FACULTY OF LAW
Lund University

Sofie Axelsson

A fair balance?

Copyright exceptions and limitations under the Digital Single Market Directive

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Supervisor: Ana Nordberg

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Contents

Summary

In the digital age of the internet, more content is available to more people than ever before. While this provides an unprecedented opportunity for people to produce creative material for entertainment, it also comes with great difficulties regarding enforcement of copyright. In a response to this, the EU has adopted the Digital Single Market Directive (DSM Directive). In practice, the Directive requires Online Content Sharing Service Providers (OCSSPs) to monitor their platforms for copyright infringement using content-recognizing artificial intelligence.

This thesis examines copyright exceptions and limitations under the DSM Directive. The purpose of this thesis is to evaluate the relationship between copyright exceptions, as provided in the European Union's Directive on harmonisation of certain aspects of copyright in the information society, and the use of algorithmic enforcement by OCSSPs in order to comply with Article 17 of the DSM Directive. The thesis investigates whether Article 17 of the DSM Directive changes the scope of copyright exceptions and limitations, and what the article means for creators' ability to produce content based on copyright exceptions and limitations.

A case law analysis finds that the Court of Justice of the European Union has harmonized copyright exceptions and limitations through its precedents. The thesis finds that the Court emphasizes ensuring a fair balance between the interests of rightsholders and users of protected works. Fundamental rights cannot be used by Member States to expand copyright exceptions and limitations. These are, however, to be considered rights in and of themselves.

In its analysis of Article 17 of the DSM Directive, the thesis finds that the Directive does not, change the legal content of copyright exceptions and limitations. Article 17(7) of the DSM Directive expresses that the provision

shall not result in the prevention of the availability of works that do not infringe copyright. The further investigation, however, finds that the technical requirement of Article 17(4) of the DSM Directive is incompatible with this notion. A case study of YouTube's copyright enforcement system, as well as an analysis of algorithms used for enforcement, finds that the current artificial intelligence is unable to accurately detect and protect copyright exceptions and limitations in users' works.

In conclusion, the thesis finds that the requirement of for algorithmic enforcement, as it is currently provided, is not compatible with the notion of copyright exceptions and limitations as rights of users of works.

Sammanfattning

I internets digitala tidsålder är mer information och material tillgängligt för fler personer än någonsin tidigare. Detta innebär nya möjligheter för produktion av kreativt material, men det kommer också med stora svårigheter när det gäller verkställighet av upphovsrätt. Som lösning på detta har EU antagit direktivet om upphovsrätt på den digitala inre marknaden (DSM-direktivet). I praktiken kräver direktivet att onlineleverantörer av delningstjänster (OCSSPs) granskar sina plattformar för upphovsrättsintrång med hjälp av innehållsigenkännande artificiell intelligens.

Detta examensarbete undersöker undantag och begränsningar i upphovsrätten under DSM-direktivet. Syftet med uppsatsen är att utvärdera förhållandet mellan undantag i upphovsrätten, i enlighet med EU:s direktiv om harmonisering av vissa aspekter av upphovsrätt i informationssamhället, och plattformars användning av algoritmer för att efterleva kraven i artikel 17 i DSM-direktivet. Uppsatsen undersöker om artikel 17 i DSM-direktivet ändrar omfattningen av undantag och begränsningar i upphovsrätten, och vad artikeln innebär för kreatörers förmåga att producera innehåll baserat på undantag och begränsningar i upphovsrätten.

En rättspraxisanalys visar att EU-domstolen har harmoniserat undantag och begränsningar i upphovsrätten genom sina avgöranden. I uppsatsen konstateras att domstolen betonar vikten av att säkerställa en rättvis balans mellan rättighetsinnehavarnas intressen och intressen för användare av skyddade verk. Grundläggande rättigheter kan inte användas av medlemsstaterna för att utöka undantag och begränsningar i upphovsrätten. Dessa är dock att betrakta som rättigheter i sig själva.

I analysen av artikel 17 i DSM-direktivet framkommer att direktivet inte ändrar omfattningen av undantag och begränsningar i upphovsrätten. I

artikel 17.7 i DSM-direktivet uttrycks att bestämmelsen inte ska leda till att förhindra tillgängligheten av verk som inte bryter mot upphovsrätten. Den fortsatta undersökningen visar dock att det tekniska kravet i artikel 17.4 i DSM-direktivet är oförenligt med detta. En studie av YouTubes system för upphovsrättsskydd, samt en analys av algoritmer som kan användas till det syftet, visar att den tillgängliga artificiella intelligensen inte kan upptäcka och skydda undantag och begränsningar i upphovsrätten i användares verk.

Sammanfattningsvis finner uppsatsen att kravet på användning av artificiell intelligens, som det ser ut just nu, inte är förenligt med uppfattningen om undantag och begränsningar i upphovsrätten som rättigheter för användare av verk.

Förord

Efter fyra och ett halvt år har det blivit dags för mig att tacka Lund för en fantastisk studietid. Under den här tiden har jag hunnit skaffa fler oförglömliga minnen än jag kan räkna upp här. Det finaste jag tar med mig är dock alla underbara vänner. Utan er hade juristexamen bara varit en examen. Ni har gjort det till en svindlande resa jag aldrig kommer glömma. Tack till er alla.

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Jag vill rikta ett stort tack till min handledare, Ana Nordberg, för många goda råd trots min sena framförhållning. Tack mamma för alla arbeten du har korrekturläst. Tack pappa för alla diskussioner och råd kring karriären. Tack Sara för korrekturläsning, och för att du fortsatt håller Axelsson-flaggan högt på Juridicum. Stort tack Axel för alla hejarop och allt stöd de senaste åren.

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Abbreviations

AI	Artificial Intelligence
DSM Directive	Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market
ECHR	European Convention on Human Rights
EU	European Union
OCSSP	Online Content Sharing Service Provider
UGC	User Generated Content

1 Introduction

1.1 Background

In the digital age of the internet, more content is available at the fingertips of more people than ever before. The possibility for social media users to upload content from any place, at any time, makes the task of surveying material for copyright infringement daunting. The traditional ways of enforcement have been found inefficient and costly. For example, it is extremely difficult to identify and track down individual users behind online infringements.[1]

New technology is the cause of many challenges for copyright law, but it may also be the solution. Artificial intelligence (AI) has the ability to identify and filter possibly infringing content automatically before the content has even been published to a website. A seemingly perfect solution for rightsholders that has, however, been criticized for its lack of transparency, bias, and the possible impairment of fundamental rights.[2]

The following thesis examines some of these topics, with a focus on copyright exceptions, algorithmic governance, and the Directive on Copyright and Related Rights in the Digital Single Market (the DSM Directive)[3].

[1] Andrea Katalin Tóth, 'Algorithmic copyright enforcement and AI: Issues and Potential Solutions, through the lens of text and data mining' (2019) 365.
[2] ibid 361.
[3] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

1.2 Subject and purpose

The purpose of this thesis is to evaluate the relationship between copyright exceptions, as provided in the EU's InfoSoc Directive[4], and the use of algorithmic enforcement by Online Content Sharing Service Providers (OCSSPs) in order to comply with Article 17 of the DSM Directive.

The thesis aims to analyse the development of copyright exceptions through case law from the Court of Justice of the European Union and compare the development to the requirements that are instated by the DSM Directive. The discussion will focus on whether the existing scope of copyright exceptions is compatible with algorithmic enforcement. The following research questions will guide the analysis:

Does Article 17 of the DSM Directive change the scope of copyright exceptions and limitations?

Article 17 of the DSM Directive relies on technical means for enforcement. What does that mean for creators' ability to produce content on the basis of copyright exceptions and limitations, including but not limited to, quotation, criticism, review, parody or pastiche?

1.3 Method and materials

1.3.1 Method

The thesis is written using a legal dogmatic method. The legal dogmatic method has no single established definition of what it entails, but it is often described as a method used to establish the content of the law using traditional legal sources.[5] The traditional legal sources, such as legislation

[4] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.
[5] Claes Sandgren, *Rättsvetenskap för uppsatsförfattare: ämne, material, metod och argumentation* (4 uppl., Nordstedts Juridik 2018) 48 f.

and case law, are given self-evident authority. Preparatory works and legal literature are also treated as having significance to the content of the law. Kleinman, professor of law at the University of Stockholm, argues that legal literature is useful due to the logic accounted for in its analysis, and its ability to apply a bird's view perspective that other legal sources lack.[6]

A notion that the legal dogmatic method is static and lacking analysis is disputed by Kleinman. He means that there is room within the legal dogmatic method to discuss and analyse the different sources of law in order to establish the content of the law.[7] When I say that the thesis is written using the legal dogmatic method, I apply the definition by Kleinman in which analysis of legal sources is allowed. It is not foreign to the legal dogmatic method to include de lege feranda[8] argumentation. Legal political argumentation, however, falls outside the scope of the dogmatic method.[9]

Furthermore, the interpretation of EU Law is of outmost importance for the thesis. EU law is distinguished by its two levels of the legal framework, a common European level and 27 national levels. The thesis analyses EU Law autonomously, as opposed to analysing how it is applied in Member States.[10]

The interpretation of EU law can be compared to the interpretation of international conventions. The Vienna Convention on the Law of Treaties[11], which codifies rules of public international law, provides rules for the interpretation of international treaties. It is relevant to the interpretation of EU law, as its Article 5 states that the Convention applies to any treaty which is the constituent instrument of an international organization and to

[6] Jan Kleineman 'Rättsdogmatisk metod' in Maria Nääv,Mauro Zamboni (ed.), *Juridisk metodlära* (2 uppl. Studentlitteratur 2018) 33 ff.
[7] ibid 26.
[8] Latin for "what the law should be".
[9] Claes Sandgren, *Rättsvetenskap för uppsatsförfattare: ämne, material, metod och argumentation* (4 uppl., Nordstedts Juridik 2018) 49 ff.
[10] Jane Reichel 'EU-rättslig metod' in Maria Nääv, Mauro Zamboni (ed.), *Juridisk metodlära* (2 uppl. Studentlitteratur 2018) 109.
[11] Signed in Vienna, 23rd May 1969.

any treaty adopted within an international organization. Article 33 of the Convention sets forth that with regard to treaties with more than one authentic language, each language version must stand on the same footing. Article 31 states that a treaty must be interpreted in good faith in accordance with the ordinary meaning of its terms in their context and in light of its object and purpose.[12]

EU Law is different to rules established by international treaties in some significant ways. First, there is a notion that the EU is a Union based on the rule of law. Second, there are established enforcement mechanisms on both the European level and the national level.[13] The CJEU stated in 1963, that the EU[14] constituted a new legal order of international law by which the Member States had limited their sovereign rights.[15] The European Economic Treaty created institutions, such as the Council, Parliament, and Commission with different constitutional competences. To supervise these institutions, the Court of Justice of the European Union (CJEU) was established. Thereby, the requisites to interpret EU Law, and to develop a legal method that takes on its specific features, was established. [16]

The CJEU is known to have an important role in the development of EU Law. It often provides guidance on, for example, how EU Law shall be interpreted by Member States and principles for fundamental rights.[17] The Court's practice has been subject to criticism for its alleged judicial activism.[18] Such criticism will, however, not be discussed further in this

[12] Wulf-Henning Roth, 'The Importance of the Instruments Provided for in the Treaties for Developing a European Legal Method' in Ulla Neergaard, Ruth Nielsen and Lynn Roseberry (eds.) European legal method: paradoxes and revitalization (DJØF Publishing 2011) 78.
[13] ibid 79.
[14] Called the "European Economic Community" at the time of the judgement.
[15] Case C 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 00001.
[16] Wulf-Henning Roth, 'The Importance of the Instruments Provided for in the Treaties for Developing a European Legal Method' in Ulla Neergaard, Ruth Nielsen and Lynn Roseberry (eds.) European legal method: paradoxes and revitalization (DJØF Publishing 2011) 80 f.
[17] Jane Reichel 'EU-rättslig metod' in Maria Nääv, Mauro Zamboni (ed.), *Juridisk metodlära* (2 uppl. Studentlitteratur 2018) 115.
[18] ibid 131.

thesis. Rather, the CJEU's driving role to legal development has motivated the inclusion of a rather extensive presentation and analysis of case law from the Court.

1.3.2 Materials

The content of EU copyright law is examined through the classical legal sources. Part of the purpose of the thesis is to establish the content of the right, as well as the development of copyright exceptions and limitations through the CJEU's case law. Thereby, the examination of legal sources, as provided by the legal dogmatic method, is appropriate in order to achieve the aim of the essay. A significant part of the thesis is constituted by the analysis of case law. The case law is used to establish the specifics of copyright exceptions and limitations. I have chosen to present cases that are often cited in legal discussion as significant to the development of copyright exceptions and limitations.

The DSM Directive is a central piece of material for the thesis, as much of the analysis is based upon the directive's effects. In addition to a discussion of the relevant articles of the directive, additional analysis is derived from legal literature on the articles' significance and impact. Some of the literature is written by authors often cited in the field of European intellectual property. Some of the material for the analysis, however, is gathered from more informal sources, such as blog posts by practitioners and submissions by interest organizations. The opinions of these authors are included for their contribution to the discussion and analysis; they are not, however, stated as fact. As discussions on the DSM Directive were only concluded in 2019 and AI is still a technology in its infancy, the topic of the thesis is relatively new to the legal discussion. However, as the DSM Directive was, and still is, subject to significant debate there is no scarcity of academic articles on the subject.

A case study on YouTube is included in order to exemplify how OCSSPs currently monitor copyright infringements through algorithmic enforcement.

The presentation on how YouTube uses algorithmic enforcement is deducted from YouTube's own website. It should be noted that the website only presents the information that YouTube chooses to present to the public, and as such is subject to corporate interests. Yet, it must still be considered to be the most relevant source that can be used for the purpose. The website is used as it is the most primary source that is publicly available.

Furthermore, it should be recognized that the content of the website is of contractual nature. YouTube's users must agree to the terms and conditions presented in order to use the services. As a consequence, the material is used in order to present an example. It is complemented by academic articles in order to establish how OCSSPs monitor copyright infringements through algorithmic enforcement.

1.4 Delimitations

The purpose of the essay is to examine AI as a tool for copyright enforcement, specifically in regard to copyright exceptions. The analysis regarding the requirements posed by the DSM directive will be limited to what is necessary to provide a further analysis of the use of AI by OCSSPs. Other aspects of the DSM Directive are outside the scope of the thesis. For example, article 17 of the DSM Directive provides a licensing option as a primary option for OSSCPs to avoid any copyright infringement liability. The licensing option is, however, only briefly discussed in this thesis.

The presentation of cases in this thesis is limited to the parts of the cases that are relevant to the purpose of the essay. Other precedents established in the case law are not mentioned or discussed.

The focus of the thesis is on EU law. At the time of writing, the DSM Directive has not yet been implemented in all EU Member States. Any variation in Member States' legislation as a result of national implementation is outside the scope of the thesis.

1.5 Thesis outline

Following the introductory chapter, chapter two covers principles of copyright and copyright exceptions. The focus is on the principles that have an effect on the arguments in the analysis part of the thesis. The second chapter is followed by a study of case law, which focuses on the treatment of exceptions and limitations by the Court of Justice of the European Union (CJEU). The fourth chapter introduces the DSM Directive, with a significant focus on Article 17.

Chapter 5 presents the ways in which AI and algorithmic governance is already used by companies in order to adhere to copyright law. This is exemplified by a case study of YouTube's Content ID. The final part of the thesis consists of the analysis and the conclusion. The analysis draws from the previous parts of the thesis in order to discuss and answer the questions posed in the introductory chapter.

2 EU Copyright Law

2.1 Introduction

This chapter contains a presentation of the exclusive economic and moral rights for owners of the intellectual property copyright. Copyright exceptions and limitations, as stipulated by the InfoSoc Directive, are also introduced. The primary focus of the thesis is copyright exceptions and limitations. In order to gain an understanding of these, however, it is essential to be familiar with copyright's exclusive economic and moral rights.

The background knowledge presented in this chapter is a necessary prerequisite in order to understand the reasoning of the CJEU in the following presentation of case law.

Furthermore, a brief section of the legal interests behind copyright, such as the right to intellectual property and the right to freedom of expression, is included. This provides a foundation for the final analysis of the thesis.

2.2 The content of the right

EU copyright law is regulated mainly through multiple directives relating to different aspects of copyright.[19] The EU grants a copyright holder several exclusive economic rights in regard to their work.

[19] See Directive 91/250 on the legal protection of computer programs (Computer Programs Directive), Directive 92/100 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (Rental Rights Directive), Directive 93/83 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, Directive 93/98 harmonising term of protection of copyright and certain related rights, Directive 96/9 on the legal protection of databases, Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society, Directive 2001/84 on the resale right, Directive 2004/48 on the enforcement of intellectual property rights, Directive

2.2.1 Reproduction of a work

The right to reproduction entails that the creator of a work has the exclusive right to temporarily or permanently reproduce that work in whole or in part. This right extends for the producers of the first fixation of films in respect to copies as well as to originals, and for broadcasting organisations whether their broadcasts are transmitted by cable or by satellite.[20] Even a minor part of a work may be protected from reproduction. The Court of Justice of the European Union (CJEU) has ruled that a part of only eleven words can be included under the concept of reproduction in part. The essential question for whether something is reproduction in part is if the excerpt depicts an element of the creator's own intellectual creation.[21]

2.2.2 Communication to the Public

Copyright owners also have the exclusive right to communicate their works to the public. This means they have the exclusive right to make their work available to the public in such a way that the public can access the work from a time and place of their choosing. The right includes any communication by wire or wireless means.[22] The publication of weblinks is not considered to be a form of communication to the public unless the work is made available to a new audience through the link. If a work is published on an open website, then all internet users are considered to be the audience for that work. Therefore, the publication of a link to that said webpage on a different site cannot be considered a communication to the public.[23] The situation changes, however, if a copyrighted work was placed on an open website without the consent of the owner. Placing a link to a website where

2012/28 on certain permitted uses of orphan works (Orphan Works Directive), Directive 2014/26 on collective management of copyright, Directive 2017/1564 permitted uses of works by persons with visual disability, and Directive 2019/790 on copyright and related rights in the Digital Single Market (DSM Directive).

[20] Article 2 Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc Directive).

[21] Case C-5/08 *Infopaq International A/S mot Danske Dagblades Forening* [2009] ECR I-06569 paras 37-39.

[22] Article 3(1) InfoSoc Directive.

[23] See Case C-466/12 *Nils Svensson and others v Retriever Sverige AB.* ECLI:EU:C:2014:76.

a work is published without the owner's consent is considered to be a communication to the public if the linker was aware that consent was not given.[24]

The CJEU has further established that operations such as those conducted by The Pirate Bay are considered to be acts of communication. The Pirate Bay worked as a peer-to-peer network, whereas the site did not host any content itself. However, the site was making the content available by managing the online sharing platform and doing so with full knowledge of the consequences of their action. Their hosting of a platform that allowed users to share copyrighted works was thereby considered an act of communication to the public.[25]

2.2.3 Right to Distribution

Furthermore, the EU grants copyright owners to authorise or prohibit any form of distribution to the public by sale or by other means. The right is in respect to copies as well as to originals. The distribution right is not exhausted in respect to the original work or copies thereof, except where the first transfer of ownership is made by the rightsholder.[26] The principle of exhaustion thereby entails that where the first sale of an original work or a copy thereof is made by the copyright owner in the EU, they may not object to any further distribution of that entity of the work.[27]

The principle of exhaustion applies to software as well, meaning the sale of used software is allowed. The CJEU clarified that there shouldn't be a difference whether a customer purchased software and accessed it by

[24] See Case C-160/15 *GS Media BV v Sanoma Media Netherlands BV and others* ECLI:EU:C:2016:221.
[25] See Case C-610/15 *Stichting Brein v Ziggo BV and XS4All Internet BV.* ECLI:EU:C:2017:456.
[26] Article 4 InfoSoc Directive.
[27] Article 4(2) InfoSoc Directive.

receiving a cd or if they accessed it by downloading it from the seller's website.[28]

EU law further prescribes that copyright holders must be protected from circumference of effective technological measures. "Technological measures" means any technology that is created to restrict acts, in regard to copyrighted works, that are not authorised by the rightsholder. It is also not permitted to manufacture or distribute devices whose purpose is to circumvent effective technological measures.[29] While linking is generally allowed, it is not permitted if it amounts to a circumference of technological measures.[30]

2.3 Exclusive Moral Rights

Moral rights are not regulated by the EU Directives. Recital 19 of the InfoSoc Directive states that moral rights should be exercised in accordance with national legislation, the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

The Berne Convention provides for the right of authorship, to be named as author, as well as the right to object to modifications and derogatory treatment of works.[31] It further states that the duration of moral rights must be at least as long as the creator's economic rights, and that redress of moral rights shall be governed by national legislation where the right is claimed.[32]

[28] Case C-128/11 *UsedSoft GmbH mot Oracle International Corp.* ECLI:EU:C:2012:407 paras 47-48.
[29] Article 6 InfoSoc Directive.
[30] Case C-466/12 *Nils Svensson and others v Retriever Sverige AB.* ECLI:EU:C:2014:76.
[31] Article 6bis(1) of the Berne Convention for the Protection of Literary and Artistic Works.
[32] Article 6bis(2-3) of the Berne Convention for the Protection of Literary and Artistic Works.

2.4 Copyright Exceptions and Limitations in EU law

There are several EU Directives that provide exceptions and limitations to copyright's exclusive moral and economic rights.[33] The InfoSoc Directive is perhaps the most significant in relation to exceptions and limitations, as it provides a list of 21 different exceptions that Member States can choose to implement in their copyright legislation. The list is exhaustive, meaning Member States cannot legislate for any other exceptions they may want to introduce.[34]

One of the exceptions is mandatory for all Member States: acts of temporary reproduction. Article 5(1) InfoSoc Directive states that temporary acts of reproduction that are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable (i) a transmission in a network between third parties by an intermediary, or (ii) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance.

Below are examples of voluntary exceptions or limitations that Member States may choose to implement. I have selected to present the exceptions and limitations that are further discussed in the subsequent section on the CJEU's case law.

Article 5(3)(a) InfoSoc Directive stipulates that Member States may provide exceptions or limitations to copyright for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible.[35]

[33] InfoSoc Directive, Computer Programs Directive, Orphan Works Directive, Directive on permitted uses of works by persons with visual disability, DSM Directive.
[34] Article 5 InfoSoc Directive.
[35] Article 5(3)(a) InfoSoc Directive.

According to Article 5(3)(c), Member States may stipulate an exception for reproduction or communication by the press of published articles on current economic, political or religious topics. The use of works in connection with the reporting of current events can also be exempt from copyright's exclusive rights. The source, including the author's name, must be indicated in both cases unless it turns out to be impossible.[36]

The copyright exception for quotation for the purpose of criticism or review is provided by Article 5(3)(d) InfoSoc Directive. It states that quotations can be allowed for purposes such as criticism or review, provided that they relate to a work which has already been lawfully made available to the public, that, unless this turns out to be impossible, the author's name is indicated, and that the use is in accordance with fair practice, and to the extent required by the specific purpose.[37]

Article 5(3)(k) states that Member States may provide exceptions or limitations to copyright for the purpose of caricature parody or pastiche.[38]

The Directive provides for several other exceptions that can be applied to specific situations. For example, Article 5(3)(n) of the InfoSoc Directive provides an exception to communicate works, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments such as publicly accessible libraries or educational establishments.[39]

2.4.1 Three step test

The application of Article 5(5) InfoSoc Directive is often referred to as the three step test. Originating in the Berne Convention[40], the test has since been included in ensuing intellectual property conventions such as the

[36] Article 5(3)(c) InfoSoc Directive.
[37] Article 5(3)(c) InfoSoc Directive.
[38] Article 5(3)(k) InfoSoc Directive.
[39] Article 5(3)(n) InfoSoc Directive.
[40] Article 9 Berne Convention.

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) [41] and the WIPO Internet Treaties.[42] The name comes from the three conditions which must be fulfilled for an exception or a limitation to be applicable. Article 5(5) InfoSoc Directive states that exceptions and limitations shall only be applied in (i) certain special cases (ii) which do not conflict with a normal exploitation of the work or other subject-matter and (iii) do not unreasonably prejudice the legitimate interests of the rightsholder.

The question has been raised of who the addressees of the three step test are. Is the test meant to guide the implementation of exceptions and limitations in Member States' legislations, or shall it also be applied by national courts when interpreting the scope of relevant exceptions? There is no explicit answer in the legal text or in the travaux préparatoires. For that reason, there is an argument that only national legislature should be the addressees of the three step test, due to lack of ground for the application of Article 5(5) in the course of private litigation.[43]

Another scholar interprets case law from the CJEU to suggest that the three step test is not intended to affect the substantive content of the exceptions provided by Article 5(1)-(4) InfoSoc Directive. She also asserts that acts that clearly fall within one of the exceptions shall be considered to satisfy Article 5(5). In any case, exceptions and limitations must be interpreted in light of Article 5(5).[44]

[41] Article 13 TRIPS.
[42] Article 10 of WIPO Copyright Treaty and Article 16(2) of the WIPO Phonograms and Performances Treaty.
[43] Christophe Geiger, 'From Berne to national law, via the Copyright Directive: the dangerous mutations of the three-step test' [2007] European Intellectual Property Review 486, 488 f.
[44] Eleonora Rosati, *Copyright and the Court of Justice of the European Union* (Oxford Scholarship Online 2019) 149.

2.5 Fundamental legal interests that affect copyright

The EU copyright legislation aims to find a balance between the interests of copyright stakeholders. Primarily, there are two prevalent interests behind copyright legislation issues: the right to intellectual property and the freedom of expression of the users of copyrighted works. These rights are presented below.

2.5.1 The right to intellectual property

The right to property is established through Article 17 of the EU Charter of Fundamental Rights (the Charter). The first provision of the article states that everyone has the right to own and use their property and that no one may be deprived of their possessions except in the public interest and by conditions provided by law. They shall also receive fair compensation, paid in good time, for their loss. The second provision stipulates that intellectual property is included in the protection.[45] Protection of intellectual property is explicitly mentioned because of its growing importance.[46]

The text of the Charter's Article is based on Article 1 of the Protocol to the European Convention of Human Rights (ECHR) which states that every natural or legal person is entitled to the peaceful enjoyment of their possessions. The ECHR also proclaims that States shall have the right to enforce laws as they deem necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or penalties.[47] This is a fundamental right that all nations have in common. The right has been recognized on numerous occasions in cases at the Court of Justice.[48]

[45] Article 17 of the Charter.
[46] Official Journal of the European Union C 303/17 - 14.12.2007.
[47] Article 1 of the ECHR.
[48] Official Journal of the European Union C 303/17 - 14.12.2007

Through its case law, the CJEU has expressed that the right to intellectual property is not an absolute right. Therefore, there must be a consideration between the right to intellectual property and other fundamental rights. Courts in the Member States are obligated to ensure that this consideration is reasonable.[49]

2.5.2 Freedom of expression

The right to freedom of expression is stipulated by the Charter in Article 11. It states that everyone shall have the right to freedom of expression, and that right shall include the freedom to hold opinions and to receive and impart information and ideas without interference by public authority. Furthermore, the freedom and pluralism of the press shall be respected.[50]

The Article of the Charter corresponds to Article 10 of the ECHR. This Article further asserts that the exercise of freedom of expression, as it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society. The permitted limitations are in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[51]

In accordance with Article 52(3) of the Charter, the meaning and scope of the right shall be the same as what is guaranteed by the ECHR. Thereby, Member States may not impose any limitations that exceed those provided by Article 10 of the ECHR.[52]

[49] Case C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2011] ECR 00000 paras 44-45 and Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* [2008] ECR I-00271 paras 62-68.
[50] Article 11 of the Charter.
[51] Article 10 ECHR.
[52] Official Journal of the European Union C 303/17 - 14.12.2007.

The 2nd paragraph of Article 11 specifically guarantees that the freedom and pluralism of the media shall be respected. This legislation is based on case law from the CJEU regarding television[53] and on the Protocol on the system of public broadcasting in the Member States annexed to the Treaty Establishing the European Community.[54]

In some instances, the right to intellectual property and the right to freedom of expression are in contrast to each other. As many areas of law must balance opposing interest, copyright legislation must do so as well.[55] Exceptions and limitations to copyright is an essential part of that balancing task, which will be further examined by the case law analysis in the following chapter.

[53] Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda and others v Commissariaat voor de Media* [1991] ECR I-4007.
[54] Official Journal of the European Union C 303/17 - 14.12.2007.
[55] Krisjanis Buss Baltic 'COPYRIGHT AND FREE SPEECH: THE HUMAN RIGHTS PERSPECTIVE' [2015] Journal of Law & Politics 182, 188 ff.

3 Case Law Analysis

3.1 Introduction

The following chapter contains a review of the CJEU cases Deckmyn, Football Association Premier League, Painer, Ulmer, Spiegel Online and Funke Medien. For each of the cases, the background is presented followed by a presentation of the part of the case that focused on copyright exceptions or limitations. A choice has been made to focus only on the parts of the cases that are relevant to the aim and purpose of this thesis. No mention is made of parts of the cases which set a precedent that falls outside the scope of this thesis.

I will analyze the manner in each case in which the Court chooses to interpret copyright exceptions and limitations. As case law is an important legal source in the assessment of EU law, this section is important in order to establish the EU's legal framework on copyright exceptions and limitations.

3.2 Deckmyn

3.2.1 Circumstances of the case

Deckmyn, a member of Vlaams Belang political party in Belgium, had handed out calendars for the start of the new year 2011. The cover page of these calendars showed a drawing that would become the copyright issue of the case. The drawing resembled a comic that had been completed by Vandersteen in 1961. In the original art, a main character from the comic was shown throwing coins to people who are trying to pick them up. Deckmyn had used the same scenario, replacing the characters from the

comic with a Belgian mayor as the person throwing coins and people of color as the persons picking the coins up.[56]

Deckmyn stated that his drawing should be considered to fall under the scope of the parody copyright exception in Belgian law.[57] The Vandersteen family objected to this notion, citing that parodies must meet certain criteria, such as fulfilling a critical purpose, showing originality, displaying humorous traits, seeking to ridicule the original work, and not borrowing a greater number of formal elements from the original work than would be strictly necessary in order to produce the parody. They further proclaimed Deckmyn's work to be discriminatory in its message.[58]

The Court of Appeals of Brussels decided to stay the proceedings and referred the case to the CJEU in order to address the concept of parody and its essential elements under EU law.[59]

3.2.2 The CJEU's Preliminary Ruling

First, the Court decided that the concept of parody under Article 5(3)(k) InfoSoc Directive must be considered an autonomous concept of EU law and interpreted uniformly throughout the EU. This conclusion was not to be affected by the optional nature of the parody exception. If Member States were able to determine the limits of exceptions in an unharmonized manner, that would be incompatible with the objective of the InfoSoc Directive.[60]

The CJEU then went on to analyze the concept of parody. It stated that the essential characteristics of parody were to evoke an existing work while being noticeably different from it and while adding an expression of humour or mockery. Furthermore, the Court ruled that the exception of parody did not require the establishment of certain conditions, such as originality and

[56] Case C-201/13 *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others* ECLI:EU:C:2014:2132 paras 7-9.
[57] Ibid, para 11.
[58] Ibid, para 12.
[59] Ibid, para 13.
[60] Ibid, paras 15–16.

display of a character different from the original work, as the plaintiffs had claimed.[61]

Significantly, the CJEU concluded that the parody exception must strike a fair balance between the interests of rightsholders and the freedom of expression of the user of a protected work that is relying on the exception of parody.[62] The court then deemed it up to the national court to determine whether the message in the parody should be considered discriminatory, in which case the Vandersteens would have "a legitimate interest in ensuring that the work protected by copyright is not associated with such a message"[63].

The Court's focus on striking a fair balance between the interests of copyright owners and the freedom of expression is perhaps the main significance of the case. The CJEU emphasized this balancing on several occasions[64] in their judgement. This is a deviation from a stricter interpretation of copyright exceptions and limitations. It is also noticeable that the court did not apply the European three-step test, according to which copyright exceptions shall be evaluated. Through their judgement, the Court can be said to expand the importance of freedom of speech in regard to copyright exceptions.[65]

3.3 Football Association Premier League

3.3.1 Circumstances of the case

The Football Association Premier League (FAPL) ran the professional English football league Premier League and recorded Premier League matches. They owned the right to make the audiovisual content of the

[61] Ibid, para 20.
[62] Ibid, para 27.
[63] Ibid, para 31.
[64] Ibid, paras 27, 34, 35.
[65] Global Freedom of Expression, 'Deckmyn v. Vandersteen' (*Colombia University*, 2021) https://globalfreedomofexpression.columbia.edu/cases/deckmyn-v-vandersteen/ accessed 10 May 2021.

matches available to the public by means of television broadcasting.[66] The FAPL licensed the broadcasting rights to the highest bidder in a certain territory. Winners of the bidding received the exclusive right to broadcast Premier League in that territory. In order to protect this right, each of the broadcasting licenses required broadcasters to (i) not exploit their rights outside their territory, (ii) encrypt their programmes so they could not be seen outside their territory and (iii) not to supply decoding cards outside their territory.[67]

The broadcasting subscriptions available in the United Kingdom where Premier League matches were included were more expensive than those offered in, for example, Greece. Because of this, certain restaurants and bars within the United Kingdom used decoder boxes that allowed them to receive a satellite channel broadcast from other Member States. The FAPL raised their concerns regarding that practice, arguing that such activities undermined the exclusivity of the rights granted in the license agreements. They further claimed that the broadcaster selling the cheapest decoding cards had the potential to become, in practice, the broadcaster at European level, undermining the viability of their business model. As a response to the practice, the FAPL brought three test cases before the High Court of Justice of England and Wales. Two of the cases were against suppliers to public houses of equipment and satellite decoder cards that enabled the reception of programmes of foreign broadcasters.[68] The FAPL alleged that the defendants infringed their copyright by trading in foreign decoding devices designed or adapted to give access to the services of FAPL and others without authorisation.[69] The defendants claimed their actions were legal, as they were using legal decoder cards that were put on the market in a different Member State by the relevant broadcaster.[70] Once the cases

[66] Case C-403/08 *Football Association Premier League Ltd and Others v QC Leisure and Others* [2011] ECR I-09083 paras 30-31.
[67] Ibid, paras 33–35.
[68] Ibid, paras 42–44.
[69] Ibid, para 46.
[70] Ibid, para 49.

reached the High Court of Justice of England and Wales, it decided to stay the proceedings and refer several questions to the CJEU.[71]

3.3.2 The CJEU's Preliminary Ruling

One of the questions referred to the CJEU was in regard to the interpretation of article 5(1) of the InfoSoc Directive. The national court asked whether a reproduction, performed within the memory of a satellite decoder and on a television screen, fulfilled the conditions laid down in Article 5(1) of the InfoSoc Directive and thereby was to be considered a limitation to copyright.[72] The CJEU brought up the fact Article 5(1) should be considered as a derogation from the main rule of the InfoSoc Directive, and that the conditions within therefore had to be interpreted strictly. However, the interpretation had to enable effective use of the exception. The purpose of Article 5(1) InfoSoc Directive is to allow and ensure the development and operation of new technologies, and to safeguard a fair balance between the rights and interests of right holders and users of protected works who wish to avail themselves of those new technologies.[73]

The CJEU pointed out that any act, in order to be subject to the exception, had to fulfill the conditions of Article 5(5) InfoSoc Directive. Upon that statement, the Court concluded that the relevant acts did satisfy those conditions. It could then further conclude that the acts, which were performed within the memory of a satellite decoder and on a television screen, fulfilled all requirements to be authorized by Article 5(1) InfoSoc Directive.[74]

In its judgement, the Court moved away from a narrow interpretation of limitations in favor of an interpretation that promotes effectiveness of exceptions and limitations. The Court also emphasized the need to take into account the objective and purpose of an exception. In its evaluation of the

[71] Ibid, para 54.
[72] Ibid, para 160.
[73] Ibid, paras 162–164.
[74] Ibid, paras 181–182.

three step test, as stipulated by Article 5(5), the Court affirmed it was applicable and succinctly stated the conditions of the test were met. As the court interpreted the exception with flexibility in order to ensure its effectiveness, a teleological interpretation of the exception can be said to be favored over a strict interpretation.[75]

3.4 Painer

3.4.1 Circumstances of the case

Painer worked as a freelance photographer and focused primarily on children in nurseries and day homes. The case concerned portrait photographs, taken by Painer, of a girl that was later abducted. When the girl was abducted in 1998, Painer's photos were used by authorities in their launch of a search appeal.[76] In 2006, the girl managed to escape from her abductor. As there were no current photographs of her before she made her first public appearance, several newspaper and magazine publishers published Painer's old photo along with their reporting on the escape. In addition, some of the media outlets had published a portrait that was created by a computer from Painer's photographs in order to represent what the girl may have looked like in 2006.[77]

Painer brought an action against the media outlets to cease the reproduction and/or distribution of her photos without her consent and without indicating her as author. She also sought appropriate remuneration and damages for her loss.[78] In their assessment of the case, the German court referred several questions to the CJEU. Among others, the court asked several questions on

[75] Stijn van Deursen, Thom Snijders 'The Court of Justice at the Crossroads: Clarifying the Role for Fundamental Rights in the EU Copyright Framework' [2018] IIC <https://doi.org/10.1007/s40319-018-0745-8> accessed 25 May 2021, 1080, 1087.
[76] Case C-145/10 *Eva-Maria Painer v Standard Verlags GmbH* [2011] ECR 00000, paras 27, 30.
[77] Ibid, paras 33, 34, 36.
[78] Ibid, paras 37–38.

how Articles 5(3)(d) and (e) InfoSoc Directive should be interpreted in the light of the three step test as stipulated by Article 5(5) InfoSoc Directive.[79]

3.4.2 The CJEU's Preliminary Ruling

Part of the CJEU's response regarded whether Article 5(3)(d) InfoSoc Directive could be applied where a press report quoting a work or other protected subject-matter is not a literary work protected by copyright.[80] The Court answered the question in the affirmative. Its reasoning behind the answer is of significance for the interpretations of exceptions and limitations in general. The Court brought up what is stated in recital 31 of the Directive; that a fair balance must be safeguarded between the rights and interests of authors and the rights of users of protected works. Furthermore, the Court clarified that exceptions had to be interpreted strictly as they are derogations from a general rule. However, it stated, exceptions and limitations had to be interpreted in a way that ensures they are effective and serve the purpose they were meant to.[81] On those considerations, the Court concluded that the exception stipulated by Article(3)(d) InfoSoc Directive should apply where a press report quoting a work or other protected subject-matter is not a literary work protected by copyright.[82]

While the CJEU noted that exceptions as a general rule should be interpreted strictly, it seemed to make the judgement that it was more important that the exceptions and limitations serve the purpose they were meant for, which was to ensure a fair balance between the right to freedom of expression of users of a work and authors' reproduction right. One interpretation of the Court's arguments is that it favoured a teleological interpretation of exceptions and limitations to a strict interpretation.[83]

[79] Ibid, para 43.
[80] Ibid, para 129.
[81] Ibid, paras 132–133.
[82] Ibid, para 137.
[83] Compare Stijn van Deursen, Thom Snijders 'The Court of Justice at the Crossroads: Clarifying the Role for Fundamental Rights in the EU Copyright Framework' [2018] IIC <https://doi.org/10.1007/s40319-018-0745-8> accessed 25 May 2021 1080, 1087.

3.5 Ulmer

3.5.1 Circumstances of the case

Technische Universität Darmstadt (TU Darmstadt) operated an academic library where it installed electronic reading points. These reading points allowed its visitors to reference works in the library's collection.[84] One of the available works was a textbook published by Ulmer, the Plaintiff of the case.[85] TU Darmstadt had digitized the textbook in order to make it available to its patrons on the library's reading point installations. The reading points did not allow for a larger number of copies of a work to be consulted at any time than the number of copies available in the library. Users could, however, print out the work or store it on a USB stick from the reading points.[86] It should also be noted that Ulmer had made an offer to TU Darmstadt to purchase and use the textbook as an electronic book; an offer that TU Darmstadt had declined.[87]

Article 5(3)(n) of the InfoSoc Directive states that Member States can allow a copyright limitation where a work can be communicated to the public for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of an establishment, if the work is not subject to purchase or licensing terms.[88] The question at hand in the proceedings, initiated by Ulmer publishing house, was the interpretation of this copyright limitation under German law.

Ulmer held that if a rightsholder has offered to conclude a licensing agreement, and that offer is "appropriate", then that should be sufficient to rule out the application of Article 5(3)(n). TU Darmstadt opposed this with the argument that there would have to exist a concluded licensing agreement

[84] Case C-117/13 *Technische Universität Darmstadt v Eugen Ulmer KG* ECLI:EU:C:2014:1795, para 10.
[85] Ibid, para 11.
[86] Ibid, para 13.
[87] Ibid, para 12.
[88] Article 5(3)(n) InfoSoc Directive.

between the establishment and the rightsholder, which set out the conditions for use of the work in question.[89]

The German court stayed its proceedings and referred questions to the CJEU about how it should interpret Article 5(3)(n) InfoSoc Directive. Specifically, it asked if a work is subject to purchase and licensing terms once the rightsholder presents such an offer, if establishments according to Article 5(3)(n) can digitize works in their collection, and if the rights according to Article 5(3)(n) can go so far as to allow users to print out or store works from terminals.[90]

3.5.2 The CJEU's Preliminary Ruling

The CJEU stated that the interpretation suggested by Ulmer would imply that the rightsholder could, entirely on their own discretion, deny the concerned establishment the right to benefit from the copyright limitation. This would hinder the core mission of the limitation, to promote public interest.[91] Ulmer's interpretation was in other words difficult to combine with the aim of Article 5(3)(n) InfoSoc Directive, to reach a fair balance between rightsholders and users of protected works who wish to communicate them to the public for the purpose of individual study.

Additionally, the Court pointed out that it in its judgement must adhere to the conditions set out by Article 5(5) InfoSoc Directive. The decision to require a concluded purchase or license agreement was not considered to conflict with the three conditions of the Article.[92]

The Court's evaluation of the three-step test, as stipulated in Article 5(5), can be said to be teleological as opposed to a strict interpretation. This understanding of the Court's judgement is based on their emphasis on

[89] Ibid, para 15.
[90] Ibid, para 22.
[91] Ibid, para 32.
[92] Ibid, para 33.

striking a fair balance between rightsholders and user's interests, and their focus on the aim of the copyright limitation of the InfoSoc Directive.

On the question of whether an establishment should be able to digitize works in their collection, the CJEU found that "Article 5(3)(n) of Directive 2001/29, read in conjunction with Article 5(2)(c) of that directive, must be interpreted to mean that it does not preclude Member States from granting to publicly accessible libraries covered by those provisions the right to digitise the works contained in their collections, if such act of reproduction is necessary for the purpose of making those works available to users, by means of dedicated terminals, within those establishments".[93]

In the evaluation of the digitalization question, the Court stated that the limitation of Article 5(3)(n) InfoSoc Directive would risk being rendered meaningless if establishments did not have a right to digitize works.[94] This statement further indicates a teleological interpretation of the limitation.

Regarding the third question, the CJEU first stated that printing out material or transferring it to a USB stick was not to be considered a communication to the public in accordance to Article 3 InfoSoc Directive, but rather a reproduction in accordance to Article 2 of that Directive. This as it involved the creation of a new digital or analog copy that could be removed from the establishment by users of the terminals.[95] Such acts were not to be permitted under Article 5(3)(n) InfoSoc Directive, since they were not necessary for the purpose of making the work available to the users of that work, by dedicated terminals, in accordance with the conditions laid down by the provision. Furthermore, it would not be permitted because the acts would be carried out by users of the terminals, and not by the establishment.[96]

[93] Ibid, para 49.
[94] Ibid, para 43.
[95] Ibid, paras 52–53.
[96] Ibid, para 54.

In the answers to both question one and two, the Court's main focus was the balance of interests between rightsholders and users of TU Darmstadt library's reading points. The copyright limitation in question in the case was interpreted teleologically as opposed to strictly. By doing so, the CJEU can be said to expand the freedom of expression. In one instance, however, the Court did not expand expression. It did not extend the limitation to include printing out works or storage on a USB stick. In this instance, rather, an appropriate balance was struck by interpreting Article 5(2)(a) or (b) of the Directive to allow for such expansion to be authorized by the national legislation in Member States.[97]

3.6 Spiegel Online

3.6.1 Circumstances of the case

Beck, a German politician and member of the German Parliament, was the author of a manuscript on criminal policy. When the manuscript was published in 1988 as an article to a book, the publisher shortened one of the sentences in the manuscript and changed its title. Beck was criticized in the following years for the statements in the published article, and he distanced himself from the work by stating that his manuscript had been altered by the publisher.[98] When he ran for Parliament in 2013, the manuscript was once again discovered and put to him. While he did not consent for it to be published, he provided the manuscript to several newspaper editors in order to show that it had been amended by the publisher. He also published both versions of the text on his personal website, where he included the statement 'I dissociate myself from this contribution. Volker Beck' on each page.[99]

[97] Global Freedom of Expression, 'Technische Universität Darmstadt v. Eugen Ulmer KG' (*Colombia University*, 2021) <https://globalfreedomofexpression.columbia.edu/cases/technische-universitat-darmstadt-v-eugen-ulmer-kg/> accessed 10 May 2021.
[98] Case C-516/17 *Spiegel Online GmbH v Volker Beck* ECLI:EU:C:2019:16, para 10.
[99] Ibid, para 11.

The defendant in the case, Spiegel Online, operated an internet news portal with the same name. It published an article where it stated that the central statement of Beck's manuscript had in fact not been altered by his publisher. Therefore, it argued, Beck had misled the public over a number of years. Original versions of the manuscript and the book contribution were available on the news portal through means of hyperlinks.[100] In response to the article, Beck brought an action against Spiegel Online for infringing his copyright by making available the complete texts of the manuscript and article on its news portal.[101]

The German court took into consideration the interpretation of Article 5(3)(c) and (d) InfoSoc Directive, which establish exceptions to copyright on the basis of reproduction by the press and quotation for the purpose of criticism and review. The court considered the exceptions in the light of the fundamental rights of freedom of the press and freedom of information and referred a total of six questions to the CJEU. It asked, inter alia, in what manner the fundamental rights of the Charter could be taken into account when determining the scope of the exceptions or limitations provided for in Article 5(3) InfoSoc Directive. Another question was whether fundamental rights of freedom of information and freedom of the press could justify exceptions or limitations to the exclusive rights of authors beyond those provided for in Article 5(3) InfoSoc Directive.[102]

3.6.2 The CJEU's Preliminary Ruling

In its response to the question on exceptions' scope, the CJEU stated that derogations from a general rule must, in principle, be interpreted strictly. The Court went on to explain that exceptions and limitations to copyright should be considered as users' rights. As such, there must be a balance between the right to intellectual property and the right to freedom of expression guaranteed through the copyright exceptions. This balance was

[100] Ibid, para 12.
[101] Ibid, para 13.
[102] Ibid, paras 14–15.

possible, because while the right to intellectual property is guaranteed in the Charter, it is not an absolute right. The CJEU provided as guidance for the national court that it had to, having regard to all the circumstances of the case before it, rely on an interpretation of those provisions which, whilst consistent with their wording and safeguarding their effectiveness, fully adhered to the fundamental rights enshrined in the Charter.[103]

On the topic of whether fundamental rights could motivate an expansion of exceptions and limitations, the CJEU judged that no such expansion was possible.[104] The Court pointed out that the harmonization of the InfoSoc Directive aims to safeguard, in particular in the electronic environment, a fair balance between the interests of rightsholders and the freedom of expression of users of protected works.[105] Furthermore, the exceptions and limitations in question, Article 5(3)(c) and (d) InfoSoc Directive, were specifically aimed at protecting the fundamental rights of expression.[106] The Court concluded, also considering that the list of exceptions and limitations is exhaustive, that Member States were required to apply those exceptions and limitations consistently. That consistency could not be ensured if Member States were able provide any exceptions or limitations beyond those in the InfoSoc Directive.[107] Freedom of information and of the press as stipulated in the Charter could thereby not be used to motivate further copyright exceptions or limitations.

While the CJEU limited the possibility to justify limitation of copyright on the basis of fundamental freedom, it did refer to copyright exceptions and limitations as users' *rights*. In referring to exceptions and limitations as rights, the CJEU indicated that they should be given a stronger position rather than if they were referred to as simple liberties, privileges or even interests.

[103] Ibid, paras 53, 54, 59.
[104] Ibid, para 49.
[105] Ibid, para 42.
[106] Ibid, para 45.
[107] Ibid, para 48.

3.7 Funke Medien

3.7.1 Circumstances of the case

The defendant in the case, Funke Medien, operated a website of a German daily newspaper that published a large number of classified documents called "the Afghanistan Papers". The documents had been prepared as part of weekly military status reports that were sent to certain select members of German Parliament. Instead of bringing an action against Funke Medien for national security reasons, the Federal Republic of Germany opted to bring an action against the website operator for infringing its copyright over the classified documents.[108]

The questions the Federal German Court referred to the CJEU focused on how the InfoSoc Directive should be interpreted in relation to freedom of information and the press. Specifically, the first question focused on whether any latitude was allowed in terms of national implementation of the exclusive right of authors to reproduce and publicly communicate their work as well as copyright exceptions and limitations. In the second question, the German court asked whether the fundamental rights of the EU Charter should be taken into account when ascertaining the scope of copyright exceptions or limitations as provided in the InfoSoc Directive. The final question was whether the fundamental rights of freedom of information or freedom of media of the Charter justify exceptions or limitations to the exclusive rights of authors to reproduce and publicly communicate their works beyond the exceptions or limitations provided for in Article 5(2) and (3) of the InfoSoc Directive.[109]

3.7.2 The CJEU's Preliminary Ruling

The CJEU clarified the criteria, established in case law, for documents to be considered "works". The subject matter must be original in the sense that it

[108] Case C-469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland* ECLI:EU:C:2019:623, paras 9-11.
[109] Ibid, para 15.

is the individual intellectual creation of the author, and it must reflect the author's personality through creative choices.[110] The Advocate General stated that it would be nearly impossible for the classified documents to satisfy the criteria of being their author's intellectual creation and the result of creative choices. However, that judgement was entirely up to the national German court.[111]

In regard to the first question, the CJEU expressed that Article 2(a) and Article 3(1) of the InfoSoc Directive, which regulate rightsholders exclusive right to reproduction and communication to the public, required full harmonization in Member States' national law. The articles on copyright exceptions and limitations, however, needed to be harmonized to the degree that a smooth functioning of the internal market could be ensured.[112] This meant the exceptions and limitations must be exercised within the limits imposed by EU law, which means that the Member States are not in every case free to determine, in an unharmonized manner, the parameters governing those exceptions or limitations.[113] Furthermore, the Court stated that Member States must interpret the copyright exceptions and limitations in a manner that ensures a fair balance between the various fundamental rights protected by the European Union legal order.[114]

In its evaluation to answer the second question, the Court asserted that any derogation from a general rule, in this case the exclusive economic rights of intellectual property, must be interpreted strictly.[115] However, it had to be noted that copyright exceptions and limitations constitute rights in themselves. This entailed that courts must ensure a fair balance between, on the one hand, the interests of rightsholders, and on the other hand, the rights and interests of users of works.[116] The right to protection of intellectual

[110] Ibid, para 19.
[111] Ibid, para 24.
[112] Ibid, para 40.
[113] Ibid, para 46.
[114] Ibid, para 53.
[115] Ibid, para 69.
[116] Ibid, para 70.

property is established through Article 17(2) of the Charter; however, that right is not absolute. The right to freedom of speech is guaranteed by Article 11 of the Charter. The CJEU deemed that in the balancing between these two rights, Member States shall consider the type of protected speech, especially concerning political and public interest.[117]

The CJEU decided, in respect to the third question, that the right to freedom of information and freedom of the press could not be applied in order to further allow exceptions and limitations to copyright beyond those exceptions that are stipulated by Article 5 InfoSoc Directive.[118] The court emphasized that the list of exceptions was exhaustive, and that it must be interpreted in an harmonized manner in order to ensure legal certainty and the functioning of the internal market.[119] Furthermore, the relevant exceptions and limitations were drafted in order to protect freedom of expression in themselves.[120]

To put it another way, the fair balance between rightsholders and users of works, that the Court has emphasized in previous decisions, can be said to be internalized in copyright law through limitations and exceptions.[121]

One commenter implies that perhaps the main significance of this case is that the CJEU once again went so far as to explicitly state that copyright exceptions and limitations are to be considered as rights, as opposed to interests, of the users of works or other subject manner. In doing so, the Court once again provided guidance on how to perform the balancing act

[117] Ibid, para 74.
[118] Ibid, para 64.
[119] Ibid, para 62.
[120] Ibid, para 60.
[121] Sebastian Schwemer and Jens Schovsbo, 'What is Left of User Rights? – Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime' in Paul Torremans (ed.), *Intellectual Property Law and Human Rights* (4th edi., Wolters Kluwer, 2020) 9.

between the right to intellectual property and the right to freedom of expression.[122]

3.8 Case Law Analysis

Through its case law, the CJEU has played a big part in the harmonization of the framework for exceptions and limitations. An empirical study has found that the CJEU pursues an upwardly harmonizing agenda through the prevalence of teleological themes.[123]

Even though the implementation of most exceptions and limitations are voluntary for Member States, they must be interpreted autonomously within the framework of EU law. As was made clear in the Deckmyn case, that interpretation must also be without any certain conditions that are not stated in the Article of the exception or limitation.

In the cases included in this presentation, the CJEU focused on the fact that copyright exceptions and limitation must ensure a fair balance between the interests of copyright owners and freedom of expression for users of protected works. This interpretation is supported by recital 31 of the InfoSoc Directive, which states that such a fair balance is one of the Directive's main objectives. The CJEU also observed that copyright exceptions and limitations must be regarded as exceptions from a general rule, which would entail that they should be interpreted strictly. In my opinion, however, the Court then seems to prioritize achieving a fair balance of interests and ensuring that the purpose behind the copyright exceptions is realized.

[122] Compare Kacper Szkalej 'The New Copyright Directive: Article 17 and copyright limitations – picking two cherries and leaving the rest to spoil? Part I' (*Kluwer Copyright Blog*, 29 October 2019) <http://copyrightblog.kluweriplaw.com/2019/10/29/the-new-copyright-directive-article-17-and-copyright-limitations-picking-two-cherries-and-leaving-the-rest-to-spoil-part-i/> accessed 25 May 2021.
[123] Marcella Favale, Martin Kretschmer and Paul C. Torremans 'IS THERE A EU COPYRIGHT JURISPRUDENCE? An empirical analysis of the workings of the European Court of Justice' [2016] Modern Law Review <https://doi.org/10.1111/1468-2230.12166> accessed 25 May 2021 31, 34.

Thereby, my observation is that the presented cases lean towards a teleological interpretation of copyright exceptions and limitations as well as a teleological interpretation of the three step test.

Through its case law, the CJEU has closed the door on the application of fundamental rights as a limitation of copyright. Member States cannot use fundamental rights, such as the freedom of expression, in order to go beyond the exhaustive list of exceptions in Article 5 InfoSoc Directive. However, the CJEU advanced its recognition of the importance of copyright exceptions and limitation by acknowledging them users' rights in Speigel Online and in Funke Medien. It remains to be seen what this acknowledgement may mean for copyright law in practice, but the Court's choice to opt for the word "rights" as opposed to "interests" or "privileges" could be seen as a statement.

However, as the Court denied Member States the option to grant exceptions or limitations on the basis of fundamental rights enshrined in the Charter, I think it seems like a reasonable compromise to recognize the exceptions and limitations as rights in and of themselves. This matches the mentioned notion that the fair balance between rightsholders and users of works can be said to be internalized in copyright law through limitations and exceptions.

In conclusion, the EU is gradually arriving at a harmonized system for copyright exceptions and limitations. Their importance has also gradually been reiterated through the CJEU's case law.[124]

[124] Compare my analysis to: Caterina Sganga, 'A Decade of Fair Balance Doctrine, and How to Fix It: Copyright versus Fundamental Rights before the CJEU from Promusicae to Funke Medien, Pelham and Spiegel Online' [2019] European Intellectual Property Review 16 ff.; Thom Snijders & Stijn van Deursen, 'The Road Not Taken – the CJEU Sheds Light on the Role of Fundamental Rights in the European Copyright Framework – a Case Note on the Pelham, Spiegel Online and Funke Medien Decisions' [2019] IIC <https://doi.org/10.1007/s40319-019-00883-0> accessed 25 May 2021 1176, 1189, and Kacper Szkalej 'The New Copyright Directive: Article 17 and copyright limitations – picking two cherries and leaving the rest to spoil? Part I' (*Kluwer Copyright Blog*, 29 October 2019) <http://copyrightblog.kluweriplaw.com/2019/10/29/the-new-copyright-directive-article-17-and-copyright-limitations-picking-two-cherries-and-leaving-the-rest-to-spoil-part-i/> accessed 25 May 2021.

4 Directive on Copyright and Related Rights in the Digital Single Market

4.1 Introduction

The purpose of this thesis is to evaluate the relationship between copyright exceptions and limitations and the use of algorithmic copyright enforcement by OCSSPs. Up until this point, the thesis has presented the content of EU copyright law and analysed the development of exceptions and limitations through case law from the CJEU.

The following chapter will present the content of Article 17 DSM Directive, which, in practice, requires OCSSPs to employ algorithmic enforcement in order to survey content for copyright infringement. Furthermore, this section critically analyses Article 17 using opinions written by legal scholars and practitioners.

4.2 Background

The DSM Directive stems from the new digital environment envisioned by the EU. For about two decades, the EU has had digitalisation as a central point for its political agenda. In the EU's single market for people, goods, services, and capital, movement is free. The EU's digital strategy is based on creating a similar Digital Single Market (DSM) with free movement for digital content and services.[125] Its flagship initiative, "A Digital Agenda for Europe", aims to deliver sustainable economic and social benefits. The

[125] Federico Ferri, 'The dark side(s) of the EU Directive on copyright and related rights in the Digital Single Market' [2020] China-EU Law Journal <https://doi.org/10.1007/s12689-020-00089-5> accessed 25 May 2021.

European Commission assumed responsibility in its initiative to provide a balanced legal framework to create a true single market for online content and services with clear rights regimes, including protection and remuneration for rights holders and active support for the digitisation of Europe's cultural heritage.[126]

The DSM Directive is an important piece of the EU's digital strategy. Before it was adopted by the European Parliament and the Council of the EU on 17 April 2019, it was subject to burdensome procedures with political institutions, national policy makers, and relevant stakeholders. Throughout the process, the directive gained significant media attention, and has been claimed to symbolize a "copyright revolution" at the EU level.[127]

The DSM Directive shall be implemented by the Member States before 7 June 2021.

4.3 Definition of Online Content Sharing Service Providers

The definition of OCSSPs can be found in Article 2(6) of the DSM Directive. The Article states that any provider of information society services with the main purpose to store and give the public access to copyright-protected works uploaded by users who is organized in a for-profit manner shall be considered to be an OSCCP.[128]

Platforms that store and publish copyright-protected material on a not-for-profit basis are excluded from the definition. For example, online encyclopedias, educational and scientific repositories, and open source

[126] Communication from the Commission 'Europe 2020 A strategy for smart, sustainable and inclusive growth' [2020] <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC2020&from=en>.
[127] Federico Ferri, 'The dark side(s) of the EU Directive on copyright and related rights in the Digital Single Market' [2020] China-EU Law Journal <https://doi.org/10.1007/s12689-020-00089-5> accessed 25 May 2021.
[128] Article 2(6) DSM Directive.

software-developing and-sharing platforms that operate in a not-for-profit manner are not considered to be OSCCPs by the Directive's definition. Furthermore, online marketplaces, business-to-business cloud services and cloud services that allow users to upload content for their own use are also excluded from the definition.[129] This means platforms such as Facebook, YouTube, TikTok, Instagram, and similar fall under the definition of OSCCPs while sites like eBay or Amazon are excluded.

4.4 Licensing option

Article 17 offers OCSSPs two options in order to avoid liability for copyright infringement. These entities can either obtain permission from copyright owners to offer user-generated content on their platforms, or they can take measures, such as implementing filtering algorithms, in order to prevent infringing content from being uploaded.[130] The directive refers to rightsholders exclusive rights as stated by Article 3(1) and (2) of the InfoSoc Directive, and makes clear that OCSSPs must respect these rights as they are considered to perform a communication to the public when content is uploaded to their platforms.[131]

Further distinction of online platforms' obligations is provided in Article 17(2). In accordance with the article, OCSSPs must have authorization from rightsholders for actions carried out by users of the services falling within Article 3 InfoSoc Directive when they are not acting on a commercial basis or their activity does not generate significant revenue.[132] Basically, this means OCSSPs must have licenses for all imaginable content their users may upload. As it is essentially impossible to foresee all content that users may potentially upload, this amounts to quite an enormous licensing task. The provision, however, frees individual users of all copyright responsibility. They may upload any imaginable content to platforms

[129] Article 2(6) DSM Directive.
[130] Article 17(1) DSM Directive.
[131] Article 17(1) DSM Directive.
[132] Article 17(2) DSM Directive.

without considering copyright liability, as all content shall be licensed by the OCSSP.[133]

The seemingly only way to effectively license all copyrighted material that may appear on a platform with user-generated content would be in partnership with collecting societies. In order to cover all types of user uploads, collecting societies would have to offer an all-embracing licensing deal covering not only copyrighted content of their members but also of their non-members. Even then, it would be difficult to license all potential user content, posing challenges to not only OCSSPs but rightsholders as well.[134]

Another challenge for the licensing solution stems from the internet's wide reach and disregard for national borders. Specifically, licensing deals that are available in one Member State may look completely different in the territory of another Member State. As the European copyright landscape is described today, Pan-European licenses are the exception as opposed to the rule. For the use of Article 17(2)'s licensing option to be successful, it may need to lead to a harmonization of rules on extended collective licensing and more flexibility of licensing solutions. As the situation stands today, the fragmented landscape of European collecting societies puts up difficulties toward umbrella licensing solutions.[135]

Professor Martin Senftleben predicts that the licensing requirement will lead to OCSSPs resembling TV channels in the future, only showing content that the platform was able to get a rights clearance for. Users will only be able to upload material that that falls within the scope of the licensing agreement that the OCSSP, copyright holders, and collecting societies were able to agree upon. Especially, he points out, there will be a decline of content

[133] Martin Senftleben, 'Bermuda Triangle – Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market' (2019) 3.
[134] Ibid 3–4.
[135] Ibid 4.

diversity due to the lack of remixes and mashups of pre-existing material. It seems unlikely that copyright owners would grant licenses for user-generated mashups of the movie when it first launches in cinemas, or that copyright owners would grant licensing for all kinds of mashups in general. Rightsholders have little incentive to grant licenses for any remixed content that includes critical statements towards their copyrighted work.[136]

4.5 Filtering option

Besides licensing, OCSSPs can avoid copyright infringements by filtering content uploaded to their platform. The criteria for this are stipulated in Article 17(4) DSM Directive. OCSSPs must have made best efforts to obtain a license without success.[137] They must then demonstrate that they have made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information.[138]

The provision uses neutral terms to describe the actions OCSSPs must employ. However, it quickly becomes clear that the only automated filtering tools can meet the provision's requirements. The use of automated filtering tool seems inevitable once the available amount of user-generated content is considered.[139] It becomes especially clear if the previous suggested wording of the Directive is considered. The draft proposal for the DSM Directive stated that platforms must use "effective content recognition technologies" in order to ensure the functioning of licensing agreements or to prevent the availability of copyrighted works on covered services.[140] Recital 39 of the draft proposal made it clear that the measures referenced in the proposed

[136] Ibid 4.
[137] Article 17(4)(a) DSM Directive.
[138] Article 17(4)(b) DSM Directive.
[139] Martin Senftleben, 'Bermuda Triangle – Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market' (2019) 5.
[140] Commission Proposal for a Directive of the European Parliament and the Council on Copyright in the Digital Singe Market (2016) article 13.

article meant systems like Google's Content ID. The recital stated that collaboration between information society service providers and rightsholders is essential for the functioning of content recognition technologies.[141]

As stated, the final version of the Directive does not include a reference to or a requirement for content recognition technologies. The Commission changed the wording to require OCSSPs to make their "best efforts"[142] to prevent unauthorized copyright material on their sites after receiving significant criticism for the draft proposal wording.[143] However, the final wording of the provision provides little more than plausible deniability regarding use of automated content recognition. For example, the Article states that OCSSPs must ensure unavailability of content for which rightsholders have provided relevant and necessary reference files.[144] In the language of automated content recognition, this means content for which the copyright owner has provided reference files. The OCSSP is required to obtain or create a reference file for any content that is subject to a notice, and they must then prevent the content of appearing on the platform by screening subsequent uploads.[145]

In order to determine whether an OCSSPs has complied with the requirement to use its best effort, the type, the audience, the size of the service, and the type of content it hosts shall be taken into account. The availability of suitable and effective means and their cost shall also be considered.[146] The considerations of the cost of suitable and effective means

[141] Commission Proposal for a Directive of the European Parliament and the Council on Copyright in the Digital Singe Market (2016) recital 39.
[142] Article 17(4)(b) DSM Directive.
[143] Annemarie Bridy, 'The Price of Closing the "Value Gap": How the Music Industry Hacked EU Copyright Reform' [2020] Vanderbuilt Journal of Entertainment & Technology Law 323, 353.
[144] Article 17(4)(b) DSM Directive.
[145] Annemarie Bridy, 'The Price of Closing the "Value Gap": How the Music Industry Hacked EU Copyright Reform' [2020] Vanderbuilt Journal of Entertainment & Technology Law 323, 354.
[146] Article 17(5) DSM Directive.

was included after concerns about the draft proposal were raised regarding compliance costs for OCSSPs.[147]

Some scholars consider the filtering requirement to completely transform the function of copyright law. Senftleben goes so far as stating that the new copyright regulation becomes a central basis for content censorship in the world. He asserts that the new law degenerates copyright into a censorship and filtering instrument as opposed to serving as an engine of content creation and dissemination.[148]

Elkin-Koren of UCLA states that algorithmic copyright enforcement tilts the balance of copyright law. She recognizes that the default for copyright used to be that alleged copyrighted material was available unless proven to be infringing. Under algorithmic enforcement, potentially infringing material is detected by algorithms removed from public circulation unless the rightsholder explicitly authorizes the content.[149]

4.5.1 Exceptions and Limitations

The right for users to upload content that is covered by copyright exceptions or limitations is stipulated by provision 7. The provision states that the cooperation between OCSSPs and rightsholders shall not result in the prevention of the availability of users' works that do not infringe copyright, including the content is covered by an exception or limitation. Furthermore, the provision specifies certain exceptions that Member States must implement. These are the use of material for quotation for the purpose of criticism and review and for the purpose of caricature, parody or pastiche.[150]

[147] Annemarie Bridy, 'The Price of Closing the "Value Gap": How the Music Industry Hacked EU Copyright Reform' [2020] Vanderbuilt Journal of Entertainment & Technology Law 323, 354.
[148] Martin Senftleben, 'Bermuda Triangle – Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market' (2019) 5.
[149] Niva Elkin-Koren, 'Fair Use by Design' [2017] UCLA Law Review 64 1082, 1093.
[150] Article 17(7) DSM Directive.

In recital 70 of the Directive, the Commission motivates the right to exceptions and limitations by stating their importance for the guarantee of users' freedom of expression. The recital acknowledges the importance of striking a balance between the fundamental rights in the Charter, in particular the freedom of expression and freedom of the arts, and the right to property, including intellectual property. The exceptions and limitations that have been made mandatory, according to the recital, serve to ensure users freedom of expression across the EU.[151]

As such, the Commission motivates the choice of certain exceptions and limitations that must be guaranteed. Article 17(7) does not ensure the availability of content that may otherwise be available on the basis of the other exceptions on the InfoSoc Directive. One example of content that is not included within the mandatory exception is incidental inclusion of a work that is allowed on the basis of Article 5(3)(i) InfoSoc Directive. Considering the motivation behind the mandatory exceptions, users' freedom of speech, it seems provision 7 amounts to a valuation of the copyright exceptions in the InfoSoc Directive. One lawyer draws the conclusion that if certain exceptions have been made mandatory in order to ensure freedom of expression, it seems the Commission does not consider remaining exceptions as important to ensure that purpose.[152]

4.6 General monitoring obligation

In provision 8, the Directive states clearly states that the application of Article 17 shall not lead to a general monitoring obligation.[153] A prohibition against general monitoring obligations is unavoidable for the Directive to not contradict Article 15 of the E-Commerce Directive, which states that

[151] Recital 70 DSM Directive.
[152] Kacper Szkalej 'The New Copyright Directive: Article 17 and copyright limitations – picking two cherries and leaving the rest to spoil? Part I' (*Kluwer Copyright Blog*, 29 October 2019) <http://copyrightblog.kluweriplaw.com/2019/10/29/the-new-copyright-directive-article-17-and-copyright-limitations-picking-two-cherries-and-leaving-the-rest-to-spoil-part-i/> accessed 25 May 2021.
[153] Article 17(8) DSM Directive.

Member States shall not impose a general obligation on providers to monitor the information that they transmit or store.[154] However, Article 14 of the same Directive provides that rightsholders may seek an injunction "requiring the service provider to terminate or prevent an infringement".[155] That fine line between effectively *preventing* copyright infringement and applying a general monitoring obligation has been discussed in the CJEU on several occasions.[156]

In Scarlet Extended v. SABAM, the CJEU decided that ordering an internet access provider to continuously filter its network traffic in order to prevent peer-to-peer file sharing was not consistent with Article 15 E-commerce Directive.[157] SABAM wanted the court to require the defendants to block infringing file sharing in real time.[158] The defendants opposing argument was that such an injunction would in practice entail a general monitoring obligation in violation with Article 15. They stated that any system for blocking or filtering peer-to-peer traffic would require general surveillance of the traffic passing through their services. In order to filter out any one type of traffic from their network, they would have to screen all passing data.[159] The CJEU found that preventive monitoring of such kind require active observation of all electronic communications, and thereby include all transmitted information and all customers using the network.[160]

As stated, Article 17(8) DSM Directive and Article 15 E-Commerce Directive prohibit a requirement that imposes general monitoring obligations. Yet, it seems the requirements for OCSSPs stipulated in Article

[154] Article 15(1) Directive 2000/31/EC of the European Parliament and of the Council of June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (E-commerce Directive).
[155] Article 14 E-commerce Directive.
[156] Annemarie Bridy, 'The Price of Closing the "Value Gap": How the Music Industry Hacked EU Copyright Reform' [2020] Vanderbuilt Journal of Entertainment & Technology Law 323, 354.
[157] Case C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2011] ECR 00000 paras 53-54.
[158] Ibid, para 20.
[159] Ibid, para 25.
[160] Ibid, para 39.

17(4) come close to the type of activities that were deemed too far-reaching in Scarlet Extended v. SABAM. The text of the Directive seemingly tries to circumvent this notion by limiting the best efforts obligation to "specific works"[161] that copyright owners identify. As the CJEU's concluded in SABAM, however, monitoring a network for certain specific activity requires monitoring of all activity, and can thereby be classified as "general" monitoring. Thereby, some conflicting requirements may remain in the DSM Directive's Article 17 that Member States will have a difficult time implementing in a coherent manner.[162]

4.7 Complaint and redress

According to provision 9 of the article, OCSSPs are required to have effective and expeditious complaint and redress mechanism for users who's uploaded material has become subject to disputes or has been taken down by the platform and for disputes over the disabling of access to content. Rightsholders shall duly justify their requests to have content removed, and such requests shall be reviewed without undue delay by a human. The provision also implicates that there must be impartial redress mechanisms available for settlement of disputes. These additional measures shall not affect users' access to regular courts. There is an extra emphasis on access to a court or relevant judicial authority to assert the use of an exception or limitation to copyright. It is also clarified and emphasized that the Directive shall not in any way affect legitimate uses of content.[163]

Some parts of the section are worth acknowledging. The provision underlines the requirement for additional mechanisms to be impartial. One interpretation of such, provided by practitioner and doctoral researcher Szkalej, is that the EU legislator acknowledges that OCSSPs may not have

[161] Article 17(4)(b) DSM Directive.
[162] Annemarie Bridy, 'The Price of Closing the "Value Gap": How the Music Industry Hacked EU Copyright Reform' [2020] Vanderbuilt Journal of Entertainment & Technology Law 323, 354.
[163] Article 17(9) DSM Directive.

incentive to scrutinize to the fullest extent whether uploaded content is infringing or not. Their initial interest may lie in avoiding liability for negligent, commercial, cross-border copyright infringement. Thus, the most significant decision may in reality take place when an effected user challenges the initial publication judgement of an OCSSP. A risk to this setup is that only the OCSSP-users who are legally and financially prepared to take on legal battles will see a point in challenging OCSSPs' decisions. Disputes over copyright infringement may in many cases stop at the first tier administered by OCSSPs, before any of the safeguards in Article 17(9) brought into force.[164]

Another factor of concern is the stipulated timeframe for redress. The redress function may appear unattractive to users due to the fact that it may take a while to until a decision on the allegedly infringing content is taken. A high degree of efficiency and reliability is essential for redress mechanisms to effectively serve as a counterbalance to filtering measures. However, there is evidence to suggest that users are unlikely to even file a complaint in the first place. If users can expect to wait a while for a final decision on their content, then the redress mechanism does not adequately balance the interests of users and rightsholders. User-generated content often deals with current events and film or music releases where it is important to react quickly in order to engage the targeted audience. Even if the redress function comes to a final decision that a certain content was permissible due to copyright exceptions, the moment may already have passed for the user-generated content to be successful.[165]

[164] Kacper Szkalej 'The New Copyright Directive: Article 17 and copyright limitations – picking two cherries and leaving the rest to spoil? Part II' (*Kluwer Copyright Blog*, 29 October 2019) <http://copyrightblog.kluweriplaw.com/2019/11/04/the-new-copyright-directive-article-17-and-copyright-limitations-picking-two-cherries-and-leaving-the-rest-to-spoil-part-ii/> accessed 25 May 2021.

[165] Martin Senftleben, 'Bermuda Triangle – Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market' (2019) 9.

4.7.1 Ex Post/Ex Ante Enforcement

In the situations where it applies, article 17 can be said to change copyright protection and enforcement from being ex post to ex ante. The traditional procedure for enforcement contains an initial evaluation of whether a work is protected or not. A negating answer means there is no copyright infringement and thereby no enforcement. If a work is protected under copyright or related rights, the next step of the evaluation is to determine whether any exceptions to exclusivity apply. The relevance of the exceptions can be determined through the three-step test. If there are no applicable exceptions, the copyright can be enforced in accordance with the legal options available.

In accordance with article 17, OCSSPs must determine if a work is identical or sufficiently similar to another copyright protected work before it is uploaded to the OCSSP's platform. If content is flagged for potential infringement, the OSCCP must enforce copyright by making the content unable to upload. The decision can then be challenged by the creator of the alleged infringing content in a complaints procedure set up by the OSCCP. Legal proceedings are also available at this stage.

5 Algorithmic enforcement through AI technology

5.1 Introduction

The thesis has now presented the content of EU copyright law, recognized the development of copyright exceptions and limitations through case law, and analyzed Article 17 DSM Directive. I have found that OCSSPs, in practice, must employ AI technology in order to comply with the demands of Article 17 DSM Directive.[166]

The following section includes a case study of YouTube's copyright management tools. YouTube is an OCSSP that must adhere to the requirements stipulated by Article 17 DSM Directive. The case study is included in the thesis in order to provide a practical example of how OCSSPs can choose to address Article 17's requirements.

Additionally in this chapter, algorithms that can be used in order to filter potentially copyright infringing content are explained. An understanding of these algorithms, and their inherent challenges, will be essential in order to answer the questions posed in section 1.2 of the thesis.

5.2 Case Study: YouTube

YouTube has created different types of copyright management tools that can be used by their creating users. The management tools are Copyright Takedown Webform, Copyright Match Tool, Content Verification Program and Content ID. One management tool, Copyright Takedown Webform, is available to all YouTube users. The remaining tools are available based on

[166] Chapter 4.5 of this thesis.

certain criteria, such as a proven need for frequent copyright management, available resources for the user to manage their content and rights, and users' knowledge of YouTube's copyright system. YouTube states on their Help Center webpage that they aim to expand availability of their management tools, but that they're also committed to protecting users from misuse of the tools that lead to disruption of their services.[167] A more through presentation of the management tools follows below.

5.2.1 Copyright Takedown

A Copyright Takedown requires a user who deems that their copyright has been violated to submit a formal notice. They can report the video they claim is subject to the breach through a webform via their YouTube account, or through email, fax or mail. The person submitting the request must be the copyright owner or an authorized representative.[168]

If a video is taken down as a result of a Copyright Takedown, then the user who had uploaded the infringing video receives a "copyright notice" as well as a "copyright strike". [169] The first time a user receives a copyright strike they are required to complete Copyright School, which is a program created by YouTube to help their creating users understand copyright and the way it is enforced by YouTube. If a user receives a copyright strike from a live stream, then their access to live streaming is restricted for 90 days. A copyright strike remains on a creator's account for three months before it expires. [170]

[167] 'Overview of copyright management tools' (*YouTube*, 2021) <https://support.google.com/youtube/answer/9245819?hl=en&ref_topic=9282364#zippy=%2Ccopyright-takedown-webform> accessed 25 April 2021.
[168] 'Submit a copyright takedown request' (*YouTube*, 2021) <https://support.google.com/youtube/answer/2807622> accessed 25 April 2021.
[169] 'The difference between copyright takedowns and Content ID claims' (*YouTube*, 2021) <https://support.google.com/youtube/answer/7002106?hl=en> accessed 25 April 2021.
[170] 'Copyright strike basics' (*YouTube*, 2021) <https://support.google.com/youtube/answer/2814000?hl=en#zippy=%2Cwhat-happens-when-you-get-a-copyright-strike> accessed 25 April 2021.

If a user accumulates three copyright strikes, then their account, as well as their associated channels, is subject to termination. Furthermore, all their videos are removed, and they are restricted from creating any new channels.[171]

5.2.2 Copyright Match Tool

YouTube's Copyright Match Tool is available for channels that demonstrate a need for a scaled management tool. The Copyright Match Tool identifies full reuploads of a creator's video and presents it to the creator in their YouTube account. It's then up to the creator to decide what action they would like to take. They can choose to archive the match, to message the channel, or to request removal. If they archive the match, then the matched video or channel is not affected. Users can return to their archived matched and choose a different action at a later date. The option to message the channel sends a pre-written email to the channel that has uploaded the matching video. The "request removal" action submits a legal request for YouTube to remove the matched video from the site. The affected channel receives a copyright strike if a video is taken down.[172]

In order to use the Copyright Match Tool, a user must be the first to upload the content to YouTube. YouTube uses the video upload time to decide which user account should be notified of the video matches. Users are notified of matching videos that are uploaded after the first video. The Copyright Match Tool finds full, or nearly full matches to creator's videos. The tool may not find matches if only part of a video is reuploaded. The same is true for reuploads containing only the audio from a video.[173]

On their Help Center website, YouTube clarifies that a match with a user's video does not guarantee there has been a copyright infringement.

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[171] Ibid, accessed 25 April 2021.
[172] 'Copyright Match Tool' (*YouTube*, 2021) <https://support.google.com/youtube/answer/7648743#zippy=%2Chow-can-i-get-access-to-the-copyright-match-tool> accessed 25 April 2021.
[173] Ibid, accessed 25 April 2021.

Therefore, they point out, it is important to use the Copyright Match Tool responsibly in order to limit misuse. A user that intentionally or repeatedly abuses the copyright removal process or attempts to reverse engineer the match system may lose access to the feature or have their account terminated.[174]

5.2.3 Content Verification Program

The Content Verification Program is designed for copyright owning companies to issue more than one removal request at a time. Using the program, copyright holders can find material they consider infringing to their material and give YouTube sufficient details to identify and remove it.[175] It is up the copyright owner to search YouTube, using the tool, by entering keywords, video IDs or selecting a filter such as channel ID, livestream, publish date or video length. If the copyright owner finds any infringing material through their search, then it is up to them to submit takedown requests for the infringing video. Under the Content Verification Program, it is possible to submit takedown requests in bulk. YouTube allows users to request the takedown of up to 100 videos at a time.[176]

5.2.4 Content ID

Content ID is a unique software that was built by YouTube in order to enable copyright owners find copies of their material on YouTube. It is granted by YouTube to copyright owners who meet certain criteria. The creator must own the exclusive copyright of a large body of original content that is regularly uploaded to YouTube by other users.[177] By reading the

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[174] 'Copyright Match Tool' (*YouTube*, 2021) <https://support.google.com/youtube/answer/7648743#zippy=%2Chow-can-i-get-access-to-the-copyright-match-tool> accessed 25 April 2021.
[175] 'Content Verification Program' (*YouTube*, 2021) <https://support.google.com/youtube/answer/6005923> accessed 25 April 2021.
[176] 'Use the Content Verification Tool' (*YouTube*, 2021) <https://support.google.com/youtube/answer/3010500?hl=en&ref_topic=9282364#zippy=%2Cfind-videos-that-match-your-assets%2Csubmit-copyright-takedown-requests> accessed 25 April 2021.
[177] 'How Content ID works' (*YouTube*, 2021) <https://support.google.com/youtube/answer/2797370#zippy=%2Cwho-can-use-content-id%2Cwhat-options-are-available-to-copyright-owners%2Crelated-topics> accessed 25 April 2021.

qualification criteria, one can immediately conclude that the main beneficiaries of Content ID would be large companies.

Users who want to qualify for content ID have to show evidence of the copyrighted content of which they have the exclusive rights. Once someone is approved for Content ID, they have to complete an agreement with YouTube. The agreement will state that only material with exclusive rights can be used as reference. The copyright owner will also have to provide the geographic locations of exclusive ownership of the material.[178]

They then provide YouTube with audio or video reference files that identify their copyrighted works. From these files, Content ID creates a so called "fingerprint" that is kept in a database of hundreds of years of content. The YouTube website is scanned against these fingerprints to identify potential matches. The fingerprints are advanced enough that they can identify video, audio, and even melodies that are imitated from the original content.[179]

Some content is not exclusive to a certain user. Examples of such material are mashups, "best of"s, compilations, and remixes of other works, video gameplay, software visuals, trailers, unlicensed music and video, music or video that was licensed but without exclusivity, and recordings of performances.[180]

If a match is identified, Content ID gives the copyright owner more options beyond removal of copies. The owner can block videos, monetize videos, or track the video's viewership. By monetizing the video, the ad revenue that is generated from the video goes to the copyright owner or is sometimes shared with the uploader. By tracking the video's viewership statistics, they

[178] 'Qualify for Content ID' (*YouTube*, 2021) <https://support.google.com/youtube/answer/1311402> accessed 25 April 2021.
[179] 'How Content ID works' (*YouTube*, 2021) <https://support.google.com/youtube/answer/2797370#zippy=%2Cwho-can-use-content-id%2Cwhat-options-are-available-to-copyright-owners%2Crelated-topics> accessed 25 April 2021.
[180] 'Qualify for Content ID' (*YouTube*, 2021) <https://support.google.com/youtube/answer/1311402> accessed 25 April 2021.

can access detailed analytics such as which countries the content is popular in. According to YouTube, the most popular option is for copyright owners to monetize their owned content. YouTube states that they have paid out billions of US dollars in advertisement revenue to content owners through Content ID.[181]

As opposed to copyright takedown notices, which result in copyright strikes, there is no limit to the number of Content ID claims a channel can receive. The Content ID claims don't affect a user's channel or their access to features. They may, however, affect monetization of videos.[182]

Users that have been subject to a Content ID claim can dispute the claim. YouTube informs users through their Help Center webpage that disputes are intended for instances where the uploader has all necessary rights to the content in the relevant video. They further encourage users to gain an understanding of copyright law and potential copyright exceptions, or alternatively, seek legal advice in order to determine if they should dispute a claim or not.[183]

After a video is disputed, the copyright owner then has 30 days to respond. They can choose to release their claim if they agree with the dispute, or they can choose to uphold the claim if they consider it valid. If they don't take any action, their claim on the disputed video will expire after 30 days. They can also choose, however, to submit a copyright takedown request to remove the disputed video from the site. If a video is removed through a

[181] 'How Content ID works' (*YouTube*, 2021) <https://support.google.com/youtube/answer/2797370#zippy=%2Cwho-can-use-content-id%2Cwhat-options-are-available-to-copyright-owners%2Crelated-topics> accessed 25 April 2021.
[182] Video: 'Copyright Takedowns & Content ID – Copyright on YouTube' (*YouTube*, 2021) <https://www.youtube.com/watch?v=4qfV0PRsCrs&list=PLpjK416fmKwRnRbv72ksHRYEknNSaAFkd> accessed 25 April 2021.
[183] 'Dispute a Content ID claim' (*YouTube*, 2021) <https://support.google.com/youtube/answer/2797454> accessed 25 April 2021.

takedown request, this results in a copyright strike to the uploader's account.[184]

If a copyright owner denies a user's dispute of a Content ID claim, then the user has the option to file an appeal. The copyright owner has 30 days to respond to the appeal. They can again choose to release their claim or take no action, in which case their claim seizes. They also receive two options for takedown of the disputed video. They can choose to request immediate removal of the video, which results in a copyright strike for the uploader, or they can schedule a takedown request for the video in 7 days. If a takedown request is scheduled, then the uploader can choose to cancel their appeal and have the Content ID claim remain active on the video. The uploader may choose to do so in order to avoid a copyright strike from the pending takedown.[185]

If a video is removed from YouTube during the appeal stage, resulting in a copyright strike for the uploader, and the uploader withholds that they have the appropriate rights to upload the video, then the final action is to submit a counter notification. A counter notification is a legal request for YouTube to reinstate the video. It is available for users if a video was removed for alleged copyright infringement due to a mistake or misidentification of the material. Complete and valid counter notifications are forwarded by YouTube to the claimant, who then has 10 business days to provide evidence that they have initiated a court action to keep the content down. If they fail to do so within the timeframe, then the disputed video is reinstated to YouTube.[186]

[184] 'Dispute a Content ID claim' (*YouTube*, 2021) <https://support.google.com/youtube/answer/2797454> accessed 25 April 2021.
[185] Ibid, accessed 25 April 2021.
[186] Ibid, accessed 25 April 2021.

During the dispute process, YouTube holds on to any revenue earned separately and releases it to the user that has won the dispute once the it is resolved.[187]

5.2.5 Algorithms behind Content ID

For competitive reasons, most online platforms, including YouTube, resist disclosure of the algorithms they use.[188] Something can be said, however, about the way content filtering algorithms often work. In order to analyze uploaded content, the algorithms break down data into smaller units, that are them compared to the data existing in the database. There are two common ways of doing this, through either "hashing" or "search" algorithms.[189]

Hashing algorithms transform values into a shorter "key". A basic time unit of, for example, audio content is transformed into a sequence of bits, which are units of information with only two values, such as 0 and 1. The objective is to generate unique keys of different strings of original values. It is, however, possible that two different pieces of content generate the same or similar has values. The risk of the creating of so-called "clashes" stems from the fact that hashing techniques reduce content into small sets of values and all algorithms using the technique have a theoretical risk of generating clashes. The risk of clashes is minimized by using "robust" hashing, which are hash values generated from statistics from signals that are relatively immune to processing. Robust hash values are, for example, not affected by which file format the analyzed content is in.[190]

Hash values are compared by the "distance" between the hash blocks. The distance is calculated by counting the number of places where the two hash

[187] 'How Content ID works' (*YouTube*, 2021) <https://support.google.com/youtube/answer/2797370#zippy=%2Cwho-can-use-content-id%2Cwhat-options-are-available-to-copyright-owners%2Crelated-topics> accessed 25 April 2021.
[188] Toni Lester and Dessislava Pachamanova, 'The Dilemma of False Positives: Making Content ID Algorithms more Conducive to Fostering Innovative Fair Use in Music' [2017] UCLA Entertainment Law Review 51, 54.
[189] Ibid 61-62.
[190] Ibid 62-63.

sequences are different. The hashing algorithm includes a threshold for which distance between two hash values is considered close enough that an infringement is identified. A small threshold means the algorithm is less likely to report a false positive because the two has values would then have to be close to identical to generate a match. However, if the algorithm is unsuccessful in creating unique hash keys for original content, then a low threshold value cannot be used to compensate for that original flaw.[191]

Another type of algorithm used for copyright enforcement are search algorithms. These algorithms can deconstruct audio content into elementary units of music, "music phonemes". In order to represent a song in a database, a sequence of phonemes is created. Characteristics of a piece of audio are reduced to a smaller set of representative characteristics. When combined in the right way, these characteristics can generate audio existing in the database. Search algorithms develop continuously as songs are added to their database. They do so by revising the set of phonemes to better represent songs in the database.[192]

Search algorithms evaluate audio by identifying matches for fragments of pieces of audio, and continuously calculating the probability that the matching units of music are in fact the same audio clip. As with hashing algorithms, a set threshold probability value determines whether the algorithm deems audio to be infringing or not. A lower probability threshold results in more infringement matches whereas a higher probability threshold results in less infringement matches. A possibility for false positives stem from the fact that audio can have very similar peaks, lows, and frequencies despite not being the same audio.[193]

[191] Toni Lester and Dessislava Pachamanova, 'The Dilemma of False Positives: Making Content ID Algorithms more Conducive to Fostering Innovative Fair Use in Music' [2017] UCLA Entertainment Law Review 51, 63.
[192] Ibid 63.
[193] Ibid 64.

5.2.5.1 Technical challenges

A significant challenge for copyright enforcement challenges is data quality. Research has shown that even highly accurate algorithms can fail to accurately classify audio pieces when they are used on music recordings from cell phones. The researchers found that recordings from phones were "marked with substantial quality degradation of the test audio, a significant spectral tilt introduced by the mobile phone microphone, as well as noise and channel characteristics introduced by recording in a real-world environment."[194] When the quality of the input data is low it may be a poor representation of the actual audio. As with most AI, the output is only as reliable as the input data.[195]

Another challenge can be for algorithms to identify content that is non-infringing due to copyright exceptions and limitations. Algorithms can identify matching elements of content, but they cannot assess the purpose for which the matching elements were used.[196]

The translation of legal text into algorithms provides further challenges. Potentially biased code writers, without legal training, must translate policy from legal text to code. There is a risk that the resulting enforcement algorithms advance OCSSPs own interpretation of the law. The code may even be affected by unconscious bias.[197] In any case, there is incentive for OCSSPs to build code that produces errs on the side of false positives, as that can make the licensing process with rightsholders more convenient. YouTube's Content ID has been known to result in many false positives.[198]

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[194] Pavel Golik, et al., 'Mobile Music Modeling, Analysis and Recognition' (Research at Google 2012) <https://storage.googleapis.com/pub-tools-public-publication-data/pdf/37754.pdf> 1.
[195] Toni Lester and Dessislava Pachamanova, 'The Dilemma of False Positives: Making Content ID Algorithms more Conducive to Fostering Innovative Fair Use in Music' [2017] UCLA Entertainment Law Review 51, 64.
[196] Ibid.
[197] Maayan Perel & Niva Elkin-Koren, 'Accountability in Algorithmic Copyright Enforcement' [2016] STAN.TECH. L.REV. 473, 518.
[198] Maayan Perel & Niva Elkin-Koren, 'Accountability in Algorithmic Copyright Enforcement' [2016] STAN.TECH. L.REV. 473, 516.

For example, a video of a cat purring is among the content that has been flagged as copyright infringing music.[199]

[199] Ernesto Van der Sar, YouTube Flags Cat Purring as Copyright Infringing Music, (*Torrentfreak*, 11 February 2015) <https://torrentfreak.com/youtube-flags-cat-purring-as-copyright-infringing-music-150211/>.

6 Analysis

6.1 Introduction

The purpose of this thesis has been to evaluate the relationship between copyright exceptions, as provided in the EU's InfoSoc Directive, and the use of algorithmic enforcement by OCSSPs in order to comply with Article 17 of the DSM Directive. Furthermore, the thesis has aimed to analyse the development of copyright exceptions through case law from the CJEU and compare the development to the requirements that are instated by the DSM Directive. As Article 17 relies on technical measures for enforcement, part of the discussion will cover whether the existing scope of copyright exceptions is compatible with algorithmic enforcement. In order to guide the analysis and fulfil the purpose of the thesis, I posed two research questions. The first question was whether Article 17 of the DSM Directive changes the scope of copyright exceptions and limitations. The second question was what the required technical means for enforcement would mean for creators' ability to produce content on the basis of copyright exceptions and limitations, including but not limited to, quotation, criticism, review, parody or pastiche.

The following chapter is divided in two sections, which answer one research question each. Some consideration is given to possible further research.

6.2 The scope of copyright exceptions and limitations

The first research question of the thesis was whether the Article 17 of the DSM Directive changes the scope of copyright exceptions and limitations.

As presented in chapter 2 of this thesis, EU copyright legislation includes one mandatory and 21 optional exceptions or limitations that Member States can choose to implement. These exceptions shall be applied to situations in light of the three step test, which provides requirements for acts to be included under exceptions and limitations. The scope of copyright exceptions and limitations in the EU legal framework has been analyzed through case law, as the CJEU has played a significant role in their harmonization throughout the EU. The majority of the cases presented in chapter 3 were settled before the DSM Directive was enacted. This allows for a comparison of copyright exceptions and limitations before and after the DSM Directive.

In chapter 3, I found that the CJEU prioritized a few things. The Court seemed to make an effort to harmonize copyright exceptions and limitations and to ensure a fair balance between the interests of rightsholders and the freedom of expression for users of copyrighted works. As was described in chapter 2.5, the right to ownership in intellectual property and the freedom of expression are protected by the Charter and sometimes compete with each other.

The fair balance between rightsholders and users of works, that the Court has emphasized in its decisions, was found to be internalized in copyright law through limitations and exceptions. The Court denied Member States the option to allow copyright exceptions and limitations on the basis of fundamental rights. Instead, it emphasized the status of exceptions and limitations as rights in and of themselves.

Article 17(7) DSM Directive makes the exceptions of quotation for the purpose of criticism and review and use of works for the purpose of caricature, parody, and pastiche mandatory for member states. Through recital 70, the European lawmaker motivates this by stating the importance of copyright exceptions and limitations in guaranteeing users' freedom of expression. Furthermore, the recital emphasizes the importance of finding a

balance between the fundamental rights of ownership of intellectual property and freedom of expression. The motivations behind Article 17(7) are similar to several considerations by the Court presented in this thesis' case study.

In my opinion, the Directive's inclusion of mandatory exceptions and limitations is not surprising based on the CJEU's case law. As stated above, the fair balance between rightsholders and users of works can be said to be internalized in copyright law through limitations and exceptions. For this reason, it seems natural to make certain exceptions and limitations mandatory in order to ensure a fair balance of rights across the EU.

Furthermore, the development is not surprising against the background of increased harmonization. The Court has showed an intent to harmonize exceptions and limitations, even those that were voluntary. The legislative bodies choses to continue this action by making several more exceptions and limitations mandatory.

In an obvious way, Article 17(7) of the DSM Directive changes the scope of copyright exceptions and limitations by making quotation for the purpose of criticism and review and use of works for the purpose of caricature, parody and pastiche mandatory. However, I have not collected evidence that the Directive changes the scope of these, or any other, exceptions in regard to the content of the exceptions and limitations. At least, this is, in the theoretical application of exceptions and limitations and the actual content of the law. The motivation behind exceptions and limitations is similar to the previous reasoning by the CJEU. The creation and publication of work on the basis of copyright exceptions and limitations under the DSM Directive in practice, however, is examined in the following section.

6.3 Content relying on copyright exceptions and limitation

The second research question was what the implied technical requirement of Article 17(4) DSM Directive would mean for creators' ability to produce content on the basis of copyright exceptions and limitations, including but not limited to, quotation, criticism, review, parody or pastiche. As I found above, the content of copyright exceptions and limitations have not changed through the adoption of the DSM Directive. This section analyses what the Directive means for copyright exceptions and limitations *in practice*.

As is made clear in chapter 4, the DSM Directive has provisions that are meant to safeguard the over-filtering of content. One of these provisions is Article 17(7), which holds that the cooperation between OCSSPs and rightsholders shall not result in the prevention of availability of content that do not infringe copyright, including on the basis of exceptions and limitations. Based on what I found in chapter 5 of this thesis, I make the assumption that the technical requirements of Article 17(4) will make such prevention inevitable.

Perhaps the biggest issue of the DSM Directive in relation to copyright exceptions and limitations is the current technology available for algorithmic enforcement in combination with the incentive for OCSSPs to avoid liability for copyright infringement.

The algorithms that can be used for copyright enforcement are described in chapter 5. In this section, I found that the AI breaks down content into its smallest building blocks, whether it be hash values or elementary units of music. Through this technique, systems such as YouTube's Content ID can identify short pieces of infringing material. The algorithms are set to have a certain threshold value of have many hashes or elements can be a match before the AI flags content of copyright infringement. The lower the

threshold value is, the bigger the risk of false positives; the higher the threshold value is, the bigger the risk of the AI missing infringing content. As OCSSPs' main incentive may be to avoid liability for copyright infringement, the incentive is there to set the algorithm at a low threshold value. False positives would not cost the platform anything. It would be up to the flagged user to initiate the complaint and redress system. Too many false negatives, however, could be costly for the OCSSP if it is deemed non-compliant with the "best efforts" requirement of Article 17(4) DSM Directive.

Even if the probability threshold is at a level that does not amount to a notable number of positive matches, the AI technology still can't seem to conduct all-embracing evaluation of whether the use of copyrighted material should be allowed due to an exception or limitation. The algorithms do not have the ability to assess the purpose for which the matching elements of content are used. Any content that is created on the basis of, for example, quotation for the purpose of criticism and review will be flagged by systems such as YouTube's content ID.

As the requirements of the DSM Directive are expressed, I find it will be difficult for creators to create content on the basis of copyright exceptions and limitations. While the Directive states that it shall not result in the prevention of the availability of content that is not infringing, this thesis has found that such guarantees are incompatible with the demands of algorithmic enforcement that the Directive implicates.

Another issue is the complaint and redress system required by the Directive. Article 17(9) DSM Directive provides that OCSSPs must have an impartial complaint and redress system, where requests are reviewed by humans. In chapter 4, I present concerns that have been raised in relation to the system provided by the Directive. For example, the timeframe of the redress function. The YouTube case study illustrates this. After a user disputes a claim on a video that has been flagged for infringement by Content ID, the

owner of the copyrighted material it is allegedly infringing has 30 days to respond to the dispute. User-generated content often deals with new releases in film, TV or music. In this category of entertainment, an initial processing time of 30 days is likely too long. Furthermore, I found evidence to suggest that most users are unlikely to even protest the findings of the algorithmic enforcer in the first place. Because of this, I find the mandatory complaint and redress systems to be a poor excuse for unreliable algorithmic enforcers. If the complaint and redress systems are not used as they should, or are unreliable, then the initial evaluation by the AI is much more significant.

The DSM Directive does not claim to aim to undermine copyright exceptions and limitations. On the contrary, the Directive makes additional exceptions and limitations mandatory to Member States, and it states that it shall not result in the prevention of availability of content that do not infringe copyright, including on the basis of exceptions and limitations. However, as I argue throughout this thesis, these aims are incompatible with the demands on OCSSPs to monitor their platforms by way of algorithmic enforcement.

There are scholars that have presented solutions as to how they suggest European countries may combat this incompatibility. These proposed solutions are not part of the purpose of this thesis, but they would be a good starting point for future research.

Lambrecht, a researcher and lecturer, argues that the dilemma can solved through an approach she calls “Freedom of Speech by design”. As copyright exceptions and limitations have been recognized as users’ *rights*, she says, their legal guarantees must move beyond the declaratory and be given effect. Exceptions and limitations could be protected by default in algorithmic copyright systems. The AI systems would then have to be

trained not only to find infringing content but also trained to find exceptions and limitations.[200]

Senftleben offers another solution. He states that the problem of over-filtering copyright exceptions and limitations can be solved through a reverse filtering logic. His solution would allow for users to create, for example, music mashups without being subject to infringement. Member States would be required to take another look at the "pastiche" exception when they implement the Directive. He argues that pastiche can be extended to include user generated content such as remixes. A broadening of users' privileges could motivate a reverse filtering logic. In such cases, algorithms would not focus on finding traces of copyrighted content in user generated content. The decisive factor would instead be whether the user had added enough own material.[201]

A suggestion for further research would be to evaluate and analyse these, and other, proposed solutions.

[200] 'Free Speech by Design – Algorithmic protection of exceptions and limitations in the Copyright DSM Directive.' [2020] JIPITEC <https://www.jipitec.eu/issues/jipitec-11-1-2020/5080> accessed 25 May 2021

[201] Martin Senftleben, 'Bermuda Triangle – Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market' (2019) 15 ff.

7 Conclusions

The thesis has examined copyright exceptions and limitations under the DSM Directive. The purpose of the thesis was to evaluate the relationship between copyright exceptions, as provided by the InfoSoc Directive, and the use of algorithmic enforcement by OCSSPs in order to comply with Article 17 of the DSM Directive.

The first research question was whether Article 17 of the DSM Directive changes the scope of copyright exceptions and limitations. The case law analysis found that the CJEU has harmonized copyright exceptions and limitations through its precedents. The Court emphasized ensuring a fair balance between the interests of rightsholders and users of protected works. Fundamental rights cannot be used by Member States to expand copyright exceptions and limitations. These are, however, to be considered rights in and of themselves. Through an analysis of Article 17 of the DSM Directive, I have found that the Directive does not change the legal content of copyright exceptions and limitations, except in the sense that some exceptions and limitations are made mandatory for Member States.

The second research question was what the Article 17 means for creators' ability to produce content based on copyright exceptions and limitations. Article 17(7) of the DSM Directive expresses that the provision shall not result in the prevention of the availability of works that do not infringe copyright. The further investigation, however, has found that the technical requirement of Article 17(4) of the DSM Directive is incompatible with this notion. A case study of YouTube's copyright enforcement system, as well as an analysis of algorithms used for enforcement, found that the current artificial intelligence is likely unable to accurately detect and protect copyright exceptions and limitations in users' works.

In conclusion, the thesis finds that the requirement of for algorithmic enforcement, as it is currently provided, is not compatible with the notion of copyright exceptions and limitations as rights of users of works.

Bibliography

EU legislation

Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs

Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property

Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission

Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights

Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases

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

Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art

Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights

Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works

Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market

Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society

Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC

Directive 2000/31/EC of the European Parliament and of the Council of June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market

Preparatory works

Commission Proposal for a Directive of the European Parliament and the Council on Copyright in the Digital Singe Market, COM (2016) 593 final (Sept. 14, 2016)

Official Printed Communication

Communication from the Commission 'Europe 2020 A strategy for smart, sustainable and inclusive growth' [2020] <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC2020&from=en>

Official Journal of the European Union C 303/17 - 14.12.2007

Treaties

Agreement on Trade-Related Aspects of Intellectual Property Rights (1995)

Berne Convention for the Protection of Literary and Artistic Works (1886)

European Union Charter of Fundamental Rights (2009)

European Convention of Human Rights (1994)

The Vienna Convention on the Law of Treaties (1969)

World Intellectual Property Organization Copyright Treaty (1996)

World Intellectual Property Organization Phonograms and Performances Treaty (1996)

Literature

Annemarie Bridy, 'The Price of Closing the "Value Gap": How the Music Industry Hacked EU Copyright Reform' [2020] Vanderbuilt Journal of Entertainment & Technology Law 323

Krisjanis Buss Baltic 'COPYRIGHT AND FREE SPEECH: THE HUMAN RIGHTS PERSPECTIVE' [2015] Journal of Law & Politics 182

Stijn van Deursen, Thom Snijders ‘The Court of Justice at the Crossroads: Clarifying the Role for Fundamental Rights in the EU Copyright Framework’ [2018] IIC < https://doi.org/10.1007/s40319-018-0745-8> accessed 25 May 2021

Niva Elkin-Koren, ‘Fair Use by Design’ [2017] UCLA Law Review 64 1082

Marcella Favale, Martin Kretschmer and Paul C. Torremans ‘IS THERE A EU COPYRIGHT JURISPRUDENCE? An empirical analysis of the workings of the European Court of Justice’ [2016] Modern Law Review <https://doi.org/10.1111/1468-2230.12166> accessed 25 May 2021

Federico Ferri, ‘The dark side(s) of the EU Directive on copyright and related rights in the Digital Single Market’ [2020] China-EU Law Journal <https://doi.org/10.1007/s12689-020-00089-5> accessed 25 May 2021

Christophe Geiger, ‘From Berne to national law, via the Copyright Directive: the dangerous mutations of the three-step test’ [2007] European Intellectual Property Review 486

Pavel Golik, et al., ‘Mobile Music Modeling, Analysis and Recognition’ (Research at Google 2012) <https://storage.googleapis.com/pub-tools-public-publication-data/pdf/37754.pdf>

Andrea Katalin Tóth, ‘Algorithmic copyright enforcement and AI: Issues and Potential Solutions, through the lens of text and data mining’ (2019)

Jan Kleineman ‘Rättsdogmatisk metod’ in Maria Nääv, Mauro Zamboni (ed.), *Juridisk metodlära* (2 uppl. Studentlitteratur 2018)

Maxime Lambrecht ‘Free Speech by Design – Algorithmic protection of exceptions and limitations in the Copyright DSM Directive.’ [2020] JIPITEC <https://www.jipitec.eu/issues/jipitec-11-1-2020/5080> accessed 25 May 2021

Toni Lester and Dessislava Pachamanova, ‘The Dilemma of False Positives: Making Content ID Algorithms more Conducive to Fostering Innovative Fair Use in Music’ [2017] UCLA Entertainment Law Review 51

Maayan Perel & Niva Elkin-Koren, ‘Accountability in Algorithmic Copyright Enforcement’ [2016] STAN.TECH. L.REV. 473

Jane Reichel ‘EU-rättslig metod’ in Maria Nääv, Mauro Zamboni (ed.), *Juridisk metodlära* (2 uppl. Studentlitteratur 2018)

Eleonora Rosati, *Copyright and the Court of Justice of the European Union* (Oxford Scholarship Online 2019)

Wulf-Henning Roth, 'The Importance of the Instruments Provided for in the Treaties for Developing a European Legal Method' in Ulla Neergaard, Ruth Nielsen and Lynn Roseberry (eds.) European legal method: paradoxes and revitalization (DJØF Publishing 2011)

Claes Sandgren, *Rättsvetenskap för uppsatsförfattare: ämne, material, metod och argumentation* (4 uppl., Nordstedts Juridik 2018)
Sebastian Schwemer and Jens Schovsbo, 'What is Left of User Rights? – Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime' in Paul Torremans (ed.), *Intellectual Property Law and Human Rights* (4th edi., Wolters Kluwer, 2020)

Sebastian Schwemer and Jens Schovsbo, 'What is Left of User Rights? – Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime' in Paul Torremans (ed.), *Intellectual Property Law and Human Rights* (4th edi., Wolters Kluwer, 2020)

Martin Senftleben, 'Bermuda Triangle – Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market' (2019)

Caterina Sganga, 'A Decade of Fair Balance Doctrine, and How to Fix It: Copyright versus Fundamental Rights before the CJEU from Promusicae to Funke Medien, Pelham and Spiegel Online' [2019] European Intellectual Property Review

Thom Snijders & Stijn van Deursen, 'The Road Not Taken – the CJEU Sheds Light on the Role of Fundamental Rights in the European Copyright Framework – a Case Note on the Pelham, Spiegel Online and Funke Medien Decisions' [2019] IIC <https://doi.org/10.1007/s40319-019-00883-0> accessed 25 May 2021 1176

Websites

'Content Verification Program' (*YouTube*, 2021) <https://support.google.com/youtube/answer/6005923> accessed 25 April 2021.

'Copyright Match Tool' (*YouTube*, 2021) <https://support.google.com/youtube/answer/7648743#zippy=%2Chow-can-i-get-access-to-the-copyright-match-tool> accessed 25 April 2021.

'Copyright strike basics' (*YouTube*, 2021) <https://support.google.com/youtube/answer/2814000?hl=en#zippy=%2Cwhat-happens-when-you-get-a-copyright-strike> accessed 25 April 2021.

'Dispute a Content ID claim' (*YouTube*, 2021)

<https://support.google.com/youtube/answer/2797454> accessed 25 April 2021.

Ernesto Van der Sar, YouTube Flags Cat Purring as Copyright Infringing Music, (*Torrentfreak*, 11 February 2015) <https://torrentfreak.com/youtube-flags-cat-purring-as-copyright-infringing-music-150211/> accessed 21 May 2021.

Global Freedom of Expression, 'Deckmyn v. Vandersteen' (*Colombia University*, 2021) https://globalfreedomofexpression.columbia.edu/cases/deckmyn-v-vandersteen/ accessed 10 May 2021.

Global Freedom of Expression, 'Technische Universität Darmstadt v. Eugen Ulmer KG' (*Colombia University*, 2021) <https://globalfreedomofexpression.columbia.edu/cases/technische-universitat-darmstadt-v-eugen-ulmer-kg/> accessed 10 May 2021.

'How Content ID works' (*YouTube*, 2021) <https://support.google.com/youtube/answer/2797370#zippy=%2Cwho-can-use-content-id%2Cwhat-options-are-available-to-copyright-owners%2Crelated-topics> accessed 25 April 2021.

Kacper Szkalej 'The New Copyright Directive: Article 17 and copyright limitations – picking two cherries and leaving the rest to spoil? Part I' (*Kluwer Copyright Blog*, 29 October 2019) <http://copyrightblog.kluweriplaw.com/2019/10/29/the-new-copyright-directive-article-17-and-copyright-limitations-picking-two-cherries-and-leaving-the-rest-to-spoil-part-i/> accessed 25 May 2021.

Kacper Szkalej 'The New Copyright Directive: Article 17 and copyright limitations – picking two cherries and leaving the rest to spoil? Part II' (*Kluwer Copyright Blog*, 29 October 2019) <http://copyrightblog.kluweriplaw.com/2019/11/04/the-new-copyright-directive-article-17-and-copyright-limitations-picking-two-cherries-and-leaving-the-rest-to-spoil-part-ii/> accessed 25 May 2021.

'Overview of copyright management tools' (*YouTube*, 2021) <https://support.google.com/youtube/answer/9245819?hl=en&ref_topic=9282364#zippy=%2Ccopyright-takedown-webform> accessed 25 April 2021.

'Qualify for Content ID' (*YouTube*, 2021) <https://support.google.com/youtube/answer/1311402> accessed 25 April 2021.

'Submit a copyright takedown request' (*YouTube*, 2021) <https://support.google.com/youtube/answer/2807622> accessed 25 April 2021.

‘The difference between copyright takedowns and Content ID claims’ (*YouTube*, 2021) <https://support.google.com/youtube/answer/7002106?hl=en> accessed 25 April 2021.

‘Use the Content Verification Tool’ (*YouTube*, 2021) <https://support.google.com/youtube/answer/3010500?hl=en&ref_topic=9282364#zippy=%2Cfind-videos-that-match-your-assets%2Csubmit-copyright-takedown-requests> accessed 25 April 2021.

Video: ‘Copyright Takedowns & Content ID – Copyright on YouTube’ (*YouTube*, 2021) <https://www.youtube.com/watch?v=4qfV0PRsCrs&list=PLpjK416fmKwRnRbv72ksHRYEknNSaAFkd> accessed 25 April 2021.

Table of Cases

Case C-117/13 *Technische Universität Darmstadt v Eugen Ulmer KG* ECLI:EU:C:2014:1795

Case C-160/15 *GS Media BV v Sanoma Media Netherlands BV and others* ECLI:EU:C:2016:221

Case C-610/15 *Stichting Brein v Ziggo BV and XS4All Internet BV.* ECLI:EU:C:2017:456

Case C-516/17 *Spiegel Online GmbH v Volker Beck* ECLI:EU:C:2019:16

Case C-469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland* ECLI:EU:C:2019:623