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Conflicting interests in European Union copyright law

A socio-legal analysis of what problem representations Article 17 DSMD is grounded in

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Abstract

For many years, critics of the European Union copyright framework have raised concerns about the lack of legal recognition of exceptions and limitations to copyright-protected works and other protected subject matter, and argued that the European Union copyright framework favours the protection of intellectual property over fundamental rights. The debate about this imbalance reached new heights when the European Commission enacted a proposal, which after much controversy passed legislation as the Directive on Copyrights in the Digital Single Market (DSMD). With the goal to foster the development of a fair licensing market between rightholders and online content-sharing service providers, Article 17 DSMD imposes, among other things, a new strict liability and enforcement regime alongside a harmonised recognition of certain exceptions and limitations.

With the purpose to make visible the politics in policymaking, I use the poststructural policy analysis strategy 'What's the Problem Represented to Be?' to study the legislative history of Article 17 DSMD in order to; (a) address how the European Commission has represented the problems in which Article 17 DSMD was argued to be needed, and (b) analyse in which ways Article 17 DSMD could be said to be legitimised through the ways the problems are formulated in the official documents. The results indicate that the ways in which the European Commission has represented the problems in the official documents are very much aligned with what stakeholders within the business of copyright claimed to be problematic in the public consultations that the European Commission issued to gather insights of different stakeholder's perception of the European Union copyright framework. What users perceived as problematic was left ignored in the official documents, which I argue is the reason why the proposal failed to achieve legitimacy. However, Article 17 DSMD provides certain provisions that had been demanded by users in the public consultations, alongside a promise that the European Commission will base their guidance on how Article 17 DSMD should be incorporated in national legislations on the results of stakeholder dialogues in which users will partake. It is on the basis of this give-and-take strategy that Article 17 DSMD could be argued to have achieved legitimacy. However, by applying Habermas's theory of communicative action, I argue that Article 17 DSMD is not based on a mutual understanding and that it is grounded in instrumental rationality, and that it therefore cannot be seen as legitimate.

Keywords: Article 17, Copyright, DSMD, European Commission, Habermas, Legitimacy, Participatory Web, Policy, User Rights, WPR.

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"A code of cyberspace, defining the freedoms and controls of cyberspace, will be built. About that there can be no debate. But by whom, and with what values? That is the only choice we have left to make." – Lawrence Lessig

List of abbreviations

ACR	Automated content recognition
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
DSMD	Directive (EU) 2019/790 of the European Parliament and 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
EC	European Commission
ECD	Directive 2000/31/EC of the European Parliament and 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’)
EU	European Union
ISD	Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society
ISP	Internet service provider
MEP	Member of European Parliament
OCSSP	Online content-sharing service provider
UGC	User generated content

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1. Introduction and research problem

In 2016, the European Commission (EC) proposed the first draft of what is commonly known as the Directive on Copyrights in the Digital Single Market (DSMD)[1]. This directive contained several articles, but draft Article 13 received a particular backlash from European Union (EU) citizens as more than five million people signed a petition for its removal, and thousands gathered in protests across Europe (Spoerri, 2019, p. 174). The objective behind this article was to fill a supposed *value gap*, in which the creative industries for years had promulgated that the out-dated EU regulatory copyright framework made it possible for online content-sharing service providers (OCSSPs) to capitalise on the expense of rightholders having their content disseminated on platforms such as YouTube without being fairly remunerated (Bridy, 2019). In draft Article 13, the EC explicitly called for effective measures such as "the use of effective content recognition technologies" to remove unauthorised content from platforms (European Commission Proposal, 2016, p. 29). Due to public responses that this would jeopardize fundamental rights such the right to freedom of expression, draft Article 13 was revised and later passed as Article 17 DSMD in a final referendum. Article 17 DSMD imposes a new strict liability regime for OCSSPs and also a new enforcement regime, in which above measures are argued to still be implicitly imposed if OCSSPs fails to achieve authorisation (through licensing agreements) (Bridy, 2019).

If roughly put, copyright gives rightholders certain exclusive rights over their works, including, perhaps most famously, the exclusive right to copy the work (Lessig, 2006, p. 171). If this right is put to its extreme, it could function as a tool for censorship, which is the reason why such laws must always be balanced against the wider interests of the public. However, the EU copyright framework has been criticised by academics and human rights organisations to favour the rights of rightholders over those of the general public (Geiger & Izyumenko, 2019), which has been argued to be the result of letting the creative industries dictate the legislative approach (Farrand, 2015). Furthermore, EU copyright law has been argued to not be anchored in social norms (Svensson & Larsson, 2009 and Larsson, 2012) and that this has resulted in political mobilisations against enhanced copyright protections (Fredriksson &

1 Formally the Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directive 96/6/EC and 2001/29/EC.

Arvanitakis, 2015), which forces EU law makers to take citizens interests into consideration when proposing new legislations in the area of copyright law (Farrand, 2015).

Taking into consideration that Article 17 DSMD has been described as one of the most controversial EU legislation in modern times (see for instance Spoerri, 2019, p. 174), and the fact that Members of the European Parliament (MEPs) have never been subject to a similar degree of lobbying before (European Parliament Q&A, 2019), questions arise as to what and whose interests have been taken into consideration when implementing Article 17 DSMD. By directing attention to the legislative history of Article 17 DSMD this thesis seeks to address (a) the discourses used to address the problems in which this article was argued to be needed, and (b) how these problem representations can be said to legitimise the article.

1.1 Aim, purpose and research questions

The aim of this thesis is to study how the EC has constructed the problems in which Article 17 DSMD came to be, using Carol Bacchi's (2009) "What's the Problem Represented to be?" (WPR) approach as an analytical tool, but also to study in which ways Article 17 DSMD can be said to be legitimised through the ways the problems are formulated.

The purpose of this study is thus to challenge the premise that the EC attempts to solve existing problems and instead make the case that the EC has produced a particular kind of problem, which needs a particular kind of solving. The critical task is therefore to interrogate the problem representations in the legislative history of the DSMD, and to make visible the politics involved in the construction of the *problems*. How problems are represented impacts the formation of law, and how the law is formatted has consequences for those who fall under its scope. When supranational institutions seek harmonisation in legal areas where fundamental rights are balanced against one another, and/or in areas where the public interests are large, this inevitably put EU law making and legitimacy into question, which is also a question this thesis aims to address.

The research questions that are used for reaching the aim of this thesis are:

(1) How has the EC represented the problems in which Article 17 DSMD was needed?
(2) In which ways can Article 17 DSMD be said to be legitimised through the problem formulations in the EC official documents?

1.2 Disposition

This thesis includes seven chapters. The first chapter provides an introduction to the research problem and present the objectives of this thesis. The second chapter presents background information about Article 17 DSMD and the legislative process. The third chapter consists of a literature review where problems related to copyright law are described from different perspectives. The fourth chapter presents the theoretical framework that is Habermas's theory of communicative action. Chapter five describes the empirical material and Bacchi's WPR-approach, which has been used for the analysis of the material. The result of the collected data and the analysis of it are presented in chapter six, where relevant findings from the literature review together with the theoretical framework are put in connection with the WPR-approach in the analysis of the findings. The final chapter provides the conclusion and offers recommendations for future research.

2. Background

The EU's first attempt to harmonise copyrights due to the advancement of digital technologies was adopted in 2001 as the Directive 2001/29/EC (commonly referred to as the InfoSoc Directive, but hereafter referred to as ISD). This directive was enacted to implement the WIPO Copyright Treaty to help "ensure a balanced level of protection for works and other subject matter, while allowing the public access to material available via networks" (EU Council Decision, 2000, p. 6). Since its implementation, several issues have been raised on parts of the ISD, which is something that consequently led the European Commission to announce that they would start reviewing this directive in combination with stakeholder discussions. This resulted in a published *Report on the responses to the Public Consultation on the review of the EU copyright rules*. A public consultation, which generated more than 9,500 replies and a total of more than 11,000 messages including questions and comments, from a wide range of stakeholders including users, consumers, rightholders, industries, collective management organisations and governments (European Commission Report, 2014, pp. 3-4).

After being elected to the presidency of the EC in 2014, Jean-Claude Juncker set his campaigning on improving EU's financial status in the digital market in motion by appointing a project team constituting of his colleagues ("the Juncker Commission"), led by Andrus Ansip, with the task of finding the necessary legislative steps to implement a Digital Single Market (European Commission Q&A, 2014). On May 6, 2015, the EC announced, in the Communication *A Digital Single Market Strategy for Europe*, a strategy built on the following three pillars:

> *I. Better access for consumers and businesses to online goods and services across Europe – this requires the rapid removal of key differences between the online and offline worlds to break down barriers to cross-border online activity.*
>
> *II. Creating the right conditions for the digital networks and services to flourish – this requires high-speed, secure and trustworthy infrastructures and content services, supported by the right regulatory conditions for innovation, investment, fair competition and a level playing field.*
>
> *III. Maximising the growth potential of our European Digital Economy – this requires investment in ICT infrastructures and technologies such as Cloud computing and Big Data, and research and innovation to boost industrial competiveness as well as better public services, inclusiveness and skills* (European Commission Communication, 2015a, pp. 3-4).

Seven months later, on December 9, 2015, the EC announced, in Communication *Towards a modern, more European copyright framework* that a new copyright reform was on its way to Europe. The following year, on September 14, 2016, the EC issued the first draft of the proposed Directive, with the much controversial draft Article 13 emphasising the use of preventive measures "such as the use of effective content recognition technologies" (European Commission Proposal, 2016, p. 29). What followed next was a faltering setback for the Juncker Commission to say the least. With draft Article 13 being colloquially referred to as the "upload filter provision", sparking massive protests and more than five million signatures opposing the Directive (Spoerri, 2019, p. 174), academics, civil rights organisations, and early internet pioneers such as Tim Berners-Lee (creator of the world wide web), alarmed that such monitoring measures would be in crosshairs with settled EU case law, infringe on fundamental rights protected in Charter of Fundamental Rights of the European Union (CFR), and fundamentally change the open internet we know today into one of surveillance and filtering (Samuelson, 2019, p. 22 and Tyner, 2019, p. 276).

According to the European Parliament, the DSMD has been the subject of intense campaigning, whereas statistics show that never have MEPs been subject to a similar degree of lobbying before (European Parliament Q&A, 2019). Despite the fact that the lobbying came from two opposing camps (those for and against), it has been argued that the EC has primarily served, or been influenced by, the interests of old media and the entertainment industries (Bridy, 2019). However, the rather harsh language in draft Article 13 has since been revised. After MEPs voted to re-open the Directive for debate on July 5, 2018, the Directive passed in a referendum on September 12, 2018. After trilogue negotiations (behind closed doors) between the EC, the Council of the European Union and the European Parliament, the final language in the DSMD was settled on February 13, 2019. On March 26, 2019, the DSMD passed final referendum in the European Parliament with 348 MEPs voting for and 274 MEPS voting against it. The DSMD entered into force on June 7, 2019, and Member States of the EU have until June 7, 2021, to incorporate the DSMD into their own legislation.

2.1 Article 17 of the Digital Single Market Directive

For the legislators, the functioning of the online content market has gained in complexity. While acknowledging that online content-sharing services providers (OCSSPs) give access to a large amount of online content, enabling cultural diversity and easing access to content, they find it challenging when copyright-protected content is uploaded without authorisation from

rightholders. Legal uncertainty is said to exist as to whether OCSSPs engage in copyright-relevant acts when their users upload content with no authorisation from rightholders, an uncertainty that "affects the ability of rightholders to determine whether, and under which conditions, their works and other subject matter are used, as well as their ability to obtain appropriate remuneration for such use" (Recital 61, DSMD). The goal with Article 17 is therefore to "foster the development of the licensing market between rightholders and [OCSSPs]" (ibid.)

Article 17 DSMD applies only to online content-sharing service providers (OCSSPs). The first sub-paragraph in Article 2(6) DSMD defines an OCSSP 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 large amounts of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes"*

What amounts to "large amounts of copyright-protected works" is not further elaborated on in the Directive, but there is consensus among legal scholars concerned with intellectual property law that this definition is clearly tailored to cover YouTube and similar platforms (Grisse, 2019, p. 888).

The second sub-paragraph in Article 2(6) further provides that:

> *Providers of services, such as not-for-profit online encyclopedias, not-for-profit educational and scientific repositories, open source software-developing and-sharing platforms, providers of electronic communications services as defined in Directive (EU) 2018/1972, online marketplaces, business-to-business cloud services and cloud services that allows users to upload content for their own use, are not 'online content-sharing service providers' within the meaning of this Directive.*

Article 17(1) DSMD is the starting point of the scheme established in the provision and the first sub-paragraph explains that OCSSPs are performing "an act of communication to the public" when they give access to copyright-protected works or other protected subject matter uploaded by its users. Therefore, according to the second sub-paragraph, OCSSPs shall obtain an authorisation from rightholders. This means that OCSSPs are now primarily held liable for their users' uploads. This is new to EU copyright legislation, since, in the context of Article 3 of the ISD, the Court of Justice of the European Union (CJEU) have adopted a view that an act of communication requires that the user (e.g. an OCSSP) plays an essential role (having full knowledge of the consequences of their action) in giving access to protected subject matter (Grisse, 2019, p. 889).

Pursuant to Article 17(2) DSMD, member states shall provide that, where an OCSSP obtains authorisation, for instance by concluding a licensing agreement, the authorisation also covers acts carried out a commercial basis or where by users of the services falling within the scope of article 3 of the ISD when they are not acting on their activity does not generate significant revenues.

When an OCSSP performs an act of communication to the public or an act of making available to the public under the conditions laid down in the DSMD, the limitation of liability established in Article 14(1) Directive 2000/31/EC (ECD) shall not apply to the situations covered by Article 17 DSMD. This follows from Article 17(3) DSMD. The meaning of Article 14(1) ECD is explained in section 3.1.1.

If no authorisation is granted, OCSSPs shall, pursuant to Article 17(4) DSMD, be liable for unauthorised acts of communication to the public, including making available to the public, of copyright-protected works and other subject matter, unless they demonstrate that they have: (a) made best efforts to obtain an authorisation, and (b) made in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the OCSSPs with the relevant and necessary information; and in any event (c) acted expeditiously, upon receiving a sufficient substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b). An OCSSP is thus exempt from liability if it observes the duties of care laid down in this paragraph. As will be explained in greater detail in section 3.2.2, this is the most criticised paragraph in the DSMD since it is interpreted to impose OCSSPs to use filtering technologies.

In determining whether the service provider has complied with its obligations under Article 17(4) DSMD, and in light of the principle of proportionality, Article 17(5) DSMD states that the following elements, among others, shall be taken into account. (a) The type, the audience and the size of the service and the type of works or other subject matter uploaded by the users of the service. (b) The availability of suitable and effective means and their cost for service providers.

According to Article 17(6) DSMD, Member States shall provide that, in respect of new OCSSPs the services of which have been available to the public in the EU for less than three

years and which have an annual turnover below EUR 10 million, calculated in accordance with Commission Recommendation 2003/361/EC (20), the conditions under the liability regime set out in paragraph 4 are limited to compliance with point (a) of paragraph 4 and to acting 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.

Article 17(6) DSMD further states that where the average number of monthly unique visitors of such service providers exceeds 5 million, calculated on the basis of the previous calendar year, they shall also demonstrate that they have made best efforts to prevent further uploads of the notified works and other subject matter for which the rightholders have provided relevant and necessary information.

Article 17(7) DSMD states the following. The cooperation between OCSSPs and rightholders shall not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation. Member States shall ensure that users in each Member State is able to rely on any of the following existing exceptions or limitations when uploading and making available content generated by users on online content-sharing services: (a) quotation, criticism, review; (b) use for the purpose of caricature, parody or pastiche.

Pursuant to Article 17(8), the application of Article 17 DSMD shall not lead to any general monitoring obligation. Member States shall provide that online content-sharing service providers provide rightholders, at their request, with adequate information on the functioning of their practices with regard to the cooperation referred to in Article 17(4) DSMD and, where licensing agreements are concluded between service providers and rightholders, information on the use of content covered by the agreements.

According to Article 17(9), Member States shall provide that OCSSPs put in place an effective and expeditious complaint and redress mechanism that is available to users of their services in the event of disputes over the disabling of access to, or the removal of, works or other subject matter uploaded by them.

Where rightholders request to have access to their specific works or other subject matter disabled or to have those works or other subject matter removed, they shall duly justify the reasons for their requests. Complaints submitted under the mechanism provided for in the first subparagraph shall be processed without undue delay, and decisions to disable access to or remove uploaded content shall be subject to human review. Member States shall also ensure that out-of-court redress mechanisms are available for the settlement of disputes. Such mechanisms shall enable disputes to be settled impartially and shall not deprive the user of the legal protection afforded by national law, without prejudice to the rights of users to have recourse to efficient judicial remedies. In particular, Member States shall ensure that users have access to a court or another relevant judicial authority to assert the use of an exception or limitation to copyright and related rights. This follows from the second subparagraph of Article 17(9) DSMD.

According to the third subparagraph of Article 17(9) DSMD, the Directive shall in no way affect legitimate uses, such as uses under exceptions or limitations provided for in Union law, and shall not lead to any identification of individual users nor to the processing of personal data, except in accordance with Directive 2002/58/EC and Regulation (EU) 2016/679.

The fourth subparagraph of Article 17(9) DSMD states that OCSSPs shall inform their users in their terms and conditions that they can use works and other subject matter under exceptions or limitations to copyright and related rights provided for in Union law.

Article 17(10) states that as of 6 June 2019 the EC, in cooperation with the Member States, shall organise stakeholder dialogues to discuss best practices for cooperation between online content-sharing service providers and rightholders. The Commission shall, in consultation with online content-sharing service providers, rightholders, users' organisations and other relevant stakeholders, and taking into account the results of the stakeholder dialogues, issue guidance on the application of Article 17 DSMD, in particular regarding the cooperation referred to in paragraph 4. When discussing best practices, special account shall be taken, among other things, of the need to balance fundamental rights and of the use of exceptions and limitations. For the purpose of the stakeholder dialogues, users' organisations shall have access to adequate information from online content-sharing service providers on the functioning of their practices with regard to paragraph 4.

3. Literature review

When conducting research in the social sciences, a central part is to map the existing literature on the topic. In relation to this thesis, a literature review was conducted to understand the main themes and arguments on Article 17 DSMD in particular, but also on copyright regulations in general. Likewise important was to investigate the different theoretical and methodological approaches researchers have had on this topic, which was essential in order to identify an existing gap in the literature (Hart, 2018, p. 31), which this thesis will contribute to fill.

Since I am interested in why this copyright reform came into existence, and more importantly, why the EC thought it was important to do so in order to solve a problem, I started this quest for knowledge by searching on literature related to this topic. Using the Lund University library database LUBsearch, which is powered by EBSCOhost, I used the advanced search option and typed in the following search-string to find the literature: "DSMD" or "Copyright Directive" or "Digital Single Market" or "Copyright" AND "European Union" or "EU" or "European Commission" or "European Parliament". The search initially generated 7,578 findings, but when selecting "English" as language, "academic journals" and "peer review" as criteria, as well as research conducted between 2015 and 2020, the search generated 848 hits. At the outset this can be perceived as a quite researched topic, but after sorting out duplicates, articles about data mining, telecommunications, or irrelevant Articles in the DSMD (or irrelevant to the topic in general) this left only 15 articles after abstract screening. Adding "Article 13" or "Article 17" to the search string generated only seven results, setting aside journals that I found relevant in the initial search. Through the reference sections of the relevant journals, it was made possible to further add material related to this topic.

Since I am interested in filling the research gap with a thesis belonging to the field of sociology of law, it was imperative to include studies conducted on copyright within this field, or from a social scientists perspective in general. An issue related to research on intellectual property law, or copyright law in specific, is that such topics are often left for legal academics. Therefore, I had to snowball (most) of my search for relevant literature through the works of Stefan Larsson and Lawrence Lessig, two of very few socio-legal researchers who have spent much of their careers on intellectual property law and copyright.

3.1 A problem in threes

Copyright, which in simple terms gives a copyright holder certain exclusive rights over the work, and the exclusive right to copy the work, is a regulation that has been at constant war with technological advancements (Lessig, 2006, p. 171). From once being a battle over protecting physical materials like CDs or VHS-tapes, rightholders and lawmakers are now struggling with protecting the digitised versions of protected subject matter (Tóth, 2019, p. 364). Under attack now is the participatory web (often referred to as Web 2.0) as websites that fall under this definition allows its users to upload, and therefore partake, in the spread of information on the Internet. In below sections are different perspectives on what has been regarded as problematic for rightholders.

3.1.1 Safe harbour immunity

From a rightholders perspective, the so-called storage *safe harbour* provided by the ECD has been argued to shield Internet service providers (ISPs) such as YouTube from liability for copyright infringements (Lawrence, 2019, p. 517). This safe harbour is found in ECD Article 14 and it states that an ISP will not be held liable for what its users upload if the ISP had neither knowledge nor control over what was uploaded, but also that the ISP must take down infringing materials after receiving notification from a copyright owner (see ECD Article 14 paragraph 1). This is thus a *reactive* copyright enforcement, and it is commonly referred to as the "notice-and-takedown regime" or the "horizontal intermediary liability regime" (Frosio, 2016, p. 656 and Samuelson, 2019, p. 20). Furthermore, ECD Article 14 provides that a rightholder may seek an *injunction*, which is permitted by national law, to require an ISP to either *terminate* or *prevent* an infringement (See ECD Article 14 paragraph 3). This has caused headaches for European courts for many years since *preventing* deviates from the custom use of reactive measures in that it entails an active and on-going monitoring for infringing content, which is prohibited by ECD Article 15 which provides that Member States cannot condition safe harbours for any eligible ISP on a "general monitoring obligation" (Bridy, 2019, p. 107).

For rightholders, who have been trying to advocate for such preventive measures, settled EU case law by CJEU has thus been deemed problematic in that it has refused to adopt this approach. European courts have however had problems reconciling the availability of the preventive measures under ECD Article 14 with the prohibition on general monitoring in

ECD Article 15 (Bridy, 2019, p. 132 and Colangelo & Maggiolinio, 2018, p. 3). This issue, Bridy (2019) argues, was circumvented by the EC, explicitly in Draft Article 13 with its filtering obligations, and implicitly under best efforts requirements in Article 17 that impose a new *staydown* mandate (p. 133). From a rightholders perspective, safe harbours has thus been regarded as a legal loophole, which has made it possible for OCSSPs to escape liability and to capitalise on copyright-protected content (de las Heras, 2019, p. 112).

3.1.2 Conflicts with YouTube

The reason why (most) scholars concerned with intellectual property law interpret Article 17(4)(b) and (c) DSMD and its *best efforts* requirements to impose monitoring is because the use of filtering technologies is already common practice for large OCSSPs like YouTube and Facebook. Even though not obliged under ECD, YouTube developed its own filtering technology *Content ID* in 2007, which is a system that works by creating a unique digital fingerprint of every file uploaded by its users and to match that fingerprint with a database consisting with fingerprints of reference files provided by rightholders (Bridy, 2019, p. 108). This reference library contains over 75 million digital fingerprints, and according to Tóth (2019), YouTube's Content ID offers a nuanced approach to copyright management, since a flagged video (match of fingerprints) provides certain options to rightholders; who can choose to either let it be and enjoy that their content is spread and viewed by the many, block access to it, or claim all advertising revenues in case the video is monetized (pp. 368-369).

What has been regarded as problematic with this technology for rightholders is according to Bridy (2019), that YouTube has been able to use Content ID as a bargaining chip in licensing negotiations with rightholders since YouTube has had no legal duty to monitor for copyright infringements. This, she argues, has sparked conflicts between rightholders and YouTube, whereas rightholders have long argued for full access to YouTube's Content ID and more recently, a legislative change (end safe harbour immunity) that would take this bargaining chip away and thereby raise licensing rates (p. 111). From a technical legal perspective, Tóth (2019) argues, the way YouTube operates today provides an "ex post facto licensing mechanism" that deviates from copyright law's concept of a licensing agreement in that there are no direct agreements between rightholders and users since (a) there is no prior authorisation for users to upload their content, and (b) the collection of revenues takes place after the use rather than prior to the use (p. 369).

3.1.3 The “value gap”

The safe harbour protection that shield OCSSPs like YouTube from liability has been argued to make the existence of a “value gap” possible (see for instance Lawrence, 2019 and Nordemann, 2019), which implies that there is a mismatch between the value that OCSSPs extract from its users uploading copyright-protected content and the revenue returned to the music industry.

The support for such a claim is often found in journals that refer to articles conducted by the International Federation of the Phonographic Industry (IFPI) who has been using the term “value gap” since 2015, promulgating that it poses “the biggest threat to the future sustainability of the music industry” and that “legislative action is needed” (IFPI, 2015, p. 25). IFPI’s main argument is that Spotify, who has a much smaller user base than YouTube pay record companies US $20 per user instead of YouTube’s less than US $1 (ibid). But, de las Heras (2019) argues that there are also other trade organisations that have lobbied for closing the value gap through legislative measures, but with different terminologies (p. 106). Micova, Hempel and Jacques (2018) add to the discussion that YouTube have caused numerous issues for advertising-dependent broadcast television, since it has become much harder for “traditional media” to generate revenues from advertising to fund new original content, since advertisement is now better invested on online platforms (pp. 226-228).

It is however important to mention that the supposed existence of a value gap has been a controversial topic among academics. Bridy (2019) is perhaps the most critical of this supposition in this literature review, arguing that YouTube has been a very lucrative business for rightholders, and that the industries’ lobbying campaigns for legislative changes based on a value gap is nothing but corporate greed. Comparing a closed distribution (and subscription based) platform like Spotify with YouTube that is open to all users at all time, is like comparing apples with oranges according to her. And for ECD safe harbour protection to be put at stake is unfair not only because it is only OCSSPs (like YouTube) that are eligible for its protection (and not Spotify), but also because such protection is essential to the Internet’s interactive architecture since ISPs cannot manage the operating risk inherent in hosting massive quantities of third-party content without them. Bridy’s main argument, is that Article 17 DSMD is a copyright reform that settles a private dispute between YouTube and the music industry, and that not only is it YouTube that will pay, but also those participating in the online culture.

According to Schroff and Street (2018), copyright has for long been understood as key to the viability of the creative industries, which has formed copyright into a kind of *currency* in that it enables rightholders to either capitalise on the revenues from it or on the basis of the exploitation of it (p. 1307).

The most common approach to the existence of a value gap is however that not enough evidence has been brought forth to support this by the legislators (see for instance Colangelo & Maggiolinio 2018 and Spoerri 2019). Even though researchers have pointed to the fact that the EC has tried to gather evidence on a value gap to supporting evidence-based policy-making in the area of copyright, no official documents have provided such data (Spoerri, 2019, p. 176). It has also been argued that it is important to take factors other than economical analyses into consideration so that copyright law also develops in line with social and cultural goals (Mansell, 2015).

3.2 A tug of war between values and fundamental rights

Apart from providing and protecting the exclusive rights of rightholders, copyright law also provides certain rights-to-copy. Inherent in copyright law are two diverging but co-existing theoretical views on how it should function. On the one hand is the *droit d'auteur* approach, with the primary goal of protecting the exclusive rights of rightholders, and on the other is the *utilitarian* approach with the goal to use copyright as a means to promote the advancement of learning and culture by giving certain exclusive rights to authors to stimulate the production and distribution of intellectual works (Tóth, 2019, p. 362). When proposing new copyright regulations, it becomes a matter of balancing the two theoretical approaches, and if one is privileged over the other, it has consequences for society as this dictate how originality, creativity and copying should be understood (Street, Negus & Behr, 2018, pp. 66-67). What approach the EC should take when formatting the DSMD is thus why they have been subject for such intense lobbying (Spilsbury, 2019).

According to Litman (2018) intellectual property scholars have had fierce debates over the formation of intellectual property law, where some advocate for stronger *property* rights and others for stronger user rights. In this literature review however, the majority of the researchers who have scrutinised Article 17 DSMD, raise much concern and are critical as to how the EC has balanced such rights. The previous research belonging to this second theme is

thus constituted by problems associated with balancing different rights when implementing new copyright regulations.

3.2.1 A balancing of rights

When the EC announced in 2015 that a new copyright reform was on its way, a large group of the (jurisprudential) academic community had high expectations that this reform would solve "the problems of imbalances, inflexibility, and the lack of legal certainty" (Geiger & Izyumenko, 2019, p. 14). However, these imbalances do not relate to the imbalances in remuneration paid to rightholders, instead it adheres to arguments that EU copyright law have been favouring the rights of rightholders over the rights of users.

Geiger and Izyumenko (2019) argue that what has been causal to this imbalance is that EU copyright law have left little space for the so-called *exceptions and limitations* in the ISD, which is a legislation that was implemented in the EU to harmonise EU copyright law by providing certain copyright exceptions (rights use copyrighted works without authorisation). According to Geiger and Izyumenko, exclusive rights of rightholders are defined broadly, while such exceptions and limitations have been made narrow, optional, and exhaustive. Their main argument is however that the EC has made things worse in that it has implemented a *fair use* clause in Article 17 DSMD that allows for legitimate uses of copyrighted material (such as criticising, commenting or making a parody) and that this has historically been strongly opposed in the EU because this will not function as in the United States where a common law foundation allows much more flexibility. In the EU, the authors argue, the copyright philosophy's emphasis is on the person who has created the work, and the public interest is secondary (p. 29). Consequently, adhering to this philosophy, critics argue, has made the EC and the MEPs of the EU listen to "business needs" when implementing this new copyright reform (Bridy, 2019, Samuelson, 2019), hence putting an end to the dream of a copyright reform fit for the digital age (Joseph, 2015 and Tyner, 2019).

According to Geiger and Izyumenko (2019) there has been, and still remains, a lack of legal recognition for the so-called "digital remix culture" and an absence of UGC (user generated content) exceptions in the EU copyright legal framework which is problematic not least in the light of the participatory web. In the United States, they argue, settled case law allow amateur users (through the application of the fair use doctrine) to contribute to the cultural development by building on pre-existing copyrighted material of others (pp. 22-23). To avoid

the loss of the participatory web, Senftleben (2019) stress that, it is time to do what EU Member States have for long been refrained from doing, which is to search the underexplored avenues of the EU copyright *acquis* (which is something that ISD Article 5 allows) in order to make full use of the list of exceptions and limitations in the ISD. This is something, which he argues, that cannot be overlooked since privileging UGC can provide breathing space for UGC without a licensing and filtering obligation (Senftleben, 2019, p. 10).

Kalimo, Meyer and Mylly (2018) have, from a jurisprudential perspective, conducted a discourse analysis on the role that the CJEU play in the European value discourse using copyright law as a case study. Acknowledging the vital task for the court to reconcile between the individualist values protected by copyright, and fundamental values such as freedom of expression and the protection of cultural diversity, they argue that the court's discourse of the plurality of values in copyright cases are unnecessarily one-sided and shallow. Even though they argue that there is a clear economical underpinning in certain cases (p. 300), their conclusion is that this one-sidedness is not the result of certain values being systematically trumped by others, but that the CJEU does not communicate their reconciliation efficiently, which if it did, they argue, it would strengthen the legitimacy of the court's decisions (p. 286).

In contrast, Izyumenko (2016) argue that the case law of recent years marks an important shift, as it points to a greater consideration of the interests of all parties to copyright enforcement processes, including those of the internet users. He argues that "the CJEU has even went so far as to mandate the "users' rights" (p. 124) which could be enforced in courts. In this light, the CJEU can be considered more attentive to freedom of expression than was the European Court of Human Rights (ECHR) in its first case on copyright-defensive website blocking. From this perspective, he further argues, it can be said that the CJEU moves towards an understanding of freedom of information as an integral part of the European Union copyright order in full recognition of its underlying rationales (Ibid.).

3.2.2 Legal concerns

At the core of the concerns are the much-criticised paragraphs 17(1) and 17(4) DSMD, which as argued earlier in this thesis, constitute the most dramatic changes to EU copyright law. With this new strict primary liability regime and the exception criteria for OCSSPs to avoid liability (see section 2.1), there is almost full consensus among the researchers in this literature review that this reform is not fit for the digital age. Tyner (2019) argues that even

though the EC has edited the language on filtering technologies (which was explicitly stated in draft Article 13), Article 17 DSMD still relies on the use of such methods. This, he finds problematic for various reasons, but his main argument is that this is not fit for the digital age since "it poses great danger to the concepts of decentralisation, access to information, and freedom of speech - all of which are foundational to the Internet's origin" (Tyner, 2019, p. 277). He is worried that the over-blocking of legitimate use of copyrighted content (false positives) by filtering technologies will result in censorship, drawing for instance on criticism on the shortcomings of YouTube's Content ID which has been argued to block videos that have had copyrighted band posters hanging on the wall, or songs playing in the background. He is also worried that it is only larger platforms that will be able to develop their own filters like YouTube, which consequently will give such platforms more control over the online space (Ibid., p. 285).

Samuelson (2019) has similar concerns while adding that it is unlikely that EU Member States can require developers of filtering technologies to redefine their algorithms so that all parodies, critical comments, and other privileged uses will remain available to the public. She is also sceptical to the licensing approach in Article 17(4) DSMD, claiming that "it is not even remotely possible for OCSSPs to get licenses from every copyright owner of European works available in digital form" (p. 27), while also raising scepticism towards EC's aspiration for a digital single market, claiming that there is no such single market for licensing (Ibid.). This is something that Spoerri (2019, p. 186) claims to be a very expensive price to pay for closing a supposed value gap.

That Article 17(4) DSMD implicitly still requires upload filters is something that Grisse (2019) argue is something that most researchers agree upon, and especially if taking into consideration the required high industry standards of professional diligence and the fact that such filtering technologies are being used. However, since Article 17 DSMD is written in such vague terms, and the fact that different paragraphs could be interpreted differently if read in relation to different recitals (which according to Grisse provides legal uncertainty), she remains hopeful that the stakeholder dialogues promised in Article 17(10) DSMD will produce clearer guidelines on how this should be interpreted (p. 894).

Many (Bridy, 2019: Frosio, 2018: Grisse, 2019: Kalimo, Meyer & Mylly 2018, Romero-Moreno, 2019, Senftleben 2019) have compared this new filtering obligation with CJEU judgement in *Sabam v Netlog* (see CJEU, case C-360/10 *Sabam v Netlog*). In short, the CJEU

ruled in a dispute between the collecting society Sabam and the social network website Netlog, where the former wanted to impose the preventive injunction in EDC article 14 and make Netlog install a filter system (at Netlog's own expense) that would apply indiscriminately to all its users, because Sabam claimed that this website made unauthorised use of copyrighted content. In this case, the CJEU arrived at the conclusion that an implementation of such a filter system would infringe on fundamental rights. First, balancing the fundamental right to intellectual property provided in Article 17(2) of the Charter of Fundamental Rights of the European Union (CFR) with the freedom to conduct a business in Article 16 CFR, the CJEU decided that the implementation of such a filtering system would result in an infringement in Netlog's right to conduct a business since this would require Netlog "to install a complicated, costly, permanent computer system at its own expense" (CJEU, ibid., para. 46-47). Second, the CJEU ruled that such a filtering system would also violate the fundamental right to the protection of personal data (Article 8 CFR) and the users freedom to information (Article 11 CFR) (CJEU, ibid., para. 48-50).

The conclusions that are drawn from this case is that the filter approach in 17(4)(b) DSMD is problematic from the perspective of the fundamental rights and freedoms guaranteed under Articles 8, 11 and 16 CFR (Senftleben, 2019, p. 7). But Senftleben argue that the EC have tried to escape this verdict on general monitoring by establishing an obligation to filter "specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information" in Article 17(4)(b) DSMD. A strategy which, he argues, is very doubtful to succeed since it is unlikely that rightholders will only select specific copyrighted material instead of all (p. 7). Examining the appropriacy of filtering and monitoring measures with this fundamental rights perspective, Frosio (2018) draw not only from this case, but also from other settled EU cases, and comes to the conclusion that this is not only in conflict with the jurisprudence of the CJEU but also with fundamental rights (p. 366).

Grisse (2019) adds to this discussions that Article 17(8) DSMD stipulates that the application of Article 17 DSMD should not lead to a general monitoring obligation, while also noting that Article 17 DSMD is "clearly *lex specialis*, not only regarding Article 14 ECD, but also regarding Article 15 ECD" (p. 896), since OCSSPs are no longer covered by Article 14 ECD according to Article 17(3) DSMD. Her main argument is in this regard however that a general monitoring obligation might be incompatible with EU primary law (here referring to the

CFR), since the *Sabam v Netlog* case indicated that the CJEU found that monitoring obligations would infringe on fundamental rights (ibid.).

The concerns about how this will affect user freedoms have made Quintais et al (2019) offer recommendations to how Member States should implement Article 17 DSMD into their national legislations in a way that would safeguard user freedoms. They stress the need for Member States to focus on achieving the goal of licensing and to do their best to limit the preventive obligations as these will encroach on the freedom of EU citizen's rights to freedom of expression and information in the online environment. If preventive measures however must be taken, they argue that it is vital to interpret this in the context of the rules for exceptions and limitations in Article 17(7) and the procedural safeguards in Article 17(9) DSMD. These are recommendations, which more than 50 European legal academics have endorsed and signed (Quintais et al., 2019, pp. 6-9).

Another concern, which is raised by Marušić (2019), is that EU has derogated parts of its powers to OCSSPs with the new liability and enforcement regime, which is something that she argues will compromise the legal certainty standard established under EU and Member States legal regimes, since the intrinsic problem connected to OCSSP's self-regulating model is legal uncertainty.

In contrast to those who suspect that Article 17 DSMD will jeopardize the participatory web, it is clear that advocates for stronger intellectual property rights do not necessarily have the rights of users in mind when promulgating legislative changes. Lawrence (2019) for instance does neither mention nor partake in discussions about balancing different rights when recommending a worldwide solution for stronger intellectual property rights. Nordemann (2019) does mention exceptions and limitations, but is on the other hand the only researcher in this literature review to argue that the EC has taken those too much into consideration as Article 17 DSMD "no longer contain any effective measures for a notice and stay down regime" (p. 275).

3.3 Copyright and social norms

Speaking on behalf of copyright regulations in the United States, Lessig (2006) points out that dramatic changes came about to this area of law after the content industries started to promulgate for more efficient copyright protection in a response to the advancement of digital

technologies. Referring to the enactment of the Digital Millennium Copyright Act (DMCA) and it's White Papers, legislative changes were introduced as attempts to restore *balance* in intellectual property law by restating and clarifying existing law in terms that everyone could understand. Restatements, he argues, that were tilted towards the direction of increased protection. According to him, the role that code (as in what builds the architecture of cyberspace) plays in the protection of intellectual property was not taken into consideration. His main argument is that *code* functions as law, and that this serves as the primary defence of intellectual property law in cyberspace. With different digital technologies in mind, such as systems that filter or block access to content, he argues that "we are not entering into a time when copyright is more threatened than it is in real space, instead we are entering a time when copyright is more effectively protected than at any time" (Lessig, 2006, p. 175). The question in such an age, he asks (rhetorically), is whether the protection for intellectual property is too great.

With the notion of code as law, Lessig argues that the balance between control and access is not obligatory under code. With reference to culture, he argues that "professionally produced culture is but a tiny part of what makes any culture sing" (p. 193), warning that an increase in code aimed at protecting intellectual property will have a profound impact on user-generated creativity (amateur culture) which the Internet has allowed to spread explosively (Ibid., pp. 193-194). For Lessig, this brings into question what substantial values we want cyberspace and copyright law to be constitutive of. Do we want more freedoms or more control? Should copyright law enable free culture or permission culture? (Ibid., p. 196).

According to Larsson (2014) it is commonplace that new copyright regulations are followed by goals to encourage creativity, but that the perception of creativity in copyright law is rather contradictory to this goal if taking social norms into consideration. He argues that the perception of creativity in copyright law is imbedded in a notion of a *solitary genius* where the author creates original pieces without any contextual/cultural input, inspiration or borrowing (Larsson, 2014, pp. 117-118). His main argument is that this perception is too narrow and too individualistic because creativity is both socially and contextually dependent. Drawing from the socio-legal understanding of norms, he adds that the ways in which people communicate and interact on the Internet challenges copyright law in this regard, since there is a clear normative gap between social and legal norms. By referring to the American intellectual property expert James Boyle, Larsson notes that there is no evidence whether

enhanced copyright protection or the perception of creativity inherent in copyright law actually encourages creativity (Ibid. pp. 119-120). A troubling fact, especially if taking into consideration that the notion of creativity inherent in the social norms does not only fall outside the notion of creativity in copyright law but is also counteracted through increased protection.

Using the development of EU copyright law (before the DSMD) as a case-study to examine the issue of lobbying in the EU legislative process, Farrand (2015) argues that this field of law has up until very recently made possible for industries to "dictate the legislative approach through early agenda-setting, the framing of issues and the provision of expert knowledge" (p. 513), whereas legal academics have been the primary group contesting these agendas. More recently, with the rejection of the Anti-Counterfeiting Trade Agreement (ACTA) in mind, the pitfalls of enhanced copyright protection have become a more salient issue in which citizens of the EU have taken more interest. This new phenomenon of lobbyists against copyright law, Farrand concludes, will push legislators into taking into account the views and preferences of citizens even when this collides with the agendas that are set by the industries (Ibid.).

Although having conducted their research prior the DSMD, Fredriksson and Arvanitakis (2015) argue from a cultural studies perspective that, while copyright organisations and established media companies argue for stricter intellectual property laws, a growing body of citizens challenges the copyright regime, a mobilisation most evident in the formation of pirate parties, who perceive themselves as movements of digital civil rights, defending the public domain and the citizen's right to privacy against copyright expansionism and increased online surveillance. From in-depth interviews with representatives of pirate parties in Europe, Australia and Canada, they found that a key objective for these parties is that they want free access to culture and information while opposing patents and private monopolies. In Europe, pirate parties formed as a response to the implementation of EU copyright directives (p. 137).

With the concept of norms (used as theory) in a sociologist of law perspective, Svensson and Larsson (2009) studied to what extent social norms support the legal norms that regulate file sharing on the Internet. Using survey data from 1,047 Swedish respondents in the ages between 15-25 years, they found not only no support for social norms to hinder illegal file sharing, but also that copyright law (national and supranational) does not correlate with this social norm in any way. Moreover, they found strong indications that an enforcement of

copyright regulations would not change the social norm on illegal file sharing. In their study, 75 % of the respondents did not consider file sharing of copyright protected material as illegal, and almost as many would keep downloading if more stringent copyright regulations were to be enforced, a rather "large gap between the judicial perceptions that copyright is based upon and young people's viewpoint of what is right and wrong" (p. 60).

In later studies, Larsson explored why this gap between social norms and copyright law exists. In his book *Metaphors and Norms* Larsson (2011) bridges the study of norms with the theory of "metaphors" developed by the cognitive scientists George Lakoff and Mark Johnson, as a means to understand why the social and legal norms differ. Studying metaphors, he argues, allows one to depict hidden values and underlying conceptions in the imperative dimensions of (especially) formalised norms (p. 52). By analysing the word "copy", his study reveals that the conceptualisation of "copies" in copyright law adheres to an act of replicating something that is original, valuable, and in need of protection and control, a conception that can also be traced in metaphors such as "property", "trespassing", "piracy" and "theft" (p. 130). One reason why copyright law has a weak representation in social norms, Larsson (2012) argues, is because concepts that were once well-defined in copyright law have failed to encompass the rapid change brought forth by the digitisation of protected subject matter. The definition of a copy, which was once delimited to plastic objects, now extends to new digital phenomena. Sharing or downloading a copyrighted file, is therefore not necessarily perceived as "theft" in a physical sense (p.123).

Larsson (2014) used open-ended answers from a large online survey consisting of 17,244 US respondents and 1,271 French respondents to study how file-sharers conceptualise copyright and copyright infringements in a digital context, and to see whether there were any differences in how the two groups conceptualise such issues. Interestingly, he found that US file-sharers are more prone to speak of the "market", "government" and the "industry", which can be interpreted as being more inclined to conceptualise the issue in a context of a social dilemma that follows from a *utilitarian* tradition, whereas French file-sharers were more prone to speak about the artist and their remuneration, which belongs to the *droit d'auteur* tradition (p. 100).

3.4 Summary and presentation of research gap

In sum, this literature review has highlighted the two sides of the same coin that is copyright. On the one hand, the literature has shown that from a rightholder's perspective, enhanced copyright protection is argued to be imperative for innovation and for artists to be fairly compensated for their content. From this perspective, safe harbour immunity, YouTube and the value gap are perceived as problematic. On the other hand, from what could be argued to be the perspective of users', the rights-to-copy exceptions and limitations, or the balancing between fundamental rights have been perceived as problematic in that the implementation of the DSMD will disturb the balancing between copyrights and rights-to-copy, in that the EC favours the former over the latter, which is something that has been argued to be characteristic for EU copyright law and the droit d'auteur approach. From a social sciences' or sociology of law perspective, this trend seems not to be anchored in societal values or norms, which has been argued to be the reason for the gap between legal and social norms and why people mobilise against increased copyright protection.

The studies that have been conducted on Article 17 DSMD are limited and, as has been argued elsewhere, it has primarily been studied by scholars concerned with intellectual property law, whereas the legal framework has been subject for dogmatic legal analyses. This one-sidedness of perspectives makes the research gap rather immense, but to be fair not much can be said about the effects of the directive since it has not yet been implemented in the Member States or used by the CJEU. However, to my knowledge, no socio-legal studies have been conducted on this topic so far. This invites for examinations of what EU citizens think of this legislation or what values they want copyright law to be reflective of, or on what basis (problems) this reform was founded upon in the first place. This thesis takes into account the latter two.

4. Theoretical framework

With the overall intent to challenge the premise that the EC attempts to solve objectively defined societal issues through legislations for the greater-good, Habermas (1987), argued somewhat 40 years ago in his two-volume magnum opus *The theory of communicative action*, that not only are such societal issues interpreted and implemented in ways that do not correspond to the demands held by the collective, these legislations, when not reflecting collective demands, also have negative consequences for society as a whole.

In this chapter I will discuss the central elements of Jürgen Habermas's theory of communicative action that will serve as the theoretical framework for this thesis. By way of introduction, this is as much a philosophy of modern society as it is a critical theory about the rationalisation of modern society. From an interactionist perspective, and if put simple, it revolves around Habermas's central claim that it is not possible to obtain genuine democracy under conditions characteristic for modern days, since the rationalised modern society does not allow the collective to decide the formation of the society in which they inhabit and are in turn shaped by.

Apart from this theory counting as one of the most significant achievements in social theory, the strength of using this theory is that Habermas ascribed its empirical value to the sociological study of law since it enables the analysis of why certain laws fails to achieve legitimacy and what can happen if such laws are passed (Deflem, 2013, p. 75).

4.1 Communicative rationality

Much like the individualistic notion of a *solitary genius* in copyright law, Habermas found the notion of a *solitary thinker* and its monological approach to knowledge production to be insufficient for universalistic claims. According to Habermas, this Cartesian model of reason and rationality have paved the way for a distorted understanding of rationality that is fixed on cognitive-instrumental aspects (goal fulfilment and sufficiency), which have consequently led to a social science where the (ontological) focus has been on the relationship between subject and object. For Habermas, this perception of rationality has made critical theory, and the sociological study of modern society, come to a dead-end in that it allows only for a teleological understanding of action. On the basis of Habermas's earlier works on the development of the modern society and the transformation of the public sphere, it was vital

for him to break with this version of rationality since it legitimises the rationalisation of modern society, which, as explained above, was central to his diagnosis (Habermas, 1984, p. vi).

Setting the paradigm of consciousness aside, Habermas shifted attention towards a paradigm of language, or rather, communicative actions while introducing his concept of communicative rationality. With this new concept, rationality is no longer tied to a *thinker's* interpretation of the world and how best to manipulate it, instead it is tied to mutual understanding (the telos) in speech-acts among interacting subjects (Ibid. pp. 10-12).

4.1.1 The theory of communicative action

In contrast to instrumental and strategic action, which are oriented towards efficiency and goal fulfilment, and where language is used as only one of several *media* by the speaker so that he or she can manipulate his or her audience to serve his or her own interests, communicative action is achieved when subjects adopt a practical stance oriented towards mutual understanding. In the quest for the latter, language is *the* medium in which subjects interact (through speech-acts) in order to *negotiate* a common understanding of whatever phenomena (Ibid. p. 95).

Furthermore, according to Habermas, speech-acts (e.g. the EC's presentation of a problem) imply validity claims[2] on three levels: (i) theoretical claims to truth, (ii) normative rightness, and (iii) subjective truthfulness (Habermas, 1984, p. 23). In order to achieve communicative rationality, or for speech-acts to even take on the formation of communicative action, the above implied claims must be open to both criticism and justification since mutual understanding cannot be achieved until the hearer takes up an affirmative position towards the claims made by the speaker (Ibid. pp. 8-23). If what the speaker asserts fails to receive uptake, he or she should together with the hearer engage in argumentations and dialogues (an order of communication which Habermas referred to as *discourse*) to test the rational justifiability on the basis of the statement's truthfulness, correctness and authenticity (Ibid.).

[2] Important to note here is that *validity claims* should be understood as a translation of the German term *Geltungsanspruch*, which connotes to a richer social idea of truth than that of *empirical truths*. This allows, for instance, constative speech-acts about morality to be considered true, correct and authentic.

In relation to the EC's representation of a problem, the above would suggest that such a claim should be open to criticism and justification on the one hand, and for dialogues and discussions to take place if what is claimed fails to receive uptake on the other. This element of the theory will thus be applied to the analysis of how the EC sought legitimacy in this regard.

4.1.2 System and lifeworld

In order to develop a critical theory that could constitute the bridge between theory and praxis to achieve genuine democracy, Habermas found it necessary to develop a two-level perspective of society that could draw from both the action-theoretical paradigm and system-theoretical paradigm (Habermas, 1984, p. vi). The concept of lifeworld refers to a set of resources that lie along the dimensions of culture, society and personality and which function, respectively, for cultural reproduction, social integration and personality development. It is upon these resources actors draw when they engage in communicative action to transmit and renew knowledge (Habermas, 1987, pp. 119-120 & 140: Baxter, 2014, p. 227). According to Habermas, a negative effect of the rationalisation of modern society is that this brings about internal differentiation in the above set of resources, meaning for instance that the ways in which we reproduce knowledge (e.g. uploading content on platforms) becomes distorted. This is due to certain domains of lifeworld becoming *colonised* by systems that impose non-communicative media of interaction, consequently leading these domains to *uncouple* from lifeworld (Habermas, 1987, p. 196).

In contrast to the lifeworld, it is not communicative rationality but cognitive-instrumental rationality that is inherent in the system(s). In modern societies, it is mainly the economic system and political system that, respectively, impose the "steering media" of money and power that provides *rewards* or *punishes* instead of language as a medium to reach mutual understanding (Ibid.).

4.2 Habermas's sociology of law

Habermas's concept of law refers to an institutionalisation of norms, which means that law is intimately connected with morality (product of lifeworld) in that it needs moral justification to achieve legitimacy (Habermas, 1987, pp. 172-173). This, as Deflem (2013) notes, "opens up

the way for an important philosophical component to determine the rational foundation of just law" (p. 81).

With the concept of *juridification* (Verrechtlichung), which refers to the increase in formal law that can be observed in modern societies, Habermas argues on the basis of a detailed historical investigation of the development of law, that there has been four epochal juridification processes in the historical development of the democratic welfare state. What is characteristic for these juridification processes is that they have been driven by individuals demanding more rights but that the way in which they have been legally responded to are framed in terms that accommodate the economic and administrative systems (Habermas, 1987, pp. 358-361). With the concept of juridification, Habermas is thus able to demonstrate that laws can be interpreted in terms of institutionalising the norms or values in the lifeworld, but that processes of law making define and implement these norms in terms of the media of money and power (Ibid, p. 364).

It is important to mention that in his two-volume theory of communicative action, Habermas had a dual concept of law, which he later changed since he was criticised for not being able to maintain the distinction between the two. This thesis will in this regard take into consideration his latter conceptualisation where he viewed law entirely as an institution of the lifeworld, which can thus be colonised by the economic and political system in such a way that laws are redefined and implemented on the basis of standards of instrumental efficiency (Deflem, 2013, p. 85). In his later work *Between Facts and Norms*, Habermas paid much interest to the connection between law and politics in regard to the relationship between law and morality and posited that legislations require compromise and bargaining, equating legitimacy to "a reasonable consensus" in light of not just moral concerns but also collective goals, "problems of value" and "the balancing of interests" (Baxter, 2014, p. 231: Habermas, 1996, pp. 151-155).

5. Methodology

In this chapter I present an overview of the empirical material, how it has been gathered, and the strategy that has been used to analyse it. My reflections on the methodological approach, and ethical considerations are also discussed in sections below.

5.1 Empirical material and sampling strategy

The empirical material for this thesis constitute of the official documents that were provided by the EC between 2014 and 2019, and which together constitute the legislative history of the DSMD. The empirical material consists of two public consultation reports, one Working Staff Document (impact assessment), four Communications, and the DSMD.

The specific consultation reports are: the *Report on the responses to the Public Consultation on the Review of the EU Copyright Rules* from 2014, and the *Synopsis Report on the Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries and the Collaborative Economy* from 2016. These reports can be described as the starting points of debates for policy measures, since they have summarised the different views on issues related to EU copyright law that are held by different groups of stakeholders.

The Working Staff Document *Impact Assessment on the modernisation of EU copyright rules* from 2016 can be described as examining the need for EU action and what possible impacts the available solutions might have.

The four specific Communications are *A Digital Single Market Strategy for Europe* from 2015; *Towards a modern, more European Copyright Framework* from 2015; *Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market* from 2016; and the *Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market* from 2016. Without going into detail on what each of these Communications provide, together they constitute so-called *White Papers*, wherein the EC has either communicated the approach in which they will address the issues related to copyright or a decided Commission policy.

The DSMD is thus the final product, where different recitals, articles and paragraphs can be found.

When it comes to the sampling of these official documents, there was no function to select the legislative history of the DSMD as can be the case for other EU Directives on the EC website. Instead, the specific documents were chosen on the basis of being "related" to the DSMD, and further delimited for being provided by the EC. This sampling strategy can result in some official documents being excluded from the complete legislative history of the DSMD, but in order to make sure that no important documents were missing I have included those mentioned within the official documents (in references) and also those discussed in the previous literature.

5.2 Delimitations

The material included in the analysis of this study encompasses only official documents provided by the EC between 2014 and 2019. This means that the interests of stakeholders that are not provided in these documents are not included in this thesis. In regard to different responses to problems related to EU copyright law in the reports discussed in section 5.1, the selection of stakeholders has been delimited to groups of rightholders and users, meaning for instance that what Member States perceive as problematic is excluded. The DSMD is part of a digital single market strategy, which addresses multiple problems that the EC argue needs solving, whereas the DSMD addresses multiple problems related to copyright. Some of these are interrelated with one another, but for obvious reasons, the representations of problems that have been selected are those directly related to Article 17 DSMD.

5.3 The WPR approach

The analytical strategy that will guide the analysis of the official documents presented in section 5.1 in order to answer my research questions, is the "What's the Problem Represented to be" (WPR) approach to policy studies developed by Carol Bacchi (2009). This is a poststructural strategy that is much intertwined with Foucauldian theories, and it offers a new perspective to the study of policies. It is described by Bacchi and Goodwin (2016) to be used as a tool to make the politics visible in policies, since it offers guidance to the scrutinising of governmental problematisations of certain phenomena. The WPR approach "puts in question the common view that the role of governments is to solve problems that sit outside them" and instead suggests that governments produce *problems* as particular kinds of problems, a *productive* activity that needs critical attention (Bacchi & Goodwin, 2016, p. 13-14). The purpose of using the WPR approach is therefore to challenge the premise that governments

(the EC in this case) simply address and solve problems that needs fixing when creating new policies, by instead making the case that policies do not address existing problems, rather governments produce problems as particular sorts of problems.

With the WPR approach comes a set of seven questions (steps) to help guide the researcher with the endeavour to critically analyse the problematisations within policies. The set of questions can be seen in table 1 below.

Table 1. The set of questions in the WPR approach.

What's the Problem Represented to be? (WPR) approach to policy analysis
Question 1: What's the problem (e.g., of "gender inequality", "drug use/abuse", "economic development", "global warming", "childhood obesity", "irregular migration", etc.) represented to be in a specific policy or policies? **Question 2:** What deep-seated presuppositions or assumptions underlie this representation of the "problem" (*problem representation*)? **Question 3:** How has this representation of the "problem" come about? **Question 4:** What is left unproblematic in this problem representation? Where are the silences? Can the "problem" be conceptualized differently? **Question 5:** What effects (discursive, subjectification, lived) are produced by this representation of the "problem"? **Question 6:** How and where has this representation of the "problem" been produced, disseminated and defended? How has it been and/or how can it be disrupted and replaced? **Step 7:** Apply this list of questions to your own problem representations.

Source: (Bacchi & Goodwin, 2016, p. 20).

The first step of the WPR approach, involves identifying the problem(s) that is/are represented in a policy. Strategically, this implies for the researcher to *work backwards* in the legislative history of a policy to identify what has been represented as a problem and what the goal of the proposed policy is. The second step involves the clarification of deep-seated presuppositions or assumptions that are inherent in the representation of the problem. This is an endeavour, which implies three different goals, the first of which is to identify the meanings (e.g. presuppositions/assumptions) within the policy documents that need to be in place for the problem representations to be intelligible. The second goal is to identify how the problem representation is constructed through key concepts and binaries. The third, and final goal, is to identify and reflect upon possible patterns in the problematisation that might "signal the operation of a particular political or governmental rationality" (Ibid., p. 21).

The third step is to examine how the problem representation has come to be through a Foucauldian *genealogical* approach. This step will however not be used in this thesis since it states that the researcher should provide a "detailed mapping of practices that produced identified problem representations" (Ibid., p. 22). This is an analytical endeavour that, simplified, calls for the researcher to "go back in time" to trace the "history" of the problem representation (Bacchi, 2009, p. 10).

The fourth step involves making visible the invisible in the problem representation. The point of doing this is to destabilise the problem representations in a policy document by drawing attention to what is left unproblematised and silenced, and to think of other ways in which the "problem" could be represented (Bacchi & Goodwin, 2016, p. 22). This allows for the critical potential of the WPR approach, since it enables a shift in focus towards tensions and contradictions within problem representations (Bacchi, 2009, pp. 12-13).

Step five involves the identification of certain effects from the identified problem representations. These effects do not adhere to the "measureable outcomes" of a policy but instead three specific kinds of interrelated effects: *discursive effects*, *subjectification effects*, and *lived effects*. In this thesis, only the first two will be used since the latter calls for an investigation of how the problem representations are "played out" in people's lives, which is an endeavour that falls outside the scope of this thesis. Discursive effects, however, refer to limitations that the framing of a problem can have on the understanding of the problem, and the goal is therefore to make these silencing discursive effects visible. Subjectification effects refers to how discourses in policies can put groups of people in opposition to each other when indicating that one is responsible for the problem (Ibid., pp. 15-17).

The sixth step involves highlighting how and where the problem representation has been produced, disseminated and defended. This endeavour directs attention to practices and processes that allow certain problem representations to dominate (Ibid., p. 19). The final step encourages the researcher to apply the above six steps to one's own problem representation. This endeavour calls for a Bourdieusian *reflexivity* (self-analysis) to expose the conceptual logics that are inherent in the researcher's understanding of the problem (Ibid.). My own reflections are presented in section 5.5 below instead of chapter 6.

As mentioned at the beginning of this section, Bacchi's WPR model is much intertwined with the works of Foucault, and it invokes his theoretical concepts of *governmentality, power, knowledge* and *genealogy*, which require a short elaboration. With Bacchi's model adhering to the French poststructural tradition, it shares Foucault's nominalist understanding of *power* as a name that is simply attributed to a complex strategical situation that can take many forms. However, like Foucault, the WPR approach is concerned with the power that is exercised by contemporary governments: a form of power that can be analysed through the established systems for regulating the conduct of conduct (Bacchi & Goodwin, 2016, pp. 28-29). This form of power adheres to Foucault's concept of *governmentality*, which, if much simplified, relates to the techniques and rationalities that contemporary governments use for regulating the conduct of the population. Rationalities relate to different forms of *knowledge* that is intertwined with power, and from a poststructural perspective understood as *contingent* historical creations (human constructs) (Ibid., p. 42). For Foucault, the intimate relationship between power and knowledge can be found in discourse, where knowledge is "governed" by power in that it sets limits on what is possible to think, write or speak about certain phenomena (Ibid., p. 35). This suggests that people internalise what is being imposed on them, which is something that can be found in Bacchi's key propositions that "we are governed through problematisations" (Bacchi, 2009, p. 25). This is why Bacchi (and Foucault) finds it important to trace the origins of the discourse and to study what effects it has on the population (Bacchi & Goodwin, 2016, p. 31), but also why the WPR model puts emphasis on *what* people say, and not what *people* say.

Rationalities justify particular modes of rule and the techniques government use for exercising their power (e.g. problem representations in policy documents). Important to note is that this exercise of power brings into play a wide range of professional and expert knowledge who may only be loosely associated with the state apparatus, but still have a significant role in how the population is governed (Ibid., p. 42). With power being seen as both *productive* and *relational*, the tracing of power calls for a *genealogical* approach, which, as described earlier in this section, relates to the historical mapping of how a phenomenon (e.g. problem representation) has come about. This is key for Foucault because it reveals "the battles that take place over knowledge" (Ibid., p. 46).

5.4 Methodological reflections

The aim and research questions of this thesis call for a qualitative research approach, which is a methodological approach that comes with certain strengths and weaknesses. Qualitative research is often criticised for being too subjective in comparison to quantitative studies, which is something that put into question both the validity and reliability of the research (Bryman, 2015, p. 368). In defence for the validity of this thesis (and my own ingenuity), the WPR approach offers a rather systematic approach to the analysis of how a problem is constructed. In addition, the theoretical definition of a *problem* is inherent in each of the steps that are applied in the analysis, which makes the theoretical and operational definition correlate.

However, in regard to the reliability and replicability of this study, this brings into consideration the final step in the WPR approach that call for reflexivity. There is no escaping the fact that my own conceptual logic of what is problematic with EU copyright law is influenced by my educational background and political beliefs. This means that I might perceive this differently compared to someone who is legally trained in intellectual property law or someone who identify as a rightholder rather than a user. With this in mind, emphasis has been put on being as transparent as possible both when explaining the analytical inquiry and when presenting the results. Despite the fact that a similar study would not be based on my own subjective conceptual logic, a replication of this analysis should provide similar results if following each step explained in sections above.

When it comes to the choice of empirical material and analytical strategy to provide empirical data to answer my research questions, the main strength of using a WPR approach is that it is specifically designed for studying how problems are represented in policy documents. However, the reason for choosing Habermas's theory of communicative action over Foucauldian theories, which is the more intuitive choice when conducting a WPR policy analysis, require some elaboration. In my opinion, the WPR model makes good use as a "tool" for providing necessary information about how the EC has represented the problems in which Article 17 DSMD was needed, but not so much for the analysis of legitimacy (if understood as rooted in human perceptions). Since this thesis is both delimited from any historical investigation of the problem representation(s), and from inquiring empirical data from documents other than those provided by the EC, this would deviate from Foucault's emphasis on locating the diffusion of power. In this regard, manoeuvring to Habermas's

theory in the analysis where the WPR calls for a genealogical approach makes it possible to arrive at conclusions that are situated in the present through a theoretical framework that is complementary to the results gathered from a delimited WPR analysis.

On a philosophical level, I situate myself on Habermas's side in the Foucault-Habermas debate on who provided a better critique on the nature of power in modern society. I am critical to Foucault's decentring of the subject in his historical investigations of the diffusion of power, and his relativistic stance towards *meaning* in discourse. Using Habermas's theory enables an analysis that takes into consideration the communicative capacity of subjects and is, in my opinion, therefore better suited for answering my research questions.

5.5 Ethical considerations

The empirical material, and thus all the data that is gathered, consists (exclusively) of official documents that are provided to the public by the EC website, meaning that this study runs no risk of harming the confidentiality of any participant or respondent since all data is available to the public. Instead, focus has been put on a high-level of transparency, to show that the conclusions that are drawn rest on validity and reliability.

6. Results and analysis

In this chapter, I present the empirical findings of what the problem is represented to be in the official documents. Bacchi's WPR-approach, previous literature and the theoretical framework are applied in the analysis of the results. Below sections are structured in accordance with the different steps in the WPR approach.

6.1 The problem(s) presented in the EU official documents

When it comes to what has been represented as problematic and why legislative action is needed, recital 61 DSMD summarises this rather well when providing that the goal of Article 17 DSMD is to *foster* the development of a *fair* licensing market between rightholders and OCSSPs, and that rightholders should receive "*appropriate* remuneration for the use of their works or other subject-matter" (my italics). This goal signalises some of the main problems that have been emphasised throughout the legislative history of the DSMD, which are; (i) that the licensing market is not fair, (ii) that rightholders are not appropriately remunerated for the distribution of their content on certain platforms, and (iii) that (what was then) the current regulatory framework is not fit for purpose in a digital age, which is why *fostering* (a new copyright reform) is needed.

The above problematisations were first described in the EC's Communication *A Digital Single Market Strategy for Europe*. In this document, and under the headline "A fit for purpose regulatory environment for platforms and intermediaries", the role of *certain* platforms (OCSSPs) is problematised. Here, it is argued that the market power of some online platforms make it possible for them to "control access to online content" and "exercise significant influence over how various players in the market are remunerated" (European Commission Communication, 2015a, p. 11). Since Article 17 DSMD is applicable only to OCSSPs that "store and give the public access to large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes" (Article 2(6) DSMD), it is evident that the role of platforms that fall under this definition have been represented as a problem. Furthermore, it is stated in the above Communication that "recent events have added to the public debate whether to enhance the overall level of protection from illegal material on the Internet" (European Commission Communication, 2015a, p. 12). In this regard, the storage safe harbour and the notice-and-takedown regime (see section 3.1.1) is represented as a problem in that this has "underpinned

the development of the Internet in Europe" and that "the disabling of access to and the removal of illegal content by [OCSSPs] can be slow and complicated…" (Ibid.). The EC further provides that "52.7 % of stakeholders say that action against illegal content is often ineffective and lacks transparency" and that differences in national practices "impede enforcements" and "undermine confidence in the online world" (Ibid.).

In the proceeding Communication *Towards a modern, more European copyright framework*, the EC further argues that there is a "growing concern about whether the current EU copyright rules make sure that the value generated by some of the new forms of online content distribution is fairly shared, especially where rightholders cannot set licensing terms and negotiate on a fair basis with potential users" (European Commission Communication, 2015b, p. 9).

In regard to the dissemination of unauthorised content, the EC argue that such "infringements are currently very frequent and harmful, not only to rightholders but also the EU economy as a whole" and that "the current legal framework seems not to be fully fit for the challenges" (Ibid, p. 11). From a copyright perspective, the EC argue, "an important aspect is the definition of the rights of communication to the public and making available" as "these rights govern the use of copyright-protected content in digital transmissions" and that "their definition therefore determines what constitutes an act on the internet over which creators and the creative industries can claim rights and can negotiate licenses and remuneration" (Ibid., p. 9).

In an impact assessment by the EC, under the headline "what is the problem and why is it a problem?" it is stated that: "rightholders have no or limited control over the use and the remuneration for the use of their content by services storing or giving access to large amounts of protected content uploaded by their users" (European Commission Impact Assessment, 2016, p. 137). Due to the market power of some OCSSPs, the EC argues that "rightholders are not necessarily able to enter into agreements with them for the use of their content." which is something that "affects rightholders' possibility to determine whether, and under which conditions, their content is made available on the services and to get an appropriate remuneration for it" (Ibid., p. 138).

The above is signalling that (what was then) the current enforcement and liability regimes are considered problematic, especially in relation to the role (market power) of certain platforms,

as this has been causal to the *unfair* state of affairs. This problem representation is also evident in the explanatory memorandum in the Proposal Directive, where it is stated that "rightholders face difficulties when seeking to license their rights and be remunerated for the online distribution of their works" and that it is "therefore necessary to guarantee that authors and rightholders receive a fair share of the value that is generated by the use of their works and other subject-matter" (European Commission Proposal, 2016, p. 3). Draft Article 13 became the preferred solution to combat the above problem representations, and in the opening paragraph of this Article it is stated that OCSSPs, in cooperation with rightholders, should "take measures to ensure the functioning of agreements concluded with rightholders for the use of their works" or otherwise to "prevent the availability on their services of work" through measures "such as the use of effective content recognition technologies" (Ibid., p. 29). As have been argued earlier in this thesis, this however coincided in Article 17 DSMD due to public responses.

To summarise and to put this into context with previous research and the theoretical framework, the EC has thus argued that the current legal framework has allowed platforms to communicate to the public or make available unauthorised content to a degree that it has been harmful to both rightholders and for the EU economy, while OCSSPs have been able to capitalise on this and escape liability. Consequently, this has, according to the EC, made possible for *certain* platforms to control the licensing market and for rightholders to not be fairly remunerated. It is, like Bridy (2019) argued, obvious that the EC is referring to YouTube and similar platforms. If her claim that YouTube has been a lucrative business for rightholders is taken into consideration, or the fact that the EC has not provided any evidence on rightholders being unfairly remunerated by OCSSPs (Colangelo & Maggiolinio 2018), it is questionable whether the dissemination of unauthorised content has been as harmful for rightholders and the EU economy as the EC claim.

Without jumping ahead to the analysis of the steps presented in sections below, these problem representations, as will become clear, are not based on speech-acts aimed at a mutual understanding of what is considered problematic with the EU copyright law. Instead, arguments like "not fit for purpose" or "not fit for challenges" indicate what Habermas referred to as instrumental rationality, since such arguments are instead rooted in efficiency and goal fulfilments, as in making EU copyright law fit for purpose (efficient) and the goal to foster the development of a fair licensing market between OCSSPs and rightholders.

6.2 The EC's construction of the problems

When it comes to the presuppositions (or assumptions) that need to be in place for the problem representations to be intelligible, it is clear that the conceptual logic of copyright that is present in the official document is deeply rooted in the droit d'auteur tradition. Throughout the legislative history of Article 17 DSMD are claims that rightholders can neither control the use of their works on platforms nor how they are remunerated. This is accompanied with the assumption that copyright law serves as an integral incentive for creativity and that this right needs to be protected in order to secure the future generation of content.

For instance, in the Communication *A Digital Single Market Strategy for Europe*, the EC argues that "copyright underpins creativity and the cultural industry in Europe" and that "the EU strongly relies on creativity to compete globally" (European Commission Communication, 2015a, p. 6). When arguing for a more effective and balanced enforcement system against copyright infringements, the EC states that this "is central to investment in innovation and job creation" whereas "measures to safeguard fair remuneration of creators also need to be considered in order to encourage the future generation of content" (Ibid., p. 7). As has been mentioned earlier in this thesis, the droit d'auteur approach in copyright law is characteristic for EU copyright law, and it is an approach that puts emphasis on the creator's right to decide how his or her creative works are to be used (Larsson, 2011). The individualistic notion that is inherent in this approach's perception of creativity makes the discourse on "a more effective enforcement system", "fair remuneration" and "innovation" intelligible. But as Larsson (2014) points out, it is a perception of creativity that is neither anchored in social norms nor confirmed by any evidence to encourage innovation (pp. 119-120). Instead, it refers explicitly to professional culture since taking into consideration amateur culture (e.g. remix culture) would not be intelligible in how they represent the problems.

What is also interesting is that the conceptual logic that is inherent in the discourse concerning the "market" or "industry" in the official documents adheres to the utilitarian tradition, which according to Larsson (2011) has historically been more connected to copyright law in the United States. As mentioned in the section above, it is written in Communication *Towards a modern, more European copyright framework*, that copyright infringements are not only harmful to rightholders but also to "the EU economy as a whole" (European Commission Communication, 2015b, p. 11). The presupposition or assumption in this regard is thus that

the problems that are related to infringements are emphasised as *social issues* in that it fragmentises and erodes the EU economy. This is evident in how such issues are interpreted in the impact assessments, where it is stated:

> *"Only the most significant and likely impacts are reported in this IA [impact assessment]. The impacts are assessed by group of stakeholders (e.g. online services, rightholders, consumers), focusing mainly on economic impacts, for example in terms of exploitation of content, revenues, business models, competitive situations, compliance costs."* (European Commission Impact Assessment, 2016a, p. 136).

Focusing mainly on economic impacts can further be understood as that the conceptual logic of copyright that is embedded in the discourses belonging to a more utilitarian tradition puts emphasis on social issues that are related to the EU market and economy. Further statements such as that the economic impacts "are mostly assessed from a qualitative point of view, considering how the different policy options would affect the negotiations between those creating or investing in the creation of content and those distributing such content online" (Ibid.), show that the presuppositions of copyright law and how it should function cannot include other types of impacts, such as how it would affect the participatory web, since this would not be intelligible. This is not only evident when referring to this group of stakeholders (users) as "consumers", but also because the much controversial draft Article 13 in the proposal was the result of this impact assessment as the preferred solution.

This special interest in economic impacts and the perceiving of them as the most significant when analysing potential impacts (let alone through qualitative measures with stakeholders that have obvious economical interests) can arguably be perceived as the EC only being interested in validating "its" own presuppositions. This indicates that the EC takes a stand in a political matter, which, as Mansell (2015) points out, should be assessed in a manner so that the EU copyright framework develops in line with other social and cultural goals. Not allowing such assessments to take place can therefore be seen as the EC not being interested in having its claims tested on the basis of their rational justifiability as true, correct or authentic (Habermas's notion of discourse). Recalling Svensson and Larsson's (2009) and Larsson's (2014) studies on the gap between legal and social norms, it is highly doubtful that Internet users would perceive the economic impacts as the most significant.

Within the EC's construction of the problems are also certain key concepts and binaries that need to be addressed. *Harmonisation* is such a concept, and it is used by the EC when presenting the digital single market strategy and when arguing for the need of supra-national interventions. Harmonisation in this sense refers to the process of creating a common standard of copyright law in the EU. The national and supranational levels of copyright law have furthermore been used as binaries when constructing the problem, whereas a harmonised regulatory framework for all Member States has been privileged over the other. In recital 2 DSMD, it is stated that the DSMD (with its different Articles) provides a "harmonised legal framework" which "contributes to the functioning of the internal market, and stimulates innovation, creativity, investment and production of new content, also in the digital environment, in order to avoid the fragmentation of the internal market". Again, it becomes obvious that the lawmakers are only concerned with professional culture, and that they continue the evidence-free development of reforming copyright law in hope that it will stimulate creativity and innovation and benefit the economy.

Another key concept is that of updating or making EU copyright law "fit for purpose" in a digital age. This allows for binaries such as future and current (or simply old and new) to be part of the problem presentation. In regard to (what was then) the current state of affairs (the legislative copyright framework) this was represented as part of the problem, whereas the future (as presented in the digital single market strategy) or the *new* as in the recitals of the DSMD is privileged over the other since it was their solution. Authorised and unauthorised uses of copyright protected material is another pair of binaries where the former is clearly prioritised over the latter by the EC.

Basing the problem representations on these conceptual logics, concepts and binaries thus make arguments for stronger copyright protection intelligible. For rightholders, such problem representations indicate that the EC take their *problems* seriously, whereas measures to install solutions that would benefit the EU economy further provide legitimacy for not only the EC but also the EU apparatus (which is as much an economical as it is a political union). However, as Street, Negus and Behr (2018) noted, what approach the legislators' privilege dictate how we conceptualise creativity, originality and copying (pp. 66-67). The EC has been clear in providing that it perceives enhanced copyright protection as an incentive for creativity and the future generation of content, which is a perception of creativity that is grounded in a notion of a *solitary genius* that, as discussed above, is neither proven to encourage creativity nor consistent with the views of the wider society (Larsson, 2014, pp. 118-119).

Problems do indeed pursue as Habermas (1987) notes when economical and political system imperatives intrude upon lifeworld to impose conduct instrumentally aimed at success. The rational foundation inherent in Article 17 DSMD is to coordinate both the conduct of users and OCSSPs through legislative measures in instrumental terms. The new liability regime (Article 17(1) DSMD) and the new enforcement regime (Article 17(4) DSMD), can in Habermasian terms be understood as imposing strategic action, because it is (primarily) through these provisions that the EC manipulate the behaviour of users and OCSSPs. In regard to the above discussion, this means that the ways in which people reproduce cultural knowledge on platforms (through the uploading of content) is intruded upon since Article 17 DSMD does not take this kind of creativity into consideration. This is especially worrying considering the gap between legal and social norms that existed prior to this article.

6.3 What is missing?

As mentioned earlier in this thesis (see chapter 2), the EC announced a public consultation that covered a broad range of issues that had been brought up concerning EU copyright rules. This public consultation generated more than 9,500 replies to the consultation document (a questionnaire consisting of 80 open-ended questions) and more than 11,000 messages. The responses have been summarised in the EC's *Report on the responses to the Public Consultation on the Review of the EU Copyright Rules*, and the answers have served as a basis for the representation of the problems in the legislative history of the DSMD. The consultation allowed respondents to identify themselves under a stakeholder category, and the distribution of stakeholders can be seen in table 1 below.

Table 1. The self-declared category affiliation of survey respondents.

	Registered in the EU transparency register	Non-registered in the EU transparency register.	Anonymous respondents – Registered	Anonymous respondents - Non Registered	Total	%
End users/Consumers	81	4224		1317	5622	58.7
Authors/Performers	97	1612	8	659	2376	24.8
Institutional Users	67	222		16	305	3.2
Publishers/Producers/Broadcasters	105	623	4	97	829	8.6
Service Providers/Intermediaries	34	74	2	3	113	1.2
Collective Management Organisation	51	47	1	10	109	1.1
Member States		11			15	0.2
Public Authorities	2	11			13	0.1
Other	66	121		12	199	2.1

Source: (European Commission Report, 2014, p. 5).

The 80 questions covered in this consultation touch upon numerous issues that fall outside the scope of what later became Article 17 DSMD, whereas some are also intertwined with one another. However, the answers make good use for making visible the invisible in the problem representations discussed in above sections.

What is missing in the EC's problem representations then? The short answer is: the views of the majority, or at least, what user respondents found problematic with (what was then) the current state of affair concerning EU copyright law. As can be seen in table 1 above, "end users/consumers" constitute 58.7 % of the respondents in the public consultation, and their perception on certain issues that were brought up deviate rather drastically from that of "authors/performers", "publishers/producers/broadcasters" and "collective management organisations" (stakeholders within the business of copyright).

For starters, respondents to the consultation were asked whether the current terms of copyright protection are still fit for purpose in a digital environment. Here, the majority of respondents who identified as "end users/consumers" considered the current terms to be inappropriate, because they considered the protections "too long" which is "counter-productive for creators" and "a burden to innovation" (Ibid., p. 27), whereas they argued that shorter terms would ensure "wider access to works in the public domain as a matter of general public interest" (p. 28). This signals another perspective of innovation, where the innovation of amateurs are included, and to what Lessig (2006) referred to as the amateur culture, which is the everyday culture that is characteristic for the participatory web. What is missing in the problem representations, and in the constructions of these problems, is (in general) the majority's perception of what the substantial dimension of cyberspace and copyright law should be constitutive of.

As to the functioning of the legal framework for exceptions and limitations, it is stated that end users/consumers "consider that the optional nature of the list of exceptions create legal uncertainty…" and that it is a common view that "exceptions, at least those linked to the exercise of fundamental rights (e.g. quotation and criticism, news reporting, parody) should be mandatory and harmonised" (European Commission Report, 2014, pp. 29-30). Furthermore, "many end users want to preserve or strengthen existing exceptions and limitations" whereas some perceive "copyright law as barriers to the exercise of fundamental rights" and that "there is not a sufficient balance between the rights of rightholders and

exceptions" (Ibid.). This relates to the lack of legal recognition of UGC that Geiger and Izyumenko (2019) found problematic with EU copyright law (both prior and post implementation of Article 17 DSMD).

In contrast, authors/performers, publishers/producers/broadcasters and collective management organisations, "generally consider that exceptions have a damaging effect on cultural production" and that the current optional list of exceptions, is "very broad, flexible and fit for purpose" (European Commission Report, 2014, p. 31). The fact that most stakeholders within these groups "are against any further harmonisation" since they consider this to risk the "weakening of copyright protection in Europe at the expense of creators" (Ibid.) signal a conflict between users and rightholders, or the "constant war" between copyright law and technological advancements, as Lessig (2006) put it.

When it comes to the dissemination of content created on the basis of pre-existing works on the Internet, a significant amount of end users/consumers have experienced problems when seeking to disseminate UGC online. Users point towards legal uncertainty, and that content, which they have uploaded, has been taken down by platform's identification systems without a clear rationale. And it is stated that end users consider "that the current legal framework is inadequate in terms of catering the practices that have become widespread, and that licensing schemes and current enforcement practices are not an appropriate way to deal with UGC" (European Commission Report, 2014, p. 68).

In regard to the strengthening copyright enforcement and enhancing copyright protection, users "are generally not in favour of strengthening enforcement, including as regards infringements committed with a commercial purpose" (Ibid., p. 83) and that users instead "suggest that other fundamental rights [than that of the right to the protection of copyright] should prevail or that no enforcement should be encouraged…" (Ibid.). Users do also "not favour further involvement of intermediaries, neither through a modification of the liability regime provided by the [ECD] nor through the use of injunctions that would require [OCSSPs] to monitor content and prevent future infringement" (Ibid.). Furthermore, users are also "not in favour of any active involvement of ISPs in the detection and enforcement of IPR [intellectual property right] that would require the application of filtering technologies" (Ibid.).

It is further stated that many end users find "that the current civil enforcement framework fails to ensure the right balance between the right to have one's copyright respected and other fundamental rights" since the current civil enforcement framework is "biased towards the interests of rightholders and there is a need for more balanced copyright rules" (Ibid.). A concern that is provided by end-users is that "a renewed focus on enforcement measures will only further undermine the social acceptance of the system as a whole" (Ibid.).

Authors/performers on the other hand, are more supportive of efficient enforcements of copyright as regards infringements on both a commercial and non-commercial basis. Many of these respondents have stressed "that the current enforcement system is failing to provide the protection necessary in the modern digital environment" (Ibid., p. 84), describing it as slow and old-fashioned, claiming that it allows certain platforms to capitalise on the dissemination of unauthorised content (Ibid.).

In regard to harmonisation and questions on whether the EU should pursue the establishment of a single EU copyright system, it is interesting to note that neither the majority of the stakeholder groups within the business of copyright nor the group of "intermediaries/distributors/other service providers" support this idea. Instead, it is stated that "the vast majority of end users/consumers consider that the EU should pursue the idea of a single EU copyright title" and that many of these respondents consider that an "immediate objective should be to focus on the current set exceptions and limitations and on the recognition of a clear set of rights for users" (Ibid., p. 89).

The above discussion boils down to be two very dividing perspectives on both the structural form of copyright law and what substantial values it should inherit. In the *Synopsis Report on the Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries and the Collaborative Economy*, these diverging views on substantial values is perhaps even more apparent. In this report, different stakeholders shared their views on issues related to the role of online platforms. Table 2 below show the distribution of respondents and to which category they identified.

Table 2. The self-declared category affiliation of survey respondents.

Breakdown of respondents[2]	General information	Online Platforms	Online Inter-mediaries	Collaborative Economy
Business	125	116	103	42
Public authority	29	26	24	14
Research institution or think tank	33	30	22	18
Assoc. businesses	195	179	161	59
Assoc. civil society	37	33	28	12
Assoc. consumers	12	12	8	9
Individual citizen	408	407	332	135
Online platform	43	42	34	21
Other	152	147	135	24
Total	1034	992	847	334

Source: (European Commission Report, 2016, p. 4).

This consultation received 1034 replies, but the EC notes that an additional contribution of 10,599 responses was received via an advocacy association, openmedia.org[3], but that a significant number of those responses were anonymous and therefore "impossible to categorise"[4] (European Commission Report, 2016, p. 4).

In regard to what was then the current state of affairs, consumer associations, individuals, and civil society associations primarily raised concerns about the uncertainty of how platforms collect and use personal data, anonymity, and when platforms unilaterally remove content from their platforms since this threatens freedom of expression. Businesses, on the other hand, were concerned with three issues: "right infringement", "inconsistent regulation", and "unfair trading practices" (Ibid., p. 6). However, it states that "a cross-cutting issue all replies mention is the responsibility and liability of platforms and the distinction between active and passive intermediaries" (Ibid., p. 7).

When it comes to the relationship between rightholders and the dissemination of copyright-protected content on OCSSPs, it should by this stage come as no surprise that a substantial number of rightholders argue that "piracy", "the market power of some online platforms" and "the lack of clarity in copyright law around the notion of communication to the public under the [ISD] and limited liability for intermediaries under the [ECD]" are problems that needs solving (Ibid., p. 12). As regards "other stakeholders", their views vary in regard to this

3 This is a non-governmental organisation that focuses on digital rights, media access, and civil liberties.
4 Only 28.5% of these individual contributions came from EU countries (see appendix 9.1 for the geographical distribution of the respondents).

relationship, whereas some "stress the importance of freedom of expression, the advantages from the use of online content, and confirm the applicability to platforms of the liability exemptions under the [ECD]" (Ibid.).

When it comes to the "fitness of the liability regime under the [ECD]" most rightholders do not consider this fit-for-purpose, while the vast majority of individual users, content up-loaders, and intermediaries do think so. In the questionnaire, it was asked whether a "take-down and stay-down" regime should be introduced to the EU copyright framework. It is stated that *all* notice-providers and a vast majority of rightholders were in favour of this, whereas a vast majority of individual users opposed this on the basis that it would undermine the fundamental rights to freedom of expression (Ibid., p. 18).

Drawing attention instead to what user respondents have argued to be problematic with the EU copyright framework, it becomes evident that there is a big discrepancy between their arguments and what is represented as problems in the official documents discussed in sections above. As you might have become aware, I have not highlighted any utterances by the EC as to what they perceive as problematic in regard to exceptions and limitations in relation to UGC. This is because there are no such utterances, *user rights* in relation to UGC were first mentioned in Article 17 DSMD, the final product. In the EC's Communication *Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market* that was issued on the same day as the proposal, it is stated that the proposal "introduces new mandatory exceptions in the areas of education, research, and preservation of cultural heritage" (European Commission Communication, 2016b, p. 6). In this Communication (as in every other Communication) existing exceptions have been represented as problematic in relation only to institutional usages of copyright-protected material. This has resulted in different Articles in the DSMD, which for instance allow research institutions to conduct data-mining (Article 4 DSMD) or use works and other subject matter in digital and cross-border teaching activities (Article 5 DSMD). The shift from draft Article 13 to Article 17 DSMD is discussed in detail in section 6.5 below.

Taking into consideration what users argue to be the problem with EU copyright law enables suggestions to how the represented problems could be formulated instead. The above user responses gives clear indications that users do not want enhanced copyright protection but

rather a harmonised legal recognition of user rights to install balance between author's rights and user's rights. The problem representations could therefore be reformulated on this basis.

Through the application of Habermas's theory of communicative action it would therefore be most beneficial to make full use of the potential in democracy, and thus reformulate the problems on the basis of a common understanding. If recognising the above argumentations by the different stakeholders as speech-acts on what is problematic with the EU copyright framework, one could desire that the EC, as the executive branch of the EU responsible for proposing legislations, to at least assess the truth assumptions and consider the objective facts of what the groups of stakeholders claim. The fact that the EC issued public consultations to gather information on what is perceived as problematic from different stakeholders is positive, but to pay attention only to one side when communicating the problems, and not bothering to provide any evidence to support these problem representations, makes one question whether this spectacle is merely a strategy to achieve legitimacy by pretending to show interest. Now, the problem formulations in the EC official documents can be argued to have failed to receive uptake by users not only on the basis of them not agreeing on the implied validity claims in the problem representations, but also because there has been no *discourse* (in a Habermasian sense) to test the problem representations rational justifiability as true, correct or authentic. It is in this sense, I argue, no wonder why EU citizens gathered in protests to show dissatisfaction with the new copyright reform.

It cannot be regarded as a mere coincidence that the extent to which the EC's and rightholders perspectives of the problems related to the EU copyright framework corresponds. Evidently, it is still the case, as Farrand (2015) noted, that the creative industries dictate the legislative approach in the area of EU copyright law.

6.4 Effects produced by the problem representations

A WPR approach to policy analysis departs from the presumption that some problem representations create more difficulties for members of some social groups than for members of other groups in that they produce certain effects (Bacchi, 2009, p. 15). As mentioned in section 5.3, these effects are not related to measurable outcomes but rather the more subtle *discursive* and *subjectification* effects that are inherent in how a problem is represented.

6.4.1 Discursive effects

The premise of discursive effects rests on the simple proposal that the framing of a problem within a policy puts limits on how the problem can be perceived, which is something that can have devastating effects for groups of people. A goal with this fifth step is therefore to make these silencing discursive effects visible (Bacchi, 2009, p. 16).

What are the discursive effects of the problem representations in the EU official documents then? Starting with the conceptual logic of the droit d'auteur notion, in which much of the discourses and framings of the problem representations are inherent, this can make it difficult to think of the dissemination of copyright-protected content as something positive. With the framing of such infringements as something that hinder innovation, and something that put the future generation of content in risk, puts aside the fact that it enables creativity (in a non-individualistic fashion) and the variety of content which is characteristic for the participatory web.

In regard to the EC's conceptual logic of how copyright law should function in a digital single market, and their representation of problems that are related to the market fragmentations of the EU are, as discussed in section 6.2, rooted in the utilitarian tradition. However, with clear market incentives, the representations of these problems, and the discourses surrounding them, *create* particular sorts of problems. These problems (or social issues) are framed as related to the functioning of the EU economy rather than to the balancing of fundamental rights. As has been discussed in the literature review, and shown in section 6.3 above, such social issues are not primarily what users regard as problems.

6.4.2 Subjectification effects

The idea behind subjectification effects is that people become subjects *of a particular kind* when the discourses in policies set up social relationships and set groups of people in opposition to each other (what Foucault referred to as *dividing practices*). Inherent in the representation of problems is often the group *responsible* for the problem. This dividing practice has a useful governmental purpose, in that the stigmatisation of targeted population indicate desired behaviour among the majority (Bacchi, 2009, pp. 16-17).

As has been emphasised throughout this chapter, the role of certain online platforms have been represented as a problem (depending on their market powers and whether they operate for profit-making purposes). In extension, both the liability and enforcement regimes have been framed as problems in that they have enabled the development of the Internet we know today (in Europe). This has signalled that UGC of unauthorised content is a problem. In this context, it should by this point be rather evident that users and intermediaries (or OCSSPs) have been put in opposition to rightholders, whereas the activities of the former two groups has been represented as causal for both the unfair position that rightholders find themselves in, and the eroding of the EU economy.

Users who upload content that is covered for instance by a licensing agreement between an OCSSP and a rightholder will, in accordance with Article 17(2) DSMD, be able to do so if they are not acting on a commercial basis or where their activity does not generate significant revenues. In the best of worlds, where extensive licensing agreements are met, and where Article 17 DSMD is incorporated into Member States with an emphasis on exceptions and limitations, this would still mean that UGC that fall under the scope of amateur culture is considered a problem if a user uploaded it with the intention to profit when uploading it. Think for instance about the millions of people who upload content on YouTube, and those who have been able to pursue a career in doing so due to the new digital economy. Those are the *problem*, and together with the OCSSPs enabling their content, the ones responsible for some of the problems represented in the legislative history of the DSMD.

When putting the above two effects into context with Habermas's theory of communicative action, they could be understood as what happens when lifeworld is colonised by the economical and political systems and become *rationalised*. Characteristics for this happening, according to Habermas, is when the ways in which we produce new knowledge, integrate into society or form our identities turn from being the product of communicative action to strategic action based on instrumental rationality (Habermas, 1989, pp. 119-120). If we equate the participatory web with lifeworld, the ways in which users produce new knowledge (e.g. by uploading content) will become further distorted due to these new imperatives that target unwanted behaviour and instead impose strategic action to act in accordance with the law. Here, *code* as law will also regulate such unwanted behaviour through the application of filtering technologies (if not already implemented). The silencing discursive effects that put limits on how a problem could be perceived, can further be put in relation to Habermas's

claim that a cognitive-instrumental rationality fails to take into account the subject-subject relationship which Habermas found necessary as antidote to his diagnosis (rationalisation). But as argued above, this would not be intelligible in regard to the EC's conceptual logic and goals.

6.5 How/where has the representations of the "problems" been produced, disseminated and defended? How has it been (or could it be) questioned, disrupted and replaced?

The purpose of applying this sixth step to the analysis of how the problems are represented is to emphasise the existence of contesting views (Bacchi, 2009, p. 19). By directing attention towards how and where the problem representations have been produced, disseminated and defended highlights the practices and processes in which the EC has tried to achieve legitimacy for a dominant view.

When it comes to how and where the problem representations have been produced, disseminated and defended it is important to emphasise the resemblance between how the problems are represented in the official documents and what the stakeholders within the business of copyright argued to be problematic with the EU copyright law in the public consultation reports. As explained in section 5.1, public consultations are the starting point for debates on policy measures, and as Farrand (2015) have argued, it is in the industries' interest to dictate what approach EU copyright law should take through early agenda-settings on how issues related to copyright should be framed (p. 513). That the EC responded only to what stakeholders within the business of copyright perceived as problematic with the EU copyright framework in the Communications and in the Proposal cannot be understood as the EC operating in a vacuum, but instead that they indeed responded to business needs. Even though this thesis is delimited to problem representations in the EC's official documents only, the literature review has shown that IFPI (who coined the term value gap) has played an active role in the shaping and defending of discussed problem representations (see section 3.1.3). Not least is this evident in the EC's impact assessment where they ascribe unauthorised UGC on platforms as a problem for rightholders and the functioning of the online market by referencing this to IFPI (European Commission Impact Assessment, 2016, p. 139, ref. 414).

Relating this to Habermas's sociology of law, this could be argued to constitute a textbook example of how law as an institution of the lifeworld becomes colonised by the systems of economy and politics. With draft Article 13 as the preferred solution to regulate behaviour online (put an end to unauthorised UGC), this was clearly not decided on the basis of communicative action and mutual understanding but instead on instrumental rationality. The fact that the EC did not bother taking user's claims into consideration, despite the fact that they constituted the majority of respondents in both of the public consultations, can further be understood as reasons why this resulted in protests across the EU. This also relates to Farrand's (2015) argument that EU citizens have taken interest in copyright law and constitute a new group of lobbyists, which legislators will have to take into account even if this collides with the agendas that are set by the industries (p. 513).

Applying Habermas's concept of law as an institutionalisation of norms that need moral justification to achieve legitimacy on the discussions above, one can understand why the proposal and its draft Article 13 backfired and instead resulted in Article 17 DSMD. Since the reformatting of the Proposal took place under formal trilogue meetings between the EC, the Council of the European Union and the European Parliament behind closed doors, and no accompanying EC Communication was issued when announcing the DSMD, this offer little insight to the new recourse. The different paragraphs in Article 17 DSMD however entail that certain issues that were raised by users in the public consultations had been taken into account (as mentioned in section 6.3). For instance, Article 17(7) DSMD with its *fair use* clause provides that users in each Member state will now be able to rely on certain exceptions and limitations when uploading UGC on online content-sharing services, and pursuant to Article 17(9) DSMD, Member States shall now provide that OCSSPs put in place an effective and expeditious complaint and redress mechanism so that users can issue complaints when their content is removed erroneously. As presented in section 6.3, most stakeholders within the business of copyright were against further exceptions and limitations since this would weaken the copyright protection at the expense of creators (European Commission Report, 2014, p. 31).

However, with Article 17 DSMD, users were offered breadcrumbs in comparison to stakeholders within the business of copyright. The exceptions and limitations can be seen as a good example of Habermas's (1987) historical investigation of the development of law in that users demanded rights which were given, but in a way that accommodate the economical and

political system. Especially if taking into consideration that Geiger and Izyumenko (2019) argued that these will not be as flexible as in the United States since the EU copyright philosophy's emphasis is on the author, and public interests comes second (p. 29), or Samuelsson's (2019) concern that filtering technologies will not be able to separate what is a parody from what is not (p. 27).

With what could be referred to as the colonisation of cyberspace (lifeworld) through the increase in copyright law (juridification), most of the legal scholars in the literature review are still concerned that Article 17(4) DSMD implicitly imposes filtering technologies if OCSSPs fail to obtain *extensive* licensing agreements. Tyner (2019) and Spoerri (2019) to name a few, both find that this new enforcement regime pose a danger to freedom of expression and the right to information, while both claiming that this new reform is not fit for the digital age.

Taking into consideration Article 17(8) DSMD, which provides that the application of Article 17 DSMD should not lead to any general monitoring obligation, and Article 17(10) DSMD, which provides that the results of the stakeholder dialogues will issue guidance in the application of Article 17 DSMD, these could (alongside paragraphs discussed above) in combination with the fact that the Article is formulated in such a vague fashion, be understood as a strategy in which the EC has defended their dominant view of the problems and to achieve legitimacy. In Habermasian terms however, it would be bold to *claim* that a reasonable consensus of collective goals or balancing of interests has been met.

7. Conclusion

The aim of this thesis was to study how the EC has constructed the problems in which Article 17 DSMD was needed, and to study in which ways this article can be said to be legitimised through the ways the problems are formulated in the legislative history of the article. To achieve this, I used Bacchi's critical policy analysis that is the WPR approach, previous research, and Habermas's theory of communicative action as the theoretical framework when scrutinising the legislative history of Article 17 DSMD and asking the following the two questions:

- How has the EC represented the problems in which Article 17 DSMD was needed?
- In which ways can Article 17 DSMD be said to be legitimised through the problem formulations in the EC official documents?

In regard to the first research question, the analysis in chapter 6 shows that the EC has primarily represented the old liability and enforcement regimes as problematic by arguing that they have made it possible for certain OCSSPs to control the licensing market, and for rightholders to not be fairly remunerated for the dissemination of their content on these OCSSPs. This relates to what has been discussed as problematic from a rightholder's perspective in the literature review, where de las Heras (2019) claim that the old regulatory framework constitutes a "legal loophole" (p. 112) that has made possible the existence of a "value gap" (Lawrence, 2019 and Nordemann, 2019). The analysis on what presuppositions and assumptions that are inherent in the EC's problem representations in the official documents further indicate that they are deeply rooted in the droit d'auteur tradition since the EC puts emphasis on enhanced protection for rightholders with arguments that it underpins creativity and that better protection is needed to secure the future generation of content. As shown in Larsson's (2012) study, this is a perception of creativity that is neither proven to encourage innovation nor to be consistent with the views of the wider society (p. 119-120). The problem representations in the EC official documents are also rooted in the utilitarian tradition, but here with an emphasis on the collective harm of copyright infringements since it is underpinned with arguments that it is harmful to the EU economy as a whole. Applying Habermas's theory of communicative action to the analysis of the EC's rationale, it is clear that its perception of how to best overcome these problems is guided by an instrumental rationality aimed at goal-fulfilment and efficiency.

Through the analysis of what is missing in the EC's problem representations, the respondent data from the public consultations revealed that there are conflicting interests and discrepancies between what rightholders and users perceived as problematic with the EU copyright framework, and that the claims made by users (the majority of respondents) have been ignored and not taken into consideration in the EC's problem representations. Instead, the EC has based their problem representations exclusively on what rightholders found problematic, which I argue is not coincidental, but rather, as Farrand (2015) discussed in his research, a consequence of the creative industries dictating the legislative approach through early agenda-setting and "expertise" knowledge.

If the arguments provided by the different stakeholders are perceived as speech-acts, one could expect that the executive branch for proposing new legislations in the EU would at least assess the truth assumptions and consider the objective facts of what the groups of stakeholders claim. Instead, the EC issued an impact assessment that focused "mainly" on economic impacts and reported only the most "significant" and "likely" impacts of different policy options that had been assessed qualitatively on the basis of how they would affect "the negotiations between those creating or investing in the creation of content and those distributing such content online" (European Commission Impact Assessment, 2016, p. 136). Considering the fact that draft Article 13 was the preferred solution from this impact assessment, and that no evidence on the existence of a "value gap" was provided, this gives rather clear indications that the EC has not been interested in testing how its problem representations could be rationally justified as true, correct and authentic.

If taking into consideration what the stakeholders who identified as users perceived as problematic, there can be no doubt that the EC's problem representations have failed to receive uptake by these users, not only on the basis of them not agreeing with the implied validity claims, but also because there has been no dialogues or discussions (Habermasian discourse) to test their rational justifiability. Through the application of Bacchi's theoretical assumption that problem representations can have negative effects for groups of people, the ways in which the EC represent the problems target both the conduct of users and OCSSPs as problematic (responsible for harming the EU economy), while asserting (through the new copyright reform) that strategic action is the desired behaviour on the participatory web.

From a Habermasian perspective, this can be understood as the economical and political systems colonising lifeworld in that it will distort the cultural reproduction of knowledge. In relation to the above discussions, this is highly problematic because it is something that, most likely, will impact how we interact on the participatory web in an age where we spend increasingly more time online. That the EC's problem representations are not based on a mutual understanding (and therefore not on communicative rationality), or at least in a reasonable consensus of collective goals or balanced interests, is also problematic if taking into consideration Svensson and Larsson's (2009) and Larsson's (2014) studies on the already existing gap between social and legal norms, and that EU citizens have taken an increased interest in EU copyright law (Ferrand, 2015), but also because there were high expectations that a new copyright reform would bring about a recognition of user rights (Geiger & Izyumenko).

In regard to the second research question: all official documents prior to the issuing of Article 17 DSMD had draft Article 13 in the proposal as the preferred solution for addressing the problem representations, which not only failed to receive legitimacy, but also sparked protests across Europe. This was due to the fact that no user interests were taken into account and because draft Article 13 explicitly emphasised the use of content recognition technologies. However, in Article 17 DSMD, some of the issues that were raised by users in the public consultations have been taken into account. One central demand from users was to receive a harmonised legal recognition of exceptions and limitations, which is now provided in the *fair use* clause in Article 17(7) DSMD. However, as Geiger and Izyumenko (2019) notes, Article 17(7) DSMD does still not recognise "remix culture" (p. 29), and in addition to the EU copyright framework being deeply rooted in the droit d'auteur tradition, this clause will make little difference, especially if taking into consideration the claims that the measures that the new enforcement regime imposes will not be able to separate privileged from unprivileged uses (Tyner, 2019, p. 277). Applying Habermas's concept of juridification on Article 17(7) DSMD provides a textbook example of a juridification process since the demands for a harmonised recognition of user rights has been responded to by a law-making process that defined and implemented this demand in a way that accommodate the economical and political systems.

Another central demand by users was for the EC not to impose any new enforcement measures since this would further undermine the social acceptance of the system as a whole.

This was obviously not taken into consideration, but Article 17(8) DSMD provides that Article 17(4) DSMD should not lead to any general monitoring provisions. However, most legal scholars agree that Article 17(4) DSMD implicitly still requires upload filters, especially if taking into consideration the required high industry standards of professional diligence and the fact that such filtering technologies are already in use (Grisse, 2019, p. 894). If such preventive measures will be imposed, it will encroach on the freedom of EU citizen's right to freedom of expression and information in the online environment (Quintas et al., 2019, pp. 6-7). Since the proposal failed to achieve legitimacy, the EC revised the language in Article 17 DSMD, which is now written in such vague terms that it, according to Grisse (2019), provides legal uncertainty, and also makes it impossible to tell with certainty what effects this will have (p. 894). Hopefully, this will become clear when the EC will be issuing guidance on how Article 17 DSMD should be incorporated into national legislations on the basis of the results of the stakeholder dialogues.

It is through this strategy of give-and-take that Article 17 DSMD can be said to be legitimised, at least if taking into consideration the fact that it passed the final referendum in the European Parliament. However, with a Habermasian perspective on law as an institutionalisation of norms that needs moral justification to achieve legitimacy, Article 17 DSMD in its entirety is neither based on communicative rationality nor consistent with the substantial values that users wants the EU copyright framework to be constitutive of. Recognising law as an institution of lifeworld, therefore, makes it possible to argue that the executive branch that is responsible for proposing new legislation in the EU is colonised by the systems. Taking into consideration that there was already a gap between social norms and the EU copyright framework, the implementation of Article 17 DSMD will undoubtedly widen this gap. By virtue of how Article 17 DSMD was perceived by the public, and the fact that it passed the final referendum, further puts at risk the democratic legitimacy of the institutional framework of the EU.

7.1 Recommendations for future research

My recommendation for future research is first and foremost that researchers from disciplines other than the legal faculties should contribute through different perspectives important insights to the field of copyright. It is important that this is not left solely to scholars concerned with intellectual property law since there are dimensions of copyright that fall outside the scope of legal dogmatic analyses. In regard to Article 17 DSMD, I have

contributed to the identified research gap by providing answers on what problem representations Article 17 DSMD was grounded in, but also with insights on what substantial values EU citizens (users/consumers) want the EU copyright framework to reflect. If one wishes to do a similar study, I would recommend expanding the scope of how these problem representations came into existence and include other documents than those provided by the EC. This would require a historical investigation, which this thesis was delimited from, and is arguably its greatest weakness. Otherwise, it is important to study what is discussed in the stakeholder dialogues and how Article 17 DSMD will be incorporated into national legislations. As of June 2021, the DSMD must be incorporated, and future research should engage with analysing its effects. The possibilities here are many, but it could, for instance, involve the studying of; how Article 17 DSMD effect the cultural reproduction on platforms, if licensing agreements include a cultural diversity that takes into account minority groups, or how users or EU citizens perceives it.

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European Union. Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

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8.4 Table of CJEU cases

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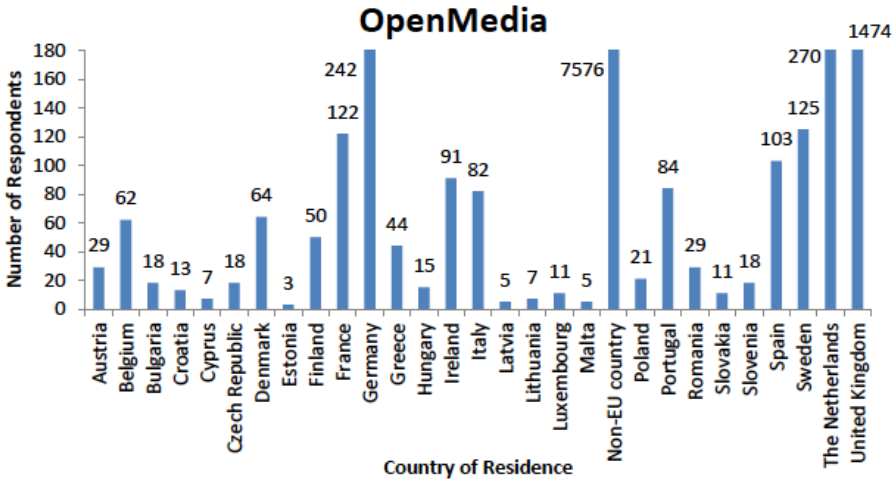
9. Appendix

9.1 Respondent's country of residence

Appendix 1: Geographical distribution of OpenMedia respondents.



Comment: 71,5 % of the individual contributions to the public consultation came from non-EU countries (40.3% from USA), 28.5 from EU countries. Source: European Commission Report, 2016, p. 5.