Article 17(7) of Directive 2019/790 on Copyright and Related Rights in the Digital Single Market

Is Everything Set in Stone?

Kristina Boehm

Master's Thesis in European and International Trade Law

HARN63

Spring 2021

LUND UNIVERSITY

SCHOOL OF ECONOMICS AND MANAGEMENT

Table of Contents

Abstract

Prior to the adoption of Article 17 of the Directive (EU) 2019/790 on Copyright and Related Rights in the Digital Single Market, the e-Commerce Directive provided hosting liability exemptions for intermediary service providers. In addition, copyright exceptions and limitations were previously optional and their implementation was at liberty of the Member States. Under the new Article 17 Member States are obliged to allow exceptions and limitations enlisted under Article 17(7): '(a) quotation, criticism, review; (b) … for the purpose of caricature, parody or pastiche'. Under certain criteria platform hosting providers may be classified as Online Content Service Providers, who engage in 'communication or making available to the public'. In such cases, they become liable for content uploaded on their platform by their users, unless the service providers conclude a licensing agreement with the rightholders or implement the 'best efforts' method to fulfil an obligation under Article 17. On the one hand, the Directive attempts to safeguard the freedom of expression online, on the other hand, introduction of Article 17 may impose inevitable *implied* filtering requirements, as [in]directly expressed under Article 17(4). The freedom of expression of users is still the underlying question, as content filtering will most likely be accomplished by technological means. The result of the research confirmed mandatory nature of exceptions and limitations under Article 17(7) of the Copyright Directive, yet their definition scope could be more elaborate to be implemented uniformly across the EU Member States. According to some scholars there are several inherent contradictions within Article 17 DSMD; and one could say also with e-Comm. Directive, yet it is very much a matter of interpretation and perspective, as some underlying obligations are *implied* as opposed to *expressed*.

Foreword

Analysis of the Directive or its certain aspects comprises a number of technicalities and procedures to follow. I would like to acknowledge Senior Lecturer Johan Axhamn for the time, dedication and continuous support in writing the thesis. I am grateful to Department of Business Law at Lund University, including but not limited to a head of department Professor Jörgen Hettne, academic advisor Sofia Rosendahl and the lecturers for encouraging the students amidst the times of Covid-19.

Abbreviations and Acronyms

CJEU	Court of Justice of the European Union
COD	The Ordinary Legislative Procedure (CODECISION)
Digital Services Act	Proposal for a Regulation 2020/0361(COD) of the European Parliament and of the Council on a Single Market For Digital Services
DSM	Digital Single Market
DSMD/ The Copyright Directive	Directive (EU) 2019/790 on Copyright and Related Rights in the Digital Single Market
ECS	European Copyright Society
E-Comm. Directive	Directive 2000/31/EC of the European Parliament and of the Council on Information Society Services, in particular Electronic Commerce ('Directive on Electronic Commerce')
EC/The Commission	European Commission
EP	European Parliament
EU	European Union
GIF	Graphics Interchange Format
InfoSoc Directive	Directive 2001/29/EC of the European Parliament and of the Council on the Harmonisation of Copyright and Related Rights in the Information Society
IP	Intellectual Property
OCSSP	Online Content-Sharing Service Provider
TFEU	Treaty on the Functioning of the European Union
The Charter	Charter of Fundamental Rights of the European Union
The Guidance	The Guidance on Article 17 DSMD by the Commission (2021)
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UGC	User-Generated Content
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty

1 Introduction

1.1 Background

Condorcet argued that knowledge is objective and thus intrinsically public. Diderot, Young, Lessing and Fichte, on the other hand, presumed that knowledge originates in the individual mind and thus should be considered a private property. Supporters of Condorcet believed that exclusive legal rights to individuals could only be justified if it encourages the creation and transmission of new ideas. Advocates of opposing doctrine of Diderot, Young, Lessing and Fichte postulated that perpetual property is intrinsic and legal recognition of that right was simply rational. The utilitarian position maintained the public interest, while natural-rights proponents stressed the paramountcy of the individual creator.[1] How about the rights of the creators to a fair remuneration in the world wide web (internet), on the one hand, and the users' rights on the other, can a balance be achieved?

1.1.1 The EU's Fundamentals for Copyright Liability

In a nutshell the regulatory structure of the European Union (hereafter 'EU') for copyright jurisdictions comprises eleven Directives and two regulations.[2] The copyright regime originates from the World Intellectual Property Organization (hereafter 'WIPO') Internet Treaties: the WIPO Copyright Treaty (hereafter 'WCT') and the WIPO Performances and Phonograms Treaty (hereafter 'WPPT'), signed by the EU in 1996, ratified in 2009 and entered into force in 2010. These treaties substantiate the current copyright regime and also incentivized software and databases to be eligible for copyright protection.[3]

The Berne Convention[4], signed by the EU Member States, governs copyright in the EU and establishes minimum protections. The Berne Convention continues to constitute the basic elements of the European copyright system. The EU is bound to follow the rules set out in the Berne Convention via the Agreement on Trade-

[1] Hesse C. (2002) *The Rise of Intellectual Property, 700 B.C.-A.D. 2000: An Idea in the Balance*. Daedalus, no. 2.
[2] See Appendix A.
[3] Guze N. (2019) *Net Neutrality and the EU's copyright Directive for the DSM*, 43(1) Loy. L.A. Int'l & Comp. L. Rev. 63
[4] Berne Convention for the Protection of Literary and Artistic Works <https://www.wipo.int/treaties/en/ip/berne/> (Last visited 20.07.2021).

Related Aspects of Intellectual Property Rights (hereafter 'TRIPS Agreement'). Article 13 of the TRIPS Agreement sets out exceptions and limitations:

> 'Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightholder.'[5]

The Berne Convention contains a similar provision incorporating the exclusive right of reproduction in Article 9(2). It permits the replacement of the exclusive right of broadcasting, and the exclusive right of recording of musical works, by non-voluntary licenses. Article 10(1) allows: 'to make quotations from a work which has already been lawfully made available to the public'. Under Article 9(1) of the TRIPS Agreement, it will be mandatory for the members to institute exceptions for quotations under Article 10(1) – the mandatory exception under Berne Convention. As it comes to others, there is no obligation for any of these exceptions or limitations to be acknowledged, yet in case they are, the conditions laid down in the Berne Convention will need to be accounted for.[6]

The Berne Convention 1971 Paris Act articulated 'the right of communication to the public' in a somewhat scattered manner, emerging in 'public performance'; 'communication to the public', 'public communication', 'broadcasting', and other forms of transmission. The WTC systematized those definitions by fully covering the communication right for all protected works of authorship. The WCT also invented a new formulation, the 'right of making available to the public'. According to Article 8 WTC this right corresponds to communication of works over the internet, where the users 'access these works from a place and at a time individually chosen by them'. Once WCT had entered into force, some Berne Convention Member States were in the process of ratifying the treaty. Thus the 'right of making available' is a broadening of the scope of Berne Convention rights. In addition, 'making available' is tight to compulsory licensing. The right was defined within the Berne Convention Article 11 broadcasting and retransmissions rights, Member States may bind it with compulsory licensing. Thus Member States must refer to 'the making available' right as exclusive. However, neither the Berne Convention nor the WIPO Treaties define the 'public'

[5] Agreement on Trade-Related Aspects of Intellectual Property Rights, signed in Marrakesh, Morocco on 15 April 1994 <https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm> (Last visited 20.07.2021).
[6] Ricketson (2003) *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment* WIPO, Geneva, SCCR/9/7.
<https://www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_7.pdf> (Last visited 20.07.2021).

in ‘communication to the public‘ or in ‘making available to the public, leaving the Member State states identify it via case law.[7]

Article 17 of the Directive on Copyright in the Digital Single Market[8] (hereafter ‘DSMD’ or ‘The Copyright Directive’) is currently being fiercely debated. Just recently at the online conference[9] held by European Copyright Society (hereafter ‘ECS’), prof. Christopher Geiger featured rather radical solutions to mitigate the effects of the Copyright Directive[10], cited later in this thesis. According to the Guidance on the application of Article 17 DSMD (hereafter ‘*The Guidance*’)[11] Article 17 is *lex specialis* to the norms on intermediaries of the e-Commerce Directive[12] (hereafter ‘E-Comm. Directive’) and Information Society Directive (hereafter ‘InfoSoc Directive’)[13]. Since 2000, both the e-Comm. and the InfoSoc Directives have been the cornerstone of internet regulation in the EU.[14] Article 5 of the InfoSoc Directive enumerates optional permitted uses of copyrighted materials that do not infringe on the exclusive rights of copyright holders. Under this article, each Member State may formulate exceptions and limitations to copyright protections in the case of education, press coverage, religious celebrations, parody amongst others.[15] Article 3(1) of InfoSoc Directive incorporates Article 8 of the WCT in the context of ‘communication to the public’.

[7] Ginsburg J. C. (2004) *The (New?) Right of Making Available to the Public.* Columbia Law School 04-78.
[8] Directive 2019/790 of the EP 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.
[9] ECS (2021) *Copyright Challenges During the Pandemic (and Beyond)*, Online Conference. <https://europeancopyrightsociety.org/2021-online> (Last visited 20.07.2021).
[10] Geiger, C. & Jütte, B. J. (2021) *Platform Liability under Article 17 of the Copyright in the DSMD, Automated Filtering and Fundamental Rights: An Impossible Match* GRUR International.
[11] The Commission to the EP and the Council (2021) *Guidance on Article 17 of Directive 2019/790 on Copyright in the DSM,* Brussels, COM 288 final.
[12] Directive 2000/31/EC of the EP and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on Electronic Commerce’).
[13] Directive 2001/29/EC of the European Parliament and of the Council on the Harmonisation of Copyright and Related Rights in the Information Society.
[14] Sanchez M. N. (2021) *EU Directive on Copyright in the DSM: An Outlier in Intermediary Liability and the Death of Safe Harbor Protections* 55 USF L Rev 251.
[15] Brooks A. (2020) *Liable for Anonymous: The Danger of Holding Digital Platforms Liable for Copyright Infringement of Third-Party Users* 52 Geo Wash Int'l L Rev 129.

1.1.2 The EU Copyright Directive 2019/790

On March 26, 2019 the European Parliament (hereafter 'EP') jointly with the Council voted to pass the Copyright Directive, a subject to either national implementations or a compliance with the Copyright Directive by all EU Member States by June 7, 2021.[16]

Previously the e-Comm. Directive provided safe harbour exemptions for intermediary service providers who, as per Article 12 of the e-Comm. Directive, operated as 'mere conduits', under 'no general obligation to monitor the information which they transmit or store'. In general, e-Comm. Directive still has this function, however, for some intermediaries who qualify as Online Content-Sharing Service Provider (hereafter 'OCSSP') and perform an act of communication to the public laid down in Article 17 will apply instead, as per Article 17(3) DSMD. In fact, e-Comm. Directive prevents Member States from extorting general monitoring obligations on service providers outside express situations.[17] Article 14(1) of the e-Comm. Directive states that a 'hosting' service provider is not liable for content stored by a recipient; as long as the service provider 'does not have actual knowledge … or is not aware of facts or circumstances' of unlawfully uploaded content.[18]

Article 2(6) DSMD defines OCSSP as provider of an information society service designed to store and grant the public access to a large quantity of copyrighted material uploaded by its users, which it organises and promotes for profit-making purposes. *The Guidance* draws attention to para. 2 of Article 2(6) DSMD - a *non-exhaustive* list of providers which do *not* fall under OCSSPs within the scope of the Directive comprising: 'not-for-profit online encyclopaedias', 'not-for-profit educational and scientific repositories', 'open source software-developing and-sharing platforms', 'providers of electronic communications services, as defined in the EU Directive on Electronic Communications Code[19]', 'online marketplaces', 'business-to-business cloud services' and 'cloud services that allow users to upload content for their own use'.

[16] Geddes K. (2020) *Meet Your New Overlords: How Digital Platforms Develop and Sustain Technofeudalism,* 43 Colum JL & Arts 455.
[17] Ibid.
[18] Sanchez M. N. (2021) *EU Directive on Copyright in the DSM: An Outlier in Intermediary Liability and the Death of Safe Harbor Protections* 55 USF L Rev 251.
[19] Directive (EU) 2018/1972 of the EP and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast).

Article 17(10) DSMD requires the Commission to issue *the Guidance* in relation to the collaboration between OCSSPs and the rightholders, accenting on fundamental rights and the clauses of exceptions and limitations. The aim of *the Guidance* is to verify an adequate transposition of Article 17 across the Member States. The introduction to *the Guidance* communicates that the current ongoing case of *Republic of Poland v the EP and Council of the EU*[20], cited further in this thesis, may result in reassessment of *the Guidance's* content and may have effect on the transposition of Article 17 by the Member States. The author of this thesis does not exclude the possibility, depending on the outcome of the case *Republic of Poland v the EP and Council of the EU*[21], the Copyright Directive itself may be amended.

The traditional view is that it was normally possible for rightholders and users, including consumers, to deviate from exceptions and limitations in a license or a contract. The interpretation provided by *the Guidance* is that the exceptions and limitations mentioned in Article 17(7) should always prevail over, and may not be ruled out, of contractual agreements (licenses) as referred to in Articles 17(1) and 17(2). *Questions and Answers – New EU copyright rules,* set out by the Commission, reiterate that this change contributes to the freedom of expression online:

> 'Until now, copyright exceptions … were only optional and Member States were free not to implement them. Under the Copyright Directive, this is no longer the case: Member States are obliged to allow [exceptions]. This is a particularly important step for the freedom of expression online'. [22]

This is thus a paradigm that profoundly shifts the balance between rightholders and users. Prior the emergence of the Copyright Directive, in Sweden, for example, exceptions and limitations did not hold a mandatory nature. The Collecting Society in Sweden (hereafter 'STIM')[23] Annual Report 2019 manifested, that Sweden had abruptly voted against the Copyright Directive in the last minute, even though previously supporting it. STIM, nonetheless, questions on which grounds *YouTube* should have a privilege to comply to different rules to those set out for Spotify.[24]

[20] C-401/19.
[21] Ibid.
[22] The Commision (2021) *Questions and Answers – New EU copyright rules.* Brussels.
[23] STIM Official Website. <https://www.stim.se/sv/> (Last visited 2021.05.15).
[24] STIM *Annual Report 2019* <https://www.stim.se/sites/default/files/stim_ar2019.pdf> (Last visited 2021.05.15).

According to the Official Journal of the EU Copyright Directive amends: Directive on the Legal Protection of Databases[25] and InfoSoc Directive. Article 17 DSMD warrants digital platforms to prevent unlawful uploads of copyrighted material by third-party users, as stated in Article 17(4): 'if no authorisation is granted, [OCSSPs] shall be liable for unauthorised acts of communication to the public'. Geiger and Jütte (2021) further develop this notion with the Court of Justice of the European Union (hereafter 'CJEU') case-law on the communication to the public that under Article 3(1) of the InfoSoc Directive, Article 17(1) 'makes OCSSPs directly liable' for content uploaded by their users. As mentioned in the previous section, Geddes (2020) accentuates that the Copyright Directive goes against the e-Comm. Directive's principle 'Member States are prevented from imposing a monitoring obligation' (Recital 47), as interpreted by the CJEU.[26] Nonetheless, similar formulation can also be found under Article 17(8): 'the application of this Article shall not lead to any general monitoring obligation'. One worry hovering over a formulation in Article 17(8), is that if there is no general monitoring obligation, in which manner are OCSSPs expected to, for instance as per Articles 17(4) (b) '… to ensure the unavailability of specific works' or as per 17(4) para. 3, '… to prevent [the contents'] for the future uploads…'? In certain fashion, not only the Copyright Directive contradicts e-Comm. Directive, but some scholars speculate may paradoxically have a conflict within its own scope.

As Szpunar expresses, a 'lawful monitoring injunction' of Article 15(1) e-Comm. Directive is specific if it is 'limited in terms of the subject and duration of the monitoring'. A scope of an unlawful 'general' requirement to monitor would thus need to be more vague.[27] Leistner concludes that a requirement to monitor infringing content uploads, although the entirety of uploads to a platform run by an OCSSP is subject to a 'matching exercise', are not of a general nature and therefore comply with of Article 15(1) e-Comm. Directive or Article 17(8) DSMD. According to Leistner's understanding, the monitoring of specific infringements, would not be qualified as 'a general monitoring obligation'. Staydown duties could be attributed to the CJEU judgment in *Glawischnig-*

[25] Directive 96/9/EC of the EP and of the Council on the Legal Protection of Databases.
[26] Geddes K. (2020) *Meet Your New Overlords: How Digital Platforms Develop and Sustain Technofeudalism* Colum JL & Arts 455.
[27] Geiger C. & Jütte, B. J. (2021) *Platform liability under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match.* GRUR International.

Piesczek[28] where the court manifested staydown obligations in a context of specific legal infringements as compatible with Article 15(1) e-Comm. Directive.

Pursuant to Recital 8 DSMD, new technologies enable the automated technical analysis of content digitally. At times, text and data mining can involve acts protected by copyright or the *sui generis* database right. In case exception or limitation does not cover such contents, an authorisation to engage in such acts is required from the rightholders. Senftleben (2020) points out, that the new EU rules on 'user-generated content' (hereafter 'UGC') licensing and screening will be manifested as *ex-ante* control: content filtering. Algorithmic copyright enforcement with a purpose to identify infringing content prior its publication has a tremendous impedance on users' freedom in the world web.[29] It nonetheless appears as simultaneously progressive and an imprudent step to outsource copyright enforcement to artificial intelligence. As Ursula von der Leyen, President of the European Commission (hereafter 'The Commission'), said in January 2020:

> 'We cannot accept a situation where decisions that have a wide ranging impact on our democracy are being made by computer programs without any human supervision'.[30]

Insofar, the question begs: what is 'user-generated content'? The term UGC is associated with non-commercial forms of expression such as memes, GIFs (Graphics Interchange Format) and fan fiction. Halbert (2009) defines UGC as:

> 'the division between culture produced as a commodity for consumption and the culture that is generated by people acting as creative beings without any market incentive'.

The earliest writings of the term UGC emerged in 1995.[31] Two decades ago, Bogle (1999) had suggested that UGC could replace professional content and make the once 'all powerful editor/producer type … just another content provider'. Bogle identifies that experts will have to focus on filtering content, instead of creating[32]. Geiger and Jütte (2021) point out that UGC frequently

[28] C-18/18.
[29] Senftleben M. (2020) *Institutionalized Algorithmic Enforcement – The Pros and Cons of the EU Approach to UGC Platform Liability* 14 FIU L Rev 299.
[30] The quote is derived from: Geiger C. & Jütte, B. J. (2021) *Platform liability under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match.* GRUR International.
[31] Halbert D. (2009) *Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights*, 11 Vand. J. Ent. & Tech. L. 921, 924-26.
[32] Bogle D. (1999) *Consumer Revolution – Online*, Australian, Sept. 30, at M12.

involves creative reuses of existing protected works.[33] As an example of UGC, Dawkins originally elaborated the word 'meme' in 1976 as 'unit of cultural transmission' that nurtures itself 'leaping from brain to brain.'[34] Internet memes have been described as 'the cultural parallel of genes,' characterized by imitative behaviour.[35]

Questions and Answers – New EU Copyright Rules (2021) by the Commission puts in a spotlight that the use of existing works for purposes of quotation, criticism, review, caricature as well as parody are explicitly allowed all over Europe, as the Copyright Directive communicates. This implies that memes and related content for the purposes of quotation, criticism, review, caricature, parody and pastiche (like GIFs or similar) may be used without restrictions.

Exceptions and limitations from the rules enlisted under Article 17(7) comprising '(a) quotation, criticism, review'; and '(b) use for the purpose of caricature, parody or pastiche' may appear ambiguous and their certain aspects open up for different interpretations. Senftleben (2020) suggests that the definition of 'pastiche' is rather open-ended.[36] This enables the Member States to amplify the meaning of UGC to their own taste of preference, perhaps. There is a great chance that this will sabotage the purpose of the Copyright Directive, which is articulated in Recitals 6 and 70 that exceptions and limitations:

> '… seek to achieve a fair balance between the rights... of... rightholders… and of users…'[37]
>
> '... guarantee the freedom of expression of users [to strike] a balance between the fundamental rights... in [the Charter] …'[38]

Recital 45 of the DSMD demonstrates the purpose of the Copyright Directive in terms of licensing agreements: extended collective licensing enable to settle agreements in those areas where collective licensing based on an authorisation by rightholders does not incorporate all works. This arrangement has the potential to grant 'full legal certainty to users'. Some argue that any license agreement cannot go against Article 17 of the DSMD, as Recital 66 of the DSMD stipulates: the measures should not prevent 'the availability of non-infringing content … the use

[33] Geiger C. & Jütte, B. J. (2021) *Platform Liability under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match.* GRUR International.
[34] Dawkins R. (1976) *The Selfish Gene* Oxford University Press Inc., New York.
[35] Johnson S. J. (2013) *Memetic Theory, Trademarks & the Viral Meme Mark*, 13 J. Marshall Rev. IP. L.
[36] Senftleben M. (2020) *Institutionalized Algorithmic Enforcement – The Pros and Cons of the EU Approach to UGC Platform Liability* 14 FIU L Rev 299.
[37] Directive (EU) 2019/790 on Copyright and Related Rights.
[38] Ibid.

of which is covered by a licensing agreement, or an exception or limitation …'. The relationship between permissions is unclear, in case such license tackles the users' right to quote.

In March 2007, *Viacom and others* challenged *YouTube*, a video-sharing platform and subsidiary of *Google*, claiming copyright infringement based on more than 150,000 videos uploaded by third-party users to *youtube.com*.[39] The lawsuit was settled by *Google* reportedly with no monetary compensation to *Viacom*. In response *YouTube* designed a new 'digital fingerprinting system' 'Content ID' to prevent such claims. The 'Content ID' is not flawless since internet users frequently re-invent copyrighted material in independently creative ways. The automated system cannot distinguish the two videos and thus be either claimed removed by the rights holder. Since *Viacom v. Youtube*, rightholders have been stressing to hold digital hosts accountable for the copyright infringement.[40]

There are multiple proposals, recommendations and reviews produced by various scholars on how to amend the Copyright Directive. Brooks (2020), for example, recommends that the Commission should propose amendments to the Copyright Directive, in its linguistical scope, meaning to implement more elaborate definitions.[41] Pursuant to the preamble of the Copyright Directive the EU Member States should attempt to safeguard the individual rights of freedom of speech laid down in the EU Charter of Fundamental Rights[42] (hereafter 'The Charter') as well as the rights falling under the copyright exceptions.[43]

The study conducted by the EP summarizes 17(4) DSMD: the Directive grants the platforms several alternatives to escape direct liability for their users' uploads: to either conclude an agreement with the rightholder for the exploitation of the works; or

> '(i) make their best efforts to obtain an authorisation…
> (ii) make their best efforts to ensure the unavailability of specific works violating copyright, which the rights holders have provided them with the relevant and necessary information,
> (iii) act expeditiously to disable access to … the notified works, and make their best efforts to prevent their future uploads.'[44]

[39] *Viacom Int'l, Inc. v. YouTube*, Inc., No. 1:07-cv-02103-LLS.
[40] Brooks A. (2020) *Liable for Anonymous: The Danger of Holding Digital Platforms Liable for Copyright Infringement of Third-Party Users* 52 Geo Wash Int'l L Rev 129.
[41] Ibid.
[42] Charter of Fundamental Rights of the EU 2012/C 326/02.
[43] Directive (EU) 2019/790 on Copyright and Related Rights.
[44] De Streel A. (2020) *Online Platforms' Moderation of Illegal Content Online.* [Study Requested by the IMCO Committee] EP, Policy Department for Economic, Scientific and Quality of Life Policies.

1.2 Aim and Research Questions

The purpose of this thesis is to describe and analyse Article 17(7) in the Directive on Copyright in the Digital Singlet Market, with a focus on the relationship of exceptions and limitations enumerated under Article 17(7) and licensing agreements mentioned in Article 17(7) and- 17(2) as well as the freedom of expression of users and filtering obligations.

To fulfil the purpose, the following research questions will be answered:

i. Are exceptions and limitations listed under Article 17(7) mandatory and elaborate enough to be incorporated in an analogical manner nationally across all EU Member States?

ii. Do exceptions and limitations guarantee 'the freedom of expression of users' in their current state of formulation and is it accountable for copyright law to be enforced privately either by technological or algorithmic means?

iii. Is there an inherent conflict within Article 17 DSMD and/or with previously passed legislation?

1.3 Materials and Method

To fulfil the purpose of this thesis and to answer the research questions, a legal dogmatic method is implemented. A cornerstone to the analysis of this thesis is the Article 17 of the Copyright Directive, its meaning and implications, along with its preamble, case law from the CJEU, the Commission's *Guidance* and scholarly publications. In addition, other sources such as official documents, legal literate and reports are reviewed.

Dogmatic legal science comprises a complex of systematic meanings of norms. The dogmatic legal methodology is a theoretical science which imposes the method of empiristic operation upon 'an envisioned world of meanings'. Dogmatic legal science, which involves the objective meaning of positive law is differentiated from practical legal science. Consequently dogmatic legal science does not incorporate reality but 'a merely envisioned world of meaning'.[45]

[45] Teruo M. (1970) *Dogmatic Legal Science and Sociology of Law* ARSP Archives for Philosophy of Law and Social Philosophy. Vol. 56, No. 3.

The EP and the Council of the EU jointly adopted the new Copyright Directive in spring 2019. One of the primary purposes of the Directive is to reinforce the position of creators and rightholders and their right to a fair remuneration in the context of their copyrighted material made available to the public online. Preamble to the Copyright Directive sets out the purpose of the Directive and accounts fundamentals of the EU law copyright law, its current state and future objectives. Preamble to the Copyright Directive is an essential component to this thesis.

'Legal fiction' is an indispensable legislative tool for the purposes of maintaining consistency in the judgements, for example where a special law modifies a general law – *lex specialis derogat legi generali*. Husovec and Quintais (2020) elucidate that the rational EU legislator would depict Article 17 of the Copyright Directive either as 'special' or as a new '*sui generis*' right. Even though Articles 17(1) and (2) are *lex specialis* to Article 3 of the InfoSoc Directive, Article 17(1) introduces a new – *sui generis* – right of 'communication to the public' which previously did not exist in this context.[46] Sections (2.1.3) '*YouTube Case'* and (3.2) 'Article 17 and Communication to the Public' of this thesis provides court's interpretation on the subject matter. Nonetheless, both interpretations *lex specialis* and *sui generis* are credible. The former has more weight as it is both: referred to by the Commission and interpreted by the court.

The Commission had issued *the Guidance on Article 17 DSMD* in June 2021 to assist Member States in implementing the new rules on the use of copyrighted content by OCSSPs, and to encourage the growth of the licensing market, and as it appears, to clarify certain rather ambiguous concepts of Article 17. The introduction to *the Guidance* proclaims that it is not 'legally binding', yet it has been 'formally adopted'. In addition to *the Guidance*, the Commission had published a document named *Questions and Answers – New EU copyright rules.*[47] Both legal sources hold a normative value. Normative theory of adjudication is somewhat inferior as its purpose is to guide judges in their rationale behind judgements, yet normative theory fails to fully accomplish this task as the nature of the law is indeterminate. Leiter (1998) goes on to say that normative theory is

[46] Husovec M. & Quintais J. P. (2020) *How to License Article 17? Exploring the Implementation Options for the New EU rules on Content-Sharing Platforms* Grur International Issue 4/2021.
[47] The Commision (2021) *Questions and Answers – New EU copyright rules.* Brussels.

irrelevant within the framework of this logic as it advices judges in their decision-making, yet judges tend to omit such theoretical recommendations.[48]

Spindler (2020) describes this twofold paradox of the normative value, that a Member State standardization procedure for Article 17(4) DSMD must adhere to *the Guidance* under Article 17(10) DSMD. At the same time, *the Guidance* does not have any legally binding nature towards courts. That said, national courts of the Member States must adhere to *the Guidanc*e, yet they may deviate from it.[49]

The central cases to this thesis is *Republic of Poland v the EP and Council of the EU* and *YouTube*[50], in addition to relevant previous case law, such as *Deckmyn*, *Funke Medien*, *GS Media*, *Rafael Hoteles*, *Stichting Brein*, *GS Media*, *Painer*, *Pelham*, *Spiegel Online* and *Stim*.[51]

Scholarly publications complement this thesis by critically examining the essence and drawbacks of Article 17 of the Copyright Directive, including, but not limited to exceptions and limitations enlisted under Article 17(7). They also outline pros and cons to the Article and contribute with its further possible developments. This thesis tackles the contingency that certain aspects of exceptions and limitations enlisted under Article 17(7) are autonomous in their essence. On a general level, 'autonomous' implies not being subject to external legal norms. The CJEU clarifies:

> 'the very nature of EU law […] requires that relations between Member States be governed by EU law to the exclusion […] of any other law' implying that 'the EU has a new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation.'[52]

To narrow it down, the opinion of Mr Advocate General Cruz Villalón (2014) on *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others*[53], upon request of request for a preliminary ruling from the Hof van beroep te

[48] Leiter B. (1998) *The Value of Normative Theory*. Legal Theory, 4(2), 241-[iii].
[49] Spindler G. (2020) *The Liability System of Art. 17 DSMD and National Implementation – Contravening Prohibition of General Monitoring Duties?* 10 JIPITEC 344.
[50] *Republic of Poland v the EP and Council of the EU* (C-401/19) and *YouTube* (C-682/18).
[51] *Deckmyn* (C-201/13), *Funke Medien* (C-469/17), *GS Media* (C-160/15), *Republic of Poland v EP and Council of the EU* (C-401/19), *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles* (C-306/05), *Stichting Brein v Ziggo* (C-610/15), (C-160/15), *Painer* (C-145/10), *Pelham* (C-476/17), *Spiegel Online* (C-516/17), *Stim, SSAMI v Fleetmanager Sweden AB, Nordisk Biluthyrning AB* (C-753/18).
[52] C-2/13; Molnar T. (2016) *The Concept of Autonomy of EU Law from the Comparative Perspective of International Law and the Legal Systems of Member States*. Hungarian Yearbook of I L and EU L. The Hague, Eleven International Publishing.
[53] C-201/13.

Brussel, the concept of 'parody' in Article 5(3)(k) of the InfoSoc Directive is characterized as an autonomous concept of Union law:

> '… when a provision of EU law does not refer to the law of the Member States for the purpose of determining its meaning and scope, the necessity of a uniform application of EU law and the principle of equality require the provision to be given an independent and uniform interpretation, having regard to the context of the provision and the objective of the relevant legislation. That enables the conclusion that the concept of 'parody' in Article 5(3)(k) of the [InfoSoc] Directive is an autonomous concept of Union law.'

According to the Official Journal of the EU the direct effect principle enables individuals to immediately invoke European law before courts, whether implemented nationally or not. However, the Directive is 'an act addressed' to the EU Member States and a subject to a transposition into national laws. In exclusive cases the CJEU recognises the direct effect in favour of individuals. In *Van Duyn*[54] judgement of 4 December 1974 the Court had articulated that a Directive has direct effect when its provisions are unconditional and accurate and when the EU Member State has not transposed the directive by the deadline. Nonetheless, it can only have direct vertical effect.[55]

At the present moment (July 2021), following countries have published the respective updates: Check, Denmark, Germany, France, Lithuania, Hungary, Malta and Netherlands[56]. Sweden, for example, was long awaiting *the Guidance* from the Commission on implementing the Article. Given that the deadline for national transposition was June 7, 2021, the Member States' task was complicated by the fact that *the Guidance* was published as late as June 4, 2021. That, to a certain degree, justifies the delay of the national transposition by the Member States. The EU Member States have an obligation to transpose the Directive, but Directives may not be cited by an EU Member State against an individual, as per judgement of 5 April 1979, *Ratti*.[57]

[54] C-41-74.
[55] The Official Journal of the EU *The Direct Effect of European Law, Direct Effect and Secondary Legislation* <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:l14547> (Last visited 20.07.2021).
[56] The Official Journal of the EU, *Transposition, Doc. 32019L0790*, Directive (EU) 2019/790 on Copyright and Related Rights.
[57] C-148/78. The Official Journal of the EU *The Direct Effect of European Law, Direct Effect and Secondary Legislation* <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:l14547> (Last visited 20.07.2021).

1.4 Structure

This thesis commences by introducing the EU's copyright liability regime and the new Copyright Directive 2019/790, it then outlines aim and research questions supplemented by materials and method in the chapter (1).

The discussion section of the chapter (2) introduces the scope of 'the right of communication to the public', as developed by the CJEU and its application to online platforms such as in the cases of *Youtube*[58] and *Stichting Brein*[59]; and the scope of the limitation on liability for hosting providers in the e-Comm. Directive. This chapter further describes and analyses the relevant exceptions and limitations as set out in Article 5 of the InfoSoc directive (parodies, pastiche and quotations), and the traditional relationship between exceptions and limitations and contractual agreements (licenses). The definition of OCSSP is derived from Article 2(6) DSMD.

As the thesis progresses, chapter (3) assesses what is established by Article 17 of the new Directive, with a focus on Article 17(7) and its relationship with Articles 17(1) and 17(2). It sites the state of the law prior the adoption of the Copyright Directive with some touch of the 'value gap' argument. This section also features scholars' reviews and tackles some answers provided by *Guidance on Article 17 of Directive 2019/790 on Copyright in the DSM* (2021). Chaper (3) also discusses Article 17 in the new Directive and its relationship to 'the right of communication to the public', e-Comm. and InfoSoc Directives and outlines the central case to this thesis *Republic of Poland v the EP and Council of the EU*[60], which has a contingency to amend *the Guidance* and 'turn around' the Copyright Directive itself.

The purpose of the final chapter (4) is to answer the research questions set out in chapter (1).

[58] C-682/18.
[59] C-610/15.
[60] C-401/19.

2 Communication to the Public

2.1 The Right of Communication to the Public

The CJEU has defined the concept of 'communication to the public' in several judgements. This forms one of the exclusive rights of copyright holders that have been harmonised by the InfoSoc Directive. As was established in 2006 in the case *Sociedad General de Autores y Editores de España (SGAE) v. Rafael Hoteles*[61], communication to the public must be defined autonomously throughout the EU[62].

Another case is *Stichting Brein v Ziggo*[63] (2017), where *Stichting Brein*, an anti-piracy organisation, filed for an injunction to the Dutch courts against internet service providers *Ziggo* and *XS4ALL* that would order them to hinder access for their customers to the peer-to-peer file-indexer *The Pirate Bay* (hereafter '*TPB*'). The case was a pioneer to represent the liability of an internet intermediary for copyright infringement.[64]

And finally in *Stim, SSAMI v Fleetmanager Sweden AB, Nordisk Biluthyrning AB*[65] (2020) the CJEU established that the business operation activities of car-leasing companies renting out vehicles containing radio equipment do not in principle carry out 'a communication to the public' of copyrighted musical pieces in the context of the InfoSoc Directive and the Rental Rights Directive[66]. It is therefore not obligatory to obtain licences. The CJEU's judgment overrules the judgment of the Swedish District Court and follows through the logic of Advocate General Szpunar.[67] Para. 32, stipulates:

> 'That user makes an 'act of communication' when he intervenes, in full knowledge of the consequences of his action, to give his customers access to a protected work, particularly where, in the absence of that intervention, those customers would not be able to enjoy the broadcast work, or would be able to do so only with difficulty'.[68]

[61] C-306/05.
[62] Angelopoulos C. (2017) *Communication to the Public and Accessory Copyright Infringement.* The Cambridge Law J.
[63] C-610/15.
[64] Angelopoulos C. (2017) *Communication to the Public and Accessory Copyright Infringement* The Cambridge Law J.
[65] C-753/18.
[66] 2006/115/EC.
[67] Wright S. (2020) *New CJEU Ruling Clarifies the 'Communication to the Public' Provisions of EU Copyright Directives,* CSM Law Now.
[68] C-753/18.

2.1.1 Communication

The CJEU has developed a concept of communication to the public by first demonstrating that there has been an 'act of communication', depending on whether the user has played an 'indispensable role' through a 'deliberate intervention'. The Court first noted that there was no doubt that works were, by means of *TPB*'s website, being made available to the public. It stipulated that the management of an OCSSP amounts to a 'deliberate intervention'.[69]

2.1.2 Public

The second element of 'a public' refers to a group of individuals of an unspecified number that is of a certain, considerable size. It is not a must that the relevant public is reached simultaneously. Instead, the cumulative effect of making works available to a significant group of individuals in succession must be considered. Given that *TPB* is used by a considerable number of 'peers', this condition was easily satisfied. It is also vital to demonstrate that the relevant 'public' is a 'new' one: that was not already taken into account by the copyright holder when she authorised the initial communication to the public of the work, or that the communication takes place through technical means different from those which she employed. As per judgment: the first of these two criteria was established. In reaching this conclusion, the CJEU followed the logics of *GS Media*[70] judgment, where the internet is crucial to freedom of expression and information, a balance of interests must be achieved. The Court concluded that a 'hyper-linker' may only be held accountable for linking to copyright infringing material, if one was aware that the hyperlink one generated grants access to a content unlawfully uploaded online. The Court also gave a tribute to a notion of presumption of knowledge for cases where the posting of a hyperlink is carried out for profit. A 'fault' concept was presented to copyright. A similar principal was applied in *Ziggo*[71]. The judgment is somewhat speculative: whether the fault threshold should be adapted to the circumstances of the case. The type of fault presupposed in *GS Media*[72] and in *Ziggo*[73] is not of entirely similar nature.[74]

[69] Angelopoulos C. (2017) *Communication to the Public and Accessory Copyright Infringement.* The Cambridge Law J.
[70] C-160/15.
[71] C-610/15.
[72] C-160/15.
[73] C-610/15.
[74] Angelopoulos C. (2017) *Communication to the Public and Accessory Copyright Infringement.* The Cambridge Law J.

2.1.3 *YouTube Case*

Advocate General Saugmandsgaard Øe (2020) expressed the notion on *YouTube and Cyando*[75] joint cases: whilst such platforms as *YouTube* would be liable under Article 17 lacking a license, this would not be the case solely in Article 3 of the InfoSoc Directive. In essence, Article 17 of the Copyright Directive 'would be a novel regime without retroactive application'.[76] He stated his opinion as follows:

> 'These divisions were brought to a head during the discussions surrounding the adoption by the EU legislature of [DSMD]. Article 17 [DSMD] establishes, with respect to operators such as *YouTube*, a specific liability regime for works illegally uploaded by users of their platforms. I should point out, however, that that directive, which entered into force in the course of the present preliminary ruling proceedings, is not applicable to the disputes in the main proceedings. These cases will therefore have to be determined through the lens of the legal framework prior to that, regardless of whatever approaches may just have been adopted by the EU legislature.'[77]

in addition,

> 'Mr Peterson and the French Government argued … as is stated in Recital 64 of [DSMD], in adopting Article 17… the EU legislature simply intended to 'clarify' how the concept of 'communication to the public' within the meaning of Article 3(1) of [the InfoSoc Directive] should always have been understood and applied to platform operators such as YouTube. I infer from their argument that Article 17 also merely 'clarified' the fact that Article 14(1) of [E-comm. Directive] had never been applicable to those operators. Article 17 [DSMD] thus constitutes a kind of 'interpreting law', simply clarifying the meaning that Directives [E-comm.] and [InfoSoc] should always have had. Solutions based on that new Article 17 should therefore apply retroactively, even before the expiry of the deadline for the transposition of [DSMD] on 7 June 2021, including in the cases in the main proceedings.'[78]

Advocate General Saugmandsgaard Øe (2020) manifested that the operators of platforms such as *YouTube* or *Cyando* do not, in principle, carry out acts of 'communication to the public'. An act of 'communication to the public' as per Article 3(1) of InfoSoc Directive implies to the transmission of a protected work to a public. An act of 'making available' comprises offering members of the public the possibility of such transmission, which can be carried out at their request from a place and at a time decided individually. Thus any transmission of a work to a public presupposes 'a chain of interventions' by several individuals who are engaged in various manners and extents in that transmission. As an example, the possibility for television 'spectators' to watch a broadcast is the

[75] C-682/18/ C-683/18.
[76] Rosati E. (2021) *Five Considerations for the Transposition and Application of Article 17 of the DSMD*. J of IP Law & Practice.
[77] C-682/18/ C-683/18.
[78] Ibid.

outcome of joint efforts, including a broadcasting organisation, distributors, the operator and the suppliers of television sets.

These separate acts cannot all be considered 'communication to the public' under the scope of Article 3(1) of InfoSoc Directive. In another scenario any link in the chain would be liable *vis-à-vis* the authors, regardless of the nature of the activity. In order to avert from such broad interpretation, the EU legislature specified, in Recital 27 of InfoSoc Directive, that the 'mere provision of physical facilities for making a communication does not in itself amount to communication within the meaning of [that directive]'. Thus a the chain of interventions should be differentiated in any transmission of a work to a public, between the person carrying out the act of 'communication to the public' under the scope of Article 3(1) of InfoSoc Directive and providers who, by providing 'physical facilities' for such transmission, act as intermediaries between that person and the public.

The Judgment of the Court (Grand Chamber) of 22 June 2021, stipulated that Article 3(1) of InfoSoc Directive must be understood in the meaning that the provider of a video-sharing platform, on which users can illegally post UGC or make available to the public, does not make a 'communication to the public' of that content unless it does so infringing a copyright.

It was once again clarified that Article 14(1) of e-Comm. Directive must be interpreted that a file hosting platform satisfies the criteria of the provision if it 'does not play an active role of to have control or possess knowledge over the content uploaded to its platform'. To be excluded from the exemption from liability 'it must have knowledge of or awareness of specific illegal acts committed by its users relating to protected content that was uploaded to its platform'.

Para. 92 asserts that *YouTube* does not intervene in the creation of content uploaded to its platform by platform users, and that it does not monitor that content before it is uploaded. According to para. 93, *YouTube* informs its users upon uploading of the file, that it is forbidden to post copyright infringing content. *YouTube* has put in place various technological measures to prevent copyright infringements: a special alert procedure for illegal content to be removed (para. 94). Even though *YouTube* created monetary value via its platform and enables both the users who have uploaded content and copyright holders to benefit from

that revenue. Nonetheless, *Youtube's* financial model is not evidently based on the fact that there is illegal content on it (para. 96).

Hypothetically speaking, as per Article 17(4) DSMD, it seems *Youtube* conforms to 'the best efforts' method to obtain an authorisation from the rightholders and to ensure the unavailability of specific works infringing copyright and acts expeditiously to disable access to the notified works. This follows from the logic of the judgment, yet the court omits referring to Article 17 of the Copyright Directive. Evidently, the judgement predominantly tackles the legislation prior to the adoption of the Copyright Directive. Thus the case may not be established as a fundamental example in the context of Article 17 DSMD.

2.2 E-Comm. and InfoSoc Directives

Some scholars claim that the adoption of the Copyright Directive might *vis-à-vis* interpolate the Article 3 of the InfoSoc Directive. As previously cited, Article 17 would satisfy certain criterion of a *sui generis* right. Rosati (2021) concludes that this could result in national legislatures omitting to follow the list of exceptions and limitations in Article 5 of the InfoSoc Directive and perhaps instead re-invent their own exceptions or limitations to the right of communication to the public under Article 17.[79] According to the wording of *the Guidance* (2021), Article 17 is a *lex specialis* to Article 3 of the InfoSoc Directive and Article 14 of the e-Comm. Directive. Due to the *lex specialis* nature of Article 17, the Member States should specifically implement this provision rather than relying simply on their national implementation of Article 3 of the InfoSoc Directive.

As such, Member States would not be able to rely, in their transpositions of Article 17, on their earlier implementations of either directive with regard to the notion of 'authorization' or 'communication to the public'.[80] Based on the wording of Article 17(3) DSMD when OCSSPs engage in 'an act of communication to the public' the limitation of liability covered in Article 14(1) of the e-Comm. Directive shall not apply to the situations covered by this Article.

[79] Rosati E. (2021) *Five Considerations for the Transposition and Application of Article 17 of the DSMD*. J of IP Law & Practice.
[80] Ibid.

Article 3(2) of the InfoSoc Directive defines communication to the public:

> 'Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:
> (a) for performers, of fixations of their performances;
> (b) for phonogram producers, of their phonograms;
> (c) for the producers of the first fixations of films, of the original and copies of their films;
> (d) for broadcasting organisations …'.[81]

Rosati (2021) argues that communication to the public in Article 17 is to be interpreted in accordance with the corresponding concept set out in, *inter alia*, the InfoSoc Directive. Article 17 does *not* create a 'sub-category' of the communication to the public right in Article 3 of the InfoSoc Directive or a *sui generis* right: it is the same right. In turn, this means that Member States are not entitled to alter the scope thereof or to introduce exceptions or limitations to Article 17 beyond what EU law does allow.[82]

The Guidance (2021) reassures that Article 17 is a *lex specialis* to Article 3 of the InfoSoc Directive and Article 14 of e-Comm. Directive. It does not create a new right in the EU's copyright law, instead it regulates the act of 'communication to the public' in the limited circumstances set by this provision. Due to the *lex specialis* status of Article 17, the Member States should transpose this provision rather than viewing their national implementation of Article 3 of InfoSoc Directive as a status quo.[83]

The exceptions and limitations, paras 1 and 2 of Article 17(7), correspond to previously passed Article 5(3)(d) and (k) of the InfoSoc Directive. Rosati (2021) distinguishes that while exceptions or limitations are voluntary under the InfoSoc Directive, the Copyright Directive communicates they are *mandatory* for Member States to introduce, mainly in relevance to UGC. Member States may decide to transpose the other exceptions or limitations in the InfoSoc Directive into their own national laws, which shall applicable to *inter alia* the clauses contained in Article 17.[84]

[81] Directive 2001/29/EC of the European Parliament and of the Council on the Harmonisation of Copyright and Related Rights in the Information Society.
[82] Rosati E. (2021) *Five Considerations for the Transposition and Application of Article 17 of the DSMD*. J of IP Law & Practice.
[83] The EC to the EP and the Council (2021) *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* Brussels, COM 288 final.
[84] Rosati E. (2021) *Five Considerations for the Transposition and Application of Article 17 of the DSMD*. J of IP Law & Practice.

Angelopoulos and Quintais (2019) substantiate that Article 17(7) DSMD imposes an obligation on Member States to ensure that users of OCSSPs benefit from certain exceptions defined as optional in Article 5 InfoSoc Directive.[85] Article 3(1) of the InfoSoc Directive, grants rightholders:

> 'the exclusive right to authori[s]e or prohibit any communication to the public…'

As per Article 3(1) of the InfoSoc Directive, OCSSP liability under Article 14 of the e-Comm. Directive granted a safe harbour for hosting OCSSP platforms:

> 'on the condition that the provider does not have actual knowledge of illegal activity' or, in 'claims for damages, is not aware of facts or circumstances' or 'upon obtaining such knowledge or awareness, the provider acts expeditiously to remove or disable access to the information.' Safe harbour protections 'shall not apply when the recipient of the service is acting under the authority or control of the provider.'[86]

The e-Comm. Directive framework could be compared to a 'rabbit hole', eliciting the intermediary liability upon awareness. Article 17(1) DSMD, on the other hand, requires OCSSPs to first get a license from the rights-holders. Article 17(3) DSMD in certain manner nullifies protection under Article 14 of the e-Comm. Directive:

> 'When an [OCSSP] performs an act of communication to the public or … making available to the public under the conditions laid down in this Directive, the limitation of liability established in Article 14(1) of [e-Comm. Directive] shall not apply to the situations covered by this Article.
> The first subparagraph of this paragraph shall not affect the possible application of Article 14(1) of [e-Comm. Directive] to those service providers for purposes falling outside the scope of this Directive.'[87]

As the Copyright Directive licensing agreements become mandatory, OCSSPs are therefore liable regardless whether they possess a 'constructive knowledge' or not, which previously granted a safe harbour protection under the InfoSoc and the e-Comm. Directives since they were passed.[88] The Member States can provide for different authorisation models in order to 'foster the development of the licensing market', which is one of the main goals of Article 17. *The Guidance* (2021) proposes that the Member States should allow for different authorisation methods to 'foster the development of the licensing market', which, in essence, Article 17 attempts to pursue.[89]

[85] Angelopoulos C. & Quintais J.P.(2019) *Fixing Copyright Reform* 10 J IP Info Tech & Elec Com L 147.
[86] Directive 2000/31/EC of the European Parliament and of the Council on Information Society Services, in particular Electronic Commerce.
[87] Directive (EU) 2019/790 on Copyright and Related Rights.
[88] Sanchez M. N. (2021) *EU Directive on Copyright in the DSM: An Outlier in Intermediary Liability and the Death of Safe Harbor Protections* 55 USF L Rev 251.
[89] The Commission to the EP and the Council (2021) *Guidance on Article 17 of Directive 2019/790 on Copyright in the DSM,* Brussels, COM 288 final.

3 Article 17 of the EU Copyright Directive 2019/790

3.1 OCSSPs and the Value Gap

The EU's approach to OCSSPs changed profoundly when the EP passed the Copyright Directive with 348 votes in support of and 274 against the proposal, which had shaken the foundation notice-and-takedown system to a notice-and-staydown system. Sanchez (2021) unveils Article 17 DSMD in a context of OCSSP liability for hosting UGC as the shift from an intermediary liability *reactive* regime to intermediary responsibility *proactive* regime. One of the arguments against the direct liability of OCSSPs for the UGC is that its *absence* facilitates freedom of expression and possibly augments the scope of the internet.[90]

Article 17 attempts to bridge the 'value gap' between internet platforms and the rightholders and redefine whether OCSSPs are liable for UGC. Sanchez (2021) sketches the term 'value gap' as when certain ad-based OCSSPs (*YouTube*, *SoundCloud*), as opposed to subscription-based providers (*Spotify*, *Netflix*) exploit safe harbour provisions by avoiding purchasing licenses from the rightholders by 'stealing the bread' from rightholders.[91]

Prior to the emergence of new Article 17 DSMD, as covered by the Recital 61 DSMD, due to legal uncertainty it was unclear according to the EU legislation whether it is OCSSPs or the individual users or both liable for unlawfully uploaded contents via designated digital platforms, or in which cases the authorization was necessary. Senftleben (2020) substantiates that EU legislative framework in e-Commerce shielded UGC platforms from liability for copyright infringement by granting a 'safe harbour' for hosting. Thus, when individual users infringed copyright, OCSSPs enjoyed legal uncertainty and figuratively washed

[90] Sanchez M. N. (2021) *EU Directive on Copyright in the DSM: An Outlier in Intermediary Liability and the Death of Safe Harbor Protections* 55 USF L Rev 251.
[91] Ibid.

the hands of the liability. That implies that if OCSSP was not actively involved in the posting of content, it only was obliged to flag and remove content upon the notification of the rightholder.[92]

The paramount 'value gap' argument plays a critical role in the debate on UGC.[93] Recital 61 DSMD also proposes to augment licensing market, it stipulates:

> '… It is … important to foster the development of the licensing ... between rightholders and [OCSSPs]'.[94]

Recital 62 stresses that UGC may be seen as a tool for OCSSPs to generate revenue, which enhances its monetary value:

> '[OCSSPs] play an important role on the online content market by competing with other online content services …' where they strive '… to store and enable users to upload and share a large amount of copyright-protected content with the purpose of obtaining profit therefrom...'[95]

Recital 63 of gives a certain sketch on how to identify whether OCSSP grants access to a large amount of copyrighted content. It should be evaluated on:

> '… a case-by-case basis and … account … the audience of the service and the number of files of copyright-protected content uploaded by the users…'[96]

Brooks (2020) however argues that the restrictive impact of Article 17 DSMD on the ability of OCSSP end users to upload content has the scope and the capacity threaten the fundamental rights of all EU residents.[97] Sanchez (2021) remarks *#SaveYourInternet*,[98] online campaign was initiated when the EU approved the Copyright Directive, setting off the alarm bells for all the stakeholders involved.[99]

Halek and Hrachovina (2020), on the other hand, suggest that this paradigm shift in the legislation has the potential to simplify rightholders' rights enforcement against OCSSPs as opposed to the less attractive alternative of chasing individual infringers. Pursuant to Article 17(1) and 17(2) DSMD, OCSSPs are deemed to communicate to the public in case they grant public access to copyrighted material uploaded on their platform by its users. This makes OCSSPs liable for the

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[92] Senftleben M. (2020) *Institutionalized Algorithmic Enforcement – The Pros and Cons of the EU Approach to UGC Platform Liability* 14 FIU L Rev 299.
[93] Ibid.
[94] Directive (EU) 2019/790 on Copyright and Related Rights.
[95] Ibid.
[96] Ibid.
[97] Brooks A. (2020) *Liable for Anonymous: The Danger of Holding Digital Platforms Liable for Copyright Infringement of Third-Party Users* 52 Geo Wash Int'l L Rev 129.
[98] *The #SaveYourInternet Fight Against Article 17 [ex. Art. 13] Continues*, *#SaveYourInternet*, <https://saveyourinternet.eu>, <https://perma.cc/KE5P-4J5E>. (Last visited 20.07.2021).
[99] Sanchez M. N. (2021) *EU Directive on Copyright in the DSM: An Outlier in Intermediary Liability and the Death of Safe Harbor Protections* 55 USF L Rev 251.

copyright-protected content uploaded by their users on their platform and requires to obtain authorisation from the rightholders.[100]

Is there enough rationale behind the Copyright Directive, or specifically Article 17 DSMD? Empirical studies generally do not reinforce the 'value gap' argument for the alteration the Copyright Directive enacts upon OCSSPs. Not to mention that the ECS claimed to be disgruntled to see that the Copyright Directive proposal was not based upon any solid scientific evidence. The ECS went so far as to express, that it was difficult to rationalize why the Commission did not dig into any studies or consider the economic rationale provided that the Copyright Directive leads to an emergence of a new Intellectual Property (hereafter 'IP') right with a tremendous impact on users' freedom. Sanchez (2021) further points out that the value gap concept is constructed upon a fabricated assumption, citing Giancarlo Frosio that there is no apparent empirical evidence of effectiveness of more aggressive enforcement strategies.[101]

It is vital to outline how inherently different business models operate: *YouTube* (ad-funded) and Spotify (subscription-based) and on which grounds the value gap should not be the only rationale for invalidating safe harbour protections for OCSSPs. *Spotify* is a 'closed distribution platform', therefore it manages the content that is provided to its subscribers. On *YouTube*, on the other hand, the users uploads exceed 500 hours of fresh video per minute. Hypothetically speaking, *YouTube* cannot overview all the content made available on its platform objectively, perhaps only by means of content filtering, which could hardly be pristine to perfection. Sanchez (2021) further cites Martin Husovec, who claimed that based on a lack of empirical evidence in favour the value gap rationale, it appears what the music industry is actually disgruntled with is rightsholders' inability to monetize their profits, thus OCSSPs should compensate rightsholders with a fee equal to what the highest paying clients pay. Thus, given differences in OCSSPs business models, the argument is that it is complex to comprehend on which grounds 'the value gap' is a sufficient rationale for removing safe harbours and imposing mandatory licensing for ad-based OCSSPs such as *YouTube*, when

[100] Halek J. and Hrachovina M. (2020) *Directive on Copyright in the DSM: A Challenge for the Future,* 16 Common L Rev 44.
[101] Sanchez M. N. (2021) *EU Directive on Copyright in the DSM: An Outlier in Intermediary Liability and the Death of Safe Harbor Protections* 55 USF L Rev 251.

it operates in an entirely different manner that of a subscription-based public platform service.[102]

Naturally there are also other file hosting services, so-called cyberlockers, such as *RapidShare* or *FilesAnywhere,* offering free storage and file-sharing services. Content uploaded on cyberlockers or similar is not categorised and a search field is not incorporated. Each file upload is manifested through a link which is sent to the uploading user and may be shared.[103]

Brooks (2020) suggested the Commission should propose modifications to the Copyright Directive to protect individual rights. Until then the EU Member States should attempt to minimize the Copyright Directive's negative effects through strategic and thoughtful implementation into national jurisdiction. While Copyright Directive strives to achieve equilibrium between users and creators, it rather favours the interests of rightholders and jeopardizes the rights of the EU residents.[104]

3.2 Article 17 and Communication to the Public

Under Article 17(1),

> '[OCSSPs] performs an act of communication to the public or … making available to the public...'[105] once UGC is uploaded online.

According to Geiger and Jütte (2021) the essence of the above formulation is ambiguous – whether it identifies a *sui generis* right of 'communication to the public', or whether it comprises a clarification of the CJEU's case law on art 3(1) InfoSoc Directive.[106] Whether the right in Article 17 constitutes a special right, or a new right that goes beyond the interpretation of CJEU case-law right, is due to be decided at the CJEU. As per existing case-law, Husovec and Quintais (2020) were, nonetheless, leaning towards *sui generis* right as the most correct interpretation.[107] However, section (2.1.3) of this thesis features the opinion of

[102] Ibid.
[103] Hanuz B. (2021) *Direct Copyright Liability As Regulation Of Hosting Platforms For The Copyright-Infringing Content Uploaded By Their Users: Quo Vadis?* JIPITEC 315.
[104] Brooks A. (2020) *Liable for Anonymous: The Danger of Holding Digital Platforms Liable for Copyright Infringement of Third-Party Users* 52 Geo Wash Int'l L Rev 129.
[105] Directive (EU) 2019/790 on Copyright and Related Rights.
[106] Geiger C. & Jütte, B. J. (2021) *Platform Liability under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match.* GRUR International.
[107] Husovec M. & Quintais J. P. (2020) *How to License Article 17? Exploring the Implementation Options for the New EU rules on Content-Sharing Platforms* Grur International Issue 4/2021.

Advocate General Saugmandsgaard Øe (2020), which communicated that Article 17 DSMD constitutes an 'interpreting law' or *lex specialis*, clarifying the meaning that e-Comm. and InfoSoc Directives should always have had. As previously discussed in this thesis, *the Guidance* (2021) clarifies that Article 17 is a *lex specialis* to Article 3 of the InfoSoc Directive and Article 14 of e-Comm. Directive. It does not create a new right in the EU's copyright law, instead it regulates the act of 'communication to the public'.

Article 17 DSMD requires OCSSPs to obtain authorization from the rightholders prior uploading UGC. Rosati (2021) points out that Recital 64 DSMD does not limit that only providers that fall under the notion of OCSSPs may perform acts of communication to the public or other restricted acts.[108] Recital 64 DSMD articulates:

> '[OCSSPs] perform an act of communication to the public … when they give the public access to copyright-protected works... uploaded by their users… [OCSSPs] should obtain an authorisation, including via a licensing agreement… This does not affect the concept of communication to the public … elsewhere under Union law, nor does it affect the possible application of Article 3(1) and (2) of [InfoSoc Directive] to other service providers using copyright-protected content.'[109]

The Guidance (2021) infers that according to Recital 64 DSMD, Article 17 does not affect the concept of 'communication to the public' or of 'making content available to the public' elsewhere under Union law, nor does it affect the likely relevance of Article 3(1) and (2) of InfoSoc Directive to other service providers using copyright-protected content. Recital 65 details that whilst Article 14 of e-Comm. Directive does not cover the liability under Article 17, this should not affect its application to such service providers which fall outside the scope of the Directive.

Authors of the paper *Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the DSMD* argue that Recital 70, para. 1 stipulates the significance to create an equilibrium of the Charter between the Article 17(2) and Freedom of Expression (Article 11) and Freedom of the Arts (Article 13). They argue that exceptions and limitations should in essence be granted *sui generis* status quo due to their origins stemming from the fundamental rights.[110]

[108] Rosati E. (2021) *Five Considerations for the Transposition and Application of Article 17 of the DSMD*. J. of IP Law & Practice.
[109] Directive (EU) 2019/790 on Copyright and Related Rights.
[110] Quintais. J. P., Frosio G., Gompel v. S., Hugenholtz, P. B., Husovec M., Jütte, B. J., Senftleben M. (2019) *Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the DSMD* 10 J IP Info Tech & Elec Com L 277.

Sganga (2020) argues, that the Court, until that moment, had not articulated essence of copyright under Article 17(2) vaguely outlining that the economic and moral rights are to be balanced against other fundamental rights and freedoms. It has for a while failed to clarify the interplay between sources in construing the content of conflicting rights, as well as incorporating the Charter with accepted constitutional traditions, as interpreted in the right to property.[111]

As per Article 17(3) DSMD:

> 'When an [OCSSP] performs an act of communication to the public or an act of making available to the public under the conditions laid down in this Directive, the limitation of liability established in Article 14(1) of [e-Comm. Directive] shall not apply to the situations covered by this Article.'[112]

Exceptions and limitations or user freedoms are imperative not only for: '(i) the acts covered by the specific right of communication to the public regulated in Article 17; but also (ii) for all acts of uploading or making available by users on OCSSP platforms that meet the requirements of the relevant exceptions and limitations.'[113]

The main distinction is that the right of communication to the public in Article 17 requires that the initial act of making available by the user is of a non-commercial character or purpose, whereas the relevant exceptions and limitations do not include such a requirement, neither in the text of Article 17(7) nor in the corresponding provisions in the InfoSoc Directive. This interpretation is not restrained by the reference to 'existing exceptions' in Article 17(7).[114]

[111] Article 17 of the Charter of Fundamental Rights; Sganga C. (2020) *A New Era for EU Copyright Exceptions and Limitations?* ERA Forum 21.
[112] Directive (EU) 2019/790 on Copyright and Related Rights.
[113] Quintais. J. P., Frosio G., Gompel v. S., Hugenholtz, P. B., Husovec M., Jütte, B. J., Senftleben M. (2019) *Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the DSMD* 10 J IP Info Tech & Elec Com L 277.
[114] Ibid.

3.3 *Republic of Poland v EP and Council of the EU*

Spindler (2020) compares the relationship between users, service providers, and rightholders within frames of Article 17 to a complex triangle – which entails balancing the stakeholders' rights. Article 17(4) b) DSMD acknowledges that there is no proactive obligation for OCSSPs to monitor their platforms, the same, however, is not valid in terms of the duty to monitor the platform in relation to license requiring content, as covered in Article 17(1) DSMD.[115] Thus if Article 17(4) is interpreted simultaneously with article 17(7) and 17(9) there is a twofold obligation for OCSSP to both 'prevent the availability' of unauthorised content while as well to safeguard the UGC encompassed in exceptions or limitations.[116]

The case *Republic of Poland v the EP and Council of the EU*[117] launched by Poland to Article 17 before the CJEU has some worries hovering over. Poland has requested the annulment of Article 17(4) paras 2 and 3 DSMD, containing the formulations that OCSSPs should:

> '[impement] best efforts to prevent their future uploads in accordance with point (b)'[118]

In essence, in case the CJEU finds that the provisions enlisted above could not be removed from Article 17, Poland asks the Court annul Article 17 in its entirety. The automatic verification or filtering of UGC allegedly infringes the right to freedom of expression and information outlined by Article 11 of the Charter. The challenges outspoken by Poland should not be left to interpretation of national courts.[119]

Lambrecht (2020) brings forward 'the lack of accountability for private enforcement of copyright law', either by technological or algorithmic means. On the other hand, the European legislator cleverly omitted referring to 'effective technologies' implied in 17(4), exceptions and limitations under Article 17(7) will

[115] Spindler G. (2020) *The Liability System of Art. 17 DSMD and National Implementation – Contravening Prohibition of General Monitoring Duties?* 10 JIPITEC 344.
[116] Lambrecht M. (2020) *Free Speech by Design: Algorithmic Protection of Exceptions and Limitations in the Copyright DSMD* 11 J IP Info Tech & Elec Com L 68.
[117] C-401/19.
[118] Directive (EU) 2019/790 on Copyright and Related Rights.
[119] Rosati E. (2021) *Five Considerations for the Transposition and Application of Article 17 of the DSMD*. J of IP Law & Practice.

be largely up to interpretation willingness and capacity of OCSSPs.[120] Similarly, Geiger and Jütte (2021) suggest, that a 'purely quantitative assessment' of UGC in order to identify infringing content cannot be 'equated to a legal analysis', which entails a profound human review or a context analysis and nuances.[121]

Spoerri (2019) argues if the legal regime would not permit certain OCSSPs to acquire upload-filters at a favourable rate or to be granted an exemption from the filtering obligations, the filtering requirement will impose market entry barrier. This could impede investment and innovation[122] and possibly distort the competition in the digital single market, while the large tech giants stay afloat.

Interestingly, the Commission's *Questions and Answers – New EU Copyright Rules* (2021) clarify that the Copyright Directive does *not* oblige to use upload filters or any specific technology to identify illegal content. Certain online platforms are required to conclude licensing agreements with rightholders. If licences are not concluded *best effort method* is applied, which does not imply any specific means or technology. This may be considered a relief, but evidently it is a nonsensical and utopian task to filter the content manually, depending on the traffic of the website.

The Guidance (2021) discusses that *best efforts* is something 'new' service providers are presupposed to comply with on a case by case basis. With regard to the best efforts that 'new' service providers exceeding five million monthly unique visitors are obliged to prevent future uploads of notified works, the requirements are more lax for OCSSPs as expressed in Article 17(4), as derived from the principle of proportionality.[123]

[120] Lambrecht M. (2020) *Free Speech by Design: Algorithmic Protection of Exceptions and Limitations in the Copyright DSMD* 11 J IP Info Tech & Elec Com L 68.
[121] Geiger C. & Jütte, B. J. (2021) *The EU Commission's Guidance on Article 17 of the Copyright in the Digital Single Market Directive – A Guide to Virtue in Content Moderation by Digital Platforms?* EU IP R.
[122] Spoerri T. (2019) *On Upload-filters and Other Competitive advantages for Big Tech Companies under Article 17 DSMD*, 10(2) J. IP. Info. Tech. & Elec. Com. L. 173.
[123] The Commission to the EP and the Council (2021) *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* Brussels, COM 288 final.

3.4 *De Minimis* Exclusion

Rosati (2021) argues that the Copyright Directive does not quantify the concept of 'large amount'.[124] Directive does not introduce any evidence of *de minimis* exclusion, therefore is left out for the interpretation by national courts. To qualify as OCSSP the entity must fulfil the conditions specified in the Recital 66 DSMD.

The Guidance (2021) on the characteristics of 'large amount', addresses this uncertainty, by clarifying that the Member States should not define 'large amount' in their national law to avert from legal dissonance of distinct interpretation of 'OCSSP' throughout various Member States.

Article 17(6), differentiates *new* OCSSPs from others by criteria of operating less than three years with an annual turnover below EUR 10 million. In case the average number of monthly unique visitors exceeds five million, the 'best efforts' principle shall apply. *The Guidance* (2021) says that however, best efforts are required to obtain an authorisation in accordance with Article 17(4) (a). This requirement imposed on start-ups is assessed on a case-by-case to ensure that this obligation does not result being unjustified or disproportionate.

3.5 Exceptions and Limitations under Article 17(7)

Previously under Articles 5(3) (d) and (k) of the InfoSoc Directive the exceptions and limitations were voluntary in nature; thus not all Member States have transposed them, and they were also a subject to different interpretation. Uploaded material that does not infringe copyright should at the minimum comprise: (i) material in the public domain; (ii) material subject to an (express or implied) license; (iii) material covered by exceptions and limitations, either in Article 17(7) DSMD and/ or in Article 5 of the InfoSoc Directive.[125] However, as Ferri (2020) points out, in case of a contradiction within exceptions and limitations under Article 17(7) DSMD and Article 5 of the InfoSoc Directive, Article 17(7) prevails due its mandatory nature.[126] This is also evident from the wording of Recital 70 DSMD, which stipulates that exceptions and limitations:

[124] Rosati E. (2021) *Five Considerations for the Transposition and Application of Article 17 of the DSMD*. J of IP Law & Practice.
[125] Quintais. J. P., Frosio G., Gompel v. S., Hugenholtz, P. B., Husovec M., Jütte, B. J., Senftleben M. (2019) Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the DSMD, 10 J IP Info Tech & Elec Com L 277.
[126] Ferri F. (2020) *The Dark side(s) of the EU Directive on Copyright and Related Rights in the DSM*. China-EU Law J.

> 'should … be made *mandatory* in order to ensure that users receive uniform protection across the Union.'[127]

As quoted above the exceptions and limitations in Article 17(7) attempt to safeguard user rights and freedoms. National lawmakers and courts should thus recognise them despite licensing agreements between rightholders and OCSSPs.[128] Similarly, *the Guidance* (2021) asserts that Member States should transpose the *mandatory* exceptions and limitations in Article 17(7) according to the Charter and comply with the case law of the CJEU.[129]

Recital 5 DSMD communicates, that *mandatory* exceptions or limitations for uses of text and data mining, illustration for teaching and cultural heritage preservation should be introduced. The existing exceptions and limitations in Union law should continue to exist, as long as they do not restrict the implication of the *mandatory* exceptions or limitations of the Copyright Directive. It also proposes that Directives on the Legal Protection of Databases and InfoSoc Directive should be amended. Recital 5 DSMD once again gives more clarity that the new Copyright Directive Prevails over InfoSoc Directive and that exceptions and limitations under 17(7) DSMD are indeed mandatory.

The second paragraph of Article 17(7) DSMD outlines a special regime for certain exceptions and limitations:

> '… Member States *shall* ensure that users in each Member State are able to rely on any of the following existing exceptions or limitations when uploading and making available *content generated by users* on [OCSSPs]:
>
> (a) quotation, criticism, review;
> (b) use for the purpose of caricature, parody or pastiche'.[130]

The formulation of Article 17(7) 'users in each Member State' implies that the exceptions and limitations are to be incorporated in all Member States of the EU to the same effect.[131] Geiger and Jütte (2021) support this notion the formulation 'shall' deems these exceptions to be mandatory, in contrast to their analogies in the InfoSoc Directive.[132] *The Guidance* (2021) also provides a clarification on the

[127] Directive (EU) 2019/790 on Copyright and Related Rights.
[128] Quintais. J. P., Frosio G., Gompel v. S., Hugenholtz, P. B., Husovec M., Jütte, Bernd J. J., Senftleben M. (2019) *Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the DSMD* 10 J IP Info Tech & Elec Com L 277.
[129] The Commission to the EP and the Council (2021) *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* Brussels, COM 288 final.
[130] Directive (EU) 2019/790 on Copyright and Related Rights.
[131] Quintais. J. P., Frosio G., Gompel v. S., Hugenholtz, P. B., Husovec M., Jütte, B. J., Senftleben M. (2019) *Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the DSMD* 10 J IP Info Tech & Elec Com L 277.
[132] Geiger C. & Jütte, Bernd J. (2021) *Platform liability under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match.* GRUR International.

subject matter, that Member States should transpose the mandatory exceptions and limitations in Article 17(7).

In the process of adoption of the Copyright Directive, the 'value gap' argument played a paramount role in the dissensus on UGC. In its essence is the adequate financial reimbursement of the rightholders for the content made available online.[133] Senftleben (2020) suggests that the fuse of UGC may hinder the 'successful invocation' of the right to quote. In *Pelham*[134], the CJEU described quotation as:

> 'the use, by a user other than the copyright holder, of a work or, more generally, of an extract from a work for the purposes of illustrating an assertion, of defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user, since the user of a protected work wishing to rely on the quotation exception must therefore have the intention of entering into 'dialogue' with that work...'. [135]

Authors of the paper *Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the DSMD* outline that the CJEU has identified the concepts of 'parody' and 'quotation' in the InfoSoc Directive as autonomous concepts of the EU Law in several judgements: *Painer*, *Deckmyn*, *Funke Medien*, *Pelham* and *Spiegel Online*[136]. Those judgements mirror a broad interpretation of the exceptions and limitations, which acknowledges their fundamental rights justification, outlines their requirements for application, and prevents national lawmakers to limit their scope.[137] Thus, the concepts of 'quotation', 'criticism', 'review', 'caricature', 'parody' and 'pastiche' in Article 17(7) should be regarded as autonomous within the EU legislation and interpreted consistently across InfoSoc and Copyright Directives, as derived from CJEU case law. Lambrecht (2020) also discusses the same notion: CJEU has clarified that the concept of 'parody' to be interpreted as an autonomous concept of EU in line with *Deckmyn* case.[138] Angelopoulos and Quintais (2019) mention that overlaps within InfoSoc

[133] Senftleben M. (2020) *Institutionalized Algorithmic Enforcement – The Pros and Cons of the EU Approach to UGC Platform Liability* 14 FIU L Rev 299.
[134] C-467/17.
[135] Ibid.
[136] *Painer* (C-145/10), *Deckmyn* (C-201/13), *Funke Medien* (C-469/17), *Pelham* (C-476/17) and *Spiegel Online* (C-516/17).
[137] Quintais. J. P., Frosio G., Gompel v. S., Hugenholtz, P. B., Husovec M., Jütte, B. J., Senftleben M. (2019) *Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the DSMD* 10 J IP Info Tech & Elec Com L 277.
[138] *Deckmyn* (C-201/13); Lambrecht M. (2020) *Free Speech by Design: Algorithmic Protection of Exceptions and Limitations in the Copyright DSMD* 11 J IP Info Tech & Elec Com L 68.

and Copyright Directives, such as between private copying and reprography should be tackled.[139]

So what exactly does *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others*[140] case entail on the concept of 'parody'? In the opinion of Mr Advocate General Cruz Villalón delivered on 22 May 2014, para. 21, for the concept of 'parody' to be considered autonomous in EU law, it must satisfy the following conditions:

> '(i).… Display an original character of its own (originality);
> (ii) Display that character in such a manner that the parody cannot reasonably be ascribed to the author of the original work;
> (iii) Seek to be humorous or to mock, regardless of whether any criticism thereby expressed applies to the original work…;
> (iv) Mention the source of the parodied work(?)'.[141]

The Commission and the Kingdom of Belgium within the frameworks of the *Deckmyn*[142] case agree that 'the concept of parody must be interpreted independently and uniformly', although the discretion between Member States is apparent. Mr Advocate General Cruz Villalón supports this view. The InfoSoc Directive neither defines the term 'parody' nor incorporates 'an express reference to the law of the Member States for the purpose of defining the term.' As stated in '1.3 Materials and Method' section of this thesis, the Advocate General concludes that the concept of 'parody' in Article 5(3)(k) of the InfoSoc Directive is an autonomous concept of Union law. The Kingdom of Belgium asserted that the distinction between 'parody', 'caricature' and 'pastiche' should not define 'parody', as the three concepts' nature is rather similar to be differentiated.

Mr Advocate General Cruz Villalón derives the dictionary definitions of the word 'parody' in various languages, finally concluding with English language definition:

> 'A prose, verse or (occas[ionally]) other artistic composition in which the characteristic themes and the style of a particular work, author, etc. are exaggerated or applied to an inappropriate subject, esp[ecially] for the purposes of ridicule …'.[143]

As it appears across various language definitions a 'parody' is a *copy* and a *creation*, which contains 'an element of tribute to, or acknowledgement of, the

[139] Angelopoulos C. & Quintais J.P.(2019) *Fixing Copyright Reform* 10 J IP Info Tech & Elec Com L 147
[140] C-201/13.
[141] Ibid.
[142] *Deckmyn* (C-201/13); Lambrecht M. (2020) *Free Speech by Design: Algorithmic Protection of Exceptions and Limitations in the Copyright DSMD* 11 J IP Info Tech & Elec Com L 68.
[143] Brown L. (2007) *Shorter Oxford English Dictionary*, Oxford: OUP 6th ed.

original work'. He also concludes that, the EU law leaves the interpretation to the national courts of the Member States. Ultimately the list of exceptions stems from various legal traditions across the EU Member States. Mr Advocate General Cruz Villalón defines parody as a 'form of artistic expression and a manifestation of freedom of expression'. An interpretation of the concept 'parody' by the civil court should accent on the freedom of expression by relying on the fundamental rights set out in the Charter. In conclusion, the concept of 'parody' in Article 5(3)(k) of InfoSoc Directive is an autonomous concept of Union law.

Rosati (2021) proposes a minimalistic approach to transposition of Article 17(7), implying that Member States are ought to institute national exceptions or limitations comprising: quotation, criticism, review, caricature, parody or pastiche as well as well as other concepts within the framework of the provision. Member States are not at liberty to introduce certain exception concepts selectively, such as 'quotation', and completely bypass others, such as 'parody' in their legislation. All these terms are autonomous in the EU law and should be adopted homogeneously within the EU. Article 25 DSMD permits Member States to incorporate 'broader provisions, compatible with the exceptions and limitations', so that it complies with Article 5 of the InfoSoc Directive: within the scope of the *acquis*, yet not beyond it.[144]

Spindler (2020) proposes a way to create some freedom for UGC in relation to the limitation for pastiches to be implemented in Member States.[145] Senftleben (2020) derives a definition of pastiche from *Merriam-Webster English Dictionary*: [146]

> '… a literary, artistic, musical, or architectural work that imitates the style of previous work.'[147]

and *Collins English Dictionary*:

> '… a work of art that imitates the style of another artist or period … a work of art that mixes styles, materials, etc.'[148].

[144] Rosati E. (2021) *Five Considerations for the Transposition and Application of Article 17 of the DSMD*. J of IP Law & Practice.
[145] Spindler G. (2020) *The Liability System of Art. 17 DSMD and National Implementation – Contravening Prohibition of General Monitoring Duties?* 10 JIPITEC 344.
[146] Senftleben M. (2020) *Institutionalized Algorithmic Enforcement – The Pros and Cons of the EU Approach to UGC Platform Liability* 14 FIU L Rev 299.
[147] Merriam-Webster English Dictionary *Pastiche* <https://www.merriamwebster.com/dictionary/pastiche> (Last visited 20.07.2021).
[148] Collins English Dictionary *Pastiche* <https://www.collinsdictionary.com/dictionary/english/pastiche> (Last visited 20.07.2021).

The authors of the paper *Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the DSMD,* on the other hand, believe that in order to strengthen the effectiveness of the exceptions and limitations and user freedoms in Article 17(7), Member States should unanimously implement a broad interpretation of a concept 'pastiche' amongst the other concepts. In this way it would incorporate the majority of transformative types of UGC uploaded by users on OCSSP platforms, including remixes and mash-ups. Member States should consider elucidating the exceptions and limitations for incidental use in their national laws in cases when UGC is published on OCSSP platforms.[149]

Similarly as cited in the previous paragraph, *Comment of the ECS on implementing Article 17 of the DSMD into National Law* tackles exceptions and limitations outlined in Article 17(7) DSMD. ECS recommends that Member States may consider broadening the concept of 'pastiche' covering a wider spectrum of UGC. If a broad limitation infrastructure for UGC – based on the open-ended concept of 'pastiche' – is combined with the payment of royalties, Article 17(7) DSMD also has the capacity to monetize and incentivize the new directive. That said, even though OCSSPs will still have to differentiate between permissible pastiche and prohibited piracy, the introduction of new use privileges for UGC may result in algorithmic content identification tools which may follow a distinct filtering logic. Instead of flagging third-party content, a system filtering quotations, parodies and pastiches focuses on creative user input that may justify the upload.[150]

Recitals 70 and 84 DSMD emphasize the virtue to comply with the Charter (Articles 11, 13, 17).[151] ECS (2020) alleges that the wording of Article 17 DSMD attempts to preserve creativity amplitude for variations of UGC that may be classified as 'transformative' in the light of the creative input which the user added to pre-existing third-party content. Article 17(7) enhances the need to safeguard copyright limitations for the purposes of 'quotation, criticism and review,' and 'caricature, parody and pastiche.' Since these concepts amplify freedom of expression and information, they are essential components to the new

[149] Quintais. J. P., Frosio G., Gompel v. S., Hugenholtz, P. B., Husovec M., Jütte, B. J., Senftleben M. (2019) *Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the DSMD* 10 J IP Info Tech & Elec Com L 277.

[150] ECS (2020) *Comment on Selected Aspects of Implementing Article 17 of the Directive on Copyright in the DSM into National Law* (2020) 11 J IP Info Tech & Elec Com L 115.

[151] Charter of Fundamental Rights of the EU 2012/C 326/02, pp. 391–407: Article (11) *Freedom of Expression and Information,* Article (13) *Freedom of the Arts and Sciences,* Article (17) *Right to Property.*

licensing and filtering obligations. Article 17(7) also verifies the use of algorithmic enforcement measures must not erode areas of freedom that support the creation and dissemination of transformative amateur productions that are uploaded to platforms of OCSSPs.[152]

Authors of the paper *Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the DSMD* propose that exceptions and limitations should be harmonized nationally to reflect the essence of the exceptions and limitations in Article 17(7). Member States may broaden the following concepts: the exceptions and limitations of quotation, criticism, review, caricature, parody or pastiche including 'acts of making available by users to online platforms outside the definition of OCSSP in Article 2(6) DSMD'.[153]

The Guidance (2021) gives an account in relation to quotation and parody referring to the CJEU. Those notions are not defined in InfoSoc Directive, thus the commonly accepted meaning in everyday language and the context details are applied. Other concepts, such as pastiche, criticism and review, which are not defined in Article 17(7), should be handled similarly.[154] Even if exceptions and limitations under Article 17(7) should be autonomous, in line with the EU law, their interpretation in 'a context of everyday use' is still rather ambiguous. Perhaps artistic concepts are rather complex to define and their definition and precision may also impose a certain degree of limitation on users' freedom.

Husovec (2019) draws the attention to *Scarlet Extended*[155] case. Since November 2011 the CJEU has highlighted that IP rights are not always just and other interests should be accounted for. Over the years, the Court held that legislative conception of exclusive rights should be derived alongside with fundamental rights, including freedom of expression. This notion also encompasses a direct connotation to exceptions and limitations.[156] Thus the CJEU has rejected that an obligation to impose general monitoring can be required, and based its arguments on fundamental rights. Also, Geiger and Jütte (2021) emphasize, that CJEU

[152] ECS (2020) *Comment on Selected Aspects of Implementing Article 17 of the Directive on Copyright in the DSM into National Law* (2020) 11 J IP Info Tech & Elec Com L 115.
[153] Quintais. J. P., Frosio G., Gompel v. S., Hugenholtz, P. B., Husovec M., Jütte, B. J., Senftleben M. (2019) *Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the DSMD* 10 J IP Info Tech & Elec Com L 277.
[154] The Commission to the EP and the Council (2021) *Guidance on Article 17 of Directive 2019/790 on Copyright in the DSM,* Brussels, COM 288 final.
[155] C-70/10.
[156] Husovec M. (2019). *The Essence of IP Rights under Article 17(2) of the EU Charter*. German LJ, 20(6).

concluded in *Schrems II*[157] that any EU legislative measure in dispute or relation to one or several fundamental rights must outline the scope of the limitation it has on the right in question.[158]

Rosati (2021) sheds the light on the subject matter from another perspective, neither Article 17(7) nor Recital 70 directly attribute the exceptions or limitations for quotation, criticism, review, caricature, parody, and pastiche as 'rights'. Therefore the exceptions or limitations under Article 5 of the InfoSoc Directive, which Article 17(7) cites as not as 'rights' of users, but mandatory in nature. Thus exceptions and limitations under Article 17(7) DSMD are a part of the EU acquis and Member States may not modify its essence to jeopardize the unity of the single market. In the opinion of Advocate General Szpunar, in *Pelham*[159] *and Spiegel Online*[160] fundamental rights are referred to as[161]:

> 'a sort of *ultima ratio* [role] which cannot justify departing from the wording of the relevant provisions except in cases of gross violation of the essence of a fundamental right.'[162]

Derived from *Spiegel Online*[163], users are not warranted to adjure the Charter, lacking a specific copyright exception or limitation at both the EU level and nationally in accordance with the EU law. Nonetheless Article 17(7) may impose vertical direct effect in case Member State have not managed to transpose certain exceptions or limitation nationally.[164]

Nevertheless, several shortcomings of exceptions and limitations under Article 17(7) remain, such as 'the general territoriality of exceptions and their fragmented regulation, scattered as they are across uneven and loosely connected sources'. Thus there is a lack of a uniform definition of concepts across sources.[165]

However, the national legislator will not be able to go beyond these concepts transposing the Copyright Directive. It will therefore be left to the courts to define the limits and possibilities for UGC within the concept of pastiche. The same

[157] C-311/18.
[158] Geiger C. & Jütte, B. J. (2021) *Platform Liability under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match.* GRUR International.
[159] C-467/17.
[160] C-516/17.
[161] Husovec M. (2019). *The Essence of IP Rights under Article 17(2) of the EU Charter*. German LJ, 20(6), 840-863.
[162] Opinion of Advocate General Szpunar, *Pelham* (C-476/17).
[163] C-516/17.
[164] Rosati E. (2021) *Five considerations for the transposition and application of Article 17 of the DSMD*. J of IP Law & Practice.
[165] Sganga C. (2020) *A New Era for EU Copyright Exceptions and Limitations?* ERA Forum 21.

applies to the attempt to establish 'statutory licences'. As explained above, despite the different term these correspond to limitations and stress that compulsory licenses are subject to the same conditions. A different use of language alone will not result in fundamental changes.[166]

The licensing and preventive requirements in Article 17 should be depicted alongside with exceptions and limitations contained in Article 17(7). The authors of the paper *Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive* stress that it is essential to consider other exceptions and limitations of UGC in cases of 'incidental inclusion' of a work or other subject-matter in other material', as stated in Article 5(3)(i) of InfoSoc Directive. Article 17(7) includes a general and a specific clause on exceptions and limitations. The general clause is contained in its first sub-paragraph, which details that the preventive obligations of 17(4) paras 2 and 3 should not block out UGC on OCSSP platforms if such content does not infringe copyright, including if it is covered by exception and limitation.[167]

Dusollier (2020) suggests that tying down obtaining a licence for content uploaded on channels similar to *YouTube*, with a filtering obligation, will complicate matters financially from those platforms to rightholders, despite the complexity of receiving such licences. It could also result in different level or inconsistency of filtering of various content and restrict a freedom of expression.[168]

In a context of the Copyright Directive's national implementation, Lambrecht (2020) proposes OCSSPs should be coerced to construct the algorithms which have the capacity to bypass flagging of exception-covered content. In case Member states do not manage to clarify OCSSPs' obligations, OCSSPs should nevertheless comply with 'protection by default' for exceptions and limitations as per their twofold liability to both impede unauthorized content and permit non-infringing content under Article 17(4), 17(7) and 17(9) DSMD. It is perhaps reasonable to solely tackle the quotation and parody exceptions, under Article 17(7), recently harmonized in the case law by the CJEU. Therefore, the most

[166] Spindler G. (2020) *The Liability System of Art. 17 DSMD and National Implementation – Contravening Prohibition of General Monitoring Duties?* 10 JIPITEC.
[167] Ibid.
[168] Dusollier S. (2020) *The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a Few Bad Choices, and an Overall Failed Ambition.* Common Market Law Review.

unambiguous situations should be clarified, as an outcome of discussions between rightholders, users, OCSSPs, and public authorities at the European level, as stipulated by Article 17(10) to:[169]

> 'discuss best practices for cooperation between [OCSSPs] and rightholders' … 'special account shall be taken … to balance fundamental rights and the use of exceptions and limitations'.[170]

Article 17(7) asserts that 'the cooperation' (expressed in Article 17(4)):

> 'shall not result in the prevention of the availability of works … uploaded by users, which do not infringe copyright … including where such works or other subject matter are covered by an exception or limitation.'[171]

Lambrecht (2020) stresses that the provision does not however directly refer to demonetization, which is a common procedure carried out by OCSSPs, such as *YouTube,* in case if the content is flagged as copyright infringing.[172] Article 17(9), para. 3, stipulates:

> 'This Directive shall in no way affect legitimate uses, such as uses under exceptions or limitations provided for in Union law'.[173]

Thus OCSSPs' duty to prevent uploads of infringing content should be evaluated based upon proportionality criteria, *stricto sensu*, to account users' fundamental rights.[174]

Wording of Article 17(7), para. 2, is more explicit:

> 'Member States shall ensure that users in each Member State are able to rely on... existing exceptions or limitations when uploading... [UGC] by users on [OCSSPs]...'[175]

than that of InfoSoc directive that some acts:

> 'shall be exempted…' or '…Member States may provide for exceptions or limitations... in the following cases…'.

Lambrecht (2020) argues that any obligation in relevance to OCSSPs should be transposed into national law, and therefore that the obligation provided by Articles 17(7) and 17(9):

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[169] Lambrecht M. (2020) *Free Speech by Design: Algorithmic Protection of Exceptions and Limitations in the Copyright DSMD* 11 J IP Info Tech & Elec Com L 68.
[170] Directive (EU) 2019/790 on Copyright and Related Rights.
[171] Ibid.
[172] Lambrecht M. (2020) *Free Speech by Design: Algorithmic Protection of Exceptions and Limitations in the Copyright DSMD* 11 J IP Info Tech & Elec Com L 68.
[173] Directive (EU) 2019/790 on Copyright and Related Rights.
[174] Lambrecht M. (2020) *Free Speech by Design: Algorithmic Protection of Exceptions and Limitations in the Copyright DSMD* 11 J IP Info Tech & Elec Com L 68.
[175] Directive (EU) 2019/790 on Copyright and Related Rights.

> 'must be given effect to by Member States in their implementing legislation' and may not be regarded as fulfilled 'by Member States by seeking to rely on any general provision informing users about existing exceptions and limitations in the terms of use of the OCSSPs'.

3.6 Legitimate Use

According to the wording of Article 17(9) DSMD:

> '…This Directive shall in no way affect *legitimate uses*, such as uses under exceptions or limitations provided for in Union law…'[176]

The Guidance (2021) identifies the concept of 'legitimate use' as a non infringing content. Rosati (2021) argues that Article 17(7) does not clarify that 'legitimate uses' should be allowed *ex ante*, rather than *ex post* by relying on the redress and complaint mechanism conveyed in Article 17(9), nor does it outline what the penalties if a user was restrained from uploading and making available content covered in exceptions and limitations under Article 17(7). Ideally the complaint and redress mechanism should be designed adequately.[177] As Recital 70 DSMD stipulates:

> 'OCSSPs should also put in place effective and expeditious complaint and redress mechanisms … [when users'] uploads could benefit from an exception or limitation… Any complaint filed … should be processed without undue delay and be subject to human review.'[178]

Thus *the Guidance* (2021) offers more clarification on 'legitimate use':

> '(a) uses under exceptions and limitations
> (b) uses by those who hold or have cleared the rights in the content they upload or uses covered by the authorisation under Article 17(2) and
> (c) uses of content not covered by copyright … notably works in the public domain or … content where the threshold of originality … is not met.'[179]

So what is permitted? To address this question, *the Guidance* (2021) describes 'non manifestly infringing' uploads, e.g. as short extracts or a small proportion of the work: a user-generated video including an extract of a feature film or an extract of a song. Content for which the rightholders have not provided a blocking instruction to the OCSSP is not regarded as 'manifestly infringing'. Exact matches of entire content or its large part should be typically regarded as 'manifestly infringing'. Appropriate criteria to identify 'manifestly infringing' content could

[176] Directive (EU) 2019/790 on Copyright and Related Rights.
[177] Rosati E. (2021) *Five Considerations for the Transposition and Application of Article 17 of the DSMD*. J. of IP Law & Practice.
[178] Directive (EU) 2019/790 on Copyright and Related Rights.
[179] The Commission to the EP and the Council (2021) *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market,* Brussels, COM 288 final.

comprise the length/size of the content, the proportion of the matching content in relation to the entire upload. In addition to the length of an extract, a combination of criteria may be applied, as the situation warrants. The Member States should to safeguard the effectiveness of the exceptions a balance of rights in line with the case law of the *Spiegel Online.*[180]

3.7 A Few Remarks on Article 17

It is paramount that legislative bodies create balanced legislation to both: incentivize innovation and creativity by protecting the rights of original content creators while also protecting the rights of individuals. The Copyright Directive's purpose is harmonization across the EU Member States and to create a balance of a free flow of information over the internet, but its current form falls short of accomplishing its goals. By adjusting the Copyright Directive, the Commission can strengthen European copyright law and safeguard the fundamental rights of European residents.[181]

More radical proposals by scholars and as derived from *Republic of Poland v the EP and Council of the EU*[182], include the annulment of Article 17 in its entirety. This would grant a new chance to elaborate a balanced liability regime for platforms and to implement it in a manner compliant with fundamental rights. This could be accomplished alongside with the ongoing negotiations of the proposed Digital Services Act[183], which main purpose is to regulate the activities and responsibilities of platforms and which faces similar challenges with regard to the protection of fundamental rights.[184] Digital Services Act amends e-Comm. Directive in a context of 'the liability exemption for providers of intermediary services', it erases Articles 12-15 in the e-Commerce Directive and transforms them, enhancing the liability exemptions of such providers, as defined by the CJEU.[185]

Another solution by Geiger and Jütte (2021) – an independent institution with a

[180] C-516/17.
[181] Brooks A. (2020) *Liable for Anonymous: The Danger of Holding Digital Platforms Liable for Copyright Infringement of Third-Party Users* 52 Geo Wash Int'l L Rev 129.
[182] C-401/19.
[183] The Commission's *Proposal for a Regulation 2020/0361(COD) of the EP and of the Council on a Single Market For Digital Services* <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A825%3AFIN> (Last visited 20.07.2021).
[184] Prof. Christophe Geiger's presentation at ECS (2021) *Copyright Challenges During the Pandemic (and Beyond)*, Online Conference <https://europeancopyrightsociety.org/2021-online/> (Last visited 20.07.2021).
[185] Proposal for a Regulation 2020/0361(COD) of 15.12.2020 of the EP and of the Council on a Single Market For Digital Services.

purpose to assist on overviewing takedown and staydown decisions. Initiating an independent institution in the collaboration between users and rightholders could possibly ensure the right to a fair trial.[186]

The Guidance (2021) recommends 'Collective licences with an extended effect' as an option, as long as they they follow the EU law, as stated in Article 12 DSMD. This could be a sensible solution for cases where it is tricky to identify all rightholders, and 'transaction cost of individual rights clearance with every rightholder concerned is prohibitively high' (Recital 45 DSMD). If the Member States were willing to develop collective licences as per Article 17, it will also be mandatory for the members states to transpose Article 12 DSMD. The Commission's *Questions and Answers – New EU Copyright Rules* (2021) clarify the purpose of collective licensing with an extended effect is for the Member States to allow collective management organisations to conclude licences covering rights of non-members, under specific conditions. This mechanism features 'the clearance of rights' in fields where individual licensing would appear too complex.

The Commission's *Questions and Answers – New EU Copyright Rules* (2021) points out, the Copyright Directive also recommends a new licensing mechanism for out-of-commerce works, which are still protected by copyright but cannot be found commercially any longer, designed namely for cultural heritage institutions amongst others. The new rules also provide a new mandatory exception to copyright in case the representative collective management organisation representing the rightholders cannot be established. The 'fall-back' exception permits cultural heritage institutions to publish the out-of-commerce works on non-commercial platforms.

The Commission's *Questions and Answers – New EU Copyright Rules* (2021) articulates that when copyright of an artwork expires it falls into the public domain. Normally it should be allowed to use and share copies of that work. Nowadays, on the other hand, some Member States protect those works of art. The new Copyright Directive, however, ensures that nobody can claim copyright protection on works in the field of the visual arts which have already fallen into

[186] Geiger C. & Jütte, B. J. (2021) *Platform Liability under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match.* GRUR International.

the public domain. This facilitates full legal certainty in a context of copies of works of art in the public domain.

The Guidance highlights that there are more specific requirements on reporting under Article 17 of Directive on Collective Management of Copyright and Related Rights[187]. These requirements apply to OCSSPs in a context of collective management organisations.

[187] Directive 2014/26/EU of the EP 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.

4 Summary and Conclusion

As detailed in the wording of Recital 70 of the Copyright Directive, the exceptions and limitations under Article 17(7) should be made mandatory to ensure that users receive uniform protection across the Union. The formulation of Article 17(7) DSMD 'users in *each* Member State' implies that the exceptions and limitations are to be incorporated in *all* Member States and to the same effect. The Commission's *Guidance* (2021) instructed that Member States should transpose the *mandatory* exceptions and limitations in Article 17(7) according to the Charter and comply with the case law of the CJEU. It was evident from the Copyright Directive even prior publication of *the Guidance* that exceptions and limitations are mandatory, so in this sense *the Guidance* merely provided an [in]formal clarification in the context of its normative value.

The narrative of this thesis has demonstrated that a clarification of meaning and implications of exceptions and limitations within the scope of Article 17(7) of the Copyright Directive was insufficient by *the Guidance* (2021), however their *mandatory* nature was confirmed. This could possibly result in unharmonised exceptions and limitations across the EU Member States within the frameworks of Article 17(7) DSMD. Case law stipulates the concepts of quotation, parody, caricature and pastiche should be regarded autonomous, while *the Guidance* merely suggests to derive their meaning from the context of everyday use. Thus scholars recommend to broaden the interpretations of pastiche, quotation, parody and caricature to avoid legal dissonance across the EU Member States.

In certain perspective, Article 17(4) presumes *de facto* obligation to implement filtering system to comply with requirements imposed by Article 17. Technologically, this will be rather complicated as amount of UGC is increasing alongside with a growing number of internet users. Even though the Copyright Directive aims to safeguard users' freedom, its current formulation with its internal contradictions still allows a certain degree of legal uncertainty.

Some argue directly or indirectly, Article 17 DSMD contradicts the e-Comm. Directive's principle 'member States are prevented from imposing a monitoring

obligation'. Also, as per Article 17(8), there is no general monitoring obligation, at the same time OCSSPs expected to, for instance as per Articles 17(4) (b) '… to ensure the unavailability of specific works' or as per 17(4) para. 3, '… to prevent [the contents'] for the future uploads…' This leads to an assumption that an inherent conflict within Article 17 is present to a certain extent. Nonetheless, the manoeuvre here is that filtering obligations under Article 17 tend to be *implied* rather than *expressed*. As previously accounted, the European legislator cleverly omitted referring to 'effective technologies' implied in 17(4).

As it appears from the analysis of this thesis following concepts of 'communication to the public' or 'making available to the public' hold a paramount role in interpreting Article 17. The liability regime hits primarily Online Content Service Providers, as defined in Article 2(6) of the Copyright Directive. These are the key concepts by means of which Article 17 attempts to clarify the meaning of prior legislation. A few valid points outlined throughout this thesis communicate that the purpose of the Copyright Directive is clarification of the prior legislation and thus should resonate with it:

i) The EU Copyright Directive amends: Directive on the Legal Protection of Databases and InfoSoc Directives.

ii) According to *the Guidance* on the application of Article 17 is *lex specialis* to the norms on intermediaries of the e-Commerce and InfoSoc Directives.

iii) Advocate General Saugmandsgaard Øe (2020), in his opinion, expressed that Article 17 is 'interpreting law', clarifying the meaning that e-Comm. and InfoSoc Directives should always have had.

iv) Based on the wording of Article 17(3) when OCSSPs engage in 'an act of communication to the public' the limitation of liability covered in Article 14(1) of the e-Comm. Directive shall not apply.

It seems, *YouTube and Cyando*[188] joint cases may not be postulated as exemplary for depicting Article 17 of the Copyright Directive, the CJEU averted from referring to Article 17 DSMD in the ruling on *Youtube.* Yet the opinion of Advocate General Saugmandsgaard Øe (2020), stipulated that Article 17 DSMD constitutes an 'interpreting law', clarifying the meaning that e-Comm. and InfoSoc Directives should always have had. However, not everything is 'set in stone' the introduction to *the Guidance* communicates that the current ongoing

[188] C-682/18/ C-683/18.

case of *Republic of Poland v the EP and Council of the EU*[189], may amend *the Guidance's* content and naturally may influence the transposition of Article 17 by the Member States. There is also a slight possibility that Copyright Directive itself may still be amended. That would, nonetheless, complicate the tasks of the Member States, who are close to finalising the implementation of the Copyright Directive.

On the one hand, it is not entirely accountable for copyright law to be enforced privately either by technological or algorithmic means, that is content filtering. Henceforth, UGC could be a subject to continuous monitoring and unjustified blocking. On the other hand, based on complaint and redress mechanism set out in the Article 17(9) users should at all times be able to claim their rights listed under exceptions and limitations under Article 17(7) DSMD. The future of legal enforcement of users' fundamental rights to a freedom of expression is still questionable and legal uncertainty remains, despite mandatory nature of exceptions and limitations under Article 17(7) of the Copyright Directive, currently in force.

[189] C-401/19.

Appendix A

The EU's regulatory framework for copyright and neighbouring rights (acquis) consists of[190]:

- Directive on the harmonisation of certain aspects of copyright and related rights in the information society ('InfoSoc Directive'), 22 May 2001
- Directive on rental right and lending right and on certain rights related to copyright in the field of intellectual property ('Rental and Lending Directive'), 12 December 2006
- Directive on the resale right for the benefit of the author of an original work of art ('Resale Right Directive'), 27 September 2001
- Directive on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission ('Satellite and Cable Directive'), 27 September 1993
- Directive on the legal protection of computer programs ('Software Directive'), 23 April 2009
- Directive on the enforcement of intellectual property right ('IPRED'), 29 April 2004
- Directive on the legal protection of databases ('Database Directive'), 11 March 1996
- Directive on the term of protection of copyright and certain related rights amending the previous 2006 Directive ('Term Directive'), 27 September 2011
- Directive on certain permitted uses of orphan works ('Orphan Works Directive'), 25 October 2012
- Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market ('CRM Directive'), 26 February 2014
- Directive 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 (Directive implementing the Marrakech Treaty in the EU), 13 September 2017
- Regulation on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject

[190] EC (2021) *Copyright Legislation | Shaping Europe's Digital Future* <https://digital-strategy.ec.europa.eu/en/policies/copyright-legislation> (Last visited 20.07.2021).

matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled (Regulation implementing the Marrakech Treaty in the EU), 13 September 2017

- Regulation on cross-border portability of online content services in the internal market ('Portability Regulation'), 14 June 2017
- Directive on copyright and related rights in the Digital Single Market ('DSM Directive'), 17 April 2019
- Directive on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes ('Satellite and Cable II'), 17 April 2019
- Directive 87/54/EC, Council Decision 94/824/EC and Council Decision 96/644/EC) harmonise the legal protection of topographies of semiconductor products.
- The e-Commerce Directive
- Conditional Access Directive

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