in structured stakeholder dialogues, these issues with licensing and related legal and contractual difficulties remain significant challenges that OCSSPs need to tackle to be able to operate within the EU.⁸⁴⁴ The burden of the duty to obtain licences that cover an open-endedly wide selection of content on OCSSPs raises questions about the compatibility with the principle of proportionality. In some parts, Article 17 indicates obligations that would be either impossible or disproportionately burdensome for the OCSSPs, thus, failing to effectively serve the aim of improving and facilitating the licensing practices. These challenges, which in some cases show themselves as impossibilities regarding obtaining the required authorisation via licensing agreements, leave OCSSPs with no option than turning their face to filtering technologies which bring even more challenges than licensing obligations. All these issues show the disproportionate nature of the licensing obligations of Article 17, which interfere with OCSSPs’ right to conduct a business. To

⁸⁴¹ Art. L. 137-2. IV Code de la propriété intellectuelle (IPC).

⁸⁴² This enables the rightholder to monetize the video by running ads on it and take the revenue. See YouTube, ‘Learn about Content ID Claims’ (*YouTube Help*) <<https://support.google.com/youtube/answer/6013276?hl=en>> accessed 23 August 2022.

⁸⁴³ Academics such as Leistner, Victor and Axhamn argued that extended collective licences might help solving some of the licensing problems and suggested that Article 12 of CDSMD may inspire Member States to facilitate collective licensing to tackle the problems that licensing obligations of the Article 17 brings. See Matthias Leistner (n 333); Jacob Victor, ‘Reconceptualizing Compulsory Copyright Licenses’ (2020) 72 *Stanford Law Review* 915.; Johan Axhamn, ‘The New Copyright Directive: Collective Licensing as a Way to Strike a Fair Balance between Creator and User Interests in Copyright Legislation (Article 12)’ (*Kluwer Copyright Blog*, 25 June 2019) <<http://copyrightblog.kluweriplaw.com/2019/06/25/the-new-copyright-directive-collective-licensing-as-a-way-to-strike-a-fair-balance-between-creator-and-user-interests-in-copyright-legislation-article-12/>> accessed 4 October 2022.

⁸⁴⁴ The goal of “streamlining licensing practices and facilitating industry agreements leading to a more sustained exploitation and a wider availability of European works” stated in Impact Assessment for the Directive did not become a reality with the stakeholder dialogues; on the contrary, these dialogues failed to meet the productivity that the Commission envisaged in many different ways. See Paul Keller, ‘Article 17 Stakeholder Dialogue (Day 2): Filters, Not Licenses!’ (*International Communia Association*, 11 November 2019) <<https://www.communia-association.org/2019/11/11/article-17-stakeholder-dialogue-day-2-filters-not-licenses/>> accessed 22 June 2020.

prevent this, national implementations at least should clarify the ambiguities mentioned above concerning the “best efforts” standards and licensing practices and concepts such as fair conditions for licensing agreements. These can be identified according to updated guidance to ensure the impact on the right to conduct a business by the licensing obligations is proportionate.⁸⁴⁵

4.3.2 Compatibility of Article's Filtering Obligations with Right to Conduct a Business

In the absence of licencing agreements, OCSSPs must ensure the unavailability of specific works and other subject matter and make “best efforts” to prevent their future uploads.⁸⁴⁶ In practice, OCSSPs have to employ automated content recognition technologies to locate as many instances of infringing content as possible in a proactive manner and ensure compliance with Article 17(4).⁸⁴⁷ This means that platforms need to actively monitor all the information passing through their platform to filter and block works using automated content recognition tools. However, in terms of the necessity principle, the degree of interference is the key consideration when assessing whether the filtering and stay down obligations of Article 17 might be considered necessary to achieve the legitimate aim of protecting copyright. Moreover, regarding the proportionality principle, the scope and application of monitoring, filtering and blocking must also be appropriate, respecting the fair balance.⁸⁴⁸

The freedom to conduct a business has been a popular tool for fair balancing; the CJEU used this freedom as a counterweight in various decisions.⁸⁴⁹ Court often underlined the importance of striking the fair balance between the protection of the intellectual property right enjoyed by those rightholders under Article 17(2) of the Charter and, on the other, the right to the freedom to conduct a business enjoyed by service providers under Article 16 of the Charter.⁸⁵⁰ For instance, a requirement for the instalment of this type of filtering system is found to be infringing the freedom to conduct a business under Article 16 in twin cases

⁸⁴⁵ Karina Grisse, ‘After the Storm—Examining the Final Version of Article 17 of the New Directive (EU) 2019/790’ (2019) 14 *Journal of Intellectual Property Law & Practice* 887. 893

⁸⁴⁶ Article 17(4) of CDSMD.

⁸⁴⁷ Christina Angelopoulos and others (n 419).

⁸⁴⁸ *Scarlet Extended* (n 16), para 53; *Netlog* (n 16), para 51; *UPC Telekabel* (n 49), para 52; *Mc Fadden* (n 16), paras 82-83; *Poland v European Parliament* (n 79), para 75.

⁸⁴⁹ *Alemo-Herron v. Parkwood Leisure Ltd.*, Opinion of the Advocate General Cruz Villalón (n 781), para 51.

⁸⁵⁰ *Promusicae* (n 87), paras 68, 70; *UPC Telekabel* (n 49), paras 46,49; *Scarlet Extended* (n 16), paras 45-46; *Netlog* (n 16), paras 43-44.

Scarlet Extended and *Netlog* by the CJEU.⁸⁵¹ Filtering was identified as an unnecessarily complicated and costly procedure which creates barriers to legitimate trade, therefore, would result in a serious infringement of the right to conduct a business of a typical example of OCSSP, the social network Netlog, in addition to being incompatible with the fair balancing of the competing fundamental rights.⁸⁵² Moreover, it has been underlined that the *modus operandi* of the filtering systems, which has a general and partly unspecified scope of the required filtering, the persons concerned and the communications affected by the monitoring in addition to the intensity of the monitoring to be carried out constitutes an important cause for filtering obligations to be disproportionate and incompatible with the right to conduct a business.⁸⁵³ Thus, the pre-*Glawischnig-Piesczek* case law established that where the filtering system that needs to be implemented by the OCSSPs involves monitoring the entirety of the information passing through their platform, this would require the platform to carry out general monitoring, which, in addition to being prohibited by EU law, puts a disproportionate burden on OCSSPs and disturbs the fair balance.⁸⁵⁴ Even where this monitoring is accepted as not constituting general monitoring in line with *Glawischnig-Piesczek*, OCSSPs still need to face the significant technical and financial burden that this wide-scale monitoring and filtering would interfere with their right to conduct a business.

From the OCSSPs' perspective, obligations under Article 17(4) bring the risk of the economic cost of the installation and maintenance of these filtering systems, which is impossible to be determined a priori.⁸⁵⁵ This lack of foreseeability regarding the costs brings the risk of filtering obligations to infringe the very substance of the freedom of an OCSSP to conduct a business. There are many cost items related to these systems, including searching for and testing the system itself, the investment costs, the engineering and management costs of the project or recurring maintenance and operational monitoring costs.⁸⁵⁶ Filtering systems require both human resources, such as user support teams and technical resources, such as software and hardware, to operate. Costs involve the technological integration of external filtering products into the platform as well as customer support for both rightsholders and users. Thus, the complex technical solutions to prevent the availability of copyright-protected

⁸⁵¹ *Netlog* (n 16), para 46; *Scarlet Extended* (n 16), para 48.

⁸⁵² *ibid.*

⁸⁵³ *Scarlet Extended*, Opinion of Advocate General Cruz Villalón (n 70), para 52; *Netlog* (n 16), para 46; *Scarlet Extended* (n 16), para 48.

⁸⁵⁴ *ibid.*

⁸⁵⁵ *Scarlet Extended*, Opinion of Advocate General Cruz Villalón (n 70), para 52.

⁸⁵⁶ *ibid.* footnote 38.

works that OCSSPs have to employ to meet Article 17's requirements would constitute a high cost considering the total expense of implementing, operating and maintaining such automated content recognition tools. In addition to the costs, there are other challenges that OCSSPs need to face, such as the complexity and permanency of filtering. Therefore, this chapter examines the compatibility of Article 17(b) and (c) by focusing on the challenges of implementation of filtering tools which include challenges such as cost and complexity of filtering and operation and maintenance of them, which adds permanency of filtering to these challenges which bring the interferences with the right to conduct a business.

4.3.2.1 *Challenges with the Implementation of Filtering Tools*

First, platforms need to deal with the implementing costs unless the OCSSP in question is in a place that can develop its own content moderation system. In that case, there are different challenges that the platform needs to tackle. First, finding the algorithms and the staff that are skilled in implementing them is quite challenging as the availability of both is not high.⁸⁵⁷ As not many skilled staff are available, accessing and attracting them is hard for businesses other than large and established companies which are no more than a handful.⁸⁵⁸ Unlike the rest, these big tech companies can provide skilled experts' requirements without worrying about their finances and be the more desirable employer overall. Second, the availability of high-quality data sets to train the AI-enabled systems also may pose an obstacle for the OCSSPs. Unlike the data sets that are being used to identify harmful content, there is no framework to encourage the sharing and exchanging of datasets used to identify copyright infringement.⁸⁵⁹ Lastly, the availability and the costs of computational power required to train the developing system and interference with the operating system can also constitute a barrier to smaller platforms. If an OCSSP can tackle all of these problems without disproportionately interfering with their right to conduct a business, they would be taken only one of the steps to satisfy the level of enforcement expected from them by the Directive.

⁸⁵⁷ Cambridge Consultants (n 367) p. 63.

⁸⁵⁸ These companies are namely, Facebook, YouTube and TikTok; Shelley Walsh, 'The Top 10 Social Media Sites & Platforms 2022' (*Search Engine Journal*, 30 May 2022) <<https://www.searchenginejournal.com/social-media/biggest-social-media-sites/>> accessed 7 October 2022. ; Simon Kemp, 'Digital 2022: April Global Statshot Report' (*DataReportal – Global Digital Insights*, 21 April 2022) <<https://datareportal.com/reports/digital-2022-april-global-statshot>> accessed 7 October 2022.

⁸⁵⁹ Dame Wendy Hall and Jérôme Pesenti, 'Growing the Artificial Intelligence Industry in the UK' (2017) <<https://www.gov.uk/government/publications/growing-the-artificial-intelligence-industry-in-the-uk>> accessed 25 October 2021.

However, one should keep in mind that this scenario of developing own tools is not applicable to most of the platforms. Developing their own automated content recognition system is not even an option for most platforms as it requires significant economic, technical and human sources that only a few can afford. For instance, by 2018, Google had invested at least \$100 million in building YouTube's Content ID software, including staffing and computing resources.⁸⁶⁰ SoundCloud has estimated that it has spent approximately €5m on such technologies, not including the costs of the licensed tool they are using in combination.⁸⁶¹ However, one should keep in mind that the definition of OCSSPs in Article 2(6) has a more extensive scope that embraces the smaller platforms too. Therefore, many OCSSPs need to consider the cost of implementing the filtering technologies which are already available on the market, which would impact their finances considerably.⁸⁶²

One of the widely licenced software is *Audible Magic* which describes itself as automated proactive filtering. This is the same software that was subject to the injunction in *SABAM* cases in which CJEU found the requirement of implementing this software in a serious infringement of the freedom of the hosting service provider to conduct its business for the reason that the implementation of this permanent computer system at the platforms own expense is complicated and costly.⁸⁶³ Contrarily, this software has been presented as the cheap alternative for Content ID by the VP for the Digital Single Market.⁸⁶⁴ Moreover, the Impact Assessment claimed that “*a small scale online service provider with a relatively low number of monthly transactions can obtain such services as from €900 a month.*”⁸⁶⁵ However, the starting price of €900 a month estimate is applicable for this tool to filter a maximum of 5.000 music files only. For the significant majority of the OCSSPs, being able to operate with this low level of files is not a realistic expectation. Therefore, the actual cost of this tool would be way much higher as, while the company is non-transparent regarding

⁸⁶⁰ Cedric Manara, ‘Protecting What We Love about the Internet: Our Efforts to Stop Online Piracy’ (*Google*) <<https://www.blog.google/outreach-initiatives/public-policy/protecting-what-we-love-about-internet-our-efforts-stop-online-piracy/>>.

⁸⁶¹ Soundcloud uses a combination of Audible Magic and its own technology. See Impact Assessment.

⁸⁶² *YouTube and Cyando*, Opinion of Advocate General Saugmandsgaard Øe (n 77), para 222.

⁸⁶³ *Scarlet* (n 16), para 48, *Netlog* (n 16), para 46.

⁸⁶⁴ ‘Proposed Copyright Directive – Commissioner Confirms It Is Illegal’ (*European Digital Rights (EDRi)*, 28 June 2017) <<https://edri.org/our-work/proposed-copyright-directive-commissioner-confirms-it-is-illegal/>> accessed 18 October 2021.

⁸⁶⁵ Impact Assessment; VP Ansip claimed that such tools cost “400, 500 bucks” to identify 10.000 songs in 2017. See Herman Rucic, ‘There Are Some Things Money Can’t Buy ...’ (*Copybuzz*, 21 June 2017) <<https://copybuzz.com/copyright/things-money-cant-buy/>>.

the costs, evidence suggests that medium-sized platforms engaged in file-hosting services paid between \$10,000 and \$50,000 a month of licensing fees just to use Audible Magic's filtering tool in 2011.⁸⁶⁶

It would be hard to say that there is a functioning market for providing content moderation services that focus on copyright enforcement. Unlike the services that focus on moderation regarding illegal content such as hate speech and child pornography, copyright enforcement is not the focus of various large and small companies; there are not many options for the OCSSPs to choose from. *Audible Magic* seems to have a monopoly in the market as most of the leading user-generated platforms, such as Twitch, Tumblr, and Dailymotion, are using the company's technology for content recognition.⁸⁶⁷ Therefore, it is unlikely for this market to experience a reduction in prices and an increase in performance as there is near-zero competition. Thus, this monopoly within the providers of copyright enforcement tools would negatively affect the OCSSPs' conduct a business as they will be forced to implement the only widely available tool with an extensive database of copyright-protected work. Therefore, unless these services are also accessible to medium or small-sized OCSSPs, it is hard to avoid the negative impact on the right to conduct a business by Article 17.

However, the licensing fees paid to the third-party provider amount to only a portion of the total costs associated with fingerprinting software. In addition to these fees, filtering systems require integration with existing systems and additional operational work, and the initial setup costs should also be considered.⁸⁶⁸ At this stage, one must keep in mind that there is a widespread shortage of suitably qualified staff skilled in implementing these automated tools, which disproportionately impacts smaller businesses that would have a hard time employing and retaining skilled staff.⁸⁶⁹ Especially recruiting staff for widely used AI technologies is extra challenging and costly as their skill sets are in high demand within the technology industry. Thus, considering the need for employing human resources for the required automated tools, the cost of implementation becomes an even heavier burden on the OCSSPs.

⁸⁶⁶ Jennifer M Urban, Joe Karaganis and Brianna Schofield (n 14); Another source states that, for mid-sized streaming platforms, the company is quoting on average \$30,000 to \$60,000 per month of licensing fees. See Evan Engstrom and Nick Feamster (n 164) 22.

⁸⁶⁷ 'Customers and Partners' (*Audible Magic*) <<https://www.audiblemagic.com/customers-partners/>> accessed 7 October 2022.

⁸⁶⁸ *Audible Magic*'s setup fee was \$2,500 in 2017. See Herman Rucic, 'There Are Some Things Money Can't Buy ...' (*Copybuzz*, 21 June 2017) <<https://copybuzz.com/copyright/things-money-cant-buy/>> accessed 18 October 2021.

⁸⁶⁹ Cambridge Consultants (n 367).

4.3.2.2 *Challenges with the Operation and Maintenance of Filtering Tools*

The cost of filtering technologies is not limited to the implementation phase as these tools are being introduced permanently; OCSSPs should maintain and improve these technologies. It has been confirmed that in order to meet the requirements under Article 17(4)(b) and (c), OCSSPs have to implement automated content recognition tools that would monitor and filter the content.⁸⁷⁰ According to the Article, platforms must ensure the unavailability of specific works and other subject matter and disable or remove such works in addition to preventing their future uploads.⁸⁷¹

One of the significant challenges derives from the vague wording of “specific works and other subject matter” as it indistinctly extends the liability of OCSSPs. The ambiguous wording creates a wide and unclear scope for the types of filters that should be employed by the OCSSPs to avoid liability under Article 17. While this raises questions regarding Article 17’s compatibility with the foreseeability principle, in practice, this will likely result in platforms being obliged to implement different filters for different types of content.⁸⁷² However, it must be added that the intention of the lawmaker with this is to achieve a future-proof regulation that can keep pace with changing circumstances.⁸⁷³ However, in practice, where filtering obligations constitute a disproportionate practice by disturbing the fair balance between the protection of copyright and the right to conduct a business, this ambiguity would introduce a substantial burden which interferes with the OCSSPs’ right to conduct a business.⁸⁷⁴

One can assume that “*specific works and other subject matter*” covers all kinds of content, ranging from pictures, graphics, sculptures, literary works, sound recordings, music,

⁸⁷⁰ *Poland v European Parliament* (n 79), paras 53-54.

⁸⁷¹ Article 14(b), and (c) CDSMD.

⁸⁷² As one of the “quality of law” requirements of the ECtHR, the law must be sufficiently clear for individuals to conduct themselves in accordance with its commands. See Council of Europe/European Court of Human Rights, ‘Article 7 The “Quality of Law” Requirements and the Principle of (Non-)Retrospectiveness of the Criminal Law under Article 7 of the Convention’ (Research and Library division, Directorate of the Jurisconsult 2019)<https://www.echr.coe.int/Documents/Research_report_quality_law_requirements_criminal_law_Art_7_ENG.PDF> accessed 13 October 2021

⁸⁷³ *Poland v European Parliament* (n 79), para 74.

⁸⁷⁴ *Scarlet Extended* (n 16), para 48; *Netlog* (n 16), para 46.

choreographies, and even architectural works. However, as mentioned in Chapter 3, currently, there is no content detection tool available that can filter different types of content with only one filter. These technologies are designed to operate on a single media type, and for the widely-used fingerprinting algorithms, this is usually audio. The reason behind this limitation is merely technical; binaries are not amenable to the signal processing techniques used by other media fingerprinting systems; hence fingerprinting a binary executable is currently not possible.⁸⁷⁵ This means that the OCSSPs cannot use audio filtering technologies to identify and filter video, images, text, or binary executable files such as software programs.

As there is no definite answer for the types of works that are protected under Article 17 and should thus be filtered, in order to avoid liability, platforms are obliged to implement numerous different filters. This would constitute a big financial hit for user-generated content platforms as they usually permit their users to upload different types of content, such as written text, images or files, including designs for 3D printing or software code.⁸⁷⁶ Even the implementation of multiple filters does not automatically mean that platforms will be able to filter all of the content on the site as required by the Article. While UGC platforms permit users to upload written text, software code, images or files, including designs for 3D printing and gameplay footage, the available tools have no technological capability to examine each upload for its unique features.⁸⁷⁷ For instance, a platform that hosts sheet music for any instrument is left entirely helpless in this situation as no automated content recognition tool exists that filters all sheet music being uploaded on their platform, and they do not have the sources to develop these tools by themselves.⁸⁷⁸ In other words, despite the level of advancement of the tool that they implemented, it is not likely for OCSSPs to fail to uniquely identify all “other” types of “subject matter”, therefore, avoid liability under Article 17.

As pointed out previously, the difficulty of adapting content recognition and filtering to the extensive content that users can upload will always remain a limitation that makes it fundamentally difficult to perform automated content identification in line with Article’s obligations. A related technical issue that limits the operation of filters stems from the

⁸⁷⁵ Evan Engstrom and Nick Feamster (n 164), p. 17.

⁸⁷⁶ David Abecassis and Alexander Gann, (n 293) 7-9.

⁸⁷⁷ *Poland v European Parliament*, Opinion of Saugmandsgaard Øe (n 272), para 67. Discussed in detail in Chapter 3.

⁸⁷⁸ Jonathan Keane, ‘How European Startups Are Grappling with the EU’s Copyright Reforms’ (*Tech.eu*, 16 March 2017) <<https://tech.eu/features/14478/startups-eu-copyright-reforms/>> accessed 19 October 2021.

databases. In order to operate successfully, filtering technologies require access to the file in question to compare the upload to the original file to detect the infringement.⁸⁷⁹ To ensure the proper functioning of upload filters, OCSSPs must maintain a reference database to be able to filter large amounts of content efficiently. The great amounts of material, which includes numerous different content categories uploaded on the platforms, make creating a database for copyrighted content extremely challenging. First, the existence of a reference database for copyrighted content is in the hands of rightholders more than OCSSPs, which unsurprisingly brings additional problems for these platforms.⁸⁸⁰ In order to create such databases, initially, rightholders must submit accurate data to platforms which could be fingerprints or hashes of their copyrighted content. However, there are many cases where rightholders refused to provide the required data to some OCSSPs.⁸⁸¹ As examined in Chapter 3, there are also many examples of faulty information provided by the rightholders to the OCSSPs for their reference databases, as well as examples of rightholders intentionally declaring ownership of the works that they do not hold the rights, including works of public domain.⁸⁸² This would result in improper filtering, liability and disputes, which would be reflected in the OCSSPs' finances. However, this disproportionate liability on OCSSPs is likely to be avoided by considering the principle of proportionality and the elements in Article 17 (5) for the assessment of compliance with the Article's obligations in addition to Article 17(4) and Recital 66. Additionally, maintaining such databases requires a significant storage capacity and prompt content analysis abilities, which bring extra and considerable costs for the OCSSPs.⁸⁸³ Also, one should keep in mind that most of the databases are non-interoperable, which introduces an additional challenge for OCSSPs to create and maintain such databases to ensure the efficient functioning of the filters.⁸⁸⁴

⁸⁷⁹ Evan Engstrom and Nick Feamster (n 164), p. 19.

⁸⁸⁰ Article 17(4) of CDSMD.

⁸⁸¹ IFPI refused to provide fingerprint data to one hosting site, which left this platform unable to implement their audio fingerprinting tool effectively. See Ernesto Van der Sar, '4shared: Copyright Holders Abuse Google's DMCA Takedown System' (*Torrent Freak*, 23 November 2016) <<https://torrentfreak.com/4shared-copyright-holders-abuse-googles-dmca-takedown-system-161123/>> accessed 14 October 2021. Cf Recital 66 of CDSMD which states where this lack of active cooperation prevents OCSSPs to make their best efforts, they will be not liable for unauthorised acts of CTPP of such unidentified works or other subject matter.

⁸⁸² Felix Reda, Joschka Selinger and Michael Servatius (n 326) 27; Annemarie Bridy (n 191).

⁸⁸³ European Commission Directorate General for Communications Networks, Content and Technology and others, *Study on Copyright and New Technologies: Copyright Data Management and Artificial Intelligence* (Publications Office 2022) <<https://data.europa.eu/doi/10.2759/570559>> accessed 10 October 2022. 51

⁸⁸⁴ *ibid.* 95.

Thus, especially for the platforms that host user-generated content, creating and maintaining a reference database for the broad spectrum of works that are and could be subject to the creation of UGC seems truly difficult. Therefore, in order to avoid liability under Article 17's regime, unless databases were centralised, it is essential for OCSSPs to compare every fingerprint against numerous databases for numerous rightholders and numerous types of material. Naturally, this will lead the costs of implementation of Article 17 to increase dramatically. Moreover, since the OCSSP would need to deploy multiple upload filters to detect every work individually, using each supplementary database would also duplicate the implementation costs. Even where the platforms are employing technology from other software companies, this problem persists. It is important to keep in mind that, in *Netlog*, the Court found the injunction for the social media platform Netlog to employ filtering for only one type of media, namely music, as disproportionately costly.⁸⁸⁵

Also, there are more technically and financially demanding cases for OCSSPs in which, in order to make the upload filter operate, they should break encryption measures so the content can be identified and matched by the filter.⁸⁸⁶ Even an OCSSP has overcome forenamed challenges; filtering systems have serious adaptability and accuracy problems, which reflect a financial burden on the platform.⁸⁸⁷ There is no software available that can provide a solution for all the different challenges that rich and diverse content brings. Therefore, there is no doubt that this burden on the platforms that host multimedia creations that combine various types of content forms, such as user-generated content platforms, would also be disproportionately costly.

Additionally, one must keep in mind that not all automated content recognition tools can provide mechanisms that undertake complicated copyright management problems, such as disputes between several rightowners concerning rights on a specific piece of content or user disputes.⁸⁸⁸ On this point, OCSSP has to consider their obligations in Article 17(7), which requires them to place filtering systems that would not interfere with legitimate uploads and allow users to benefit from copyright exceptions and limitations. Ensuring the fundamental

⁸⁸⁵ *Netlog* (n 16), para 46.

⁸⁸⁶ Christina Angelopoulos and others (n 419).

⁸⁸⁷ Evan Engstrom and Nick Feamster (n 164), p.11.

⁸⁸⁸ European Union Intellectual Property Office., *Automated Content Recognition: Discussion Paper. Phase 2, IP Enforcement and Management Use Cases*. (Publications Office 2022) <<https://data.europa.eu/doi/10.2814/952694>> accessed 10 October 2022.

right-compliant operation of these filters is important as OCSSPs might be held accountable to their users for failing to ensure the availability of legitimate uploads depending on the national implementation of Article 17.⁸⁸⁹ This would require OCSSPs to employ systems with low false positive rates which at least requires implementing costly automated content recognition tools. As mentioned in Chapter 3, there is no guarantee for the legitimate uses that need to be safeguarded under Article 17(7), even where the platform employs sophisticated automated filters. However, these shortcomings of automated content recognition technologies can directly trigger the OCSSPs' liability both for infringing content and failure to ensure legitimate uses. Moreover, where over-blocking takes place, there will be additional costs that would also directly impact their right to conduct a business, such as reputation damage and lower profit when these erroneous decisions push off the frustrated users and advertisers to the competitor platforms, which would also bring lower growth and opportunity costs.⁸⁹⁰

In addition to the costs examined above, OCSSPs have to consider the costs of developing multiple legal strategies for their worldwide operation to deal with the different systems introduced by the new regime of the CDSMD. Meaning that, to comply with Article 17(4) and (7), the same content must be blocked by the OCSSPs in one member state while it has to go and stay online in another because of the different jurisdictions of the Member States would have different rules regarding the permitted uses of the content such as different E&L. Therefore, to tackle this complex issue, some OCSSPs might need to implement geo-blocking technology which has been found as not helpful for platforms, frustrating for users and as it decreases the cross-border e-commerce, conflicting with the goal of Digital Single Market strategy⁸⁹¹ Therefore, naturally, the burden of these new obligations will reflect on the platforms' economy. Moreover, these compliance costs would be most likely to result in OCSSPs cutting their investments and abandoning or avoiding certain markets where burdensome obligations are imposed.⁸⁹²

⁸⁸⁹ Tito Rendas, (n 138).

⁸⁹⁰ Cambridge Consultants (n 367), p.63.

⁸⁹¹ European Commission, 'Geo-Blocking and the Role of Platforms in the Online Economy' (*European Commission - European Commission*) <https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5704> accessed 28 October 2021.

⁸⁹² Natalia E Curto (n 353) 2.

Moreover, considering the goal of providing a future-proof provision with Article 17, in the future, platforms likely will need to develop more complex and sophisticated technologies, such as machine learning to undertake the filtering obligations in a way that meets the best efforts in accordance with high industry standards of professional diligence.⁸⁹³ This improvement of the systems is also important for ensuring the effectiveness of one of the important safeguards of Article 1(7), which requires these filters to not interfere with legitimate uploads. As argued previously, with the help of AI systems, the instances of false positives can be held to an acceptable level, and the suitability of these filters can be improved. However, while expecting these from OCSSPs to achieve a freedom of expression compliant enforcement of the Article, the compliance with the freedom to conduct a business must not be overlooked.

These challenges show the significant potential of Article 17's obligations to interfere with the right to conduct a business. In consequence, all these issues examined above would have a detrimental effect on the OCSSPs' freedom to conduct their business under Article 16 of the Charter of Fundamental Rights of the EU and the efficiency of the principle of proportionality safeguard in Article 17(5). Thus, no matter if the OCCSP is developing its own software or outsourcing it, implementation, operation and maintenance of these upload filters come at a relatively high cost. Moreover, in addition to the aforementioned challenges and costs, OCSSPs have to invest in human resources to apply policies and monitor compliance with the requirements, such as tracking and managing user appeals.⁸⁹⁴

4.3.2.3 *Cost of Human Moderation*

The cost of the human workforce, including human review teams for moderation, is not something that OCSSPs can ignore while calculating the cost of the implementation of these technologies and considering the proportionality of the Article's obligations. As mentioned above, in addition to the hardware and software that content recognition tools require to maintain moderation, apply policies, and monitor compliance with the requirements, these technologies require a human workforce. Thus, in order to meet the content moderation requirements of the Directive, including the safeguards for freedom of expression in Article

⁸⁹³ Recitals 3 and 66 of CDSMD; *Poland v European Parliament* (n 79), para 73.

⁸⁹⁴ Jennifer M Urban, Joe Karaganis and Brianna Schofield (n 14).

17(7) and 17 (9), OCSSPs have to employ human moderators to maintain a multi-phased workflow.

Even though the content moderation approach varies across platforms, to meet Article 17's standards, it needs to contain moderation performed by both automated systems and human moderators.⁸⁹⁵ These human review teams do necessary controls regarding the blocking decisions of the upload filters, review flagged and reported content by the users and review complaints regarding wrongful takedowns and blockings. Therefore, their workload is heavy; these teams have to review vast amounts of content to help the platform moderate the uploads effectively and promptly. The latest transparency report from Google shows that almost 1 million videos required reactive moderation in 6,278,771 total videos removed between April 2021 and June 2021.⁸⁹⁶

Manual review by the human teams is compulsory for the complaints under the CDSMD as it explicitly requires the employment of human review teams as a part of the mandatory complaint and redress mechanisms that need to be put in place by the OCSSPs.⁸⁹⁷ Moreover, Recital 70 states that these teams need to process any complaint without undue delay, which would require OCSSPs to employ voluminous teams with many human moderators to ensure these complaints are being dealt with by the human teams promptly. Therefore, the vast quantities of content on the platforms, in addition to the duty to provide effective and expeditious complaint and redress mechanisms supported by human review, point out the necessity to employ considerable numbers of human moderators for the human review teams for OCSSPs. The cost of this employment would most likely be a significant burden on the shoulders of OCSSPs, especially the smaller platforms' finances would take a hit from it as the duty of providing the human review includes takedown decisions which OCSSPs of all sizes are obliged to perform according to the Article.

Considering the fact that ensuring the legitimate content is not being affected is even more important for OCSSPs than ensuring the unavailability of copyright protected works to satisfy

⁸⁹⁵ Recital 70, Article 17(4) and Article 17 (9) of CDSMD.

⁸⁹⁶ 'YouTube Community Guidelines Enforcement – Google Transparency Report' (*Google Transparency*) <https://transparencyreport.google.com/youtube-policy/removals?content_by_flag=period> accessed 22 October 2021.

⁸⁹⁷ Article 17(9) of CDSMD states that “*complaints submitted under complaint and redress mechanism shall be processed without undue delay, and decisions to disable access to or remove uploaded content shall be subject to human review.*” Also see Recital 71 of CDSMD.

the best efforts standards, platforms must ensure they implement safeguards in Article 17(7) and 17(9).⁸⁹⁸ Thus, human review plays a significant role within the platforms' content recognition systems and their liability under Article 17, as prompt correction of the filters' decision via this *ex-post* safeguard is essential to ensure that the impact of the erroneous decisions on various fundamental rights of users is limited. There are real-life examples that show the importance of human review teams; for instance, in 2020, when YouTube decided to reduce the number of human review teams, a considerably greater percentage of filter decisions were overturned on appeal.⁸⁹⁹

Thus, considering the Directive's comprehensive scope of OCSSPs, it is likely for Article 17(4)'s filtering measures to impose significant challenges for the platforms' finances and impact their right to conduct a business. The fact that there are already voluntary practices of upload filters fails to provide an efficient counter argument for the argued impact on the right to conduct a business as this practice has been mostly undertaken by the "tech giants" with extensive sources and the application of these filters are usually limited to a certain type of copyright protected work or certain rightholders' works which would significantly decrease the cost of filtering comparing to the comprehensive filtering that OCSSPs employ to comply with Article 17(4).⁹⁰⁰ In order to comply with Article 17's obligations, including ensuring the effectiveness of the Article's safeguards, even the OCSSPs with the most sophisticated filtering mechanisms must make significant adjustments.

Therefore, the filtering obligations would bring various challenges for the operations of OCSSPs, and most of these show themselves as unforeseeable, serious and permanent costs for their businesses. While trying to tackle problems with the implementation, operation, and maintenance of these tools, platforms must ensure that they keep up with the technology and improve these tools to provide high industry standards of professional diligence. However, this list of burdens that Article 17(4) brings on the OCSSPs does not stop here; in addition to licensing and filtering, OCSSPs must ensure the smooth operation of notice and takedown and notice and stay down systems.

⁸⁹⁸ *Poland v European Parliament* (n 79), para 78; Guidance (n 289), p. 2-3, 20.

⁸⁹⁹ 'YouTube Reverts to Human Moderators in Fight against Misinformation' *Financial Times* (20 September 2020) <<https://www.ft.com/content/e54737c5-8488-4e66-b087-d1ad426ac9fa>> accessed 11 December 2021.

⁹⁰⁰ Felix Reda, Joschka Selinger and Michael Servatius (n 326).

4.3.2.4 *Impact of Notice and Takedown and Notice and Stay down on Right to Conduct a Business*

OCSSPs have to comply with Article 17(4)(b) and (c), and therefore will be required to verify notifications submitted by rightholders and will have to provide the notice and takedown and stay down services for anyone who claims to be a rightholder upon receiving their “*sufficiently substantiated notice*” for takedown and “*relevant and necessary information*” for stay down. According to the Guidance, this duty applies to different scenarios, such as when some content that cannot be recognised due to technical limitations becomes available despite the fact that OCSSPs have “made their best efforts” to avoid unauthorised content under Article 17(4)(b) or when rightholders send notices requesting the removal and stay down after the content has become available even though OCSSPs have not provided online content-sharing service providers in advance with the ‘relevant and necessary’ information under Article 17(4)(b) to avoid the availability of unauthorised content.⁹⁰¹

While notice and takedown is already common practice within the OCSSPs, the notice and stay down systems obliged by Article 17 make implementing and maintaining automated tools even more costly and challenging. In addition to the takedown, to ensure that notified works are not being uploaded on the platform in the future, OCSSPs must take “*all the steps that would be taken by a diligent operator*” and actively monitor, detect and block these works from all uploads going through their platform.⁹⁰² Otherwise, OCSSPs will be subject to the hybrid liability system of Article 17; the direct liability borne by users who upload infringing content and the secondary liability borne by OCSSPs as an intermediary.⁹⁰³

In practice, to meet this requirement, platforms should implement automated content recognition tools that offer real-time monitoring of all uploads without any limitation on their duration.⁹⁰⁴ This makes the Article’s obligations problematic for various reasons. Firstly, CJEU, in many decisions, remarked that since stay down injunctions obliged these services to implement complex, expensive and permanent upload filter systems at their own expense,

⁹⁰¹ Guidance (n 289), p. 15.

⁹⁰² Recital 66 CDSMD.

⁹⁰³ *Poland v European Parliament*, Opinion of AG Saugmandsgaard Øe (n 272), footnote 56.

⁹⁰⁴ Felipe Romero-Moreno, “‘Notice and Staydown’ and Social Media: Amending Article 13 of the Proposed Directive on Copyright” (2019) 33 *International Review of Law, Computers & Technology* 187 <<https://www.tandfonline.com/doi/full/10.1080/13600869.2018.1475906>> accessed 12 June 2020.

they are seriously infringing the freedom to conduct their business under Article 16 of the Charter.⁹⁰⁵ The CJEU held that this requirement fails to be fair and proportionate while being excessively costly.⁹⁰⁶ Similarly, in *McFadden* injunction that requires “*the provider to prevent the recurrence of an infringement of a right related to copyright*” was found to be infringing the right of freedom to conduct a business, as it places a burden on the access provider capable of affecting his economic activity and restricting the access that the platform offers to its users.⁹⁰⁷

Secondly, these requirements were found to interfere with the general monitoring ban as they require filtering, which de facto amounts to a prohibited general monitoring obligation.⁹⁰⁸ As examined in detail previously, there is rich case law regarding the general monitoring ban; CJEU has shed light on the general monitoring ban in various decisions and examined its relationship with fundamental rights, including the freedom to conduct a business⁹⁰⁹ and the free movement of goods and services in the internal market.⁹¹⁰ It has been recognised that while being incompatible with the general monitoring ban, these type of obligations requires extensive measures with costs that hard to forecast and fail to strike a fair balance between the protection of the intellectual property right enjoyed by rightholders and that of the freedom to conduct a business enjoyed by service providers.⁹¹¹

Moreover, historically, these systems have many problems that affect the OCSSPs' freedom to conduct a business. Notice and takedown mechanisms give OCSSPs enough incentive to over-block as the cost of a statutory damages award usually far exceeds the benefit of resisting an improper removal request.⁹¹² There is no doubt that the stay down regime would give platforms further incentives to over-block, as OCSSPs are now obliged to monitor and filter for future uploads too. Besides, it has been repeatedly underlined that OCSSPs, as private entities, are unsuitable and ill-equipped for the task of monitoring and regulating infringing content.⁹¹³ As examined before, the biased nature of the takedown systems is

⁹⁰⁵ *L'Oréal* (n 113); *Scarlet Extended* (n 16); *Netlog* (n 16); *Youtube and Cyando* (n 208).

⁹⁰⁶ *L'Oréal* (n 113), para 139; *Scarlet Extended* (n 16), para 36; *Netlog* (n 16), para 34.

⁹⁰⁷ *Mc Fadden* (n 16), paras 81-82.

⁹⁰⁸ Article 8 of DSA.

⁹⁰⁹ *Scarlet Extended* (n 16); *Netlog* (n 16); *Mc Fadden* (n 16).

⁹¹⁰ *L'Oréal* (n 113); Martin Senftleben and Christina Angelopoulos (n 229).

⁹¹¹ *Netlog* (n 16) , para 51; *Scarlet Extended* (n 16), para 53.; *Mc Fadden* (n 16), para 98; *Youtube and Cyando* (n 77), Opinion of Advocate General Saugmandsgaard Øe, para 243.

⁹¹² Evan Engstrom and Nick Feamster (n 164), p. 4.

⁹¹³ *ibid.*

nothing new; takedown practices have been affected by the increasing use by large rightsholders of automated “bots” to search and detect possible infringements.⁹¹⁴ Platforms have been reporting the high number of takedown requests that include false reports and how big rightholders often use these mechanisms as their legal enabler to misuse their IPRs.⁹¹⁵ These voluminous false notices include links that are pointing to the same files or none at all. For example, according to a study, 31% of takedown requests that Google received over a six-month period were identified as problematic due to reasons of being either fundamentally flawed or questionable.⁹¹⁶ Remarkably, most of them fail to comply with the essential statutory requirement, namely, identifying the works in question. Greater than 19% of takedown requests failed to sufficiently identify the allegedly infringed work or the material alleged to infringe and failed to meet the most basic elements of these notifications.⁹¹⁷ Thus, there are already many examples of platforms enforcing false automated notices via automated tools and processing the takedown notices for material that is non-infringing in practice.

This shift towards using automated systems to generate notices resulted in a great number of notices, which mostly consist of misidentified or imprecise notices mostly sent by professional rightholders targeting large-scale infringement.⁹¹⁸ As they are bound to examine these false notices, this examination of these automated takedowns costs OCSSPs time, effort and money, therefore creating a significant burden on the platform. The misuse of the notice and takedown and notice and stay down systems will cost platforms as they have to deal with large amounts of notices mostly sent by automated takedown bots; OCSSPs need to bear the costs of facilitating these systems and satisfying the mass numbers of requests that they receive from rightholders.⁹¹⁹ For the OCSSPs, increased numbers of takedown notices mean increased filter use and increased workload for human review, which would cost the platform money, time and effort. In addition, they need to handle the complaints about those false claims, which the platforms would want to avoid not just because they are costly as they

⁹¹⁴ Jennifer M Urban, Joe Karaganis and Brianna Schofield (n 14).

⁹¹⁵ Ernesto Van der Sar, ‘Fail: Anti-Piracy Outfits Send Takedown Request For Non-Existent Torrents’ (*Torrent Freak*, 21 August 2016) <<https://torrentfreak.com/fail-anti-piracy-outfits-send-takedown-request-for-non-existent-torrents-160821/>> accessed 14 October 2021.

⁹¹⁶ Jennifer M Urban, Joe Karaganis and Brianna Schofield (n 14).

⁹¹⁷ Jennifer Urban, Joe Karaganis and Brianna L Schofield (n 422).

⁹¹⁸ Jennifer Urban, Joe Karaganis and Brianna L Schofield (n 422).

⁹¹⁹ Ernesto Van der Sar, ‘Fail: Anti-Piracy Outfits Send Takedown Request For Non-Existent Torrents’ (*Torrent Freak*, 21 August 2016) <<https://torrentfreak.com/fail-anti-piracy-outfits-send-takedown-request-for-non-existent-torrents-160821/>> accessed 14 October 2021.

require prompt human review but because of the negative effect on their reputation in the eyes of their users.

The removal of the non-infringing content because of the false notifications of the rightholders constitutes a significant interference with the user's fundamental rights, especially their freedom of expression, as examined in the previous chapters. This impact on their users is most likely to cause damage to the platform's reputation.⁹²⁰ In any case, content moderation practices compete with commercial models of OCSSPs as they adopt advertising-driven approaches.⁹²¹ The blocking of their customers' access or removing the content from their platform is not a desirable action for the OCSSPs as users' access and the diversity of the content on their platform translate into revenue for these platforms.⁹²² This abuse of the takedown and stay down tools by the rightholders cause chilling effects and costs OCSSPs their users in the competitive landscape of the online world. Secondly, by being an enabler for the misuse that rightholders are performing, they might end up being subject to damages caused by these false notifications. Thus, if the national implementations merely follow the Directive's wording and fail to specify sanctions against abuse, this significant economic burden on the platforms, which affects the OCSSPs' right to conduct a business negatively in various ways, would remain.

As a related issue, especially big platforms such as YouTube offer various privileged tools for big rightholders and continue developing new tools that give the rightholders the upper hand. For instance, "*The Content Verification Program*" of YouTube is designed exclusively for copyright-holding companies to issue more than one removal request.⁹²³ Also, a new tool that YouTube offers only to big rightholders allows them to block videos worldwide with just a couple of clicks if they think the video infringes their copyright. These tools were reported by an established content creator on the platform as "*the reason why rightholders are no longer using the DMCA takedown notices anymore.*"⁹²⁴ While this creates an environment where the parties sacrifice lawfulness for speedy enforcement, it also incentivises malicious

⁹²⁰ Cambridge Consultants (n 367).

⁹²¹ Cambridge Consultants (n 367) p.45.

⁹²² Annemarie Bridy, 'Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement' (SocArXiv 2016) preprint <<https://osf.io/bk8w2>> accessed 20 October 2021.

⁹²³ 'Content Verification Program' (*YouTube Help*) <https://support.google.com/youtube/answer/6005923?hl=en&ref_topic=9282364> accessed 18 October 2021.

⁹²⁴ H3 Podcast, *Ethan Got Arrested - Off The Rails #10* (2021) <<https://www.youtube.com/watch?v=ZxzPBgRuPul>> accessed 27 October 2021.

rightholders to misuse these tools and send false takedown notices faster and in bigger volumes. Considering the obligations under the CDSMD, which require OCSSPs to take all the steps that would be taken by a diligent operator to achieve the result of preventing the availability of unauthorised works or other subject matter on its website, it is likely for more platforms to come up with similar tools for big rightholders in order to meet the best effort standards and avoid any liability which would make the unbalanced environment of online enforcement of copyright even worse while bringing additional costs for the OCSSPs including the loss of their users.

Thus, all these challenges with licensing, filtering, and takedown obligations examined so far in this chapter show the significant potential of Article 17's obligations to disproportionately interfere with the right to conduct a business, resulting in the Article being incompatible with the Charter. However, the potential of Article 17(5) as a safeguard to avoid this incompatibility by ensuring the measures under Article 17 are proportionate should be investigated.

4.4 Assessing The Efficiency of Article 17(5) in Ensuring Article 17's Compatibility with the Right to Conduct a Business

As it is often underlined by the CJEU, it is “*important not to impose on those providers a liability which could jeopardise the profitability of their activity.*”⁹²⁵ By looking at the examination within this chapter, one can say that the liability which shifted to platforms regarding copyright infringements brought a disproportionate burden on their operations, especially with Article 17's extensive obligations for the prevention of unauthorised works online. The obligations of licencing and filtering in Article 17 introduce challenges regarding meeting the proportionality standards despite the fact that the same Article in its section 5 reaffirms the principle of proportionality.⁹²⁶

The many problems mentioned above can potentially be tackled with the efficient implementation of Article 17(5). Established case law and Article 17 (5) enable OCSSPs to choose the measures that they would use to ensure compliance with Article 17 (4), which are

⁹²⁵ *Youtube and Cyando*, Opinion of Advocate General Saugmandsgaard Øe (n 77), para 245.

⁹²⁶ Article 17 (5) of CDSMD.

best adapted to the resources and abilities available to them.⁹²⁷ Recently, CJEU explicitly underlined the importance of the principle of proportionality for the implementation of Article 17 to ensure the national implementation is striking a fair balance between competing fundamental rights.⁹²⁸ Thus, Article 17(5) has the potential to become a comprehensive safeguard in practice as it requires the consideration of the principle of proportionality for the assessment of all the best efforts obligations in Article 17(4).⁹²⁹

Article 17(5) states that among other elements, the type, the audience and the size of the service and the type of works uploaded, and the availability of suitable and effective means and their cost for service providers will be taken into account for determining the compliance of OCSSPs with the obligations under Article 17(4). In addition to these elements, Recital 66 also refers to the principle of proportionality for the assessment of ‘best efforts.’ The term ‘among others’ deserves special attention as it opens the door for member states to introduce additional elements for the assessment of the best efforts compliance of the OCSSPs.

Thus, in principle, Article 17(5) can help safeguard OCSSPs’ freedom to conduct business by applying the proportionality principle to the best efforts requirements as long as national implementations effectively implement this safeguard for the assessment of best efforts. This would also require the efficient integration of Recital 62 while implementing the OCSSPs definition in Article 2(6) to ensure that smaller neutral platforms with a low rate of infringing uploads would be covered by Article 17’s liability regime. However, by looking at the available national implementations, which have implemented the elements listed in Article 17(5) word-by-word, the likelihood of this provision to constitute an effective safeguard in practice for the right to conduct a business becomes questionable.⁹³⁰ Nevertheless, the application of this safeguard in national courts by providing the case-by-case analysis might include consideration of additional elements and achieve the effective application of the principle of proportionality, consequently ensuring the limited liability of OCSSP.⁹³¹

However, in practice, ensuring that the implementation of the Article allows the desired fair balance between competing fundamental rights and the application of the principle of

⁹²⁷ *UPC Telekabel* (n 49), para 52; *Poland v European Parliament* (n 79), para 75.

⁹²⁸ *Poland v European Parliament* (n 79), para 99.

⁹²⁹ *Guidance* (n 289), 8.

⁹³⁰ *João Pedro Quintais and others* (n 325) 171.

⁹³¹ *Poland v European Parliament* (n 79), para 99.

proportionality would be challenging because of the vague nature of “best efforts” standards and the evidence regarding the burdensome nature of the implementation of obtaining umbrella licences and various challenges with automated content recognition systems. As examined previously, best efforts standards are one of the vague concepts of the Directive that can lead to legal uncertainty, especially considering the many different translations within the national implementations of this concept.⁹³² While the need for this vagueness to ensure that the provision is future-proof has been underlined by the Commission and the CJEU, the problems that would bring in practice should not be overlooked.⁹³³

This brings the risk of creating some fragmentations on the EU level. As best efforts standards are undefined, even the assessment concluded in the light of the elements in Article 17(5), different Member States might identify the same effort of OCSSPs differently regarding the level of satisfaction of these standards. Accordingly, the fact that the OCSSPs have to undertake this complicated assessment to ensure that they are avoiding liability under the Article puts a disproportionate burden on their shoulders.⁹³⁴ This uncertainty would affect their finances directly, therefore, their right to conduct a business. For instance, this legal uncertainty caused by this would be most likely to result in small platforms being overwhelmed by the fear of meeting the best-efforts standards to be crushed under the costly implementation of automated tools or facing direct liability under CDSMD.

Moreover, to constitute an efficient safeguard, Article 17(5) must ensure that OCSSPs have flexibility regarding the technology or the solution to comply with the best efforts obligation; however, various potential obstacles exist for this result. First, the wording of Recital 66 may jeopardise the effectiveness of Article 17 (5) as it requires platforms to take “*all the steps that would be taken by a diligent operator*”, which is already reflected in some national implementations as an extensive and disproportionate duty such as “*taken every measure to avoid that situation*” to avoid liability under Article 17(4).⁹³⁵ Second, the legal uncertainty

⁹³² The ‘best efforts’, as an important factor for determining OCSSPs liability, resulted in different translations by different Member States and in many different implementations such as Croatia, Estonia, Greece, Latvia showed itself as ‘*all that is possible*’ or ‘*every possible effort*’ See Aline Larroyed, ‘When Translations Shape Legal Systems: How Misguided Translations Impact Users and Lead to Inaccurate Transposition – The Case of “Best Efforts” Under Article 17 DCDSM’ [2020] SSRN Electronic Journal <<https://www.ssrn.com/abstract=3740066>> accessed 30 August 2022.

⁹³³ Guidance (n 289), p.11; *Poland v European Parliament* (n 79), paras 73-75.

⁹³⁴ Felix Reda, Joschka Selinger and Michael Servatius (n 326).

⁹³⁵ *Poland v European Parliament*, Opinion of Saugmandsgaard Øe (n 272), footnote 229.; French translation of Recital 66. See DIRECTIVE (UE) 2019/790 DU PARLEMENT EUROPÉEN ET DU CONSEIL du 17 avril

around the definition of what type, audience and size of services and what type of works and other subject matter would fall into the scope makes it a risky choice for small to medium-sized OCSSPs to rely on Article 17 (5) for claiming that implementing filtering technologies would be disproportionate for their businesses.⁹³⁶ This uncertainty constitutes a big problem for the small to medium-sized OCSSPs that fail to fall into the scope of the start-up exemption of the Directive and affects the effectiveness of Article 17 (5) in practice. Also, even though the Guidance states that the proportionality requirement within Article 17(5) “*means in practice that online content-sharing service providers should not be expected to apply the most costly or sophisticated solutions,*” Recital 66 requires OCSSPs to take all the steps that would be taken by a diligent operator to “*prevent the availability of unauthorised works or other subject matter on its website taking into account best industry practices in light of all relevant factors and developments*” in order to determine the fulfilment of the best efforts standards.⁹³⁷ While underlining that platforms are free to choose the technology they implement, they do not have any discretion on the level of the efforts they need to show; on the contrary, this would depend on the cooperation arrangements with rightholders.⁹³⁸

This means that OCSSPs are expected to keep up with the fast-evolving technological solutions that would be the most sophisticated and costly ones to avoid liability under the CDSMD’s liability regime. Directive’s new regime creates an environment tainted by the constant threat of unforeseen copyright liability for the platforms with its obligation to demonstrate “best efforts” to proactively monitor for potentially infringing material via automated tools.⁹³⁹ This burden on the OCSSPs would result in severely curtailed investment in online start-ups, the substantial cost of permanent and complex technical solutions and the systematic removal of non-infringing material. These obligations would push already risk-averse OCSSPs to be more cautious and make less content available which would cause them to become less competitive with other regions and eventually affect even the European Digital Single Market.⁹⁴⁰ Moreover, in order to implement filtering systems, European

2019 sur le droit d'auteur et les droits voisins dans le marché unique numérique et modifiant les directives 96/9/CE et 2001/29/CE (Texte présentant de l'intérêt pour l'EEE) *OJ L 130*, 17.5.2019, p. 92–125 <<https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:32019L0790&from=EN>> accessed 01 September 2022.; For a detailed examination of French implementation See Appendix A.

⁹³⁶ Thomas Spoerri (n 293).

⁹³⁷ Guidance (n 289), p 12; Recital 66 of CDSMD.

⁹³⁸ Guidance (n 289), p.12.

⁹³⁹ Evan Engstrom and Nick Feamster (n 164).

⁹⁴⁰ Lenard Koschwitz, ‘Article 13: How Startups Would Be Affected by Such a Copyright Reform’ (*EU-Startups*, 17 January 2019) <<https://www.eu-startups.com/2019/01/article-13-how-startups-would-be-affected-by-such-a-copyright-reform/>> accessed 19 October 2021.

platforms, including start-ups, have to rely on the few major US filter providers, which would also negatively impact the Digital Single Market aims and eventually the EU economy in addition to the start-ups, users and content creators.

Another aspect of the Article's obligations which creates challenges for compliance with the proportionality principle is the aforementioned issues with notice and takedown and stay down systems, which require a vast amount of content to be monitored and filtered, in addition to handling the great volume of notices from everyone that claims to be a rightholder. The required justification within these notices, namely "sufficiently substantiated" notice for the stay down and "relevant and necessary information" for the filtering and takedown, falls short of providing legal certainty and proportionality. There is no explanation regarding what would qualify as "relevant and necessary information" or what notice can be considered as "sufficiently substantiated" within the Directive. These concepts play a crucial role in identifying the OCSSPs' liability regarding the content subject to a takedown notice; therefore, the uncertainty around them is highly undesirable from OCSSPs' point of view and makes their burden even heavier. Thus, where national implementations fail to clarify these concepts and ensure that the repeated incomplete or incorrect notifications by rightholders are subject to dissuasive sanctions, there will be a disproportionate interference with the right to conduct a business.

Thus, in practice, considering the available tools and requirements in Article 17 (4), the applicability of this safeguard for the right to conduct a business is challenging. Moreover, using the principle of proportionality in Article 17 (5) to exempt the platforms from the costly obligations of upload filters brings the danger of conflicting with the start-up exemption in Article 17 (6).⁹⁴¹ As Article 17 (6) includes tailored and strict requirements for the qualification for the exemption, it should not be undermined by using the principle of proportionality and providing an exemption that would go beyond the scope of Article 17 (6).⁹⁴² While trying to limit the impact on the OCSSPs by ensuring proportionality and following the aim of promoting innovation in the Digital Single Market, if a national implementation clarifies that small and medium-sized platforms without required sources are exempt from implementing upload filters, it might exceed the scope of the same Directive,

⁹⁴¹ Gerald Spindler (n 798).

⁹⁴² Gerald Spindler (n 798) 364.

therefore, be incompatible. Moreover, as discussed previously, even though this exemption introduces an exemption from filtering provisions in Article 17(4)(b), platforms still will be obliged to implement filters to comply with licensing obligations as this obligation requires them to install a filter for the information about these rights.⁹⁴³

In conclusion, even though Article 17(5) suggests that the proportionality principle must be taken into account, considering the actions that OCSSPs have to take to comply with the best efforts obligation, their liability concerns and all the other problems examined above, Article 17(5)'s proportionality would have a really limited practical effect unless the effective application of this principle ensured by the implementations.

4.5 Conclusion

Historically, the safe harbour regime provided OCSSPs immunity from liability for user-generated content that has been uploaded and shared by their users, which allowed the growth of the UGC and, accordingly, these platforms. However, with the CDSMD, the required implementation of the upload filters brings various new cost items which would negatively impact the platforms' economy and their right to conduct a business. There are both direct and opportunity costs that platforms have to face. Direct costs include the cost of developing or implementing the automated tools and operating costs, including maintaining and upgrading. Examples of these could be the hardware and software expenses of the upload filter, human review teams, and overall time and effort in setting up this content recognition system. There are disproportionate costs of developing or licencing, operating and maintaining the technologies to meet the ambiguous and comprehensive "best efforts" obligation. It is well acknowledged that filtering injunctions require permanent and complex technical solutions and represent a substantial cost for the OCCSPs, thereby infringing the freedom to conduct a business.⁹⁴⁴ However, these costs are not limited to software and hardware costs of filters; complying costs also include the additional recruits to implement the mandatory complaint and redress mechanisms of Article 17(9) and the financial risks associated with the non-licensed works that remain available on the platform.⁹⁴⁵

⁹⁴³ Franz Hofmann, 'Fünfzehn Thesen Zur Plattformhaftung Nach Art. 17 DSM-RL' [2019] GRUR 1219.

⁹⁴⁴ Ofcom, "'Site Blocking' to Reduce Online Copyright Infringement" (2011), p.40; *UPC Telekabel* (n 49), para. 50.

⁹⁴⁵ Thomas Spoerri (n 293).

As one of the aims of the Directive is to extend the role of the OCSSPs in online enforcement and allocate more responsibility with regard to policing the Internet and their users, these OCSSPs have been required to implement technical measures” to police copyright infringements. However, from the OCSSPs business perspective, copyright protection is mostly unfavourable to economic interests; while it benefits rights holders, it imposes administrative and hardware costs on the OCSSP, undermines their immunities and alienates or cuts off customers.⁹⁴⁶ For most platforms, the financial cost of implementing and operating an automated content recognition system exceeds the benefits. From the businesses’ standpoint, the effort and money spent on developing, implementing and maintaining a content recognition tool could have been better spent on other business priorities.⁹⁴⁷ One should bear in mind that OCSSPs, especially user-generated content platforms, act as enablers for users who want to publish their own content rather than traditional publishers with editorial control.⁹⁴⁸ Due to this business model, moderation for copyright infringements is not a priority for their growth. Therefore, despite the fact that the OCSSPs carry the cost of these technologies, they are not the primary beneficiaries of these tools, which increases the weight of the economic burden on their shoulders.

Moreover, many small and medium size OCSSPs within the EU are not capable of implementing ACR tools.⁹⁴⁹ The obligations of Article 17 would harm these platforms more than the big and established tech companies as meeting the best effort standards are more challenging and expensive for them compared to the big OCSSPs with their own sophisticated filtering technologies, extensive human resources and effective complaint and redress mechanism in place. Therefore, the potential benefit to rightholders comes with a high cost, which will be borne mostly by small and mid-sized platforms of the EU.⁹⁵⁰ Also, this negative impact would not be limited to the individual OCSSPs; Article 17 will cause undesirable changes within the Digital Single Market and negatively impact innovation within the EU. While big OCSSPs supported by large tech companies will use their

⁹⁴⁶ Milton Mueller, Andreas Kuehn and Stephanie Michelle Santoso, ‘Policing the Network: Using DPI for Copyright Enforcement’ (2012) 9 *Surveillance & Society* 348 <https://ojs.library.queensu.ca/index.php/surveillance-and-society/article/view/pol_net> accessed 21 October 2021.

⁹⁴⁷ Cambridge Consultants (n 367) p.61

⁹⁴⁸ *ibid.*

⁹⁴⁹ Open Letter to European Members of Parliament from 240 EU Businesses Against Copyright Directive Art. 11 & 13 (March. 19, 2019), available at: <<https://perma.cc/VX2C-SAXC>>.

⁹⁵⁰ Thomas Spoerri (n 293).

technological and financial advantages to outperform smaller OCSSPs, these OCSSPs would have to licence from the few providers of filtering technologies which are mostly US based.⁹⁵¹ In time, these providers become monopolies for these technologies, and ultimately, there will be an oligopoly as these providers would have significant control over different actors of online enforcement with the extensive data that they receive and collect.⁹⁵²

The problems examined within the chapter show that measures required under Article 17, especially the implementation of content moderation systems, are complex and costly, and these challenges put a disproportionate burden on start-ups and small to medium size companies. This will result in a detrimental effect on their freedom to conduct their business under Article 16 of the Charter, and where the efficient safeguards are absent, it becomes tremendously difficult for the Article to meet the proportionality standards, therefore, to be compatible with the Charter. Thus, looking at the issues examined in this chapter and the challenges with implementing Article 17 (5) as an efficient safeguard, one can say that while incorporating strong obligations for licencing and filtering, the Directive falls short when it comes to ensuring fairness, proportionality and legal certainty and interferes with the protection of the right to conduct a business. Moreover, on a larger scale, it has the potential to negatively impact the aims of the Digital Single Market and the EU economy. Thus, this picture with Article leaves a challenging task for national implementations to ensure that proportionality is considered at every step of online copyright enforcement by efficiently implementing Article 17(5). To tackle these challenges and ensure the compatibility of Article 17 with the Charter, the next chapter will provide recommendations for the national implementations of the Article, including the efficient implementation of the safeguards.

⁹⁵¹ Thomas Spoerri (n 293).

⁹⁵² Federal Commissioner for Data Protection and Freedom of Information (*Bundesbeauftragte für den Datenschutz und die Informationsfreiheit*), press release: Reform des Urheberrechts birgt auch datenschutzrechtliche Risiken (February 26, 2019), available at: <https://www.bfdi.bund.de/DE/Infothek/Pressemitteilungen/2019/10_Uploadfilter.html;jsessionid=B4190157E6A16C7DB3E5825542229E5.2_cid329>.

Chapter 5: Fundamental Right-Compliant Implementation of Article 17

5.1 Introduction

This chapter provides recommendations for the fundamental right compliant implementation in light of the extensive analysis within the previous chapters, which include the Commission's Guidance and the key decision for Article 17, *Poland v European Parliament*, that defined the issues and the areas that require recommendations.

A number of procedural safeguards, both *ex-ante* and *ex-post*, will be suggested to ensure that Article 17, and in particular, upload filters, is implemented in a way that is compatible with the fundamental rights examined in the previous chapters. These suggested procedural safeguards, including a specialised filtering system, will be explained in detail to reflect how these recommendations would successfully work in practice.

5.2 Procedural Safeguard Recommendations to Ensure the Compatibility of Article 17 with the Charter

It has been acknowledged that in order to ensure the fundamental right-compliant implementation of Article 17, the efficient implementation of the safeguards, Article 17(5)-(10), is a must.⁹⁵³ However, ensuring all these safeguards are efficiently implemented into national laws constitutes a challenge. Each safeguard requires attention to be paid to different matters while keeping the connection between safeguards and the duty of ensuring harmony to the different practical challenges they raise in mind. These include not going beyond the level of manoeuvring that Member States are allowed to with their implementation and also the consideration of the common practice of self-regulation and the non-compliance of OCSSPs.⁹⁵⁴

⁹⁵³ *Poland v European Parliament* (n 79); *Poland v European Parliament*, Opinion of AG Saugmandsgaard Øe (n 272).

⁹⁵⁴ After a year of the deadline for implementation most platforms continue to follow and enforce their own "statutes", their terms and conditions, instead of taking action regarding the new implementations of the CDSMD. See Appendix B for the analysis of terms and conditions of three of the biggest user generated content platforms, namely YouTube, Facebook, Twitter, to support the argument of current non-compliance.

Moreover, as Article 17 will apply to different types of providers, services and protected subject matter and requires the adoption of technological measures, some concepts are left deliberately vague to ensure the rules are future-proof and flexible.⁹⁵⁵ It is for the Member States and the Commission to determine the detailed rules for such measures and up to platforms to determine the specific measures by following these detailed rules, such as the type of filtering technology.⁹⁵⁶

To implement Article 17 in a way that ensures fair balance, the effective implementation of strong safeguards for user rights must be satisfied.⁹⁵⁷ It is important to ensure that introducing safeguards for user rights with no practical applicability or enforceability brings the risk of incompatibility with EU law. Article 17 requires elaboration to clarify how its sub-paragraphs are intended to interact with each other and therefore ensure a fair balance between fundamental rights which makes the word-by-word implementation not suitable. Therefore, in light of the in-depth analysis and discussions within this study, this chapter provides recommendations for the fundamental right-compliant implementation of Article 17 by focusing on each safeguard.

5.2.1 Recommendations Regarding the Implementation of Article 17(7)

This safeguard constitutes a focal point within the upload filter discussion, and perhaps it is the most potent tool among the safeguards provided by the Directive against Article 17(4)'s strong obligations regarding copyright enforcement. Putting into practice Article 17(4) in compliance with Article 17(7) and Article 17 (9) requires platforms not to prevent content that legitimately reproduces works and further not to have the objective or even the effect of preventing legitimate uses.⁹⁵⁸ Therefore, an ideal system, first and foremost, should not automatically and proactively block legitimate content. As the first step to limit the content that would be subject to filtering, the requirement for rightholders to provide relevant and

⁹⁵⁵ *Poland v European Parliament* (n 79), paras 73-74; *Poland v European Parliament*, AG Opinion (n 272), para 95; *Delfi AS v. Estonia* (n 130), para, 121.

⁹⁵⁶ *Poland v European Parliament* (n 79), para 75; *Poland v European Parliament*, AG Opinion (n 272), para 151.

⁹⁵⁷ *Poland v European Parliament* (n 79), para 99.

⁹⁵⁸ *Poland v European Parliament*, AG Opinion (n 272), para 165.

necessary information should be clarified by the national implementations, as in the absence of such clarification, the ambiguity surrounding this concept might fail to limit filtering efficiently. The acknowledgement of ‘relevant and necessary information’ as one of the limitations to general monitoring and filtering obligations by the CJEU makes it crucial to ensure the efficiency of this limit in practice.⁹⁵⁹ Thus, national implementations must ensure that rightholders are obliged to provide, at least, the correct information about the ownership of the specific works that they are requesting to be subject to Article 17 (4)’s obligations or, where possible, an official confirmation of the ownership. For instance, this information could be, for fingerprinting technologies, a fingerprint of the work, or a file, together with information on the ownership of the right.⁹⁶⁰

Then, to ensure the over-blocking is controlled and the interference on the freedom of expression is proportionate, the system must not allow filters to decide the proactive blocking of content alone. Especially when the use of the copyright-protected work within the upload falls within the scope of E&L or constitutes a transformative work, it should limit the automated blocking to only manifestly infringing uploads.⁹⁶¹ Thus, all uploads besides the manifestly infringing ones should benefit from a “presumption of lawfulness” to limit the instances of false positives.⁹⁶² However, where this erroneous blocking takes place, it should be limited to a rate that is low as possible, which requires Member States to agree on a tolerable percentage of false positives during stakeholder dialogues in order to clarify which technologies that platforms can implement in light of Article 17(5). Following that, to ensure the instances of false positives are limited and over-blocking is not constituting a significant threat to the users’ rights, a practical standard to identify manifestly infringing uploads should be set in line with CJEU case law.

However, it is hard to define which uploads would constitute manifestly infringing because of the lack of clarification regarding the relevant criteria; the *Poland* decision states that these

⁹⁵⁹ *Poland v European Parliament* (n 79), para 89.

⁹⁶⁰ European Union Intellectual Property Office., *Automated Content Recognition: Discussion Paper. Phase 2, IP Enforcement and Management Use Cases*. (Publications Office 2022) <<https://data.europa.eu/doi/10.2814/952694>> accessed 10 October 2022. Footnote 147

⁹⁶¹ *Poland v European Parliament*, AG Opinion (n 272), para 206; Guidance (n 289), p. 20.; AG defines manifestly infringing content as “information which has first been established by a court as being illegal or, otherwise, information the unlawfulness of which is obvious from the outset, that is to say, it is manifest, without, *inter alia*, the need for contextualisation.” See *Poland v European Parliament*, AG Opinion (n 272), para. 193.

⁹⁶² *Poland v European Parliament*, AG Opinion (n 272), para 193.

uploads should be obviously infringing to be identified as manifestly infringing, and their illegal status must be observable without requiring an independent assessment of the content by the OCSSPs.⁹⁶³ These manifestly infringing uploads include, in addition to identical copies of the work that is identified by the users, uploads of the work with insignificant alterations, which constitute an equivalent in line with *Glawischnig-Piesczek*.⁹⁶⁴ However, to ensure a low level of false positives, the concept of equivalent content must be applied very strictly; especially considering the nature of media uploads differs considerably from defamatory posts, this strict nature of the application becomes more critical.⁹⁶⁵ Following this standard, filters could distinguish between manifestly infringing and the rest of the uploads that are likely legitimate based on a variety of technical parameters of the upload.⁹⁶⁶ A typical example of a technical parameter could be the match percentage with the reference file, for instance, with the fingerprints in the platforms' database. Exact matches of entire third-party works or matches of significant proportions of these works should generally be considered manifestly infringing and get blocked preventively and automatically. For instance, when a substantial portion of the video is identical to the copyright-protected work, this upload should be preventively blocked.⁹⁶⁷

Additionally, platforms should inform their users regarding the operation of these filters and offer tools that notify users at the upload stage regarding the possible infringement within their upload that the filter detects and allow users to remove parts that include copyright-protected work before the upload if there is no applicable exception that the use of copyright protected work benefits from.⁹⁶⁸ In this way, if it is possible to carry out with the type of media of the upload, the user can take out the infringing part and carry on with uploading their content to the platform. While reducing the instances of infringements on the platform, this also helps OCSSPs to satisfy their duty of notification as this duty is not limited to after

⁹⁶³ *Poland v European Parliament* (n 79), para 90; *Glawischnig-Piesczek* (n 241), paras 41-46.

⁹⁶⁴ *Poland v European Parliament*, AG Opinion (n 272), paras 200-202.

⁹⁶⁵ Application of *Glawischnig-Piesczek* to copyright field accepted as problematic. See Marcella Favale, 'Robots as the New Judges: Copyright, Hate Speech, and Platforms' (2021) No. 04-2021 <https://microsites.bournemouth.ac.uk/cippm/files/2021/09/04-2021-MFavale_Robots-as-the-New-Judges.pdf>.

⁹⁶⁶ *Poland v European Parliament*, AG Opinion (n 272), para 211; For example, Sections 9-10 of UrhDaG <https://www.gesetze-im-internet.de/englisch_urhdag/englisch_urhdag.html> See Appendix A.

⁹⁶⁷ It is important to note that with complaint and redress mechanisms, rapid recovery of the upload should be possible.

⁹⁶⁸ Sarah TeamYouTube, 'New "Checks" Step in the Upload Flow on Desktop - YouTube Community' (*Google Support*, 16 March 2021) <<https://support.google.com/youtube/thread/102365314/new-%E2%80%9Cchecks%E2%80%9D-step-in-the-upload-flow-on-desktop>> accessed 17 November 2021.

the enforcement action is taken by the filter and helps safeguard users' right to a fair trial, too.⁹⁶⁹

However, limiting the filters with parameters would not offer a complete solution, as there are other scenarios to consider. For example, the work in question could be public domain, subject to Creative Commons licenses, may be posted online free of charge by the authors, or some copyright exceptions can be applied even when the level of third-party use is high.⁹⁷⁰ Moreover, a very widely used type of UGC, “memes”, which forms a big part of communications and interactions on social media as a type of transformative work with no commercial endeavour, should not be subject to automated blocking as this use can be placed within the scope of parody, pastiche or caricature exception.⁹⁷¹ As implied by the root of their name, the Ancient Greek word *mīmēma*, which means “something imitated,” they copy and reproduce the third-party work.⁹⁷² Therefore, a meme could include the entire third-party image with the text additions and alterations by users that add the humour element. However, even where the meme constitutes significant original or creative modifications of the work by the user, it will get caught on the upload filter's net as these technologies are unable to understand the transformative touch that the user added. As underlined within this project repeatedly, even though Article 17(7) identified the implementation of quotation, criticism, review, caricature, parody and pastiche exceptions as minimum user freedoms, in practice, the existence of these copyright exceptions and limitations depends on the national implementations and their practical enforcement by the platforms.⁹⁷³ Thus, the ideal implementation that ensures the application of safeguards should enable users to assert their content's legitimacy and provide practical tools to prevent automatic blocking instead of ensuring just the restoration of the content.

Thus, *ex-ante* safeguards should be placed for users' legitimate uses to avoid being blocked by the upload filter merely because of the inclusion of third-party work. Therefore, to ensure their enforcement in practice and help prevent legitimate uses from being affected by the

⁹⁶⁹ *Barbulescu v Romania* (n 610) para 133; *Tele2* (n 88), para 121.

⁹⁷⁰ *Scarlet Extended* (n 16), para 52; *Netlog* (n 16), para 50.

⁹⁷¹ *Guidance* (n 289), p. 21-22.

⁹⁷² Merriam-Webster, 'MEME' <<https://www.merriam-webster.com/dictionary/meme>> accessed 25 November 2021.

⁹⁷³ Sevra Guler Guzel, 'Article 17 of the CDSM Directive and the Fundamental Rights: Shaping the Future of the Internet' (2021) 12 *European Journal of Law and Technology* <<https://ejlt.org/index.php/ejlt/article/view/817>> accessed 23 July 2021.

upload filters, users should be given a chance to declare if their upload benefits from E&L at the uploading stage of their content. A straightforward way to achieve this is to enable users to flag these uses as legitimate.⁹⁷⁴ A good example of this can be found in the German implementation of Article 17.⁹⁷⁵ UrHDaG introduces the concept of “uses presumably authorised by law,” which constitutes a rule on “manifestly non-infringing” uploads⁹⁷⁶ and combines this with the pre-flagging tool. To fall within the scope of “uses presumably authorised by law”, user-generated content should: first, contain less than half of one or several other works or entire images and combine this work with other content; second, use the third party works should be only to a “minor extent,”⁹⁷⁷ or it should be pre-flagged by the user as legally authorised.⁹⁷⁸ Therefore, where the use of work is not minor, for instance, it falls within the scope of E&L, Section 11 provides a pre-flagging tool for users to flag their uploads as including uses authorised by law to ensure that these will not be subject to automated blocking and will stay online until the conclusion of a complaint procedure.⁹⁷⁹ Thus, UrHDaG excludes the preventive automated blocking for uses presumably authorised by law which is not manifestly infringing and provides a delayed takedown until the infringing nature of the content is confirmed through the conclusion of the complaints procedure.⁹⁸⁰

User notifications via pre-flagging will help improve the accuracy of the upload filters and reduce the number of false positives. Consequently, over-blocking, which constitutes a serious interference with freedom of expression, can be avoided as this tool allows users to flag uploads containing third-party works as legitimate and prevents them from being subject to automatic blocking. One should keep in mind that restoring content does not mean that the fundamental right affected by the automatic blocking is automatically being restored. Especially when the affected right is the freedom of expression and information, in the cases in which the expression concerns current affairs or political debates, it is impossible to

⁹⁷⁴ *Poland v European Parliament*, AG Opinion (n 272), para 211; Section 11 of UrHDaG.

⁹⁷⁵ For a detailed examination of German pre-flagging see Appendix A.

⁹⁷⁶ Christina Angelopoulos, ‘Articles 15 & 17 of the Directive on Copyright in the Digital Single Market Comparative National Implementation Report’ (CIPIL 2022) <<https://informationlabs.org/wp-content/uploads/2022/09/Angelopoulos-Report-Full-Report.pdf>>. p.44

⁹⁷⁷ Section 10 of UrHDaG states: “1. uses of up to 15 seconds in each case of a cinematographic work or moving picture, 2. uses of up to 15 seconds in each case of an audio track, 3. uses of up to 160 characters in each case of a text, and 4. uses of up to 125 kilobytes in each case of a photographic work, photograph or graphic.”

⁹⁷⁸ Section 9 of UrHDaG.

⁹⁷⁹ In addition to the obligation to provide a pre-flagging tool, Section 11 section provides detailed notification obligations for the OCSSPs. See Sections 5 and 11 of UrHDaG.

⁹⁸⁰ Section 9 of UrHDaG.

recover the negative effects.⁹⁸¹ Ensuring this in practice, first and foremost, requires automated proactive filtering to be limited to only manifestly infringing uploads, meaning that the rest of the uploads, including pre-flagged content, should go online. Therefore, the pre-flagging tool plays a vital role in the fair balancing of the rights as it provides an *ex-ante* safeguard for users, which is obligatory to be placed by the platforms.⁹⁸²

In order to improve the pre-flagging, in line with Recital 70, OCSSPs should be explicitly obliged to inform their users regarding the authorisations that the users can benefit from.⁹⁸³ This information could be provided within their terms and conditions and, in addition to that, as a click-through page prior to uploading with clear and brief information regarding E&L to raise users' awareness regarding which uses can be legitimate and pre-flagged. This page should clearly explain how users can benefit from E&L on the platform and the sanctions for the misuse of the pre-flagging tool. Users can upload their content by communicating that they understand the outcomes of misuse, both in-platform and legal, in a form that platforms may decide. This practice, while it helps achieve an improved application of pre-flagging, which would support users' exercise of freedom of expression and creation by promoting responsible behaviour when uploading content online and help reduce the instances of false flagging, would also help OCSSPs to meet the notification requirements of the Article 17 (9) and comply with the right to a fair trial. However, despite these precautions and sanctions, pre-flagging is open to abuse by malicious users as it gives the power to tackle the automated filtering of their declarations.⁹⁸⁴ Therefore, an additional confirmation phase by a party outside the platform-uploader-rightsholder triangle can add a layer of authentication to the uploader's flag while strengthening the fair balance.⁹⁸⁵

The implementation must ensure that the minor and non-commercial uses of third-party material should not be subject to automated blocking as the preventive filtering and blocking

⁹⁸¹ *Poland v European Parliament*, AG Opinion (n 272), para 188; *Observer and Guardian v. the United Kingdom* (n 554), para 60; *Yildirim v. Turkey* (n 1), para 47.

⁹⁸² Guidance (n 289), p.18-23; Pre-flagging is the most significant reason why German implementation was deemed to be most user right friendly and the closest implementation to the ideal. See Matthias Leistner, 'The Implementation of Art. 17 DSM Directive in Germany – A Primer with Some Comparative Remarks' [2022] (forthcoming) GRUR International. 7; Communia Association, 'German Article 17 Implementation Law Sets the Standard for Protecting User Rights against Overblocking – International Communia Association' (20 May 2021) <<https://www.communia-association.org/2021/05/20/german-article-17-implementation-law-sets-the-standard-for-protecting-user-rights-against-overblocking/>> accessed 4 November 2021

⁹⁸³ Recital 70 of CDSMD; *Poland v European Parliament*, AG Opinion (n 272), para 163.

⁹⁸⁴ Section 9 of UrhDaG. Also See Appendix A.

⁹⁸⁵ This system will be explained in detail below.

for users' small-scale not-for-profit uses would be disproportionate and interfere with users' freedom of expression while monitoring of users' behaviour for detection of these trivial acts would interfere with users' data protection.⁹⁸⁶ Therefore, in addition to the pre-flagging tool, Member States can introduce additional layers of protection against over-blocking, such as the so-called "*minor uses*" exception. While not constituting an additional exception to copyright, it can serve as a "delayed takedown"⁹⁸⁷ enabler for the uploads that are likely legitimate to help protect users' expressions and contribute to limiting the instances of over-blocking. A suitable quantitative threshold for the minor use exception can be set following empirical research on the user-generated content and harmonised on the EU level. Even though setting a quantitative threshold might cause identification problems as quantitative thresholds cannot be applied to every type of content, not providing any minor use exception would result in more false positives and over-blocking, as allowing these tools to block short extracts would higher their error levels. An implementation needs to provide such basic parameters to enhance the foreseeability, accountability, and transparency of the filtering. Setting quantitative margins into upload filters is not a tool for certainty regarding the existence of an exception; it merely aims to prevent any content with a "*reasonably conceivable*" application of the exception from getting an automatic block.⁹⁸⁸

For instance, UrhDaG states that an upload could benefit from the minor use exemption where the upload is non-commercial or only serves to generate insignificant income and defines different thresholds for the different media types for the inclusion of the third-party work to the user upload as preventive filtering for these uploads would be disproportionate.⁹⁸⁹ These parameters, in addition to whether the use is surrounded by the user's input, could be one of the considerations, especially for social media platforms that host UGC. One must keep in mind that the consideration of minor use should be taken into account for the non-flagged uploads, as uploads that are pre-flagged as legitimate by the user do not require this assessment to go online. Thus, UrhDaG ensures that automated blocking of content is limited to manifestly infringing uploads, and pre-flagged uploads and uploads with minor uses should go online. However, while introducing broader rules to ensure the availability of UGC

⁹⁸⁶ Giovanni Buttarelli (n 653).

⁹⁸⁷ Matthias Leistner (n 982). 7

⁹⁸⁸ *Poland v European Parliament*, AG Opinion (n 272), footnote 250.

⁹⁸⁹ Section 10 Act on the Copyright Liability of Online Content Sharing Service Providers (Urheberrechts-Diensteanbieter-Gesetz – UrhDaG).

with minor and transformative uses of copyright-protected work⁹⁹⁰, Member States must ensure that these broadenings comply with mandatory E&L to ensure that these provisions would not impact the level of harmonisation on the EU level.⁹⁹¹

Lastly, where applicable, monetisation can be used as an additional tool to reach an ideal implementation of Article 17(7), as it would help strike a fair balance between copyright and freedom of expression. Therefore, an ideal implementation should promote monetisation over blocking or takedown and stay down and incentivise rightholders to let the content stay online while benefiting from its revenue. In this way, important user expressions, including artistic expressions, important information and commentaries that would contribute to democratic debates, and any other different type of user creations can stay available without harming the rightholders. While supporting the exercise of users' freedom of expression, this solution aligns with the business models of the platforms and the interest of the rightholders. The obligation to encourage monetisation would also align with the outcomes of the stakeholder discussions required under Article 17(10).⁹⁹² This mechanism is already in place within big UGC platforms, and most rightsholders do not merely tolerate but actually encourage copyright infringement to benefit from their IPRs.⁹⁹³ However, while promoting monetising, it is important to ensure that this practice does not feed the imbalance between platforms and creator users due to platforms' one-sided terms and conditions that they impose on users.⁹⁹⁴

The recommended actions above are vital to meet proportionality and strike a fair balance between competing fundamental rights of users, platforms and rightholders. Member States should “*safeguard the effectiveness of the exceptions and permit observance of their purpose*”,⁹⁹⁵ as underlined by the case law of CJEU.⁹⁹⁶ Platforms should ensure the

⁹⁹⁰ Christophe Geiger, “Fair Use” through Fundamental Rights in Europe: When Freedom of Artistic Expression Allows Creative Appropriations and Opens up Statutory Copyright Limitations’ [2020] Joint PIJIP/TLS Research Paper Series <<https://digitalcommons.wcl.american.edu/research/63>>.

⁹⁹¹ Article 25 of CDSMD.

⁹⁹² Felipe Romero Moreno, ‘Targeted Consultation Addressed to the Participants to the Stakeholder Dialogue on Article 17 of the Directive on Copyright in the Digital Single Market’ (BILETA).

⁹⁹³ Kristelia García, ‘Monetizing Infringement’ [2020] U.C. Davis Law Review <<https://scholar.law.colorado.edu/articles/1308>>.

⁹⁹⁴ Further regulation might be needed to ensure the fair balanced practice of monetization of copyright-protected content. See João Pedro Quintais and others (n 325).

⁹⁹⁵ Guidance (n 289), p. 22.; *Poland v European Parliament* (n 79), para 87; *Poland v European Parliament*, AG Opinion (n 272), para 144ff.

⁹⁹⁶ *Spiegel Online* (n 133).

prevention and minimisation of the negative effects on the users' fundamental rights with a careful application of these safeguards, which includes ensuring the effective application of Article 17(7) to protect freedom of expression and information. In line with the case law of the CJEU,⁹⁹⁷ Article 17(7) requires Member States to implement or adapt the mandatory E&Ls in a way that is consistent with the Charter⁹⁹⁸ and to ensure their effectiveness.⁹⁹⁹ One should keep in mind that the problems mentioned and the imbalance of the powers between the actors of the online enforcement will remain as long as users have only *ex-post* safeguards for the filters' *ex-ante* decisions. As CDSMD is binding as a whole, Member States must ensure that "the obligation of result" within Article 17 (7) must be achieved, with forms and methods to achieve it being under the Member States' discretion.

Therefore, in order to comply with Article 17 (7)'s requirements and, most importantly, ensure a proportionate and balanced environment, the effective enforcement of user rights is a must. This enforcement must be ensured by the national implementations in line with the principle of procedural autonomy.¹⁰⁰⁰ In practice, this would be limiting the automated filtering to manifestly infringing uploads and pairing this with a mechanism that ensures the application of E&Ls and keeps over-blocking under control.¹⁰⁰¹ National laws should also include liability for failure to provide and ensure the right to lawful uses can be effectively exercised by users in line with Article 17 (7) and place effective and dissuasive sanctions for the cases in which OCSSP fails to comply with Article 17 (7). The implementation must ensure the failure to meet the obligation of result in Article 17 (7), which obliges platforms with a duty to protect users' freedom of expression by allowing users to upload and make available legitimate content generated by them, especially when this content is for the specific purposes of quotation, criticism, review, caricature, parody or pastiche has serious consequences just like the outcomes of the non-compliance with Article 17 (4). Also, it should be clearly stated that where the platform fails to take adequate measures for the availability of legitimate uses, it should be liable for damages caused to its users.¹⁰⁰²

⁹⁹⁷ *Painer* (n 139), para 133; C-117/13 and C-117/13 *Technische Universität Darmstadt v Eugen Ulmer KG, (TU Darmstadt)* [2014] ECLI:EU:C:2014:2196, paras 49, 57.

⁹⁹⁸ *Spiegel Online* (n 133), para 52; *UPC Telekabel* (n 49), para 46.

⁹⁹⁹ Guidance (n 289), p. 19.

¹⁰⁰⁰ Article 298(1) TFEU; *Poland v European Parliament*, AG Opinion (n 272), footnote 249.

¹⁰⁰¹ *Poland v European Parliament*, AG Opinion (n 272), para 211.

¹⁰⁰² 'Model Rules on Online Platforms' (European Law Institute 2019)

<https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Model_Rules_on_Online_Platforms.pdf> accessed 21 September 2022.

Moreover, national implementations should make it clear that Article 17(7)'s obligation is incorporated within the "best efforts" obligation and failure to enforce this obligation would bring the loss of the benefit of the exemption of Article 17(4) and endorse the equal importance of protecting user rights.¹⁰⁰³ As best efforts requirement one of the vague concepts of Article 17, horizontal rules of DSA might step in and enable national implementations to require further requirements for the OCSSPs, which fall into the scope of VLOPs. DSA requires platforms, in addition to the information duties, to act in a diligent, objective and proportionate manner in applying and enforcing the restrictions via any tool or measure that they employ, including algorithmic decision-making and human review. Most importantly, it underlines the duty of platforms to take users' fundamental rights into account while enforcing the rules that impose access restrictions to the content on their platforms.¹⁰⁰⁴ This might provide an extra layer of protection for legitimate content and user rights regarding the enforcement policies, especially regarding automated decision-making of the OCSSPs, which are also VLOPs under the DSA, as they should design their content recognition mechanisms according to not just CDSMD's requirements also the due diligence standards of DSA.

5.2.2 Recommendations regarding implementation of Article 17(9)

In order to ensure a fundamental rights-compliant implementation of Article 17, Article 17(9), which ensures the implementation of effective appeal tools, plays an important role. There are many different scenarios within the online enforcement of copyright that providing users with a complaint and redress mechanism is strictly mandatory to ensure a fair balance between competing fundamental rights.¹⁰⁰⁵ For example, as explained previously, there are various problems with currently placed direct takedown tools, such as the abuse of the "trusted rightholders" status and over-blocking issues, especially with hash-matching-based stay down systems.¹⁰⁰⁶ Therefore, to tackle these important problems and reach a fundamental right-compliant implementation, Article 17(9) plays a critical role.

¹⁰⁰³ *Poland v European Parliament*, AG Opinion (n 272), footnote 249.

¹⁰⁰⁴ Article 14(4) of DSA.

¹⁰⁰⁵ Right to fair trial encompasses right to challenge. See *Dombo Beheer BV v The Netherlands* App no 14448/88 (ECtHR, 27 October 1993) 18 EHRR 213, para 33; *Bulut v Austria* App no 17358/90 (ECtHR, 22 February 1996) ECHR 10 para 47; *UPC Telekabel* (n 49), para 57.

¹⁰⁰⁶ Examined in Chapters 3 and 4.

In line with the Article, first and foremost, users should be notified about the blocking and removal of their content via upload filters and takedowns. As these decisions interfere with users' fundamental rights, such as freedom of expression and right to privacy, notification regarding any takedown that took place due to a takedown request of a rightholder should be sent to the user. This type of notification is a must to ensure compliance with the right to a fair trial¹⁰⁰⁷, as it enables "*the affected to exercise their right to a legal remedy.*"¹⁰⁰⁸ Therefore, where the upload is identified as infringing and blocked by the upload filter or following a takedown notice, the user should be notified immediately regarding this blocking with a notification that sufficiently explains their rights, including copyright exceptions and limitations, the dispute resolution tools that are available and the actions that they can take against this blocking if the use is legitimate.

Moreover, users should be able to send counter-notices to OCSSPs to challenge these decisions when they think that their content has been subject to a malicious or false erroneous takedown request. This counter-notice, just like DMCA counter-notices, should enable them to request the "putting back online" of their uploaded content.¹⁰⁰⁹ The implementation must guarantee that the evidence would be heard from the affected persons in line with the equity of arms principle to ensure respect to the right to a fair trial and fair balance principle.¹⁰¹⁰ Where the defendant had not been able to reply to that official's submissions, this simple impression of imbalance in the defendant's rights was enough for CJEU to find a violation of rights of defence and equity of arms, which are features of the broader concept of a fair trial.¹⁰¹¹ Users should have the possibility to refute the opponent rightholder's views, especially considering that rightholders are sending takedown requests effortlessly and mostly automatically.¹⁰¹² Thus, notifications, counter-notices and recovery remedies for users should be placed to ensure compliance with Article 17(9).

¹⁰⁰⁷ Chapter 3: *Tele2* (n 88), para 141.; *Yildirim v Turkey* Decision no. 2011-625 DC of the French Constitutional Council of 10 March 2011, paragraph 8.

¹⁰⁰⁸ *Tele2* (n 88), para 121.

¹⁰⁰⁹ 17 U.S.C. § 512(g)(2)-(3) DMCA; Jennifer M Urban, Joe Karaganis and Brianna Schofield (n 14).

¹⁰¹⁰ *Yildirim v Turkey* (n 1); Decision no. 2009-580 DC of the French Constitutional Council of 10 June 2009, paragraph 38.; Felipe Romero Moreno, 'Targeted Consultation Addressed to the Participants to the Stakeholder Dialogue on Article 17 of the Directive on Copyright in the Digital Single Market' (BILETA).

¹⁰¹¹ *Borgers v Belgium* (n 735), para 29.

¹⁰¹² Jennifer M Urban, Joe Karaganis and Brianna Schofield (n 14); Jennifer Urban, Joe Karaganis and Brianna L Schofield (n 422).

The practice of leaving the legality assessment of uploaded content to rightholders who are naturally biased or the context-blind upload filters with efficiency levels depending on the accuracy and genuineness of the information provided by rightholders creates a suitable environment for over-complaining and interferes with the right to a fair trial and freedom of expression. As argued previously, there is no clarification regarding what could constitute “relevant and necessary information” in different cases and no defined sanctions for rightholders’ abuse of the takedown mechanism within the Directive. As clarified by CJEU, takedown notices must contain sufficient information that clearly shows the unauthorised use within the upload without requiring a detailed legal examination by the platform, and the removal is compatible with freedom of expression and information.¹⁰¹³ Thus, the takedown and stay down tools and the nature of relevant and necessary information should be clearly explained within the implementation to prevent “*unjustified complaints concerning on the basis of incorrect or improper reference information.*”¹⁰¹⁴ Also, penalties should be in place to minimise the risk of “false-complaining” in addition to penalties for over-blocking; rightholders who knowingly send false takedown and stay down requests should be liable for damages incurred by any party that is injured by this notification.¹⁰¹⁵ False notifications include where the rightholder fails to provide the relevant and necessary information or “fails to consider copyright exceptions”¹⁰¹⁶ or user pre-flags where the pre-flagging tool is adopted. The penalty for the abuse of takedown notices and counter-notices should have a similar effect on users and rightholders to ensure a fair balance and tackle the current problems with rightholder abuse of the takedown mechanism.

As a related problem, assessing whether a specific use of content is permitted by the rightholders will cause inconsistency that negatively affects the foreseeability, which is one of the components of the right to a fair trial. Depending on the context, the same use can be tolerated or accepted as intolerable according to the rightholders or the upload filters that work with the data provided by the rightholders.¹⁰¹⁷ Therefore, similar facts are unlikely to achieve similar results, which brings the problem of Article 17 failing to be foreseeable. The

¹⁰¹³ *Poland v European Parliament* (n 79), para 91; *YouTube and Cyando* (n 77), para 116.

¹⁰¹⁴ *Poland v European Parliament*, AG Opinion (n 272), para 148.

¹⁰¹⁵ These damages for providing false information in a takedown or counter notice might include actual damages and attorney’s fees; see: 17 U.S.C. § 512(f); A similar example in EU law can be found in Article 82 of GDPR.

¹⁰¹⁶ *Lenz v Universal Music Corp*, 801 F.3d 1126 (9th Cir 2015) (2015) F.3d (United States Court of Appeals for the Ninth Circuit).

¹⁰¹⁷ There are already examples of this in practice. See *Kristelia García* (n 993).

leading cause of this problem lies in leaving the assessment regarding the uploaded content to rightholders or the upload filters with efficiency levels depending on the accuracy and genuineness of the information provided by rightholders. However, Member States are directly bound by fundamental rights and must respect procedural safeguards. Most importantly, for this assessment, Member States have to always take into consideration circumstances that exonerate the user accused of an infringement of copyright.¹⁰¹⁸ Therefore, whether a specific use of content is permitted should be explicitly set out within the implementation by the Member States to achieve fundamental right-compliant implementation of Article 17 and improve foreseeability and compliance of rightholders with these permitted uses when sending their takedown and stay down notifications must be ensured.

As underlined previously, failing to provide an equal opportunity for the users results in an imbalanced practice that interferes with the right to a fair trial and the fair balance principle.¹⁰¹⁹ Granting the authority to decide on the status of the upload to only one side of the assessment is enough to identify this practice as imbalanced. Ideally, the assessment should be left to the courts.¹⁰²⁰ However, in practice, considering the fast pace of the online world and platforms, providing a rapid court decision for all pre-flagged uses is unlikely. As these uploads should stay online when the dispute regarding the legality of the use of the third-party work is being reviewed, the long progressing times can damage the rightholders. Therefore, a practical and fast way of improving decision-making which would help achieve a balanced assessment could be the platform's users' involvement.¹⁰²¹

As Article 17(9) plays an essential role in protecting freedom of expression, right to privacy and right to a fair trial, the need for a high degree of efficiency and reliability for this safeguard to work as intended should not be underestimated.¹⁰²² However, as examined previously, complaint and redress mechanisms historically suffer from efficiency problems; users are mostly unaware of these mechanisms or find the tools complicated to use.¹⁰²³ The

¹⁰¹⁸ *Productores de Música de España (Promusicae) v Telefónica de España SAU*. [2007]

ECLI:EU:C:2007:454, Opinion of Advocate General Kokott, p. 114

¹⁰¹⁹ *Dombo Beheer BV v The Netherlands* App no 14448/88 (ECtHR, 27 October 1993) 18 EHRR 213, para 33; *Ankerl v Switzerland* App no 17748/91 (ECtHR, 23 October 1996) ECHR 45, para 38; *Bulut v Austria* (n 981), para 47.

¹⁰²⁰ *Poland v European Parliament*, AG Opinion (n 272), para. 203.

¹⁰²¹ The community review mechanism will be explained further within this chapter.

¹⁰²² Axel Metzger and others (n 285), p.17.

¹⁰²³ Jennifer M Urban and Laura Quilter (2006) 'Efficient Process or Chilling Effects - Takedown Notices under

lengthy processing times and the fact that these mechanisms are known for their failure to provide users with quick and effective solutions as they do to the rightholders are other factors that discourage users from resorting to these mechanisms.¹⁰²⁴ Therefore, to achieve the ideal implementation of Article 17(9), Member States should instruct OCSSPs to implement a system that would minimise these problems by following updated guidance by the Commission.

Article 17(9) requires online content-sharing service providers to put in place an “*effective and expeditious*” complaint and redress mechanism allowing users to challenge the blocking or removal of their content. First and foremost, it is important for the platform to ensure that users are aware and can easily access these complaint and redress tools. The complaints these tools have brought should be subject to human review to deliver a rapid decision regarding the status of the upload, whether it should stay down or be restored. Therefore, in accordance with Article 17 (9), if the user challenges the decision regarding the infringing status of the upload via redress tools, the upload should be subject to human review. The human review procedure should deliver prompt decisions regarding the online status of the challenged content and ensure that both user and the rightholder are able to provide their input. In principle, the challenged content should remain online during the review until the end of the complaint and redress procedure; however, rightholders can submit a notice to request that the content be taken down during the review if it meets the criteria. Similarly, where content is taken down during the review process, users can also send a notification to request content to go online if they prove the time-sensitive status of their upload for their fundamental right practice.

Users can use complaint and redress mechanisms regarding any decision that involves removal or disabling access to their upload; this could be when their upload is found manifestly infringing and blocked or be subject to the *ex-post* removal of the user uploads via rightholders’ takedown and stay down requests. As underlined before, easy access must be ensured, and the operation of these redress tools should be explained to users within the notification they receive upon the takedown or the blocking. These complaints should be

Section 512 of the Digital Millennium Copyright Act’ Santa Clara High Tech. L.J. 22; Jennifer M Urban, Joe Karaganis and Brianna Schofield (n 14); United States Copyright Office, ‘Section 512 Of Title 17 A Report Of The Register Of Copyrights’ (2020). <https://www.copyright.gov/policy/section512/section-512-full-report.pdf>> accessed 23 September 2020.

¹⁰²⁴ Jennifer M Urban, Joe Karaganis and Brianna Schofield (n 14).

handled without undue delay, and where rightholders fail to respond swiftly, in principle, the contested upload should go online.¹⁰²⁵ There should be a set time window within the implementation rather than vague terms of “without undue delay”¹⁰²⁶ or “reasonable timeframe”¹⁰²⁷ for OCSSPs to process and rightholders to respond to these complaints not affect users' freedom of expression, which could be agreed within the stakeholder dialogues.¹⁰²⁸ Also, the requirement for this mechanism to be effective, rapid and user-friendly in order to be fundamental rights compliant should be underlined in the implementation. Service providers should ensure the human review mechanism provides timely and effective solutions, and instead of providing a one-sided conversation, it enables both sides of the dispute to contribute and defend their stances.

In most cases, restoring the legitimate upload in a timely manner is vital for exercising the right to freedom of expression and information, as the upload can lose its interest and informative value.¹⁰²⁹ However, in practice, it is challenging to provide the required human review as it would require employing large numbers of skilled moderators who would not always be available, and this practice would be disproportionately costly for the OCSSP. At this stage, an additional review by the users may be introduced, which will be proposed below with the community review system to help with the immense workload of human review teams.

Lastly, as a part of the process, the user should be notified of the outcome of the human review, and if their appeal was successful, the platform should reverse the decision regarding the blocking or removal promptly. A time window may be provided within the national implementation to enforce the outcome of the complaint and redress assessment. If the user's appeal fails, the notification should include sufficient information regarding the further appeal mechanisms made available by the Member States, as it is a requirement of Article 17(9) to challenge the final decision and for the overall settlement of these disputes. To ensure the right to a fair trial, the out-of-court mechanisms should have expertise on

¹⁰²⁵ European Commission, ‘Directive on Copyright in the Digital Single Market: Commission Seeks the Views of Participants to the Stakeholder Dialogue on Article 17 | Shaping Europe’s Digital Future’ (27 July 2021) <<https://digital-strategy.ec.europa.eu/en/news/directive-copyright-digital-single-market-commission-seeks-views-participants-stakeholder-dialogue>> accessed 25 November 2021.

¹⁰²⁶ Article 17(9) of CDSMD.

¹⁰²⁷ Guidance (n 289), p.24.

¹⁰²⁸ For instance, there are defined time limits within GDPR; under Article 12 a data controller must respond “without undue delay and in any event within one month of receipt of the request.”

¹⁰²⁹ *Poland v European Parliament* (n 79), para 60.

copyright disputes and should be free and not too complex to prevent putting off the average user from appealing the decision. For instance, an independent institutional copyright body of each Member State can be incorporated into the appeal process for the removal or blocking decisions.¹⁰³⁰

Thus, the ideal implementation of Article 17 (9) should require providing effective remedies which prevent feeding the imbalance between the protection over the rightholders and users to satisfy the fair trial guarantee and proportionality principle. However, one should keep in mind that an ideal implementation of Article 17 (9) alone without ensuring the effective implementation of other safeguards in Article 17 (5)-(10) would be meaningless in achieving a fundamental rights compliance implementation of Article. Especially for the fundamental right-compliant implementation of upload filters, in the absence of the *ex-ante* safeguards of Article 17 (7), it is not possible to mention the proportionality and effective protection of freedom of expression. This is because the collateral effect of such filtering is too great to be compatible with freedom of expression, irrespective of whether affected users have a right of appeal against blocking their information; therefore, further protection must be provided with *ex-ante* safeguards.¹⁰³¹ In line with that, the right implementation of Article 17 (9) should provide “*offensive means of reaction*” and open the door for users to enforce their rights imposed by Article 17 (7) against OCSSPs by enabling users to hold OCSSPs liable where they fail to not to prevent legitimate uploads.¹⁰³² This interpretation of the Article also aligns with the CJEU’s approach, which has been progressively leaning towards identifying copyright exceptions as rights instead of mere defences.¹⁰³³ Moreover, Article 17 (9) might be used for user claims under tort law where the platform was neglectful regarding accommodating the legitimate uses which provide users with a right to recompense as OCSSP fails to satisfy its duty of care.¹⁰³⁴

¹⁰³⁰ This independent copyright authority (ICA) can be established under DSA’s Digital Services Coordinators as the platforms’ liability under DSA includes the blocking and removal of copyright protected content. It will be discussed in detail below.

¹⁰³¹ *Poland v European Parliament*, AG Opinion (n 272), para 186.

¹⁰³² *Poland v European Parliament*, AG Opinion (n 272), para 161; Tito Rendas, ‘Are Copyright-Permitted Uses “Exceptions”, “Limitations” or “User Rights”?’ The Special Case of Article 17 CDSM Directive’ (2022) 17 *Journal of Intellectual Property Law & Practice* 54.; Michel M Walter and Silke von Lewinski (eds), *European Copyright Law: A Commentary* (Oxford University Press 2010). p. 1022.

¹⁰³³ *Funke Medien* (n 133), para 70; *Spiegel Online* (n 133), para 54; C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2011] ECLI:EU:C:2011:239, Opinion of Advocate General Trstenjak, para 196.

¹⁰³⁴ Lorna Woods and William Perrin, ‘Online Harm Reduction – a Statutory Duty of Care and Regulator’ [2019] SSRN Electronic Journal <<https://www.ssrn.com/abstract=4003986>> accessed 21 September 2022.

These recommendations regarding the complaint and redress mechanisms also comply with the DSA. First, recommended system ensures more transparent enforcement on the platforms by ensuring an additional layer of review of the automated decisions by the trained users in addition to the platforms' human teams that would only come into play *ex-post*. Moreover, strengthening the notification obligations and introducing more detailed rules regarding the operation of complaint and redress mechanisms would also be in line with the DSA. DSA's Article 20 includes an obligation to provide an effective internal complaint handling system for platforms' decisions regarding the removal or blocking of the content and provides strong safeguards for the enforcement of this redress mechanism, such as the obligation to restore legal content which has been subject to the false positives without undue delay which also provides an *ex-post* safeguard for the over enforcement. In addition, compliance with Article 20 of the DSA requires platforms to inform complainants without undue delay and ensure this notification includes the out-of-court dispute settlement information and, most significantly, introduces a legal body, Digital Services Coordinators, which ensures the standards for the body which would undertake this out-of-court settlement of disputes. These standards are, namely, impartial and independent, expert, easily accessible, able to provide swift, efficient and cost-effective redress, and governed by clear and fair rules.¹⁰³⁵ The article also fills the silence of the CDSMD by regulating the outcomes of the appeal decisions, in this context, fees within this article. According to Article 21(5) of DSA, where the user is successful with their appeal, the platform must reimburse the user for any fees and other reasonable expenses; however, if their appeal fails to be successful, users shall not be liable for the costs that the platform paid. In line with Article 21 of DSA, the recommended mechanism also suggests the involvement of an expert institutional body regarding disputes over the disabling of access to, or the removal of, works.

Thus, these obligations of DSA align perfectly with the above recommendations for the ideal implementation of Article 17 (9) of the CDSMD. Therefore, it would be practical and economical for platforms to design or switch their complaint and redress mechanism according to the DSA as it provides more detailed obligations regarding the features of this mechanism. Considering that most of the OCSSPs will fall into the scope of VLOPs, it would be beneficial for OCSSPs to consider an all-embracing complaint and redress tool that would cover different types of unlawful content. This approach would also help platforms achieve

¹⁰³⁵ Article 21(3) of DSA.

more user-friendly tools for the users and satisfy the requirement under Article 20 (3) DSA while providing ideal compliance with Article 17(9). Therefore, it would be beneficial for all the parties if the national implementations consider DSA's articles for the overlapping obligations with CDSMD to ensure higher standards regarding the application of these obligations.

5.2.3 Recommendations regarding implementation of Article 17 (8)

The required technical procedure under Article 17 (4), the employment and operation of upload filters, brings the problematic vague scope of monitoring that interferes with the rooted principle of the general monitoring ban, which has been repeated in Article 17 (8). Also, Article 17(9) ensures that the obligations set out according to the Directive not leading to any identification of individual users nor the processing of personal data and be compatible with data protection and privacy, which underlines the compatibility with GDPR and Directive on privacy and electronic communications¹⁰³⁶

As it has been argued within Chapter 3, despite the Directive's language not imposing specific technological tools, the currently available tools, upload filters, are data intrusive in nature.¹⁰³⁷ It has been found that by the CJEU, due to the *modus operandi* of these upload filters, the monitoring that they carry out is general, which blurs the scope *ratione personae*, *ratione materiae* and *ratione temporis*;¹⁰³⁸ therefore, the specific impact of this monitoring on the exchange of data is not possible to be determined.¹⁰³⁹ Unless it is limited with well-defined restrictions in terms of scope, time and profiles concerned, monitoring to detect trivial infringements that in most instances would not impact rightholders' interests noticeably would constitute a disproportionate practice.¹⁰⁴⁰ Therefore, it has been concluded that while this “*data processor-invasive*”¹⁰⁴¹ operation of upload filters clashes with the

¹⁰³⁶ General Data Protection Regulation; Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) *OJ L 201, 31.7.2002*, p. 37–47

¹⁰³⁷ *Scarlet Extended* (n 16), para 35; *Netlog* (n 16), paras 34–38.

¹⁰³⁸ *Scarlet Extended* (n 16), paras 52–53.

¹⁰³⁹ *Scarlet Extended* (n 16), para 52.

¹⁰⁴⁰ Giovanni Buttarelli (n 653).

¹⁰⁴¹ Felipe Romero-Moreno, “‘Notice and Staydown’ and Social Media: Amending Article 13 of the Proposed Directive on Copyright’ (2019) 33 *International Review of Law, Computers & Technology* 187. 16

general monitoring ban, it also poses a risk of serious interference with users' data protection.¹⁰⁴²

To tackle these problems, first, monitoring should be carried on in a truly specific manner. Thus, the conditions within the Article for imposing filtering obligations, such as “*the relevant and necessary information*” of Article 17(4)(b) and a “*sufficiently substantiated notice*” of Article 17(4)(c), should be clearly stated. To perform content moderation which respects fundamental rights, ideally, the implementation has to ensure that the duration, the scope of the moderation, especially the types of communications to be impacted, and the types of users being subjected to profiling are limited.¹⁰⁴³

In order to minimise data protection problems, upload filters can carry on gradual monitoring suggested by Romero-Moreno, where the active monitoring is limited to the uploads, which include third-party works in the platforms' database of work of high commercial value and operate a less data processor-exhaustive monitoring for the detection of these uploads.¹⁰⁴⁴ Moreover, users should be enabled to assert their rights once the implementing measures taken by the internet service provider are known; the monitoring must be subject to additional data protection safeguards, such as the prior checking or authorisation by the relevant national data protection authorities.¹⁰⁴⁵

The implementations must pay particular attention to these limitations to ensure the required data protection as these platforms have to monitor for equivalent content in line with the *Glawischnig-Piesczek* decision, which stated that monitoring for equivalent content in addition to identical is accepted as compatible with the general monitoring ban.¹⁰⁴⁶ Therefore, the strict standards to follow while monitoring for the equivalent content must be clearly laid down, the range of the equivalent content must be strictly limited to content with insignificant

¹⁰⁴² *Scarlet Extended* (n 16), paras 33-38; *Netlog* (n 16), paras 35-40; *Glawischnig-Piesczek* (n 241), para 34; *Barbulescu v Romania* (n 725), para 121; *James and Others v the United Kingdom* App no 8793/79 (ECtHR, 21 February 1986), para 51; *Uzun v Germany* App no 35623/05 (2010) 53 EHRR 852, para 78; *Yildirim v Turkey* (n 1), para 64.

¹⁰⁴³ Martin Senftleben and Christina Angelopoulos (n 229).

¹⁰⁴⁴ “*This system starts with the assessment of whether the uploaded material contains a registered work of high commercial value; then, checking the frequency and number of unlawful uploads that is, asking a database for suspected repeat infringement IP addresses; next, sending a message alerting of potential commercial-scale infringement or redirecting to a commercial website; and lastly, giving the opportunity to alleged commercial scale uploaders to challenge the blocking before actually implementing it.*” See Felipe Romero Moreno (n 328).

¹⁰⁴⁵ *UPC Telekabel* (n 49), para 57; Giovanni Buttarelli (n 653).

¹⁰⁴⁶ *Glawischnig-Piesczek* (n 241), paras 35,46.

alterations, and it must be ensured that transformative uses would not be subject to this monitoring in order to maintain the specific nature of the monitoring.¹⁰⁴⁷

5.2.4 Recommendations regarding implementation of Article 17(5)

While implementing and putting Article 17 into practice, the proportionality principle set out in Article 17(5) should be considered in every stage of this implementation as the “blanket safeguard.” Member States should embrace Article 17(5), which provides proportionality as an overarching safeguard throughout their all implementation, as it lies within the core of the balancing of the fundamental rights discussion. Therefore, the implementation must ensure the practical application of proportionality and incorporate it into the assessment of the best efforts standards of the Article.

Thus, as achieving an application of best efforts obligation on a case-by-case basis on practice is a must to ensure proportionality, the national implementation should have clear information on how to apply the proportionality to Article 17(4)’s conditions. To ensure this, first, the scope of OCSSP in Article 6(2) should be implemented in light of Article 17(5), which would help balance the intervention of the best efforts obligations with the platforms’ right to conduct a business as examined in detail in Chapter 4. Then, the implementation should underline that the assessment of best efforts for OCSSPs shall be assessed based on the ‘relevant and necessary information’ provided by the rightholders. Thirdly, clarify how the consideration of different factors regarding the service, costs, and content should be undertaken in different circumstances on a case-by-case basis. These different factors may include the platform’s type, size and audience, the availability and cost of different solutions that need to be implemented, including human review, and the prevailing or residual nature of content uploaded by the users.¹⁰⁴⁸ For instance, even though they fail to meet the exception requirements within Article 17(6), smaller service providers should not be expected to implement costly and complicated technologies such as fingerprinting. Instead, they should be able to rely on notice and takedown mechanisms to show their best efforts or even big platforms which do not consider their main purpose as enabling the uploading and sharing of

¹⁰⁴⁷ *Poland v European Parliament*, AG Opinion, (n 272), para 202.

¹⁰⁴⁸ European Commission, ‘Directive on Copyright in the Digital Single Market: Commission Seeks the Views of Participants to the Stakeholder Dialogue on Article 17 | Shaping Europe’s Digital Future’ (27 July 2021).

a large amount of copyright-protected content¹⁰⁴⁹ might be able to avoid liability according to the proportionality principle. OCSSPs should be free with their choice of automated content recognition technology in line with Article 17(5) and the principle of proportionality. However, another important parameter that needs to be set in light of the principle of proportionality regarding these technologies is the tolerable level of false positives that the upload filters generate. Despite the fact that there is no available technology that can identify legitimate uses flawlessly, CJEU's stress on excluding filters that cannot distinguish the lawful uses without needing an independent assessment for compliance with Article 17(4) should not mean excluding every upload filter available.¹⁰⁵⁰ That is why the acceptable error rate for different types of filtering technologies should be set in a way that they are as low as possible to ensure compliance with Article 17 (7).¹⁰⁵¹ Moreover, while setting this acceptable level of error, the approach of the legislature, which considers false positives more serious than false negatives and the precedence of Article 17 (7) over Article 17 (4), must be considered.¹⁰⁵² To keep the error rate low as possible additional mechanisms such as pre-flagging and human review should be implemented.¹⁰⁵³ As it would also define the OCSSPs' compliance with Article 17(4), the thresholds that would trigger automatic blocking must be defined following proportionality in a way that justifies this preventive enforcement action within the stakeholder dialogues in which parties are bound to put special attention to the fair balancing of fundamental rights and the use of exceptions and limitations.¹⁰⁵⁴

Proportionality comes into play also for notice and takedown obligations as the assessment of best efforts depends on the relevant and necessary information that rightholders provide. So, it should be clear in the implementation what constitutes relevant and necessary regarding information that rightholders provide to make OCSSPs ensure the unavailability of specific content. Similarly, as these factors apply to the stay down mechanism when rightholders request the prevention of future uploads of notified works from OCSSPs, a clarification regarding what constitutes a "*sufficiently substantiated notice*"¹⁰⁵⁵ also has great importance to ensure proportionality. Both concepts are related to a general monitoring ban that needs to

¹⁰⁴⁹ Recital 62 of CDSMD.

¹⁰⁵⁰ *Poland v European Parliament* (n 79), paras 85, 90.

¹⁰⁵¹ *Poland v European Parliament*, AG Opinion (n 272), para 214.

¹⁰⁵² *Poland v European Parliament* (n 79), para 78; *Poland v European Parliament*, AG Opinion (n 272), para 207.

¹⁰⁵³ *Poland v European Parliament*, AG Opinion (n 272), para 211.

¹⁰⁵⁴ Article 17(10) of CDSMD.; *Poland v European Parliament*, AG Opinion (n 272), paras 211-213.

¹⁰⁵⁵ Article 17(4)(c) of CDSMD.

be followed, too; therefore, extra care is required, especially with respect to the prevention of uploads for infringements that have not yet taken place. Thus, it is important that implementation clearly requires rightholders to provide specific and detailed information, which includes the identification of the allegedly infringed work, verification of the specific rights held by the rightholder and the infringing upload with the information on where it is located on the platform, i.e. infringing upload's URL.

Moreover, in addition to the application of the proportionality to Article 17(4) obligations, as underlined under the Article 17(7) recommendations, in order to provide proportionate enforcement that respects the fair balance of different fundamental rights, national implementations must ensure there is no imbalance between the sanctions regarding the failure to implement sufficient copyright moderation practices and the failure to protect user rights and interest. The implementation must take into account the fact that the protection that is guaranteed to the right to property has its limits, just like the other fundamental rights, and as an economic right, it has to be balanced against social rights.¹⁰⁵⁶ Therefore, where the system only provides sanctions for failing to employ preventative measures that incentivise copyright protection over user rights, it is impossible to mention proportionality.

Thus, in line with Article 17(5), the Member States and the Commission should define and determine comprehensive rules for the obligations of the Article, especially for the best efforts requirement, as the enforcement of the copyright online requires a supervised and transparent process.¹⁰⁵⁷

5.3 Conclusion

Therefore, an ideal implementation, first and foremost, in line with the minimum criteria for Convention-compatible legislation on Internet blocking measures,¹⁰⁵⁸ should clarify the definition of OCSSPs and the scope of the blocking or removal of the uploaded content; set a

¹⁰⁵⁶ Article 52(1) EU Charter.

¹⁰⁵⁷ *Poland v European Parliament*, AG Opinion (n 272), paras 210-212.

¹⁰⁵⁸ According to the opinion of Judge Albuquerque *Ahmet Yildirim v Turkey* (n 1): A definition of the categories of persons and institutions liable to have their publications blocked, a definition of the categories of blocking orders, a provision on the territorial ambit of the blocking order, indication of the "interests" that may justify the blocking, observance of the criterion of proportionality, compliance with the principle of necessity, definition of the authorities competent to block, a procedure to be followed, notification of the blocking and a judicial appeal procedure against the blocking order.

limit on the duration of the monitoring and blocking; underline the importance of proportionality throughout the application of Article 17, which provides for the fair balancing of fundamental rights of users, OCSSPs and the competing IPRs of rightholders. Then, accordingly, ensure that the blocking is necessary and encourage the implementation of less draconian measures, such as notice and takedown and where the *ex-ante* filtering is inevitable, ensure that it is limited to uploads with established illegality by a court or manifestly infringing ones and the operation of upload filters are not interfering with legitimate uses such as E&L. It should provide a clear definition of the procedure to be followed for redress, which includes the examination by the competent authority, the hearing of evidence from the affected user, notification of the blocking and the grounds for it to the user, and out-of-court and court appeal against the blocking or removal decision. Lastly, set a reasonable time limit for dispute resolutions to ensure the effectiveness of these appeal mechanisms.

Another important thing about the implementation to keep in mind is that Article 17 is open to interpretation and review anytime. Recital 66 mentions the “best industry practices” and the “state of the art” as standards for the best efforts assessment. As these standards are subject to rapid changes, the stakeholder dialogues envisaged by the EU legislature in Article 17(10) should take place continuously in order to regularly update the guidance and provide resilience for the rules.¹⁰⁵⁹ As Recital 66 opens up the door for AI technologies, it is important for the legislation also to provide solutions for problems arising from the implementation of AI upload filters and machine learning. The aim of the legislator with these points is to help reach a future-proof regulation that can keep up with technological developments and changes in practice. While one can argue that these continuous updates can affect the foreseeability of the law, CJEU’s reference to *Delfi* decision in the *Poland* decision clarifies the compliance with ECtHR case law by stating that limitations can be formulated with sufficiently open terms to be able to keep pace with changing circumstances.¹⁰⁶⁰ Therefore, by following a flexible approach, this study recommends a procedural system for the implementation of Article 17, which harmonises the CJEU’s case law that has been examined throughout this dissertation with the literature and existing national implementations to provide a fundamental right complaint enforcement of copyright online.

¹⁰⁵⁹ Article 17(10) of CDSMD; *Poland v European Parliament* (n 79), paras 73-74; *Poland v European Parliament*, AG Opinion (n 272), footnote 253.

¹⁰⁶⁰ *Poland v European Parliament* (n 79), para 74.

5.4 Suggested Implementation Model

In line with the provided recommendations above, which are generated through an in-depth examination of the competing fundamental rights and analysis of case law, in this chapter, this study will suggest the implementation model for Article 17.

One must keep in mind that delegating the review of online legality to the OCSSPs, while constituting an inappropriate transfer of juridical authority to the private sector, would cause an opaque enforcement process that would clash with the fundamental principles of EU law.¹⁰⁶¹ This important assessment and the protection of users' fundamental rights should not be entirely left to these private parties. Therefore, this study recommends the integration of users into the assessment of online legality to strike a fair balance between the competing rights and interests of users, OCSSPs and rightholders, as the traditional procedures do not include user input in this online legality assessment. Thus, as a result of the detailed examination of regulations, case law, literature and case studies, this study suggests that the ideal filtering should be decentralised, ex-post, transparent and hybrid.

A. Decentralised: There is no such thing as one size fits all when it comes to content filtering, as different cultures and locations require different moderation rules. For instance, each member state has their own copyright exceptions and limitations in place within their national laws, and even for the harmonised copyright exceptions such as quotation, review and parody, each location has its own understanding of what constitutes parody and what types of content would fall within the scope of the copyright exceptions and limitations. This filtering makes it possible to enforce different regulations in different locations and policies on different users, such as particular subgroups within the platform. For instance, one of the biggest platforms, Reddit, implements this type of filtering and pairs this with a voting system by their users, which helps the platform optimise the standards that apply to different communities.¹⁰⁶² The platform provides a minimum of common guidelines and enables

¹⁰⁶¹ *Poland v European Parliament*, AG Opinion (n 272), paras 59, 212; European Commission (2010), 'Summary of the results of the Public Consultation on the future of electronic commerce in the Internal Market and the implementation of the Directive on electronic commerce (2000/31/EC)'

¹⁰⁶² Spandana Singh, 'Everything in Moderation' (New America 2019) <<http://newamerica.org/oti/reports/everything-moderation-analysis-how-internet-platforms-are-using-artificial-intelligence-moderate-user-generated-content/>> accessed 10 January 2022. 26.

different communities to be managed by the standards set by their own moderators. Therefore, by applying community rules, moderators help form the culture of each community clearly, while upvotes, downvotes, and discussions by the platform users further form the culture in an indirect manner.¹⁰⁶³ Therefore, a decentralised filter that involves multiple distributed moderators operates with a degree of independence, and this type of more specified filtering would be a more fundamental right-compliant way to carry on filtering.

B. Ex-post: The implementation should avoid introducing *ex-ante* filtering as default; on the contrary, it should underline the fact that it needs to be strictly applied.¹⁰⁶⁴ *Ex-post* filtering has different benefits for both platforms and the users; compared to preventive filtering systems, *ex-post* mechanisms are found to be fundamental rights-compliant as it is less draconian, less intrusive and less expensive.¹⁰⁶⁵ It has been accepted that *ex-post* systems such as takedown are appropriate tools for balancing the rights and interests of all those involved in many cases.¹⁰⁶⁶ *Ex-post* filtering helps with over-blocking problems as it operates filtering on the content on the platform and is available for the users, and leaves the lawful content on the platform until there is a takedown request or a flag that claims the upload is infringing. This type of filtering has the advantage of letting valuable and time-sensitive content for freedom of expression and democratic dialogue go online without any delay. Therefore, it avoids the harmful outcomes of *ex-ante* filtering, such as the exclusion of many valuable and legitimate content with the automatic decisions of filters and the negative effects on freedom of expression, access to information and democratic dialogue.¹⁰⁶⁷ In addition to this, it reduces the extreme workload that moderators and human review teams need to undertake, which might ease the burden on the human teams and help the platform economy by reducing the human cost of content moderation and achieving a more proportionate practice.¹⁰⁶⁸ This *ex-post* manner can be further improved by carrying reactive filtering, which requires a notification such as flagging by users or complaints by rightholders to

¹⁰⁶³ Reddit, 'Reddit Content Policy' <<https://www.redditinc.com/policies/content-policy>> accessed 10 December 2021.

¹⁰⁶⁴ *Yildirim v Turkey* (n 1).

¹⁰⁶⁵ *Poland v European Parliament*, AG Opinion (n 272), footnote 261.; *Delfi v Estonia* (n 130), paras 158-159; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, App no [22947/13](#) (ECtHR, 2 February 2016) CE:ECHR:2016:0202JUD002294713, para 91.

¹⁰⁶⁶ *Delfi v Estonia* (n 130), para 159.

¹⁰⁶⁷ Policy Department for Citizens' Rights and Constitutional Affairs and Directorate-General for Internal Policies (n 59).

¹⁰⁶⁸ *Promusicae* (n 87), para 68; *UPC Telekabel* (n 49), paras 46,49.

decide which uploads will be subject to filtering in addition to moderation carried on by upload filters. Thus, even though the Directive requires the implementation of *ex-ante* filtering, the employment of *ex-post* filtering should be considered for smaller OCSSPs in light of Article 17(5), and the *ex-ante* filtering should be strictly limited to manifestly infringing uploads to ensure compliance with Charter.¹⁰⁶⁹

C. Transparent: one of the most important features for the filtering that should be carried on by the OCSSPs is transparency, as this principle carries significant importance for the fundamental right protection online, especially for users' data protection, right to respect for private life and right to a fair trial.¹⁰⁷⁰ To reach transparent filtering, OCSSPs should first explain the filtering that they operate in an easily understandable and sufficiently detailed way. When these filters take action, the platform should immediately inform individual users, ideally also their community, about the automated blocking decisions of the upload filters.¹⁰⁷¹ The information that should be provided includes how the implemented upload filter work within the platform, the reasoning behind the automated blocking of the user's content, redress mechanisms that include human review, all available in out-of-court and court appeal regarding the automated decisions concerning their content to ensure the compliance with the right to a fair trial.¹⁰⁷² Procedural tools for automated decisions should provide a remedy in a timely manner, and they should be user-friendly and free.¹⁰⁷³ These tools should enable users to challenge automated decisions and obtain human responses. Moreover, to mention an efficient level of transparency, users and the wider community must be enlightened about the filtering process, including how they can benefit from their rights of E&L. Therefore, transparent filtering should be carried on in order to ensure compliance with fundamental rights when operating upload filters. This would also ensure compliance with upcoming DSA requirements of transparency.¹⁰⁷⁴

¹⁰⁶⁹ *Poland v European Parliament* (n 79), paras 81, 85-95; *Poland v European Parliament*, AG Opinion (n 272), para 198; Guidance (n 289), p 20.

¹⁰⁷⁰ Recital 58 of GDPR; Commission, 'Commission Recommendation of 1.3.2018 on measures to effectively tackle illegal content online' Brussels, 1.3.2018C(2018) 1177 final. <<https://digital-strategy.ec.europa.eu/en/library/commission-recommendation-measures-effectively-tackle-illegal-content-online>>. p.12.

¹⁰⁷¹ European Commission, 'Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online' C/2018/1177 OJ L 63, 6.3.2018, p. 58.

¹⁰⁷² *Tele2* (n 88), para 100.; *Barbulescu v Romania* (n 725), para 133; *H. v. Belgium*, App no_8950/80 (ECtHR, 30 November 1987), para 53; *Hirvisaari v. Finland*, App no [49684/99](#) (ECtHR, 27 September 2001), para 30.

¹⁰⁷³ Article 6 of the Convention.

¹⁰⁷⁴ Chapter III of DSA. For detailed information on the transparency requirements See Chapter 2.3.3.

D. Hybrid: Lastly, the ideal filtering should be hybrid, meaning that content filtering is undertaken by a combination of automated tools and human teams. This type of filtering involves a “*multi-stage combination of humans and machines that interact in complex ways.*”¹⁰⁷⁵ This collaboration helps both actors to improve each other’s shortcomings. For instance, as no currently available technology can assess the legitimacy of an upload, mainly because of their incapability to distinguish the copyright exceptions and limitations that the upload benefits, the human review helps automated filters with this assessment and should be the ones who decide the blocking of the content that the filter assumed to be infringing. Meanwhile, as automated tools are more advanced regarding speed compared to human teams, they can help these teams by carrying out initial filtering, which reduces the number of cases they need to decide and gets rid of manifestly infringing uploads faster. As explained below, another actor can be introduced to share the workload of human review teams, namely, the platform’s community.

In order to achieve and maintain ideal filtering, which is fundamental rights compliant, in addition to the recommendations examined within this chapter, by considering the legal limits and nature of the upload filters, this study proposes the following procedural system for Article 17’s most problematic part, filtering obligations. Considering the lawmaker’s focus on the big OCSSPs for copyright reform, this proposal is most suitable for platforms with a large number of active users and sufficient resources.¹⁰⁷⁶

All the research that this study examined shows that upload filters should merely filter; they should not decide. The critical assessments cannot be left to the upload filters with no understanding of the context of the uploads,¹⁰⁷⁷ neither to OCSSPs, nor rightholders alone, as they have aligned interests regarding protecting the IPRs. Especially, the time-sensitivity of some user fundamental rights, such as freedom of expression, makes the traditional filtering which asks questions after the execution of the automated decision, incompatible with the protection of the fundamental rights and, consequently, with the Charter. Considering Article 17 (7), Article 17 (9) and the mandatory protection of fundamental rights that must be

¹⁰⁷⁵ Policy Department for Citizens’ Rights and Constitutional Affairs and Directorate-General for Internal Policies (n 59).

¹⁰⁷⁶ Impact Assessment, p. 138-148.

¹⁰⁷⁷ “*We cannot accept a situation where decisions that have a wide ranging impact on our democracy are being made by computer programs without any human supervision*” Ursula von der Leyen, ‘Speech by the President on Inauguration of New US President’ (*European Commission*) <https://ec.europa.eu/commission/presscorner/detail/en/speech_21_167> accessed 27 April 2021.

ensured within the implementation, it is clear that preventive removal of uploads via automatic decision-making should not be declared as the norm. Therefore, there should be a new and different way of online enforcement of copyright, which ensures a collaborative effort that includes the input of every actor within this process in order to achieve balanced enforcement that respects all fundamental rights.¹⁰⁷⁸

That is why this implementation suggests the introduction of an additional review stage, which will be handled by the platform's community to improve the pre-flagging system. This addition would help solve many problems arising from the automated nature of decision-making, improve the accuracy of the decisions and consequently ensure the respect of the essence of freedom of expression. First, it would incorporate pre-flagging by allowing users to prevent *ex-ante* filtering for the uploads that include uses that benefit from copyright exceptions and limitations, then introduce a type of human review sourced by the platform's community to improve the pre-flagging and, consequently, the filter's decisions. This additional review stage would also help the official human review team of the OCSSP by providing them with references that they can benefit from for their examination of the cases. It would also help make the whole decision-making progress more balanced by guaranteeing the contribution of equal strength from every party of the online copyright enforcement and preventing the accumulation of power and liability to certain actors. Moreover, this involvement can strengthen the feeling of shared responsibility within the OCSSPs' users; in this system, the removal of content would involve the shared responsibility of users, moderators, and automated tools, which would improve the accuracy of the users' contribution and the effectiveness of this system overall.¹⁰⁷⁹ This system introduces a type of filtering that prioritise transparency and enhances the sheer decision-making, which results in more fair and adequate decisions which would strengthen compliance with fundamental rights. However, it should be added that this mechanism is recommended for platforms with a

¹⁰⁷⁸ There are successful examples of hybrid collaborative filtering for recommendation systems which uses content-based filtering in combination with the information provided by user and ratings; this combination leads to knowledge increase, which contributes to better and more accurate results. See G Geetha and others, 'A Hybrid Approach Using Collaborative Filtering and Content Based Filtering for Recommender System' (2018) 1000 *Journal of Physics: Conference Series* 012101.; Xiao-Lin Zheng and others, 'A Hybrid Trust-Based Recommender System for Online Communities of Practice' (2015) 8 *IEEE Transactions on Learning Technologies* 345.; 'Collaborative Filtering | Machine Learning' (*Google Developers*) <<https://developers.google.com/machine-learning/recommendation/collaborative/basics>> accessed 12 September 2022.

¹⁰⁷⁹ Natali Helberger, Jo Pierson and Thomas Poell, 'Governing Online Platforms: From Contested to Cooperative Responsibility' (2018) 34 *The Information Society* 1 <<https://www.tandfonline.com/doi/full/10.1080/01972243.2017.1391913>> accessed 14 December 2021.

significant number of uploads and active users, which also have the sources to implement such a system without being disproportionately burdened.

This procedure includes a pre-flagging tool that would enable users to declare that their use of the copyright-protected work benefits from E&L or that the work belongs to the public domain or benefit from creative commons licence for their public uploads that do not seek commercial gain or do not generate substantial revenue. This tool, coupled with the community review, ensures users are provided with *ex-ante* safeguards, just like rightholders, for their fundamental rights that are subject to *ex-ante* filtering. The availability of this tool is important to strike a fair balance and fulfil the requirements of the critical safeguard in Article 17(7), namely the requirement of not preventing lawful content from going online, especially when the use of third-party work within the upload is covered by the E&L. With this pre-flagging tool, users are provided with the ability to declare their use of the third-party work is legitimate, therefore ensure that the *ex-ante* filtering is strictly limited to the manifestly infringing works.

5.4.1 Case Study: CS:GO Overwatch

The proposed review system has been inspired by the Overwatch anti-cheat system. This system was introduced to solve the dramatically increasing cheating problem within CS:GO, a competitive multiplayer game with 12.4 Million monthly unique users.¹⁰⁸⁰ This system enables the community to regulate itself by allowing qualified and experienced members to assess reports and where it is necessary to issue temporary bans regarding the cases of users cheating in the game.¹⁰⁸¹ That is why it is important to examine the functioning of this system to have an idea regarding how the proposed system would work in practice.

The functioning of the system mainly relays on the community members, “investigators”, to participate in the system by watching replays and deciding whether an offence occurred within the gameplay. These cases are reported by the players and selected by the coordinator

¹⁰⁸⁰ John McDonald, ‘Using Deep Learning Techniques to Address CS:GO’s Cheating Problem’ (Game Developers Conference, San Francisco) <<https://youtu.be/kTiP0zKF9bc>>.

¹⁰⁸¹ Counter-Strike, ‘Overwatch FAQ’ <<http://blog.counter-strike.net>> accessed 14 December 2021.

for their review. In order to take any action, namely, issue a ban, the investigators should collectively agree that an offence has occurred within these cases. In addition to that, since 2017, Valve has been implementing deep learning mechanisms called VACnet to monitor gameplays to detect cheaters with more certainty and refer these to the human review via the Overwatch system, which increases the chance for this system to be a model for the recommended system of this work to improve the efficiency with a hybrid operation.¹⁰⁸² As Valve praises the high level of ‘convictions’ on the cases submitted by the VACnet, it adds that the human element, Overwatch, is vital for this system as deep learning evolves along with human jurors, and it gets its training data from Overwatch.¹⁰⁸³

In order to be qualified to be selected as an investigator, Overwatch requires community members to be active. The parameters taken into account include “competitive wins, account age, hours played, Skill Group, low report count”. However, the CS:GO team adds that to be a good Overwatch investigator, a player does not need to be in a high-skill group and ensures that there is no relationship between skill groups and the ability to be an Overwatch Investigator.¹⁰⁸⁴ To maintain the investigator title, the investigators should keep their accuracy with their decisions and participation high, which is reflected in their “Overwatch score.” Therefore, the system changes scores by examining their performance with their caseload. This score evidences the investigator’s ability to consistently and accurately judge the cases.¹⁰⁸⁵

The accuracy of investigators is calculated according to the majority decision of a group of investigators for the same replay; the individual investigators gain a positive score if their verdict aligns with the majority decision and score negatively when their decision conflicts with the majority decision. The level of change in score depends on how strong the majority decision is; when the decision is close to being unanimous, meaning most investigators are in agreement, the change would be significant and smaller when they disagree.¹⁰⁸⁶ Moreover, to further help the team to maintain a good operation of the system, the cases that are examined by investigators also include occasional test cases. These cases are being put into their review

¹⁰⁸² Evan Lathi, ‘Valve Has 1,700 CPUs Working Non-Stop to Bust CS:GO Cheaters’ [2018] *PC Gamer* <<https://www.pcgamer.com/vacnet-csgo/>> accessed 16 September 2022.

¹⁰⁸³ John McDonald (n 1080).

¹⁰⁸⁴ Counter-Strike, ‘Overwatch FAQ’ <<http://blog.counter-strike.net>> accessed 14 December 2021.

¹⁰⁸⁵ *ibid.*

¹⁰⁸⁶ *ibid.*

list by the CS:GO team to check how the investigator is handling the cases that need to be reviewed, and they help them perceive the investigator's carefulness regarding the review of the case, how informed the decisions are and the level of accuracy.

In order to ensure the participation of every member of the community, every new investigator will enter the pool with a low score, and the only way to improve their score is to deliver accurate decisions. This also ensures that case outcomes be driven by only the high-scored investigators who practice the most accurate decision-making. The number of cases to be investigated increases parallel to members' activity and their Overwatch accuracy scores. The system provides more cases for investigators with high scores to review and, most importantly, gives their decision more validity during the decision-making, which means that their decision would have more weight for the final verdict.

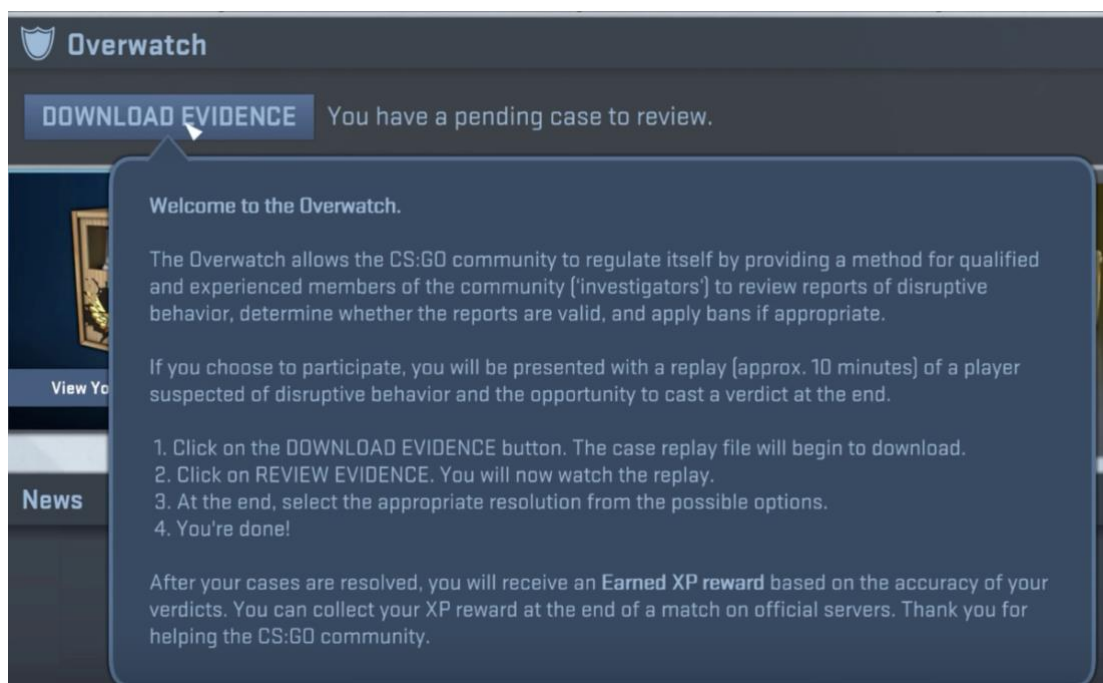
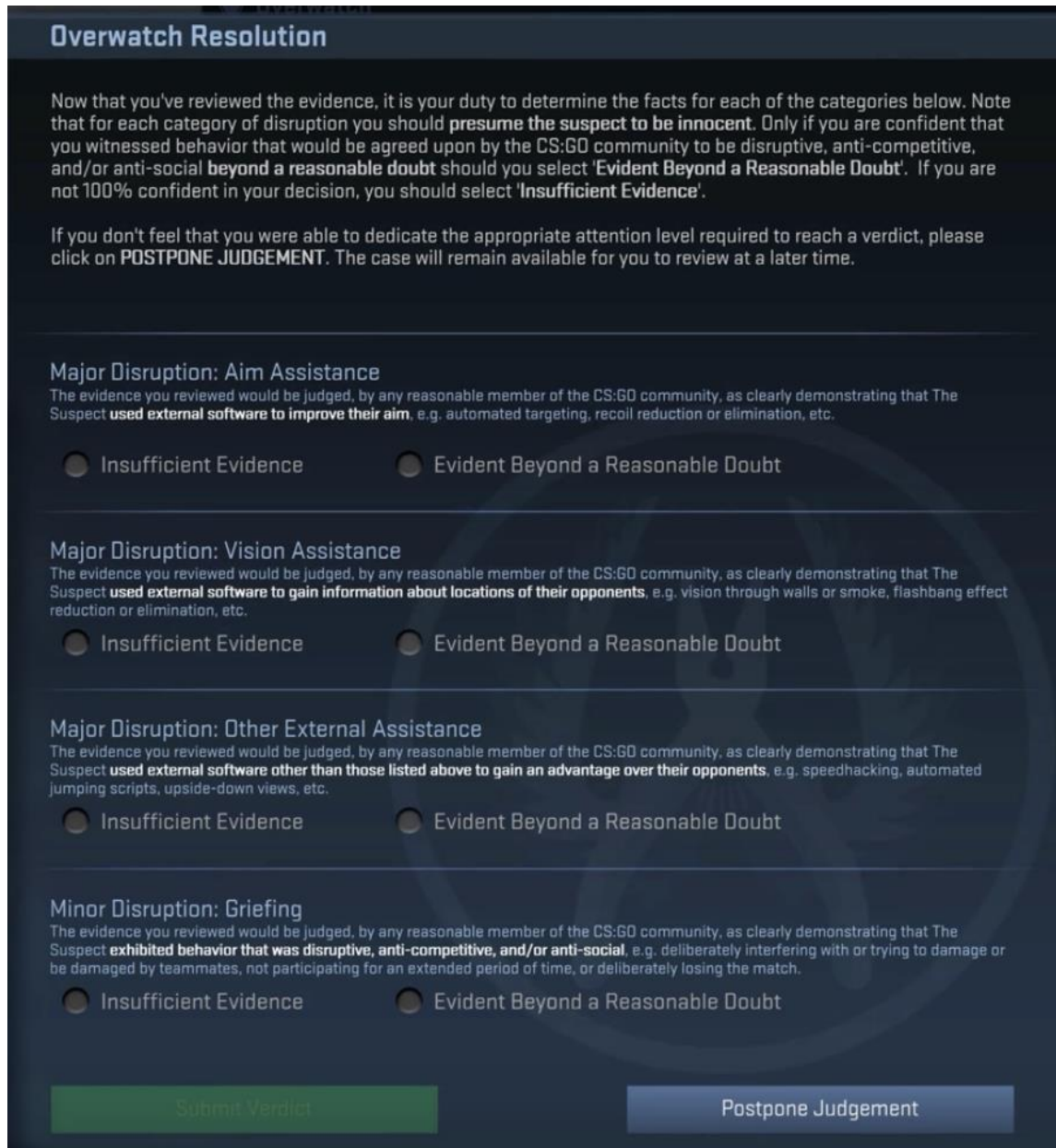


Figure 3: Overwatch review page

Investigators review fully anonymised replays of the randomly selected matches to determine whether or not players have committed any offences during that replay solely based on the actions of the suspected players. At the end of this review, investigators should deliver their decision regarding the accused acts as either *“Insufficient Evidence”* or *“Evident Beyond a*

Reasonable Doubt.”¹⁰⁸⁷ According to these decisions, the case will be closed, and when there is a collective judgment of the investigators and in the absence of a conclusive decision or where the majority of the input is “*Insufficient Evidence*,” it will be discarded. This review takes place rapidly with the user-friendly system and the active contribution of the investigators; a user reported that it takes them 30 minutes to complete a case, including watching the 10-minute gameplay.¹⁰⁸⁸



Overwatch Resolution

Now that you've reviewed the evidence, it is your duty to determine the facts for each of the categories below. Note that for each category of disruption you should **presume the suspect to be innocent**. Only if you are confident that you witnessed behavior that would be agreed upon by the CS:GO community to be disruptive, anti-competitive, and/or anti-social **beyond a reasonable doubt** should you select 'Evident Beyond a Reasonable Doubt'. If you are not 100% confident in your decision, you should select 'Insufficient Evidence'.

If you don't feel that you were able to dedicate the appropriate attention level required to reach a verdict, please click on **POSTPONE JUDGEMENT**. The case will remain available for you to review at a later time.

Major Disruption: Aim Assistance
The evidence you reviewed would be judged, by any reasonable member of the CS:GO community, as clearly demonstrating that The Suspect **used external software to improve their aim**, e.g. automated targeting, recoil reduction or elimination, etc.

Insufficient Evidence Evident Beyond a Reasonable Doubt

Major Disruption: Vision Assistance
The evidence you reviewed would be judged, by any reasonable member of the CS:GO community, as clearly demonstrating that The Suspect **used external software to gain information about locations of their opponents**, e.g. vision through walls or smoke, flashbang effect reduction or elimination, etc.

Insufficient Evidence Evident Beyond a Reasonable Doubt

Major Disruption: Other External Assistance
The evidence you reviewed would be judged, by any reasonable member of the CS:GO community, as clearly demonstrating that The Suspect **used external software other than those listed above to gain an advantage over their opponents**, e.g. speedhacking, automated jumping scripts, upside-down views, etc.

Insufficient Evidence Evident Beyond a Reasonable Doubt

Minor Disruption: Griefing
The evidence you reviewed would be judged, by any reasonable member of the CS:GO community, as clearly demonstrating that The Suspect **exhibited behavior that was disruptive, anti-competitive, and/or anti-social**, e.g. deliberately interfering with or trying to damage or be damaged by teammates, not participating for an extended period of time, or deliberately losing the match.

Insufficient Evidence Evident Beyond a Reasonable Doubt

Figure 4: Overwatch decision page

¹⁰⁸⁷ *ibid.*

¹⁰⁸⁸ *Lessons from an Overwatch Marathon* (Directed by 3klikphilip, 2018) <<https://www.youtube.com/watch?v=WluBbLy4PFM>> accessed 19 September 2022.

Consequently, Investigators will be awarded for their accurate decisions regarding these reviews. Systems provide them with experience points, and if they further deliver more accurate decisions continuously, they receive experience point boosters which is a significant incentive that could be applied to every match they are playing. At this point, it should be underlined that, as accurate decisions bring the points, investigators are not fixated on detecting the cheaters; they observe the importance of successfully determining the innocence.¹⁰⁸⁹ Also, while “punishing” the cheaters, it enables the system to give trust scores to players that play fairly and match those users with each other to ensure that they enjoy the game without cheaters.

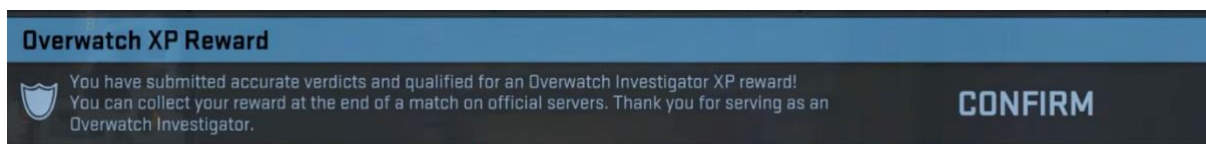


Figure 5: Reward notification

While there is sufficient information regarding the operation of Overwatch, there is limited publicly available official data that would help with evaluating the efficiency, as Valve does not release any official reports on the Overwatch system. They abstain from disclosing information, especially on detection of the cases, because it results in this detection losing its functionality as the bad actors adapt themselves accordingly.¹⁰⁹⁰ However, by looking at the operation, this community-supported hybrid decision-making seems like a good match for the automated copyright enforcement on big OCSSPs. Therefore, this study suggests the application of community regulation systems to automated copyright enforcement online to achieve a modern and fundamental right-compliant implementation.

With this system, users believe what they are undertaking is not a chore; it is rather a privilege and a satisfactory duty as it enables users to help and protect their community.¹⁰⁹¹ Moreover, according to the users, the system “provides an inherent sense of togetherness and

¹⁰⁸⁹ *ibid.*

¹⁰⁹⁰ John McDonald (n 1080).

¹⁰⁹¹ Ed Thorn, ‘CS:GO - Overwatch Guide’ (*Metabomb.net*, 9 January 2019)

<<https://www.metabomb.net/csgo/gameplay-guides/csgo-overwatch-guide-2>> accessed 7 January 2022.

pride within the CS:GO fan base” and even describes investigators as guardian angels.¹⁰⁹² Similarly, moderation on one of the biggest platforms, Reddit, is successfully handled by their users¹⁰⁹³, namely “mods,” who see this duty as a privilege as a part of the platform’s “community-first” ethos.¹⁰⁹⁴ This feeling of protecting the community might be introduced to users with the idea of protecting freedom of expression and arts and IP rights of creators on the platform and therefore motivating users to help provide fair enforcement of IPRs rather than advertising the system as a support mechanism for over-enforcement of IP rights. Moreover, in-platform initiatives should be introduced just like Overwatch’s experience points gain for accurate decisions such as the chance to be promoted within the programme, perks and access to different tools within the platform, virtual and physical awards such as vouchers, merchandise of the platform, exclusive access to events, workshops, meetups and direct access to the human review team directors and where applicable offers to participate in beta testing for new products and services.¹⁰⁹⁵ For instance, YouTube already has a significant group of users that received training from the platform regarding flagging unlawful content on YouTube under the YouTube Heroes programme, which now operates under the name YouTube contributors, and they can constitute a start group for this study’s recommended system.¹⁰⁹⁶

However, while promoting and introducing this system, it is important to stress the fact that the scoring mechanism against misuses ensures the wrongdoers are identified and thrown out of the system promptly and that there are severe penalties placed for any misuse or abuse of the privileges of being a community member. These penalties could be withdrawal of access to certain perks, termination of the trusted user status and removal from the program, and temporary and permanent bans for their platform account. Also, any unlocked perk that has not yet been redeemed, used, or accepted should be stripped from their programme account

¹⁰⁹² Anthony Clement, ‘Ultimate CS:GO Overwatch System Guide | TGG’ (8 February 2021) <<https://theglobalgaming.com/csgo/overwatch-system>> accessed 7 January 2022.

¹⁰⁹³ Reddit, ‘Transparency Report 2020 - Reddit’ <<https://www.redditinc.com/policies/transparency-report-2020>> accessed 7 January 2022.

¹⁰⁹⁴ Joel Khalili, ‘How Reddit Turned Its Millions of Users into a Content Moderation Army’ (*TechRadar*, 19 June 2021) <<https://www.techradar.com/uk/news/how-reddit-turned-its-millions-of-users-into-a-content-moderation-army>> accessed 10 January 2022.

¹⁰⁹⁵ ‘YouTube Contributors Program Rules - YouTube Help’ <<https://support.google.com/youtube/answer/7159025>> accessed 7 January 2022.

¹⁰⁹⁶ Sarah Perez, ‘YouTube Enlists Volunteers to Moderate Its Site via a New “YouTube Heroes” Program’ (*TechCrunch*, 21 September 2016) <<https://techcrunch.com/2016/09/21/youtube-enlists-volunteers-to-moderate-its-site-via-a-new-youtube-heroes-program/>> accessed 21 September 2022.; ‘YouTube Contributors Program Rules - YouTube Help’ <<https://support.google.com/youtube/answer/7159025>> accessed 7 January 2022.

due to the trusted user status being terminated.¹⁰⁹⁷ As is the case with all the mechanisms, this system is also not foolproof, but the power of making people feel important and how it motivates them is not something to ignore. There might be “trolls” who misuse this system, but through the scoring mechanism, they will be out of this mechanism and even from the platform promptly.

5.4.2 Community Review System

In light of the analysis of primary and secondary legal sources and the above case study, Community Review System has been developed.

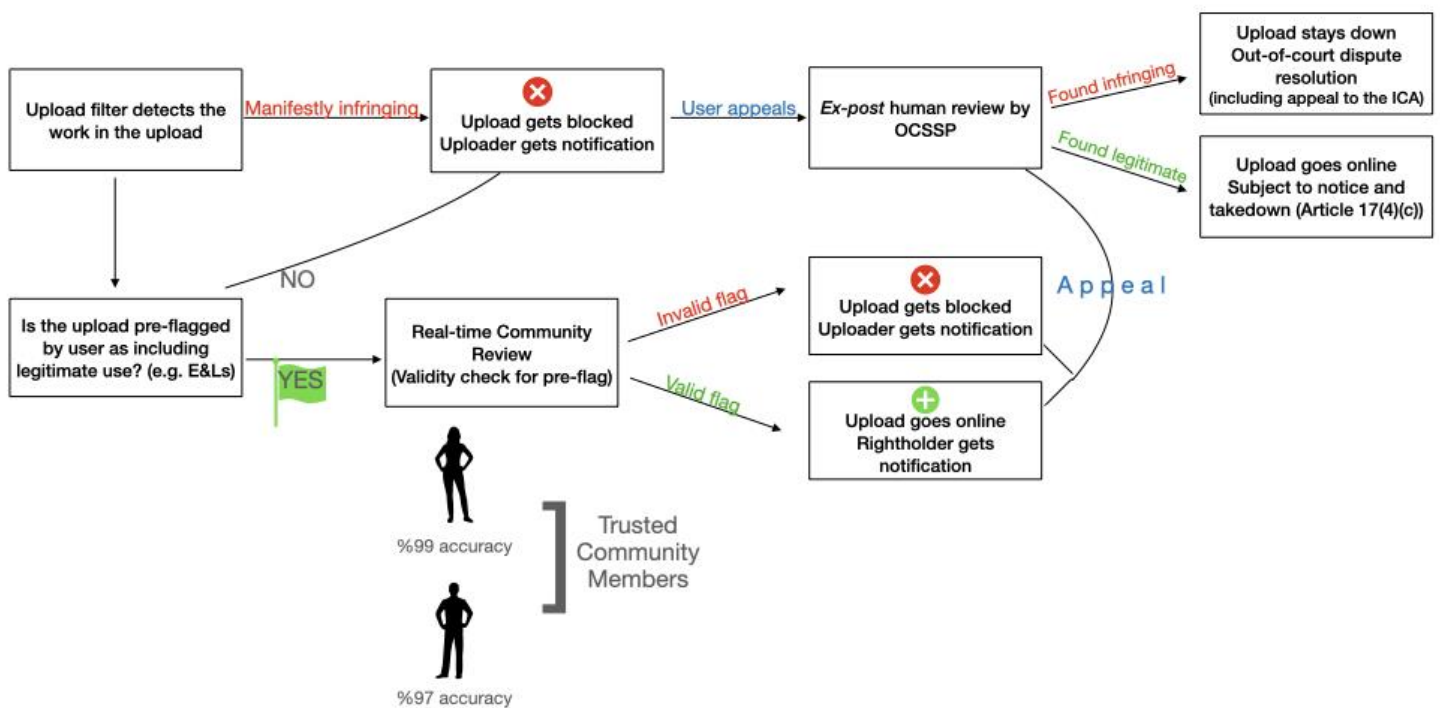


Figure 6: Automated filtering with Community Review

¹⁰⁹⁷ 'YouTube Contributors Program Rules - YouTube Help'
<https://support.google.com/youtube/answer/7159025> accessed 7 January 2022.

The stages of the recommended Community review system are as follows:

1. During the upload, users have the option to declare the nature of the content they will be uploading. Prior to pre-flagging, the user must read brief information regarding the E&L and the outcomes of abusing the pre-flagging system and confirm that they understand. When their upload includes third-party work covered by any copyright exceptions and limitations, the user can declare by using the “*pre-flag*” tool, which triggers the rapid *community* review and prevents the legitimate upload from being blocked by the filter and minimises loss of freedom of expression. As suggested previously, during the uploading stage, users should be informed about the copyright-protected work within their upload by the upload filter, which would provide a notice and choice mechanism to the user prior to uploading, enabling the user to remove the potentially infringing work from their content. Moreover, to assist the review, the uploader who uses the pre-flagging tool selects the legitimate use that the upload benefits from. If the uploaded material is a video, the uploader can mark up to three points on their video, which potentially can show the legitimate use. Thus, firstly, the user uploads the content, and the upload filter detects the copyright-protected work; however, where this upload is not manifestly infringing and has a flag that indicates legitimate use, it does not block it.

When there is a high percentage match with the third-party work within the upload and the reference file of that work within the database of the filter, the upload identifies as “manifestly infringing” and triggers the preventive blocking. The threshold for this blocking, the percentage of the match, should be high to presume that the use of the third-party work within the upload constitutes an infringement. Where this high percentage of the original work is identified within the content by the filter, this upload can be subject to automated proactive blocking as it constitutes a “manifestly infringing” upload according to the algorithm of the upload filter. The user will get an immediate notification regarding this blocking decision with the necessary information regarding the appeal options, which include in-platform, out-of-court and court dispute resolution options. This decision will be subject to human review if the user makes an appeal via complaint and redress mechanism placed within the platform, and the allegedly manifestly infringing content will stay down during this process.

If there is no identical or high match with the original work for the pre-flagged uploads, the community immediately and automatically receives the upload for review to provide an *ex-ante* rapid human review regarding the authenticity of the pre-flag. Therefore, this system ensures that the filter does not decide the fate of the uploads at first glance and human involvement in the decision-making at the upload stage. The flag guarantees that, despite detecting copyright-protected work within the upload, the upload will not be automatically blocked; instead, the upload filter sends the pre-flagged content to the community members for review. This step is essential for minimising the abuse of pre-flagging tool and ensuring a fair balance between copyright and freedom of expression. This combination of pre-flagging and community review prevents irreparable harm to the freedom of expression of users, which is exercised through time-sensitive uploads in a balanced way.

Uploaders can choose not to be subject to pre-flagging confirmation by the community with an option that will be presented to them during the upload process; however, this means that if the upload filter identifies the use of a third-party work within their upload that meets the manifestly infringing threshold, their upload will be subject to preventive blocking. They would be able to challenge the blocking and argue the legitimacy of their uploads via *ex-post* tools such as complaint and redress mechanisms. This action is required to ensure a fair balance between freedom of expression and the right to intellectual property and compliance with the Berne three-step test.

2. For pre-flagged uploads, the second phase is the community confirmation phase to ensure the inclusion of the users to achieve balanced decision-making. At this phase, a group of local online users who volunteered, namely community members, will be picked by an algorithm to receive the uploaded content to review and confirm the legitimacy of the pre-flag. These users must be selected based on their activity levels and accuracy scores and undertake training regarding the copyright exceptions and limitations for the Member State that they are based.¹⁰⁹⁸ Community members, upon

¹⁰⁹⁸ The user specification will be explained in detail below.

reviewing the case, can select the option of *correct use of pre-flag* or *misuse of pre-flag* or where they believe that they are not able to decide, they can request *reassignment of the case* to another trusted user. To assist trusted community members with their decision, questionnaires that ask specific questions that would help detect the copyright exception within the upload can be provided.¹⁰⁹⁹

This decision by the community should be delivered in real time or within a day latest. This confirmation constitutes the *rapid ex-ante community review* which would be delivered by the users to ensure human involvement while not putting a disproportionate burden on the platform, as they do not employ human review teams for this duty.

The community will receive the regular pre-flagged content that is detected, as the existence of the copyright exception is “not *certain*, but merely *reasonably conceivable*.”¹¹⁰⁰ Community members are required to read the T&C of this scheme, which includes efficient information regarding copyright exceptions and limitations that the Member State implemented and the sanctions for misuse of this confirmation system. According to this, the community will examine the case and see if the upload matches the requirements to be rightfully pre-flagged, meaning the alleged copyright E&Ls exist within the upload or the work belongs to the public domain or benefit from creative commons licence. This group of users will confirm the validity of the user pre-flag merely by looking at the use of the third-party work within the upload.

The community confirmation will be undertaken by hundreds, thousands, or even millions of community members in regular timeframes, depending on the size of the platform. According to the accuracy of their reporting, the community users will receive hidden points for the algorithm that is picking these users, meaning that the algorithm would prioritise the users with high accuracy points. This accuracy will be calculated according to the matches with human review teams’ decisions regarding the same cases.¹¹⁰¹ If the outcome of the human review is the same as the user’s decision, the user’s score will go up. The accuracy rates of users’ decisions will make

¹⁰⁹⁹ To ensure a harmonised application, an example of questionnaire can be drafted by the Commission or an independent copyright authority on EU level.

¹¹⁰⁰ *Poland v European Parliament*, AG Opinion (n 272), footnote 250.

¹¹⁰¹ Including the decisions of Member State’s independent copyright authority as the certified out-of-court dispute settlement body.

the users “trusted” in the eyes of the algorithm that picks users, and by using the feedback loop, this system will achieve a list of trusted users and prefer these trusted users for this confirmation phase. These *Trusted Community Members* will receive more uploads to review, and in this way, the accuracy of the decisions will be strengthened, and the workload of the “human review” team will be eased. Also, the collaborative nature of decision-making minimises the abuse of these tools, as malicious reports will get neutralised with the majority of the accurate reports. When these community members misuse their powers by deliberately providing inaccurate decisions, these misuses should be subject to dissuasive sanctions such as revoking the Trusted Community Member status, suspension of their account, and in more serious cases, removal of the account. At the same time, depending on their performance, in-platform perks should be offered to the Trusted Community Members, such as premium memberships to OCSSPs services to remunerate and motivate them. Additionally, the users who use the pre-flagging tool accurately can be rewarded in a similar manner.

If the community decision is collectively confirmative of the absence of the declared pre-flagging reason for the copyright-protected work detected by the upload filter could not be detected within the upload by the community, it will be blocked. The user will receive an immediate notification of this decision containing necessary knowledge regarding their decision and how to challenge it, including in-platform effective and expeditious complaint and redress mechanisms, which require this decision to be examined by the human review teams of OCSSPs. Also, to ensure prompt decision-making, in-platform communication channels between users and rightholders should be placed by the OCSSPs to solve the dispute before the complaint and redress procedure. Where applicable, rightholders will be encouraged to monetise the upload that includes their work.

If the community collectively confirms the validity of the pre-flag, this upload will go online and could be subject to a takedown. This decision of the community and the online status will be communicated with the rightholder immediately with a notification that includes sufficient knowledge regarding their appeal options. However, the content should continue to stay on the platform during the process of

appeal as its non-manifestly infringing nature is confirmed by the pre-flag, which has been confirmed by the community.

3. As stated above, the outcome of the community review can be promptly subject to *ex-post* human review upon the application of the user via in-platform complaint and redress tools. The upload will then be transferred to the “human review” team and go under an inspection of more specialised teams of moderators employed by the platform.

This human review decision should be delivered within a week, and if the content is time-sensitive for the uploader’s freedom of expression and impart information right, the user should have the option to declare this status of the upload with relevant evidence to the platform, which then should put extra care to speed up the procedure. In order to benefit from this, sufficient information regarding the sensitive nature of the upload must be provided by the uploader. As a default, the review must include both sides’ arguments; however, if rightholders do not react in a timely manner, platforms are allowed to decide on the blocked content without their input. If the human review decision reverses the community review decision, the upload will go online with immediate notification to the rightholder about the action that has been taken and the necessary information on how to challenge this decision. However, the information they need to provide for the appeal of this decision must be more detailed than the information they provided for the filtering.¹¹⁰²

If human review confirms the infringing nature of the upload, the content remains blocked, and the user can seek further redress mechanisms, such as out-of-court mechanisms offered by the Member State for the settlement of this dispute or court appeals. At this stage, an independent copyright authority of each Member State can provide supervision and further appeal regarding these decisions.¹¹⁰³

4. As it is evident from the operation of this suggested system, the importance of effective, transparent and expeditious complaint and redress mechanisms for the further protection of the competing fundamental rights is vital. Efficient appeal tools

¹¹⁰² Guidance (n 289), p.24.

¹¹⁰³ To improve harmonisation, these bodies can be formed together with the DSA. Will be discussed in detail below.

for both users and rightholders should be in place for the parties to use their right to appeal effectively. These appeal mechanisms should be effective, user-friendly, and, most importantly, provide timely solutions. Users can complain about the blocking or removal of the content, while rightholders can send justified notifications with efficient details to platforms to review the uploaded content which is available on the platform. As underlined previously in this chapter, the standards for the information that these notifications should contain must be clarified within the national implementation. Moreover, when these cases are resolved by appeal tools, the outcomes can be used for training data for the filters that use deep learning techniques to improve the speed and accuracy of the automated decisions.

5. Where users or rightholders believe that the outcome of the in-platform appeal process is unsatisfactory, both users and rightholders can send the decisions to the independent supervisory copyright body of the Member State (Independent Copyright Authority)(ICA) for their review, which can investigate many steps of the in-platform appeal such as the accuracy of pre-flags, the decisions of community, takedown requests. Such a body has been envisaged in the amendments for the Proposal of the Directive; however, it could not find a place in the final version. The Amendment for Article 13 states that “*Member States shall establish or designate an impartial body with the necessary expertise, with the aim of helping the parties to settle their disputes under this system.*”¹¹⁰⁴

This body can be established by taking the Digital Services Coordinator of DSA as a model. Digital Services Coordinator is the authority appointed with the task of supervising the application and, where necessary, enforcing DSA in each Member State.¹¹⁰⁵ Member States can designate an existing national authority and more than one competent authority to have specific supervisory or enforcement tasks, including appeal powers.¹¹⁰⁶ This copyright body can be placed as a specialised department under the Digital Services Coordinator as an establishment in compliance with DSA’s

¹¹⁰⁴ Amendments 78 and 252 of Amendments adopted by the European Parliament on 12 September 2018 on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market COM(2016)0593

¹¹⁰⁵ Recitals 110-116 of DSA.

¹¹⁰⁶ Recital 113 of DSA.

supervisory structure, which would be practical considering its role to qualify and inspect the out-of-court dispute settlement bodies of the Member States.¹¹⁰⁷ According to the DSA, the illegal content includes the non-authorized use of copyright-protected material,¹¹⁰⁸ and section three of Chapter three of the Act includes provisions regarding the blocking and removal decisions and complaint and redress mechanism in VLOPs, which would cover most of the OCSSPs. For instance, Article 20 obliges VLOPs to put in place an internal complaint-handling system in respect of decisions taken in relation to the allegedly-illegal content, including copyright infringing content and Article 22 sets out the measures online platforms are to adopt against misuse of the *trusted flagger* status. These examples of overlapping might enable Member States to ensure the enforcement of both from one administrative system. Moreover, these specialised authorities can also contribute to the future-proofness of the Directive by attending and providing data to the continuous stakeholder dialogues to ensure the up-to-datedness of rules as well as the compliance of the practices of OCSSPs with fundamental rights and the continuation of the fair balance. There are studies that suggest that an independent but legitimised institution on the EU level would be more appropriate for supervising the compliance with Article 17.¹¹⁰⁹ However, as underlined in the *Poland* decision, the burden is placed on the Member States to achieve a fundamental right-compliant implementation of the Article with their national implementations.¹¹¹⁰

5.4.3 Legal and Practical Justifications for the Recommended System

Considering the importance of ensuring the efficient safeguards for the compliance of Article 17 with fundamental rights, the Member States, while implementing the Article, must pay special attention to Article 17(7), (8), (9), (10) and guarantee the effectiveness of these safeguards. Thus, they need to consider the collateral effect of the measures they implement

¹¹⁰⁷ Article 21 of DSA.

¹¹⁰⁸ Recital 12 of DSA.

¹¹⁰⁹ Christophe Geiger and Bernd Justin Jütte (n 472).; Christophe Geiger and Natasha Mangal, 'Regulating Creativity Online: Proposal for an EU Copyright Institution' [2022] GRUR International- Journal of European and International IP Law 2022 (Forthcoming) <<https://www.ssrn.com/abstract=4107644>> accessed 14 September 2022.

¹¹¹⁰ *Poland v European Parliament* (n 79), para 99.

to comply with Article 17(4); as the interference with fundamental rights stems from an automated process need for such safeguards is all the greater.¹¹¹¹ More specifically, it has been confirmed that when it comes to putting Article 17 in practice, ensuring the availability of legitimate works, the safeguard in Article 17(7) prevails over the duty of preventing the availability of specific works.¹¹¹² Member States and platforms must keep in mind that the application of statutory copyright exceptions also determines whether a transmission is lawful.¹¹¹³ An ideal implementation must ensure the practical efficiency of the Article's safeguards as these have been accepted as the only way to limit the interference of Article 17(4)'s measures on users' freedom of expression and prevent the Article from being incompatible with the Charter.¹¹¹⁴ Consequently, the approach to be followed by the Member States for the implementation of Article 17 must prioritise the goal of striking a fair balance between the various fundamental rights protected by the Charter.¹¹¹⁵

The shortcomings and inefficiency of the automated measures to ensure the required protection for users' fundamental rights were pointed out many times by different academics and experts, and it was an important argument of this study to demonstrate the unfitness of upload filters as well. This type of filtering, as they filter and block lawful content, is clearly excluded by the CJEU in the context of Article 17 in line with the established case law of the Court.¹¹¹⁶ Also, the lack of empirical evidence related to the operation of existing practices caused by the unwillingness and selectiveness of platforms and rightholders regarding sharing information does not help with the effectiveness assessment of these systems.¹¹¹⁷ However, there are many studies supported by individual experiences with the existing tools for appeal that show the inefficiency of these *ex-post* mechanisms.¹¹¹⁸ Thus, this system aims to make the current filtering practices voluntarily implemented by some platforms to avoid liability compatible with the Charter and ensure that proportionality and fair balance is

¹¹¹¹ *Poland v European Parliament* (n 79), para 67; *Schrems* (n 79), para 176.

¹¹¹² *Poland v European Parliament* (n 79), para, 78; *Poland v European Parliament*, AG Opinion (n 272), paras 191-193; Guidance (n 289), p.20.

¹¹¹³ *Poland v European Parliament* (n 79), para 85.

¹¹¹⁴ *Poland v European Parliament* (n 79), para 98.

¹¹¹⁵ *Poland v European Parliament* (n 79), para 99.

¹¹¹⁶ *Poland v European Parliament* (n 79), paras 85-86; *Poland v European Parliament*, AG Opinion (n 272), paras 164-165, 191-193; *Scarlet Extended* (n 16), para 52; *Netlog* (n 16), para 48.

¹¹¹⁷ The YouTube Team, 'Access for All, a Balanced Ecosystem, and Powerful Tools' (*blog.youtube*, 12 December 2021) <<https://blog.youtube/news-and-events/access-all-balanced-ecosystem-and-powerful-tools/>> accessed 5 January 2022.

¹¹¹⁸ Katharine Trendacosta, 'Unfiltered: How YouTube's Content ID Discourages Fair Use and Dictates What We See Online' (*Electronic Frontier Foundation*, 10 December 2020) <<https://www.eff.org/wp/unfiltered-how-youtubes-content-id-discourages-fair-use-and-dictates-what-we-see-online>> accessed 24 December 2021.

respected by their operation. Thus, by combining a pre-flagging tool which ensures the application of automated preventive filtering is limited to manifestly infringing content and community review, it ensures that limit the autonomy of the filters and a system that strikes a fair balance between competing fundamental rights of users, rightholders and OCSSPs. Implementation of such *ex-ante* mechanisms is a must for an implementation that ensures the fair balance of competing rights and interests, as confirmed by the emphasis that CJEU put on safeguards for the compatibility assessment of Article 17 with the Charter.¹¹¹⁹ The focus of the lawmaker on Article 17 (7), in particular copyright exceptions and limitations, the legislative history of the Article and the policy goals of the European framework further justifies such an approach.¹¹²⁰

The main aim of the recommended implementation is to ensure that a fair balance between all the fundamental rights involved in online copyright enforcement has been struck. While dealing with copyright infringements to protect the right to property, the delicately balanced procedures for this enforcement should also protect users' rights, such as freedom of expression, data protection and privacy, and the right to a fair trial. This requires implementing effective safeguards, which the recommended implementation aims to provide different ones in different stages of the enforcement process. One of the key elements regarding ensuring a fair balance is the effective enforcement of copyright exceptions which limits the application of the right to intellectual property. However, the exercise of these exceptions also has limits set by the three-step test that must be complied with.¹¹²¹ Article 5(5) of the InfoSoc Directive states that these copyright exceptions would be allowed only in certain special cases that do not conflict with the normal exploitation of the work and that do not unreasonably prejudice the legitimate interests of the rightholder.¹¹²² However, the long-term application of the three-step test shows that a flexible, abstract formula should be applied in order to achieve the desired harmonisation of these limitations within the EU.¹¹²³ This formula has been incorporated into the recommended implementation instead of limiting the exclusive rights of rightholders based upon merely the users' declarations in all cases, namely pre-flags, it introduces an additional step to ensure the required limits are placed, yet

¹¹¹⁹ *Poland v European Parliament*, AG Opinion (n 272), paras 190-199; *Poland v European Parliament* (n 79), paras 94-100.

¹¹²⁰ Matthias Leistner (n 982). 7-8

¹¹²¹ Originated in Article 9.2 of Berne Convention; Article 13 of TRIPS Agreement

¹¹²² Article 5 of InfoSoc Directive.

¹¹²³ P Bernt Hugenholtz, 'Why the Copyright Directive Is Unimportant, and Possibly Invalid' (2000) 11 *European Intellectual Property Review* 501.

it does not take away an essential *ex-ante* tool for the user in a way that would affect the users' fundamental rights disproportionately.

The recommended implementation introduces an additional step, community review, to ensure the exercise of copyright exceptions is taking place within the limits of the three-step test. The additional step aims to strengthen the legitimacy of the “limits to limitations on exclusive rights”¹¹²⁴ without putting a heavy burden on the OCSSPs. The recommended implementation includes thresholds for blocking and user declarations, such as pre-flagging for the exercise of copyright exceptions and limitations to ensure the availability of legitimate works in line with Article 17(7). the recommended implementation is in line with the requirement of limited use of automated blocking for the implementation of Article 17; automated blockings should be limited to the cases of manifestly infringing uses of copyright-protected works, and any other upload should go online with the assumption of lawfulness.¹¹²⁵ With this aspect, it aligns with German implementation as UrhDaG follows the same concept with its “uses presumably authorised by law” and requires platforms to avoid preventive blocking of the uploads with lawful uses of third-party work when they are declared as benefiting from copyright exceptions and limitations with flags. However, some suggest that the German implementation goes too far and walks the line of the three-step test in terms of the power it grants to the user declaration.¹¹²⁶ Recommended system aims to discard the criticism the German pre-flagging tool received regarding giving users too much power and failing to ensure proportionality and a fair balance between the rightholders' copyright and users' freedom of expression.¹¹²⁷ Thus, to avoid the imbalance this practice may bring and prevent the illicit use of the newly introduced pre-flagging tool, this implementation introduced this additional step for users' declarations to be confirmed by a party outside of the uploader-platform-rightholder triangle. In this way, this recommended system aims to provide robust safeguards for all the actors for the desired balanced

¹¹²⁴ Martin Senftleben, ‘Copyright, Limitations and the Three-Step Test. An Analysis of the Three-Step Test in International and EC Copyright Law’ (PhD thesis, University of Amsterdam 2004) <<https://hdl.handle.net/11245/1.224623>>.

¹¹²⁵ *Poland v European Parliament* (n 79), para 85; Guidance (n 289); *Poland v European Parliament*, AG Opinion (n 272), para 208.

¹¹²⁶ French High Council for Literary and Artistic Property, ‘Mission du CSPLA sur les outils de reconnaissance des contenus et des oeuvres sur les plateformes de partage en ligne II’ (2021).; Eleonora Rosati, ‘Five Considerations for the Transposition and Application of Article 17 of the DSM Directive’ (2021) 16 *Journal of Intellectual Property Law & Practice* 265.

¹¹²⁷ *Promusicae* (n 87), paras 68; *UPC Telekabel* (n 49), paras 46,49; *Scarlet Extended* (n 16), paras 45-46; *Netlog* (n 16), paras 43-44.

enforcement and ensure the equality of arms to the in-platform decision-making process.¹¹²⁸ This approach finds further support from the principle of proportionality in Article 17 (5), by benefiting the flexibility that it provides, in addition to Article 17(7) and Article 17(8).¹¹²⁹

This recommended implementation aims to solve problems with different aspects of online copyright enforcement for all the actors in a balanced way. Therefore, it focuses on problems with striking a fair balance, user freedoms, and the critical position of the platforms. First of all, by tinkering with the current positions and powers of the copyright enforcement actors, it aims to strike a fair balance between users', platforms' and rightholders' fundamental rights and overall ensure that the measures placed are proportionate by respecting the Charter.¹¹³⁰ The current system puts stress on the platforms as default and requires them to intervene as third parties in the conflict of interest between rightholders and the users. While this assignment is practical as platforms are accepted as best placed to bring infringing activities to an end, this misdistribution of powers results in platforms that are not neutral, which conflicts with the regulation and well-established case law of CJEU and ECtHR.¹¹³¹ As explained previously, in practice, platforms as business entities often protect the rightholders' interests as they often match up with theirs, and the current system provides no opportunity for users to raise their voices while uploading the content.¹¹³² The only tool for the users, complaint and redress mechanism, is available after the decision of platform and rightholders has already taken place, and as explained previously, their effectiveness and success rates are historically low.¹¹³³ Therefore, the enforcement takes place within this biased environment in the hands of “*unwanted judges of online legality*”,¹¹³⁴ which clashes with the Charter's guarantees and the fair balance principle. As stated by AG Saugmandsgaard Øe, “*the operation of the practical solutions regarding the online enforcement of copyright and this process can neither be left to platforms nor rightholders; the protection of users' rights*

¹¹²⁸ Equality of arms principle can be applied to the decision-making processes outside of the court. See European Court of Human Rights, ‘Guide on Article 6 of the European Convention on Human Rights’ (2021) <https://www.echr.coe.int/documents/guide_art_6_eng.pdf> accessed 17 February 2022.

¹¹²⁹ Christina Angelopoulos, ‘Articles 15 & 17 of the Directive on Copyright in the Digital Single Market Comparative National Implementation Report’ (CIPIIL 2022) <<https://informationlabs.org/wp-content/uploads/2022/09/Angelopoulos-Report-Full-Report.pdf>>. p.32

¹¹³⁰ *Poland v European Parliament* (n 79), para 66; C-336/19 *Centraal Israëlitisch Consistorie van België and Others* [2020] EU:C:2020:1031, para 65.

¹¹³¹ *YouTube and Cyando* (n 208), paras 106, 117; *GS Media* (n 156), paras 40-51; *The Pirate Bay* (n 156), paras 35-46; *Filmspeler*, (n 156), paras 41-51; *L'Oréal* (n 113), para 113.

¹¹³² See Chapter 3 and 4.

¹¹³³ See Chapter 3.

¹¹³⁴ *YouTube and Cyando*, AG Opinion (n 77), para. 187-188; *Poland v European Parliament*, AG Opinion (n 272), para 197.

should not rest solely on the willingness of those rightholders or shaped by the platforms' financial motives."¹¹³⁵

It also has been underlined by the CJEU that rightholders right to intellectual property is not inviolable, and for that reason, it must not be protected as an absolute right.¹¹³⁶ Also, following the wording of the Article, OCSSPs and rightholders must ensure that their cooperation shall not result in the prevention of the availability of legitimate works.¹¹³⁷ Thus, while OCSSPs can choose the measures which are best adapted to their operation, they need to respect the essence of the right to freedom of expression and information¹¹³⁸, and rightholders also must respect freedom of expression and information during this cooperation, for example, by ensuring that their requests of blocking and removal are compatible with freedom of expression and information.¹¹³⁹ Therefore, as these aims failed to be achieved with the current filtering practices, this study suggests an additional system to ensure the required compliance with user rights and the principle of fair balance.

Therefore, to make the filtering process more fundamental right-compliant, first, this recommended system includes users in the decision-making process during the content filtering to achieve a balanced distribution of power with pre-flagging. Giving this *ex-ante* safeguard to users would help rightholders pay attention to the users' input rather than acknowledging platforms as the only actors within the online enforcement as judges or the protector of their rights.¹¹⁴⁰ Second, by letting the community inspect the *pre-flag*, this system gives users a voice and responsibility that would constitute an additional safeguard for user rights and the internet culture. This system aims to effectively implement Article 17(7) and ensure a fair balance between competing rights and interests as it includes uploaders' input regarding the content instead of trusting merely automated decisions by filters which unable to recognise copyright exceptions and limitations.¹¹⁴¹ It aims to correct the false positives or negatives generated by these filters and help minimise their error rate, which is important for their suitability for Article 17.¹¹⁴² By making the users' approval a necessary

¹¹³⁵ *Poland v European Parliament*, AG Opinion (n 272), paras 211-212.

¹¹³⁶ *Poland v European Parliament* (n 79), para 92; *Funke Medien* (n 133), para 72.

¹¹³⁷ *Poland v European Parliament* (n 79), para 77.

¹¹³⁸ *Poland v European Parliament* (n 79), paras 75-76; *UPC Telekabel* (n 49), para 52.

¹¹³⁹ *Poland v European Parliament* (n 79), para 91; *YouTube and Cyando* (n 208), para 116.

¹¹⁴⁰ *Poland v European Parliament* (n 79), para 87; *Poland v European Parliament*, AG Opinion (n 272), para 170.

¹¹⁴¹ *Poland v European Parliament* (n 79), paras 85-87.

¹¹⁴² *Poland v European Parliament*, AG Opinion (n 272), para 214.

consideration for the status of the content, this mechanism ensures human involvement within the automated decision-making of the platform by benefiting from the platforms' communities at the filtering stage and aims to minimise the instances of abuse of the *pre-flagging* while proportionately limiting the power of the pre-flagging tool that grants to uploaders.

Moreover, this system ensures that important communications and the exercise of the freedom of expression will stay on the platform until the infringement is confirmed organically and guarantees the practice of freedom of expression and information enshrined in Article 10 in the Charter and also guaranteed within the CDSMD.¹¹⁴³ This practice helps prevent interferences with the users' freedoms by limiting the instances of over-blocking. This focus on preventing over-blocking and therefore providing *ex-ante* safeguards have great importance as there is no other way to truly recover the harm to the users' rights done by false positives.¹¹⁴⁴ Thus, this mechanism aims to prevent lawful uses from being blocked on the basis of "*mere allegation by rightholders of infringement of copyright,*"¹¹⁴⁵ and by requiring community approval for pre-flags, it ensures that the status of the upload will not be decided only based on a declaration of legitimacy by the users. Moreover, this review by the platform's community can ease the workload of human review teams, which will help achieve quick and more accurate decision-making by providing them with reference decisions. With community review, the number of files to be reviewed by the human moderators will be reduced, and the pre-reviewed uploads by the community can speed up the decision-making of the human review teams. Therefore, this additional step would also help the platform's economy by easing the workload and the need for high numbers of employees to review the uploads as it shares the workload with users and help with the compliance of the filtering obligations with the right to conduct a business.¹¹⁴⁶

This support by the platform's community is welcomed since human review cannot be replaced by AI technologies, as underlined in the literature many times. So, to handle the appeal for removal and blocking decisions in line with Article 17(9), the dependency on humans is not going away anytime soon. As mentioned previously in Chapter 4, according to

¹¹⁴³ *Yildirim v Turkey* (n 1), paras 48,50, 66; *Poland v European Parliament*, AG Opinion (n 272), para 65.

¹¹⁴⁴ *Poland v European Parliament*, AG Opinion (n 272), para 216.

¹¹⁴⁵ *Poland v European Parliament*, AG Opinion (n 272), para 163.

¹¹⁴⁶ *Scarlet Extended* (n 16), para 48; *Netlog* (n 16), para 46.

a recent report, the number of false positives increased dramatically when YouTube reduced the staff and workload of their human review teams and gave more power to the automated systems for content moderation.¹¹⁴⁷ Platform overturned half of the total number of appeals, and under the automated systems' ascendancy, the accuracy of the decisions decreased by almost %50, which led YouTube to re-assign human reviewers for content moderation.

However, it has also been examined that the human review teams can be a costly burden on the shoulders of many OCSSPs, and there are challenges with finding and employing a skilled workforce, especially when it comes to filters that benefit AI technologies.¹¹⁴⁸ Therefore, a collaboration of all the parties in online copyright enforcement is required, as it would bring the greatest help in order to tackle these challenges.

Thus, this system provides an initial decision for *the time-sensitive pre-flagged content* with the involvement of humans before the stage that human review is required, according to Article 17(9). This step also provides a safeguard against misuse of the pre-flagging tool as an additional review step which helps make flags more accurate. The operation of this system is not complicated on a level that would constitute a big burden on platforms big as OCSSPs, which are recognised as under the obligation of best efforts of Article 17(4) in the light of proportionality; it only requires an additional step within their traditional automated decision making. As usual, the upload filter selects the uploads that would be subject to review; however, it is limited when deciding the online status of the upload. There are already examples of systems letting users object to the automated decisions and reverse the blocking until the dispute is objectified with a filed DMCA notification from rightholders.¹¹⁴⁹

When developing this recommendation, consideration of other implementation recommendations and available mechanisms has also taken place.¹¹⁵⁰ For instance, the *trusted/trustworthy rightholders system* proved problematic within Chapter 3, as trusted rightholders such as big media companies and, in some cases, even governments misuse this

¹¹⁴⁷ Alex Barker and Hannah Murphy, 'YouTube Reverts to Human Moderators in Fight against Misinformation' *Financial Times* (20 September 2020) <<https://www.ft.com/content/e54737c5-8488-4e66-b087-d1ad426ac9fa>> accessed 11 December 2021.

¹¹⁴⁸ *ibid.*

¹¹⁴⁹ Elizabeth Gotham, 'Lessons from Content ID: Searching for a Balance between Editorial Discretion and Free Expression on Application Platforms' (Social Science Research Network 2012) SSRN Scholarly Paper ID 2258861 <<https://papers.ssrn.com/abstract=2258861>> accessed 18 December 2021.

¹¹⁵⁰ Guidance (n 289), p.22; Section 14(4) of UrHDaG; Matthias Leistner (n 333).

privilege and the trust that the system puts in them in their own interests.¹¹⁵¹ This has been shown that any assumed trust in only one actor of the enforcement triangle without any effective safeguards to balance their upper hand harms the fundamental rights of other actors within the enforcement irrevocably. That is why recommended implementation introduces a new and neutral actor in the decision-making, the members of the platform, to balance the power dynamics within the automatic enforcement of copyright. However, the community review is only limited to the normal pre-flagged content, which provides a system that allows the time-sensitive pre-flagged uploads to go online while running an additional check for the assessment of the pre-flag ensuring the automated filtering is limited to manifestly infringing uploads.¹¹⁵² Moreover, notifications to relevant parties and effective redress mechanisms are placed at every level of this system, ensuring robust safeguards are placed to achieve balanced enforcement. Most importantly, this system includes dissuasive penalties and sanctions regarding the misuse of the pre-flagging tools or the abuse of the trusted community member status. In this way, this recommendation aims to suggest a guide for the ideal national implementations by following the fundamental right-compliant approach.

5.5 Conclusion

With the confirmation of CJEU, it is now certain that implementations must ensure respect to fair balance and the Charter, which requires the introduction of effective safeguards to provide sufficient protection for fundamental rights.¹¹⁵³ Especially, users' rights which are protected under Article 17 (7), have particular importance that has been acknowledged, and this particular importance requires implementations to ensure that lawful content should not face any obstacles while going online.¹¹⁵⁴ Ensuring that the filtering measures are accompanied by appropriate and efficient safeguards that would limit their interference with fundamental rights is vital for Article 17's implementation.¹¹⁵⁵ However, on their own, the procedural safeguards within Article 17 are not *sufficient* to ensure a 'fair balance' between copyright and users' freedom of expression.¹¹⁵⁶ Thus, it is important to implement a system that would guarantee the effectualness of these safeguards in practice, which ensures the

¹¹⁵¹ See Chapter 3 and 4.

¹¹⁵² *Poland v European Parliament*, AG Opinion (n 272), para 198; Guidance (n 289), p.20.

¹¹⁵³ *Poland v European Parliament* (n 79), paras 98-99.

¹¹⁵⁴ *Poland v European Parliament* (n 79), para 87.

¹¹⁵⁵ *Poland v European Parliament* (n 79), para 98.

¹¹⁵⁶ *Poland v European Parliament*, AG Opinion (n 272), para 180.

obligation of result in Article 17 (7) is respected and the fair balance between competing rights of users, rightsholders and OCSSPs is struck.

Applying an innovative community management system to the online copyright enforcement process would help solve important problems with Article 17 and help achieve fair-balanced enforcement of copyright online. Therefore, an ideal implementation includes the suggested community system in addition to the other recommended safeguards within this chapter. As investigated in detail in chapter 3, algorithms lack critical reflection, transparency and accountability, unlike the notice and takedown mechanism, which, compared to automated preventative upload filters, provides accountability around content takedown decisions with notices with sufficient information regarding the action, possible infringement and appeals that enables users to provide counterarguments. Although there are problems with their operation, such as lengthy processing times and the inevitable abuse of these tools, these mechanisms provide efficient transparency and accountability by operating a mainly human-reviewed process. Thus, to achieve an ideal process in accordance with Article 17's obligations, a transparent and hybrid model that ensures the constant engagement of humans in the loop should be adopted by the platforms. Preferably, taking into account the unharmonised nature of the copyright laws within the EU, this enforcement should be partly decentralised to achieve more accurate and context-specific decisions regarding the content. In the recommended system, while human review teams are centralised to increase accountability, the Community review teams should be decentralised to have more accuracy with the filters' decisions, such as decisions regarding the exception of parody within the uploaded work. Including the users within this process would help platforms save time and resources by relying on its users to aid with content moderation. Moreover, this inclusion keeps users engaged and positions the platform as a promoter of fair-balanced copyright enforcement and freedom of expression and arts.¹¹⁵⁷ In this way, it aims to strengthen the efficiency of the guarantees for different fundamental rights, such as freedom of expression and conduct a business provided by the Article's safeguards in practice.

¹¹⁵⁷ Spandana Singh (n 1062).

Chapter 6: Conclusion

6.1 Introduction

This study, which has been held throughout the entirety of the CDSMD timeline starting from the proposal stage, provides a comprehensive critical analysis of Article 17. At a time when there was a limited number of recommended procedural safeguards and no consensus over what constitutes an ideal implementation of the Article, this study aimed to close this gap in the literature by critically assessing the compatibility of Article 17 with the Charter and ECHR and consequently providing recommendations for implementations to help with tackling the issues with this compliance. This journey to achieve the ideal implementation of Article 17 required examining and, in some parts, reconsidering many essential and relevant concepts of EU copyright and human rights. In addition to that, this study investigated the digital world and online platforms, thus, intermediary liability and platform regulation. Thus, concluded research which combines old and new regimes to provide solutions for one of the most problematic areas of modern copyright law, online enforcement.

The two-folded nature of the aims of the research first required assessing the compatibility of Article 17 with the Charter. During this assessment, the study examined the impact of Article 17's obligations with a focus on filtering obligations on different actors, such as users and the platform's fundamental rights. Then, focusing on the fundamental right-compliant implementation, the study provided recommendations for Member States for their national implementations, including an implementation model that suggests additional procedural safeguards. This model includes a content filtering mechanism which is decentralised, ex-post, transparent and hybrid. Most importantly, this implementation model offers a mechanism that incorporates platforms' users into the filtering for copyright infringements as reviewers, inspired by the Overwatch anti-cheat system of the CS:GO video game, to ensure the effectiveness of Article 17's safeguards in practice.

Thus, this chapter will conclude the study by summarising the key research findings in relation to the research aims and questions. It will also inform the reader about the study's main contributions. An evaluation of the study's limitations and suggestions for future research directions will also be included.

6.2 Summary and Findings

In order to answer the central research question of whether and how Article 17 of the EU Directive on Copyright in the Digital Single Market could be implemented in a way which is compatible with the Charter and ECHR, the extent of its compatibility had been assessed right by right. Chapter 3 examined the impact of Article 17 on users' fundamental rights, namely, freedom of expression, right to information, right to privacy and protection of personal data, right to an effective remedy, and a fair trial.

The detailed examination and critical analysis of relevant legislation, case law, and relevant secondary sources showed that the combination of strong obligations for enforcement without robust safeguards for user rights upsets the delicate balance between copyright protection and users' fundamental rights and results in Article 17 interfering with the users' rights and freedoms protected by the Charter. Where this fair balance is failed to be struck, the impact of the measures taken under Article 17(4) on users' fundamental rights can be serious and, in some cases, irreparable.

This critical analysis allowed the study to demonstrate the fact that not only preventive measures under Article 17(4)(b) and (c), the licensing obligations under Article 17(4)(a) too may interfere with users' freedom of expression. Obtaining licences for all the potential works that users may upload is almost an impossible task for OCSSPs. The challenges with obtaining necessary licences would impact the selection of works that users can communicate on these platforms. The study suggested that due to the limited content they can use, users' freedom of expression and information would also be disproportionately limited, creating a global monoculture on the internet.

However, with the extensive examination and analysis of the relevant primary and secondary sources, the study established that the most extensive impact of Article 17 would be on users' freedom of expression due to the combination of the important position of OCSSPs for users to exercise this right and the preventive filtering imposed on these platforms. Especially the non-commercial expressions of users, user-generated content, would be significantly affected by the automated content recognition technologies which undertake preventive filtering. The analysis showed that with the current operation of upload filters, it is not possible to ensure

that the restrictions on the freedom of expression are proportionate. These measures are prone to false positives and, by erroneously removing or blocking lawful communications, including those that benefit from mandatory copyright exceptions under Article 17(7), they interfere with users' freedom of expression. This tendency of filters to result in false positives and perform over-blocking and over-removal is explained by a detailed examination of several underlying reasons: the design of the filters, poor data quality in the fingerprint databases, open-to-abuse nature and lack of transparency regarding their operation and, their context-blindness. Beyond these, this study provided some evidence regarding the misuse of copyright enforcement tools, including but not limited to the upload filters, by individuals, companies, law enforcement and even governments. The analysis of relevant secondary sources showed that while aimed at preventing copyright infringements, these tools are widely open to abuse and can serve as a subtle censorship tool, thereby posing a serious threat to users' freedom of expression. This finding underlined the importance of dissuasive sanctions against and the need for more transparency around the operation of such tools and contributed to the implementation recommendations.

Also, in light of an in-depth examination of mandatory copyright exceptions and related case law, this study described the challenges with ensuring the functionality of Article 17(7) in practice due to the shortcomings of automated content recognition tools. Consequently, it established that the word-by-word implementation of Article 17 (7) would fail to ensure the level of effectiveness that is expected from a safeguard for freedom of expression as it would merely provide an *ex-post* safeguard for the content that has been blocked in an *ex-ante* manner. This result contributed to the suggested *ex-ante* safeguards, namely, the pre-flagging tool that accompanies the automated filtering mechanism, which enables users to declare the copyright exception within their upload to tackle the *ex-ante* automated blocking. This study finds that allowing users to enforce their rights to benefit from copyright exceptions through the effective implementation of Article 17(7) is an essential step to get the over-blocking under control and achieve the fair balance between copyright protection and the right to freedom of expression and arts, impart information under the Charter; therefore, the implementation of Article 17(7) and Article 17(9) necessitates extra attention.

The study found that the main functions of upload filters, scanning and assessing users' communications and automated decision-making, carry a significant risk of negatively and disproportionately interfering with users' data protection and privacy. Moreover, as an

interesting finding, the study showed that there is an intersection between the interferences of the Article with data protection and privacy and the interferences with freedom of expression or the right to a fair trial. The level of harm that the upload filter's systematic processing of data brings to users cannot be justified with the benefit of protecting rightholders' IP rights; therefore, this practice disturbs the fair balance, too. The critical analysis of relevant sources showed that there is still doubt regarding whether Article 17(8) and Article 17(9) can efficiently limit the interference of Article 17(4)(b) and (c) on Article 7 and Article 8 of Charter by providing sufficient guarantees to users. This study suggests that the national implementations must ensure the monitoring and filtering are strictly limited to manifestly infringing content to ensure the operation of upload filters is proportionate and the monitoring is specific. Also, as an *ex-post* safeguard, national implementations must ensure that users can easily raise complaints where operations of OCSSPs result in the identification of individual users or processing of personal data when these are not in accordance with Directive 2002/58/EC and Regulation (EU) 2016/679.

This study showed that the measures that OCSSPs employ to comply with Article 17(4), such as upload filters, notice and takedown and stay down, already suffer from problems that impact various fundamental rights of users, often caused by their opaque operation of these measures and the inconsistency and inaccuracy of their automatically generated decisions. Thus, where Article 17 fails to provide efficient safeguards for users to protect their fundamental rights, such as freedom of expression, data protection and right to privacy from the impact of the obligations of the Article, it interferes with users' right to a fair trial. To assess the efficiency of Article 17(9) as the safeguard to the right to an effective remedy and fair trial, this study conducted a detailed examination of the institutional and procedural requirements of the right to a fair trial. The study has assessed the compatibility of suggested appeals in the Article, namely, complaint and redress mechanism, out-of-court and court appeals.

The study found that the traditional complaint and redress mechanisms do not meet the requirements of the right to a fair trial as they lack independency and impartiality and fail to offer the users practical and effective tools to appeal and guarantee their fundamental rights. Despite the human review requirement for these complaints, the objectivity of complaint and redress mechanisms is questionable as this review will be conducted by the OCSSPs' employees. These constitute the inappropriate transfer of juridical authority to the private

sector. This finding provides support for the employment of the recommended community review mechanism while implementing Article 17.

Also, the *ex-post* nature of these appeals makes them insufficient to ensure that the interference of copyright enforcement measures with freedom of expression is limited. Thus, the provided safeguards are not sufficient to resolve the disadvantage of the users arising from the preventive enforcement measures and ensure the equality of arms principle is respected. Thus, the critical analysis demonstrated the need to introduce *ex-ante* safeguards for users, in addition to the careful implementation of the appeal mechanisms in Article 17(9), to ensure that users are effectively remedying their fundamental rights that are impacted by the copyright enforcement measures obliged by Article 17(4).

Thus, the critical analysis of relevant sources provided convincing evidence regarding the interference of Article 17 with the abovementioned fundamental rights of users, and this finding defined the majority of the focus areas of the recommended safeguards. The remaining focus has resulted from the analysis of the impact of Article 17 on OCSSPs' right to conduct a business and the efficiency of the safeguards provided in the Article for the protection of this right. Thus, the study turned to the other side of the online enforcement equation, the OCSSPs and their increasing responsibilities regarding the online enforcement of copyright with the obligations introduced by the CDSMD. The fundamental right that is at risk of violation by these obligations, the right to conduct a business, is a historically overlooked right, so the analysis of this right in the context of Article 17 helped fill the research gap regarding the relationship between Article 17 of CDSMD and Article 16 of Charter.

For this analysis, the study first examined the notion of OCSSP to identify the scope and the proportionality of Article 17's obligations. This examination revealed the problems caused by the definition of OCSSPs, which intensified with the lack of meaningful protection provided by the safeguards in practice. Thus, it supported the implementation recommendations that require a clearer definition of OCSSPs and ensured the proportionate application of Article 17's obligations with efficient safeguards. Then, the study examined the substance of the obligations of Article 17, which requires OCSSPs to satisfy requirements of licensing, filtering, notice and takedown and notice and stay down examined in detail to assess their interference with the right to conduct a business. It identified the various challenges that the

OCSSPs need to tackle to satisfy the obligation under Article 17 (1) and (4)(a), including the issues with the availability, obtainability and costs of these licensing agreements, which revealed the high risk of licensing obligation to impose a disproportionate burden on OCSSPs, therefore interfere with the right to conduct a business. The fact that besides the little possibility of the principle of proportionality being effectively applied to this obligation, there is no meaningful safeguard for the OCSSPs' right to conduct a business that has been found further supported this outcome. This analysis, by revealing and examining problems with obtaining the required authorisation via licensing agreements, also supported the theory that Article 17 encourages OCSSPs and rightholders to favour filtering instead of licensing, contrary to the CDSMD's aim.

A detailed analysis revealed the various ways of filtering obligations to impact the right to conduct a business. The automated content recognition technologies that OCSSPs need to employ to ensure the unavailability of copyright-protected work on their platform bring unforeseeable, serious and permanent costs for their businesses. The various challenges that OCSSPs need to tackle for their implementation, operation, maintenance and improvement and the many expected and unexpected burdens on the OCSSPs' businesses would bring listed and examined to assess the interference of Article 17's obligations with their right to conduct a business.

The study found that the obligations that would interfere with the right to conduct a business include implementing different types of technologies for different types of content, the cost of the human workforce and creating and maintaining databases and keeping up with the technology to improve these tools as Article 17 aims to be future-proof. Similarly, it has been found that notice and takedown and notice and stay down mechanisms, with their open-to-abuse nature, in many instances, put a disproportionate burden on OCSSPs to monitor, block and remove notified works and interfere with their right to conduct a business. The study suggested that the only safeguard that would help limit this interference on a larger scale is Article 17(5), which requires the principle of proportionality to apply when assessing the compatibility of OCSSPs with Article 17's best effort standards, suffers from problems that would impact its application in practice. Thus, this analysis provides support for the implementation recommendations that are aimed at ensuring a fair balance between rightholders, users and platforms, such as the community implementation mechanism, which enables sharing the burden of filtering with platforms' users and clear concepts regarding the

necessities of rightholder notifications for the enforcement actions and sanctions for misuse of the in-platform mechanisms.

Thus, the analysis of primary and secondary sources in the Chapters 3 and 4 identified the interferences of Article 17 with the fundamental rights of users and platforms and the shortcomings of the safeguards in Article 17(5)-(10). By doing so, it also provided the primary evidence to suggest that the only way to implement Article 17 in a way which is compatible with the Charter and ECHR is to ensure the interference of Article 17(4)(a)(b) and (c) with different fundamental rights is limited and proportionate through safeguards. The study concluded that while Article 17 interferes with various fundamental rights, in principle, with the safeguards that it provides, it opens the door for Member States to ensure these interferences are limited and the fundamental rights of users and OCSSPs are surrounded with sufficient guarantees. This outcome aligns with CJEU's decision in the *Poland* case, where the Court examined the compatibility of Article 17(4) with freedom of expression and underlined the dependency of this compatibility on the safeguards. In other words, as long as the safeguards are efficiently implemented in a way that proportionately limits the impact of these obligations and allows a fair balance to be struck between the various fundamental rights protected by the Charter, the obligations under Article 17 would be compatible with the Charter.

The study concluded that to ensure the interference of Article 17 with the fundamental rights and strike a fair balance between competing fundamental rights, the implementation should include robust safeguards, including detailed *ex-post* safeguards as well as *ex-ante* safeguards, as the enforcement of the copyright is also *ex-ante*. The implementation of *ex-ante* safeguards is crucial as these safeguards can effectively prevent the irreparable violation of freedom of expression, unlike the *ex-post* complaint and redress mechanisms which are identified as “additional” safeguards to Article 17(7) by the CJEU.

While the findings within the chapters suggest that ensuring compliance with the Charter strictly depends on the effective implementation of these safeguards provided in Article 17(5)-(10), the study also acknowledged the challenges with ensuring all these safeguards are efficiently implemented into national laws. While trying to tackle various challenges with the efficient implementation of each safeguard in practice, Member States must ensure that they would not exceed the level of discretion that the EU law permits. Thus, while providing

recommendations for implementation and suggesting a number of procedural safeguards, it also considered these challenges.

The critical analysis of the study provided additional evidence for the argument, which suggests that in order to ensure the compliance of Article 17 with the Charter, the national implementation should avoid transposing the Article literally. This study suggests that, instead, Member States should provide *ex-ante* safeguards for the *ex-ante* operations of the measures that OCSSPs employ to comply with Article 17(4), specifically to ensure the copyright exceptions and limitations, which are now accepted as user rights, can be enjoyed by the users. The analysis for the recommendations also revealed the relationship between the Article's safeguards for different fundamental rights, as in the context of filtering, without providing effective protection for freedom of expression, it is impossible to mention the effective protection for the right to a fair trial. It also drew the relationship between the relevant DSA sections, which expands this study's contribution to the DSA regulation and its national implementations. Also, for the implementation of CDSMD, it suggested that it would be beneficial for all the parties if the national implementations enable filling the silences of CDSM with DSA's articles for the overlapping obligations in practice to ensure higher standards regarding the application of these obligations. In light of these findings, to satisfy the second aim of the study, recommendations for national implementations have been introduced.

First, the implementation must ensure that the automated preventive decision-making is strictly limited to the manifestly infringing content, ensuring that enforcement measures are not allowed to automatically and proactively block legitimate content. This was found important for the protection of the majority of the fundamental rights examined in the study. To ensure this, first, national implementations must ensure that, under the 'relevant and necessary information' requirement, rightholders are obliged to provide, at least, the correct information about the ownership of the specific works that they are requesting to be subject to Article 17 (4)'s obligations or where possible, an official confirmation of the ownership. Then, to further limit over-blocking and protect uploads that benefit from copyright exceptions and limitations to ensure these mandatory exceptions and limitations are effective in line with Article 17(7), recommendations introduce a pre-flagging tool. This tool allows users to flag their content to declare that the use of copyright-protected work does not constitute an infringement, for instance, when they benefit from mandatory copyright

exceptions and limitations. As an important *ex-ante* safeguard, this tool constitutes an effective guarantee for the users' freedom of expression. However, to restrain the misuse of this tool and ensure a fair balance, these declarations of users must be subject to the confirmation of the members of the platforms' community as the neutral decision maker. As one of the most important original contributions, the study suggested that this additional confirmation phase by a party outside of the platform-uploader-rightholder triangle can add a layer of authentication to the uploader's flag while strengthening the fair balance. This solution, by enabling OCSSPs to share the burden of content control for copyright infringements, would also help with safeguarding the right to conduct a business. Also, together with pre-flagging, this mechanism would help to provide an equal opportunity for the users in decision-making, and as a practical and fast way of improving the decision-making, it would help achieve a balanced assessment and strengthen the guarantees for the right to a fair trial.

In addition to that, to strengthen the protection of the right to a fair trial, this study suggested various detailed notification duties for the OCSSPs against users, including pre-upload checks, filtering decisions, takedown decisions, and appeal procedures. Also, to ensure that instances of over-blocking and false-complaining are sufficiently limited, the implementation must provide dissuasive penalties for the acts of knowingly sending false takedown and stay down requests. Taking the DMCA and GDPR as examples, this study suggested that the penalty for this could be the liability for damages incurred by any party that is injured by this notification. To further strengthen the guarantees for users' fundamental rights, it described the features that the effective and expeditious complaint and redress mechanism needs to have, including the time-sensitivity exception in human review, in detail. Most importantly, the study stressed the importance of Article 17(5) as a blanket safeguard and suggested recommendations for its effective application in practice, such as the clarified scope of OCSSPs, "best effort" standards and notifications that trigger enforcement measures. The recommendations, in many instances, required the efficient use of stakeholder dialogues in Article 17(10) as a guidance tool.

This study designed an implementation model with a unique filtering system that ensures compliance with fundamental rights that have been examined within the core chapters. The suggested implementation model for filtering constitutes the significant original contribution of this study. As a result of the detailed examination of regulations, case law, literature and

case studies, this study suggests that the ideal filtering should be decentralised, ex-post, transparent and hybrid. To achieve this ideal filtering and ensure compliance with the Charter and ECHR, in light of the detailed analysis in the core chapters, this study recommends the community review filtering mechanism, which is built on the idea that upload filters should merely filter; they should not decide. This mechanism includes an additional review stage for pre-flags, which will be handled by the platform's community. This system introduces a type of filtering that enhances the sheer decision-making, which results in more fair and adequate decisions and, by prioritising transparency, strengthens compliance with fundamental rights. This system is supported with legal and practical justifications, including its compliance with the three-step test and the findings in the Overwatch case study.

Thus, this study concluded that national implementations must ensure that platforms provide *ex-ante* safeguards such as pre-flagging and community review and robust *ex-post* safeguards such as effective appeal mechanisms, and overall, introduce mechanisms to ensure the fair balance between different actors of online enforcement and the compliance with the three-step test is not disturbed. The ideal implementation should implement both *ex-ante* and *ex-post* safeguards with utmost scrutiny by avoiding the literal transposition, as this would seriously risk the compliance of Article 17 with the Charter. The study concluded that Member States should give close and thoughtful attention to ensure their interpretation of the Article does not conflict with users' and OCSSPs' fundamental rights or with the other general principles of EU law, especially the principle of proportionality. In addition to its critical analysis of wide-ranging primary and secondary resources from different disciplines, this study ensured its original contribution to the literature with its recommendations for national implementation and the procedural safeguards that it designed, which could constitute a guide for policy actions, future implementations, and amendments of Article 17. Furthermore, with its concepts and rules that could be applied to the online enforcement regulations, including but not limited to the DSA, this study provided findings that could be generalisable beyond CDSMD.

6.3 Research Limitations

While this study provides comprehensive research on Article 17, as Article 17 is still an evolving topic, it is important to note that the analysed recent developments, events and

national implementations are limited to the ones that took place within the study's timeline. Also, while it examines all the obligations of the Article and their impact on fundamental rights, it puts a particular focus on filtering obligations. The licensing obligation was examined in detail to assess its compatibility with fundamental rights, yet compared to other obligations, recommendations, especially the procedural safeguards, did not include solutions for licensing due to the time and scope limitations of the study. Therefore, the study's findings are limited regarding the compatibility of licensing obligations and potential solutions with licensing.

Also, as this study's main topic is an EU Directive, CDSMD, by focusing on the EU framework, this study does not provide a detailed examination of online copyright infringement rules of other countries. This also constitutes the reason for the limited analysis of DSA. The examination of DSA is limited to the parts that interconnect with the CDSMD to define the impact of DSA on the implementation of CDSMD and, overall, the relationship between CDSMD and DSA.

Most importantly, for the sake of the quality and originality of research, this study focuses on the proportionality step of the ECtHR's three-step test for the compatibility assessment instead of going through all steps of the test, namely being "in accordance with the law"; secondly, pursuing one or more legitimate aims contained in Article 8(2) and 10(2) Convention; and thirdly, being "necessary" and "proportionate". The reason behind this limitation is two-fold. First, there are already works in the literature that assess the compatibility of Article 17 with each specific prong of the test. Second, CJEU, with the Poland decision, left little doubt regarding the Article's compatibility with the first two steps of the test. The decision has clarified that the focus for the future is the proportionality as the compatibility with this step; therefore, the compatibility of the Article with the Charter is found to be dependent on how Member States implement the Article, particularly the safeguards provided in Article (5)-(10).

6.4 Future Research

To navigate the deep waters of Article 17, which embraces many different areas of law, this study investigated not just copyright law but also platform regulation, technology including

AI and internet law, media law, EU law and human rights law. Moreover, the Article itself and the related concepts include complex systems that need to be broken down and examined both in solitary and together. A topic linked to various research areas, such as the topic of this study, will surely need future investigation.

As it underlined within this study, there are many theories and suggested outcomes regarding the Article, but they all depend on what would happen in practice; different applications of the Article's concepts in practice can result in different outcomes. Thus, it is important to keep an eye on the future of Article 17 to fully understand the Article and CDSMD as a whole. This study captured and analysed a considerable part of Article 17's timeline, including the pre-CDSMD regime, the proposal stage of CDSMD, entering into force, and early national implementations; however, the story of Article 17 has not come to an end.

First, there are many upcoming national implementations from different Member States that can change the already fragmented environment. This argument can be supported by the fact that there is still no clear consensus on the ideal implementation of the Article, and the highly criticised Guidance of the Commission is now outdated. In case of the Commission publishes an updated Guidance which follows the *Poland* decision, future research should also critically examine the updated guidelines. In addition to the new national implementations, in the future, there could be reviewed and amended versions of already existing national implementations that are following an excessively minimal or maximalist approach. Thus, it is important to analyse these reviewed versions to assess the differences and their new status of compliance with relevant fundamental rights in detail.

Second, in addition to these, for the Member States with national implementations that are already in force, there will be national court decisions of the Member States regarding the national implementations of Article 17. Research on how the national courts interpret the rules and, while doing that, how they would ensure respect for the various fundamental rights protected by the Charter and with the other general principles of EU law, such as the principle of proportionality. Moreover, there is no doubt that there will be more referrals to the CJEU concerning the Article, which would provide an important source for further research to develop an early critical analysis of the Article.

Thirdly, as the Member States will start implementing DSA into their national laws, further research examining the relationship between CDSMD and DSA is needed. The potential

clarifications by EU institutions regarding this relationship and guidance on how to implement DSA, especially the overlapping areas of CDSMD and DSA, should be critically analysed to ensure these rules are implemented in practice in an efficient and fundamental right-compliant way. In addition to DSA, the relationship between CDSMD and legislation on AI and machine learning, such as the upcoming EU AI Act, should be explored to ensure the up-to-dateness of the automated content management within the platforms and the harmonisation between CDSMD, DSA and AI Act.

Lastly, it is important to investigate what would happen in practice. Future empirical research is needed for the examination of the practice to fill the gaps that secondary research cannot fill. For instance, research on how the platforms implement the rules into their practices and the changes in their terms and conditions is needed to ensure a complete study on Article 17. This would also provide preliminary evidence on the efficiency of the rules, which can be a start for further policy actions of the Member States and the EU. It is also important to observe how Article 17 reacts to real-life issues. This can include assessing its effectiveness and how far it meets the objectives of the Directive in practice with quantitative research. Consequently, whether and how far it changes the online environment and the behaviours of different actors of online copyright enforcement can be assessed through empirical research. Most importantly, the suggested community review system can be put into practice in collaboration with OCSSPs in the EU to test its efficiency and the level of protection it provides for users' freedom of expression.

In addition to the above suggestion regarding future research, it is important to keep in mind that, as a future-proof regulation, Article 17 will require constant updating to keep up with technological developments and changes in practice. Meaning that the detailed rules for Article 17(4)'s enforcement measures can be subject to continuous change, considering the rapid developments in technology, especially in automated content recognition technologies. Thus, future research on the area will be needed, which would help redefine the best efforts standards.

Since enforcement measures taken in other jurisdictions can affect other countries and the internet as a whole, and most of the OCSSPs are based in the US, it is important to research the policy actions and reforms regarding online copyright and intermediary liability regulations and examine the relationship with CDSMD. Further future work could be

undertaken to reach a more harmonised and efficient application of copyright enforcement rules worldwide by including other country laws in its analysis.

Despite conducting a comprehensive approach, this study constitutes only an in-depth investigation into a small part of a bigger problem with global outcomes. Thus, there is always a place for more research on automated content recognition and moderation tools and algorithmic decision-making, especially their limitations and efficiency. It is important for lawmakers, rightholders and platforms not to be under the illusion that technological development would solve the complex and deep-rooted issues of regulating online platforms. While the use of technology can be beneficial, the use of technology without properly understanding its effects on fundamental rights can turn dystopian scenarios into reality.

That is why this study examined all aspects of Article 17 and provided recommendations to ensure a fundamental right-compliant implementation. It defined rubrics for balanced and fair enforcement of copyright on online platforms that could be applied to the application of other rules. Most significantly, it designed and proposed a filtering procedure that can be put into practice by OCSSPs to ensure that automated filtering is not disproportionately interfering with users' freedom of expression. With these original contributions, this study aims to contribute to the development of a democratic, fair, diverse, and creative internet by ensuring the current and upcoming rules are strictly fundamental right-compliant.

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Appendix A: National Implementations

1. Germany

The CDSMD has been implemented as a standalone act in Germany; the legislature chose this over selective modification of each of the relevant affected sections of the German Copyright Act.¹¹⁵⁸ Germany implemented Article 17 of the CDSM Directive with the Act on the Copyright Liability of Online Content Sharing Service Providers (UrhDaG)¹¹⁵⁹, which came into force in August 2021. UrhDaG includes a structured yet complex procedural mechanism regarding user uploads. The clarification of the OCSSP liability regarding the acts of communication to the public via their users which takes place in the platforms can be found in Section 1, mostly following the CDSM Directive's wording, followed by the definition for which platforms would fall into the scope of OCSSP in section 2(1). Germany adds an additional criterion for the OCSSP definition; according to the UrhDaG, the provider must “*compete with online content services for the same target groups*”, which gets its inspiration from Recital 62 CDSMD.¹¹⁶⁰ While Commission states that Member States are advised to transpose and apply the different elements of the definition in the light of Recitals 61, 62 and 63, this additional criterion can result in narrowing the scope of Article 17.¹¹⁶¹ The controversial 'best efforts' obligations of Article 17 can be found under three different segments: Section 4, which regulates licencing obligations according to Article 17(4)(a) and Sections 7-11, which contain the obligation to ensure the unavailability of specific works according to the Article 17(4)(b) and (c). Failure to comply with these sections brings civil law liability, injunctions and damages, according to Sec. 97 of the Act on Copyright and Related Rights (Urheberrechtsgesetz – UrhG).¹¹⁶²

¹¹⁵⁸ Julian Waiblinger and Jonathan Pukas, ‘Implementation of Art. 17 DSM Directive into German National Law – the German Act on the Copyright Liability of Online Content Sharing Service Providers (UrhDaG)’ (*Kluwer Copyright Blog*, 28 February 2022)

<<http://copyrightblog.kluweriplaw.com/2022/02/28/implementation-of-art-17-dsm-directive-into-german-national-law-the-german-act-on-the-copyright-liability-of-online-content-sharing-service-providers-urhdag/>> accessed 11 March 2022.

¹¹⁵⁹ ‘Act on the Copyright Liability of Online Content Sharing Service Providers (Urheberrechts-Diensteanbieter-Gesetz – UrhDaG)*’ <https://www.gesetze-im-internet.de/englisch_urhdag/englisch_urhdag.html> (hereinafter ‘UrhDaG’)

¹¹⁶⁰ Section 2(4) of UrhDaG.

¹¹⁶¹ Christina Angelopoulos, ‘Articles 15 & 17 of the Directive on Copyright in the Digital Single Market Comparative National Implementation Report’ (CIPIIL 2022) <<https://informationlabs.org/wp-content/uploads/2022/09/Angelopoulos-Report-Full-Report.pdf>>.

¹¹⁶² ‘Act on Copyright and Related Rights (Urheberrechtsgesetz – UrhG)’ <https://www.gesetze-im-internet.de/englisch_urhg/index.html> .

In efforts to eliminate the criticism regarding the licensing obligation under Art 17(1) and to improve the unbalanced relationship between platforms and rightholders regarding the licensing obligations, UrhDaG provides a defined framework for liability regarding 'best efforts' obligations for obtaining authorisation from rightholders. Section 4 states that OCSSPs fulfil the best efforts to obtain an authorisation where they acquire rights of use when they are *1. offered to them, 2. are available through representative rightholders which are known to the service providers, or 3. can be acquired through collecting societies or dependent rights management entities established in Germany*. So, first, Section 4 underlines that licensing obligation does not mean that OCSSPs should obtain licences for the worldwide repertoire, and it specifies a proportionate requirement regarding the effort that OCSSPs need to show to obtain these licences. This clarifies that platforms do not have to search for all kinds of licences from unknown rightholders actively; platforms must obtain the licence to avoid liability only when rightholders offer a license agreement that meets Section 4's standards. While this defined scope for the licencing obligations aims to achieve a balanced and proportionate implementation of Article 17(4)(a), it also brings the risk of disadvantaging small right-holders.¹¹⁶³ While this defined scope for the licencing obligations aims to achieve a balanced and proportionate implementation of Article 17(4)(a), it also brings the risk of disadvantaging small right-holders.¹¹⁶⁴

Second, sections 7-11 set out the blocking obligations for OCSSPs under two different types of blocking: simple (Section 8) and qualified (Section 7). While section 7 corresponds to the preventive blocking obligation, which requires the employment of upload filters, section 8 corresponds to the takedown obligation, which requires rightholder notification for blocking to take place. Following these provisions, the Act provides special sections for qualified blocking. Sections 9-11 constitute the most attention-grabbing part of the implementation, and these sections regulate the preventative filtering for blocking unauthorised content. These provisions can be seen as a reflection of the German lawmaker's efforts to tackle the challenges that preventive filtering via automated tools brings, such as over-blocking.

¹¹⁶³ Martin Husovec and João Pedro Quintais, 'Too Small to Matter? On the Copyright Directive's Bias in Favour of Big Right-Holders' in Tuomas Mylly and Jonathan Griffiths (eds), *Global Intellectual Property Protection and New Constitutionalism. Hedging Exclusive Rights* (Oxford University Press 2021) <<https://papers.ssrn.com/abstract=3835930>> accessed 27 September 2022.

¹¹⁶⁴ *ibid.*

1.1 The Case of Presumably Authorised Uses

CJEU clarified that the enforcement of Article 17(4) in compliance with Article 17(7) and (9) safeguards and the Charter requires automated blocking to be limited in its *Poland* decision.¹¹⁶⁵ According to the Court, to comply with the requirements of Article 17 and the fair balance principle, lawful content must not be subject to automated blocking.¹¹⁶⁶ The limit has been specified as 'manifestly infringing uploads' by the AG in his Opinion for the case, meaning that other uploads should go online in principle.¹¹⁶⁷ It has been accepted that restoring legitimate content which does not infringe the copyright or related rights in an *ex-post* matter is not enough to meet the requirements of Article 17(7).¹¹⁶⁸ The fact that adverse effects of over-blocking on freedom of expression cannot always be avoided with such *ex-post* mechanisms, which bring the risk of the disproportionate application of these measures, has been underlined repeatedly.¹¹⁶⁹

Therefore, to satisfy these findings and limit the instances of over-enforcement in line with Article 17's requirements, the German implementation introduces the concept of "uses presumably authorised by law" and provides a pre-flagging opportunity for users to provide their input regarding the copyright exceptions in their uploads for the decision-making process. While there is no explicit mention of manifestly infringing uploads, the concept of "uses presumably authorised by law" constitutes a rule on "manifestly non-infringing" uploads.¹¹⁷⁰ This concept is the most significant reason why this implementation was deemed to be the most user right friendly and balanced national implementation.¹¹⁷¹ In order to benefit from this presumption, UrhDaG defines some requirements and states that these

¹¹⁶⁵ Case C-401/19 *Republic of Poland v European Parliament and Council of the European Union* ('*Poland v European Parliament*') [2022] ECLI:EU:C:2022:297, para 85-95

¹¹⁶⁶ *Poland v European Parliament* (n 8), para 85.

¹¹⁶⁷ Case C-401/19, *Poland v Parliament and Council* [2021], ECLI:EU:C:2021:613, Opinion of Advocate General Saugmandsgaard Øe, (hereinafter 'AG Opinion'), paras 205-206; European Commission, 'Communication From The Commission To The European Parliament And The Council Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market', 4.6.2021 COM(2021) 288 final. (hereinafter 'Guidance'), p.20.

¹¹⁶⁸ *Poland v European Parliament*, para 87; AG Opinion in *Poland v European Parliament*, para 188; Guidance p.20.

¹¹⁶⁹ AG Opinion in *Poland v European Parliament*, para 188, footnote 226; *Ahmet Yildirim v Turkey* App. no.3111/10 (ECtHR, 18 December 2021), para 47,54; *Observer and Guardian v. the United Kingdom*, Application No. 13585/88 (ECtHR, 26 November 1991), para 47; *Kablis v. Russia* applications nos. 48310/16 and 59663/17 (ECtHR, 30 April 2019), para 91; *C-70/10 Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) (Scarlet Extended)*, [2011] EU:C:2011:771, para 52-53.

¹¹⁷⁰ Christina Angelopoulos (n 4), p.44.

¹¹⁷¹ Matthias Leistner, 'The Implementation of Art. 17 DSM Directive in Germany – A Primer with Some Comparative Remarks' [2022] (forthcoming) GRUR International. 7

requirements should be met cumulatively. According to Section 9, to fall within the scope of 'uses presumably authorised by law', a user-generated content should: first, contain less than half of one or several other works or entire images and combine this work with other content; second, the use the third party works should be only to a “minor extent: or it should be pre-flagged by the user as legally authorised. As one of the “uses presumably authorised by law”, thresholds for minor use have been defined in Section 10 for different media.¹¹⁷²

In addition to meeting these quantitative thresholds, these uses should not serve commercial purposes or only serve to generate insignificant income in order to benefit from this exception. Uploads that fall within the scope of minor use should not be subject to automated blocking and should stay online until the conclusion of a complaint procedure.¹¹⁷³ However, how the upload filters detect these uses and identify them as minor remains unanswered. Especially in the cases where the content includes different types of media, this constitutes a significant problem for the practicality and the realistic enforcement of this exception. Considering that user-generated content usually consists of the combination of several traditional media formats, detecting minor uses will not be so straightforward in practice with upload filters. As underlined many times in this study, upload filters are designed to operate on a single media type, and for the widely-used fingerprinting algorithms, this is usually restricted to audio files.¹¹⁷⁴

However, in many cases, legitimate content includes copyright-protected work broader than what the UrhDaG's threshold allows when it benefits from a copyright exception. For instance, in terms of parody or pastiche, most of the time, the entirety of the copyright-protected work is subject to transformative use.¹¹⁷⁵ Therefore, where the use of work is not 'minor', Section 11 provides a pre-flagging tool for users to flag their uploads as including 'uses authorised by law' to ensure Article 17(7) is implemented as an effective safeguard and corrects a significant shortcoming of automated mechanisms. UrhDaG requires platforms to allow users to pre-flag the legitimate use of third-party content at the point of upload to

¹¹⁷² Section 10 of UrhDaG states: *1. uses of up to 15 seconds in each case of a cinematographic work or moving picture, 2. uses of up to 15 seconds in each case of an audio track, 3. uses of up to 160 characters in each case of a text, and 4. uses of up to 125 kilobytes in each case of a photographic work, photograph or graphic.*

¹¹⁷³ Section 9 of UrhDaG.

¹¹⁷⁴ This will be the case in the near future as well. See Evan Engstrom and Nick Feamster, 'The Limits of Filtering: A Look at the Functionality and Shortcomings of Content Detection Tools' (Engine 2017) <<http://www.engine.is/the-limits-of-filtering/>>.p. 17.

¹¹⁷⁵ Case C-469/17, *Funke Medien NRW GmbH v Bundesrepublik Deutschland*, ECLI:EU:C:2019:623; Case C-476/17, *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben*, ECLI:EU:C:2019:624; Case C-516/17, *'Spiegel Online GmbH v Volker Beck'* [2019] ECLI:EU:C:2019:625.

prevent it from being subject to the preventive automatic blocking and help to reduce the instances of false positives. In this way, users can declare the lawfulness of their use of copyright-protected work, such as copyright exceptions and limitations, before the assessment of the automated systems regarding the legitimacy of the upload takes place. It is important to note that, while introducing the concept of presumably legal uses, UrhDaG introduces a new compensation claim for the caricatures, parodies and pastiches by requiring OCSSPs to pay appropriate remuneration for the acts of communication to the public.¹¹⁷⁶

In addition to the obligation to provide a pre-flagging tool, Section 11 section provides detailed notification obligations for the OCSSPs. First, OCSSPs need to inform the user about the rightholder's blocking request, and second, they need to notify the user about the need to have legal permission regarding their use of a work set out in Section 5. Section 5, together with Section 44 ff. of UrhG, sets out the mandatory exceptions of Article 17(7), namely quotations, caricatures, parodies and pastiches, and obliges OCSSPs to draw the user's attention to these uses authorised by law in their general terms and conditions. Therefore, Section 11 ensures that uploads, where the use of a third-party work constitutes more than minor use according to Section 10 but is flagged by the user as lawful use, should go online. It is important to note that, where the user includes a use presumably authorised by law, the relevant rightholder must be notified with the information regarding their right to lodge a complaint via internal complaints procedure for this presumption to be reviewed by impartial natural persons.¹¹⁷⁷

Thus, UrhDaG excludes the preventive automated blocking for uses presumably authorised by law which is not manifestly infringing and provides a delayed takedown until the infringing nature of the content is confirmed through the conclusion of the complaints procedure.¹¹⁷⁸ Users are allowed to flag their uploads before and if the blocking request follows the upload within a 48-hour period after the upload to declare that their use of copyright-protected content falls within the scope of copyright exceptions protected by Article 17(7). The possibility of benefiting from this “delayed takedown” regime is limited to the cases of *ex-ante* blocking and stay down via upload filters and the content that are not time-sensitive and to the duration of the complaint and redress procedure.¹¹⁷⁹ Therefore, the

¹¹⁷⁶ Section 5(2) of UrhDaG.

¹¹⁷⁷ Section 9(3) and 14 of UrhDaG.

¹¹⁷⁸ Section 9 of UrhDaG.

¹¹⁷⁹ Sections 7(2)2, 8(3), 9(1), 14(3) of UrhDaG.

delayed takedown mechanism ceases when the decision is delivered, which should take place at the latest within one week after the complaint submission, according to Section 14.

Accordingly, where the pre-flagged content is identified as infringing upon the completion of the complaint and redress procedure, OCSSP will be exempt from liability for the duration of the complaints process, unlike the user.¹¹⁸⁰ Where this concerns uploads with minor uses, there will be no liability for both user and the OCSSPs for the duration of the complaints process.¹¹⁸¹ After the decision, the only possibility for OCSSPs to be liable is if they fail to carry out the complaint procedure according to Section 14; in this case, they will be liable for damages under copyright law. However, this exemption from liability is not extended to the user; these individuals remain liable according to the general rules. Therefore, this indemnification of OCSSPs with Section 12(2) goes beyond the limits of the Directive and carries the risk of creating an imbalance.¹¹⁸²

However, not every kind of content can benefit from the “uses presumably authorised by law” regime; an exception has been provided in Section 7(2) by the lawmaker regarding the *'uses of cinematographic works or moving images until the completion of their first communication to the public, in particular during the simultaneous transmission of sporting events.'* The act provides a complaint and redress mechanism for the rightholders as well as users but provides an exception to uploads staying online during the process rule with a special internal complaint procedure for “trustworthy rightholders” under Section 14(4). According to this section, these rightholders can stop presumably legal user-generated content from being available online if they consider the use within the content as harmful; where a trustworthy rightholder reports a presumably legal use as harmful to their copyright, it must be blocked immediately by the platform until the delivery of the decision through the complaint procedure.

This so-called “red button tool” for trusted rightholders can be accepted as a reflection of the Guidance’s “earmarking” mechanism, which argues that these types of content bring high risks of significant economic harm, therefore, require heightened care.¹¹⁸³ This mechanism was found incompatible by the AG in his opinion for the *Poland* case as it fails to deliver the

¹¹⁸⁰ Sections 11(2) of UrhDaG.

¹¹⁸¹ Sections 12(2) and (3) of UrhDaG.

¹¹⁸² Matthias Leistner (n 15), 8.

¹¹⁸³ Guidance, p. 13-14.

guarantees for freedom of expression, namely, allowing the uses of copyright exceptions and limitations and limiting the automated blocking to only manifestly infringing content.¹¹⁸⁴ One can say that CJEU supports AG's opinion in this regard, considering the stress that the decision put on the filtering that is limited to the unlawful content within the decision.¹¹⁸⁵ Most importantly, CJEU, by stating Article 17, does not oblige platforms to block uploads in cases where detecting the unlawfulness of the content “*would require an independent assessment ... in the light of the information provided by the rightholders and of any exceptions and limitations to copyright*”¹¹⁸⁶ disregarded these type of mechanisms as they impose an additional duty on platforms to exercise diligence with regard to earmarked content and assess their ‘economic harmfulness’ to satisfy the best effort standards of the Article.¹¹⁸⁷ However, unlike Guidance’s version, German earmarking has stricter limits regarding the type of content and the duration that this privilege can be applied. While Guidance’s earmarking gives rightholders a tool that they can enforce *ex-ante*, which has the potential to enable rightholders to override Article 17’s guarantees for freedom of expression by enabling them to block any upload automatically, UrHDaG’s exception to pre-flag simply results in triggering the automated content filtering or trusted rightholders being not required to wait for the end of the complaints procedure to ensure the unavailability of the upload, not automatically preventing the upload like earmarking mechanism. Moreover, by limiting the duration until the completion of works’ first communication to the public and subject matter to cinematographic works or moving images, this section ensures that this exception will not lead to a disproportionate practice, unlike the unrestricted monitoring that rightholders can request with earmarking.

However, there are additional concerns regarding the operation of this special complaint procedure for rightholders. First, the Act is quiet regarding the criteria for being trustworthy, which affects foreseeability as it would result in OCSSPs having a disproportionate power of judgement to grant this tool to rightholders of their choice.¹¹⁸⁸ Also, as examined in previous

¹¹⁸⁴ AG Opinion in *Poland v European Parliament*, para 223.

¹¹⁸⁵ João Pedro Quintais, ‘Article 17 Survives, but Freedom of Expression Safeguards Are Key: C-401/19 - Poland v Parliament and Council’ (*Kluwer Copyright Blog*, 26 April 2022) <<http://copyrightblog.kluweriplaw.com/2022/04/26/article-17-survives-but-freedom-of-expression-safeguards-are-key-c-401-19-poland-v-parliament-and-council/>> accessed 9 May 2022.

¹¹⁸⁶ *Poland v European Parliament*, para 90.

¹¹⁸⁷ Guidance, p.14.

¹¹⁸⁸ Article 52(3) of the Charter of Fundamental Rights of the European Union [2012] OJ C 326, 26.10.2012, p. 391–407. (hereinafter: ‘Charter’); *Yildirim v Turkey* (n 12); C-203/15 and C-698/15, *Tele2 Sverige AB*, ECLI:EU:C:2016:572, Opinion of Advocate General Saugmandsgaard Øe, para 150.

chapters, there is always the risk of abuse with these types of tools. These tools, such as privileged takedown mechanisms, historically have many problems resulting in fraudulent claims, such as false claims from rightholders for third-party works to get the monetisation revenue¹¹⁸⁹ or works in the public domain.¹¹⁹⁰ The Act attempts to eliminate this risk by putting these declarations of significant harm subject to review by a natural person, which might bring the challenge for the OCSSPs to handle these complaints timely.

That is why there should be dissuasive and effective sanctions in place within the national transposition to eliminate this high risk of misuse. It is important for these self-governing control mechanisms to be combined with sanctions against abuse; therefore, Section 18 states that in the case of abuse of any of these mechanisms, pre-flagging, simple and qualified blocking, and trusted rightholders' "red button" mechanism, the repeated abuser must be excluded from these procedures for an appropriate period of time. In addition to that, where the rightholder acts on intention or negligence regarding the abusive requests, the rightholder is obliged to compensate the service provider and the user concerned for the resulting damage. Also, in the case of repetitive over-blocking by OCSSP, users can claim an injunctive relief only via registered user rights associations against this service provider.¹¹⁹¹

However, German implementation has been criticised for its failure to provide sufficient sanctions for platforms in the case of a failure to safeguard the user rights and interests; there is no sanction within the UrhDaG for the non-compliance of the platforms.¹¹⁹² As mentioned previously, there is a civil liability under UrhG if they fail to protect rightholders' interests; however, a provision for this liability is missing for protecting user interest. Thus, the concept of 'uses presumably authorised by law' lacks an unambiguous enforcement regime which brings the risk of UrhDaG being ineffective regarding user rights protection.¹¹⁹³ The importance of sanctions comes into play also regarding the enforcement of Article 17's obligations regarding safeguarding user rights; while this approach is in line with the wording of the Article, the effectiveness of these sanctions is arguable as the misuse affects the users'

¹¹⁸⁹ Examined in Chapter 3 and 4; Also see Kristelia García (n 993).

¹¹⁹⁰ Jennifer M Urban, Joe Karaganis and Brianna Schofield, 'Notice and Takedown in Everyday Practice' (UC Berkeley 2017) UC Berkeley Public Law Research Paper ID 2755628 <<https://papers.ssrn.com/abstract=2755628>>

¹¹⁹¹ Section 18(6).

¹¹⁹² Jasmin Brieske and Alexander Peukert, 'Coming into Force, Not Coming into Effect? The Impact of the German Implementation of Art. 17 CDSM Directive on Selected Online Platforms' [2022] CREATe Working Paper Series <<https://zenodo.org/record/5865619>> accessed 11 March 2022.

¹¹⁹³ *ibid.*

rights to benefit from copyright exceptions and limitations which accepted as user rights¹¹⁹⁴, and the lack of sanctions for OCSSPs and rightholders negatively impacts the required level of safeguarding of user rights. However, compared to other Member State implementations, Germany provides the most comprehensive sanctions system with Section 18.¹¹⁹⁵

Thus, by looking at the UrhDaG as a whole, especially considering the introduction of the 'uses presumably authorised by law' concept and the pre-flagging mechanism, one can say that the German implementation pays sufficient attention to user rights' safeguards by prioritising the duty of reducing the false positives and over-blocking. This is the first time for an implementation to offer a procedural mechanism designed to ensure that the OCSSPs are not preventing legitimate content on their platforms and that the instances of over-blocking are limited. While increasing the effectiveness of the user safeguard in Article 17 (7), this mechanism also helps OCSSPs meet their obligation of result, which trumps the obligation of "best efforts" to block and prevent infringing uses of works.¹¹⁹⁶ That is why this implementation has been recognised as one of the most ambitious implementations of the CDSM Directive and the first implementation that focuses on providing the user rights protection imposed by Article 17 in practice with the potential of becoming a model for the platforms.¹¹⁹⁷

Thus, introducing this delayed takedown for the uses that benefit from copyright exceptions (pre-flagged) and the ones that the UrhDaG finely defines (minor uses) provides a system that considers the limits of upload filters, especially regarding the identification of E&Ls and allows the plausible *prima facie* presumption that the use in question does not infringe copyright.¹¹⁹⁸ It is not possible to expect OCSSPs to ensure zero risk of copyright infringement; by looking at the CDMSD, it is clear that they are not expected to prevent every potential infringing upload as the best efforts obligations in Article 17(4) constitute

¹¹⁹⁴ *Poland v European Parliament*, para 86-87.

¹¹⁹⁵ Christina Angelopoulos (n 4), p.45.

¹¹⁹⁶ Guidance, p.20; AG Opinion in *Poland v European Parliament*, para 165.

¹¹⁹⁷ Even though YouTube has not clarified if the rules of UrhDaG are being applied globally, considering the worldwide availability of these new tools shortly before entry into force of the German law, and a similar statement from the platform's Brussels branch indicates that this might be the case. This is also sensible from an economic standpoint for the platforms, given that no national legislation currently mandates them to act otherwise. See Marco Pancini, 'YouTube's Approach to Copyright' (*Google - The Keyword*, 31 August 2021) <<https://blog.google/around-the-globe/google-europe/youtubes-approach-to-copyright/>> accessed 17 November 2021.

¹¹⁹⁸ Matthias Leistner (n 15) 7.

OCSSPs only need to limit themselves to due diligence endeavours.¹¹⁹⁹ Thus, the assumption of UrhDaG regarding the legitimacy of the uploads with minimal inclusion of the protected works or user-generated content when the upload contains less than half of a work or several works by third parties while being combined with other content as this provides sufficient assumption that the upload is likely legitimate as it cannot substitute the original work. The lack of commercial motive from users and the limited-duration impact of this assumption on liability also strengthen this assumption and raise the possibility of this mechanism being supported by the proportionality principle. Therefore, one can say that the German implementation uses the upload filters effectively for the identification of the content but does not allow these automated tools to block legitimate content and effectively and optimally benefits the complaint and redress mechanisms provided in Article 17 (9) as a safeguard.

This system has been further justified by academics such as Leistner and Angelopoulos by suggesting that the German implementation, by providing such self-governing control mechanisms, does not introduce additional exceptions to copyright out of the scope of EU acquis; instead, it simply specifies Article 17's obligations.¹²⁰⁰ It provides a limited exemption from liability only for the duration of the complaint and redress process, which is set as a one-week maximum, and it does not impact the scope of copyright protection or copyright exceptions nor the possibility of licensing the content that benefits presumed legality. The mere *ex-post* protection of freedom of expression would fail to satisfy the obligations of the important safeguard in Article 17(7) as this practice would cause interferences with legitimate content and, therefore, bring the risk of disproportionate interference with freedom of expression and fail to ensure the required respect in the essence of this right.¹²⁰¹ As Article 17 found compatible with fundamental rights, it is up to national implementations to embed the proportionality principle by ensuring the effective transposition of safeguards which should result in a realistic application in practice by the OCSSPs. While trying to ensure this with the concept of presumably authorised uses, at some parts by pushing the limits to ensure this and fair balancing of the competing fundamental rights, German implementation carries a significant risk regarding the goal of harmonisation

¹¹⁹⁹ AG Opinion in *Poland v European Parliament*, para 184; Christina Angelopoulos (n 4), p. 29; Irini Stamatoudi and Paul Torremans, "The Digital Single Market Directive" in I Stamatoudi and P Torremans, *EU Copyright Law – A Commentary* (2nd ed., Edward Elgar 2021), para. 17.259-17.261.

¹²⁰⁰ Matthias Leistner (n 15), 10; Christina Angelopoulos (n 4), 33.

¹²⁰¹ AG Opinion in *Poland v European Parliament*, para 170ff; *Poland v European Parliament*, para 70.

of CDSMD. However, Angelopoulos argues that the formulation of the CDSMD, which suffers from bad legislative quality, is the underlying reason behind this high potential regarding the fragmentation rather than the national implementations of the Article.¹²⁰² Either way, the approach that needs to be adopted for the implementation is now clearer with the *Poland* decision for Member States considering the CJEU's stress on the safeguards of the Article. Ensuring the filter is fundamental right-compliant requires both *ex-ante* and *ex-post* precautions. While introducing *ex-ante* safeguards such as automated blocking thresholds and pre-flagging tools to minimise the risk of over-blocking, where the filters generate erroneous decisions despite these safeguards will be handled with *ex-post* safeguards.¹²⁰³

German UrhDaG incorporates *ex-ante* safeguards following Article 17(7) and ensures the effective application of safeguards. One can say that the *Poland* decision has strengthened the German implementation's position by underlining the strict implementation of safeguards which increases the chances for German implementation to be acknowledged as a guide for upcoming implementations.¹²⁰⁴ While this would minimise and perhaps eliminate the problems with harmonisation, it would help with big platforms that have already started their adaptation process, as the German implementation was the first implementation with detailed safeguards.¹²⁰⁵

2. France

The French implementation follows a word-to-word transposition of Article 17 and suggests that this approach provides sufficient fundamental rights protection, and its interferences of Article 17(4) with the freedom of expression are proportionate and acceptable. It supports the idea that automated content recognition mechanisms “*must be given their due in the*

¹²⁰² Christina Angelopoulos (n 4), 33.

¹²⁰³ *Poland v European Parliament*, paras 86, 93.

¹²⁰⁴ In an attempt to provide a solution for over-blocking, Hungarian Explanatory Memorandum refers to the use of the pre-flagging tool. See Christina Angelopoulos (n 4).

¹²⁰⁵ Even though YouTube has not clarified if the rules of UrhDaG are being applied globally, considering the worldwide availability of these new tools shortly before entry into force of the German law, and a similar statement from the platform's Brussels branch indicates that this might be the case in the near future. This is also sensible from an economic standpoint for the platforms, given that no national legislation currently mandates them to act otherwise. See Marco Pancini, 'YouTube's Approach to Copyright' (*Google - The Keyword*, 31 August 2021) <<https://blog.google/around-the-globe/google-europe/youtubes-approach-to-copyright/>> accessed 17 November 2021.

implementation of Article 17 of CDSM Directive.”¹²⁰⁶ However, it fails to acknowledge the risks that come with the implementation of these technologies by merely restating the safeguards in Article 17 without considering the practical results and potential inefficiency. It is important to note that, Article 17 has been implemented into the Code de la propriété intellectuelle (IPC) by ordinance n° 2021-580 of 12 May 2021, meaning that the text has not been subject to amendments and discussion before the Parliament¹²⁰⁷ and legislative procedure did not include different drafts nor public consultations, unlike the German implementation.¹²⁰⁸

In contrast to the German approach, French implementation follows the wording of the Directive closely with some minor clarifications, such as the scope of the OCSSPs. While mostly following the wording of the Directive strictly, at some parts, French implementation diverts from the letter of the provision. An example of this can be seen within the implementation of Article 17(1), which defines the affected exclusive rights, namely an act of communication to the public or an act of making available. French implementation describes the restricted acts as rights of “representation” and “reproduction”, and the extension of affected rights to the reproduction right raises problems with compliance with the wording of the Article.¹²⁰⁹ Yet, Angelopoulos argues that this approach is logical as it is not possible for OCSSPs not to copy the content they host and follows the intention behind Article 17(1) as clarified in the Guidance.¹²¹⁰ Also, the application of the immunity of Article 17(4) to all “acts of unauthorised exploitation”¹⁵² limits the damage. However, this diversion from the wording results in unclear compatibility of the implementation with the text of the Directive. In line with that, according to the French implementation, when a user uploads unauthorised content to the platform, two independent acts of infringement take place; therefore, it accepts

¹²⁰⁶ French High Council for Literary and Artistic Property, ‘Mission Report on Content Recognition Tools on Digital Sharing Platforms: Proposals For The Implementation of Article 17 of The EU Copyright Directive’ (January 2021) <<https://www.culture.gouv.fr/Thematiques/Propriete-litteraire-et-artistique/Conseil-superieur-de-la-propriete-litteraire-et-artistique/Travaux/Missions/Mission-du-CSPLA-sur-les-outils-de-reconnaissance-des-contenus-et-des-oeuvres-sur-les-plateformes-de-partage-en-ligne-II>> accessed 15 November 2021.

¹²⁰⁷ Valérie Laure Benabou, ‘Articles 15 & 17 of the Directive on Copyright in the Digital Single Market Questionnaire – Annex to the Comparative National Implementation Report - FRANCE’ (2022). p.15

¹²⁰⁸ Communia Association, ‘DSM Directive Implementation Portal - France’ <<https://www.eurovision.communia-association.org/detail/france/>> accessed 30 September 2022.

¹²⁰⁹ Art. L. 137-2. I Code de la propriété intellectuelle (IPC)

¹²¹⁰ Christina Angelopoulos (n 4); European Commission, “Communication from the Commission to the European Parliament and the Council on Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market”, 4 June 2021, COM(2021) 288 final, p. 6.

that authorisations granted to users do not eliminate the obligation of the OCSSP to obtain authorisation.¹²¹¹ This approach ignores the hybrid character of Article 17 between primary and secondary liability.¹²¹²

Similarly, regarding the definition of OCSSPs, France does not clarify whether the list of services is non-exhaustive. Most importantly, it converts the concept of large amount to ‘significant quantities’, which is a key notion of defining whether a platform is falling within the scope of OCSSP by giving access and storing such an amount of copyright-protected works uploaded by their users according to the wording of Article 2(6) CDSMD. This vague concept specified by a further decree and following quantitative limits introduced by order of the Ministry of Culture as 400,000 unique visits to the platform in France each month; regarding the number of files, the threshold is 100 for audio-visual works, radio works, written works including the press, video games or 5000 for musical works or 10,000 for visual artworks or 10,000 for the files including different types of works and these thresholds regarding the number of files cannot be cumulated.¹²¹³ In line with Recital 63, the consideration of this 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, must be conducted case by case.¹²¹⁴ As this assessment requires a case-by-case analysis, this quantitative approach can raise problems with the compatibility of this interpretation, especially with the right to conduct a business, as in some cases, the scope of the OCSSPs can be extended beyond the intention of the Directive which targets the services that play an important role on the online content market through these thresholds.¹²¹⁵ Identifying these thresholds would bring the risk of unfair treatment to special cases and being overturned by the CJEU as it disturbs the harmonised application of the CDSMD within the Union.¹²¹⁶ In addition to that, while defining the targeted platforms, OCSSPs, L. 137-I IPC adopts a broader concept, namely ‘indirect profit’, for defining the commercial purpose of the

¹²¹¹ Art. L. 137-2. IV Code de la propriété intellectuelle (IPC)

¹²¹² Matthias Leistner, ‘European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive Compared to Secondary Liability of Content Platforms in the U.S. – Can We Make the New European System a Global Opportunity Instead of a Local Challenge?’ [2020] *Zeitschrift für Geistiges Eigentum/Intellectual Property Journal* 123. p.23.

¹²¹³ Valérie Laure Benabou (n 50), p.18.

¹²¹⁴ Recital 63 of CDSMD.

¹²¹⁵ Recital 62 of CDSMD; Christina Angelopoulos (n 4), p.28.

¹²¹⁶ Matthias Leistner (n 151).

platform with their organisation and promotion activities. It is not clear what the concept of indirect profit can cover, which brings the risk of extending the scope of OCSSPs disproportionately.

Similarly, the French translation of Recital 66 states that the only way for OCSSPs to avoid liability where no authorisation has been granted is by demonstrating that they have taken *every* measure to avoid that situation.¹²¹⁷ However, the corresponding sentence in the English version requires these platforms to make their *best efforts* in accordance with high industry standards of professional diligence to avoid the availability of unauthorised works identified by rightsholders. As an important factor for determining OCSSPs' liability, the "best efforts" resulted in different translations by different Member States and, in many implementations such as Croatia, Estonia, Greece, and Latvia, showed itself as "*all that is possible*" or "*every possible effort*."¹²¹⁸ However, in practice, the obligation of taking every measure constitutes an obligation to over-block to avoid liability under Article 17; OCSSPs must perform excessive *ex-ante* filtering and blocking. This would result in breaching the obligation of result in Article 17(7), which is acknowledged as having higher importance than the obligation to ensure the unavailability of unauthorised uses.¹²¹⁹ Consequently, it would disproportionately interfere with users' freedom of expression due to the absence of the required protection for lawful uses, including copyright exceptions and limitations. This also puts a disproportionate burden on platforms' shoulders and negatively impacts OCSSPs' right to conduct a business, as expecting them to take every measure possible requires extensive economic, technical and financial resources, more than what is available to each platform.¹²²⁰

By enforcing the requirement for 'every measure', this implementation aims for 'zero risk' of copyright infringement and ignores the guarantees that make the limitation that Article 17(4) puts on fundamental rights compatible with EU law. These measures include measures that systematically undermine user rights with their collateral effect on the freedom of expression

¹²¹⁷ DIRECTIVE (UE) 2019/790 DU PARLEMENT EUROPÉEN ET DU CONSEIL du 17 avril 2019 sur le droit d'auteur et les droits voisins dans le marché unique numérique et modifiant les directives 96/9/CE et 2001/29/CE (Texte présentant de l'intérêt pour l'EEE) *OJ L 130*, 17.5.2019, p. 92–125 <<https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:32019L0790&from=EN>> accessed 01 September 2022.

¹²¹⁸ Aline Larroyed, 'When Translations Shape Legal Systems: How Misguided Translations Impact Users and Lead to Inaccurate Transposition – The Case of "Best Efforts" Under Article 17 DCDSM' [2020] SSRN Electronic Journal <<https://www.ssrn.com/abstract=3740066>> accessed 30 August 2022.

¹²¹⁹ *Poland v European Parliament*, para 78; Advocate General Opinion in *Poland v European Parliament*, paras 191-193.

¹²²⁰ Case C-314/12 *UPC Telekabel v Constantin Film ('UPC Telekabel')* [2014] ECLI:EU:C:2014:192, para 49.

while trying to enforce the right to intellectual property. Such measures that could potentially undermine freedom of information are found incompatible with the requirement that a fair balance to be struck between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other.¹²²¹ Requiring this would result in ignoring Article 17(7) and conflicts with the Directive itself, and it has been identified as “bad drafting” by AG in his opinion.¹²²² All these examples indicate an approach that carries the potential of going beyond what the Article requires with “best efforts” obligations and result in a disproportionate burden on different actors, which fails to strike a fair balance between the competing interests of users, platforms, and rightholders.

In accordance with this approach, French implementation does not provide any solutions for the *ex-ante* assessment of the lawful uses, such as copyright exceptions and limitations and misses the most important mark of the ideal implementation. According to the French Government, the filtering measures of Article 17(4) are alone enough to satisfy the fair balance requirement as they are “strictly targeted” at the works that rightholders communicated with the platform.¹²²³ As argued previously, notices by rightholders are not known to be accurate and controlled, and the combination of this with the technical shortcomings of the filters brings the risk of a practice which is incompatible with the Charter.¹²²⁴ It is important to consider the guarantees of the safeguards of the Article, which require filtering not to have an arbitrary or excessive effect on lawful content to ensure compliance with the fundamental right of internet users to freedom of information in line with established case law.¹²²⁵ Where a significant amount of lawful content gets blocked, this measure “unnecessarily deprives” users of the possibility of lawfully sharing and accessing information and fails to satisfy the fair balance principle.¹²²⁶ This would make the interference with the essence of this right unjustified in the light of the objective pursued, therefore, necessitating additional controls on these filters to ensure the obligation of result in Article 17(7) is achieved.

¹²²¹ *Scarlet Extended* (n 12), para 53; C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV (Netlog)* [2012] EU:C:2012:85, para 51.

¹²²² Advocate General Opinion in *Poland v European Parliament*, footnote 229.

¹²²³ Advocate General Opinion in *Poland v European Parliament*, para 185.

¹²²⁴ Chapter 3 and 4

¹²²⁵ C-324/09, *L'Oréal and Others* [2011] EU:C:2011:474, para 131; *UPC Telekabel Wien* (n 49) para 56; C-484/14, *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH* [2016] EU:C:2016:689, para 93.

¹²²⁶ *Ahmet Yildirim v. Turkey* (n 12), para 66

However, these important guarantees for freedom of expression within the Article and EU law are not very visible within the French implementation. For instance, there is no procedure that would limit the instances of over-blocking. Section 4 of the Act, which is titled “user rights” merely states that

“The provisions of this chapter cannot oppose the free use of the work within the limits of the rights provided for by this code, as well as those granted by the holders of rights. In particular, they must not have the effect of depriving users of online content sharing service providers of the effective benefit of the exceptions to copyright provided for by this code.”

This constitutes an improvement compared to the draft version of the Act, which fails to implement Article 17(7).¹²²⁷ Nevertheless, it is debatable how far this wording corresponds to the Article 17(7)’s wording as it explicitly requires cooperation between online content-sharing service providers and rightholders to not result in preventing legitimate content and the use of E&Ls. One can say that France fails to provide appropriate protection of copyright exceptions and limitations in line with Article 17(7) as the scope of the national implementation of the exceptions named in the Article is narrower than CJEU’s interpretation.¹²²⁸ For instance, quotation exception is strictly limited to “short quotations justified by the critical, polemical, educational, scientific or informative nature of the work in which they are incorporated.”¹²²⁹ This means that a significant number of user-generated content, including uses of sampling, might be excluded by the protection under this exception. Moreover, the level that the users can benefit from these exceptions in practice also raises concerns.

¹²²⁷ Communia Association, ‘Draft French Implementation Bill of Article 17 English’ (*DSM Directive Implementation Tracker*) <https://s3.us-west-2.amazonaws.com/secure.notion-static.com/0701b81e-cc46-4546-91b5-f1282a59853e/Draft_French_implementation_bill_of_article_17_-_EN_version.pdf?X-Amz-Algorithm=AWS4-HMAC-SHA256&X-Amz-Content-Sha256=UNSIGNED-PAYLOAD&X-Amz-Credential=AKIAT73L2G45EIPT3X45%2F20220901%2Fus-west-2%2Fs3%2Faws4_request&X-Amz-Date=20220901T085015Z&X-Amz-Expires=86400&X-Amz-Signature=850650ac56c5b428a5b678421e425bbf39ee2a9e26f822ad3e27ec95ada839bc&X-Amz-SignedHeaders=host&response-content-disposition=filename%20%3D%22Draft%2520French%2520implementation%2520bill%2520of%2520article%252017%2520-%2520EN%2520version.pdf%22&x-id=GetObject> accessed 1 September 2022.

¹²²⁸ Case C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others*, (‘Painer’)[2011] ECLI:EU:C:2011:798; *Pelham* (n 18) and *Spiegel Online* (n 18).

¹²²⁹ Christina Angelopoulos (n 4), p.40.

While the fact that Article L137-4 is the first example of user rights appearing clearly within the French law by stating that the best effort obligations should not deprive users of the effective benefit of the copyright exceptions provided for in this code constitutes an important step for the recognition of user rights, in practice, it is not likely for this section to provide users more than defences regarding their right to benefit from exceptions to copyright. First, the law provides only one way to secure legitimate uploads, which is with the post-operation of the complaint and redress mechanism, and second, in cases where OCSSP fails to allow users to benefit from these exceptions, this practice of over-blocking is not tied to any special liability.¹²³⁰ The Article, by mostly following the wording of Article 17(9), provides a complaint and redress mechanism which requires control by a natural person.¹²³¹ Article L.137-4 IV offers the option to refer their complaint to the Regulatory Authority for Audiovisual and Digital Communication (ARCOM), which was created by Act no. 2021-1382 of 25 October 2021 by merging CSA (Conseil Supérieur de l'Audiovisuel) and HADOPI.¹²³² However, this procedure has the potential to result in lengthy decision-making as instead of a set time or period, it is up to the ARCOM to determine the period, and in the absence of conciliation within a period of one month from the date of referral, it shall have a period of two months from the date of referral to make its decision which would jeopardise all the efficiency of this safeguard.¹²³³ The only sanction against abusive requests is related to the ARCOM appeals; in the case of repetitive and systematic misuse complaints, ARCOM is not required to take action, which constitutes a sanction with questionable dissuasiveness.¹²³⁴

Interestingly, despite this section mentioning the right to apply to the judge, in practice, this is not possible as the user cannot go to court to claim their right to benefit from a copyright exception in the aftermath of *Mulholland Drive* (Cass. Civ. 1^{ère}, February 28, 2006.) decision.¹²³⁵ Therefore, this regime leaves users with dead ends for their attempts to enforce their rights to benefit from copyright exceptions which further intensifies the power

¹²³⁰ Article L.137-4.

¹²³¹ Article L.137-4 III.

¹²³² LOI n° 2021-1382 du 25 octobre 2021 relative à la régulation et à la protection de l'accès aux œuvres culturelles à l'ère numérique MICE2106504L; Brad Spitz, 'France: ARCOM, a New Regulatory Authority to Fight Online Copyright Infringement' (*Kluwer Copyright Blog*, 6 January 2022) <<http://copyrightblog.kluweriplaw.com/2022/01/06/france-arcom-a-new-regulatory-authority-to-fight-online-copyright-infringement/>> accessed 29 September 2022.

¹²³³ Article L. 331-32.

¹²³⁴ L. 137-4 V.

¹²³⁵ Valérie Laure Benabou (n 50), p.23.

imbalance between users and rightholders on contrary to the important aim of achieving fair balancing between the rights of users and intellectual property protection of rightholders.¹²³⁶ Especially in light of the *Poland* decision, the lack of effective safeguards for the legitimate uses of users within the French implementation raises compatibility issues with the Directive and Charter.

Despite their importance being underlined with the legislative history of the Article and lastly with the *Poland* decision, there are no mechanisms proposed to effectively safeguard the lawful uses of third-party work, which include uses benefit from exceptions and limitations.¹²³⁷ Instead, under the user rights section, French implementation only provides an *ex-post* complaint mechanism and other dispute resolutions, which would take place after the filtering and blocking of legitimate content.¹²³⁸ French Government argues that recovery by *ex-post* safeguards is enough to maintain a fair balance as preventive filtering and blocking would cause a “temporary” inconvenience to users.¹²³⁹

However, as consistently argued, merely providing appeals for users’ unlawfully blocked content does not constitute an effective safeguard for freedom of expression as it does not remedy over-blocking.¹²⁴⁰ It has been established that the fact that users can appeal via complaint and redress mechanism would not make filtering that blocks lawful communications compatible with the fair balancing principle.¹²⁴¹ This can be supported by the legislative evaluation of the Directive too. The actions that enabled the Article’s text to pass the Parliament include separating the safeguards regarding lawful uses and complaint and redress mechanisms as individual safeguards that need to be considered.¹²⁴² Thus, this additional nature of Article 17(9) shows that implementing mere *ex-post* safeguards would not be enough to ensure Article 17’s guarantees for user rights.

¹²³⁶ *Poland v European Parliament*, para 98.

¹²³⁷ The recent approach of the CJEU can also support the obligation to protect these uses; in *Funke Medien* (n 18) and *Spiegel Online* (n 18), CJEU underlines the need for safeguarding the effectiveness of these exceptions. See above and Chapter 3.; AG Opinion, para 189.

¹²³⁸ Art. L. 137-4.II the Ordonnance n° 2021-580.

¹²³⁹ AG Opinion in *Poland v European Parliament*, footnote 209.

¹²⁴⁰ *Poland v European Parliament*, paras 85-95; AG Opinion in *Poland v European Parliament*, para 180; Guidance p.20

¹²⁴¹ *Poland v European Parliament*, paras 85-95; AG Opinion in *Poland v European Parliament*, para 186; *Scarlet Extended* (n 12), para 53; *Netlog* (n 64), para 51.

¹²⁴² European Parliament, ‘Amendments adopted by the European Parliament on 12 September 2018 on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market’ COM(2016)0593 – C8-0383/2016 – 2016/0280(COD), <https://www.europarl.europa.eu/doceo/document/TA-8-2018-0337_EN.pdf?redirect>

Additionally, regarding transparency, while obliging platforms to provide information necessary for a transparent evaluation of the remuneration, French implementation introduces an exception for trade secrets, with the opportunity of introducing more detailed exceptions in line with contractual arrangements.¹²⁴³ While this exception is required when it is limited to the reasonable expectation of protection of sensitive data for the business, this open-ended possibility to introduce detailed exceptions has the potential to damage the effectiveness of the transparency requirements and hinder the aim of achieving transparent and balanced environment online as these contracts will be determined between OCSSPs and rightholders.¹²⁴⁴

Therefore, the French implementation ignores the recognition of the insufficiency of merely implementing the complaint and redress mechanism and restoring the legitimate content *ex-post* for the transposition and application of Article 17(7).¹²⁴⁵ As it is, it only corresponds to one of the two cumulative obligations for filters, preventing the infringing works from going online and ignores the critical obligation of not preventing legitimate content, which requires allowing users to benefit from copyright exceptions and limitations.¹²⁴⁶ Considering the legislative development and wording of Article 17, this failure to ensure Article 17 (7)'s guarantees results in losing the liability exemption in the Article for OCSSPs.¹²⁴⁷ In practice, there is a high risk for OCSSPs that follow French implementation to fail to provide effective safeguards for their users and result in incompliant practice with Article 17(7), despite the fact that this safeguard constitutes one of the conditions for OCSSPs to satisfy to qualify for the liability exception under Article 17.

In addition to the complaint and redress mechanism, the French Government in *Poland* hearings suggested the possibility of voluntary measures taken by rightholders for the protection of user rights by referring to the monetisation practices. While this idea is not

¹²⁴³ Article L.218-4 IPC; l'Autorité de la concurrence, Decision 22-D-13 du 21 juin 2022 relative à des pratiques mises en œuvre par Google dans le secteur de la presse; See 'Related Rights: The Autorité Accepts Google's Commitments' (*Autorité de la concurrence*, 21 June 2022). <<https://www.autoritedelaconcurrence.fr/en/communiqués-de-presse/related-rights-autorite-accepts-googles-commitments>> accessed 30 September 2022.

¹²⁴⁴ Chapter 4 discussed the abuse of the protection granted to trade secrets by big companies such as Facebook and the outcomes of the lack of transparency.

¹²⁴⁵ Guidance; AG Opinion in *Poland v European Parliament*, paras 187-191.

¹²⁴⁶ AG Opinion in *Poland v European Parliament*, para 186.

¹²⁴⁷ Guidance p. 20; AG Opinion in *Poland v European Parliament*, footnote 249.

innovative since EU law has examples such as Article 6(4) of Directive 2001/29, this does not constitute a safeguard for user rights for the interferences of filtering resulting from Article 17(4)(b) and (c).¹²⁴⁸ As has been underlined by this study many times, handing the faith of user rights to actors with competing interests guarantees interference with users' rights.¹²⁴⁹ This trust that French implementation puts in rightholders becomes concerning with the fact that there are no sanctions for the abuse of the measures such as takedown and stay down systems by the rightholders despite the empirical data of their abuse.¹²⁵⁰

Therefore, this implementation falls short of satisfying the effective implementation of strong safeguards for user rights and therefore fails to implement Article 17 in a way that ensures fair balance.¹²⁵¹ While the necessity of the safeguards has been underlined by the CJEU for the fundamental right compliant status of Article 17, introducing safeguards for user rights with no practical applicability or enforceability brings the risk of incompatibility with EU law. One should keep in mind that Article 17 requires elaboration to clarify how its subparagraphs are intended to interact with each other and therefore ensure a fair balance between fundamental rights. This nature of the Article makes the word-by-word implementation not suitable for this provision.¹²⁵² Thus, one can say that the French implementation ignored some essential points for a proportionate and fundamental right-accordance implementation of Article 17 by not providing the necessary safeguards, which can cause more compliance problems with EU law than the implementations that introduced additional safeguards within the scope of Directive and its Recitals.¹²⁵³

¹²⁴⁸ AG Opinion in *Poland v European Parliament*, footnote 208, 252.

¹²⁴⁹ AG Opinion in *Poland v European Parliament*, footnote 252.

¹²⁵⁰ Jennifer M Urban, Joe Karaganis and Brianna Schofield, 'Notice and Takedown in Everyday Practice' (UC Berkeley 2017) UC Berkeley Public Law Research Paper ID 2755628 <<https://papers.ssrn.com/abstract=2755628>> accessed 14 July 2020.

¹²⁵¹ *Poland v European Parliament*, ECLI:EU:C:2022:297, para 99.

¹²⁵² Christina Angelopoulos (n 4), p.32.

¹²⁵³ Christina Angelopoulos (n 4), p.32.

Appendix B: Self-regulation and the Non-Compliance of Online Content-Sharing Service Providers

After a year of the deadline for implementation, the current environment draws a non-appealing picture; many Member States are still trying to implement the Directive into their national law, and the Member States that implemented the CDSMD months ago are suffering from a lack of enforcement. Instead of taking action regarding the new implementations of the CDSMD, most platforms continue to follow and enforce their own “statutes”, namely their terms and conditions (T&C) or terms of services (ToS).

This self-regulation movement is an outcome of the many direct and indirect obligations and initiatives for platforms to avoid liability that is increasing dramatically. Therefore, it is understandable why platforms take further cautions and introduce different mechanisms to strengthen their copyright enforcement. However, while defining and enforcing their T&C, these platforms must respect the fundamental rights of the users and adopt the “*positive measures of protection*”, which guarantees that the freedom in relations between the users and platforms to be enjoyed efficiently.¹²⁵⁴ These positive obligations arise from Article 10 of the Convention and are supported by rich case law.¹²⁵⁵ In line with these obligations, primarily, they should respect the copyright exceptions and limitations by allowing their application within their T&C and sufficiently informing the users regarding these copyright exceptions and limitations. Moreover, CDSMD clearly introduces an obligation to inform their users that they can use works and other subject matter under exceptions or limitations to copyright in their terms and conditions.¹²⁵⁶ Thus, users should be informed on what are their statutory copyright exceptions (quotation, criticism, review, caricature, parody or pastiche as the minimum) and how to benefit them via the platform (pre-flagging). Informing users about copyright exceptions and limitations while supporting users’ freedom of expression and creation would help with reducing the risk of accidental infringements of copyright.¹²⁵⁷ Accordingly, the current conditions that enable justifying blocking and removal of the uploads with the mere allegation by rightholders of infringement of copyright should be

¹²⁵⁴ Case C-401/19, *Poland v Parliament and Council* [2021], ECLI:EU:C:2021:613, Opinion of Advocate General Saugmandsgaard Øe, (hereinafter ‘AG Opinion’), para 82

¹²⁵⁵ *Appleby v. the United Kingdom*, App no 44306/98 (ECtHR, 6 May 2003) para 39; *Khurshid Mustafa v. Sweden*, App no 23883/06 (ECtHR, 16 December 2008) para 31.

¹²⁵⁶ Article 17(9) of CDSMD Directive

¹²⁵⁷ AG Opinion, footnote 204.

disregarded under this obligation.¹²⁵⁸ These steps are essential to support the exercise of freedom of expression of the platform users, and these practices would help reduce the risk of unintentional infringements of copyright.¹²⁵⁹

However, in the current picture, big platforms continue to regulate their content with their imbalanced T&Cs, negatively affecting user creativity and internet culture as these regulations provide extra-judicial punishments for the alleged infringements. Although the implementation of the CDSMD would stop the self-regulatory nature of filtering and blocking, as content moderation is an obligation under Article 17, private companies continue to handle and assess the legality of the content with the opaque content recognition mechanisms that they developed or implemented. Considering its practicality, self-regulation should not be something that should be ignored entirely; however, it is important that the self-regulation that OCSSPs apply to seek to strike a fair balance and be transparent, as in most cases, it includes the operation of automated decision-making which interferes with users' fundamental rights.

1. Current (Non)compliance

Looking at the current picture, one can say that the authority of self-regulation is more powerful than ever, and the impact of the in-force national implementations of the CDSM Directive is yet to be seen. Especially regarding measures against the failure to protect user rights, including their legitimate uses of third-party work in line with Article 17(7), platforms are mostly silent. A recent study in Germany reported that none of the investigated platforms (YouTube, Rumble, TikTok, Twitter, Facebook, Instagram, SoundCloud and Pinterest) meets the mandatory duties under the UrhDaG, and the ones that are close to satisfying these requirements were the two big tech companies which already had filtering mechanisms in place before the CDSM Directive.¹²⁶⁰ A report delivered by *Der Spiegel*, which includes the most prominent platforms, shows that YouTube was the only platform that confirmed its

¹²⁵⁸ AG Opinion, para 163.

¹²⁵⁹ *ibid.*

¹²⁶⁰ Jasmin Brieske and Alexander Peukert, 'Coming into Force, Not Coming into Effect? The Impact of the German Implementation of Art. 17 CDSM Directive on Selected Online Platforms' [2022] CREATE Working Paper Series <<https://zenodo.org/record/5865619>> accessed 11 March 2022.

plans to comply with the German implementation, UrhDaG.¹²⁶¹ According to the report, while Twitch and TikTok refused to share any information, Facebook referred to their existing takedown systems and tools for the rightholders to show its compliance; they did not provide any information on how and when they will incorporate the pre-flagging tool into their filtering.

In contrast, YouTube stated that they would introduce a new pre-flagging tool for users and creators in parallel to their compliance announcement in their blog.¹²⁶² According to this announcement, this tool will be introduced to enable them to indicate the “uses presumably authorised by law” within their uploads accordingly to Section 11 of UrhDaG. Also, where there is a use presumably authorised by law, the platform stated that the content would not be taken down accordingly to the UrhDaG until the dispute has been resolved.¹²⁶³ However, there is no sign of this pre-flagging tool in practice yet; instead, YouTube introduced a new tool named “*Checks*”, which informs the uploader whether their video contains copyrighted material that would automatically be blocked by Content ID prior to upload.¹²⁶⁴ However, this tool is only available to the users on the YouTube Partner Program, namely for significant rightholders and professional and semi-professional creators.¹²⁶⁵ Also, the platform noted that they expanded the availability of their “*Copyright Match Tool*”, which scans YouTube uploads for potential matches to the videos reported in the approved takedown requests.¹²⁶⁶

Even after a year from the implementation deadline, by looking at the information available by the leading platforms regarding their content management, one can say that the required protection of users’ fundamental rights and the desired fair balance between competing interests of different actors of copyright enforcement by CDSMD is missing. To support this

¹²⁶¹ Patrick Beuth, ‘Urheberrecht: Was sich jetzt mit dem Uploadfilter-Gesetz ändert’ *Der Spiegel* (1 August 2021) <<https://www.spiegel.de/netzwelt/web/urheberrecht-was-sich-jetzt-mit-dem-uploadfilter-gesetz-aendert-a-82670dc4-5398-4f68-a36b-022d47388455>> accessed 17 March 2022.

¹²⁶² Sabine Frank, ‘Das neue Urheberrechtsgesetz in Deutschland und die Position von YouTube’ (*YouTube Official Blog*, 1 August 2021) <<https://blog.youtube/intl/de-de/news-and-events/das-neue-urheberrechtsgesetz-deutschland-und-die-position-von-youtube/>> accessed 17 March 2022.

¹²⁶³ *ibid.*

¹²⁶⁴ ‘New “Checks” Step in the Upload Flow on Desktop - YouTube Community’ (*Google Support*, 16 March 2021) <<https://support.google.com/youtube/thread/102365314/new-%E2%80%9Cchecks%E2%80%9D-step-in-the-upload-flow-on-desktop>> accessed 17 November 2021.

¹²⁶⁵ *ibid.*

¹²⁶⁶ ‘Use the Copyright Match Tool - YouTube Help’ (*Google Support*) <https://support.google.com/youtube/answer/7648743?hl=en&ref_topic=9282364> accessed 17 November 2021.

argument, this chapter will look at and analyse the available information provided by the three of the biggest user-generated content platforms on their websites, focusing on terms and conditions. The criteria for compliance with Article 17 identified as the implementation of automated content recognition systems in line with Article 17(4), respect to copyright exceptions and limitations in line with Article 17(7), and availability of complaint and redress mechanisms and human review in line with Article 17(9).

	YouTube	Facebook	Twitter
Automated content recognition systems (Article 17(4))	Yes	Yes	Not enough data
Respect to copyright exceptions and limitations (Article 17(7) and (9))	No	No	No
In-platform complaint and redress mechanisms (Article 17(9))	Yes	Yes	No
Human review for blocking and removal decisions (Article 17(9))	Yes	Not enough data	Not enough data

Table 1: Compliance of platforms with Article 17

YouTube’s terms of service (ToS) under the *Uploading Content* title states that uploading content that “*We may use automated systems that analyze your Content to help detect infringement....*”¹²⁶⁷ Under the *Removal of Content by YouTube* title, the platform reserves the right to remove or take down content that is in breach of this Agreement or may cause harm to YouTube, users, or third parties without specifying the means for this removal and also reserving the right to not to notify the user regarding these removals under specific circumstances.¹²⁶⁸ There is no further information regarding what these automated systems are and how they operate within these terms of service; however, detailed information

¹²⁶⁷ YouTube, ‘Terms of Service’ (5 January 2022) <<https://www.youtube.com/static?gl=GB&template=terms>> accessed 1 September 2022.

¹²⁶⁸ *ibid.*

regarding the Copyright and rights management can be found under Policy, Safety and Copyright Policies, which ToS states that the use of service is subject to. YouTube lists its copyright management tools as Copyright takedown webform, Copyright Match Tool, Content Verification Programme and lastly, Content ID. While the first three tools serve to takedown obligations in line with Article 17(4)(c), Content ID ensures compliance with Article 17(4)(b) with its preventive filtering. Moreover, their Copyright Match Tool has the potential to ensure compliance with stay down obligations in Article 17(4)(c). This tool serves the aim of *finding reuploads of videos removed through the webform by using Content ID's matching technology* which is typically only available to big rightholders *such as movie studios, record labels, and collecting societies*.¹²⁶⁹ Upon the approval of the webform removal request, which is a DMCA takedown request, the tool identifies re-uploads of the videos reported in the removal request and allows the rightholder to choose an action to take.¹²⁷⁰ Rightholders who are 'YouTube Partners' can use this tool without needing an official DMCA takedown request, the mere action of uploading the content for the first time to the platform gives them ownership in YouTube's eyes. While it is unlikely for the act of initial upload to meet the Article's requirement of "sufficiently substantiated notice" for stay down, by offering to filter for the future uploads of the content, YouTube aims to show that as a platform, they are making their "best efforts." Therefore, as a first step for compliance with Article 17, YouTube ensures that necessary tools are in place to stop infringing content from going online via their platform, remove them expeditiously and prevent future availability. However, as repeatedly underlined, the application of Article 17(4) without considering safeguards in Article 17(7) and (9) is not possible.¹²⁷¹

Therefore, when the ToS examined in search of compliance with required user rights protection by respecting the copyright exceptions and limitations, it revealed that there is no explicit mention of the statutory rights of users to benefit from copyright exceptions and limitations. The only thing that might be accepted as hinting at the copyright exceptions and limitations under Union law is the inclusion of being "*otherwise legally entitled to do so*" to

¹²⁶⁹ YouTube, 'YouTube Copyright Transparency Report H1 2021' <https://storage.googleapis.com/transparencyreport/report-downloads/pdf-report-22_2021-1-1_2021-6-30_en_v1.pdf>. 2

¹²⁷⁰ 'Use the Copyright Match Tool' (n 13).

¹²⁷¹ European Commission, 'Communication From The Commission To The European Parliament And The Council Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market', 4.6.2021 COM(2021) 288 final. (hereinafter 'Guidance'), p.20; AG Opinion, paras 165, 207; *Poland v European Parliament*, paras 80.

the conditions for incorporating a third-party intellectual property within the user content in addition to the permission from that party. Similarly, an interesting detail which might be seen as a hint to the application of copyright exceptions and limitations could be the “bear in mind” section under the information regarding Content ID which states: Before submitting takedown requests, it's important to consider whether fair use, fair dealing or *other exceptions to copyright* applies in each situation. Also, there is no information available regarding these exceptions besides the US doctrine of fair use, and in order to argue this, users can benefit from some Copyright Management tools that follow DMCA procedures. Therefore, one can say that the abovementioned tools and conditions are clearly not sufficient to fulfil Article 17(7) and Article 17(9) as it is not clear from this wording that users can use works and other subject matter under exceptions or limitations to copyright and related rights provided for in Union law and there is no mention how users can rely on these exceptions and limitations while uploading.

The next safeguard to assess the compatibility of ToS is Article 17(9)'s in platform appeal tools and human review for the blocking and removal decisions. As an important *ex-post* safeguard, Article 17(9), together with Recital 70, requires effective and expeditious complaint and redress mechanisms that support the use of copyright exceptions and limitations. Under the Removal of Content By YouTube section, YouTube states that they reserve the right to remove or take down content and directs the users to the Troubleshooting page of their Help Center for information on how to appeal these decisions.¹²⁷² Users can decide whether they want their complaint to go through the platform's initial dispute first or the “escalate to appeal” option, which is still in the making.¹²⁷³ The dispute can result in the claimant's reinstatement, which the user can appeal against via the platform, or they can start the legal process under DMCA by submitting a takedown request.¹²⁷⁴

¹²⁷² YouTube (n 14).

¹²⁷³ Platform aims to provide 'escalate to appeal' option which skips the initial dispute and provides quicker resolution by the platform as it gives the claimant rightholder seven days to respond. However, YouTube states that '*the 'Escalate to appeal' option for block claims may not be available yet.*' See 'Appeal a Content ID Claim - YouTube Help' (YouTube Help, 2022) <<https://support.google.com/youtube/answer/12104471#escalate&zippy=%2Cescalate-to-appeal>> accessed 2 September 2022.

¹²⁷⁴ 'Dispute a Content ID Claim - YouTube Help' (YouTube Help, 2022) <<https://support.google.com/youtube/answer/2797454#zippy=%2Cwhat-the-claimant-can-do>> accessed 2 September 2022.

The “Appeal a Content ID claim” page has warnings regarding being sure that they “*have all the necessary rights to use the claimed content*” without hinting at the possibility of their use of copyright exceptions and limitations. Also, during both the dispute and appeal process, the upload with the claim does not stay on the platform. Currently, the disputes and appeals give claimants 30 days to respond, meaning that the upload will be offline for at least more than a month, which would make this mechanism far from being expeditious. Moreover, their efficiency is also questionable, as the latest transparency report shows that only 0.5% of “content ID claims” have been disputed by the users via their tools.¹²⁷⁵ By looking at the complex dispute and appeal procedure that communicates to the users via help pages which include lots of warnings, one can say that the intimidation and confusion of users might be the reason for this low rate of appeals. Lastly, regarding the human review that the users’ appeals need to be subject to, it has been clearly stated by the platform that the claimant reviews both the initial dispute and the appeal.¹²⁷⁶ The only indication of human review is the examination of “YouTube reviewers” regarding the validity of copyright takedown requests.¹²⁷⁷

As the above examination shows, within YouTube’s ToS or additional policies and help pages, there is no mention of new copyright exceptions and limitations. There is no indication that the preventive filtering via Content ID will be limited to the manifestly infringing content or the implementation of a pre-flagging system for Germany will take place. Also, there is no information regarding complaint and redress mechanisms that users can use regarding the erroneous blocking of their uploads which benefit from these exceptions. On the opposite, ToS of YouTube continues to limit platforms’ liability regarding their users’ acts of communication to the public or making available, despite it being clearly against CDSM’s liability regime and providing big rightholders privileged tools that are open to abuse.

Another big OCSSP is Facebook, whose terms and conditions demonstrate a focus on harmful content in general. Platform informs users under the title “your commitments to

¹²⁷⁵ YouTube, ‘YouTube Copyright Transparency Report H1 2021’ <https://storage.googleapis.com/transparencyreport/report-downloads/pdf-report-22_2021-1-1_2021-6-30_en_v1.pdf>.

¹²⁷⁶ ‘Dispute a Content ID Claim - YouTube Help’ (*YouTube Help*, 2022) <<https://support.google.com/youtube/answer/2797454#zippy=%2Cwhat-the-claimant-can-do>> accessed 2 September 2022.

¹²⁷⁷ ‘Submit a Copyright Removal Request - YouTube Help’ (*YouTube Help*, 2022) <<https://support.google.com/yttoutube/answer/2807622>> accessed 2 September 2022.

Facebook and our community” that they cannot use their platform to “*share anything that infringes or violates someone else's rights, including their intellectual property rights unless an exception or limitation applies under applicable law.*”¹²⁷⁸

The platform states that they develop advanced technical systems such as artificial intelligence and machine learning systems, which are being used together with human teams around the world for the detection of misuse and harmful conduct.¹²⁷⁹ Consequently, the platform may remove or disable unlawful content or disable the account that breaches the terms under their repeat infringer policy.¹²⁸⁰ Rights Manager, Facebook’s automated content management tool, allows rightholders with large or growing catalogues of content to monitor and protect the content that they upload to the reference library. Similar to YouTube’s system, uploading the content for the first time gives the same effect of uploading this to the reference library for the upload filter to scan uploads accordingly; no confirmation of ownership is required. Rightholders are able to customise “match rules” containing location, overlap, content type, publisher and privacy type.¹²⁸¹ In case of a match, the rightholder can choose between the monitoring, blocking, monetising the upload, applying their attribution, or requesting a DMCA takedown.¹²⁸² However, the only document that the operation of preventive measures is clearly evident is the transparency report of the parent company Meta. Under proactive enforcement report platform shares data about the amount of content removed prior to any notification from rightholders for potential copyright infringement. According to the report, up to %94.4 of the removals for potential copyright infringements were handled by the proactive enforcement of the platform, which resulted in the removal of 8 million pieces of content.¹²⁸³

In addition to that, as a takedown tool, the platform provides an online form which is described as the fastest and easiest way to submit a claim of copyright infringement by the

¹²⁷⁸ ‘Terms of Service’ (Facebook) <<https://www.facebook.com/legal/terms>> accessed 5 September 2022.

¹²⁷⁹ *ibid.*

¹²⁸⁰ *ibid.*; ‘Copyright;’ (Facebook Help Centre)

<https://www.facebook.com/help/1020633957973118?helpref=about_content> accessed 5 September 2022.

¹²⁸¹ ‘Match Rules in Rights Manager’ (Meta Business Help Centre) <<https://en-gb.facebook.com/business/help/156214071866178>> accessed 5 September 2022.

¹²⁸² ‘Copyright;’ (Facebook Help Centre)

<https://www.facebook.com/help/1020633957973118?helpref=about_content> accessed 5 September 2022.;

‘Matches in Rights Manager’ (Meta Business Help Centre) <<https://en-gb.facebook.com/business/help/156214071866178>> accessed 5 September 2022.

¹²⁸³ Meta, ‘Intellectual Property’ (Transparency Center) <<https://transparency.fb.com/data/intellectual-property/proactive-enforcement/facebook>> accessed 5 September 2022.

platform.¹²⁸⁴ Within the help pages, the platform includes warnings regarding the in-platform sanctions and legal consequences of misuse by referencing 512(f) DMCA and reminds the possibility of fair use exception.¹²⁸⁵ Therefore, one can say that Facebook is equipped to comply with Article 17(4)'s filtering, takedown and stay down obligations to prevent and block copyright infringements. However, there is not enough information regarding the operation of proactive measures and no specific hint of compliance with CDSMD.

The search for compliance with the obligation of not preventing the legitimate uploads of users, especially when they are covered by an exception or limitation, results in not-so-promising findings. A hint for exceptions and limitations shows itself in the section that informs users regarding what they can share in the terms and conditions by stating that unless an exception or limitation applies under applicable law, they cannot share anything that infringes intellectual property rights. Another reference to copyright exceptions and limitations can be found within the Help Centre, which lists the possibility of the user's use of a work being covered by an exception to copyright under the considerations before uploading.¹²⁸⁶ This takes the user to the "What are fair use and other exceptions to copyright?" page, which contains the only explicit mention of EU copyright exceptions:

"In the EU, each Member State must ensure that users are able to rely on the following exceptions when making content available: quotation, criticism, review, caricature, parody or pastiche."

However, this section does not go beyond repeating the wording of Article 17(7), as there is no information regarding how users can benefit from these exceptions when uploading to their platform within the terms or help pages. This might inform users that they can use works and other subject matter under exceptions or limitations to copyright and related rights provided for in Union in line with Article 17(9), but Facebook fails to ensure the required respect to copyright exceptions and limitations within the copyright enforcement that they operate in line with Article 17(7).

¹²⁸⁴ 'What Information Do I Need to Include in a Copyright Report to Meta?' (*Facebook Help Centre*) <<https://www.facebook.com/help/231463960277847>> accessed 5 September 2022.

¹²⁸⁵ 'Copyright' (*Facebook Help Centre*)

<https://www.facebook.com/help/1020633957973118?helpref=about_content> accessed 5 September 2022.

¹²⁸⁶ *ibid.*

Regarding compliance with placing in platform complaint and redress mechanisms, the Terms state that users will be notified regarding the removals and can request another review.¹²⁸⁷ However, the possibility of this appeal is heavily limited by various circumstances, including legal, technical, and operational.¹²⁸⁸ While the in-platform appeal is included in the Terms, there is neither sufficient information regarding the system nor any guarantee that ensures users benefit from this mechanism in practice. Therefore, it is unlikely for the mere and minimal opportunity to request review to constitute an effective and expeditious complaint and redress mechanism. Moreover, there is no information regarding whether blocking and removal decisions would be subject to human review. Therefore, this way of appeal misses the mark of Article 17(9).

The last platform, Twitter, which updated its terms and conditions after the deadline for implementation of the CDSM Directive on 19 August 2021, provides different terms of conditions for users located in the European Union, EFTA States, or the United Kingdom or outside of these, including the United States.¹²⁸⁹ Just like previously examined platforms, Twitter excludes itself from the liability, including the liability arising from users' uploads, contrary to the CDSM Directive's clear imposition of primary liability and states that their operators may not monitor or control the content posted.¹²⁹⁰ Under the Content on The Services section, the platform reserves its right to remove Content that violates the User Agreement, including copyright-infringing content. Regarding the potentially copyright-infringing content on the platform, Twitter provides Copyright reporting forms which is a DMCA takedown form. There is no further information regarding the content management of the platform under the Terms of Service; however, Help Centre includes their copyright policy which provides clear information regarding how DMCA takedown process takes place via their platform.¹²⁹¹ There is no sign of the operation of filters to prevent infringing content from going to their platform or mention of any tool that prevents future uploads of infringing

¹²⁸⁷ 'Terms of Service' (Facebook) <<https://www.facebook.com/legal/terms>> accessed 5 September 2022.

¹²⁸⁸ "...unless you seriously or repeatedly violate these Terms or if doing so may expose us or others to legal liability; harm our community of users; compromise or interfere with the integrity or operation of any of our services, systems or Products; where we are restricted due to technical limitations; or where we are prohibited from doing so for legal reasons." See 'Terms of Service' (Facebook) <<https://www.facebook.com/legal/terms>> accessed 5 September 2022.

¹²⁸⁹ 'Twitter Terms of Service' <<https://twitter.com/content/twitter-com/legal/en/tos>> accessed 5 September 2022.

¹²⁹⁰ *ibid.*

¹²⁹¹ 'Twitter's Copyright Policy' (Twitter Help) <<https://help.twitter.com/en/rules-and-policies/copyright-policy>> accessed 5 September 2022.

content in compliance with Article 17(4) from the information that Twitter provides on their pages.

Twitter paints a disappointing picture regarding compliance with Article 17(7). There is no mention of EU copyright exceptions and limitations within their Terms. The statement “*You agree that such Content will not contain material subject to copyright or other proprietary rights, unless you have necessary permission or are otherwise legally entitled to post the material...*” can be accepted as the only hint to the possibility of users benefiting from copyright exceptions. Also, under their Copyright Policy, the platform underlines the fact that “*not all unauthorized uses of copyrighted materials are infringements*” and links this to an article that provides information on fair use. However, just like the Terms and Conditions, there is no mention of copyright exceptions and limitations of the EU. Therefore, Twitter fails to inform their users that they can use works and other subject matter under exceptions or limitations to copyright and related rights provided for in Union law and show no indication of adopting Article 17(7)’s protection of exceptions or limitations to their enforcement of copyright.

Platform’s appeal mechanism strictly follows DMCA counter-notice process. In line with DMCA, rightholders file copyright complaints, and the platform decides on the removal or blocking of the upload according to the complaint.¹²⁹² When this removal or blocking takes place, the user receives a notification regarding the blocking or removal, which includes a full copy of the complaint and instructions on how to appeal via filing a counter-notice.¹²⁹³ The platform defines this notice as a request to reinstate the removed material, which starts a legal process and warns about the outcomes of the misuse.¹²⁹⁴ There is no evidence regarding an in-platform appeal mechanism that would enable users to dispute the platform’s decision; instead, users can appeal the removal decisions by filing counter notices since the platform follows DMCA takedown process. The only mention of user appeals concerns account suspension: users can file a suspension appeal when their account receives multiple copyright complaints and gets suspended under the Repeat Infringer Policy. Thus, the compatibility of

¹²⁹² ‘Twitter’s Copyright Policy’ (*Twitter Help*) <<https://help.twitter.com/en/rules-and-policies/copyright-policy>> accessed 5 September 2022.

¹²⁹³ *ibid.*

¹²⁹⁴ *ibid.*

this system with the required complaint and redress mechanism under Article 17(9) is highly questionable.

2. Conclusion

The analysis of the information available content management practices of these three platforms shows the persistence of these platforms enforcing their self-regulation, which is significantly not in compliance with Article 17 of the CDSM Directive. All three platforms limit their liability regarding their users' acts of communication to the public or making available via their uploads and show no effort to ensure balanced enforcement by prioritising their interests and rightholders' rights at every step. There are references to EU copyright exceptions and limitations within all platforms' terms and conditions, the clear one being Facebook's, yet there is no indication of how users can benefit from these rights and what the platforms would do to protect users' fundamental rights. There is no update regarding how the automated filtering would respect these uses by limiting their blocking only to manifestly infringing uploads; on the contrary, Facebook enables rightholders to set the criteria for automated blocking. Similarly, complaint and redress mechanisms fail to meet Article 17's requirements as, besides YouTube, they mostly follow the DMCA counter-notice process instead of providing effective and expeditious in-platform appeal instruments. The operation of human review is unclear in most of the platforms as there is no clear indication of how the complaints are being processed. Thus, the current picture shows that besides YouTube, there is no procedural updates or new tools introduced within these platforms to comply with Article 17's requirements. The only obligation that most platforms have the means to follow is Article 17(4); however, without adopting the essential procedural safeguards of Article 17, only implementing these filtering systems disturbs the fair balance and results in non-compliance with the Article and Charter.¹²⁹⁵ Therefore, with Article 17 being in force in 16 Member States after a year from the deadline for the implementation, the enforcement of these T&Cs becomes acts of non-compliance.

There are different reasons behind this lack of compliance of OCSSPs with the rules of the CDSM Directive, many of which are underlined within this study. First, the uncertainty regarding the scope of OCSSPs. Many platforms, depending on the unclear definition of

¹²⁹⁵ *Poland v European Parliament*, paras 69, 98-99.

OCSSPs, assume that they are out of the scope of the liability, and even the ones that clearly fall into the scope of large content-sharing platforms aim to benefit from the lack of sanctions within the national implementations for the failure of protecting user rights. Second, most of the platforms do not have YouTube's resources to employ software, hardware and human teams to be able to comply with the obligations of Article 17. Third, even though recent developments such as the *Poland* decision helped clarify the framework, practical solutions for the implementation are still unclear. Especially the deep-scaled practical problems with upload filters which bring challenges with providing Article 17's safeguards in practice, do not look like they are going away anytime soon. Considering the risks of *delegating the review of online legality* to online platforms on freedom of expression of the users, which includes collateral censorship via platforms, the lack of efficient safeguards in practice is alarming.¹²⁹⁶ Therefore, compliance with Article 17 requires these platforms to provide safeguards that limit the interference of Article 17(4)'s measures to all their users, irrespective of the Member State in which they are located.¹²⁹⁷ However, the rules regarding the application of these safeguards have to be specified by the Member States within their implementation and by the Commission with their updated guidance, as this duty cannot be left to private parties, namely rightholders or platforms, entirely.¹²⁹⁸

However, most national implementations fall short of ensuring the practical applicability of the safeguards. While failure to comply with Article 17(4)'s requirements regarding the employment of automated content recognition tools for copyright enforcement results in liability, most of the national implementations do not impose a liability where the cooperation between online content-sharing service providers and rightholders prevents the legitimate content of users going online. For example, even the most celebrated implementation in terms of user rights protection, German implementation, ensures total civil liability, including the duty to pay damages for the failure to comply with Article 17(4)'s requirements¹²⁹⁹ but for the failure to protect user rights it only provides sanctions against the abuse of rightholders or platforms. According to Section 18, a service provider who repeatedly performs over-blocking may be subject to injunctive relief if claimed by a registered user rights

¹²⁹⁶ AG Opinion in *Poland v European Parliament*, para 115; Joint Dissenting Opinion of Judges Sajó and Tsotsoria in *Delfi v Estonia* App no 64569/09 (ECtHR, 16 June 2015), p 2; *Ahmet Yildirim v. Turkey* (n 12), para 47.

¹²⁹⁷ Article 114 Treaty on the Functioning of the European Union; AG Opinion in *Poland v European Parliament*, para 152; *Poland v European Parliament*, para 69.

¹²⁹⁸ AG Opinion in *Poland v European Parliament*, paras 210-212.

¹²⁹⁹ Section 97 of German Copyright Act (*Urheberrechtsgesetz*).

association¹³⁰⁰, and a rightholder who intentionally or negligently requests blocking is obliged to compensate the service provider and the user concerned for the resulting damage.¹³⁰¹ While these would, at their best, provide *ex-post* protections regarding the user rights, there is no liability on the OCSSP who fail to ensure Article 17(7)'s enforcement. As a result, after the implementation came into force, platforms preferred making changes in line with Article 17(4)'s obligations and employed or improved automated content recognition tools without ensuring the applicability of safeguards, especially Article 17(7), as the consequences of failing to ensure the protection of copyright are clearly defined within the national implementations unlike ailing to ensure the protection of user rights.

¹³⁰⁰ Section 18(6) of Act on the Copyright Liability of Online Content Sharing Service Providers (*UrhDaG*).

¹³⁰¹ 18(2) of *UrhDaG*.