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### Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match

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# PLATFORM LIABILITY UNDER ARTICLE 17 OF THE COPYRIGHT IN THE DIGITAL SINGLE MARKET DIRECTIVE, AUTOMATED FILTERING AND FUNDAMENTAL RIGHTS: AN IMPOSSIBLE MATCH

*Christophe Geiger & Bernd Justin Jütte\**

“We cannot accept a situation where decisions  
that have a wide-ranging impact on our democracy  
are being made by computer programs without any human supervision.”

-Ursula von der Leyen  
President of the European Commission  
20 January 2020

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## ABSTRACT

The Directive on Copyright in the Digital Single Market (CDSM Directive) introduced a change of paradigm with regard to the liability of some platforms in the European Union. Under the safe harbour rules of the Directive on electronic commerce (E-Commerce Directive), intermediaries in the EU were shielded from liability for acts of their users committed through their services, provided they had no knowledge of it. Although platform operators could be required to help enforce copyright infringements online by taking down infringing content, the E-commerce Directive also drew a very clear line that intermediaries could not be obliged to monitor all communications of their users and install general filtering mechanisms for this purpose. The Court of Justice of the European Union confirmed this in a series of cases, amongst other reasons because filtering would restrict the fundamental rights of platform operators and users of intermediary services. Twenty years later, the regime for online intermediaries in the EU has fundamentally shifted with the adoption of Article 17 CDSM Directive, the most controversial and hotly debated provision of this piece of legislation. For a specific class of online intermediaries called “online content-sharing providers” (OCSSPs), uploads of infringing works by their users now result in direct liability and they are required undertake “best efforts” to obtain authorization for such uploads. With this new responsibility come further obligations, which oblige OCSSPs to make best efforts to ensure that works for which they have not obtained authorization are not available on their services. How exactly OCSSPs can comply with this obligation is still unclear. However, it seems unavoidable that compliance will require them to install measures such as automated filtering (so-called “upload filters”) using algorithms to prevent users from uploading unlawful content. Given the scale of the obligation, there is a real danger that measures taken by OCSSPs in fulfilment of their obligation will amount to expressly prohibited general monitoring. What seems certain however is that the automated filtering, whether general or specific in nature, cannot distinguish appropriately between illegitimate and legitimate use of content (e.g. because it would be covered by a copyright limitation). Hence, there is a serious risk of over-blocking of certain uses that benefit from strong fundamental rights justifications such as the freedom of expression and information or freedom of artistic creativity.

This article first outlines the relevant fundamental rights as guaranteed under the EU Charter of Fundamental Rights and the European Convention of Human Rights that are affected by an obligation to monitor and filter for copyright infringing content. Second, it examines the impact on fundamental rights of the obligations OCSSPs incur under Article 17, which are analysed and tested also with regard to their compatibility with general principles of EU law such as proportionality and legal certainty. These are, on the one hand, obligations to prevent the upload of works for

which they have not obtained authorization and, on the other, an obligation to remove infringing content upon notification and prevent the renewed upload in relation to these works and protected subject matter (so-called “stay down”- obligations). Third, the article assesses the mechanisms to safeguard the right of users of online content-sharing services under Article 17. The analysis demonstrates that the balance between the different fundamental rights in the normative framework of Article 17 CDSM Directive is a very difficult one to strike and that overly strict and broad enforcement mechanisms will most likely constitute an unjustified and disproportionate infringement of the fundamental rights of platform operators as well as of users of such platforms. Moreover, Article 17 is the result of hard-fought compromises during the elaboration of the Directive which led to the adoption of a long provision with complicated wording and full of internal contradictions. As a consequence, it does not determine with sufficient precision the balance between the multiple fundamental rights affected, nor does it provide for effective harmonization. These conclusions are of crucial importance for the development of the regulatory framework for the liability of platforms in the EU since the CJEU will have to rule on the compatibility of Article 17 with fundamental rights in the near future, as a result of an action for annulment of introduced by the Polish government. In fact, if certain features of that article are to be considered incompatible with the constitutional framework of the EU, this should lead to the erasing of certain paragraphs and, possibly, even of the entire provision from the text of the CDSM directive.

## EXECUTIVE SUMMARY

The obligation of hosting platforms to partake in the enforcement of copyright infringement has been subject since 2000 to the legal framework of the E-Commerce Directive (ECD). This directive provides liability exemptions for certain types of intermediaries when users commit unlawful acts on their services, including copyright infringements. The evolution of online services, giving users vast possibilities to upload autonomously copyright-protected content, combined with the will to involve more strongly the platforms in the copyright enforcement process however recently induced the European Union (EU) legislator to revise the legal framework and to burden certain types of hosting services, called “online content-sharing service providers (OCSSPs)”, with more responsibilities.

With the Directive on Copyright in a Digital Single Market (CDSM Directive), the EU creates in Art. 17(a) special liability regime for this specific category of online platforms. It makes OCSSPs directly liable for acts of their users when they upload content onto their services and thereby (potentially) infringe copyright. As a result, OCSSPs must themselves obtain authorization for such uploads - or provide “best efforts” to obtain authorization - and failure to do so triggers obligations to ensure that unlawful content is not being made available or removed upon request. According to Article 17(4) more specifically, OCSSPs are required to comply with a complicated combination of obligations that require them to undertake “best efforts” to (1) obtain authorization for content uploaded by their users, (2) to prevent the availability of unauthorized content, and (3) to remove unauthorized content and to ensure its future unavailability in order to avoid liability.

However, the new legal framework does not only significantly affect OCSSPs in the way they organize their services but will also considerably impact the interests of users of such platforms as well as rightholders whose works and other subject matter are shared on such services. If the directive strongly affirms that the measures required under Article 17(4) should under no circumstances lead to general monitoring obligation for online content-sharing services (Art. 17(8)), reinforcing a fundamental principle of the established EU platform liability regime, it is very likely that OCSSPs will have no other option but to resort to automated enforcement (i.e., the algorithmic identification and filtering of potentially infringing content) in order to fulfil the obligation imposed on them. Filtering infringing content without checking the legality of every upload of all the works notified by rightholders leads potentially to an unsolvable contradiction. Moreover, automated enforcement by way of filtering and monitoring will inevitably affect lawful content uploaded by

users due to the technological limitations of monitoring and filtering technology, frustrating their ability to express themselves, to disseminate their creativity and to share and receive information.

The impacts of the new liability system provided by the CDSM directive on the various interests and fundamental rights of users, rightholders and the platforms are significant and therefore necessitate a very careful assessment to ensure its compatibility with the EU treaties and thus with the fundamental principles at the core of the EU construction. In the past, the CJEU's case-law on intermediary liability has shaped this complex triangular relationship in the light of fundamental rights. The introduction of additional obligations for specific types of intermediaries requires revisiting this relationship in an Article 17 scenario. Therefore, this study re-examines the balance between the various fundamental rights and other interests in the light of the rights and obligations defined in Article 17 in general, and specifically the obligations for OCSSPs to filter certain types of content in Article 17(4). Such a re-examination seems essential as national legislators are currently (or soon will be) struggling with the implementation of the CDSM Directive in their national law. The new legislative framework for certain hosting platforms has also led to strong criticism among the academic community for its problematic implications and imbalances; the new liability system has then been challenged by Poland before the CJEU immediately after the adoption of the directive, requesting for the annulment of the disputed article in parts or in full.

One of the main criticisms aims at the incompatibility of Article 17 with European fundamental rights. These rights are guaranteed, for acts of the EU, by the Charter of Fundamental Rights of the European Union (EUCFR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The rights contained in these instruments have been interpreted and further, especially in relation to the online environment, shaped by the jurisprudence of the CJEU and the European Court of Human Rights (ECtHR). Accordingly, the provisions of the CDSM Directive have to be interpreted in the light of these two instruments and the jurisprudence of their respective courts. Their rich case-law provides guidance on the conflicts and challenges created by Article 17 CDSM Directive, including:

The right to freedom of expression, including the right to receive and impart information, and the right to artistic freedom are significantly restricted if the obligations of Article 17 CDSM Directive can only be met by the use of automated filtering. Automated filtering leads to the inaccessibility of content shared on online content-sharing platforms, thereby frustrating the rights of users in a significant manner. Furthermore, users uploading content, which is caught by automated filtering mechanisms, would be restricted in their right to impart information, including such information that could be lawfully made

available under an exception or limitation to copyright. These legitimate uses such as e.g. for quotations, criticism, review or parody purposes benefit from a very strong fundamental rights justification which the directive otherwise explicitly aims to safeguard (Art 17 (7)). Thus, any automated filtering inevitably induced by Art. 17 that would be incapable of recognizing and respecting these legitimate uses would not be only violating the explicit will of the legislature but also important rights in a democratic society.

Requiring OCSSPs to take a more active role in the enforcement of copyright requires them to invest significant financial and human resources in order to comply with their new obligations under Article 17 CDSM. Burdening private businesses with such broad tasks, coupled with legal uncertainty resulting from the vagueness of the obligations imposed on OCSSPs, restricts their freedom to conduct business as protected by Art. 16 of the Charter, as the CJEU recalled on numerous occasions. In the context of Article 17, this relates, first, to the requirement to cooperate with rightholders and to conclude licensing agreements for content uploaded by their users, second to verify that this content does not fall under an exception and limitation in one of the 27 member states, which is extremely challenging as these are not harmonized, and finally to disable and prevent access to content for which no authorization has been obtained and is not covered by a limitation. All these new obligations are very heavy and complex to implement. Therefore, they must be considered in the light of the fundamental right of freedom to conduct business, as well as with regard to the principle of proportionality and legal certainty.

Automated enforcement necessarily requires the processing of personal data and enforcing copyright infringements necessitates disclosing such information to injured parties or law enforcement authorities. The data of users, i.e. when and what they upload and download to and from online content-sharing platforms, is protected by the right to the protection of personal data and the respect for private and family life. In cases of alleged violations of copyright, these rights conflict with the right to property of rightholders. In this regard, the CJEU has already determined that the general filtering of user data to prevent infringements *cannot* be reconciled with the fundamental rights of users, but also those of platform operators.

One of the main objectives advanced for Article 17 CDSM Directive is to provide rightholders with better control over the unauthorized exploitation of their works and other subject matter. In this regard, it must be considered that the right to property does not provide absolute protection and that the right needs also to serve a social function, which takes particular shape in the normative framework of copyright. The protection provided for rightholders by Article 17 CDSM Directive and its specific application must have regard to these underlying principles and must guide the definition of the obligations of OCSSPS to partake in the protection of copyright but also the restriction of the rights of users, specifically the rights to freedom of expression and artistic freedom.

The obligation to monitor *ex post* or *ex ante* content to be uploaded on the platform will inevitably lead to numerous conflicts between the interests of rightholders and users because of too restrictive filtering mechanism that disables lawful uses, or the failure to remove unlawful content. The settlement of these disputes implicates the right to an effective remedy, both for users and rightholders. Problematic in this regard is the forum in which these disputes are settled and in which the unlawfulness of uploaded content is determined. Because the interests at stake are grounded in fundamental rights, private dispute settlement managed only by platform operators or rightholders is likely not to be compliant with procedural fundamental rights and poses a delicate question of legitimacy with regard to who decide which content should be available on these platforms.

In short, the obligation imposed on OCSSPs under Article 17(4) will make it unavoidable that platforms within the scope of the provision will monitor and filter content uploaded by their users by automated means. This is the result of legal drafting that fails to determine the balance between the relevant fundamental rights at EU level. It is constitutionally highly problematic that a prerogative and obligation of the EU legislator would have to be performed by national legislators, with outcomes that will most likely result in a lack of full harmonization in crucial areas of copyright law and, as a result, legal uncertainty in the EU.

The automated enforcement that is almost certain to emerge will significantly restrict the fundamental rights of users of these platforms by preventing the availability of lawful uploads. To safeguard the rights of platform users, specifically their right to receive and impart information, it is absolutely necessary to control and limit the scope of automated enforcement as much as possible, to prevent for example only the upload of content that is manifestly illegal. What is manifestly illegal and what constitutes permissible automated enforcement mechanisms is however a difficult and complex assessment and should not be left for private actors to decide, as this qualification will affect the exercise of important fundamental rights that are of crucial importance for the guarantee of a democratic and pluralistic society. For this reason, it is suggested that an independent institution is set up at EU level to monitor the implementation and application of Art. 17 in a fundamental rights-compliant manner. This institution could take the form of a supervisory body that would also perform alternative dispute resolution (ADR) functions, ensuring that disputes arising in relation to uploaded content are settled impartially and in an efficient, but fundamental rights-compliant manner. In addition, this institution could be tasked with, *inter alia*, issuing guidelines for the interpretation of Article 17, developing best practices together with stakeholders, provide for empirical data to assess its impacts, and to recommend - if proven necessary - improvements to policy makers. Only under this condition could the liability system created by Art. 17 provide for sufficient guarantees for

fundamental rights and basic legal principles of EU law, securing that what is available online results not solely from automated technological means or the decisions of private economic players. In the absence of such an institution, it is hard to imagine how Article 17 could be “saved” from an annulment by the CJEU.

## INTRODUCTION

After a long political and public debate, the European legislator adopted the Directive on Copyright in the Digital Single Market (CDSM Directive)<sup>1</sup> in April 2019.<sup>2</sup> One of its core provisions redefines the liability regime for specific online platforms by creating new obligations for large content-hosting platforms, so-called online content-sharing service providers (OCSSPs).<sup>3</sup> According to the Directive, this change of paradigm in the liability system is meant to reflect the changing realities of how works and other subject matter protected by copyright are accessed online.<sup>4</sup> Because of their special position, OCSSPs are from now on considered to perform copyright relevant acts when their users upload content.<sup>5</sup> In turn, Article 17 CDSM Directive establishes an extremely complicated system of conditions under which OCSSPs can avoid liability.

Article 17 has come under heavy critique,<sup>6</sup> notably for the effects it is likely to have on various fundamental rights (FR).<sup>7</sup> The effects of the

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<sup>1</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17.5.2019, p. 92-125 (CDSM Directive).

<sup>2</sup> Providing a general overview of the Directive: João Pedro Quintais, *The New Copyright in the Digital Single Market Directive: A Critical Look*, 42(1) *European Intellectual Property Review* (2020), 28-41 and Séverine Dusollier, *The 2019 Directive on Copyright in the Digital Single Market: Some progress, a few bad choices, and an overall failed ambition*, 57(4) *Common Market Law Review* (2020), 979-1030.

<sup>3</sup> These service providers are defined in Article 2(6) and Recital 62 CDSM Directive, see *infra* 3.1.

<sup>4</sup> Recital 61 CDSM Directive.

<sup>5</sup> Article 17(1) CDSM Directive.

<sup>6</sup> See for example Felipe Romero Moreno, 'Upload filters' and human rights: implementing Article 17 of the Directive on Copyright in the Digital Single Market, 34(2) *International Review of Law, Computers & Technology* (2020), 153-182 and Christina Angelopoulos, & João Pedro Quintais, *Fixing Copyright Reform: A Better Solution to Online Infringement*, 10(2) *Journal of Intellectual Property, Information Technology and E-Commerce Law* (2019), 147-172.

<sup>7</sup> A number of extensive studies have been published on the various aspects on Article 17, including its effects on fundamental rights, see e.g. Matthias Leistner, *European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive Compared to Secondary Liability of Content Platforms in the U.S. – Can We Make the New European System a Global Opportunity Instead of a Local Challenge?* *Zeitschrift für Geistiges Eigentum/Intellectual Property Journal (ZGE/IPJ)*, Issue 2, p. 123-214, available at SSRN: <https://ssrn.com/abstract=3572040> (2020), 1-78; Julia Reda, Joschka Selinger, & Michael Servatius, *Article 17 of the Directive on Copyright in the Digital Single Market: a Fundamental Rights Assessment (Study for Gesellschaft für Freiheitsrechte)*, (December 2020), available at SSRN: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3732223](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3732223); Martin Senftleben, & Christina Angelopoulos, *The Odyssey of the Prohibition on General Monitoring Obligations on the Way to the Digital Services Act: Between Article 15 of the E-Commerce Directive and Article 17 of the Directive on Copyright in the Digital Single Market* (October 22, 2020), available at SSRN: <https://ssrn.com/abstract=3717022>; Gerald Spindler, *Art. 17 DSM-RL und dessen Vereinbarkeit mit primärem Europarecht*.

basic intermediary liability regime under the Directive on electronic commerce (ECD)<sup>8</sup> and under the Directive on copyright and related rights in the information society (InfoSoc Directive)<sup>9</sup> on the exercise of FR by intermediaries, rightholders and users of hosting platforms has been subject to a number of preliminary rulings by the Court of Justice of the European Union (CJEU).<sup>10</sup> In this jurisprudence, the Court has ruled out that online intermediaries can incur obligations requiring them to install general monitoring and filtering mechanisms to identify and block copyright-infringing content.<sup>11</sup>

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Zugleich ein Beitrag zu Umsetzungsmöglichkeiten, 122(3) *Gewerblicher Rechtsschutz und Urheberrecht* (2020), 253-261; Gerald Spindler, Upload-Filter: Umsetzungsoptionen zu Art. 17 DSM-RL, *Computer und Recht* (2020), 50-59, further suggestions and commentaries have been made by a wider range of relevant organizations and groups of scholars, also on plans for national implementation, see for example: The European Copyright Society, Comment of the European Copyright Society. Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market into National Law, 11(2) *Journal of Intellectual Property, Information Technology and E-Commerce Law* (2020), 115-131; ALAI, DRAFT OPINION on certain aspects of the implementation of Article 17 of Directive (EU) 2019/790 of 17 April 2019 on copyright and related rights in the digital single market, available at: [https://www.alai.org/en/assets/files/resolutions/200330-opinion-article-17-directive-2019\\_790-en.pdf](https://www.alai.org/en/assets/files/resolutions/200330-opinion-article-17-directive-2019_790-en.pdf), accessed: 25.01.2021; ALAI, DRAFT OPINION on certain aspects of the implementation of Article 17 of Directive (EU) 2019/790 of 17 April 2019 on copyright and related rights in the digital single market, available at: [https://www.alai.org/en/assets/files/resolutions/200330-opinion-article-17-directive-2019\\_790-en.pdf](https://www.alai.org/en/assets/files/resolutions/200330-opinion-article-17-directive-2019_790-en.pdf), accessed: 25.01.2021; Hilty et al., *Gesetz über die urheberrechtliche Verantwortlichkeit von Diensteanbietern für das Teilen von Online-Inhalten (Urheberrechts-Diensteanbieter-Gesetz – UrhDaG) Stellungnahme zum Referentenentwurf vom 2. September 2020*, available at: [https://www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/Stellungnahme\\_UrhDaG\\_Referententwurf\\_MPI.pdf](https://www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/Stellungnahme_UrhDaG_Referententwurf_MPI.pdf), accessed: 25.01.2021.

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

<sup>9</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p. 10-19 (InfoSoc Directive). This directive does not foresee a specific liability standard, but simply refers to the liability regime established by the e-Commerce directive (Recital 16).

<sup>10</sup> See for example CJEU, Judgment of 29.01.2008, *Promusicae*, Case C-275/06, EU:C:2008:54; CJEU, Judgment of 24.11.2011, *Scarlet Extended*, Case C-70/10, EU:C:2011:771; CJEU, Judgment of 16.06.2012, *SABAM v Netlog*, Case C-360/10, EU:C:2012:85; CJEU, Judgment of 27.03.2014, *UPC Telekabel Wien*, Case C-314/12, EU:C:2014:192; CJEU, Judgement of 15.09.2016, *Mc Fadden*, C-484/14, EU:C:2016:689; see also the ongoing proceedings in *YouTube*, for which the AG delivered his Opinion, AG Saugmandsgaard Øe, Opinion of 16.07.2020, *YouTube*, Joined Cases C-682/18 and C-683/18, EU:C:2020:586.

<sup>11</sup> See Stefan Kulk, & Frederik Zuiderveen Borgesius, Filtering for copyright enforcement in Europe after the Sabam cases, 34(11) *European Intellectual Property Review* (2012), 791-795; Christina Angelopoulos, Are blocking injunctions against ISPs allowed in Europe? Copyright enforcement in the post-Telekabel EU legal landscape, 9(10) *Journal of Intellectual Property Law* (2014), 812-821; see for further references Stefan Kulk, *Internet Intermediaries and Copyright Law, Towards a Future-proof EU Legal Framework*, (Ridderprint:Alblasserdam, 2018); Aleksandra Kuczerawy, *Intermediary Liability and Freedom of Expression in the EU: From Concepts to*

The extent to which intermediaries, and hosting providers in particular, can incur liability for infringements committed by their users was discussed intensively leading up to the adoption of the CDSM Directive.<sup>12</sup> It comes therefore as no surprise that, immediately after its adoption, the provision of the CDSM Directive that re-balances the delicate distribution of duties and responsibilities between rightholders, users and intermediaries has been challenged on FR grounds by the Polish Government before the CJEU.<sup>13</sup>

At the core of this discussion lies the question under which circumstances and in which way intermediaries are obliged to take measures to ensure that copyright and related rights are not infringed via their services. While the regime of the ECD provided for relatively broad ‘safe harbours’, i.e. liability exclusions for intermediaries,<sup>14</sup> the new sectoral regime under Article 17 CDSM Directive redesigned liability

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*Safeguards*, (Intersentia:Cambridge, 2018); For a comparative perspective: Folkert Wilman, *The Responsibility of Online Intermediaries for Illegal User Content in the EU and the US*, (Edward Elgar Publishing:Cheltenham, Northampton, 2020).

<sup>12</sup> See e.g. The European Copyright Society (2020) and Joao Pedro Quintais et al., Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics, 10(3) *Journal of Intellectual Property, Information Technology and E-Commerce Law* (2019), 277-282.

<sup>13</sup> CJEU, Action brought on 24 May 2019- *Republic of Poland v European Parliament and Council of the European Union*, (Case C-401/19). According to the pleas in law and main arguments, “the Republic of Poland seeks the annulment of Article 17(4)(b) and Article 17(4)(c), *in fine*” (...), or, “should the Court find that the contested provisions cannot be deleted from Article 17 of Directive (EU) 2019/790 without substantively changing the rules contained in the remaining provisions of that article, the Republic of Poland claims that the Court should annul Article 17 of Directive (EU) 2019/790 in its entirety”.

<sup>14</sup> Articles 12-15 ECD exempt information society service providers from liability if they comply with the respective conditions. Particularly relevant for hosting providers is Article 14 ECD, which provides that information society service providers who offer a service which “consists of the storage of information provided by a recipient of the service” are not liable for such information if “(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.” Article 15 provides further that services that fall under Articles 12-14 shall not be required to generally monitor or filter information or to actively seek information that could indicate illegal activities; see for a detailed analysis and further references: Mark D. Cole, Christina Etteldorf & Carsten Ullrich, *Cross-Border Dissemination of Online Content*, (Baden-Baden: Nomos, 2020), pp. 188-200, see for a good summary Giancarlo Frosio, & Christophe Geiger, Taking Fundamental Rights Seriously in the Digital Service Act’s Platform Liability Regime, available at SSRN: [https://ssrn.com/abstract=https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3747756](https://ssrn.com/abstract=https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3747756) (2020), 1-44, p. 8; and Annemarie Bridy, The Price of Closing the ‘Value Gap’: How the Music Industry Hacked EU Copyright Reform, 22(2) *Vanderbilt Journal of Entertainment and Technology Law* (2020), 323-358. See in general with many further inspiring contributions the comprehensive volume edited by Giancarlo Frosio, *The Oxford Handbook of Online Intermediary Liability* (Oxford: Oxford University Press, 2020).

exemptions for OCSSPs as a specific class of intermediaries.<sup>15</sup>

In 2012, *SABAM v Netlog*<sup>16</sup> set out the parameters of filtering obligations in the triangular relationship between the various FR of rightholders, users and intermediaries in the context of the liability regime of the ECD.<sup>17</sup> In *SABAM v Netlog*, the CJEU determined that hosting providers cannot be required to install systems that monitor or filter “most of the information stored by the hosting service provider” to avoid all present and future infringements. The expenses incurred by such an obligation would “result in a serious infringement of the freedom of the hosting service provider to conduct its business since it would require that hosting service provider to install a complicated, costly, permanent computer system at its own expense”.<sup>18</sup> The Court further stressed that a general monitoring obligation would infringe the rights of users of hosting services, most notably the right to protection of personal data and the right to receive and impart information.<sup>19</sup> As a result, a general monitoring obligation as a measure to protect the property rights of copyright holders does not strike a fair balance between the various FR concerned.

The statutory language of Article 17 is relatively vague and merely requires that OCSSPs “ensure the unavailability of specific works”.<sup>20</sup> Although the text of the directive avoids references to monitoring or filtering, it is widely agreed among commentators that some sort of automated content control will be necessary to fulfil the obligations arising under Article 17(4) CDSM.<sup>21</sup> This potentially stands in contradiction to the interpretation of Article 16 EU Charter as interpreted in *SABAM v Netlog* and the express prohibition of general filtering and

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<sup>15</sup> See e.g. for a comprehensive summary Quintais, *EIPR* (2020).

<sup>16</sup> CJEU, C-360/10 *SABAM v Netlog*, see also CJEU, C-70/10 *Scarlet Extended* for an almost identical judgment on the obligations of internet access providers.

<sup>17</sup> CJEU, C-360/10 *SABAM v Netlog*, paras. 39-50.

<sup>18</sup> CJEU, C-360/10 *SABAM v Netlog*, para. 46; see further for a more nuanced assessment of the impact of Article 17 on the right to conduct a business of platform operators Reda, & Selinger, *Article 17's impact on freedom to conduct a business – Part 1*, available at: <http://copyrightblog.kluweriplaw.com/2021/01/18/article-17s-impact-on-freedom-to-conduct-a-business-part-1/>, accessed: 25.01.2021 and *part 2*, available at: <http://copyrightblog.kluweriplaw.com/2021/01/19/article-17s-impact-on-freedom-to-conduct-a-business-part-2/>, accessed: 25.01.2021.

<sup>19</sup> CJEU, C-360/10 *SABAM v Netlog*, paras. 47-50.

<sup>20</sup> Article 17(4)(b) CDSM Directive.

<sup>21</sup> See e.g. Karina Grisse, After the storm—examining the final version of Article 17 of the new Directive (EU) 2019/790, 14(11) *Journal of Intellectual Property Law & Practice* (2019), 887-899, p. 894; Spindler, *GRUR* (2020), p. 259; Giancarlo Frosio, & Sunimal Mendis, Monitoring and Filtering: European Reform or Global Trend, in: Giancarlo Frosio (ed.), *The Oxford Handbook of Online Intermediary Liability*, (Oxford: Oxford University Press, 2020), pp. 561 sq; Sebastian Schwemer, & Jens Schovsbo, What is Left of User Rights? – Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime, in: Paul Torremans (ed.), *Intellectual Property Law and Human Rights*, (Alphen aan den Rijn: Kluwer Law International, 2020), p. 574: “Given the practical infeasibility of handling a large number of user uploads, the difficulty in identifying previously blocked content without technical means (...), the use of such algorithmic solutions is likely, akin to a de facto imposition”.

monitoring obligations for intermediaries<sup>22</sup> and specifically OCSSPs.<sup>23</sup>

The new Article 17 regime expressly overrides the existing safe harbour provision of the ECD and the InfoSoc Directive<sup>24</sup> and foreshadows broader obligations for online intermediaries in the EU's Digital Services Act currently under discussion.<sup>25</sup> Under the ECD-regime, intermediaries incurred an obligation to remove content upon notification. Article 17 establishes a system based on cooperation between rightholders and users that includes elements of the ECD-regime. Pursuant to Article 17(1) OCSSPs perform relevant acts of communication to the public in relation to content uploaded by their users. For these acts, OCSSPs must make "best efforts" to obtain authorization from the relevant rightholders.<sup>26</sup> Failure to obtain authorization triggers an obligation to ensure that works or other subject matter for which authorization could not be obtained are made unavailable on a hosting platform with the help of information provided by rightholders.<sup>27</sup> To achieve this outcome, OCSSPs must undertake "best efforts", a standard of care that also applies to a secondary obligation which, in its formulation, resembles, but is not identical to, the liability exemption of Article 14 ECD.<sup>28</sup> Pursuant to Article 17(4)(c) OCSSPs must "in any event" expeditiously remove infringing content after notification and ensure its future unavailability, thus establishing what has been called a "notice and stay down" mechanism.<sup>29</sup> The requirement to make content unavailable, i.e. to block and to filter user uploads, clashes with the guarantees provided in Article

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<sup>22</sup> Article 15(1) ECD.

<sup>23</sup> Article 17(8) CDSM Directive.

<sup>24</sup> Cf. Article 17(3) CDSM Directive; it is interesting to note that this results in a conflict between the e-Commerce Directive and the InfoSoc Directive with the CDSM Directive as the liability regime of the latter is different from the former two. This is surprising, as Article 1(2) of the CDSM Directive clearly states that "except in the cases referred to in Article 24, this Directive shall leave intact and shall in no way affect existing rules laid down in the directives currently in force in this area, in particular Directives 96/9/EC, 2000/31/EC, 2001/29/EC, 2006/115/EC, 2009/24/EC, 2012/28/EU and 2014/26/EU". Thus, there is, on the one side, the liability regime for OCSSPs as defined by the CDSM Directive and, on the other, the liability regime for other intermediaries as defined by the e-Commerce Directive. How these incoherencies will be solved by national legislators and courts when it comes to implementing the Directive is unclear, but this contradiction seems hard to reconcile with the principle of legal certainty that governs EU law.

<sup>25</sup> European Commission, Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) amending Directive 200/21/EC, COM(2020) 825 final, Brussels, European Commission, 15.12.2020, on FR and intermediary liability under the Digital Services Act see the recent study by Frosio, & Geiger, *SSRN* (2020) and Christina Angelopoulos, *Intermediary Liability, Fundamental Rights and the Digital Services Act (Weekend Edition no. 42)*, available at: <https://eulawlive.com/weekend-edition/weekend-edition-no42/>, accessed: 25.01.2021.

<sup>26</sup> Article 17(4)(a) CDSM Directive.

<sup>27</sup> Article 17(4)(b) CDSM Directive.

<sup>28</sup> Contrary to the liability exemption of Article 14 ECD, the 'best efforts' obligations arising under Article 17 CDSM Directive do not require knowledge to incur liability.

<sup>29</sup> See e.g. Aleksandra Kuczerawy, From 'Notice and Takedown' to 'Notice and Stay Down': Risks and Safeguards for Freedom of Expression, in: Giancarlo Frosio (ed.), *The Oxford Handbook of Online Intermediary Liability*, (Oxford: Oxford University Press, 2020).

17(7), pursuant to which users of hosting platforms shall not be prevented from uploading lawful content and, in particular, to exercise certain exceptions and limitations specifically provided for in Article 17(7)(a) & (b).<sup>30</sup> Against this background, it is appropriate and necessary to review the rifts created by monitoring and filtering obligations in the FR landscape of the EU.<sup>31</sup>

The new liability regime and its inherent conflicts raises two important questions. First, whether Article 17 CDSM and in particular the ‘best efforts’ obligation creates a fair balance between the various interests and FR concerned, in particular with regard to user’s rights that Article 17(7) mandates to safeguard. Second, if the first question is answered in the affirmative, how could procedural mechanisms guarantee that a balance that has only been sketched in the CDSM Directive is maintained in practice.

This study proceeds as follows: First, we will briefly outline the general European framework of FR protection, (2.1.) and the principle of proportionality which serves as the mechanism to reconcile conflicts between those rights and between rights and other interests (2.2.) as it applies to copyright law. Subsequently, we outline the scope of protection of the relevant FR (2.3.) and the general principles of market harmonization and legal certainty (2.4). Second, we will provide a brief overview of the mechanisms of Article 17 CDSM (3.1.) and of the technological aspects of automated filtering and monitoring and its limitations (3.2.). Third, we will in detail examine the effects of automated filtering mechanisms and notice and stay-down obligations on the various FR with particular reference to Article 17 CDSM (3.5.). Fourth, we review suggested solutions on how to implement Article 17 in compliance with FR (3.6.) before briefly summarizing our findings (4.)

## I. FUNDAMENTAL RIGHTS IMPLICATIONS OF PLATFORM LIABILITY

Mass-scale online copyright enforcement and FR are difficult to reconcile. In fact, in order to identify and control potentially infringing content, given the extremely large amount of content uploaded on platforms every day, monitoring and filtering information seems unavoidable at least to some extent.<sup>32</sup> This in turn potentially affects the rights of users and the general public to disclosure of information and restricts access to information made available on online platforms.

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<sup>30</sup> For further discussion, see e.g. Schwemer, & Schovsbo, What is Left of User Rights? – Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime in: Torremans (2020), p. 569 sq.

<sup>31</sup> See on this issue Reda et al. (2020); Senftleben, & Angelopoulos, *SSRN* (October 2020), p. 17 sq. For a horizontal approach on automated enforcement, platform liability and FR, see also Frosio, & Geiger, *SSRN* (2020), at p. 12 sq.

<sup>32</sup> This position is implicit in the CJEU’s arguments in CJEU, C-70/10 *Scarlet Extended* and CJEU, C-360/10 *SABAM v Netlog*. By prohibiting general filtering, the Court acknowledges that one way to enforce copyright is to install filtering and monitoring mechanisms.

Furthermore, in order to be able to cope with obligations to identify and monitor copyright infringement, platform operators are obliged to install costly mechanisms involving technical and human resources, which can have severe implications on their business in particular (but not only) for small or middle-sized companies<sup>33</sup>.

The CJEU has developed the scope of the obligations of online intermediaries and the rights of users in relation to copyright enforcement with reference to, and in the light of FR,<sup>34</sup> which is why a discussion on monitoring and filtering obligations cannot be decoupled from a FR discourse.<sup>35</sup> As a norm of secondary EU law, Article 17 CDSM must be interpreted in the light of primary EU law, which includes FR.<sup>36</sup>

#### A. *The systemic role of fundamental rights in the EU legal order*

FR are an integral element in the EU's constitutional order. Prior to their codification in the EU Charter of Fundamental Rights (EUCFR),<sup>37</sup> the CJEU developed FR as general principles from the common

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<sup>33</sup> See in this sense, Evan Engstrom, & Nick Feamster, *The Limits of Filtering: A Look at the Functionality & Shortcomings of Content Detection Tools*, Available at: <https://www.engine.is/the-limits-of-filtering> (2017), accessed 25.01.2021, p. 22 sq. (according to which “filtering tools are prohibitively expensive for many small OSPs” and giving examples of the costs of filtering systems).

<sup>34</sup> See specifically CJEU, C-70/10 *Scarlet Extended*; CJEU, C-360/10 *SABAM v Netlog*; CJEU, C-484/14 *Mc Fadden* and CJEU, C-314/12 *UPC Telekabel Wien*, further the ECtHR assessed intermediary liability with respect to defamatory content in ECtHR (Grand Chamber), 16 June 2015, case of *Delfi AS v. Estonia*, Appl. no. 64569/09 and ECtHR (Fourth Section), 2 February 2016, case of *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, Appl. no. 22947/13; see specifically Christophe Geiger, & Elena Izyumenko, *The Role Of Human Rights In Copyright Enforcement Online: Elaborating A Legal Framework For Website Blocking*, 32(1) *American University International Law Review* (2016), 43-115.

<sup>35</sup> Cf. Matthias Leistner, *European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive Compared to Secondary Liability of Content Platforms in the U.S. – Can We Make the New European System a Global Opportunity Instead of a Local Challenge?*, 12(2) *Zeitschrift für Geistiges Eigentum/Intellectual Property Journal* (2020), 123-214, p. 17.

<sup>36</sup> On the implication of fundamental rights for the interpretation of copyright law see Christophe Geiger, “Constitutionalising” Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union, 37(4) *International Review of Intellectual Property and Competition* (2006), 371-406; Christophe Geiger, *Copyright’s Fundamental Rights Dimension at EU Level*, in: Estelle Derclaye (ed.), *Research Handbook on the Future of EU Copyright*, (Cheltenham, Northampton: Edward Elgar Publishing, 2009), 27-48; Christophe Geiger, *Fundamental Rights as Common Principles of European (and International) Intellectual Property Law*, in: Ansgar Ohly (ed.), *Common Principles of European Intellectual Property Law*, (Tübingen: Mohr Siebeck, 2012) 223-238; Christophe Geiger, *Reconceptualizing the Constitutional Dimension of Intellectual Property- An Update*, in: Paul Torremans (ed.), *Intellectual Property Law and Human Rights*, (Alphen aan den Rijn: Kluwer Law International, 2020), 115-161; Michael Goldhammer, *Taking Constitutionalization Seriously: European IP Law, Weak Fundamental Rights and the Network of Courts*, *GRUR Int.* 2021 (forthcoming).

<sup>37</sup> CJEU, Judgment of 26.02.2013, *Åkerberg Fransson*, Case C-617/10, EU:C:2013:105, para. 29.

constitutional traditions of the Member States.<sup>38</sup> FR therefore sit at the top of the EU's hierarchy of norms along with the Treaties<sup>39</sup> and the general principles of EU law.<sup>40</sup> All FR of the EUCFR are of equal value and no hierarchy exists between them,<sup>41</sup> their scope corresponds to that of the respective rights provided for by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).<sup>42</sup> This relationship is also illustrated by regular references by the CJEU to judgments by the European Court of Human Rights (ECtHR).<sup>43</sup>

### 1. *The Court's standard of review*

The intensity of the Court's review of secondary copyright legislation in the light of the EU Charter differs.<sup>44</sup> In cases in which the CJEU is asked to interpret EU law in the light of the Charter, the Luxembourg court tends to give instructions to the national courts and then leaves it "for the national court to ascertain" the correct application of national law in the light of EU law, including the EU Charter. However, the more precise the question submitted by national courts through the preliminary reference route, the more likely is the Court to engage in a more detailed analysis of balance of rights.<sup>45</sup>

### 2. *Addressees of EU fundamental rights*

According to Article 51 EUCFR "[t]he provisions of [the] Charter are addressed to the institutions, bodies, offices and agencies of the Union

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<sup>38</sup> CJEU, Judgment of 14.05.1974, *Nold*, Case 4/73, EU:C:1974:51, para 13; see in relation to copyright: CJEU, Judgment of 12.09.2006, *Laserdisken II*, Case C-479/04, EU:C:2006:549, para. 61.

<sup>39</sup> Consolidated Version of the Treaty on European Union, OJ C 326, 26.10.2012, p. 13–45 (TEU); Consolidated Version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390 (TFEU).

<sup>40</sup> Paul Craig, & Gráinne de Búrca, *EU Law. Text, Cases and Materials*, (Oxford, New York: Oxford University Press 2020), pp. 142-144.

<sup>41</sup> For a diverging view see Alexander Peukert, The fundamental right to (intellectual) property and the discretion of the legislature, in: Christophe Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property*, (Cheltenham, Northampton: Edward Elgar Publishing, 2015), 132-148, who argues that the right to property should not be considered at the same level as, for example, the right to freedom of expression due to the "unique structure" of property rights and their existence and scope "as 'creatures' of the legislature".

<sup>42</sup> Article 52(3) EUCFR.

<sup>43</sup> See for example CJEU, Judgment of 29.07.2019, *Pelham and others*, Case C-476/17, EU:C:2019:624, para. 34.

<sup>44</sup> Good examples for a thorough review are *Sky Österreich* (CJEU, Judgment of 22.01.2013, *Sky Österreich*, Case C-283/11, EU:C:2013:28) and, to a limited extent, the ruling in *Luksan* (CJEU, Judgment of 9.02.2012, *Luksan*, Case C-277/10, EU:C:2012:65). Both cases, albeit indirectly via the preliminary reference procedure under Article 267 TFEU, challenged the validity of a provision of EU law or one of national law that implemented EU law.

<sup>45</sup> See for example, CJEU, C-70/10 *Scarlet Extended*, paras. 41-54 and CJEU, C-484/14 *Mc Fadden*, paras. 80-101, see also *Kranenborg*, in: Peers, Hervey, Kenner, & Ward, 2014, Article 8, para. 08.42.

(...) and to the Member States only when they are implementing Union law.”<sup>46</sup> This means that the provisions of the Charter bind the European legislature in all its activities and EU legislation must comply with FR. Member States are only bound by the Charter when implementing EU law.<sup>47</sup> The CJEU has also underlined that the courts of the Member States must have regard to EU FR when applying national law which serves to implement obligation under EU law.<sup>48</sup> In situations that are not fully governed by EU law, Member States remain free to apply national FR standards as long as their application does not compromise the primacy, unity and effectiveness of EU law.<sup>49</sup>

### 3. *Challenging fundamental rights incompatibilities*

The consequences of FR infringements depend on the level at which they occur. If an act of one or several EU institutions infringes a FR of the EU legal order<sup>50</sup>, it can be challenged before the CJEU.<sup>51</sup> Legislation in particular can be subject to a challenge by one of the institutions or a Member State under the procedure of Article 263 TFEU.<sup>52</sup> For this purpose, a party requesting review of a provision of a legislative act must demonstrate that the provision in question constitutes an “infringement of the Treaties or of any rule of law relating to their application.”<sup>53</sup>

Individuals can challenge a legislative measure, or any act of the institutions for that purpose, indirectly via the preliminary reference

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<sup>46</sup> Article 51(1) EUCFR.

<sup>47</sup> For example, Member States must transpose secondary legislation (i.e. directives) into their national law in full compliance with the FR of the EU Charter. Therefore, national legislatures must ensure that their transposition of secondary legislation relies on an interpretation that ensures that a fair balance is struck between the various FR protected under EU law. See e.g. CJEU, C-275/06 *Promusicae* para. 70; CJEU, Judgment of 18 October 2018, *Bastei Lübbe*, Case CC-149/17, EU:C:2018:841, para. 45, see also CJEU, Judgment of 16.07.2015, *Coty Germany*, Case C-580/13, EU:C:2015:485, para. 34. More generally see Craig, & de Búrca, *EU Law. Text, Cases and Materials* (2020), pp. 430-431.

<sup>48</sup> CJEU, C-70/10 *Scarlet Extended*; CJEU, C-360/10 *SABAM v Netlog*, but also CJEU, C-484/14 *Mc Fadden*.

<sup>49</sup> CJEU, Judgment of 29.07.2019, *Funke Medien NRW*, Case C-469/17, EU:C:2019:623, para. 32.

<sup>50</sup> E.g. by imposing a measure that in itself does not respect FR or, which in its particular formulation does not strike a fair balance between various interests involved.

<sup>51</sup> See e.g. the challenge brought by Poland against parts of Article 17(4) CDSM, in which it alleges that the obligation to filter content to prevent copyright infringements infringes the rights of users to receive and impart information, CJEU, Application of 26.07.2019, Case C-401/19, , see on this issue Bernd Justin Jütte, Finding the Balance in Copyright Law: Internal and External Control Through Fundamental Rights, in: Paul Torremans (ed.), *Intellectual Property Law and Human Rights*, (4<sup>th</sup> ed., Alphen aan den Rijn: Kluwer Law International, 2020), pp. 481-482.

<sup>52</sup> Under Article 263 challenges by individuals are nearly impossible, especially in relation to generally applicable legislation. An individual application would have to demonstrate direct and individual concern in order to challenge a directive, see Craig, & de Búrca, *EU Law. Text, Cases and Materials* (2020), pp. 546 sq.

<sup>53</sup> Article 264, second sentence TFEU; a direct challenge to an act must be brought within two months of the publication of the measure (Article 264, sixth sentence TFEU).

procedure. Article 267 gives the CJEU competence to rule on “the validity (...) of acts of the institutions (...) of the Union.”<sup>54</sup>

Article 6(1) TEU requires that the EU must respect FR as laid down in the EU Charter and also guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>55</sup> Accordingly, legislation that is incompatible with the EU Charter, any FR included in the ECHR, or any general principle of EU law can be challenged, as the Polish government has done in relation to certain aspects of Article 17 CDSM Directive. To that effect, the CJEU established in *Schrems II* that any EU legislative measure that constitutes an interference with one or several FR must define the scope of the limitation it has on the right concerned.<sup>56</sup>

Likewise, Member States, by failing to properly implement a directive, can be found to be in violation of the Charter. A failure to implement can include a failure to transpose a directive or a part of a directive. However, Member States can also be sanctioned for failure to implement a legislative measure in compliance with EU FR. This would assume that the EU act itself complies with FR, but the exercise of discretion left to the Member States when implementing the act has been exercised to the effect that the implementing law does not fully respect FR. This can be challenged, ordinarily by the Commission (and exceptionally by another Member States),<sup>57</sup> before the CJEU which can find a Member State in violation of its obligation under the EU Treaties. Such a challenge would still be possible, even if the Polish challenge were to be unsuccessful, to ‘correct’ national implementations and enable the CJEU to intervene (again) at a later point. Given the largely diverging approaches to implementing the CDSM Directive, such a (further) challenge is certainly not to be excluded.<sup>58</sup>

However, not every restriction of FR automatically constitutes a

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<sup>54</sup> Article 267, first sentence, subparagraph (a) TFEU; see for example CJEU, Judgment of 01.03.2011, *Test-Achats*, Case C-236/09, EU:C:2011:100, see also CJEU, Judgment of 08.04.2014, *Digital Rights Ireland and Seitlinger and Others*, Case C-293/12, EU:C:2014:238 and CJEU, Judgment of 06.10.2015, *Schrems*, Case C-362/14, EU:C:2015:650.

<sup>55</sup> Article 6(2) TEU.

<sup>56</sup> CJEU, Judgment of 16.07.2020, *Facebook Ireland and Schrems*, Case C-311/18, EU:C:2020:559, para. 175.

<sup>57</sup> However, other Member States would first have to bring the matter before the Commission. Only if the Commission fails to act, by delivering an opinion, within three months can a Member State bring proceedings against another Member State before the CJEU (see Article 259 TFEU).

<sup>58</sup> As Oreste Pollicino, Giovanni Maria Riccio and Marco Bassini note in the introduction of their timely edited collection, *Copyright and Fundamental Rights in the Digital Age, A Comparative Analysis in Search of a Common Constitutional Ground*, (Cheltenham, Northampton: Edward Elgar Publishing, 2020), p. 1: “The challenges that Member States will have to face in the implementation process of the DSM Directive largely derive from the strained relationship between copyright and other competing rights such as freedom of speech, data protection and freedom to conduct business”. For an overview of the status of implementation in the various Member States see: <https://www.create.ac.uk/cdsm-implementation-resource-page/>.

failure to fulfil an obligation under the Treaties or other higher-ranking EU law. In principle, FR can be limited as long as their essence is respected.<sup>59</sup> Furthermore, any limitation of a FR right must respect the principle of proportionality.<sup>60</sup>

### B. *Proportionality: The CJEU's balancing methodology*

The proportionality test is an analytical tool to determine the permissibility of limiting certain rights. In Europe, it is applied by the ECtHR and the CJEU to reconcile competing interests, often in the context of FR as they are guaranteed and protected under the ECHR and the EUCFR.<sup>61</sup>

The test of proportionality is divided into three steps.<sup>62</sup> First, the test requires to determine whether the contested measure is appropriate. To meet this condition the measure must pursue a legitimate aim and must be suitable to achieve that aim.<sup>63</sup> Second, the measure must be necessary, in other words whether the aim could be achieved by less onerous means.<sup>64</sup> The third stage consists of a balancing exercise and is also referred to as 'proportionality *strictu sensu*'. At this stage of the review the various interests are balanced against each other.

The nature of the test is complex<sup>65</sup> and its application by either court does not perfectly reflect its formulation. Especially in multipolar relationships of competing rights the test reveals its more flexible nature.<sup>66</sup> In the practice of the ECtHR, the test leaves Member States a

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<sup>59</sup> Article 52(1) EUCFR; see also to that effect AG Szpunar, Opinion of 12.12.2018, *Pelham and Others*, Case C-476/17, EU:C:2018:1002, para. 98 and AG Szpunar, Opinion of 6 June 2018, *Bastei Lübbe*, Case C-149/17, EU:C:2018:400, para. 38 and CJEU, C-580/13 *Coty Germany*, para. 35. See also on this issue: Martin Husovec, *The Essence of Intellectual Property Rights Under Article 17(2) of the EU Charter*, 20(6) *German Law Journal* (2019), 840-863, with further references.

<sup>60</sup> See further on the influence of this principle on EU copyright law, Ori Fischman Afori, *Proportionality – A New Mega Standard in European Copyright Law*, 45(8) *International Review of Intellectual Property and Competition* (2014), 889-915.

<sup>61</sup> In this function proportionality has also served to determine the scope of individual FR, see Jonas Christofferson, *Human Rights and balancing: The principle of proportionality*, in: Christophe Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property*, (Cheltenham, Northampton: Edward Elgar Publishing, 2015), p. 19.

<sup>62</sup> For one of the earlier applications of the test see CJEU, Judgment of 13.11.1990, *Fedesa*, Case C-331/88, EU:C:1990:391, paras. 12-18.

<sup>63</sup> This prong of the proportionality test is interpreted broadly; only measures which are manifestly inappropriate, see Damian Chalmers, Gareth Davies & Giorgio Monti, *European Union Law* (Cambridge: Cambridge University Press, 2019), pp. 387-388.

<sup>64</sup> Article 17 creates an interesting constellation: the 'necessity' prong will not only have to be considered in relation to the effects it has on users, and arguably rightholders, but also on OCSSPs, whose obligation to implement enforcement measures has significant effects on their business models.

<sup>65</sup> Christofferson, *Human Rights and balancing: The principle of proportionality* in: Geiger (2015), p. 19.

<sup>66</sup> Cf. Christofferson, *Human Rights and balancing: The principle of proportionality* in: Geiger (2015), p. 24.

margin of discretion while ensuring a basic protection of FR.<sup>67</sup> In any case, at EU level, proportionality is a general principle of EU law and therefore must guide the institutions,<sup>68</sup> and the Member States in implementing EU law. Accordingly, acts of the institutions and the Member States are subject to judicial review in the light of the principle of proportionality.<sup>69</sup>

Proportionality has become increasingly appealing for copyright law. In this context, proportionality has almost become synonymous with the notion of a ‘fair balance’.<sup>70</sup> In particular in a digital or online environment, in which the relations between the various interests of rightholders, users and intermediaries cannot be precisely formulated into legal norms, proportionality plays a decisive role.<sup>71</sup>

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<sup>67</sup> Cf. Christofferson, Human Rights and balancing: The principle of proportionality in: Geiger (2015), p. 21, this is evidenced by the flexible interpretation of the second step, which takes a liberal approach to the concept of ‘least onerous means’. The ECtHR leaves member states a large margin of discretion to exercise their legislative and regulatory powers while merely considering the second step within the context of the other two to ascertain whether the means chosen to achieve a legitimate aim are not unreasonable.

<sup>68</sup> The formal requirements to be followed by the institution in applying the principle of proportionality are set out in the Consolidated version of the Treaty on the Functioning of the European Union - PROTOCOLS - Protocol (No 2) on the application of the principles of subsidiarity and proportionality *OJ C 115, 9.5.2008, p. 206-209*. The CJEU is however not always consistent in its application of the test and often folds the third stage into one of the first two stages or omits it completely if the test already failed at an earlier stage, see Craig, & Búrca, *EU Law. Text, Cases and Materials* (2020), p. 583.

<sup>69</sup> Cf. Takis Tridimas, *The General Principles of EU Law*, (Oxford, New York: Oxford University Press, 2007), p. 655. The principle was introduced as a ground for judicial review in CJEU, Judgment of 17.12.1970, *Internationale Handelgesellschaft*, Case 11-70, EU:C:1970:114 and since 2009 it has been expressly recognized in Article 5(4) TFEU and serves to justify possible limitations to the FR of the Charter (Article 52(1) EUCFR). At the institutional level, Article 5 of the Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality obliges the legislator to demonstrate that a legislative proposal complies with the principles of subsidiarity and proportionality. See, for example, the impact assessment for the CDSM Directive European Commission, Commission Staff Working Document. Impact Assessment on the modernisation of EU copyright rules. Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market and Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, SWD(2016) 301 final, Brussels, European Commission, 14.9.2016, at pp. 119, 155, 195-195; It is worth noting that in this document the impact of the proposed legislative acts on fundamental right is examined separately from proportionality assessments.

<sup>70</sup> Cf. Peter Teunissen, The balance puzzle: the ECJ’s method of proportionality review for copyright injunctions, 40(9) *European Intellectual Property Review* (2018), 579-593, p. 581, Christofferson, Human Rights and balancing: The principle of proportionality in: Geiger (2015), p. 35, and Peter Oliver, & Christopher Stothers, Intellectual Property under the Charter: are the Court’s scales properly calibrated?, 54(2) *Common Market Law Review* (2017), 517-565, p. 546, all with references to CJEU, C-283/11 *Sky Österreich*, paras. 50-68.

<sup>71</sup> *Fischman Afori* describes the role of proportionality as an external standard that enables “a constitutional balance to be struck within the copyright-private law sphere.

The CJEU regularly interprets the European copyright *acquis* with reference to proportionality.<sup>72</sup> Due to the nature of harmonization (i.e. mainly by means of directives) the Court uses proportionality to explore the internal balance of copyright law and to help national courts shape appropriate remedies to fight copyright infringements.<sup>73</sup> It is also worth

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She also projects a more prominent role with far reaching consequences for substantive copyright law. Although she seems to suggest that proportionality would rather take the form of an open norm that would guide the judicial development of substantive copyright law, (Fischman Afori, *IIC* (2014), p. 900, see also Christophe Geiger, & Elena Izyumenko, Towards a European “Fair Use” Grounded in Freedom of Expression, 35(1) *American University International Law Review* (2019), 1-52) there is no reason to limit this role to the judiciary (Fischman Afori, *IIC* (2014), p. 899). Nevertheless, the role of proportionality in EU copyright law is best traced with reference to the jurisprudence of the CJEU, see for a comprehensive summary Teunissen, *EIPR* (2018). For an interesting critical approach see also Tuomas Mylly, Regulating with rights proportionality? Copyright, fundamental rights and internet in the case law of the Court of Justice of the European Union, in: Oreste Pollicino, Giovanni Maria Riccio and Marco Bassini (eds.), *Copyright and Fundamental Rights in the Digital Age, A Comparative Analysis in Search of a Common Constitutional Ground*, (Cheltenham, Northampton: Edward Elgar Publishing, 2020), p. 54.

<sup>72</sup> Christophe Geiger, The Role of the Court of Justice of the European Union: Harmonizing, Creating and sometimes Disrupting Copyright Law in the European Union, in: Irini Stamatoudi (ed.), *New Developments in EU and International Copyright Law*, (Alphen aan den Rijn: Kluwer Law International, 2016), 435-446. Likewise, the ECtHR makes regular reference to proportionality in the context of intellectual property law, e.g. when assessing the appropriateness of criminal sanctions for large scale copyright infringements, for example, when it found that a prison sentence and the award of damages was not disproportionate to sanction large-scale online copyright infringements ECtHR (5<sup>th</sup> section) of 19 February 2013, case of Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v. Sweden, Appl. No.nr. 40397/12, under D., see for example Bernd Justin Jütte, The Beginning of a (Happy?) Relationship: Copyright and Freedom of Expression in Europe, 38(1) *European Intellectual Property Review* (2016), 11-22, p. 15. More generally on the use of the proportionality principle by the ECtHR in copyright cases, see Christophe Geiger, & Elena Izyumenko, Shaping Intellectual Property Rights through Human Rights Adjudication: The Example of the European Court of Human Right, 46(3) *Mitchell Hamline Law Review* (2020), 527-612; Oleg Soldatov, Copyright and fundamental rights in European Court of Human Rights case law, in: Pollicino, Riccio & Bassini (eds.), *Copyright and Fundamental Rights in the Digital Age*, (2021), p. 99. In another case, the Strasbourg Court considered the obligations of an online news portal to moderate and filter harmful speech. It found a moderate financial fine to be proportionate for failure to expeditiously remove harmful and offensive speech (ECtHR (Grand Chamber), 16 June 2015, case of Delfi AS v. Estonia, Appl. no. 64569/09, paras. 140-161). The ECtHR stressed that the extreme nature of the speech, in other words the intensity of the violation of the right to private life (Article 8 ECHR) was a decisive factor in coming to this conclusion. However, it also stressed that the relatively low fine imposed by the national court, as well as the nature of the applicant, as a professional operator of a large online news portal, were relevant considerations (ECtHR (Grand Chamber), 16 June 2015, case of Delfi AS v. Estonia, Appl. no. 64569/09, para. 160).

<sup>73</sup> See for example CJEU, C-275/06 *Promusicae*; CJEU, C-70/10 *Scarlet Extended*; CJEU, C-360/10 *SABAM v Netlog*; CJEU, C-314/12 *UPC Telekabel Wien*; CJEU, C-484/14 *Mc Fadden*; CJEU, CC-149/17 *Bastei Lübbe*, but also reference to proportionality pre-Lisbon in CJEU, C-479/04 *Laserdisken II*, para. 64; See for overviews of the balancing case-law Ole-Andreas Rognstad, *Property Aspects of Intellectual Property*, (Cambridge, Cambridge University Press, 2018), pp. 184-189, Martin Husovec, Intellectual Property Rights and Integration by Conflict: The Past, Present and Future, 18 *Cambridge Yearbook of European Legal Studies* (2016), 239-269

noting that it often describes the functional steps of the principle of proportionality, without expressly referring to it, and instead stresses the necessity to “strike a fair balance”.<sup>74</sup>

In particular in a FR constellation such as the one underlying Article 17 of the CDSM Directive, proportionality plays an important role in reflecting on the limitations on FR of rightholders, platform operators and users. In order to conduct a proportionality assessment, it is, first, instrumental to map the relevant FR, before applying the proportionality analysis to the legal mechanism of Article 17.

### C. *The relevant fundamental rights with regard to platform liability*

The competing FR in copyright law, in particular in relation to online enforcement, have most recently been summarized by AG Saugmandsgaard Øe in the *YouTube* case:<sup>75</sup>

“I note in this regard that in SABAM the Court ruled that imposing on a platform operator a general obligation to filter the information that it stores would not only be incompatible with Article 15(1) of Directive 2000/31, but also would not strike a ‘fair balance’ between the protection of the intellectual property right enjoyed by rightholders and that of the freedom to conduct a business enjoyed by service providers pursuant to Article 16 of the Charter. Such an injunction would result in a serious infringement of that freedom since it would require that operator to install a complicated, costly, permanent computer system at its own expense. In addition, such an obligation to carry out general filtering would undermine the freedom of expression of the users of that platform under Article 11 of the Charter, since the filtering tool might not distinguish adequately between illegal content and legal content, with the result that its introduction could lead to the blocking of the latter category of content. I will add that such a result would introduce a risk of undermining online creativity, which would be contrary to Article 13 of the Charter. The danger in that regard is that maximum protection of certain forms of intellectual creativity is to the detriment of other forms of

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and Teunissen, *EIPR* (2018). However, the methodological approaches chosen by the Court have been criticized. While it permanently highlights the importance and centrality of proportionality, the Court fails to provide guidance on how this important role should be exercised, see e.g. Ole-Andreas Rognstad, *Property Aspects of Intellectual Property* (2018), p. 192; Teunissen, *EIPR* (2018), p. 593; see however the more structured analysis, for example, by AG Cruz Villalón in *UPC Telekabel*, in which he neatly outlines the appropriateness, necessity and proportionality of a blocking order: AG Cruz Villalón, Opinion of 26.11.2013, *UPC Telekabel Wien*, Case C-314/12, EU:C:2013:781.

<sup>74</sup> See for example CJEU, C-70/10 *Scarlet Extended*, paras. 45-46.

<sup>75</sup> AG Saugmandsgaard Øe, C-683/18 *YouTube*, paras. 240-244 (references omitted); see also Teunissen, *EIPR* (2018), p. 581; and with regard to platform liability, Frosio, & Geiger, *SSRN* (2020), p. 14 sq.

creativity which are also positive for society.”

### 1. *Freedom of expression and information, freedom of the arts*

The right to freedom of expression, as protected by Article 10 ECHR and Article 11 EUCFR, protects the right to hold opinions and the right to receive and impart information. According to Article 52(3) the scope of Article 11 CFREU is congruent with that of Article 10 ECHR.<sup>76</sup> Article 13 EUCFR is closely linked to Article 11 and under the ECHR artistic freedom is generally subsumed under the umbrella right of Article 10. The right to freedom of expression can be enjoyed by natural as well as legal persons, members of the public service of the Member States as well as the EU.<sup>77</sup>

The right to freedom of expressions covers opinions, information and ideas, and in general all types of information that can be communicated. Article 11 EUCFR also protects information that offends, shocks or disturbs others.<sup>78</sup> The importance of the right to freedom of expression for a democratic society and an individual’s participation in the public exchange of cultural, political and social information and ideas of all kinds has been persistently underlined by both courts.<sup>79</sup> The ECtHR has acknowledged the protection of Article 10 ECHR for fashion photography<sup>80</sup> and internet peer-to-peer filesharing,<sup>81</sup> however recognized justified restrictions to the right to freedom of expression in order to protect the right to (intellectual) property. Such restrictions are permitted if these restrictions are prescribed by law and if they are necessary in a democratic society.<sup>82</sup> Both courts have also repeatedly

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<sup>76</sup> It is worth noting that Article 11(2) EUCFR guarantees media freedom and pluralism, which are not recognized as independent rights under the ECHR.

<sup>77</sup> CJEU, Judgment of 06.11.2011, *Patriciello*, Case C-163/10, EU:C:2011:543, para. 31. However Member States cannot rely on the protection of Article 11 EUCFR, even if indirectly through their officials, see CJEU, Judgment of 07.04.2007, *AGM-COS.MET*, Case C-470/03, EU:C:2007:213, para. 72.

<sup>78</sup> ECtHR (Plenary), 7 December 1976, case of *Handyside v. the United Kingdom*, Appl. no. 5493/72, para. 49, ECtHR, ECtHR (Chamber), 24 May 1988, case of *Müller and Other v. Switzerland*, Appl. no. 10737/84, Judgment (1988), 24 May 1988, para. 33; CJEU, Judgment of 04.10.1991, *Society for the Protection of Unborn Children Ireland v Grogan and Others*, Case C-159/90, EU:C:1991:378, para. 30, see more recently CJEU, C-476/17 *Pelham and others*, para. 34.

<sup>79</sup> See for example Christophe Geiger, & Elena Izyumenko, Copyright on the Human Rights’ Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression, 42(3) *International Review of Intellectual Property and Competition* (2014), 316-342; Christophe Geiger, & Izyumenko, Elena, Intellectual Property before the European Court of Human Rights, in: Christophe Geiger, Craig Allen Nard, & Xavier Seuba (eds.), *Intellectual Property and the Judiciary*, (Cheltenham, Northampton: Edward Elgar Publishing, 2018), p. 36 sq, see also Jütte, *E.I.P.R.* (2016).

<sup>80</sup> ECtHR (5th section), 10 January 2013, case of *Ashby Donald and other v. France*, Appl. no. 36769/08.

<sup>81</sup> ECtHR (5th section) of 19 February 2013, case of *Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v. Sweden*, Appl. nr. 40397/12.

<sup>82</sup> Article 10(2) ECHR; when the right to freedom of expression comes into conflict with the right to property, including copyright, this requires a balancing between two FR under a proportionality assessment, leading, in effect to some sort of enhanced

highlighted the importance of the right to freedom of expression on the internet and, conversely the importance of the internet and the various services offered through the internet for the exercise of the rights protected by Article 10 ECHR and Article 11 EUCFR.<sup>83</sup> In *Scarlet Extended*, the CJEU stressed the importance of the internet to receive information, in other words the ability of members of the public to receive and gather information including storing such information.<sup>84</sup> The right to receive information is not merely limited to the passive reception of information but will also include active research by individuals.<sup>85</sup>

The CJEU has found the right to freedom of expression to be an obstacle to the free movement of goods and services, which, however, can be justified. In discussing whether a public demonstration constituted an obstacle to the free movement of goods in *Schmidberger*, the CJEU pointed out that the right to freedom of expression is not absolute “but must be viewed in relation to its social purpose.” Accordingly, limitations to Article 11 EUCFR are possible as long as they are proportionate and leave the essence of the fundamental right intact. In making this assessment, Member States enjoy a wide margin of discretion.<sup>86</sup> The extent of this margin depends, among other factors, on the type

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proportionality analysis. See for a detailed analysis Geiger, & Izyumenko, *IIC* (2014), p. 316. More generally on the balancing exercise of the ECtHR of intellectual property with other FR see Geiger, & Izyumenko, *Mitchell Hamline Law Review* (2020).

<sup>83</sup> ECtHR (Second Section), 1 December 2015, case of Cengiz and Others v. Turkey, Applications nos. 48226/10 and 14027/11, paras 49-50; in this case the Strasbourg Court granted victim status to active users of the video-sharing platform YouTube. The Court argued that the repercussions of a total block of the platform had significant repercussions on their works as academics, as they had used the platform to support their teaching activities and to promote their scientific activities and not merely as passive users. In a similar case, the Court found a violation of Article 10 in an indiscriminate blocking of Google sites, which also affected the website of the applicant (ECtHR (Chamber), 18 December 2012, case of Yildirim v. Turkey, Appl. no. 3111/10). Conversely, in ECtHR (Second Section), 11 March 2014, case of Akdeniz v. Turkey, Appl. no. 20877/10 the Court found the application inadmissible as the applicant were mere users of music websites, which moreover had been found to infringe copyright; however, the judgment also makes reference to the paramount interest of internet users, see further AG Saugmandsgaard Øe, C-683/18 *YouTube*, para. 241 and CJEU, Judgment of 08.09.2016, *GS Media*, Case C-160/15, EU:C:2016:644, para. 45.

<sup>84</sup> CJEU, C-70/10 *Scarlet Extended*, para. 50.

<sup>85</sup> AG Trstenjak, Opinion of 05.05.2011, *MSD Sharp & Dohme*, Case C-316/09, EU:C:2010:712, para. 85. On the scope of the right to information, see also Christophe Geiger, *Droit d'auteur et droit du public à l'information, approche de droit comparé*, (Paris: LexisNexis, 2004), p. 135; Christophe Geiger, Author's Right, Copyright and the Public's Right to Information: A Complex Relationship, in: Fiona Macmillan (ed.), *New Directions in Copyright Law*, Vol. 5 (Cheltenham, Northampton: Edward Elgar Publishing, 2007), 24-44.

<sup>86</sup> Cf. CJEU, Judgment of 12.06.2003, *Schmidberger*, Case C-112/00, EU:C:2003:333, paras. 78-80; this wide margin of discretion afforded to the Member States has a long tradition in the jurisprudence of the ECtHR, see only ECtHR (Plenary), 7 December 1976, case of *Handyside v. the United Kingdom*, Appl. no. 5493/72, paras. 48-49, ECtHR (5th section), 10 January 2013, case of *Ashby Donald and other v. France*, Appl. no. 36769/08, para. 39 and ECtHR (5th section) of 19 February 2013, case of *Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v. Sweden*, Appl. nr. 40397/12, under D.

information that is subject to the exercise of the right to freedom of expression.<sup>87</sup>

In *Mc Fadden*, in which the Court assessed the compatibility of several measures to ensure the unavailability of infringing content on a wireless network available to the public on the premises of a shop dealing in musical equipment, the essence of the right to freedom of information was found not to be undermined. In coming to that conclusion, the Court considered that the measure taken was the protection of the network by means of a password, and it also considered that other possibilities to gain access to the internet existed.<sup>88</sup> The Court found a strictly targeted measure solely aimed at terminating infringing activity proportionate, provided that other users of the access provider installing such a measure could continue to lawfully access information. If lawful access to information were to be disabled through blocking or filtering measure of an access provider, an interference with the right to freedom of information, as an expression of Article 11 EUCFR, would have been unjustified.<sup>89</sup> Similarly, the ECtHR in its recent ruling in *Kharitonov v. Russia* argued that the blocking of websites by a state agency that contain illegal content must be strictly targeted and any collateral blocking of lawful content is likely to violate the right to freedom of expression.<sup>90</sup>

Another fundamental right which is potentially affected by copyright enforcement measures is the freedom of artistic creativity. The right to artistic freedom is protected under the umbrella of Article 10 ECHR and by Article 13 EUCFR. While the notion of ‘the arts’ has been defined neither by the ECtHR, nor by the CJEU, it is considered to be a broad notion covering all forms of artistic expression, including musical and visual art.<sup>91</sup> According to the ECtHR “[F]reedom of artistic expression [...] affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds [...]. Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence there is an obligation on the State not to encroach unduly on the author’s freedom of expression [...]”<sup>92</sup> The distribution or

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<sup>87</sup> In *Neij and Sunde Kolmisoppi (The Pirate Bay) v. Sweden*, the ECtHR stated for example that the protection under Article 10 ECHR granted to the information, mainly unlawful copies of music and films, disseminated via the service operated by the applicants could not enjoy the same level of protection as political expression and debate, ECtHR (5th section) of 19 February 2013, case of Fredrik Neij and Peter Sunde Kolmisoppi (*The Pirate Bay*) v. Sweden, Appl. nr. 40397/12, under D, see also ECtHR (5th section), 10 January 2013, case of Ashby Donald and other v. France, Appl. no. 36769/08, para. 39.

<sup>88</sup> CJEU, C-484/14 *Mc Fadden*, para. 92.

<sup>89</sup> CJEU, C-484/14 *Mc Fadden*, para. 93, see also CJEU, C-314/12 *UPC Telekabel Wien*, para. 56.

<sup>90</sup> ECtHR (Third Section) of 23 June 2020, case of Vladimir Kharitonov v. Russia, Appl. no. 10795/14, para. 46.; See also Elena Izyumenko, European Court of Human Rights rules that collateral website blocking violates freedom of expression, 15(10) *Journal of Intellectual Property Law & Practice* (2020), 774-775, p. 775.

<sup>91</sup> Debbie Sayers, in: Peers, Hervey, Kenner, & Ward, 2014, para. 13.48.

<sup>92</sup> ECtHR (Second Section), 29 March 2005, case of Alinak v. Turkey, Appl. no

exhibition of artistic creation online is therefore also protected and there is an obligation on the legislator not to restrict it unduly with copyright law.<sup>93</sup> Member states enjoy a certain margin of discretion and the Strasbourg Court usually focuses on whether the interference was necessary and pursued a pressing social need.<sup>94</sup>

In relation to the protection of individuals the ECtHR exercises restraint. In *Vereinigung Bildender Künstler v. Austria*,<sup>95</sup> the Court ruled a prohibition to display a painting that allegedly undermined the public standing of an individual to be in violation of Article 10 ECHR. The purpose of the injunction ordered by the Austrian Court was not to protect public morals but to protect the rights of an individual person, moreover for an unlimited period of time. Accordingly, restrictions to the right to artistic freedom have to be interpreted restrictively.

Aside from the incentive provided by the grant of an exclusive right for intellectual creations, the use of existing works in the creation of new works is of fundamental importance. Although CJEU has recently rejected an external restriction of copyright by the right to free artistic expression,<sup>96</sup> copyright includes mechanisms that enable derived creativity.<sup>97</sup> The court specifically referred, on the basis of the InfoSoc Directive, to the exclusive rights of Article 2-4, the exceptions and limitations contained in Article 5(1)-(4) and the three-step test of Article 5(5). In his *YouTube* Opinion, AG Saugmandsgaard Øe also warned that a general monitoring and filtering obligation would not only be contrary to Article 11 EUCFR, since it would restrict access to information, but it would also “introduce a risk of undermining online creativity and “that maximum protection of certain forms of intellectual creativity is to the detriment of other forms of creativity which are also positive for

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40287/98, para. 42.

<sup>93</sup> See more generally on this topic, Christophe Geiger, Freedom of Artistic Creativity and Copyright Law: A Compatible Combination, 8(3) *UC Irvine Law Review* (2018), 413-458; Christophe Geiger, Copyright and the Freedom to Create, A Fragile Balance, 38(6) *International Review of Intellectual Property and Competition Law* 707 (2007); Christophe Geiger, When Freedom of Artistic Expression allows Creative Appropriations and Opens up Statutory Copyright Limitations, in: Shyamkrishna Balganes, Ng-Loy Wee Loon, & Haochen Sun (eds.), *The Cambridge Handbook of Copyright Limitations and Exceptions* (Cambridge: Cambridge University Press, 2021) p. 174.

<sup>94</sup> ECtHR, (1988), para. 32.

<sup>95</sup> ECtHR (First Section), 25 January 2008, case of *Vereinigung Bildender Künstler v. Austria*, Appl. no. 68354/01, para. 31.

<sup>96</sup> See CJEU, C-476/17 *Pelham and others*, paras. 34-39.

<sup>97</sup> More generally the CJEU has argued with reference not only to artistic creation, that copyright, as harmonized at EU level, represent a fair balance between the various rights and interest affected, see CJEU, C-476/17 *Pelham and others*, paras. 59-62, CJEU, Judgment of 29.07.2019, *Spiegel Online*, Case C-516/17, EU:C:2019:625, paras. 43-46 and CJEU, C-469/17 *Funke Medien NRW*, paras. 57-61. On these decisions see Christophe Geiger, & Elena Izyumenko, The Constitutionalization of Intellectual Property Law in the EU and the *Funke Medien*, *Pelham* and *Spiegel Online* Decisions of the CJEU: Progress, but Still Some Way to Go!, 51(3) *International Review of Intellectual Property and Competition* (2020), 282-306.

society.”<sup>98</sup> In this regard the importance of the way art is communicated must be highlighted. In particular, modern forms of creative digital expression are predominantly disseminated to an audience via online platforms, such as those subject to regulation under Article 17 CDSM Directive.<sup>99</sup> The regulation of dissemination channels can therefore constitute a restriction on the right to artistic freedom, which requires justification.<sup>100</sup>

## 2. *Freedom to conduct a business*

The freedom to conduct a business, together with the freedom to choose an occupation and to engage in work (Article 15) and the right to property (Article 17), is one of the three economic FR of the EUCFR. It serves to guarantee the freedom of entrepreneurs and reflects the EU’s principle of an open market economy with free competition.<sup>101</sup> Its scope is broad and covers every economic activity and guarantees the right of a business to dispose freely of its resources of an economic, technical and financial character.<sup>102</sup> Its scope also includes the right of an undertaking to choose with whom to enter into a contract, or in general, with whom to do business.<sup>103</sup>

Due to its broad scope, the freedom to conduct a business is easily affected by national measures and regulatory interventions. Therefore, the proportionality analysis carries particular importance in the context of Article 16 EUCFR and is not barred by a positive finding that the essence of the respective fundamental right remains intact.<sup>104</sup>

The Court of Justice has been largely supportive of commercial intermediaries and shielded them from excessive obligations. In *Sabam v Netlog* it argued that a “a complicated, costly, permanent computer system” solely at the expense of the intermediary constitutes a significant infringement of the FR of a hosting provider. The imposition of such a

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<sup>98</sup> AG Saugmandsgaard Øe, C-683/18 *YouTube*, para. 243.

<sup>99</sup> Martin Senftleben, Bermuda Triangle—Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market, available at SSRN: <https://ssrn.com/abstract=3367219> (2019).

<sup>100</sup> Cf. Henrike Maier, *Remixe auf Hosting-Plattformen: Eine urheberrechtliche Untersuchung filmischer Remixe zwischen grundrechtsrelevanten Schranken und Inthaltefiltern (Internet und Gesellschaft, Band 11)*, Mohr Siebeck, (Tübingen, 2018), p. 175; see also Hans D. Jarass, *Charta der Grundrechte der Europäischen Union*, (2020), Art. 13, para. 11.

<sup>101</sup> See Article 119(1) TFEU.

<sup>102</sup> CJEU, C-314/12 *UPC Telekabel Wien*, para. 49. On this relatively recent fundamental right and its relation to IP, see Gustavo Ghidini, & Andea Stazi, Freedom to conduct a business, competition and intellectual property, in: Christophe Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property*, (Cheltenham, Northampton: Edward Elgar Publishing, 2015), 410-420.

<sup>103</sup> CJEU, Judgment of 10.07.2013, Case C-426/11, EU:C:2013:521, para. 32 and CJEU, C-283/11 *Sky Österreich*, paras. 42-43.

<sup>104</sup> Cf. CJEU, C-283/11 *Sky Österreich*, paras. 46-68; here the CJEU examined whether the measure was proportionate after it had established that the essence of the freedom to conduct a business has not been affected.

system would not strike a fair balance between the property interests of rightholders and the business interest of a hosting provider.<sup>105</sup> The ramifications of large-scale filtering on the economic viability of platform services was appreciated by AG Saugmandsgaard Øe in *YouTube*. Especially smaller platforms would encounter financial difficulties when fulfilling a broad obligation to keep infringing material off their services.<sup>106</sup>

In other situations, the CJEU has been more lenient to allow restrictions of the freedom to conduct a business. In *Sky Österreich*, the CJEU examined a provision of Directive 2010/13 which obliged Member States to foresee in their national laws a rule under which broadcasters can gain access to broadcasts transmitted on an exclusive basis on a fair, reasonable and non-discriminatory manner in order to report on events of high interest to the public in the context of short news reports.<sup>107</sup> In balancing Article 16 with Article 17 EUCFR, the Court found that the interference with the freedom to conduct a business by the obligation for broadcasters to make their exclusive broadcasts accessible was proportionate. The Court highlighted that the conditions under which access to exclusive broadcasts could be gained by other broadcasters were clearly determined and Article 15 AVMSD did not prevent rightholders from charging fees for such access,<sup>108</sup> thereby cushioning the effects of the restriction to the freedom to conduct a business. In this case, however the restrictions were clearly set out in the harmonizing legislation and the restrictions were relatively light.

In two cases relating to access providers, the CJEU further determined the parameters for interferences with the freedom to conduct a business in the context of monitoring and blocking information. In *Mc Fadden*, it clarified that a requirement which obliged an access provider to marginally adjust the technical options available to him would not go as far as to encroach upon the very essence of the freedom to conduct a business.<sup>109</sup> But in this case the measure requested seemed absolutely necessary to protect the essence of another fundamental right, which in turn justified a moderate restriction of the Article 16 right;<sup>110</sup> however, an obligation to monitor internet traffic was clearly rejected in this case. In *UPC Telekabel*, the Court determined that a court injunction that ordered an access provider to block access to a specific website did not infringe the very substance of the fundamental right. Although the measure might represent a significant cost for the access provider, the fact that the choice

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<sup>105</sup> CJEU, C-360/10 *SABAM v Netlog*, paras. 44-47; see also CJEU, C-70/10 *Scarlet Extended*, paras. 46-49.

<sup>106</sup> AG Saugmandsgaard Øe, C-683/18 *YouTube*, para. 242.

<sup>107</sup> See Article 15(1) and (6) Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, OJ L 95, 15.4.2010, p. 1–24 (Audiovisual Media Services Directive).

<sup>108</sup> CJEU, C-283/11 *Sky Österreich*, para. 63-64.

<sup>109</sup> CJEU, C-484/14 *Mc Fadden*, para. 91.

<sup>110</sup> CJEU, C-484/14 *Mc Fadden*, paras. 97-99.

of which measure to implement to achieve a particular outcome was left to the service provider, taking account its capacities, weighed in favour of an appropriate balance.<sup>111</sup> However, the Court also stressed that the access provider must be able to demonstrate before a court, in order to avoid liability, that it has taken all reasonable measures. This would safeguard compliance with the principle of legal certainty and give the access provider the opportunity to ensure full compliance with the injunction.<sup>112</sup> In his Opinion in *Mc Fadden*, AG Szpunar argued that an injunction that leaves the choice of measures to be taken entirely to the intermediary could constitute a source of legal uncertainty, even if the appropriateness of such measures would be reviewable by the courts. An injunction formulated in general and vague terms would, therefore, not always succeed in striking a fair balance between the rights and interests involved.<sup>113</sup>

Intermediaries must therefore be able to rely on sufficiently defined laws clearly set out what actions have to be taken to avoid liability. Similarly, overly cost-intensive measures are more likely to restrict Article 16 EUCFR to an extent that cannot be justified with reference to competing FR. The CJEU has permitted significant restrictions to the freedom to conduct a business only when strictly necessary and provided that the economic impact on the service provider is not disproportionate. This reflects a trend in the case-law of the CJEU that does not seem to support a position that would oblige platform operators to function as general private copyright enforcers. Also, with regard to the criteria set by the Court in *UPC Telekabel*, a provision setting obligations that would leave the intermediaries no other choice but to implement automated filtering systems to be effective would also likely be considered a disproportionate restriction to the freedom to conduct business.

### 3. *Data protection, privacy and family life*

The right to private life and the right to data protection are protected by Article 7 and 8 EUCFR respectively. Both Charter rights are based on Article 8 of the ECHR which protects the right to respect for private and family life.<sup>114</sup> The right to data protection has further been given expression in secondary legislation by Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.<sup>115</sup> Article 7 in particular also

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<sup>111</sup> CJEU, C-314/12 *UPC Telekabel Wien*, para. 52.

<sup>112</sup> CJEU, C-314/12 *UPC Telekabel Wien*, para. 54.

<sup>113</sup> AG Szpunar, Opinion of 16.06.2016, *Mc Fadden*, Case C-484/14, EU:C:2016:170, paras. 116-124.

<sup>114</sup> *Vedsted-Hansen*, in: Peers, Hervey, Kenner, & Ward, 2014, Article 7, para. 07.03A.

<sup>115</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 188 (GDPR), which replaced Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Directive 95/46/EC of the European Parliament

protects the right to respect for communications, which includes private and commercial communications.<sup>116</sup>

The right to data protection can potentially enter into conflict with several other FR, especially within the context of secondary EU legislation.<sup>117</sup> In relation to copyright the conflicts with the right to property and the right to an effective remedy are most pronounced. While the CJEU tends to avoid giving substantive guidance,<sup>118</sup> the legislation itself is indicative of the balance between Article 7 and 8 EUCFR and Article 17(2) and Article 47.<sup>119</sup> The large-scale analysis of information uploaded onto a hosting service has been ruled to be incompatible with Article 15(1) ECD, which prohibits Member States to oblige service providers to monitor information transmitted via, or stored on their service.<sup>120</sup> To that effect, the CJEU underlined in *Scarlet Extended* that a general obligation to filter for infringing content would infringe the right to protection of personal data.<sup>121</sup> This is because the automated filtering of information and its use to identify infringers will inevitably lead to the processing of personal data and would enable the identification of individual users.<sup>122</sup>

The CJEU allows Member States a certain flexibility in designing their national laws to strike the balance between the right to property and the right to data protection. An illustration of the flexibility the Court affords to Member States are the *Promusicae*<sup>123</sup> and *Bonnier Audio*<sup>124</sup> rulings of the CJEU. While in the former, the Court argued that EU law did not require that access providers must provide users data in civil proceedings, it considered national legislation that required the disclosure of user data in civil proceedings “likely, in principle” to strike a fair balance between the FR concerned.<sup>125</sup> In *L’Oréal v. eBay*, the Court added, that in order to identify infringers on an online marketplace it must be possible to clearly identify infringers operating in the course of trade.<sup>126</sup> However, in either situation, the interpretation and application of national law must ensure that a fair balance is struck and, in particular,

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and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, p. 31-50 ).

<sup>116</sup> *Vedsted-Hansen*, in: Peers, Hervey, Kenner, & Ward, 2014, Article 7, para. 07.22A.

<sup>117</sup> Cf. AG Kokott, Opinion of 08.05.2008, *Satakunnan Markkinapörssi and Satamedia*, Case C-73/07, EU:C:2008:266, para. 44.

<sup>118</sup> See however CJEU, C-275/06 *Promusicae*, paras. 63-70.

<sup>119</sup> *Kranenborg*, in: Peers, Hervey, Kenner, & Ward, 2014 Article 8, para. 08.42.

<sup>120</sup> CJEU, C-360/10 *SABAM v Netlog*.

<sup>121</sup> CJEU, C-70/10 *Scarlet Extended*, paras. 50-51.

<sup>122</sup> Cf. CJEU, C-360/10 *SABAM v Netlog*, para. 49, see also Frosio, & Geiger, *SSRN* (2020), p. 24.

<sup>123</sup> CJEU, C-275/06 *Promusicae*.

<sup>124</sup> CJEU, Judgment of 19.04.2012, *Bonnier Audio and Others*, Cas e C-461/10, EU:C:2012:219.

<sup>125</sup> CJEU, C-461/10 *Bonnier Audio and Others*, paras. 57-60.

<sup>126</sup> CJEU, Judgment of 12.07.2011, *L’Oréal and Others*, Case C-324/09, EU:C:2011:474, para. 142.

the right to privacy is respected.<sup>127</sup>

The cases illustrate, however, the Court's great caution to limit the rights of individual internet users too easily. In two cases it only permitted remedies that would infringe upon the rights of users because the right to property would otherwise have been impacted in its very core. This was the case in *Mc Fadden*, where the CJEU allowed a national court to order a small business to protect its wireless network with a password as one of only three options suggested by the national court to provide the rightholder with an effective remedy.<sup>128</sup> In his Opinion in *Mc Fadden*, AG Szpunar rejected this option based on concerns for the protection of personal data.<sup>129</sup> Similarly, in *Bastei Lübbe*, the Court allowed the identification of close relatives only because the rightholder would have been left without any other possibility to enforce his rights. It stated expressly that an absolute protection of the right to family life cannot be granted if this makes the enforcement of intellectual property rights impossible.<sup>130</sup> Finally, with reference to the right to the protection of personal data, the Court applied a restrictive interpretation to the term 'address' to exclude a user's email address, telephone number and IP-address.<sup>131</sup>

The Courts positioning of the right to privacy and related FR display a high degree of restraint. A careful reading of the jurisprudence indicates that the rights under Article 7 and 8 EUCFR can only be limited to enable the enforcement of copyright under strict conditions, and often only when a restriction is necessary to preserve the essence of the right to property.<sup>132</sup> This leaves room for the assumption that the processing of data of individuals, and certainly its disclosure, constitutes restrictions to Articles 7 and 8 EUCFR that are very difficult to justify.

#### 4. *The right to property and its social function*

The right to property is guaranteed by Article 1, First Protocol to the

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<sup>127</sup> CJEU, C-275/06 *Promusicae*, para. 68; See also Husovec, *CYELS* (2016), p. 249.

<sup>128</sup> CJEU, C-484/14 *Mc Fadden*, para. 85.

<sup>129</sup> CJEU, C-484/14 *Mc Fadden*, paras. 140-142, following this observation, the AG continued that "although an obligation to make a Wi-Fi network secure that is imposed in a particular injunction is not the same as a general obligation to monitor information or actively to seek facts or circumstances indicating illegal activities, such as is prohibited by Article 15 of Directive 2000/31, any general obligation to identify and register users could nevertheless lead to a system of liability applicable to intermediary service providers that would no longer be consistent with that provision. Indeed, in the context of prosecuting copyright infringements, network security is not an end in itself, but merely a preliminary measure that enables an operator to have a certain degree of control over network activity. However, conferring an active, preventative role on intermediary service providers would be inconsistent with their particular status, which is protected under Directive 2000/31." (paras. 143-144).

<sup>130</sup> CJEU, CC-149/17 *Bastei Lübbe*, paras. 48-53.

<sup>131</sup> CJEU, Judgment of 09.07.2020, Case C-264/19, EU:C:2020:542.

<sup>132</sup> See further Geiger, & Izyumenko, *Intellectual Property before the European Court of Human Rights in: Geiger et al. (2018)*, p. 62, discussing decisions of the ECtHR where the right to privacy was invoked as a defence against copyright enforcement measures.

ECHR and Article 17(2) EUCFR. Whereas the former does not expressly mention intellectual property but guarantees the “peaceful enjoyment of (...) possessions”<sup>133</sup>, the latter simply states that “[i]ntellectual property shall be protected”.<sup>134</sup> However, under both FR regimes, the right to property can be limited. The ECHR foresees that “[n]o one shall be deprived of his possessions except in the public interest” and any interference with the right to property must be provided for by law.<sup>135</sup> Furthermore, states cannot be prevented from enforcing laws that control the use of property in the public interest. In more general terms, Article 51 EUCFR states that “[a]ny limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms.”

Accordingly, the right to property is not an absolute right and can be subject to restrictions.<sup>136</sup> In *YouTube*, AG Saugmansgaard Øe stated that the exclusive right of communication to the public of Article 3(1) InfoSoc Directive “does not necessarily have to be interpreted in a manner which ensures *maximum protection* for rightholders.”<sup>137</sup> In a similar vein, the

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<sup>133</sup> The inclusion of intellectual property into the scope of Article 1 of the First Protocol to the ECHR has been confirmed, among others, in ECtHR (Grand Chamber), 16 June 2015, case of *Delfi AS v. Estonia*, Appl. no. 64569/09, ECtHR (5th section), 10 January 2013, case of *Ashby Donald and other v. France*, Appl. no. 36769/08 and ECtHR (Grand Chamber) of 11 January 2007, case of *Anheuser-Busch Inc. v. Portugal*, Appl. no. 73049/01.

<sup>134</sup> For a comment of this unclear provision see Christophe Geiger, Intellectual Property shall be protected!? Article 17(2) of the Charter of Fundamental Rights of the European Union: a mysterious provision with an unclear scope, 31(3) *European Intellectual Property Review* (2009), 113-117, para. 116 and Jonathan Griffiths, & Luke McDonagh, Fundamental rights and European IP law: the case of Art 17(2) of the EU Charter, in: Christopher Geiger (ed.), *Constructing European Intellectual Property: Achievements and New Perspectives*, (Cheltenham, Northampton: Edward Elgar Publishing, 2013), 75-93; Alain Strowel, Copyright strengthened by the Court of Justice interpretation of Article 17(2) of the EU Charter of Fundamental Rights, in: Oreste Pollicino, Giovanni Maria Riccio and Marco Bassini (eds.), *Copyright and Fundamental Rights in the Digital Age, A Comparative Analysis in Search of a Common Constitutional Ground*, (Cheltenham, Northampton: Edward Elgar Publishing, 2020), p. 28.

<sup>135</sup> Article 1(1), First Protocol to the ECHR.

<sup>136</sup> See e.g. CJEU, C-476/17 *Pelham and others*, para. 33; CJEU, C-469/17 *Funkel Medien NRW* para. 72; CJEU, C-516/17 *Spiegel Online*, para. 56; CJEU, C-484/14 *Mc Fadden*, para. 90; CJEU, C-160/15 *GS Media*, para. 45; CJEU, Judgment of 03.09.2014, *Deckmyn*, Case C-201/13, EU:C:2014:2132, para. 26; CJEU, C-314/12 *UPC Telekabel Wien*, paras. 46-47; CJEU, C-360/10 *SABAM v Netlog*, paras. 41-42; CJEU, C-70/10 *Scarlet Extended*, para. 44; CJEU, C-275/06 *Promusicae*, para. 65.

<sup>137</sup> AG Saugmansgaard Øe, C-683/18 *YouTube*, paras. 238-239. In a footnote (n. 221) the AG suggests that in the absence of full and maximum protection, which seems to suggest that rightholders must expect to be exposed to certain infringements, it can be expected that they undertake their own efforts to help remedying infringements, including collaboration with platform operators. A similar approach was taken by the CJEU in the factually very different case *FAPL/Murphy* when it stated that “the specific subject-matter of intellectual property does not guarantee the right holders concerned the opportunity to demand the highest possible remuneration.”, CJEU, Judgment of 4.10.2011, *FAPL/Murphy*, Joined cases C-403/08 and C-429/08, EU:C:2011:631, para. 108; the AG had argued on the principle of legal certainty that rightholders cannot object to the importation of foreign TV decoders in order to maintain different pricing models for live football subscriptions across the EU Member States, partially because the

CJEU limited the scope of the related right of phonogram producers in *Pelham* by arguing that users, in exercising their FR to artistic expression, do not perform an act of reproduction in relation to a protected phonogram if the sample taken from that phonogram is unrecognizable to the ear once it has been integrated into a new work.<sup>138</sup> What is protected is the essence of the right, and only a very serious infringement of the property right might possibly not strike a fair balance between the FR concerned.<sup>139</sup>

In its early case-law on the free movement of goods the CJEU has recognized the necessity to limit the exercise of intellectual property rights in order to ensure the functioning of the internal market. In *Deutsche Grammophon*, the Court established that the manufacturer of a phonogram could not rely on its right to distribution to prevent the sale in another Member State of copies of a phonogram which has been lawfully marketed in another Member State.<sup>140</sup> It thereby rejected the possibility to justify a restriction to the free movement of goods on the ground of the protection of industrial and commercial property, which would only be possible in order to protect “right which constitute the essential subject-matter of such property.”<sup>141</sup>

According to the Court in *Mc Fadden*, measures to protect the right to property, e.g. by way of an injunction that would oblige an intermediary to terminate or prevent an infringement of copyright, must nevertheless be effective in preventing unauthorized access, or at least make access more difficult to access such content to the effect that users become discouraged.<sup>142</sup>

In any case, the third sentence of article 17(1) CFREU provides that property can be limited in the general interest.<sup>143</sup> Undoubtedly, this restriction also applies to intellectual property. Arguably, intellectual property, which is separately mentioned in paragraph 2 by a relatively blunt declaration, could be limited even further to give expression to its inherent social function.<sup>144</sup>

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relevant legal provisions did not state this expressly, see AG Kokott, Opinion of 03.02.2011, *FAPL/Murphy*, Joined cases C-403/08 and C-429/08, EU:C:2011:43, para. 56.

<sup>138</sup> CJEU, C-476/17 *Pelham and others*, para. 31.

<sup>139</sup> Cf. CJEU, CC-149/17 *Bastei Lübbe*, para. 46. See however Husovec (2019), who argues convincingly that Art. 17 (2) of the Charter “is void of any inviolable core understood as a red line which cannot be bridged by any considerations of proportionality” and that “any reference to essence in the case-law of the CJEU only points towards a higher level of scrutiny, but not towards an untouchable core of rights that may not be abolished by the legislator” (p. 855).

<sup>140</sup> CJEU, Judgment of 8.06.1971, *Deutsche Grammophon*, Case 78/70, EU:C:1971:59, paras. 12-13.

<sup>141</sup> CJEU, 78/70 *Deutsche Grammophon*, para. 11.

<sup>142</sup> CJEU, C-484/14 *Mc Fadden*, para. 95 and CJEU, C-314/12 *UPC Telekabel Wien*, para. 62.

<sup>143</sup> See reference in CJEU, C-277/10 *Luksan*, para. 68.

<sup>144</sup> Christophe Geiger, *The Social Function of Intellectual Property Rights, Or how Ethics can Influence the Shape and Use of IP law*, in: Graeme B. Dinwoodie (ed.), *Methods and Perspectives in Intellectual Property*, (Cheltenham, Northampton: Edward Elgar Publishing, 2013), 153-176. See also Caterina Sganga, & Silvia Scalzini, From

## 5. *The right to an effective remedy and to a fair trial*

The right to an effective remedy and a fair trial is guaranteed by Article 47 EUCFR and Article 6(1) ECHR.<sup>145</sup> Its scope is wide, and comes into play, in principle, whenever the Charter applies in order to guarantee the substantive rights and freedoms guaranteed therein.<sup>146</sup> It also applies in disputes between individuals in relation to rights granted under EU law.<sup>147</sup> In the context of platform liability, three aspects of Article 47 are of particular importance. First, the right to an effective remedy carries importance for rightholders who want to have recourse to redress mechanisms if their rights are infringed online. Second, users should have access to complaints and redress mechanisms in order to ensure the exercise of their rights. And third, both rightholders and users must have access to the possibility of having their claims reviewed by a competent judicial authority.<sup>148</sup>

Users of platforms must be able to rely on their FR to freedom of expression and freedom of the arts to perform certain acts online. Automated enforcement by way of monitoring and filtering cannot only limit these rights, but a failure to make effective complaints mechanisms available can also restrict the right to an effective remedy. Therefore, as a first step, limitations to these rights, even if effected by private parties such as OCSSPs, must be subject to appropriate review.<sup>149</sup> Appropriate in this context should mean, review by a competent court,<sup>150</sup> as opposed to quasi adjudication by private operators.<sup>151</sup>

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abuse of right to European copyright misuse: a new doctrine for EU copyright law, 48(4) *International Review of Intellectual Property and Competition* (2016), 405-435, p. 426; the authors distil from the terminology used in EU legislation, indicating that absolute protection is not granted to rightholders, but that the definition of the scope of the rights, and even the granting of exclusive rights themselves serves social and cultural functions, see further Caterina Sganga, *Propertizing European Copyright*, (Cheltenham, Northampton: Edward Elgar Publishing 2018), pp. 227 sq.

<sup>145</sup> On the right to a fair trial in the context of IP enforcement measures, see Jonathan Griffiths, Enforcement of intellectual property and the right to a fair trial, in: Christophe Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property*, (Cheltenham, Northampton: Edward Elgar Publishing, 2015), 438-454; Geiger, & Izyumenko, *IIC* (2014); Geiger, & Izyumenko, Intellectual Property before the European Court of Human Rights in: Geiger et al. (2018), p. 70 sq.

<sup>146</sup> Ward, in Peers, Hervey, Kenner, & Ward, 2014, Article 47, para. 47.01.

<sup>147</sup> Hofmann, in Peers, Hervey, Kenner, & Ward, 2014, Article 47, para. 47.72.

<sup>148</sup> CJEU, Judgement of 15.05.1986, *Johnston v Chief Constable of the Royal Ulster Constabulary*, Case 222/84, EU:C:1986:206, para. 19.

<sup>149</sup> Cf. Frederick Mostert, 'Digital due process': a need for online justice, 15(5) *Journal of Intellectual Property Law & Practice* (2020), 378-389, p. 388, the author proposes eight principles that should govern the review proves for users and notifiers on, including the right to have a "fair and public review by an independent an impartial panel or competent court" (footnote omitted).

<sup>150</sup> As recalled by Geiger, & Izyumenko, Intellectual Property before the European Court of Human Rights in: Geiger et al. (2018), p. 71, access to court is one core element of a fair trial and effective judicial protection guarantee in the context of IP enforcement cases decided by the ECtHR.

<sup>151</sup> Cf. Giancarlo Frosio, Algorithmic Enforcement Online, in: Paul Torremans (ed.),

In substance, the right to an effective remedy requires that users can rely on a dispute settlement mechanism that provides them with an impartial forum which deals with their complaint efficiently and expeditiously.<sup>152</sup> As much as preventive blocking of content restricts the right to freedom of expression, as much is a delay in reinstating lawful content harmful. This suggests that proceedings before national courts might not be the best option to effectively and expeditiously handle user complaints.<sup>153</sup> However, such complaints should not necessarily be handled by OCSSPs, which will have their own, reasonably justified interests in designing automated enforcement as efficiently as possible. Users must have access to an impartial forum that provides them with a quick and impartial procedure.<sup>154</sup> The CDSM Directive mandates out-of-court dispute settlement mechanism for users redress and complaints.<sup>155</sup> Indeed, a properly designed alternative dispute resolution (ADR) infrastructure would be best placed to ensure user's right to an effective remedy.<sup>156</sup>

Member States are under an obligation to provide remedies to protect natural and legal persons against “any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness” of EU law.<sup>157</sup> Accordingly, in *Mc Fadden*, the Court ruled that rightholders must have access to a remedy to enforce their rights against potential infringers, but also by way of injunction to order an intermediary to terminate and prevent future infringements.<sup>158</sup> This was further stressed in *Bastei Lübbe*, when the Court argued that the right to private life cannot be used to shield a family member from liability for copyright infringement if the rightholder would be left without an effective remedy, therefore robbing the right to property of its very

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*Intellectual Property Law and Human Rights*, (Alphen aan den Rijn: Kluwer Law International, 2020), p. 729, with reference to Maayan Perel, & Niva Elkin-Koren, Accountability in Algorithmic Copyright Enforcement, 19(3) *Stanford Technology Law Review* (2016), 473-433 the author describes the paradigmatic shift from public law enforcement institutions to private law enforcement and adjudication powers exercised by a few privately operated platforms.

<sup>152</sup> Impartiality and independence of the court is another important feature of the right to fair trial (see Geiger, & Izyumenko, Intellectual Property before the European Court of Human Rights in: Geiger et al. (2018); Geiger, & Izyumenko, *IIC* (2014); Geiger, & Izyumenko, Intellectual Property before the European Court of Human Rights in: Geiger et al. (2018), p. 77).

<sup>153</sup> Cf. Frosio, & Geiger, *SSRN* (2020), p. 27.

<sup>154</sup> Cf. Frosio, & Geiger, *SSRN* (2020), p. 29.

<sup>155</sup> See Art. 17 (9) CSDM Directive, which reads as an attempt to codify the safeguards of fair trial and the right to effective remedy within the new online platform liability implemented by the Directive.

<sup>156</sup> See also the more extensive study by Frosio, & Geiger, *SSRN* (2020), who stress further that algorithmic enforcement itself must be designed to ensure respect for the right to an effective remedy and a fair trial. More specifically, and in addition to what is discussed in this section, a fair and balanced automated enforcement regime must be transparent and accountable, meaning that users have access to information why and based on what criteria their uploads have been filtered out (p. 28).

<sup>157</sup> CJEU, Judgement of 19.06.1990, *The Queen v Secretary of State for Transport, ex parte Factortame*, Case C-213/89, EU:C:1990:257, para. 20.

<sup>158</sup> CJEU, C-484/14 *Mc Fadden*.

essence.<sup>159</sup> In a balance between various FR, the right to an effective remedy cannot be entirely ignored. On the contrary, if necessary, other FR can be limited in order to ensure the proper enforcement of rights granted under EU law. As demonstrated above, the right to an effective remedy is not absolute and the cases in which the court argued in its favour were based on very specific fact patterns.<sup>160</sup>

The right to an effective judicial remedy, therefore, has two important dimensions in relation to platform liability. One institutional, which should guarantee users and rightholder access to public law enforcement or at least impartial and independent adjudication authority, which can provide remedies to mitigate harm caused by third parties. And a procedural dimension, which should provide effectively and expeditiously for redress to compensate for harm caused and, more importantly, for injunctions that can prevent future harm from manifesting itself.

#### D. *Legal Certainty and market harmonization*

The general principle of legal certainty and the structural aim of effective market harmonization have been considered by the CJEU in the context of the ‘fair balance’ of copyright.

Legal certainty “requires that legal rules be clear and precise and aims to ensure that situations and legal relationships governed by Community law remain foreseeable”<sup>161</sup> and “that Community rules enable those concerned to know precisely the extent of the obligations which are imposed on them”.<sup>162</sup> The aim to establish an internal market is set out in Articles 3(3) TEU and 26 TFEU and given effect in the competence norm, of Article 114 TFEU.

The CJEU discussed both principles in *Pelham* when it rejected the possibility to create exceptions or limitations beyond the list of Article 5 InfoSoc Directive. It argued that the creation of new copyright rules solely based on FR would jeopardize the aim effective market harmonization, which pursues the objective of creating legal certainty.<sup>163</sup> This demonstrates that the former is a function of the latter and should ensure that diverging national rules in the Member States of the EU do not constitute barriers to intra-community trade.

The principle of legal certainty further mandates that rules are sufficiently clear and precise, a requirement which is not connected to the

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<sup>159</sup> CJEU, CC-149/17 *Bastei Lübbe*, para. 52; see also CJEU, C-580/13 *Coty Germany*, para. 51 and Husovec, *CYELS* (2016), p. 257.

<sup>160</sup> See *supra* 2.3.5.

<sup>161</sup> CJEU, Judgment of 15.09.2005, *Ireland v Commission*, Case C-199/03, EU:C:2005:548, para. 69.

<sup>162</sup> CJEU, Judgment of 21.06.2007, *ROM-projecten*, Case C-158/06, EU:C:2007:370, para. 25.

<sup>163</sup> CJEU, C-476/17 *Pelham and others*, para. 63, see also CJEU, Judgment of 13.02.2014, *Svensson and Others*, Case C-466/12, EU:C:2014:76, paras. 34-35.

aim of market harmonization. In this context, legal certainty requires that an economic actor can plan his actions in reliance on the law so as to avoid incurring liability. This was highlighted in *UPC Telekabel* when the Court argued that the addressee of an injunction must be able to foresee and ascertain, before incurring any penalty, whether he has taken all necessary measures to comply with his obligations.<sup>164</sup> However, the Court did not exclude the possibility of an injunction that specifies an outcome but leaves the choice of specific measures to the addressee of an injunction.<sup>165</sup>

### E. *Interim conclusions*

The balancing of FR in relation to online copyright enforcement demonstrates a reluctance on part of the CJEU to give priority to property protection over other important FR. It becomes apparent that the legal framework that provides rightholders with enforcement tools needs to be respectful of the FR of others, restrictions to which must be always strictly scrutinized. Although the Court does not determine the balance to be struck with finality, it has provided guidelines with which domestic courts have to apply national transpositions of the EU rules. With respect to the new liability mechanism for OCSSPs, which will be further described and analyzed below, it must be borne in mind that the right of users and platform operators, the right to privacy and freedom of expression, the right to due process and to an effective remedy, and the freedom to conduct a business respectively, have to be taken seriously and that any platform liability must be implemented in compliance with a fair balance of the rights involved<sup>166</sup>. No matter how legitimate the enforcement of exclusive rights protected by copyright law is in the online world, it cannot result in significant and disproportionate infringements of the rights of others and rightholders cannot expect to be treated more favorably than users and platform operators. Therefore, any liability regime for platforms must be designed in a FR-compliant manner and safeguards must be included to make FR a reality in its practical implementation.

## II. EXAMINING ARTICLE 17 CDSM IN THE LIGHT OF FUNDAMENTAL RIGHTS

The new liability regime established by Article 17 CDSM creates significant FR overlaps. Before addressing these conflicts and assessing the balancing mechanisms offered by Article 17 it is instrumental to briefly examine its relevant provisions in more detail.

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<sup>164</sup> CJEU, C-314/12 *UPC Telekabel Wien*, para. 54.

<sup>165</sup> CJEU, C-314/12 *UPC Telekabel Wien*, para. 52.

<sup>166</sup> See in this sense also Frosio, & Geiger, *SSRN* (2020).

A. *The new liability regime established by Art 17 CSDM – An  
overview*

Article 17 CDSM creates a new liability regime for OCSSPs.<sup>167</sup> An OCSSP is “a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes.”<sup>168</sup>

Article 17(1) provides that OCSSPs perform acts of communication to the public or making available when their users upload content protected by copyright.<sup>169</sup> For these acts, they should obtain authorizations from rightholders. Such authorizations, e.g. by way of

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<sup>167</sup> Recital 66 CDSM Directive, see also AG Saugmandsgaard Øe, C-683/18 *YouTube*, para. 252.

<sup>168</sup> Article 2(6) CDSM Directive. Recital 62 qualifies that the “Directive 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.”

<sup>169</sup> The nature of this norm is still unclear, whether it established a *sui generis* right of communication to the public, or whether it merely constitutes a clarification of the CJEU’s case law on Article 3(1) InfoSoc Directive (see on the CJEU’s extensive interpretation of Article 3 and its implications for hosting platforms: Bianca Hanuz, *Direct Copyright Liability As Regulation Of Hosting Platforms For The Copyright-Infringing Content Uploaded By Their Users: Quo Vadis ?*, 11(3) *Journal of Intellectual Property, Information Technology and E-Commerce Law* (2020), 315-339) on. Article 17(1), second sentence merely refers to Article 3(1) and (2) InfoSoc Directive to indicate which specific rights and rightholders are affected and does not establish that these two provisions are congruent in their scope. Recital 64, however, states that “[i]t is appropriate to clarify in this Directive that online content-sharing service providers perform an act of communication to the public or of making available to the public when they give the public access to copyright-protected works or other protected subject matter uploaded by their users.” *Husovec* and *Quintais* argue that Article 17(1) establishes a new right, with far-reaching implications also for the application of exceptions and limitations (Martin Husovec, & Joao Pedro Quintais, *How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms*, available at SSRN: <https://ssrn.com/abstract=3463011> or <http://dx.doi.org/10.2139/ssrn.3463011> (2019), 1-27, pp. 5-10); see to the contrary: Nordemann, & Waiblinger, *Art. 17 DSMCD: a class of its own? How to implement Art. 17 into the existing national copyright acts, including a comment on the recent German Discussion Draft – Part 1*, available at: [http://copyrightblog.kluweriplaw.com/2020/07/16/art-17-dsmcd-a-class-of-its-own-how-to-implement-art-17-into-the-existing-national-copyright-acts-including-a-comment-on-the-recent-german-discussion-draft-part-1/?doing\\_wp\\_cron=1597142146.3135290145874023437500](http://copyrightblog.kluweriplaw.com/2020/07/16/art-17-dsmcd-a-class-of-its-own-how-to-implement-art-17-into-the-existing-national-copyright-acts-including-a-comment-on-the-recent-german-discussion-draft-part-1/?doing_wp_cron=1597142146.3135290145874023437500), accessed: 25.01.2021 and Nordemann, & Waiblinger, *Art. 17 DSMCD: a class of its own? How to implement Art. 17 into the existing national copyright acts, including a comment on the recent German Discussion Draft – Part 2*, available at: [http://copyrightblog.kluweriplaw.com/2020/07/17/art-17-dsmcd-a-class-of-its-own-how-to-implement-art-17-into-the-existing-national-copyright-acts-including-a-comment-on-the-recent-german-discussion-draft-part-2/?doing\\_wp\\_cron=1597144877.2035028934478759765625](http://copyrightblog.kluweriplaw.com/2020/07/17/art-17-dsmcd-a-class-of-its-own-how-to-implement-art-17-into-the-existing-national-copyright-acts-including-a-comment-on-the-recent-german-discussion-draft-part-2/?doing_wp_cron=1597144877.2035028934478759765625), accessed: 25.01.2021. See in this regard AG Saugmandsgaard Øe, C-683/18 *YouTube*, in which the AG seems to suggest that Article 17(1) defines by way of non-retroactive extension the right of communication to the public sector-specifically.

licenses, will cover acts of communication to the public performed by the users of OCSSPs.<sup>170</sup> Accordingly, Article 17 derogates from the hosting safe harbour under Article 14(1) ECD with regard to OCSSPs.<sup>171</sup>

Article 17(1) and (4) are systematically linked, whereby the former establishes primary liability for acts of communication to the public jointly committed by the OCSSP and its users, which morphs into secondary liability if the OCSSP has failed to obtain the necessary licenses.<sup>172</sup> It is here that the conflicts between the various FR erupt most apparently.

If OCSSPs do not, or are not able to, obtain an authorization, they are directly liable for unauthorized acts of communication to the public, including the making available to the public.<sup>173</sup> However, OCSSPs can escape liability under two cumulative conditions: first, an OCSSP must demonstrate that it has undertaken “best efforts”<sup>174</sup> to obtain authorization;<sup>175</sup> second, it must have made “in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information”.<sup>176</sup> In any case, upon receiving sufficient substantiated notice from the rightholder, an OCSSPs must act expeditiously “to disable access to, or to remove from their websites, the notified works or other subject matter, and [make] best efforts to prevent their future uploads”.<sup>177</sup> These new obligations constitute a fundamental shift in the EU’s approach to intermediary liability from ‘notice and take down’ to ‘notice and stay-down’.<sup>178</sup> However, Art. 17(8) makes it very

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<sup>170</sup> Article 17(2) CDSM Directive.

<sup>171</sup> Article 17(3) CDSM Directive: “When an online content-sharing service provider performs an act of communication to the public or an act of making available to the public under the conditions laid down in this Directive, the limitation of liability established in Article 14(1) of Directive 2000/31/EC shall not apply to the situations covered by this Article”.

<sup>172</sup> Leistner, *SSRN* (2020), p. 12.

<sup>173</sup> Article 17(4), first sentence CDSM Directive.

<sup>174</sup> Differences in the translation of the “best efforts” standards have been highlighted by Rosati, *DSM Directive Series #5: Does the DSM Directive mean the same thing in all language versions? The case of ‘best efforts’ in Article 17(4)(a)*, available at: <https://ipkitten.blogspot.com/2019/05/dsm-directive-series-5-does-dsm.html>, accessed: 25.01.2021, for a comprehensive study on the linguistic variations of Article 17(4)(a) see Larroyed, *When Translations Shape Legal Systems: How Misguided Translations Impact Users and Lead to Inaccurate Transposition – The Case of ‘Best Efforts’ Under Article 17 DCDSM*, available at: <https://papers.ssrn.com/sol3/papers.cfm?>, who warns that differences in national translations can seriously jeopardize the purpose of achieving harmonization.

<sup>175</sup> Article 17(4)(a) CDSM Directive.

<sup>176</sup> Article 17(4)(b) CDSM Directive.

<sup>177</sup> Article 17(4)(c) CDSM Directive.

<sup>178</sup> Reda et al. (2020), p. 8; Schwemer, & Schovsbo, What is Left of User Rights? – Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime in: Torremans (2020), p. 586; Kuczerawy, From ‘Notice and Takedown’ to ‘Notice and Stay Down’: Risks and Safeguards for Freedom of Expression in: Frosio (2020); see in general Niva Elkin-Koren, Fair Use by Design, 64(5) *UCLA Law Review* (2017), 1082-1100, p. 1093, who addressed the phenomenon that a shift to algorithmic

clear that these new obligations should not lead to duty for OCSSPs to install general filtering systems that would monitor all uploads in a general manner.<sup>179</sup>

To determine whether OCSSPs comply with their obligations under Article 17(4), certain factors must be taken into consideration and be assessed in the light of the principle of proportionality. The relevant factors are “the type, the audience and the size of the service and the type of works or other subject matter uploaded by the users of the service”<sup>180</sup> and “the availability of suitable and effective means and their cost for service providers.”<sup>181</sup> In addition, specific new OCSSPs do not incur all obligations under Article 17(4).<sup>182</sup>

The interests of users of services that come within the scope of Article 17 are reflected in Article 17(7) and (9). The former provides that the cooperation between rightholders and OCSSPs defined in Article 17(4) shall not prevent the availability of lawful content uploaded by users.<sup>183</sup> Paragraph 7 makes express reference to uses subject to exceptions and limitations, and further stipulates that exceptions for quotation, criticism and review as well as those for the purpose of caricature, parody or pastiche must be available for users to rely on. As for the use on online platforms that qualify as OCSSPs, these exceptions are mandatory.<sup>184</sup>

The obligation for OCSSPs arising under Article 17(4) and the right of users expressed in Article 17(7) create an internal conflict within the systematic structure of Article 17.<sup>185</sup> The resolution of practical conflicts

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enforcement has led to a shift in the balance in copyright.

<sup>179</sup> Article 17(8) CDSM Directive.

<sup>180</sup> Article 17(5)(a) CDSM Directive.

<sup>181</sup> Article 17(5)(b) CDSM Directive.

<sup>182</sup> New OCSSPs which are available to the public in the EU for less than three years and which have a turnover of less than EUR 10 million must only comply with Article 17(4)(a) and are required to remove or disable access to infringing works or other subject matter upon notification (Article 17(4)(c), first sentence). Such OCSSPs with more than 5 million visitors per year must also undertake best efforts to ensure the further unavailability of notified works and subject matter (Article 17(4)(c), second sentence).

<sup>183</sup> See very clearly in this sense, with references to the protection of the FR of the users, Recital 70 of the CDSM Directive.

<sup>184</sup> See Recital 70 of the CDSM Directive, stating that “those exceptions and limitations should (...) be made mandatory in order to ensure that users receive uniform protection across the Union”. On this issue see Quintais et al., *JIPITEC* (2019), pp. 278-279; Krzysztof Garstka, *Guiding the Blind Bloodhounds: How to Mitigate the Risks Article 17 of Directive 2019/970 Poses to the Freedom of Expression*, in: Paul Torremans (ed.), *Intellectual Property Law and Human Rights*, (Alphen aan den Rijn: Kluwer Law International, 2020), 327-352, p. 335. Under the central norm that harmonized exceptions and limitation to the exclusive rights of copyright in the EU, all but one exception or limitation are options, see Article 5(2) and (3) InfoSoc Directive.

<sup>185</sup> See e.g. Pamela Samuelson, *Pushing Back on Stricter Copyright ISP Liability Rules*, *Michigan Technology Law Review*, *Forthcoming*, available at SSRN: <https://ssrn.com/abstract=3630700> (2020), p. 14; the obligation to ensure that users can perform lawful uses is extremely difficult to realize considering the obligation to ensure that unlawful uploads must be prevented. The differentiation between lawful and unlawful uses, especially in cases of context-contingent uses under copyright exceptions, is impossible to make with automated means. See in this sense Christophe Geiger, *The artificial intelligence and data-led revolution of copyright and its wider implications*,

between these two provisions is anticipated in Article 17(9), which requires Member States to provide that OCSSP put in place effective and expeditious complaint and redress mechanisms which users can avail themselves of in case access to works uploaded by them is disabled or when they have been removed.<sup>186</sup> OCSSPs must process user requests without undue delay and a decision to disable access or remove content must be subject to human review. Out-of-court redress mechanisms must also be made available, without depriving users of access to effective judicial remedies.<sup>187</sup> Article 17(9) reiterates that the Directive should in no way affect legitimate uses, including such under exceptions and limitations and that personal data shall only be processed in accordance with Directive 2002/58/EC<sup>188</sup> and Regulation (EU) 2016/679 (GDPR).

While Article 17(7) is formulated as an absolute standard (“shall not result in the prevention of the availability of works or other subject matter uploaded by users”), Article 17(4) is based on a relative “best efforts” obligation.<sup>189</sup> Furthermore, the Directive requires that OCSSPs inform users in their terms and conditions that they are permitted to use works or protected subject matter under exceptions and limitations.

Finally, the Directive specifies that a stakeholder dialogue should explore best practices for the cooperation between OCSSPs and rightholders.<sup>190</sup>

### B. Article 17, Automated filtering and fundamental rights

Article 17 foresees that OCSSPs ensure the unavailability of certain works on their platforms without, however, indicating how this should be

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Digital Encounters, Final report p. 5, underlining the “unsolvable conflict” between Art 17 (4) and 17 (8) CDSM, available at: [https://www.fidefundacion.es/docs/GlobalDigitalEncounters/Encounter\\_8\\_Report\\_Final.pdf](https://www.fidefundacion.es/docs/GlobalDigitalEncounters/Encounter_8_Report_Final.pdf)

<sup>186</sup> According to *Garstka*, these procedures were put in place by the drafters of the directive “to mitigate the damage to Freedom of expression” created by Article 17 CSDM Directive: *Garstka, Guiding the Blind Bloodhounds: How to Mitigate the Risks Article 17 of Directive 2019/970 Poses to the Freedom of Expression in: Torremans (2020), p. 335.*

<sup>187</sup> The provision again makes reference to exception and limitations, which users should be able to assert before a court of law, or another judicial authority.

<sup>188</sup> Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ L 122, 17.05.1991, p. 42-46 (Software Directive).

<sup>189</sup> This seems to establish a hierarchy between Art. 17(7) and 17(4), which was confirmed by the European Commission during the hearing before the CJEU in the context of the Polish challenge of Art. 17 (see *Keller, CJEU hearing in the Polish challenge to Article 17: Not even the supporters of the provision agree on how it should work*, available at: <http://copyrightblog.kluweriplaw.com/2020/11/11/cjeu-hearing-in-the-polish-challenge-to-article-17-not-even-the-supporters-of-the-provision-agree-on-how-it-should-work/>, accessed: 25.01.2021).

<sup>190</sup> The stakeholder dialogue, which included not only representatives from OCSSPs and rightholders, but also users’ organizations fed into the drafting of guidelines on the application of Article 17. The mandate for the stakeholder dialogue underlined that account shall be taken of “the need to balance fundamental rights and of the use of exceptions and limitations” (Article 17(10) CDSM Directive).

achieved. When fulfilling their obligation OCSSPs must be careful not to restrict their users in lawfully sharing and accessing information. At the same time, platform operators should not be obliged to explore the limits of the economic viability of their business models to ensure that the rights of rightholders are effectively enforced. The balance between the different FR that are reflected in these interests is thus largely dependent on the technological solutions that OCSSPs will employ to discharge their obligations.

### *1. Automated filtering as a necessary consequence of Article 17*

Article 17 requires that works or other subject matter for which rightholders have provided the relevant and necessary information should not be accessible. The provision must be read together with the obligation under Article 17(1) and the first condition to avoid liability under Article 17(4)(a). Accordingly, OCSSPs must ensure the unavailability of content which is protected by copyright or related rights for which it has not or could not acquire a license. Rightholders must cooperate with OCSSPs by providing the relevant information in relation to such works, so that platform operators can comply with their obligations. How and to which extent this information is provided will have significant ramifications for the obligation to ensure unavailability of the works concerned.<sup>191</sup>

To some extent, either preventively or as a reaction to prior infringements, OCSSPs will have to monitor and filter specific works automatically. *Senftleben* and *Angelopoulos* argue that Article 17 does not require OCSSPs to engage in automated monitoring of all content notified by rightholders.<sup>192</sup> More targeted options, such as takedown-models including suspension of user accounts could be considered, among other

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<sup>191</sup> The most likely scenario is that if rightholders, for various reasons, will not grant authorization for specific works or types of works OCSSPs would be provided with long lists of works and their respective data, see e.g. Gerald Spindler, *The Liability system of Art. 17 DSMD and national implementation – contravening prohibition of general monitoring duties?*, 10(3) *Journal of Intellectual Property, Information Technology and E-Commerce Law* (2019), 344-374, p. 356 and Reda et al. (2020), p. 15. In relation to these works OCSSPs would then have to ensure that any upload will be unsuccessful in order to comply with the condition of Article 17(4)(b) and (c). It should be qualified that the condition of Article 17(4)(c) only applies in cases in which content has been uploaded before and has been notified by the rightholder (cf. *Senftleben, & Angelopoulos, SSRN* (October 2020), p. 31). However, as we have seen, subparagraph (c) requires not only a takedown upon notification but, an obligation for the OCSSP to ensure the future unavailability (so-called “staydown”) of the notified content in accordance with the mechanisms of subparagraph (b).

<sup>192</sup> The authors recall three interpretations of what constitutes ‘general monitoring’: (1) a basic interpretation which defines general monitoring as a situation in which all content of a platform is monitored, even if only in relation to specific works; (2) a situation in which monitoring of all content is permitted in relation to specific infringements pursuant to a court order, and (3) a situation in which monitoring of all content is permitted in relation to specific infringements pursuant to a court order notification by, for example, the rightholder; *Senftleben, & Angelopoulos, SSRN* (October 2020), pp. 8-9.

options.<sup>193</sup> The automated filtering of at least some content seems to be unavoidable for OCSSPs, even if in combination with other non-automated mechanisms.

## 2. *Does automated filtering qualify as general monitoring? (Article 17(8))*

The Directive is very clear in this respect: The fulfilment of the ‘best efforts’ obligation arising under Article 17(4) shall not lead to a general monitoring obligation.<sup>194</sup> As we have seen, a general obligation to monitor for information society service providers (ISSP) has been ruled out by the CJEU, most prominently in *Scarlet Extended*<sup>195</sup> and *Netlog*.<sup>196</sup> The Court argued in both cases that such an obligation imposed on ISSPs by way of an injunction would conflict with various FR, including the right to receive or impart information, the right to protection of personal data and the freedom to conduct a business.<sup>197</sup>

In *L’Oréal v eBay*, the CJEU stated that an intermediary cannot be expected to engage in “active monitoring of all the data of each of its customers in order to prevent any future infringement”. Such an obligation would be in violation of Article 15(1) ECD.<sup>198</sup> Moreover, Article 3 of Directive on the enforcement of intellectual Property Rights (‘IPRED’)<sup>199</sup> provides that “measures, procedures and remedies shall be fair and equitable and shall not be unnecessarily complicated or costly“. This in itself is an expression of a balance that is informed by proportionality.

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<sup>193</sup> However, the suspension of user accounts, as only one example, must also be considered against the applicable FR, most notably the right to freedom of expression and artistic freedom, and therefore should be *ultima ratio* for repeat- or high volume-infringers.

<sup>194</sup> Article 17(8) CDSM Directive.

<sup>195</sup> CJEU, C-70/10 *Scarlet Extended*.

<sup>196</sup> CJEU, C-360/10 *SABAM v Netlog*.

<sup>197</sup> A balancing of these rights of users of online services and the right of service providers against the right to intellectual property would not justify the imposition of a general filtering or monitoring obligation, see CJEU, C-70/10 *Scarlet Extended*, paras. 41-54 and CJEU, C-360/10 *SABAM v Netlog*, paras. 39-52.

<sup>198</sup> Article 17(3) exempts the application of Article 14(1) ECD within the scope of Article 17 CDSM, which means that the category of intermediaries that qualify as OCSSPs cannot rely on the liability exemption of the ECD. By reference to Article 14, Article 15 of the ECD also becomes inapplicable to OCSSPs, however, Article 17(8) CDSM echoes the general monitoring prohibition of Article 15. And although Article 15(1) ECD is not applicable to OCSSPs because Article 17 CDSM constitutes a *lex specialis* regime for this specific type of intermediaries, by virtue of Article 17(8) such general obligation to monitor should not arise. There is nothing in the text of the Directive that suggests that Article 17(8) should be interpreted differently than Article 15(1) ECD, cf. Senftleben, & Angelopoulos, *SSRN* (October 2020), p. 26-27; cf. Leistner, *SSRN* (2020), p. 15, who also stresses that the notion of “general obligation to monitor” is a technical term which has to be interpreted in the light of the CJEU’s case-law.

<sup>199</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 195, 2.6.2004, p. 16-25 (IP Enforcement Directive).

In *Mc Fadden*, the CJEU ruled that “marginally adjusting one of the technical options open to the provider in exercising its activity” does not damage the essence of the freedom to conduct a business.<sup>200</sup> The question in this case was whether and how the owner of a music store should restrict access to an open wireless network in order to prevent unlawful downloading of protected works in the future. The Court expressly rejected the option to monitor all the information transmitted via the internet access of the store owner as well as the complete termination of the internet connection. While the former option would have run counter the general monitoring prohibition of Article 15 ECD,<sup>201</sup> the latter would have limited the owner in his exercise of his right under Article 16 EUCFR.

According to AG Szpunar, a lawful monitoring injunction ordered under Article 15(1) ECD is specific if it is “limited in terms of the subject and duration of the monitoring”.<sup>202</sup> *Senfleben and Angelopoulos* require ‘double-specificity’ in relation to infringed subject matter and infringer.<sup>203</sup> An unlawful, and therefore ‘general’ obligation to monitor would therefore have to be more unspecific.<sup>204</sup> In a similar vein, *Leistner* argues that obligations to monitor uploads in relation to specific infringing works, although the entirety of uploads to a platform operated by an OCSSP is subject to a matching exercise, are not of a general nature and therefore do not fall foul of Article 15(1) ECD or Article 17(8) CDSM.<sup>205</sup> Specifically with regard to staydown duties he draws a parallel to the CJEU judgment in *Glawischnig-Piesczek*,<sup>206</sup> in which the Court considered staydown obligations in relation to *specific* legal violations compatible with Article 15(1) ECD.<sup>207</sup>

Following *Leistner*’s interpretation, the monitoring of specific infringements, albeit in relation to all uploaded content, would not constitute a general monitoring obligation. However, Article 17(4)(b) and (c) read in combination with Article 17(1) Article 17(4)(a) suggest that OCSSPs would be required to monitor uploads in relation to all works and other subject matter for which no authorization could be obtained by way

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<sup>200</sup> CJEU, C-484/14 *Mc Fadden*, para. 91.

<sup>201</sup> CJEU, C-484/14 *Mc Fadden*, para. 87.

<sup>202</sup> AG Szpunar, C-484/14 *Mc Fadden*, para. 132; in this context the AG makes reference to the preparatory work for the ECD: see AG Jääskinen, Opinion of 09.12.2010, *L’Oréal and Others*, Case C-324/09, EU:C:2010:757, para. 182, the AG referred to a requirement of “double identity”, which requires that the infringer and the infringed subject matter is the same, which would require an intermediary to terminate or prevent infringements by the same user of a specific protected subject matter (e.g. a specific trademark). The AG considered the termination of a user account an appropriate means to achieve this result.

<sup>203</sup> Senfleben, & Angelopoulos, *SSRN* (October 2020), p. 2; this double-specificity requirement would arguably limit the effectiveness of the injunction as further infringements by other users, or the same users via different accounts, would not come within the scope of the specific monitoring obligation.

<sup>204</sup> Cf. Senfleben, & Angelopoulos, *SSRN* (October 2020), p. 24.

<sup>205</sup> Leistner, *SSRN* (2020), pp. 15-16.

<sup>206</sup> CJEU, Judgment of 03.10.2019, *Glawischnig-Piesczek*, Case C-18/18, EU:C:2019:821.

<sup>207</sup> Leistner, *SSRN* (2020), p. 16; See also Spindler, *GRUR* (2020), p. 258.

of agreement with the relevant rightholders. This does not mean, however, that all uploads in relation to content for which information is provided by rightholders constitute infringements. Copyright infringement can be equally nuanced as context-specific defamatory statements, which were at dispute in *Glawischnig-Piesczek*.<sup>208</sup> Or the upload can constitute a fully legitimate use, because it is covered by an exception and limitation to copyright, an assessment that can in itself be a very complex one. Moreover, the constellation of actors and rights in relation to injuries to personality rights and copyright infringements cannot be considered to be equivalent.<sup>209</sup> Therefore, in any constellation, it is imperative to reconsider OCSSP-obligations in the light of FR.

For the meantime, it is sufficient to conclude that, in the case of Article 17, it seems difficult to imagine how OCSSPs can discharge their obligations differently than to install filtering and monitoring systems that would be considered general in nature.<sup>210</sup> Although the way information is provided to OCSSPs might differ depending on the context, the obligation to ensure the unavailability of certain works will be most easily and effectively discharged by filtering content based on larger databases of metadata. As a result, the type of monitoring which will be required, or to which OCSSPs will be incentivized in order to escape liability will most likely amount to general monitoring and, as a result, to potential overblocking of legitimate uses.<sup>211</sup> This is in particular the case since the technology itself has its limits.

### C. A closer look at filtering: technological background

Filtering technology, as it is described in the literature,<sup>212</sup> is not as sophisticated to enable it to make complex decisions on the lawfulness or unlawfulness of uploads in an automated way.<sup>213</sup> Automated filters bear the risk of creating “false positives”,<sup>214</sup> i.e. identifying content as

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<sup>208</sup> Cf. Aleksandra Kuczerawy, & Clara Rauegger, Injunctions to remove illegal online content under the eCommerce Directive: *Glawischnig-Piesczek*, 57(5) *Common Market Law Review* (2020), 1495-1526, p. 1517, even a defamatory statement can be considered lawful if, by way of quotation, it is included into another news piece which critically reports on the context in which the defamatory statement was made.

<sup>209</sup> Cautioning against an analogy between defamation and copyright infringements based on *Glawischnig-Piesczek*, Senftleben, & Angelopoulos, *SSRN* (October 2020), pp. 14-15 and 29-30.

<sup>210</sup> Spindler, *GRUR* (2020), p. 259.

<sup>211</sup> Martin Senftleben, Institutionalized Algorithmic Enforcement – The Pros and Cons of the EU Approach to UGC Platform Liability, 14(2) *Florida International University Law Review* (2020), 299-328, p. 312, with further references.

<sup>212</sup> For a detailed overview of the various filtering technologies see Giovanni Sartor, & Andrea Loreggia, The Impact of algorithms for online content. “Upload Filters”. Study requested by the JURI Committee, (2020), p. 35 sq.

<sup>213</sup> Cf. Senftleben, & Angelopoulos, *SSRN* (October 2020), p. 13. For one of the most cited works in contemporary copyright literature that describes available filtering technologies see Engstrom, & Feamster, (2017); see further Reda et al. (2020), p. 27; Leistner, *SSRN* (2020), p. 5; Dusollier, *C.M.L. Rev.* (2020), p. 1018.

<sup>214</sup> Ben Depoorter, & Robert Kirk Walker, Copyright False Positives, 89(1) *Notre Dame Law Review* (2013), 319-359.

infringing although it is lawful.

### 1. *Limits of automated filtering technology (false positives)*

The discussion on the capability of Article 17 to fight copyright infringements and the role automated filtering should play in this context, is based on the misconception that technology is able to solve all enforcement problems. The EU legislator seems to assume that OCSSPS can employ ‘intelligent’ filters that identify infringing content while enabling the upload and making available of lawful content.

However, filtering technologies are not developed as far as it would be necessary to fulfil the obligations under Article 17 completely with automated tools.<sup>215</sup> None of the currently available filtering technologies are able to avoid so-called “false positives”, and when currently available technologies can identify similarities, they are unable to make the often-complex assessment whether a similarity between two files amounts to copyright infringement.<sup>216</sup>

#### a. Infringement threshold

Qualitatively, automated tools that are only able to recognize full or partial matches between two or several files will not be able to assess whether a particular match, i.e. the full or partial identity between two files, amounts to a reproduction of either an authorial work, or a related right. For original works, the originality threshold is impossible to determine by merely finding certain similarities. Instead, the similarities must occur in relation to original parts of the underlying work, i.e. the parts copied must be part of an author’s own intellectual creation.<sup>217</sup> For related rights, although the CJEU has established a relatively low threshold, a pure quantitative assessment is not sufficient to determine

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<sup>215</sup> Thomas Spoerri, On Upload-Filters and other Competitive Advantages for Big Tech Companies under Article 17 of the Directive on Copyright in the Digital Single Market, 10(2) *Journal of Intellectual Property, Information Technology and E-Commerce Law* (2019), 173-186, p. 182, see also a study conducted in 2018 which stresses that YouTube’s ContentID cannot distinguish between unlawful uses and uses that do not require authorization: Sabine Jacques, Krzysztof Garstka, Morten Hviid, & John Street, An Empirical Study of the Use of Automated Anti-Piracy Systems and Their Consequences for Cultural Diversity, 15(2) *SCRIPTed* (2018), 277-312, p. 287; reiterating this point Krokida, *AG’s opinion on Peterson/ YouTube: Clarifying the liability of online intermediaries for the violation of copyright-protected works?*, available at: <http://copyrightblog.kluweriplaw.com/2021/01/06/ags-opinion-on-peterson-youtube-clarifying-the-liability-of-online-intermediaries-for-the-violation-of-copyright-protected-works/>, accessed: 25.01.2021.

<sup>216</sup> Engstrom, & Feamster, (2017), p. 64. See also in this sense, but in the context of the German implementation of the Directive, Albrecht Conrad and Georg Nolte, Die Schrankenbestimmungen im Anwendungsbereich des UrhDaG - Zu viele Rollen der Diensteanbieter beim urheberrechtlichen Interessenausgleich?, *ZUM* 2021 (forthcoming).

<sup>217</sup> See only CJEU, Judgment of 19.07.2009, *Infopaq I*, Case C-5/08, EU:C:2009:465 and CJEU, Judgment of 11.12.2011, *Painer*, Case C-145/10, EU:C:2011:798.

whether a particular file infringes a related right.<sup>218</sup>

b. Contextual differentiation

Moreover, automated filters, as described above, are unable to recognize contextual nuances, which is however necessary to distinguish *prima facie* infringements from uses that fall within the scope of an exception. Such distinction would be necessary to differentiate between a simple reproduction of a part of a work, and the reproduction of the same part for a use that is parodic or that constitutes a permitted quotation. Both exceptions must be assessed in the context the use of a protected work takes place and are based on contextual consideration such as humour or mockery<sup>219</sup> and a dialogue between the original work and the work that quotes.<sup>220</sup> Moreover, artistic creations or user generated content often includes creative reuses of existing protected works which also might, under certain conditions, benefit from an exception.<sup>221</sup>

D. *Intermission: Effects of automated filtering on fundamental rights*

Considering the current state of technology, it is very likely that OCSSPs will have to resort to automated monitoring or filtering in order to comply with their obligations under Article 17(4) CDSM Directive.<sup>222</sup> Against this background, three main concerns arise in relation to automated filtering when examined through the lens of FR.

First, fulfilling the “best efforts” obligation can significantly restrict the freedom to conduct a business. The specific impact will differ between OCSSPs and their relative economic capacities must be considered in relation to the harm caused to rightholders on the respective platform.<sup>223</sup>

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<sup>218</sup> CJEU, C-476/17 *Pelham and others*, see the standard developed by the court, which requires whether a sample taken is “unrecognisable to the ear” (para. 31.).

<sup>219</sup> CJEU, C-201/13 *Deckmyn*, para. 20.

<sup>220</sup> CJEU, C-476/17 *Pelham and others*, paras. 71-73.

<sup>221</sup> See for example the case of sampling, for which the CJEU in principle left room for an application of the quotation exception of the sample is used in a dialogic manner (CJEU, C-476/17 *Pelham and others*, para 72), see also Bernd Justin Jütte, CJEU permits sampling of phonograms under a de minimis rule and the quotation exception, 14(11) *Journal of Intellectual Property Law & Practice* (2019), 827-829, p. 828. Other forms of arts borrow from protected works and have been considered as lawful because falling under the protection of freedom of artistic creativity (See Christophe Geiger, When Freedom of Artistic Expression allows Creative Appropriations and Opens up Statutory Copyright Limitations, in: Shyamkrishna Balganes, Ng-Loy Wee Loon, & Haochen Sun (eds.), *The Cambridge Handbook of Copyright Limitations and Exceptions*, (Cambridge: Cambridge University Press, 2021) p. 174).

<sup>222</sup> See *supra* 3.3.1.2.

<sup>223</sup> For example, it will surely be problematic for smaller OCSSPs who would have to acquire filtering software that complies with “high industry standards”, the cost of which could jeopardize the economic viability of their business models. See in general on the difficulty of smaller OCSSPs to gain access to sophisticated filtering technology see Spoerri, *JIPITEC* (2019), pp. 184-185; see in this sense Engstrom, & Feamster, (2017), p. 22-23, who conclude that “for smaller OSPs, the cost of these systems would make it significantly harder to attract investors and compete with dominant incumbents. In a

Second, users of platforms will be affected when they try to upload content which is filtered and blocked by automated mechanisms; users who access content via online sharing platforms will be restricted in their right to receive information. Third, the restriction of the right to receive and impart information must be balanced against the right of authors and other rightholders who have a vested interest to enforce their intellectual property rights. Without some form of enforcement, they could find themselves deprived of the essence of their rights.<sup>224</sup> However, overenforcement, which would result in collateral overblocking of lawful uses, would in many cases be disproportionate to the protection provided to rightholders through automated filtering technologies necessitated by Article 17 CDSM. As we have already demonstrated, they will have detrimental effects on free speech and the exercise of user rights.<sup>225</sup> Whether these concerns can be mitigated with effective countermeasures will be decisive in assessing whether Article 17 unduly restricts the FR concerned.

*E. Addressing fundamental rights in the mechanisms of Article 17 – a proper balance?*

The obligations for OCSSPs under Article 17(4) raise significant questions in relation to their compatibility with FR.<sup>226</sup> Their specific scope is vague and dotted with terminology that requires specification (e.g. “best efforts”). Primarily, national transpositions will have to give concrete shape to this new and unclear specific liability regime, which in turn raises serious concerns that diverging transpositions will fail to achieve a harmonized legal framework.<sup>227</sup> As we have seen, national transpositions must also consider the effects of EU FR on legislation that

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survey of investors in the U.S. and EU, a majority of respondents said they would be “uncomfortable investing in businesses that would be required by law to run a technological filter on user uploaded content.”

<sup>224</sup> CJEU, C-484/14 *Mc Fadden*, paras. 98-99.

<sup>225</sup> See also Depoorter, & Walker, *Notre Dame L. Rev.* (2013), p. 322. It must be highlighted here that, due to the technological limitations of filtering technologies, which will most likely be employed due to the relative expensiveness of other mechanisms (e.g. human review) or their lack of effectiveness (e.g. flagging), automated enforcement carries the risk to create disproportionately many ‘false positives’, i.e. takedowns of content which do not infringe or which is covered by an exception or imitation. The sheer amount of likely false positives constitutes non-negligible restrictions to the right to freedom of expression and the right to artistic freedom in particular when online platforms are used to disseminate musical and audio-visual artistic creativity (cf. AG Saugmandsgaard Øe, C-683/18 *YouTube*, para. 241).

<sup>226</sup> Cf. Senfleben, & Angelopoulos, *SSRN* (October 2020), p. 7.

<sup>227</sup> See for example Paul Keller, *Divergence instead of guidance: the Article 17 implementation discussion in 2020 – Part 1*, available at: <http://copyrightblog.kluweriplaw.com/2021/01/21/divergence-instead-of-guidance-the-article-17-implementation-discussion-in-2020-part-1/>, accessed: 25.01.2021, and 2, available at: <http://copyrightblog.kluweriplaw.com/2021/01/22/divergence-instead-of-guidance-the-article-17-implementation-discussion-in-2020-part-2/>, accessed: 25.01.2021.

implements EU secondary law.

Adding to this uncertainty is the question of how to combine the obligations set by Art. 17(4) with Article 17(7), which sets a counterweight in the copyright balance by providing users of OCSSPs with a guarantee that the obligations for OCSSPs under Article 17(1) and 17(4) should not prevent them from making lawful uses of works and other subject matter protected by copyright.

In the following sections we will demonstrate that rightholders and OCSSPs alone, in cooperation with each other, and with the mere reliance on technology, are likely to fail in maintaining a balance between the various FR. We will highlight the most relevant rifts in FR protection under the most commonly discussed scenarios in various recent studies.

### *1. Best efforts to obtain authorization (Article 17(4)(a))*

The obligation to obtain authorization consists of two components: to assess whether contents on their services require licenses and to obtain authorization for the use of that content.<sup>228</sup> *Leistner* argues that the systematic structure of Article 17(4) suggests that OCSSPs incur an obligation to investigate actively infringing content and undertake best efforts to obtain licenses for the relevant works and subject matter.<sup>229</sup> In any case, OCSSPs cannot remain passive and refrain from actively engaging with rightholders to obtain the required authorizations.<sup>230</sup> Considering that the efforts that must be undertaken have to be proportionate, *Leistner* argues further that OCSSPs cannot be expected to enter into licensing agreements with all rightholders, including smaller artists.<sup>231</sup> An obligation to identify all infringing works, even if, as

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<sup>228</sup> Spindler, *GRUR* (2020), p. 255.

<sup>229</sup> Cf. *Leistner*, *SSRN* (2020), p. 23.

<sup>230</sup> It must also be considered, when assessing the best efforts undertaken by OCSSPs, that identifying the rightholders in relation to content uploaded by users can itself pose a significant challenge.

<sup>231</sup> *Leistner*, *SSRN* (2020), p. 24, the information and transactions cost arising from such an obligation would be immense and would require OCSSPs to invest significantly in their licensing efforts. *Leistner* argues that it would suffice if platform operators enter into agreements with major rightholders and collecting societies. See to that effect also Article 12 CDSM Directive, which enables extended collective licensing. This, admittedly, would be problematic as smaller artists, which are most of the time the most in need for better licensing revenues, would be discriminated against. Spindler on the contrary proposes that smaller rightholders could instead be offered to monetize their rights. He argues that although OCSSPs cannot be required to conclude licenses with all rightholder, a positive obligation exists for platform operators to identify rightholders whose works are infringed on their platforms. He argues further that even proportionality would not limit this obligation to random checks for infringing content, (Spindler, *GRUR* (2020), p. 255). Given the sheer amount of potentially infringing content on larger platforms, but also the economic means required to conduct such searches, this interpretation might be difficult to put into practice. A proactive search and verification obligation in relation to potentially all uploads would pose significant problems with respect to Article 16 EUCFR as it would amount to a general monitoring. In any case, the practical difficulties in concluding licenses with rightholders of content uploaded by others cannot lead to discrimination to the detriment of smaller right holders.

*Spindler* argues, the systematic structure of Article 17 seems to suggest this, would place a disproportionately high burden on platform operators.<sup>232</sup> Moreover, the *European Copyright Society* argues that this requirement would effectively amount to a general monitoring obligation.<sup>233</sup>

Once an OCSSP has entered into negotiations with a rightholder or, more likely, with a group of rightholders or their representative (e.g. a collecting society), the platform operator cannot be expected to accept every offer.<sup>234</sup> The amount due for a license to use specific works and subject matter must be proportionate in relation to the size of the platform and the number of its users.<sup>235</sup> In this sense, the notion of ‘best efforts’ has a very concrete financial dimension. It must be possible for an OCSSP to reject an unreasonable license offer<sup>236</sup> while still complying with the requirement under Article 17(4)(a). An obligation to contract at a price determined by rightholders would significantly restrict the freedom to conduct a business by limiting the economic choices of platform operators.<sup>237</sup> Effectively, an obligation to contract cannot be derived from Article 17(4).<sup>238</sup> However, OCSSPs can be expected to enter into genuine negotiations in good faith in order to enable the lawful use of *relevant* works or other subject matter.<sup>239</sup>

## 2. Targeted and tailored filtering obligations

Having made best efforts, unsuccessfully, to obtain authorizations for works and other subject matter protected by copyright, OCSSPs incur the two cumulative obligations to prevent uploads of unauthorized works, to remove upon notice unauthorized works and prevent their future uploads. We have demonstrated above that any obligation arising under Article 17(4)(b) and (c) cannot amount to a general monitoring obligation.<sup>240</sup>

Therefore, any obligation to remove or block access to content must be strictly targeted and tailored. The CJEU has recently ruled in *Glawischnig-Piesczek* that a hosting platform cannot be burdened with excessive obligations, more specifically it cannot be expected that hosting

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<sup>232</sup> Spindler, *GRUR* (2020), p. 255.

<sup>233</sup> The European Copyright Society (2020), p. 119, the drafters of the opinion argue further that OCSSPs can be expected to proactively contact larger rightholders and would only act reactively upon notification by smaller and independent rightholders.

<sup>234</sup> See Leistner, *SSRN* (2020), p. 24, who argues convincingly that at least all available collective licenses should be obtained.

<sup>235</sup> See to that effect Spindler, *GRUR* (2020), p. 255: if the fees demanded by the rightholders are unreasonably high, an OCSSP cannot be expected to enter into an agreement.

<sup>236</sup> Spindler, *JIPITEC* (2019), pp. 348-349.

<sup>237</sup> Spindler, *GRUR* (2020), p. 255. Similarly, an operator of a hosting platform must also be permitted to refuse to conclude a license in the first place. The obligation to demonstrate best efforts cannot result in an obligation to contract. This would effectively enable rightholders to set the financial conditions under which OCSSPs have to operate.

<sup>238</sup> Cf. Spindler, *GRUR* (2020), p. 255.

<sup>239</sup> Cf. The European Copyright Society (2020), p. 119.

<sup>240</sup> See *supra* 3.2.

platforms actively seek information on infringing or generally illegal activity, or conduct an independent assessment of the illegality of acts.<sup>241</sup> In *UPC Telekabel*, the Court argued that an intermediary can be required to take certain measures that necessitate the use of economic resources. However, the intermediary must only take reasonable measures and not make “unbearable sacrifices”.<sup>242</sup> Moreover the intermediary must be able to anticipate and, if necessary, verify, in the light of the principle of legal certainty, whether the measures taken are sufficient to comply with the requirements of Article 17(4)(b) and (c).<sup>243</sup>

A targeted filtering obligation must also ensure that the collateral effects of such a measure are kept at a minimum.<sup>244</sup> In exercising their respective right to freedom of expression, including the right to receive information, users who post and access content on a platform must be able to perform lawful acts. A broad filtering mechanism which would result in overblocking of lawful content would most certainly restrict the right to freedom of expression in a way which would be difficult to justify in this specific constellation.

Therefore, any measure that OCSSPs take to fulfil the conditions under Article 17(4)(b) must not go beyond what is necessary to achieve the purpose of that condition, which is to protect the economic rights of rightholders. Several elements must be considered in order to define the scope of these obligation. First, Article 17(4)(b) refers to “specific works and other subject matter”. These are the types of content in relation to which OCSSPs incur an obligation to, second, “ensure [their] unavailability”. Third, OCSSPs are only required to ensure the unavailability of the specific works or subject matter if rightholders have provided them with “relevant and necessary information.”

a. Prevent access to specific works and subject matter (Article 17(4)(b))

It is necessary to distinguish the obligations arising under Article 17(4)(b) and (c). Whereas under subparagraph (c), obligations similar, but not identical, to those in *L’Oréal v eBay* arise (i.e. the removal of notified

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<sup>241</sup> CJEU, C-18/18 *Glawischmig-Piesczek*, para. 46.

<sup>242</sup> The Court makes one specific qualification that could differentiate the situation in *UPC Telekabel* from that arising under Article 17. In para. 53 it states: “That possibility of exoneration clearly has the effect that the addressee of the injunction will not be required to make unbearable sacrifices, which seems justified in particular in the light of the fact that he is not the author of the infringement of the fundamental right of intellectual property which has led to the adoption of the injunction.” One could argue that the extension of the communication to the public right under Article 17(1) would change this assessment because OCSSPs become legally responsible for acts committed by their users. Nevertheless, this constitutes a legal fiction and the actual act that causes the infringement is performed not by the platform operator but by a third party, Therefore the reasoning in *UPC Telekabel* should also be applicable for the liability exemption under Article 17(4) CDSM Directive.

<sup>243</sup> Cf. CJEU, C-314/12 *UPC Telekabel Wien*, para. 54.

<sup>244</sup> Cf. Reda et al. (2020), p. 28.

content), obligations under subparagraph (b) are different and go further. This can be explained from the systematic structure of Article 17(4).<sup>245</sup>

The monitoring of content in order to ensure the unavailability of specific works requires that specific works are identified. This requires direct cooperation between rightholders and OCSSPs.<sup>246</sup> That cooperation cannot, however, result in the advance flagging of large repertoires of music and audio-visual material without any indication of prior infringement or at least the likelihood of future infringements.<sup>247</sup> Such an arrangement would move the process that results in decision to block and filter – in itself a stark restriction of Article 11 EUCFR – outside the reach of users and constitute a significant restriction to the right to an effective remedy. How, then, can rightholders and OCSSPs find ways to stay within the permitted scope of ‘specific’ and ‘targeted’ monitoring mechanisms to ensure that certain works and subject matter are made unavailable?

The two extremes of filtering are illustrated by *SABAM v Netlog* (for hosting providers in relation to copyright) and by *Glawischnig-Piesczek* (for hosting providers in relation to personality rights). While in *SABAM v Netlog*, the CJEU found an obligation to filter indiscriminately not to be in compliance with the obligations arising under the ECD,<sup>248</sup> it found in *Glawischnig-Piesczek* that an injunction that targets specific content uploaded by specific users would not constitute a general filtering obligation.<sup>249</sup> The AG in the latter case even extended the personal scope of such an obligation to all users of a service, as long as the specificity of the subject matter limits the scope of an injunction.<sup>250</sup> And here lies the main distinction that justifies a relatively broad filtering obligation, because the subject matter that must be monitored and filtered is not only specifically defined, but it is also determined by a court which issues an injunction before a platform operator commences with monitoring and

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<sup>245</sup> Cf. Senftleben, & Angelopoulos, *SSRN* (October 2020), p. 31.

<sup>246</sup> Article 17(7) in its relevant part reads: “The cooperation between online content-sharing service providers and shall not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation.”

<sup>247</sup> This type of cooperation would certainly lead to a monitoring obligation which is more on the ‘general’ side of the spectrum, rather than of a ‘specific’ nature.

<sup>248</sup> CJEU, C-360/10 *SABAM v Netlog*, the Court ruled that EU law precludes a filtering obligation that obliges a hosting provider to install a mechanism that applies to information which is stored on its servers by its service users, which applies indiscriminately to all of those users, as a preventative measure, exclusively at its expense, and for an unlimited period.

<sup>249</sup> CJEU, C-18/18 *Glawischnig-Piesczek*, para. 35; See Kuczerawy, & Rauchegger, *C.M.L. Rev.* (2020), p. 1499: the authors criticize that the CJEU did not consider sufficiently the impact of such an injunction of the rights of users, who will be affected even by a specific filtering mechanism (p. 1524).

<sup>250</sup> AG Szpunar, Opinion of 04.96.2019, *Glawischnig-Piesczek*, Case C-18/18, EU:C:2019:458, para. 59; it is worth noting that due to the type of injunction sought in this case (interlocutory), the injunction was also limited in time (see para. 60).

filtering.<sup>251</sup>

In particular in relation to copyright infringements, the necessity to take down and remove infringing works or other subject matter expeditiously is not comparable to the necessity that arises in relation to other content.<sup>252</sup> It would, therefore, be more proportionate to limit the portfolio of works and other subject matter the upload of which can be prevented to such works *specifically* identified as infringing.<sup>253</sup> Automated filtering would then apply only to uploads which are manifestly illegal.<sup>254</sup>

A study by the *Gesellschaft für Freiheitsrechte* departs from the assumption that the obligation to ensure the unavailability of specific works or subject matter can only be guaranteed by the employment of automated filters.<sup>255</sup> These filters, however, cannot discern context.<sup>256</sup> But only if a distinction between lawful and unlawful context can be made, can a proper balance between the various interests and FR be achieved.<sup>257</sup>

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<sup>251</sup> The relevant passage reads: “(...) it is important that the equivalent information referred to in paragraph 41 above contains specific elements which are properly identified in the injunction, such as the name of the person concerned by the infringement determined previously, the circumstances in which that infringement was determined and equivalent content to that which was declared to be illegal. Differences in the wording of that equivalent content, compared with the content which was declared to be illegal, must not, in any event, be such as to require the host provider concerned to carry out an independent assessment of that content.” CJEU, C-18/18 *Glawischnig-Piesczek*, para. 45. However, even a complete congruence of an upload with a protected work can still be lawful if it falls within the scope of an exception. Most of such matches would require an independent assessment, but per *Glawischnig-Piesczek* this assessment cannot be imposed on online platforms.

<sup>252</sup> E.g. child pornography and terrorist content, cf. European Parliament, European Parliament resolution of 20 October 2020 on the Digital Services Act and fundamental right issues posed (2020/2022(INI)), P9\_TA(2020)0274, EP, 20.10.2020, paras. 11-13, at para. 13 the European Parliament stresses that in relation to illegal content online, intermediaries should not be obliged to install automated tool to moderate content.

<sup>253</sup> For example, because they have been already recognized as copyright infringement by a court. In this case, it seems totally appropriate that a content what has been taken down as a result as court decision should be not be uploaded again and upload filters could prevent that.

<sup>254</sup> See e.g. Frosio, & Geiger, *SSRN* (2020), p. 37, see also Maxime Lambrecht, Free Speech by Design. Algorithmic protection of exceptions and limitations in the Copyright DSM directive, 11(1) *Journal of Intellectual Property, Information Technology and E-Commerce Law* (2020), 68-94, p. 89; Quintais et al., *JIPITEC* (2019), see also a letter sent to Commissioner Breton on 14.09.2020 by 27 civil society and users’ organizations, available at [https://www.euractiv.com/wp-content/uploads/sites/2/2020/09/Civil\\_society\\_letter\\_Art17\\_consultation.pdf](https://www.euractiv.com/wp-content/uploads/sites/2/2020/09/Civil_society_letter_Art17_consultation.pdf), accessed on 25.01.2021. *Lambrecht* relates such a criterion to the *Glawischnig-Piesczek* standard, which would oblige OCSSPs to prevent imminent harms, i.e. uploads which are only imminent harms and should not extend to potentially harmful uploads, the verification of which would require OCSSPs to conduct further investigations, *Lambrecht, JIPITEC* (2020), pp. 89-90, the author further explains that rightholders would not be left without protection but could resort to the ‘traditional’ mechanisms of takedown requests or court injunctions.

<sup>255</sup> Reda et al. (2020), p. 25.

<sup>256</sup> Reda et al. (2020), p. 26, see also P9\_TA(2020)0274, para. 12.

<sup>257</sup> The collateral effect of employing filtering technology is that the rights of users will be significantly restricted, which can lead to a chilling effect. As a result of overblocking

In order to ensure legal certainty and to preserve some of the very essence of the right to intellectual property of rightholders whose works and subject matter are shared on online platforms, merely relying on user-self-declaration<sup>258</sup> would be insufficient.<sup>259</sup>

The notion of “best efforts” implies that not all infringing content has to be made unavailable. Here exists ample room for consideration based on FR in designing the combination of technological or human tools used to ensure obligations arising under Article 17(4) can be fulfilled.<sup>260</sup> This leaves the question of how, in maintaining a proper balance, to identify the works that can be subject to removal and, to a specifically defined extent, be filtered.

A combination of measures including human intervention, both by users and OCSSPs, and some sort of automated filtering significantly increases the burden on platform operators. In essence, general monitoring that results in overblocking is most likely the most cost-effective mechanism that would least restrict OCSSPs freedom to conduct a business and help them to avoid primary liability.<sup>261</sup> The restrictive effects on the rights of users would be significant and such restrictions could certainly not be justified. A solution that creates a fair balance at FR level is difficult to imagine within this complicated constellation.

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and user frustration through repeated unsuccessful upload, albeit of lawful content, users can be incentivized to switch platforms or cease using them altogether. Highlighting the risk of overblocking- “that is removing access to more than one wishes to, or more than the law requires”- see Garstka, Guiding the Blind Bloodhounds: How to Mitigate the Risks Article 17 of Directive 2019/970 Poses to the Freedom of Expression in: Torremans (2020), p. 332.

<sup>258</sup> Also suggested as an intermediary step, see Quintais et al., *JIPITEC* (2019), p. 280.

<sup>259</sup> This is not to say that user self-declarations should not be part of the combination of measure that will also serve to guarantee the rights of users. In this way, platform users can be reasonably included in the cooperation between rightholders and platform operators to create a just and fair balance of interests.

<sup>260</sup> *Senfleben* and *Angelopoulos* suggest other, albeit not equally effective options, that could be installed *in lieu* of filtering technology. Such alternatives could include the co-option of users to flag infringing content, pop-up banners that inform users that uploading infringing content is prohibited and contractual regulation and information through terms and conditions, Senfleben, & Angelopoulos, *SSRN* (October 2020), p. 23; the authors make reference to the original draft of what became Article 17 CDSM Directive, which expressly referred to content recognition technologies as measures to fulfil the preventive obligation under Article 17(4)(b). Whether this omission in the final version means the principled exclusion of such technological tools while the provision refers to “high industry standards of professional diligence” (see also recital 66) or merely tries to hide the facts that some sort of technological filtering in necessary cannot be determined with certainty. However, recital 66 also states that in assessing whether the high industry standards of professional diligence have been complied with it is necessary to consider, also in the light of the principle of proportionality “the evolving state of the art as regards existing means, including potential future developments, to avoid the availability of different types of content and the cost of such means for the services.”

<sup>261</sup> Cf. Spuerri, *JIPITEC* (2019), p. 183.

b. Disable access upon notification

The requirement to disable access upon notification pursuant to Article 17(4)(c) seems unproblematic at first look. In accordance with the wording of the provisions, OCSSPs can only be expected to remove infringing content when the rightholders provide “sufficiently substantiated notice”. All major user-generated content platforms already foresee mechanisms by which content can be flagged for copyright infringement.<sup>262</sup>

The requirement to provide “sufficiently substantiated notice” reflects FR concerns over excessive content flagging. OCSSPs should only be required to remove content if it is likely that the uploaded material indeed infringes copyright.<sup>263</sup> The obligation to remove content becomes problematic, from a FR perspective, when it is combined with the obligation to prevent future uploads of works or other subject matter that have been removed after an OCSSP has been notified.

c. Best efforts to ensure future unavailability of specific works (Article 17(4)(c))

The obligation that arises under Article 17(4)(c) requires OCSSPs to monitor and ensure the unavailability protected subject matter the future, which is in temporal relationship to the moment in which an infringing work has been notified. The speech-restrictive effect of a cumulation of filtering requirements would also grow increasingly the more rightholders notify infringing works, morphing eventually into a general monitoring and filtering obligation.<sup>264</sup> In this context, the notion of ‘best efforts’ must be interpreted in the same way as under Article 17(4)(b).

Therefore, considered in the light of FR, the obligation to prevent future uploads after rightholders have given notice of infringing content must be subject to reasonable restrictions in terms of time and subject matter. First, the future unavailability cannot be extended *ad infinitum* in order to enable uses, in particular lawful uses, at a later point. Second, the obligation to prevent uploads must also be targeted.

The obligations for OCSSPs can therefore not extend to an obligation that would require such platforms to take measures that would effectively have the same effects on the exercise on FR as a general filtering obligation. As automated filters cannot assess copyright infringements beyond the first step, i.e to determine whether a *prima facie* infringement has occurred,<sup>265</sup> OCSSPs must employ other means to distinguish

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<sup>262</sup> This approach is expressly foreseen in Article 14 ECD.

<sup>263</sup> See *supra* 3.5.2.1, i.e. that the content is identical or manifestly infringing, however in relation to notifications for takedowns, in order to ensure the rights of users, the takedown and subsequent staydown should only be effected after a procedure that safeguard the right to an effective remedy, including the right to be heard for users.

<sup>264</sup> Cf. Senftleben, & Angelopoulos, *SSRN* (October 2020), p. 3.

<sup>265</sup> Even *prima facie* infringements are difficult to determine with certainty, due to the qualitative nature of the originality requirement; see in general Reda et al. (2020), p. 27. Particularly in relation to related rights, in which the CJEU has introduced a subjective

infringing uploads from uploads that are lawful. A contextual analysis, and more importantly an expeditious analysis of uploads, that cannot be assessed automatically will require the investment of significant resources initially, but also at the stage of user complaints.

It is important here to restate the complex implications of moderating user complaints that OCSSPs would have to navigate that would, it is argued here, result in significant restrictions of freedom of expression and also create disproportionate burdens for platforms. First the lack of substantive harmonization of copyright exceptions and limitations creates very high information costs.<sup>266</sup> As a result, the same uploaded content can be infringing in one Member States, while fully lawful in another. Additionally, problematic in this constellation is that these decisions that potentially restrict freedom of expression would have to be made by private actors, which are charged with safeguarding the rights of users and rightholders, which are themselves difficult to reconcile.<sup>267</sup> Instead, the decisions to maintain or to remove notified content must be made by a neutral intermediary which is not biased by its own economic preferences.<sup>268</sup>

d. Proportionality as a horizontal requirement (Article 17(5))

Article 17(5) makes express reference to the proportionality principle. In assessing whether an OCSSP has complied with its obligations arising under paragraph 4, the specific characteristics of the service provider have to be taken into consideration (a) as well as the availability of suitable and effective means and their cost for the service provider (b). Also, the type of works and other subject matter uploaded by the user needs to be considered, which if interpreted in a freedom of expression and information-compliant manner might lead to a differentiation between uploads of works that carry important societal information of political,

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element into the infringement test, automates filters that are fine-tunes to identify marginal similarities, will create a large number of false positives.

<sup>266</sup> See in general Lucie M.C.R. Guibault, *Why Cherry-Picking Never Leads to Harmonisation: The Case of the Limitations on Copyright under Directive 2001/29/EC*, 1(1) *Journal of Intellectual Property, Information Technology and E-Commerce Law* (2010), 55-66; Christophe Geiger & Franciska Schönherr, *Defining the Scope of Protection of Copyright in the EU: The Need to Reconsider the Acquis regarding Limitations and Exceptions*, in: Tatiana-Eleni Synodinou (ed.), *Codification of European Copyright Law. Challenges and Perspectives*, (Alphen aan den Rijn: Kluwer Law International, 2012), 133-167. See further recital 5 CDSM Directive. See also in this sense, Christophe Geiger and Franciska Schönherr, *Frequently Asked Questions (FAQ) of Consumers in relation to Copyright, Summary Report* (EUIPO 2017) <<https://euipo.europa.eu/ohimportal/web/observatory/observatory-publications>> (listing exceptions and limitations to copyright as one of the areas of major divergence in national copyright law).

<sup>267</sup> In assessing whether an OCSSP has complied with the ‘best efforts’ standard it is not only necessary to consider the economic impact of such an obligation on the individual OCSSP, but also, and probably more importantly, the effects on the availability of lawful content. In the end, OCSSPs should not be able to demonstrate best efforts with the result that users are significantly hindered in their exercise of their Article 11 and 16 rights.

<sup>268</sup> See more detailed *infra* 3.6.

scientific or artistic nature and other uploads. The former will need to be appreciated with specific care. The appreciation of the compliance with Art. 17 (4) will be made on a case-by-case basis, as the list of elements to be taken into account is non-limitative.<sup>269</sup>

The choice of factors suggests, also in combination with the exceptions under Article 17(6), that smaller and economically less potent OCSSPs will not be measured in the same way as larger OCSSPs would. In general, the proportionality principle should ensure that OCSSPs do not incur too high a burden and that rightholders must also contribute to the enforcement of their rights.<sup>270</sup> And although it does not become apparent from the wording of Article 17(5), recital 66 also makes reference to the purpose limitation of the measure that have to be implemented pursuant to Article 17(4), which should “not go beyond what is necessary to achieve the objective of avoiding and discontinuing the availability of unauthorised works and other subject matter.” Accordingly, the design of the measures must consider the interest of smaller platforms but also users as part of a wider proportionality analysis.

### 3. *Safeguarding fundamental user rights (Article 17(7))*

Against a potentially overreaching enforcement regime based on Article 17(4), Article 17(7) provides that Member States must foresee safeguards for the exercise of lawful uses by users of online content-sharing platform.<sup>271</sup> Furthermore, Article 17(7), second sentence provides that users must be able to rely on specific exceptions when uploading and making available works and other subject matter on online content-sharing services. The exceptions are those for quotation, criticism, review, and use for the purpose of caricature, parody or pastiche.

#### a. The primary obligation to guarantee lawful uses

Article 17(7) states that the “cooperation between online content-sharing service providers and rightholders shall not result in the *prevention* of the availability of works or other subject matter uploaded by users”.<sup>272</sup> In the light of the right to freedom of expression and artistic freedom, this formulation should be read to the effect that initial (read: *preventive*) filtering of content should not lead to the unavailability of works the upload of which is lawful or non-infringing.<sup>273</sup>

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<sup>269</sup> This is confirmed by the wording of Article 17(5) which specifies that “the following elements, *among others*, shall be taken into account” (emphasis added) when assessing whether the obligations of Article 17 (4) are met.

<sup>270</sup> In this regard recital 66 CDSM Directive considers Article 17(4)(c) as an expression of proportionality.

<sup>271</sup> The provision refers expressly to non-infringing uses, including uses covered by an exception or limitation.

<sup>272</sup> Emphasis added.

<sup>273</sup> Uploaded works, the rights of which are not owned by the uploader, can be non-

Preventing such uploads initially, because they have been caught by an upload filter, would constitute a form of censorship. Such a restriction of the rights under Articles 11 and 13 EUCFR is generally not justified, even if the possibility of review could eventually lead to the availability of the work or other subject matter at a later point. The preventive blocking of an entire website without any prior legal proceedings and no indication that the website contained unlawful content was ruled to be in violation of Article 10 ECHR by the ECtHR in *Yildirim v. Turkey*.<sup>274</sup> The Strasbourg court underlined that any preventive measures that restricts the right to freedom for expression, although not in principle irreconcilable with Article 10, are “inconceivable without a framework establishing precise and specific rules regarding the application of preventive restrictions on freedom of expression.”<sup>275</sup> While in *Yildirim v. Turkey*, a Turkish court had ordered to block all access to Google Sites in order to prevent access to a specific site, the same reasoning should apply to an overblocking of lawful content on an online content-sharing platform, moreover as a preventive measure. The ECtHR further stressed the importance of balancing the restrictive measure and considered it a necessity, which must also be reflected in the legal basis that permits the restriction of the right to freedom of expression.<sup>276</sup>

A requirement for national courts to consider the effects of a blocking order is not contained in Article 17, because the decision to block or filter is made by OCSSPS based on their cooperation with rightholders. Moreover, Article 17 refers to proportionality only in relation to the extent of the ‘best efforts’ standard in Article 17(5). A framework with clear and precise rules that governs preventive restrictions of the right to freedom of expression, or the right to artistic freedom for that purpose is missing in Article 17.

As a result, the formulation of Article 17(7) suggests that monitoring and filtering as measures to ensure the unavailability of works or other subject matter is not permitted because this would prevent the availability of non-infringing content and thereby constitute an unjustified restriction to Articles 11 and 13 EUCFR.<sup>277</sup> Assigning priority to the

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infringing either because the uploader has obtained authorization, or because they fall within the scope of one of the exceptions provided for by one of the various copyright directives, most notably Article 5 (2) and (3) InfoSoc Directive.

<sup>274</sup> ECtHR (Chamber), 18 December 2012, case of *Yildirim v. Turkey*, Appl. no. 3111/10, see in particular para. 62.

<sup>275</sup> ECtHR (Chamber), 18 December 2012, case of *Yildirim v. Turkey*, Appl. no. 3111/10, para. 64.

<sup>276</sup> ECtHR (Chamber), 18 December 2012, case of *Yildirim v. Turkey*, Appl. no. 3111/10, para. 66.

<sup>277</sup> See e.g. an argument to that effect Reda et al. (2020), p. 8; Romero Moreno, *IRLCT* (2020); Also in that sense: Spindler, *GRUR* (2020), p. 259. See for empirical support a study by the Electronic Frontier Foundation (EFF) which concludes that automated filtering mechanism (in this case Google’s ContentID software, harms creators and culture as a whole: Katherine Trendacosta, *Unfiltered: How YouTube’s Content ID Discourages Fair Use and Dictates What We See Online*, EFF (10 December 2020) available at: <https://www.eff.org/wp/unfiltered-how-youtubes-content-id-discourages-fair-use-and-dictates-what-we-see-online>, last accessed 25.01.2021.

interest of users to exercise lawful uses underlines a hierarchy between Article 17(4) and 17(7) which does not become immediately apparent from the overall structure of Article 17. Nevertheless, contrary to what the governments of France and Spain have argued in the hearing on the annulment action in *Case C-401/19*, the wording of Article 17(7) read in the light of FR mandates that uploads are not initially filtered and reinstated after the user appeals through a complaint mechanism.<sup>278</sup> Instead, the default position is that uploads should initially be available and rightholders can then flag them to the OCSSP which, in the absence of any further indication in the text of the CDSM Directive, has to assess the veracity of the claim. This is also the position taken by the European Commission and the European Parliament during the hearing on the Polish challenge to Article 17.<sup>279</sup> The procedural safeguards should not work to the detriment of the user but still enable rightholders to indicate infringing content. Against takedowns, subsequent to reasoned and reasonable complaints, users would then still have the opportunity to complain and demand redress, possibly, as is argued below, through ADR mechanisms offered by an independent institution.<sup>280</sup> Article 17(9) requires that out-of-court mechanisms are made available to users to “not deprive the user of the legal protection afforded by national law”. The disputes before such bodies should be settled impartially.

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<sup>278</sup> Keller, *Article 17: (Mis)understanding the intent of the legislator*, available at: <http://copyrightblog.kluweriplaw.com/2021/01/28/article-17-misunderstanding-the-intent-of-the-legislator/>, accessed: 28.01.2021, criticizing a report on “Content Recognition tools on Digital Sharing Platforms: Proposals for the Implementation of Article 17 of the EU Copyright Directive” published on 19.01.2021 and commissioned by the French High Council for literary and artistic property – CSPLA (<https://www.culture.gouv.fr/Sites-thematiques/Propriete-litteraire-et-artistique/Conseil-superieur-de-la-propriete-litteraire-et-artistique/Travaux/Missions/Mission-du-CSPLA-sur-les-outils-de-reconnaissance-des-contenus-et-des-oeuvres-sur-les-plateformes-de-partage-en-ligne-II>). According to the report, the availability of infringing content can cause significant economic harm for rightholders, which justifies the “rare, limited and proportional infringement of freedom of expression” resulting from the application of automated filtering. Keller however notes that this reading of Art. 17, which validates automated filtering and gives preference to ex post redress mechanisms to safeguard user’s rights, is not backed by the legislative history of the provision, as “the true intent of the EU legislator has been to add strong independent user rights safeguards in an effort to get Article 17 past the finish line”.

<sup>279</sup> Keller, *CJEU hearing in the Polish challenge to Article 17: Not even the supporters of the provision agree on how it should work*, available at: <http://copyrightblog.kluweriplaw.com/2020/11/11/cjeu-hearing-in-the-polish-challenge-to-article-17-not-even-the-supporters-of-the-provision-agree-on-how-it-should-work/>, accessed: 25.01.2021.

<sup>280</sup> See *infra* 3.6, see for example the Finnish proposal for implementing Article 17 as described by Keller, *Finnish Article 17 implementation proposal prohibits the use of automated upload filters*, available at: <http://copyrightblog.kluweriplaw.com/2020/12/23/finnish-article-17-implementation-proposal-prohibits-the-use-of-automated-upload-filters/>, accessed: 25.01.2021.

b. The imperatives of exceptions and limitations

Article 17(7) CDSM provides that users of online content-sharing services shall be able to rely on the exceptions or limitations for (a) quotation, criticism, review and the (b) the use for the purpose of caricature, parody or pastiche when uploading or making available content generated by users. First and foremost, this formulation ('shall') makes these exceptions mandatory, as opposed to their equivalents in the InfoSoc Directive.<sup>281</sup> Furthermore, singling out these exceptions from all the others included in Article 5(2) and (3) InfoSoc Directive suggests that these two specific sets of exceptions are more important, or distinguish themselves in some other way from all other exceptions. It is safe to say, in any case, that the exceptions or limitations that must be available to users of online content-sharing services are highly reflective of the right to freedom of expression and artistic freedom.<sup>282</sup> Their appearance in Article 17 is another indication of the importance of FR, in particular the informational FR of users.<sup>283</sup>

This freedom would be restricted if uses falling within the scope of one of the exceptions listed, and certainly also other exceptions that are available under the respective national laws, would be prevented by general or specific filtering. The specific importance of certain types of expression, particularly speech of a political nature,<sup>284</sup> would weigh heavily against the application of content filters by OCSSPs that would inevitably create collateral effects on lawful speech.<sup>285</sup> For this purpose, procedural safeguards are essential.

The operation of such procedural safeguards by platforms raises further problems which are rooted in the lack of full harmonization of copyright exceptions in the EU. Not only does the assessment of whether a particular assessment is infringing require a delicate legal analysis when a use potentially falls within the scope of a copyright exceptions. But

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<sup>281</sup> See Articles 5(3)(d) & (k) InfoSoc Directive.

<sup>282</sup> See for example Jütte, *Finding the Balance in Copyright Law: Internal and External Control Through Fundamental Rights in: Torremans (2020)*, p. 473, see also Szpunar, *C-476/17 Pelham and Others*, para. 77.

<sup>283</sup> Underlining this is recital 70 CDSM Directive, which states that "[t]he steps taken by online content-sharing service providers in cooperation with rightholders should be without prejudice to the application of exceptions or limitations to copyright, including, in particular, those which guarantee the freedom of expression of users." See further Quintais et al., *JIPITEC* (2019), pp. 278-279, the authors argue that the scope of the exceptions and limitations for quotation, criticism, review and the use for the purpose of caricature, parody or pastiche mentioned in Article 17(7) is the same as in Article 5(3) InfoSoc Directive.

<sup>284</sup> Cf. ECtHR (5<sup>th</sup> section), 10 January 2013, case of *Ashby Donald and other v. France*, Appl. no. 36769/08, para. 32.

<sup>285</sup> As a result, the mandatory nature of the exceptions or limitation listed in Article 17(7) should significantly limit OCSSPs' obligations to implement automated filters. Because the current technological state of the art does not permit distinguishing between lawful and unlawful uploads, the application of filters must ensure that these exceptions must be exercisable by users of online content-sharing platforms, and that such uses cannot be blocked or filtered. It is also necessary, in order to ensure the effective exercise of exceptions and other lawful uses, and to avoid chilling effects, that suspected unlawful content that does not pass the 'manifestly illegal' threshold remains online.

these relevant exceptions might be implemented in one Member State while they remain unimplemented in another. Article 17(7) merely requires that certain exception *must* be available for users of online platforms, but it does not mean that in different Member States users cannot also rely on others. Diverging national lists of copyright exceptions therefore add another layer of complexity to the obligations of OCSSPs under Article 17.

c. Procedural safeguards

The removal of works or in cases in which access has been disabled, users of online content-sharing platforms must have access to effective and expeditious complaint and redress mechanisms.<sup>286</sup> AG Szpunar in *Glawischnig-Piesczek* underlined that users must be able to challenge implementing measures of intermediaries before a court as a safeguard for the exercise of freedom of expression.<sup>287</sup> The specific design of the mechanisms is not described by Article 17(9) CDSM, thus adding to the uncertainty with regard to a sufficient protection of the rights of users, but the standards that apply in order to enable users to challenge unjustified takedowns and staydowns of their uploaded content are laid down here.

First and foremost, complaint mechanisms must be effective and expeditious. This requires that OCSSPs make resources available to process user requests relatively fast. Depending on the nature of the content, the urgency of a complaint will differ, while slightly longer processing periods could be considered proportionate for content with an entertainment purpose, which can nevertheless be protected by Article 13 EUCFR. Content that serves to participate in a current political debate, or which comments on current events, will require a more expedited procedure.<sup>288</sup> These differentiations will have to be embedded in complaint mechanisms in order to safeguard the exercise of FR.

The design of complaint and redress mechanisms can also not be decoupled from considerations on the design of Article 17(4) obligations. The amount of and the way how content is filtered will determine the volume of complaints platforms will have to handle and how much resources they have to expend on establishing complaint and redress mechanisms.<sup>289</sup> This correlation has direct implications on OCSSPs freedom to conduct a business under Article 16 EUCFR, especially because decisions to remove content pursuant to Article 17(4)(b) must be subject to human review.

Whereas these obligations to ensure proper (human) review of likely

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<sup>286</sup> Article 17(9) CDSM Directive.

<sup>287</sup> AG Szpunar, C-18/18 *Glawischnig-Piesczek*, para. 65, cf. Kuczerawy, & Rauegger, *C.M.L. Rev.* (2020), p. 1516.

<sup>288</sup> See to that effect Senftleben, *SSRN* (2019), p. 9.

<sup>289</sup> Essentially, the more content OCSSPs will have to filter and block, or otherwise disable access to, the more resources online platform operators will have to invest in complaint mechanisms.

automated takedowns and staydowns and removal requests serve to ensure the rights of users, the burden imposed on OCSSPS is not insignificant. Moreover, the proportionality considerations under Article 17(5) relate expressly only to obligations arising under Article 17(4). Placing this obligation on OCSSPS would neither respect the right to an effective remedy and a fair trial, nor the freedom to conduct a business of OCSSPs. Instead, this mandated element of human review must be located elsewhere, preferable in the out-of-court mechanisms expressly referred to in Article 17(9).

F. *Resolving fundamental rights conflicts through an institutional mediator*

Our analysis of the FR implications of Article 17 CDSM Directive has demonstrated that within the express wording, and certainly within a narrow reading of Article 17, a fair balance of interests is extremely difficult if not impossible to achieve.<sup>290</sup> More critically, the restrictive and limiting effects Article 17 will inevitably have on the rights of users and platform operators are not sufficiently defined in the text of the provision. Instead, the burden of the task to protect the rights of rightholders must be borne by OCSSPs, which also have to make critical decisions which will, in many cases, restrict the right to freedom of expression and the right to artistic freedom. This burden has, as we have amply demonstrated, significant restrictive effects on the freedom to conduct a business of platform operators, not least by failing to provide legal certainty as to the specific scope of the obligations OCSSPs incur under Article 17. Moreover, the lack of legal certainty created by insufficient harmonization of important aspects of copyright law in the EU (e.g. limitations and exceptions and moral rights), combined with the foreseeable differing transpositions of Article 17 in the EU Member States, creates further difficulties for OCSSPs with potentially detrimental effects of the rights of users and rightholders, and certainly for platform operators.

One of the most critical defects of Article 17 is that normative decisions on the balance between the various FR are outsourced to private platform operators, who, in addition, will have to provide a quasi-judicial appeals infrastructure to mediate between rightholders and users. Putting this responsibility in the hands of private economic actors not only burdens them with costly procedures but also fundamentally undermines the effective protection of FR if these actors have their own economic interests which will most likely influence their decision making.

A possible solution to this triangular dilemma would be to introduce an institutional intermediary.<sup>291</sup> The legislative seed from which such a

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<sup>290</sup> See in general on the difficulty on providing legislative guidance for the operation of upload filters: Sartor, & Loreggia (2020), p. 64.

<sup>291</sup> As suggested in similar form by Frosio & Geiger, *SSRN* (2020), pp. 42-44, proposing the creation of a “Digital Single Market and Ethics EU Observatory” to monitor and

regulatory institution can be developed lies buried in Article 17(9). In the adopted version of Article 17, “out-of-court” redress mechanisms are foreseen for users,<sup>292</sup> which should also have access to a court “or another relevant judicial authority to assert the use of an exception or limitation”.<sup>293</sup> We argue, however, that an institution that deals, certainly in last instance, with user complaints could also serve to pre-emptively safeguard the rights of users and rightholders and develop guidelines and best practices to enable OCSSPS to comply with their obligations.<sup>294</sup> An independent institution that sits firmly at the intersection of the various interests could more realistically contribute, through several mechanisms, to maintaining a fair and proper balance between the FR at stake.<sup>295</sup>

First, such an ‘intermediary institution’ could determine the standards that apply to targeted filtering obligation. Targeted filtering is undoubtedly necessary to create a proper balance within Article 17 and is not excluded by Article 17(8). Therefore, the task to define what uploads constitute ‘manifestly infringing’ material which can then be subject to advance filtering should be delegated to a neutral independent third party, ideally an EU oversight institution that would *inter alia* have the task to guarantee a FR compliant implementation of Art. 17 at least in this respect. Substantively, it is certainly not sufficient to rely on standards

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regulate *inter alia* the new platform liability regimes implemented by the CDSM Directive and the new proposed Digital Services Act; see also Garstka, Guiding the Blind Bloodhounds: How to Mitigate the Risks Article 17 of Directive 2019/970 Poses to the Freedom of Expression in: Torremans (2020), pp. 350-351, proposing to introduce a dedicated EU- wide neutral, administrative body which could help in ensuring the adequate implementation and functioning of the enforcement schemes introduced by art. 17 CDSM; Kulk, *Internet Intermediaries and Copyright Law, Towards a Future-proof EU Legal Framework* (2018), p. 302 sq, proposing to move from private ordering to co-regulation though the active involvement of a governmental body to ensure transparency and “that the rights and interests of users are sufficiently considered and protected”. As Kulk convincingly argues, “co-regulation can help to protect basic principles, such as the protection of FR, the need for transparency, and a fair consideration of the rights and interests of all affected parties. Specifically regarding copyright law, co-regulation enables governments to prevent that stronger stakeholders- intermediaries and copyright owners- make agreement to undermine the copyright balance” (at 303). See more generally Perel, & Elkin-Koren, *Stan. Tech L. Rev* (2016), p. 531, who advocate increasing the competence of regulators to supervise and secure transparency of copyright enforcing algorithms.

<sup>292</sup> See recital 70 CDSM Directive, which specifically states that “Member States should also ensure that users have access to out-of-court redress mechanisms for the settlement of disputes. Such mechanisms should allow disputes to be settled impartially.”

<sup>293</sup> Article 17(9) CDSM Directive; the authors of another study suggest external alternative dispute resolution bodies to ensure the fundamental rights of users, see Alexandre de Streel, & Martin Husovec, *The e-commerce Directive as the cornerstone of the Internal Market. Assessment and options for reform. Study requested by the IMCO Committee* (2020), p. 48.

<sup>294</sup> See also Sartor & Loreggia (2020), p. 65, the authors suggest more generally applicable to platforms that the Commission draws up guidelines which can then be implemented by existing national regulatory media or communication authorities. However, the authors also ponder the possibility of establishing of a new European authority to regulate online platforms.

<sup>295</sup> Sketching the design of such an authority would obviously go beyond the scope of this paper.

such as identity or significant quantitative congruencies. The standard of what constitutes ‘manifestly infringing’,<sup>296</sup> should be developed and constantly reviewed by this institution that is vested with judicial or quasi-judicial powers.

Thereby, OCSSPs would be relieved from the responsibility to decide in borderline cases between lawful and unlawful uses, giving such decisions more legitimacy; and the rights of users would be better safeguarded by avoiding most overblocking of lawful content.

Second, notice and takedown and staydown decisions could be administered by such an independent institution, with the same benefits as outlined in the preceding paragraphs. In addition, interposing an independent institution in the cooperation between users and rightholders ensured observance with the right to a fair trial and an effective remedy. ADR mechanisms to mediate conflicts between rightholders, platform and users and develop best practices and guidelines for filtering practice that would respect EU primary law will also need to be implemented and could be appointed to this institution.<sup>297</sup>

Third, an independent institution could be charged to draw up and develop more concrete and binding guidelines that OCSSPs and rightholders could rely on when fulfilling their obligations under Article 17(4). Users would equally benefit from more guidance on the distinction between lawful and unlawful uses. The experience that could be gathered by an independent copyright body would be invaluable not only for mediating between OCSSPs, users and rightholder.<sup>298</sup> This experience could also help to identify and justify further need for harmonization of substantive copyright law and monitor the necessity to adapt the legislative framework to adapt it to new technological, economic and societal circumstances.

However, until such an independent system or further guarantees to secure FR-compliant filtering measures are put in place at EU level, Art. 17(4) seems very hard to reconcile with the FR guaranteed by both the EU Charter and the ECHR.

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<sup>296</sup> As an example of a targeted, restrictive standard that would be deemed appropriate in the light of FR. It should however be noted that such a standard is not the panacea. The appreciation of what is ‘manifestly illegal’ is still context-specific, and what is “manifestly illegal” in a certain situation can still be non-infringing in another context. This clearly shows the need to monitor closely by an independent third party the definition and the practicability of this criteria.

<sup>297</sup> For such a proposal see Frosio & Geiger, *SSRN* (2020), p. 42 sq.; the institution could also be tasked with providing for redress and appeals mechanisms required under Article 17(9).

<sup>298</sup> Already proposing an independent regulation authority or an EU Copyright council, tasked among other to secure freedom of expression in the context of disputes around creative re-uses and copyright limitations, see Geiger, *UCIL Rev.* (2018), p. 457. More generally, the idea of Copyright Council in the EU has been developed by Franciska Schönherr in her Ph.D. thesis under the direction of Christophe Geiger defended at the University of Strasbourg on 3 October 2017. See Franciska Schönherr, ‘The Construction of an EU Copyright Law, Towards a Balanced Institutional and Legal Framework’ (PhD thesis, University of Strasbourg 2017).

## CONCLUSIONS

The problem with Article 17 is its incompatibility with the Treaties of the EU and the fundamental basic principles of EU law. First, the contradictions and vague concepts which we have exposed above turn the transposition of Article 17 into an extremely complicated exercise for national legislators. It is at the national level where important normative decisions will have to be made, which impact on the fundamental rights of users, rightholders and platform operators. However, after the *Schrems II* ruling it is clear that such normative determinations under EU law must be made by the EU legislator and cannot be left to national parliaments. Second, the difficult task left to national legislators under the current formulation of Article 17 will very likely not lead to a level of harmonization that would have justified the exercise of Article 114 TFEU as legal basis for internal market harmonization.<sup>299</sup> Draft implementation bills of the Directive in several Member States are already showing that Article 17 will be implemented in various diverging ways, which will augment the confusion already created by a provision with unclear wording and conflicting aims to the detriment of the creation of a true Digital Single Market.<sup>300</sup>

Article 17 creates a complicated construct of rights and obligations

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<sup>299</sup> For a similar criticism in relation to the InfoSoc Directive see P. Bernt Hugenholtz, Why the Copyright Directive is unimportant, and possibly invalid, 22(11) *European Intellectual Property Review* (2000), 499-505: "Since the Directive has little or nothing to offer in terms of legal certainty or harmonisation (or anything else, for that matter), one must question the solidity of its legal basis in the EC Treaty" (...) In sum, the Directive lacks a proper legal basis, and should be annulled"; Ana Ramalho, *The Competence of the European Union in Copyright Lawmaking*, (Baden-Baden: Springer, 2016), p. 126, the use of Art. 114 TFEU as a competence for the EU should lead to "an assessment of whether the provisions of the directive at stake can actually achieve de facto harmonization"; the author further underlines that a broad wording in a harmonizing measure "might not lead to an effective harmonization of national laws, since Member States might interpret it in different ways." (p. 130), see also Ana Ramalho, The competence and rationale of EU copyright harmonization, in: Eleonora Rosati (ed.), *Routledge Handbook of EU Copyright Law*, (Abingdon, New York: Routledge, 2021 *forthcoming*). Looking at the competence issue in respect to Art. 17 and its challenge is important since according to CJEU case law, the grounds of lack of competence of the EU must be raised by Court *ex officio* (i.e. even if the parties failed to raise them), see Koen Lenaerts, Ignace Maselis, Kathleen Gutman, *EU Procedural Law* (Oxford: Oxford University Press, 2014), p. 365.

<sup>300</sup> See Paul Keller, *Divergence instead of guidance: the Article 17 implementation discussion in 2020 – Part I*, available at: <http://copyrightblog.kluweriplaw.com/2021/01/21/divergence-instead-of-guidance-the-article-17-implementation-discussion-in-2020-part-1/>, accessed: 25.01.2021. See also Agnès Lucas-Schloetter, L'article 17 de la directive 2019/790 sur la responsabilité des plateformes de partage de contenu culturels: clarification des règles préexistantes ou nouveau régime sui generis ?, *Propriétés Intellectuelles* 2021, n° 78, p. 6 : "Sa version finale, longue de dix alinéas et dont le moins qu'on puisse dire est qu'elle ne brille pas par sa clarté, est le fruit des âpres négociations et marchandages de dernière minute qui ont été nécessaires pour que le texte puisse être adopté".

that seems to be based on the assumption that a balance within this construct can be maintained and adjusted by technological means. “The answer to the machine is in the machine”, to quote a famous article of the 1990s<sup>301</sup>, at a time where all hopes were put by rightholders and subsequently policy makers in technology- namely technical protection measures- to solve the difficulties to enforce copyright in the digital environment.<sup>302</sup> Despite huge efforts in the EU and worldwide, we know that technical protection has not solved the issue of mass infringements of copyright law. Twenty years later, it seems that the same mistakes are made.

Filtering technology has not reached the level of sophistication that would avoid most collateral effects. As a result, the balance between the FR must be struck by private parties through a system of cooperation between rightholders and OCSSPs and quasi-adjudication of user complaints. In the formulation of Article 17, an external arbiter which would ensure compliance with FR is missing. “The answer to the machine should not be in the machine”, or in short: what is acceptable online or what is not needs to be decided collectively and not by a few, and via independent mechanisms that duly safeguards FR.<sup>303</sup>

Furthermore, Article 17 fails to provide specific guidance on the priority of outcomes. Whether the requirement to make works and other subject matter unavailable to protect the rights of rightholders is absolute, or whether the rights of users to perform lawful acts have to be given priority when OCSSPs design their mechanism to comply with their own obligations, is not apparent from the legal text. This is arguably so because a strict determination based on general standards how a proper balance must be struck is difficult. The reference to proportionality as an arbiter between the competing FR is also unhelpful because the obligations and guarantees established in Article 17 are extremely difficult, if not impossible, to reconcile.

Without external intervention decisions whether to prioritise the rights of rightholders or the rights of users would fall to OCSSPs, who would have to invest significant resources to make this decision on countless of occasions. This is further problematic for two reasons. First, the immense efforts required would restrict their freedom to conduct a business, especially if OCSSPs would have to act as a quasi-judicial actor. Second, and more importantly, OCSSPs lack the legitimacy to make such decision, which should be reserved to an independent body that considers the interests of all involved parties form a more neutral normative

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<sup>301</sup> Charles Clark, *The Answer to the Machine is in the Machine*, in: P. Bernt Hugenholtz (ed.), *The Future of Copyright in a Digital Environment*, (Aalphen an den Rijn: Kluwer Law International, 1996), p. 139.

<sup>302</sup> See the WIPO Copyright Treaties of 1996 and the InfoSoc Directive of 2001, Article. 6.

<sup>303</sup> Christophe Geiger, *The answer to the machine should not be the machine: safeguarding the private copy exception in the digital environment*, 30(4) *European Intellectual Property Review* (2008), 121-129, arguing that the answer to the machine should not be in the machine and one could think of replacing Clark’s sentence by the following one: “The answer to Copyrights’ problems is to be found within Copyright”.

perspective and can apply all necessary procedural safeguards.

By failing to properly address the FR tension in online enforcement on content-sharing platforms, Article 17 does not provide for a legal framework that creates a proper balance between the various interest and FR. In its current form, it is difficult not to consider it in violation of Article 11 EUCFR, but also other FR, including the right to property and the freedom to conduct a business.

It is clear that the implementation of the various obligations arising under Article 17 requires careful consideration. The general wording of Article 17(4) leaves much room for flexibility which can be exercised either by strict and detailed legislative prescription, or by imposing outcome-based due diligence obligations for OCSSPs. The question whether Article 17(4) requires OCSSPs to filter, however, does not arise. Under the technological framework described in this article, the fulfilment of the obligation to ensure the unavailability of content or prevent the upload of works which have been notified can only be achieved by installing filters that identify infringing content before it becomes available (again).

Therefore, the use of filtering technology should be carefully monitored not by OCSSPs themselves, but by an external institution, which serves as a supervisory authority on the subject matter which platforms can filter. The introduction of an independent institution would serve to recognize that the platform landscape has “drastically changed”<sup>304</sup> since the adoption of the ECD and that other mechanisms are required to ensure the rights of all interested parties.

An independent institution would not leave the adaptation to these new circumstances solely in the hands of private parties who would negotiate above the heads of users what content to filter, but it would take the responsibility to make important decisions on the balancing of rights and FR. Such a ‘judicial intermediary’ should further be tasked to develop guidelines and good practices that OCSSPs can rely on and when determining whether they comply with the “best efforts” requirement under Article 17(4). We thus believe that only the creation of an independent entity, combined with a more concrete pronouncement of the balance of rights and obligation under Article 17 in the future would guarantee a FR-compliant implementation of Article 17 and construct a socially accepted and acceptable system of liability for content uploaded by users. In the absence of such an institution, it is hard to imagine how the provision could be “saved” from a complete annulment by the CJEU.

The annulment of this unworkable provision would then give the European legislator a great opportunity to elaborate a balanced liability regime for platforms and to implement it in a manner compliant with fundamental rights. This could be done without difficulty in the context of the ongoing discussion of the proposed Digital Service Act<sup>305</sup>, which

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<sup>304</sup> P9\_TA(2020)0274, point B.

<sup>305</sup> Proposal for a regulation of the European Parliament and of the Council on a Single

main purpose is in fact to regulate the activities and responsibilities of platforms<sup>306</sup> and which faces similar challenges with regard to the protection of fundamental rights.<sup>307</sup> The proposed regulation would then be able to create a unified, horizontal and clearer approach to deal with illegal content online, coupled with an appropriate independent EU institutional monitoring and control mechanism. Indeed, an exciting perspective for the creation of a performing, competitive but at the same time ethical digital single market in the EU.

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Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, 15.12.2020, COM (2020) 825 final.

<sup>306</sup> See in this sense the Explanatory Memorandum of the Proposed regulation, p. 2: “The proposal defines clear responsibilities and accountability for providers of intermediary services, and in particular online platforms, such as social media and marketplace (...). Building on the key principles set out in the e-Commerce Directive, which remain valid today, this proposal seeks to ensure the best conditions for the provision of innovative digital services in the internal market, to contribute to online safety and the protection of fundamental rights, and to set a robust and durable governance structure for the effective supervision of providers of intermediary services.

<sup>307</sup> See more detailed Frosio & Geiger, *SSRN* (2020).