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Does the DSM Directive Serve the Economic Interests of Companies Rather Than the Moral and Economic Rights of the Authors?

Bachelor's thesis

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Tallinn

2020

INTRODUCTION

The European Union Directive on Copyright in the Digital Single Market (DSM Directive) came into force last year (2019) from when I am writing this. I became interested in the topic after I noticed an outburst of heated discussion in social media. Actually one of the social media influencers, Felix Kjellberg, commonly known as "Pewdiepie", first gave me an introduction to the topic. The general consensus was that the users creating content to upload to Youtube, an online intermediary where users can upload and view visual content, were frustrated and angry by the effects of the Proposal on the platform. I will examine the issue whether the DSM directive is more beneficial to authors or companies as right holders. I use a qualitative research method[1] in assessing the DSM directive by reviewing its articles, Commission documents, legal literature, academic journal articles and relevant case law. In the first part of the thesis, I will discuss the protected rights under EU copyright law and the Digital Single Market strategy which lead to the DSM proposal. Then I will assess each of the directive's article in the light of which right holders the articles benefit. In the conclusion, I will analyse my findings and answer the research question.

1. COPYRIGHT IN THE EU

1. 1 Protected Rights

Copyright is the law of literary and artistic property. It establishes authorship and rights of the creator.[2] The EU gains its competence in the field of intellectual property based on one of the key aspects of TFEU, building an internal market.[3] The EU's criteria for copyright protection is that the work must be the author's own intellectual creation. Copyright protection requires human agency. Neighbouring rights concern interpretations of copyrighted works.[4] In

[1] M. McConville and W. H. Chui. Research Methods for Law. Edinburgh: Edinburgh University Press 2007, p. 17.
[2] R. C. Dreyfuss and J. Pila. The Oxford Handbook of Intellectual Property 2018, p. 487-488.
[3] A. Ramalho. Conceptualising the European Union's Competence in Copyright – What Can the EU Do? - Springer 2014/1, p. 178.
[4] *ibid.*, p. 490.

copyright the threshold of originality is low so derivative works are protected as well. Usually permission is needed from the right holder whose copyrighted work has been used in the creation. Also compilations might be protected but only the new data is protected. The other data stays still in the public domain.[5] Copyright includes moral and economic rights. Moral rights are linked to the personality of the author and inherent in the property right that arises from the act of creation. There is the author's right to be recognized as the creator of the work, the right of attribution. Moral rights include also the right to prevent alterations to her work that are damaging to her honor or reputation, right of integrity and right of divulgation, when, where and how to disclose the work.[6] Economic rights include the reproduction right meaning the right to produce copies and the adaptation right, a right to make derivative works. You can make an adaptation of someone's work without infringing copyright. There is also the rights of public performance/communication to the public[7] and the distribution right, exclusive right to distribute copies of the work to the public.[8]

There is a possibility of EU-wide copyright protection for musical works through multi-territorial licensing which was established in the Directive 2014/26/EU on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Use in the Internal Market. This multi-territorial license that was established by the directive is called the European Licensing Passport.[9] Even if there is the possibility of EU-wide copyright protection very few CMOs will be able to get this kind of license since it is so expensive. The estimated price of obtaining and maintaining copyright licenses for twenty-eight Member States over the course of twenty years would be 200,000 euros.[10] Paying that kind of money is most likely impossible for smaller creators and even larger right holders might not want to pay that price. Intellectual property legislation still maintains its territorial nature which means that the scope of protection is limited to the state where the protection is granted. Even with multi-territorial licensing the copyright holder owns a bundle of national rights. The work can be priced differently in the Member States. It

[5] R. C. Dreyfuss and J. Pila (footnote 2), p. 492.
[6] *ibid*., p. 500.
[7] *ibid*., p. 501-506.
[8] *ibid*., p. 506.
[9] M. Trimble. Extraterritorial Intellectual Property Enforcement in the European Union - South-Western Journal of International Law 2011, p. 311.
[10] J. Hoffman. Crossing Borders in the Digital Market: A Proposal to End Copyright Territoriality and Geo-Blocking in the European Union - The Geo. Wash. Int'l L. Rev. Vol. 49, 2016, p. 149.

might be an advantage since it is possible to make the work available with a lower price in those countries with a lower income. However, separate licenses for each country might create additional transaction costs when the exploitation rights for different countries have been transferred to different right holders or collecting societies. Also in case of cross-border enforcement the courts have to decide which national legislation to use.[11]

1.2 Digital Single Market Strategy

To ensure the functioning of the single market in the digital domain the European Commission proposed the Digital Single Market Strategy in 2015.[12] Its aims were "(i) access for consumers and businesses to online goods and services across Europe; (ii) creating the right conditions for digital networks and services to flourish; and (iii) maximizing the growth potential of the digital economy".[13] The problems that it addresses are differences in the laws applicable in different member states and anti-competitive practises of companies.[14] The Commission's President, Jean-Claude Juncker's vision was that the Digital Single Market Strategy would bring new jobs and up to EUR 250 billion growth in Europe.[15] In the strategy the digital single market is defined as a market in which "the free movement of goods, persons, services and capital is ensured, and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence".[16] In pursuing this policy the Commission first published a Communication Towards a Modern, More European Copyright Framework which concerned clarification of exclusive

[11] T. Dreier. Copyright in the times of the internet—overcoming the principle of territoriality within the EU - Springer 2017/6, p. 8.
[12] A. R. Lodder and A. D. Murray. EU Regulation of E-Commerce: A Commentary. Edward Elgar Publishing Limited 2017, p. 129.
[13] M. L. Montagnani and A. Y. Trapova. Safe harbours in deep waters: a new emerging liability regime for Internet intermediaries in the Digital Single Market - International Journal of Law and Information Technology 2018/10, p. 296.
[14] A. R. Lodder and Andrew D. Murray (footnote 12), p. 129.
[15] T. Pihlajarinne, J. Vesala and O. Honkkila. Online Distribution of Content in the EU. M. Kivistö. The DSM Directive: a package (too) full of policies. Cheltenham, UK. Northampton, MA, USA: Edward Elgar Publishing 2019, p. 6.
[16] M. J. Schmidt-Kessen. EU Digital Single Market Strategy, Digital Content and Geo-Blocking: Costs and Benefits of Partitioning EU's Internal Market - Columbia Journal of European Law, vol. 24, 2018, p. 562-563.

rights, linking, news aggregators and enforcement matters.[17] The Commision also published a public consultation on the evaluation and modernization of the legal framework for the enforcement of intellectual property rights. Then there was a public consultation on the role and responsibilities of online intermediaries and platforms.[18] In the Communication on Online Platforms and the Digital Single Market, there was a plan to maintain the existing liability regime but some issues relating to illegal content needed to be addressed. The next step was the DSM Proposal.[19]

2. LIMITATIONS, LICENSING AND ACCESS TO WORKS

2.1. Scope and Objective of the DSM Directive

Jean-Claude Juncker first addressed the idea for a new regulatory instrument to tackle problems in the digital domain in July 2014 to the European Parliament. In 2016 an impact assessment was done and the Proposal for the Directive on Copyright in the Digital Single Market.[20] The DSM Directive differs from previous directives on copyright since its objective was to tackle policy problems. Whereas the previous ones were all directed to solve an individual problem. Since Juncker's vision was to create a common policy for EU copyright the Proposal was made in the form of a directive rather than a regulation. The idea was that the Member States would have room for implementation. However, the Commission's approach in formulating the articles does not leave that much of room for implementation. The Directive is technical, rather than general. It is unclear whether implementation will serve the objective of a functioning internal market.[21] The proposal states as its aim to guarantee that authors and rightholders receive a fair share of the value that is generated by the use of their works and other subject-matter. It claims to establish this by measures aiming to improve the position of rightholders to negotiate and be remunerated for the exploitation of

[17] G. Frosio. To Filter, or Not to Filter - That Is the Question in EU Copyright Reform - Cardozo Arts & Entertainment Law Journal, vol. 36, no. 2, 2018, p. 335.
[18] *ibid.*, p. 336.
[19] *ibid.*, p. 337.
[20] T. Pihlajarinne, J. Vesala and O. Honkkila (footnote 15), p. 7.
[21] *ibid.*, p. 21-22.

their content by online services giving access to user-uploaded content.[22] The Commission takes a follow-the-money approach which means depriving infringers from the revenue they gain from illegal activities. The approch's objective is to act as a deterrent.[23] In general promoting agreements between creators and information society services is good. However, the directive is lacking in clarity and consistency.[24] The directive follows the traditional exclusionary copyright approach rather than taking into account the public interest of spreading information and culture or intervening in the most problematic areas of the Infosoc directive, such as the fragmentation of copyright law.[25]

The proponents of the directive were large content providers and creators like Paul McCartney, James Blunt, and the International Federation of the Phonographic Industry (IFPI).[26] The opponents, on the other hand, were online platforms like Google (which owns YouTube) Facebook, Instagram, and Twitter.[27] In the negotiation process of the directive notable architects and pioneers of the Internet, including Tim Berners-Lee, inventor of the World Wide Web, and Jimmy Wales, the founder of Wikipedia, sent a letter to the European Parliament expressing their concern of the surveillance of the Internet and the burden from smaller companies that the directive would impose.[28] An opposing petition was signed over 5 million times.[29] On 17 May 2019, the official final version of the directive was published. Some of the concerns were addressed but a lot of the issues still remain. The proposal started as a legislative instrument to promote the digital single market turned but was in many aspects based on lobbying rather than evidence.[30] The directive is one of the longest one in the scope of copyright legislation with 86 recitals and 32 articles. It is divided into five titles: general provisions (I), measures to adapt exceptions and limitations to the digital and

[22]M. L. Montagnani and A. Trapova (footnote 13), p. 4.
[23] G. F. Frosio (footnote 17), p. 34.
[24] *ibid.*, p. 338.
[25] G. Ghidini and F. Banterle. A critical view on the European Commission's Proposal for a Directive on copyright in the Digital Single Market - Giurisprudenza Commerciale, 6, 2018/1, p. 2.
[26] A. Tyner. The EU Copyright Directive: Fit for the Digital Age or Finishing It - Journal of Intellectual Property Law 26, no. 2, 2019, p. 277.
[27] *ibid.*, p. 278.
[28] *ibid.*, p. 276.
[29] T. Spoerri. On Upload-Filters and Other Competitive Advantages for Big Tech Companies under Article 17 of the Directive on Copyright in the Digital Single Market - Journal of Intellectual Property, Information Technology and Electronic Commerce Law, vol. 10, no. 2, 2019, p. 174.
[30] J. P. Quintais. The New Copyright in the Digital Single Market Directive: A Critical Look European - Intellectual Property Review 2020, p. 1.

cross-border environment (II), measures to improve licensing practices and ensure wider access to content (III), measures to achieve a well-functioning marketplace for copyright (IV), and final provisions (V).[31]

2.2 Research and Cultural Institutions

Article 3 and Article 4 of the directive concern exceptions on text and data mining. [32] TDM is defined as "any automated analytical technique aimed at analysing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations."[33] TDM can be used, for example, by scientists to identify relevant pieces in hundreds of thousands of documents or by journalists to extract relevant information from leaked documents.[34] The process generally consists of three steps, accessing the analysed content, mining or copying the analysed content, and analysing the content itself.[35] Extracting information does not fall within the scope of copyright. However, the information is usually contained in materials with might be copyrightable.[36] Under EU law the copying done in the TDM activities consists copyright infringement unlike in other more innovation-oriented jurisdictions like the US and Japan.[37] The Infosoc directive art. 5(3) already allows the reproduction right and the right to communication to the public for the use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved.[38] Making of temporary copies is also allowed under art 5(1) of the directive. However, sometimes the materials have to be digitised and the

[31] J. P. Quintais (footnote 30), p. 3.
[32] DSM Art. 3.
[33] J. P. Quintais (footnote 30), p. 7.
[34] B. Raue. Free Flow of Data? The Friction Between the Commission's European Data Economy Initiative and the Proposed Directive on Copyright in the Digital Single Market - Springer 2018/4, p. 380.
[35] J. Míšek. Exception for Text and Data Mining for the Purposes of Scientific Research in the Context of Libraries and Repositories - TGJ Volume 16, 2020, p. 73.
[36] B. Raue (footnote 34), p. 380.
[37] T. Margoni & M. Kretschmer. The Text and Data Mining exception in the Proposal for a Directive on Copyright in the Digital Single Market: Why it is not what EU copyright law needs - Technical Report 2018/4, p. 3.
[38] M. Bottis, M. Papadopoulos, C. Zampakolas and P. Ganatsiou. Text and Data Mining in the EU Acquis Communautaire Tinkering with TDM & Digital Legal Deposit. - Erasmus Law Review 12, no. 2, 2019/11, p. 191.

copies kept longer for high quality data analysis.[39] Article 6(2)(b) of the Database directive allows the member states to provide for some exceptions to the database for the sole purpose of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved.[40] Union law provides some exceptions that may apply to TDM but that the exceptions are optional and not fully adapted.[41]

The exception under article 3 is mandatory and cannot be limited by contract.[42] The justification for the exception is the public interest in generating new knowledge and the principle that factual information is not copyrightable.[43] Regardless the article has a triple limitation to the exception. TDM can only be performed by research institutions and cultural heritage organisations which have legal access to the protected content and only for the purpose of scientific research.[44] This excludes commercial purposes, such as activities of an enterprise or an university if the sole purpose in not research. It also excludes investigative journalism.[45] This has been criticised to create a privileged class of data miners.[46] The Max Planck Institute has argued that the exception should cover commercial activities if there is lawful access to the materials, and in case of research organisations, even TDM without lawful access.[47] Another limitation is that the article only exempts the right of reproduction but not the right of distribution or communication to the public, nor the right of adaptation. This means that the results of the TDM cannot be communicated to the public or redistributed if they contain copyright infringing material.[48] In contradiction, the Berne Convention does not allow for a limitation of the right of communication to the public, including broadcasting, for the purpose of scientific research.[49] Rightholders are also allowed to apply measures to

[39] B. Raue (footnote 34), p. 381.
[40] M. Bottis, M. Papadopoulos, C. Zampakolas and P. Ganatsiou (footnote 38), p. 193.
[41] N. Jondet. The text and data mining exception in the proposal for a directive on copyright: why the European Union needs to go further than the laws of member states - Propriétés Intellectuelles, no. 67, 2018/4, p. 32.
[42] T. Margoni & M. Kretschmer (footnote 37), p. 6.
[43] B. Raue (footnote 34), p. 381.
[44] J. Míšek (footnote 35), p. 75.
[45] T. Margoni & M. Kretschmer (footnote 37), p.4.
[46] M. Myška. Text and Data Mining of Grey Literature for the Purpose of Scientific Research - TGJ Volume 13 2017, p. 35.
[47] G. Ghidini and F. Banterle (footnote 25), p. 3.
[48] T. Margoni & M. Kretschmer (footnote 37), p. 5.
[49] M. Bottis, M. Papadopoulos, C. Zampakolas and P. Ganatsiou (footnote 38), p. 192.

ensure the security and integrity of the networks and databases where the works or other subject matter are hosted, while these measures shall not go beyond what is necessary to achieve that objective. For example, an information provider may limit the accesses to its database based on this provision. That might make the exception very difficult to apply in practise. Article 4 provides for a general exception for text and data mining. However, the possible period of reproduction and extraction retention is limited to the time required directly for the purpose of performing TDM. This limits the possibility of future analyses. Rightholders are also allowed to exclude the application of the exception.[50] Under art. 6 member states have to introduce exceptions that would allow for cultural heritage institutions to make copies of any works or other subject matter that are permanently in their collections, in any format or medium, for purposes of of such works or other subject matter and to the extent necessary for such preservation.[51]

Article 2(3) of the DSM Directive defines a cultural heritage institution as "a publicly accessible library or museum, an archive or a film or audio heritage institution". Its status is assigned by national law.[52] Recital 28 of the directive states that “the cultural heritage institutions should be allowed to rely on third parties acting on their behalf and under their responsibility, including those that are based in the other Member States, for the making of copies”.[53] Article 6 provides an exception for acts of reproduction of certain works made by cultural heritage institutions for purposes of preservation. It includes acts by third parties acting on the behalf and under the responsibility of the beneficiary institution.[54] Authors have expressed their worries about who can mine their content and for what purposes.[55] If data is concentrated to a few large players, it gives them a certain “god eye’s view”.[56] However, the limitations in the DSM Directive concerning TDM do not seem to pose a great threat to authors rights since the exceptions are very limited. For example, companies that do TDM for commercial purposes are not governed by the limitations. A certain amount of restriction to

[50] J. Míšek (footnote 35), p. 75.
[51] M. Koščík. Exceptions for Cultural Heritage Institutions under the Copyright Directive in the Digital Single Market - TGJ Volume 16, 2020, p. 83.
[52] *ibid.*, p. 81.
[53] *ibid.*, p. 83.
[54] J. P. Quintais (footnote 30), p. 9.
[55] C. L. Borgman. Text Data Mining from the Author’s Perspective: Whose Text, Whose Mining, and to Whose Benefit? Text Data Mining National Forum Statement 2018/3, p. 2.
[56] *ibid.*, p. 3.

authors' rights are justified on grounds of public policy goals. Furthermore, information in itself is not copyrightable. The limitations benefit researchers and journalist whose work is detrimental to science, innovation and free press.

2.3 Exception for Teaching Activities

Article 5 provides for an exception for the use of works/subject matter in digital and cross-border teaching activities. It covers only use for "the sole purpose of illustration for teaching by educational establishments, to the extent justified by the non-commercial purpose (of the particular teaching activity) to be achieved". This excludes educational uses by other institutions, like libraries and museums or purely commercial educational services.[57] The use must take place under the responsibility of an educational establishment either on its premises, at other venues, or through a secure electronic environment. The use must also "accompanied by the indication of the source, including the author's name, unless this turns out to be impossible". The use shall be deemed to occur in the territory of the country of origin of the establishment. This should facilitate cross-border use of the materials. The article allows for member states to exclude its application "as regards specific uses or types of works/subject matter if there are suitable licences on the market, i.e. covering at least the same uses as those allowed under the exception." [58] The article is justified on public interest grounds and allows for member state discretion in balancing the public interest goals and rights of authors and other rightholders.

2.4 Out-of-Commerce Works

Articles 8-11 of the DSM directive aims to ensure EU-wide access to out-of-commerce works in the collections of cultural heritage institutions (CHIs). This can be done though a collective

[57] J. P. Quintais (footnote 30), p. 8.
[58] *ibid.*, p. 9.

licensing mechanism.[59] The making of available of materials with historical facts could be also a solution to fight the so-called fake news. Under the directive a work is defined as out-of-commerce when "a work or other subject-matter is not available to the public through customary channels of commerce and cannot be reasonably expected to become so". The directive expands the definition of already existing EU law. In the non-binding Memorandum of Understanding, the definition is limited to books or journals. On the other hand, the Orphan Works Directive does not include stand-alone photographs. What is significant is that the DSM directive covers also works that were never intended for commercial use.[60] The definition is mandatory in all member states.[61]

Under the directive, when a collective management organisation (CMO) concludes an non-exclusive license with a CHI for digitising or making available to the public, the license can be extended to unpresented rightholders if following conditions are met: "(a) the collective management organisation is, on the basis of mandates from rightholders, broadly representative of rightholders in the category of works or other subject-matter and of the rights which are the subject of the licence; (b) equal treatment is guaranteed to all rightholders in relation to the terms of the licence; (c) all rightholders may at any time object to their works or other subject-matter being deemed to be out of commerce and exclude the application of the licence to their works or other subject-matter."[62] The provisions do not apply to non-nationals of member states unless "(a) the works were first published or broadcast in a Member State; or (b) for cinematography and audiovisual work, the producer is headquartered or habitually resides in a Member State".[63]

In the Soulier case the CJEU ruled against the French law authorising a CHI to digitally reproduce and communicate to the public out-of-commerce works. The DSM directive tries to overcome the impact of this decision. The French legislation provided for an opt-out

[59] C. Geiger, G. Frosio and O. Bulayenko. Facilitating Access to Out-of-Commerce Works in the Digital Single Market - How to Make Pico della Mirandola's Dream a Reality in the European Union - Journal of Intellectual Property, Information Technology and Electronic Commerce Law 9, no. 3. 2018, p. 241.
[60] *ibid.,* p. 242.
[61] *ibid.*, p. 243.
[62] *ibid.*, p. 245.
[63] *ibid.*, p. 248.

mechanism and some other safeguards.[64] In his opinion the Advocate General Szpunar states that the French scheme favored commercial publishers over authors since the transfer of rights was without negotiation or any substantial compensation to authors without any investment from the publisher's side.[65] Furthermore, the legislation did not involve a mechanism ensuring that the authors are actually and individually informed of the use of their works. The CJEU considered this to be non-compliant with EU law. Practical implementation of this decision might prove to be quite difficult and impractical due to substantial transaction costs.[66] Market efficiency or public interest goals were not taken into account in the decision. [67] The DSM directive provides clarification on this issue. It requires general publicity measures but not individual ones.[68] Recital 28a states that "publicity measures should be effective without the need to inform each right-holder individually".[69] Again authors' rights are limited on the grounds of public policy goals. In addition to public policy goals like functioning of the market, the article greatly benefits companies like record labels and commercial publishers and CMOs as rightholders since they will be able to conclude collective licensing contracts with less transaction costs not having to consult every author or rightholder separately.

2. 5 Extended Collective Licensing

Article 12 aims to facilitate extended collective licensing. It introduces three possible licensing mechanisms. Under the first mechanism a collective management organisation (CMO) enters into licensing agreement for the exploitation of works and the license is extended to works of non-represented rightholders. In the second mechanism a CMO has a legal mandate to represent rights holders who have not authorized the organisation to do so. In the third situation, the representation powers derive from a legal presumption.[70] The collective licensing can only: "i) be managed by a CMO, (ii) within well-defined areas of use,

[64] C. Geiger, G. Frosio and O. Bulayenko (footnote 59), p. 246.
[65] C. Sganga. From Soulier to the EU copyright law reform: what future for non-voluntary collective management schemes? - Springer Science and Business Media LLC in ERA Forum, 2018/2, p. 148.
[66] C. Geiger, G. Frosio and O. Bulayenko (footnote 59), p. 247.
[67] C. Sganga (footnote 65), p. 150.
[68] C. Geiger, G. Frosio and O. Bulayenko (footnote 59), p. 247.
[69] C. Sganga (footnote 65), p. 152.
[70] J. P. Quintais (footnote 30), p. 12.

(iii) where direct individual licensing is "typically onerous and impractical" (i.e. a market failure scenario), and (iv) in a way that "safeguards the legitimate interests" of rights holders". Article 12(3) safeguards sufficient representation, equal treatment, opt-out, and information obligations vis-à-vis rightholders. The opt-out means that when a rightholder has not authorised the CMO to license her work, she may at any time easily and effectively exclude her works or other subject matter from the licensing mechanism.[71] The opt-out mechanism works as a safeguard for authors and rightholders.

2.6 VoD Platforms

Article 13 concerns the access and availability of audiovisual works on video-on-demand platforms. Member states are required to provide for "an impartial body that the would-be contracting parties can turn to if there is any difficulties in licensing negotiations".[72] This negotiation mechanism is voluntary for the parties in order to overcome challenges on the availability of audiovisual works, such as refusals to license or windows of exploitation.[73] This should be beneficial to all right holders alike that want to engage in licensing contracts.

3.7 Public Domain

Under article 14, any materials resulting from reproductions of works of visual art for which the term of protection has expired are not protected by copyright or related rights, meaning they are in the public domain. This is mostly aimed at circulation of "faithful reproductions". This applies only insofar the reproductions are not original in the sense that they are the author's own intellectual creation.[74] This does not in any way limit authors or other

[71] J. P. Quintais (footnote 30), p. 13.
[72] T. Shapiro. EU Copyright Will Never Be the Same: A Comment on the Proposed Directive on Copyright for the Digital Single Market (DSM) - European Intellectual Property Review Volume 38 Issue 12, 2016, p. 773.
[73] J. P. Quintais (footnote 30), p. 14.
[74] *ibid.*, p. 14.

rightholders intellectual property rights. It simply advances the codification of the originality standard. It is the first instance where a rule in copyright acquis mentions the public domain.[75]

3. PRESS PUBLISHER'S RIGHT

3.1 Substitution Effect or New Business Models?

The DSM directive includes a press publisher's exclusive right for the reproduction and making available of their press publications.[76] A press publication is defined in article 2(4) as: "an item produced by publishers or news agencies of a journalistic nature, such as an individual item in a periodical or regularly updated publication (e.g. newspapers or general or specialist interest magazines). The publication must have the purpose of providing information related to news or other topics and must have been published in any media under the initiative, editorial responsibility and control of a service provider. Excluded are articles from scientific or academic journals."[77] The press publisher's right will expire 2 years after the press publication is published. The term starts from 1 January of the year following the date on which that press publication is published and only applies to press publications first published after 6 June 2019.[78] It will be sufficient to show that any element/segment of the protected fixation of journalistic works had been reproduced, regardless of whether the copied part was original or not.[79] According to art. 11(3) all limitations of the Infosoc Directive apply, including quotation for criticism or review.[80] The right does not cover private or non-commercial uses of press publications by individual users, acts of hyperlinking, or the use of individual words and "very short extracts of a press publication".[81] This was justified in Recital 58 on the grounds that these uses do not impinge upon the investment protection

[75] J. P. Quintais (footnote 30), p. 15.
[76] T. Höppner. EU copyright reform: the case for a publisher's right - Intellectual Property Quarterly 2018, p. 2.
[77] S. Spilsbury. Rewriting the Rule Book: The Latest on the Draft Copyright Directive - Entertainment and Sports Law Journal 17, 2019, p. 2.
[78] J. Halek and M. Hrachovina. Directive on Copyright in the Digital Single Market: Challenge for the Future - Common Law Review, 16, 2020, p. 46.
[79] T. Höppner (footnote 76), p. 9.
[80] *ibid.*, p. 11.
[81] J. P. Quintais (footnote 30), p. 15.

rationale.[82] The individual words criteria lacks a minimum threshold thus the provision will be open to national interpretations.[83]

The need for a new neighbouring right arose from the fact that the role of a link has changed in the modern society. The main purpose of links is the delivery of information on a location of a web address. However, nowadays in certain cases, it can be also a tool for de facto content distribution. The new right was an attempt to solve problems on new linking-related business models.[84] According to the Commission's Impact Assessment, diversity of press is threatened by insufficient protection of press publisher's rights in the digital environment[85] and that a new related right is essential for the sustainability of the publishing industry and the availability of reliable information[86] which contributes to the existence of a healthy democracy.[87] 57 percent of online users access news through social media, news aggregators and search engines. Whereas, 47 percent of the users do not click links to access the whole publication on the original site. It can be concluded that the snippets that the aggregators offer are able to satisfy the information need of the users. Therefore, news aggregators might be able to replace news sites[88] and the only way for publishers to compete is to binge publish low quality journal articles which attract readers by shrill and extreme stories.[89]

On the other hand, some argue that news aggregators bring awareness to news. Therefore, increasing news consumption. However, people have always read news and will read them in the future. In that sense the demand is fixed. Since news aggregators and publishers are competing in the same market, there might be distortion of competition. Publishers have to invest more money in their functions than the aggregators which might lead to the absence of

[82] T. Pihlajarinne, J. Vesala and O. Honkkila (footnote 15), p. 25.
[83] G. Colangelo and V. Torti. Copyright, online news publishing and aggregators: a law and economics analysis of the EU reform - International Journal of Law and Information Technology 27, 2019/1, p. 89.
[84] T. Pihlajarinne, J. Vesala and O. Honkkila (footnote 15), p. 25.
[85] T. Höppner (footnote 76), p. 2.
[86] J. P. Quintais (footnote 30), p. 15.
[87] R. Danbury. Is an EU publishers' right a good idea? Final report on the AHRC project: Evaluating potential legal responses to threats to the production of news in a digital era. Centre for Intellectual Property and Information Law, Faculty of Law University of Cambridge 2016, p. 43.
[88] T. Höppner (footnote 76), p. 3.
[89] T. Pihlajarinne, J. Vesala and O. Honkkila. Online Distribution of Content in the EU. V. Moscon. Neighbouring rights: in search of a dogmatic foundation. The press publishers' case. Cheltenham, UK. Northampton, MA, USA. Edward Elgar Publishing 2019, p.

an incentive for the publishers to create good quality content.[90] It seems unfair for publishers that aggregators might benefit from their published content since aggregators do not have to invest in content production.[91] However, empirical results show that the news aggregators are complementary rather than competing services to news publishers' websites. Due to the market expansion effect news sites actually benefit from the increased traffic the aggregators bring. The decline in newspaper revenues does not seem to be resulting from the free-riding but the significant changes in the market.[92] However, it is probable that small publishers find aggregators more beneficial than bigger companies since bigger publishers have already established their audience.[93]

News aggregator services force publishers to adopt new business models based on content platforms.[94] Today it is no longer the pre-selection of authors and content and bargaining with printers that guarantee profit. The key is to create a network to attract customers and content providers. The publisher should offer content that adds value as compared to information available online. Creating a community surrounding the platform, customisation, content aggregation and the inclusion of user-generated content seem to be promising strategies.[95] Aggregators can automatically scrape, store, re-combine and display press publications. Copying is much cheaper than producing content.[96] Value can be offered to the users of the platform by organising information in a particular way so that it is easier to find or that it is customised to each user.[97] The protection of the platform is more important than the information itself since you can get the information anywhere online but the platform is what attracts the customers.[98] It can be argued that the copyright protection need of the press publishers could be satisfied by protection for original compilations of works and other materials. As a matter of fact, the sui generis database right offers considerable legal security

[90] T. Höppner (footnote 76), p. 4.
[91] C. Geiger, O. Bulayenko and G. Frosio. Opinion of the CEIPI on the European Commission's Copyright Reform Proposal, with a Focus on the Introduction of Neighbouring Rights for Press Publishers in EU Law - European Intellectual Property Review 202, 2017, p. 18.
[92] G. Colangelo and V. Torti (footnote 83), p. 89.
[93] C. Geiger, O. Bulayenko and G. Frosio (footnote 91), p. 18.
[94] M. Senftleben, M. Kerk, M. Buiten and K. Heine. New Rights or New Business Models? An Inquiry into the Future of Publishing in the Digital Era - IIC 2017/7, p. 539.
[95] *ibid.*, p. 554.
[96] T. Höppner (footnote 76), p. 2.
[97] M. Senftleben, M. Kerk, M. Buiten and K. Heine (footnote 94), p. 545.
[98] *ibid.*, p. 549.

to those wishing to invest in new platform-based business models.[99] Moreover, layering rights creates complications, transactions costs and confusion.[100] This new right supports traditional business models rather than new ones that are based on user friendliness and efficiency rather than the repertoire of works.[101] The new right might even disincentivize press publishers from transforming to new platform based business models.[102] Furthermore, there is differences in the interest of publishers. There is a danger that the right will be solely in the favor of large players in the market.[103] The Commission offers statistical evidence on the extent of so-called newspaper crisis. However, there is no evidence on the causal relationship between the new right and the increase in the revenues of the press leading to diversity of content.[104] On the other hand, it can be argued that the protection under the Database Directive is not sufficient since it only gives protection concerning extracts of whole or a substantial part or the repetitive and systematic use of insubstantial extracts which is not the normal use of the database. This is not the case in many situations and in addition, the protection might be difficult to prove.[105]

An implied license argument can be done against the new neighbouring right. If the author has not prevented the access to the material through links, then its aggregation is allowed.[106] The publishers might even have an interest in indexing their content or its appearance in search engines to attract more traffic to their sites. Making available content without access restrictions can be seen as an implied license in that light too.[107] However, it can be argued that the Robot Exclusion Protocol (REP) does not prevent robots from copying since it is voluntary to follow it. Furthermore, it goes against a fundamental principle of copyright according to which user should acquire a license from the rightholder prior use. On the other

[99] M. Senftleben, M. Kerk, M. Buiten and K. Heine (footnote 94), p. 550.
[100] M. Kretschmer, S. Dusollier, C. Geiger and C. P. Hugenholtz. The European Commission's public consultation on the role of publishers in the copyright value chain: a response by the European Copyright Society - European Intellectual Property Review 38(10), 2016, p. 593.
[101] M. Senftleben, M. Kerk, M. Buiten and K. Heine (footnote 94), p. 557.
[102] *ibid.*, p. 555.
[103] R. Danbury (footnote 87), p. 66.
[104] S. Karapapa. The Press Publication Right in the European Union: An Overreaching Proposal and the Future of News Online. Forthcoming in E. Bonadio and N. Lucchi. Non-Conventional Copyright: Do New and Non-Traditional Works Deserve Protection? Edward Elgar, 2018. p. 7.
[105] T. Höppner (footnote 76), p. 7.
[106] G. M. Riccio. Ancillary Copyright and liability of intermediaries in the EU directive proposal on copyright. Position Paper 2018/3, p. 20.
[107] M. Senftleben, M. Kerk, M. Buiten and K. Heine (footnote 94), p. 554.

hand, search engines are penalising any blocking of their crawlers by decreasing the ranking of that website.[108] This issue might, however, continue even after the implementation of the right. Market-dominant search engines rank publications by relevance and determine what will be found and what will not be. They can threaten to delist those that enforce their right and uplift those that waive their rights. A solution might be an unwaivable right.[109]

In Spain and Germany similar legislation entered into force before the DSM directive. In Germany, the press publishers were unable to negotiate better conditions with Google News since Google stood its ground and stated that if the press publishers do not grant licenses for free, their publications will be excluded from Google News. In Spain, Google shut down Google News in the country completely due to the prohibition of free licenses.[110] In these cases, the companies transferred the cost to the users through fees or reducing available content.[111] For the right not to be overly exhausted, the implementation should be case sensitive[112] since while larger platforms like Google News could sustain such a tax, smaller news aggregators could not afford it and had to shut down completely.[113] The Commission acknowledges the failure of a neighbouring right in Germany and Spain but claims that the new right will be successful due to its Pan-European nature.[114] More than 100 MEPS and majority of academics have spoken against the press publisher's right claiming that it will block a vital feature of a democratic society, the free flow of information.[115] However, the press publishers managed to convince the Commission that freeriding of news aggregation services on publisher produced content is a threat to the functioning of the press sector.[116] The Commission's Impact Assessment gave the following example of the problems publisher's are faced enforcing their rights: "a court may ask a publisher, as licensee or transferee, to prove that it owns all the allegedly infringed rights (e.g. in one case reported by the publishing industry up to 22,000 contracts with journalists in order to file a lawsuit for the

[108] T. Höppner (footnote 76), p. 7.
[109] *ibid.*, p. 12.
[110] J. Halek and M. Hrachovina (footnote 78), p. 45.
[111] A. Tyner (footnote 26), p. 282.
[112] T. Pihlajarinne, J. Vesala and O. Honkkila (footnote 15), p. 28.
[113] A. Tyner (footnote 26), p. 282.
[114] S. Karapapa (footnote 104), p. 12.
[115] A. Giannopoulou. The proposed Directive on Copyright in the Digital Single Market: a missed opportunity? - Encore, The Annual Magazine On Internet and Society Research 2018, p. 66-67.
[116] T. Pihlajarinne, J. Vesala and O. Honkkila (footnote 15), p. 25.

mass infringement of publishers' rights in DE).” The example might be a bit misleading since the new ancillary right does not change the burden of proof in providing evidence for the existence of the publishers’ rights.[117]

3. 2 Conflicting Rights

The neighbouring right overlaps author’s rights. However, increased licensing fees are not expected.[118] The Impact Assessment states that the new right introduced is without any prejudice to authors’ rights.[119] However, according to the pie theory the author’s revenues will decrease even if author’s legal rights are not affected.[120] The right might lead to a conflict of author’s and publisher’s interests in other ways too. A journalist may have a interest in having an article found and linked by a search engine content aggregator. However the decision whether this can be done might remain in the hands of the publisher. The Commission’s impact assessment on the directive does not resolve the conflict of interests. Publishers might act against the interests of authors even in current legislation but it is a matter of copyright contract law. The article might strengthen the position of press publishers.

It is possible that Art. 5 of directive 2004/48/EC on presumption of authorship could be amended.[121] It might lead to that the press publishers might be regarded to enforce copyright in any item that the publisher’s name appears on in the news publication.[122] The regime entitles authors an “appropriate share of revenues” received by press publishers. Regardless the definition is not quite clear.[123] Furthermore, in most cases press publishers acquire authors’ rights by direct individual contract, such as an employment agreement, transfer of copyright or an exclusive license[124], being therefore, in the position to claim effective

[117] C. Geiger, O. Bulayenko and G. Frosio (footnote 91), p. 14.
[118] *ibid.*, p. 11.
[119] *ibid.*, p. 13.
[120] *ibid.*, p. 12.
[121] T. Pihlajarinne, J. Vesala and O. Honkkila (footnote 15), p. 58.
[122] *ibid.*, p. 59.
[123] J. P. Quintais (footnote 94), p. 16.
[124] M. Senftleben, M. Kerk, M. Buiten and K. Heine (footnote 94), p. 552.

protection as derivative rightholders.[125] It is, therefore, questionable whether the neighbouring right adds any value.[126] The directive's recital 32 states that the intention is to protect organizational and financial contribution. However, it is not clearly defined. There is no established threshold. Even minimal or insignificant investments may be sufficient enough to provide an exclusive right.[127] Traditionally neighbouring rights are justified as a reward for the investment made. In that light, it can be argued that the publishing industry needed a lot more resources to publish than today. The press sector has shifter from printing to online publications. Many activities have been outsourced today for cost optimisation, therefore limiting publishers' activities to mere marketing, branding and rights management.[128] This contradicts the Infopaq I decision where the scope of protection under copyright was established to be for the author's intellectual creation.[129] As a result of the missing originality criteria, there is a decrease of the freedom of expression and speech and might favor large-scale information producers.[130] Traditionally mere information cannot be copyrighted. Article 2(8) of Berne Convention states that "[t]he protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information".[131] The directive seems to confuse mere information with copyright projected subject-matter by extending the scope of protection to snippets, headlines, and some forms of text mining.[132]

On the other hand, it can be argued that without the right publishers will be forced to provide lower quality content, provide less content or hide all content behind a paywall.[133] The right is not aimed towards consumers but news aggregators. Hyperlinking and quoting is still allowed. In addition, many news sites encourage sharing which would make it legal based on consent.[134] Regardless different kind of linking is not distinguished in the directive, for

[125] T. Pihlajarinne, J. Vesala and O. Honkkila (footnote 15), p. 49.
[126] M. Senftleben, M. Kerk, M. Buiten and K. Heine (footnote 94), p. 552.
[127] T. Pihlajarinne, J. Vesala and O. Honkkila (footnote 15), p. 49.
[128] C. Geiger, O. Bulayenko and G. Frosio (footnote 91), p. 16.
[129] G. M. Riccio (footnote 106), p. 13.
[130] C. Geiger, O. Bulayenko and G. Frosio (footnote 91), p. 18.
[131] S. Karapapa (footnote 104), p. 20.
[132] *ibid.*, p. 21.
[133] T. Höppner (footnote 76), p. 15.
[134] *ibid.*, p. 16.

example loyal or disloyal.[135] However, it can be argued that the intention of the right is not to interfere with author's revenues but to tap into revenue streams that they never had the access to. It is claimed that freelancers are dependent on exposure and less referrals and linking will decrease their visibility. On the other hand, strengthening the press sector might create more jobs for them[136] but in general journalists are not in a strong bargaining position against publishers when concluding exploitation contracts.[137] In exchange of their copyright freelancers get paid a flat rate per article or per certain number of clicks. Less referrals would probably decrease the revenues they are getting.[138] The article clearly creates a conflict between author's and press publishers' interests. Article 16 clarifies the publisher's position in a licensing contract between an author and a publisher and guarantees the publisher a fair compensation for the use of the work made under an exception or limitation to the transferred or licensed right.

4. RESPONSIBILITY OF ONLINE CONTENT-SHARING PROVIDERS

4.1 Value Gap

One of the most controversial parts of the directive is Article 17. The article states that "information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users shall, in cooperation with rightholders, take measures to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter or to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers".[139] The new liability regime shifts the responsibility from rightholders to the the online content-sharing service providers (OCSSPs)[140] since they

[135] T. Pihlajarinne, J. Vesala and O. Honkkila (footnote 15), p. 26.
[136] T. Höppner (footnote 76), p. 17.
[137] M. M. M. van Eechoud. A publisher's intellectual property right Implications for freedom of expression, authors and open content policies. Study, Open Forum Europe 2017/1, p. 36.
[138] *ibid.*, p. 37.
[139] M. L. Montagnani and A. Trapova. New Obligations for Internet Intermediaries in the Digital Single Market—Safe Harbors in Turmoil? Journal Of Internet Law 2019/1, p. 4.
[140] *ibid.*, p. 4.

might be in the best position to control the spread of content.[141] The platforms are obligated to remove any illegal content from their platform or they might be held responsible.[142] The platforms must go beyond physical facilities.[143] The article is aimed at tackling the so-called value gap, "the alleged mismatch between the value that online sharing platforms extract from creative content and the revenue returned to the copyright-holders".[144] The International Federation of Phonographic Industry, IFPI, claims that what Youtube is paying to rightholders does not reflect the true value of music.[145] As opposed subscription based business models like Spotify, ad-funded businesses, like Youtube, do not all obtain licenses from rightholders and the rightholders are not getting the revenue.[146] Youtube argues that this comparison is unfair and that it should be compared to radio instead since like radio Youtube generates majority of its revenue from advertisement but unlike radio Youtube is paying most of the revenue to the rightholders.[147] The radio comparison might not be so strong but it is true that the platforms are significantly different. Spotify is solely for streaming music while Youtube is a video-sharing platform that offers interactive services.[148] Spotify has two types of revenue streams, subscriptions and ads while Youtube is solely ad-funded.[149]

In the digital economy user-produced content is highly valuable since it increases commercial value by increasing the quantity and quality of interactions in a platform. It contains personal information and can be a copyrightable subject-matter.[150] Business models based on monetizing data have become predominant and consumers access digital services in exchange of their personal data.[151] Under the DSM directive, if OCSSPs want to use such content, they should conclude a licensing agreement with the users.[152] Rightholders claim that they cannot

[141] N. Elkin-Koren, Y. Nahmias and M. Perel. Is It Time to Abolish Safe Harbor? When Rhetoric Clouds Policy Goals - Stanford Law & Policy Review 2019/2, p. 3.
[142] M. L. Montagnani and A. Trapova (footnote 139), p. 4.
[143] G. Frosio (footnote 17), p. 340.
[144] J. P. Quintais (footnote 94), p. 17.
[145] V. Darias de las Heras. Content ID as a Solution to Address the Value Gap - Journal of the Music & Entertainment Industry Educators Association Volume 18, Number 1, 2018, p. 106.
[146] M. L. Montagnani and A. Trapova (footnote 139), p. 4.
[147] V. Darias de las Heras (footnote 145), p. 110.
[148] N. Elkin-Koren, Y. Nahmias and M. Perel (footnote 141), p. 21.
[149] *ibid.*, p. 22.
[150] G. Malgieri. User-provided personal content' in the EU: digital currency between data protection and intellectual property - International Review of Law, Computers & Technology Vol. 32, 2018, p. 118-119.
[151] *ibid.*, p. 121.
[152] *ibid.*, p. 119.

negotiate arm's length with these platforms[153] and that the platforms are taking advantage of the loophole in the safe harbour regime by avoiding paying for making available to the public copyright content.[154] The negotiations between the platforms and the rightholders can be described as a take-it-or-leave it situation. They can either accept the terms offered or send take-down notifications for each individual infringement.[155]Arm's length is defined in the Black's law dictionary as "relating to, or involving dealings between two parties who are not related or not on close terms and who are presumed to have roughly equal bargaining power". In Spotify's early stages it had to ensure a broad catalog of copyrighted works to attract users. The company did not have a lot of bargaining power in trying to convince major record labels to enter into exploitation contracts.[156] Spotify had to offer the labels millions in advance, equity positions, and attractive royalty rates. This negotiation clearly fell short of an arm's length position. This raises the question whether royalties offered by Spotify are actually based on the fair market price.[157]

The article has been criticised by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, European copyright academics, internet pioneers like, civil society organisations, creators, users and the media.[158] They expressed their fear of losing the free internet and restriction on lawful content.[159] The lobbying was lead by big technology companies which is interesting since they were not that concerned about fundamental rights before. It can be argued that most likely the real reason behind the opposition was the fear of losing their bargaining power.[160] On the other hand, some view that the article is a result of the discourse about "the Internet threat" which reflects a shift on the perception of the online content-sharing service providers from mere--conduits to active gatekeepers.[161] The value gap rhetoric argues that revenues from authors are shifted to companies. The added value of sharing platforms is overlooked.[162] Previously signing with a

[153] V. Darias de las Heras (footnote 145), p. 111.
[154] *ibid.*, p. 112.
[155] V. Darias de las Heras (footnote 145), p. 122.
[156] N. Elkin-Koren, Y. Nahmias and M. Perel (footnote 141), p. 22.
[157] *ibid.*, p. 23.
[158] A. Giannopoulou (footnote 115), p. 68.
[159] K. Grisse. After the storm—examining the final version of Article 17 of the new Directive (EU) - Journal of Intellectual Property Law & Practice, Vol. 14, No. 11, 2019, p. 887.
[160] V. Darias de las Heras (footnote 145), p. 125.
[161] T. Spoerri (footnote 29), p. 175.
[162] N. Elkin-Koren, Y. Nahmias and M. Perel (footnote 141), p. 25.

record label was the only way to get your music distributed. Sharing platforms have changed this causing the role of music labels to disseminate.[163] Authors do not need the labels to develop an audience anymore and are able to cash in on their popularity through album sales, concert tickets and merchandise. Famous singers like Justin Bieber, Tori Kelly, and Shawn Mendes are well known for building a massive fanbase using Youtube before signing a recording contract. Moreover Youtube is able to provide authors data of the users' content consumption which can be used in planning tours, scheduling release dates, attracting press coverage, and even securing record deals.[164]

Even before the DSM directive Youtube has been concluding licensing agreements with rightholders and monitoring copyright infringement so it cannot be argued that Youtube is turning a blind eye to illegal activities.[165] The existence of the value gap is not based on any empirical evidence.[166] Actually the emergence of streaming services has reduced piracy and brought more revenue to the music industry.[167] A publication of IFPI indicates that 2017 was the third consecutive year in which the global music industry grew after 15 years of decline and more than half of the income consists of digital revenues.[168] The idea that there is a minimum threshold to the rightholders' fair share of the economic success of their work is questionable. Copyrights establish a means for rightholders to generate revenue. However, it does not guarantee any compensation. The amount of revenue depends on the demand in the market. The music industry has not been able to show that the safe harbour provisions undermine the incentive to create.[169] It is plausible to assume that Youtube's bargaining power does not derive from the safe harbour regime but the platform's tremendous popularity.[170] It can be speculated that the music industry is lobbying the value gap rhetoric in order to gain back its lost power.[171] Any limitation to content on Youtube might actually be harmful to authors who are now utilizing the platform to interact directly with their audience.[172]

[163] N. Elkin-Koren, Y. Nahmias and M. Perel (footnote 141), p. 26.
[164] *ibid.*p. 27.
[165] *ibid.*, p. 35-36.
[166] G. F. Frosio. Reforming Intermediary Liability in the Platform Economy: A European Digital Single Market Strategy - Northwestern University Law Review 112, 2017-2018, p. 27.
[167] N. Elkin-Koren, Y. Nahmias and M. Perel (footnote 141), p. 16.
[168] *ibid.*, p. 18.
[169] *ibid.*, p. 30.
[170] *ibid.*, p. 37.
[171] *ibid.*, p. 39.
[172] *ibid.*, p. 46.

Furthermore, studies have shown that majority of the revenue from online streaming goes to record labels rather than authors. Some authors even choose to refrain from licensing their works to streaming services. The most famous example is when Taylor Swift removed most of her music from Spotify in 2014. This is the result of unbalanced bargaining power between authors and music labels and the fact that authors rarely are even able to participate in negotiations between the labels and online services.[173]

4.2 New Liability

To look into previous EU legislation, under the e-Commerce Directive, internet intermediaries with mere conduit, caching or hosting functions are not liable for illegal conduit of third parties if the intermediary is not involved in the information transmitted or with hosting services if the intermediary does not have knowledge of the illegal activities.[174] Under art. 17 of the DSM Directive, by giving access to the content in the platform the OCSSPs are carrying out an act of communication.[175] This broadens the concept of communication to the public and disregards the knowledge requirement present in the e-Commerce Directive art. 14.[176] This leaves open whether more neutral platforms that that categorize content and provide means to make content searchable, but do not actively support copyright infringement could be considered liable when they have only general knowledge of copyright infringement. This will be left for the interpretation of the courts.[177]

According to Recital 62, the OCSSP definition should target only online services that play an important role on the online content market by competing with other online content services, such as online audio and video streaming services, for the same audiences. The definition of an important role is left to the courts to interpret.[178] The article was mainly aimed at Youtube/Google and Facebook but it will also impact smaller OCSSPs. The emphasis on the adoption of automated filtering systems poses a great financial risk to OCSSPs. An effective

[173] N. Elkin-Koren, Y. Nahmias and M. Perel (footnote 141), p. 47.
[174] M. L. Montagnani and A. Trapova (footnote 139), p. 3.
[175] J. P. Quintais (footnote 94), p. 17.
[176] M. L. Montagnani. A New Liability Regime for Illegal Content in the Digital Single Market Strategy. Bocconi Legal Studies Research Paper Series Number 477007, 2019/6, p. 11.
[177] K. Grisse (footnote 159), p. 890.
[178] *ibid.*, p. 888.

complaint and redress mechanism had to be implemented as well.[179] When the OCSSPs communicate protected subject matter to the public, they have to get a license first from the rightholders. Otherwise, they will be held liable for copyright infringement. The liability will not replace the individual liability of the user and the OCSSP's liability will not necessarily result in damages since damages require fault, acting knowingly or with the reasonable grounds to know.[180] Traditionally OCSSPs have been held secondarily liable, rather than than primarily.[181] The article introduces a specific European liability and safeharbout regime that is inconsistent with legislations outside the EU. This might be harmful to OCSSPs operating in a world-wide scale since it might lead to investors reducing investment or abandoning markets where burdensome obligations are imposed all together.[182]

In order to avoid liability, the service providers have two options, to obtain authorisation from the rightholders by voluntary or extended collective licensing or demonstrate that they have: "(i) made best efforts to obtain an authorisation; (ii) made best efforts to ensure the unavailability of specific works for which the right holders have provided them with the relevant and necessary information; and (iii) acted expeditiously, subsequent to notice from right holders, to take down infringing content and made best efforts to prevent its future upload".[183] The condition ii seems to establish an upload filtering obligation and condition iii both a notice-and-takedown mechanism, similar to art. 14 of the e-Commerce directive, and a notice-and-stay-down obligation.[184] The notice-and-takedown means that when an OCSSP is notified of infringing content, the content must be taken down. The notice-and-stay-down means that the OCSSP is also obligated to remove all instances and to prevent future uploads of the infringing content.[185] For rightholders it is costly and insufficient to send a notice concerning every single takedown. On the other hand, major right holders would not spend their time or resources to do this unless they considered the rewards to be worth the effort.[186]

[179] T. Spoerri (footnote 29), p. 174.
[180] K. Grisse (footnote 159), p. 891.
[181] G. F. Frosio (footnote 166), p. 38.
[182] N. E. Curto. EU on Copyright in the Digital Single Market and ISP Liability: What's Next at International Level? Working paper, 2019/8, p. 2.
[183] J. P. Quintais (footnote 94), p. 18.
[184] *ibid.,* p. 18.
[185] F. Romeno-Moreno. 'Upload filters' and human rights: implementing Article 17 of the Directive on Copyright in the Digital Single Market - International Review of Law, Computers & Technology 2020/3, p. 2.
[186] F. Romero-Moreno. 'Notice and staydown' and social media: amending Article 13 of the Proposed Directive on Copyright - International Review of Law, Computers & Technology 2019/5, p. 198.

In Delfi v. Estonia case, it was established that a notice-and-takedown mechanism was a sufficient means to handle copyright infringement.[187] Implementing a notice-and-stay-down mechanism shifts the cost of screening content from rightholders to service providers. This calls for a costly automated enforcement.[188]

Under art. 17 OCSSPs are no longer covered with the immunity provided under art. 14 of the e-Commerce Directive. [189] It is argued that the article establishes a monitoring obligation to actively filter third-party content to identify and prevent copyright infringements.[190] This might lead to the "upload filter", which means that creators are more likely to refrain from uploading certain of their works since they are not sure whether the content is infringing or not.[191] In the Sabam cases it was established that a general monitoring obligation is incompatible with art. 15 of the e-Commerce Directive.[192] Other incompatibilities are with fundamental rights, particularly with the freedom of the intermediaries to conduct their business under art. 16 of the Charter, the freedom of expression and information rights of the users under art. 11, and the protection of the users personal data under art. 8.[193] However, under art. 17, OCSSPs are not considered mere intermediaries but actively communicating the content so it might be justified to expect more from the service providers.[194] Furthermore, specific monitoring obligations have been allowed to be imposed by member states. [195]

4.3 Algorithmic Enforcement

In the original text of the proposal the Commission advised platforms to use different kind of content recognition technologies. In the updated version they are not mentioned.[196] However,

[187] F. Romero-Moreno (footnote 186)., p. 199.
[188] M. Husovec. The Promises of Algorithmic Copyright Enforcement: Takedown or Staydown? Which Is Superior? And Why? - Columbia Journal of Law & The Arts 53, 2018, p. 77.
[189] G. Frosio (footnote 17), p. 347.
[190] M. L. Montagnani and A. Trapova (footnote 139), p. 4.
[191] G. Bonetto. Internet memes as derivative works: copyright issues under EU law - Journal of Intellectual Property Law & Practice, Vol. 13, No. 12, 2018, p. 990.
[192] C. Angelopoulos. On Online Platforms and the Commission's New Proposal for a Directive on Copyright in the Digital Single Market Centre for Intellectual Property and Information Law. Study, 2017/1, p. 35.
[193] *ibid.*, p. 38.
[194] K. Grisse (footnote 159), p. 896.
[195] A. K. Toth. Algorithmic Copyright Enforcement and AI: Issues and Potential Solutions, through the Lens of Text and Data Mining - Masaryk University Journal of Law and Technology 13, no. 2, 2019, p. 369.
[196] A. Tyner (footnote 26), p. 279-280.

in practise the liability can be avoided with algorithmic copyright enforcement, such as filtering technologies. One of the problems is the lack of transparency. Codes and algorithms are treated similarly to trade secrets. They are wanted to be kept hidden in order to gain a competitive advantage or to prevent the users from utilizing the system's loopholes. This kind of non-transparency can lead to overprotection and abuse of power with a lack of accountability.[197] Furthermore, the data gathered for establishing this kind of an algorithm is not neutral since the data itself is gathered for profit.[198] This can lead to biased enforcement where personal interest and values of the programmers are reflected.[199] Another issue is that rightholders can exercise strict control over their protected content. AI is not yet so developed that it can distinguish between infringing and non-infringing use, such us parodies or commentary.[200] For example, a two-second clip of music in a gaming video might allow for the rightholder to monetise the whole video even though such de minimis use is allowed in most jurisdictions.[201] False positives are also problematic for songwriters who utilize royalty free loops.[202] Songs utilising copyrighted content can also fall into one of the limitations like criticism.[203] Use of filtering technology might disadvantage authors of transformative works.

The best efforts criteria takes into account that it is not possible for the OCSSP to detect all infringement.[204] The best efforts requirement must be interpreted in the light of "(i) the principle of proportionality, (ii) the type, the audience and the size of the service, and the type of works uploaded by the users, and (iii) the availability of suitable and effective means and their cost for service providers". This means that if there are no suitable or effective means or no financial resources, the OCSSPs do not have to filter content. This has to be done by case-by-case assessment.[205] For example, it seems to be reasonable for OCSSPs to contact big record labels and collecting societies to obtain a license but it would be impossible to

[197] A. K. Toth (footnote 195), p. 369.
[198] O. Pollicino and G. De Gregorio. A Constitutional-Driven Change of Heart ISP Liability and Artificial Intelligence in the Digital Single Market - The Global Community Yearbook of International Law and Jurisprudence 18(1), 2019/7, p. 14.
[199] *ibid.*, p. 15.
[200] A. K. Toth (footnote 195), p. 369.
[201] *ibid.*, p. 370.
[202] T. Lester and D. Pachamanova. The Dilemma of False Positives: Making Content ID Algorithms more Conducive to Fostering Innovative Fair Use in Music Creation - UCLA Entertainment Law Review, 24(1). 2017/12, p. 11.
[203] *ibid.*, p. 12.
[204] K. Grisse (footnote 159), p. 892.
[205] T. Spoerri (footnote 29), p. 178.

contact every individual rightholder. To fulfil the best effort criterion an OCSSP must accept reasonable and fair conditions when concluding a licensing agreement.[206] The proportionality principle implies that in case of a serious danger of overblocking, upload filters might be disproportionate in certain cases.[207] Under art. 17(6), start-ups and small OCSSPs which have existed for less than 3 years with a turnover below 10 million euros, following a rightholder notice, they must respond expeditiously to remove or disable access to the unlawful content by implementing notice and takedown. If the audience surpasses 5 million visitors monthly, upon receiving a rightholder notice, such small OCSSPs must also make best efforts to prevent future uploads by adopting notice and staydown.[208] In practise this exception rarely applies since after three years a small company trying to compete with bigger OCSSPs will have to apply the filtering technology at the latest even if the turnover is under 10 million.[209] In addition, Art. 17(7) provides for some mandatory exceptions that the users can benefit from concerning quotation, criticism, review, caricature, parody and pastiche.[210]

Many of the service providers have been proactive in ensuring compliance even before the directive had been accepted since the service providers wanted to avoid possible legal liability. The directive does not oblige the service providers to monitor their users but due to the its unclarity, the service providers have acted in fear of liability or having to pay compensation to the copyright owners. Youtube's Content ID is the most sophisticated filtering tool so far. Youtube made a 100 million USD investment in it and it is responsible for 98 percent of content management.[211] An algorithm matches copyrighted content to all uploaded videos.[212] When a match is found the rightholder has three options, block the video, monetize the video by running ads against it or track the video's viewership statistics. Monetization is the most common action used. For example, in case of monetising a music video most commonly 40% of the revenue goes to the owner of the sound recording, 15% goes to the owner of the musical work, 5% to 10% goes to the video creator, and YouTube keeps the remaining 35% to 40%.[213] The Content ID is an efficient way to block content that

[206] K. Grisse (footnote 159), p. 893.
[207] K. Grisse (footnote 159), p. 895.
[208] F. Romeno-Moreno (footnote 185), p. 4.
[209] T. Spoerri (footnote 29), p. 179.
[210] J. P. Quintais (footnote 94), p. 19.
[211] T. Spoerri (footnote 29), p. 179.
[212] A. Tyner (footnote 26), p. 280.
[213] V. Darias de las Heras (footnote 145), p. 127.

abuses copyright. However, the Content ID does not distinguish between content that is commentary or parody in nature. This is a problem since in the directive, it is specifically stated that parody, pastiche or commentary should be considered an exception to the exclusive right of the copyright holder. The directive addresses the concern of false positives by establishing that there should be a method to rectify them in the copyright protection process, such as human review.[214]

The Youtube's algorithm does benefit some copyright holders. They do not have go to court to enforce their copyrights. Youtube has come up with a system were the copyright holder may claim the revenue from the video containing copyrighted material. This system has been subject to a lot of criticism since it can be easily abused. However, it is possible to dispute the claim and then will Youtube review it. The problem with this is that even videos that use copyrighted content legally may get claimed and the responsibility to dispute it, is left to the creator whose income is getting claimed. What is problematic is the compulsory nature of the Content ID's licensing system. The rightholders cannot affect the use of their work in advance but only after the use, they can either allow it, monetize it or block it. The mechanism favors dominant rightholders. Mainly big record labels and collective licensing organisation have access to use the Content ID by uploading their works in a database. However, starting from 2019, Youtube has allowed individual rightholders to make manual infringement claims as long as they provide "relevant and necessary information" on the specific portion of the video they report. Rightholders are prohibited from claiming videos which contain only a short clip of music pieces or a track playing in the background. If rightholders abuse the system, they have the risk of having their claiming rights taken away. [215] Another problems is that the content might get blocked for the whole period of the procedure of determining whether the content is infringing independent of the outcome.[216] The income deriving from videos that have been flagged for alleged infringement is freezed without the respondent having a chance to defend herself.[217] This might cause significant financial losses to content creators who get their main income from uploading videos.

[214] A. Tyner (footnote 26), p. 280.
[215] F. Romeno-Moreno (footnote 185), p. 9.
[216] M. Ahmaoja. Musiikin verkkojakelijoiden lisenssisopimukset ja Youtuben ContentID-järjestelmä DSM-direktiivissä - Lakimies, Suomalaisen lakimiesyhdistyksen aikakauskirja 7-8, 2019, p. 884.
[217] T. B. Bartholomew. The Death of Fair Use in Cyberspace: Youtube and the Problem with Content ID - Duke Law & Technology Review Vol. 13, No. 1, 2015/3, p. 67-68.

Furthermore, the procedure might favor rightholders too much and not ensure the users a proportionate share of the monetization. For example, an otherwise original video with only copyright infringing background music might be completely claimed by a rightholder.[218]

Youtube does not license its Content ID system. Currently Audible Magic, a US-based private company, is the only third-party provider that offers content recognition solutions.[219] There are some indications that the risks of taking down infringing content are exaggerated since the market has been able to provide more innovative solutions than just blocking content. The Content ID is an example of this since the rightholders have several options on what to do with the content.[220] European Commission claims that the cost of filtering tools would not be too much to bear for start-ups. However, the estimate is solely based on comments of Audible Magic submitted to the US Copyright Office.[221] The fact that the filtering obligation is not restricted to specific type of works adds up costs. According to German Federal Commissioner for Data Protection and Freedom of Information, Ulrich Kelber, the filtering obligation will create an oligopoly of a few providers of filtering technologies.[222] This creates a competitive advantage to Audible Magic since smaller companies cannot afford manufacturing filtering technologies themselves and have to rely on third-party providers. Audible Magic has a large patent portfolio which new entrants have to deal with before being able to enter the market. However, a refusal to grant a license could be considered a violation under art. 102 TFEU. We have seen this in the Magill case and Volvo v. Yeng, for example.[223] There needs to be a solution that gives any OCSSPs access to filtering technology for a reasonable price or the possibility to be exempted from the obligation. Otherwise, having a sophisticated filtering system might become a barrier of entry to the market.[224] Art. 3 of the Enforcement Directive provides that "procedures and remedies necessary to ensure the enforcement of the intellectual property rights ... shall not be unnecessarily complicated or costly ... and shall be applied in such a manner as to avoid the

[218] M. Ahmaoja (footnote 2016), p. 884.
[219] T. Spoerri (footnote 29), p. 179.
[220] E. Huhta. Copyrights, Online Intermediaries and the EU: #SaveYourInternet? Platform Liability in Light of Article 17 of the Directive on Copyright in Digital Single Market. Master's Thesis in Intellectual Property Law, Uppsala Universitet, 2019, p. 63.
[221] T. Spoerri (footnote 29), p. 180.
[222] *ibid.*, p. 181.
[223] *ibid.*, p. 185.
[224] T. Spoerri (footnote 29), p. 186.

creation of barriers to legitimate trade." Whether filtering technology is too costly can be debated. In Allostreaming case in France and the Dafra case in Brazil, Google's defense of filtering being too costly was refuted.[225] However, the case might be different if smaller platforms are concerned. In Sabam v. Netlog and Sabam v. Scarlet, the CJEU held that staydown injunctions were in violation of the freedom conduct business under art. 16 TFEU. [226]

On the other hand, the effectiveness of the filtering technologies might be overestimated due to the false impression of their advancement given by the lobbying of Audible Magic. Audible Magic stated that its technology is accurate 99 percent. Even if this sounds like a good success rate, in reality an algorithm that misidentifies one audio in every 100 does raise some issues. For example, email service providers consider that any false positive rate higher than 0.1 percent is too high to use for spam filters since it would be too restricting on speech. Furthermore, there is 21 optional copyright exceptions in EU law which are not harmonised so there is no way that an algorithm is capable of making a judgement on whether the content is infringing or not. Even works belonging to the public domain present challenges to filtering technologies. A German music professor tested Content ID by uploading public domain music pieces to Youtube.[227] All of the pieces were blocked and the professor had to appeal. Article 17 could lead to a "shoot-first-ask-questions-later" approach since OCSSPs might be tempted overblock in hope of avoiding liability. Article 17(7) addresses the issue of over-blocking by stating that the implementation shall not lead to restriction of non-infringing content.[228] However, it is surprising that the article relies on industry cooperation to avoid overblocking.[229] The platform will have to make the final decision on the status of uploads. The assessment will most likely be cautious in interpretation of copyright limitations.[230] The complaint mechanism will allow only complaints on specific instances of blocking but does not allow for the questioning of the legitimacy of the whole system.[231] For determining

[225] G. F. Frosio (footnote 166), p. 43.
[226] F. Romeno-Moreno (footnote 185), p. 19.
[227] T. Spoerri (footnote 29), p. 182.
[228] *ibid.*, p. 183.
[229] M. Senftleben. Bermuda Triangle – Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market. SSRN, p. 8. Available online: https://ssrn.com/abstract=3367219 (11.5.2020).
[230] *ibid.,* p. 9.
[231] M. Senftleben (footnote 229), p. 10.

whether content is infringing human review is needed. However, the AI can learn from human decisions and maybe developed further to recognise allowed exceptions.[232] There is also a privacy concern since the filtering technologies are collecting users' personal data. However, the filtering does not create the connection with the user's data and the content since, for example, Youtube displays the account name in connected to the content. When users accept the general terms and conditions, they agree to this information publicly displayed and probably even want this public connection.[233]

4.4 Threat to Free Internet?

Professor Neil Netanel has expressed his concern that the implementation will lead to speech hierarchy which is the disproportionate power of wealthy speakers and audiences to determine the mix of speech that comprises the public discourse while effectively silencing minorities and the poor. Where rightholders are given too much control they may suppress the ability of users accessing, sharing or expressing protected content which might lead into the reduction of ideas expressed in the public sphere.[234] As a response to criticism, the final version of the article excluded from liability "not-for-profit online encyclopedias (e.g. Wikipedia); not-for-profit educational and scientific repositories; open-source software developing and sharing platforms (e.g. GitHub); providers of electronic communications services as defined in Directive (EU) 2018/1972;31 online marketplaces (e.g. eBay); and B2B and personal cloud services that allow users to upload content for their own use".[235] The freedom of press might suffer too since social media platforms are the new communication tool for press.[236] Uploads by media are especially prone to false positives because many of them are transformative, for example using a popular properly licensed audio in a video-track, or are in the scope of a limitation especially for the purpose of news.[237] A

[232] M. Senftleben (footnote 229), p. 11.
[233] K. Grisse (footnote 159), p. 897.
[234] A. Tyner (footnote 26), p. 281.
[235] J. Halek and M. Hrachovina (footnote 78), p. 46.
[236] J. van Vegchel. European Council's Amended Proposal for a Directive on Copyright in the Digital Single Market; Is It Enough to Ward Off the Threat to Press Freedom? SSRN, p.2. Available online: https://ssrn.com/abstract=3234175 (7.5.2020).
[237] J. van Vegchel (footnote 236), p.5.

solution to this might be imposing some kind of fine on false claims or making a general exception to professional media.[238]

The Commission has been silent on any new exception on the creation of content remixes or mash-ups. This would be an additional revenue for authors and performers.[239] A study on the state of the implementation of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions found that copyright might be harming to cultural expression. This right is particularly threatened by copyright in markets where big corporations are exercising their collective power as oligopolies.[240] Another criticism that the copyright reform has faced is the possible ban on memes that comes with the Article 17. The directive's approach does not fully correspond to current norms of content production. Relying on licensing represents a traditional approach to copyright which might not be suitable to modern society.[241] The Internet is an important platform for sharing the author's creations. Today the Internet relies strongly on user generated content which might contain different degrees of creativity. "The idea of a meme is expressed and fixated in those UGC related to the originating work, which are constituted by the union of the copy of the originating work and the addition of the result of a transformative activity, such as a superimposed character."[242] Memes are, therefore, derivative works. The original work where the meme derives from is often protected by copyright. In these cases, there is a conflict between copyright and the freedom of expression. If the parody exception cannot be invoked because the provision is not implemented into national law, memes risk being considered infringement of copyright.[243] Even if rightholders would rarely impose their rights in relation to memes, there appears to be mismatch between the attitudes of people and the law. There is no moral stigma surrounding memes.[244] It can be argued that copyright is not actually limiting freedom of expression since the ideas are not protected by copyright but the the way the ideas

[238] J. van Vegchel (footnote 236), p. 7.
[239] M. Senftleben, C. Angelopoulos, G. Frosio, V. Moscon, M. Peguera and O-A. Rognstad. The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform - European Intellectual Property Review Volume 40, Issue number 3, 2018/3, p. 24.
[240] G. F. Frosio (footnote 166), p. 32.
[241] A. Giannopoulou (footnote 115), p. 72.
[242]G. Bonetto (footnote 191) p. 990.
[243] A. Giannopoulou (footnote 115), p. 70.
[244] H. Yang. A New Zealand Copyright Analysis of Memes - Auckland University Law Review Vol 25, 2019, p. 103.

are expressed.[245] The European Commission has assured that memes or gifs or any other lawful uses should not be affected.[246]

In general the stated objective was to benefit authors. However, it is questionable whether the objective is achieved or if that was the objective to begin with or was the article a lobbying effort by music labels to gain back their bargaining power. On the other hand, the article encourages platforms to conclude licensing agreements with rightholders which might grant them better terms but restriction on freedom of expression might be detrimental to other types of authors like content creators on Youtube. For the enforcement to be fair, filtering technologies have to be trained to recognise allowed limitations or use human review.

5. FAIR REMUNERATION FOR CREATORS AND IMPLEMENTATION

5.1 Fair Remuneration of Authors and Performers

Articles 18-21 deal with the rights of authors and performers (creators). Ensuring a remuneration to the copyrightholder is an incentive to creativity and a just reward for the effort put into the creation. However, there is a significant imbalance between the negotiation powers of individuals authors and performers, and production and distribution companies. Before the DSM directive, there has been only three instances where EU has intervened for the support of creators. The first one is the amendment to the Term Directive in 2011 which granted performers a mandatory and unwaivable right to an annual supplementary remuneration if they transferred their rights to the producer in exchange for a lump sum payment.[247] The Resale Right Directive addresses authors of graphic and plastic works of art and ensures that they receive an adequate share of the economic success of their original artworks by way of a royalty for every resale. The Rental Directive provides for an

[245] V. Darias de las Heras (footnote 145), p. 125.
[246] F. Romeno-Moreno (footnote 185), p. 4.
[247] G. Priora. The principle of appropriate and proportionate remuneration in the CDSM Directive: A reason for hope? - European Intellectual Property Review 42(1) 1-3, 2019/12, p. 2.

unwaivable right to equitable remuneration in favour of the author or performer of a song or a movie who transferred the exclusive rental right to the producer. [248]

The DSM directive's chapter 3 is an response to the bargaining gap problem.[249] This can be said to address the real value gap.[250] The fair remuneration principle applies to any author or performer unlike previous legislation.[251] Article 19 requires that the member states shall ensure that authors and performers receive information on a regular basis on the exploitation of their works and performances.[252] Additional information may be asked from sub-licensees under certain requirements. The transparency obligation can be limited if the creator's contribution to the overall work/performance is "not significant".[253] Article 20, the so-called best-seller clause ensures that authors and performers can renegotiate their remuneration if their works or performances become significantly successful and the remuneration cannot be considered proportionate anymore. Under Article 21, the member states should also provide for an effective dispute resolution mechanism.[254] Under Article 22, creators have a right of revocation. They may revoke in whole or in part an exclusive licence or transfer on the grounds of lack of exploitation of their work/subject matter, unless such lack is due to circumstances that the creator "can reasonably be expected to remedy". The right can be only exercised within a reasonable period of time after the conclusion of the relevant contract.[255] Recital 73 states that a lump sum payment can constitute an appropriate remuneration but it should not be the rule.[256] This article is a great contribution to establishment of authors' and performers' rights. However, from a more critical standpoint the definition of appropriate and proportionate is not clear enough. Recital 73 provides some indicative standards, the actual or potential economic value of the licensed or transferred rights, the amount of author's or performer's contribution to the work, market practices, and gives preference to recurring

[248] G. Priora (footnote 247), p. 3.
[249] *ibid.*, p. 3.
[250] J. P. Quintais (footnote 94), p. 20.
[251] G. Priora (footnote 247), p. 4.
[252] T. Shapiro (footnote 72), p. 776.
[253] J. P. Quintais (footnote 94), p. 21.
[254] T. Shapiro (footnote 72), p. 776.
[255] J. P. Quintais (footnote 94) p. 21.
[256] *ibid.*, p. 20.

payments over lump sums. However, a lot of discretion is left to the member states. The effectiveness of the provision might be somewhat dubious.[257]

5.2 Implementation

The directive must be implemented into national law by 7 June 2021. The Commission will carry out its review of the directive by 7 June 2026 and impact assessment on the OCSSPs' new liability regime by 7 June 2024. Depending on the conclusions of the assessment the Commission must "take action".[258] Concerning implementation of article 17, it has already been made clearly that different member states will be taking different approaches which might add up to the fragmentation of EU copyright law. Germany has declared its strong opposition to algorithmic-based solutions, whereas France will probably follow an even stricter approach.[259] Article 12 of the DSM directive concerning extended collective licensing might be an answer to tackling the licensing requirements of article 17. However, there are some shortcomings. Mechanisms introduced by art. 12 are merely territorial even if the issue would require a pan-European solution. Secondly, the implementation might take significant time since few member states have extended collective licensing mechanisms in place and the requirements and safeguards of the article are quite demanding.[260] National implementations should focus on legal mechanisms for licensing of the uses covered by art. 17 and should limit the application of preventive obligations.[261]

The licensing agreements cannot undermine limitations or exceptions since they are mandatory.[262] It has been argued that the filtering measures should be restricted to prima facie copyright infringement meaning content uploaded to a platform that is identical or equivalent to the "relevant and necessary information" provided by the rightholders. In cases of no prima facie infringement, there should be no presumption that the content is infringing. Such

[257] G. Priora (footnote 247),, p. 5.
[258] J. P. Quintais (footnote 94), p. 22.
[259] J. Halek and M. Hrachovina (footnote 78), p. 48.
[260] J. P. Quintais (footnote 94), p. 14.
[261] J. Quintais, G. Frosio, S. van Gompel, P. B. Hugenholtz, M. Husovec, B. J. Jütte and M. Senftleben. Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive. Recommendations from European Academics 2019/11, p. 1.
[262] *ibid.*, p. 2.

content should remain available on the platform until its legal status is determined according to the procedure under Article 17(9).[263] If part of the content matches "relevant and necessary information" provided by the rightholders, the user should make a declaration stating that the uploaded content is permissible under a limitation, such as parody or commentary. This will automatically qualify as a complaint under the complaint and redress mechanism. In the declaration, the user must duly justify the use and its compliance should be determined by human review. If a declaration is not made, the content can be taken down. The transparency of such a mechanism should be established by proportionate reporting duties for OCSSPs set up by national laws.[264]

France has implemented art. 17 by passing its own copyright law requiring content-hosting sites to obtain or at least make a good effort to obtain authorization from every copyright holder whose material they post. The law does not pose a monitoring obligation but it instructs the companies to use takedown notices. Nora Choueiri, Senior Legal Counsel at Dailymotion, states that Dailymotion receives thousands of takedown notices every month and many of them are fraudulently trying to take down their competition. As a result Dailymotion has decided to take up filtering technology.[265] Also Facebook is preparing to take measures. They have created a board to review and render judgement on difficult content review case. It will consist of eleven to forty members and both Facebook and its users can refer content to the board. Once the board has made a decision on the content, Facebook will be bound by it.[266] Each member states have discretion in implementing the directive and deciding how to tackle infringements. This creates problems for the creation of pan-European databases.[267]

There is a general trend in assigning more responsibility to OCSSPs.[268] The increased liability of OCSSPs might transform them into cyber-police[269] and downgrade law to a second-class

[263] J. Quintais, G. Frosio, S. van Gompel, P. B. Hugenholtz, M. Husovec, B. J. Jütte and M. Senftleben (footnote 261), p. 4.
[264] *ibid.,* p. 5.
[265] Platform Society: Copyright, Free Speech, and Sharing on Social Media Platforms - Fordham Intellectual Property, Media & Entertainment Law Journal 30, no. 1, 2019, p. 4-5.
[266] *ibid.*, p. 14.
[267] F. Romeno-Moreno (footnote 185), p. 9.
[268] N. E. Curto (footnote 182), p. 22.
[269] M. L. Montagnani and A. Y. Trapova (footnote 13), p. 309.

status while private entities are able to implement their terms of service with limited accountability.[270] In most legislations secondary liability is imposed on OCSSPS, whereas the DSM directive imposes a primary liability.[271]

4. CONCLUSION: Who Does the Directive Benefit?

The DSM directive's aim was to harmonise copyright rules, ensure a well-functioning digital single market and guarantee authors and rightholders fair remuneration for exploitation of their works online. To answer the question, whether the directive benefits authors or companies as rightholders, there seems to be some benefit to both of them. However, the critics of the directive claim that a lot of the objectives of the articles are not achieved and that it actually increases fragmentation of copyright law. Articles 2-6 create limitations to copyright concerning use of works for text and data mining and teaching activities. They are justified on public policy grounds like research, availability of cultural heritage and innovation. This limitation is not drastic to authors or rightholders since the articles follow the principle that mere information is not copyrightable. The TDM limitation also benefits authors like investigative journalists. Articles 8-10 concern the EU-wide access to out-of-commerce works and cultural heritage. This was justified on public interest grounds as well. A similar scheme in France was deemed unlawful on the basis that authors were not individually notified of their works. It was seen to be more favorable to publishers than authors.

Article 12 introduces three different licensing mechanisms. The objective is to facilitate extensive licensing. Facilitation of licensing should be beneficial to authors and other rightholders alike and the opt-out mechanism works as a safeguard for authors' rights. Article 13 concerns the access and availability of audiovisual works on video-on-demand platforms and establishes a negotiation mechanism for difficulties in the contractual negotiations. This should be beneficial to authors and rightholders as well. Article 14 establishes that any

[270] G. F. Frosio Why Keep a Dog and Bark Yourself? From Intermediary Liability to Responsibility -Oxford Int'l J. of Law and Information Technology 25, 2017/12, p. 17.
[271] N. E. Curto (footnote 182), p. 10.

materials resulting from reproductions of works of visual art for which the term of protection has expired are not protected by copyright or related rights, meaning they are in the public domain. This does not limit authors' or rightholders' rights any further. It just advances the codification of public domain. Article 15 creates the press publisher's neighbouring right. This benefits publishing companies in the press sector. However, maybe not as much as expected if we look at similar rights introduced in Spain and Germany where the introduction of the right seems to have reduced the traffic on the news publishers' sites. The right also contradicts with authors' monetary interest according to the pie theory. Even if authors' legal rights are not affected, the right will decrease author revenues. Article 16 clarifies the publisher's position in a licensing contract between an author and a publisher and guarantees the publisher a fair compensation for the use of the work made under an exception or limitation to the transferred or licensed right.

Article 17 establishes a new liability of OCSSPs to prevent the availability of illegal content on their platforms and to conclude licensing agreements with relevant rightholders for the use of their works. Many academics argue that this establishes a monitoring obligation which can be fulfilled with content-recognition and filtering technology. The article increases the bargaining power of record labels and CMOs against platforms. It creates limitations to freedom of expression on the Internet with false positives and possible over-blocking. This might decrease creativity of authors. Furthermore, when allegedly infringing materials are freezed the authors of the content might lose significant revenue. Generally increasing the bargaining powers of rightholders might be beneficial to authors as well and not only record labels but the evidence shows that most of the revenue from online streaming actually goes to other right holders than the authors themselves. Articles 18-21 concern fair remuneration to authors and performers. This is a step to increase the bargaining power of creators against production and distribution companies. It is greatly beneficial to authors and performers.

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