

ReCreating Europe



COPYRIGHT CONTENT MODERATION IN THE EU: AN INTERDISCIPLINARY MAPPING ANALYSIS

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TABLE OF CONTENTS

Table of Contents.....	3
Acronyms	6
List of tables	8
List of Figures	10
Preface and acknowledgements.....	12
Executive Summary.....	14
Recommendations for future policy actions	21
1. Introduction	24
2. Conceptual Framework, Methodology and Methods.....	27
2.1. Research questions	27
2.2. Content moderation in the context of regulation of, by and on platforms.....	28
2.2.1. (Platform) governance and (platform) regulation	29
2.2.2. Regulation “of” platforms.....	30
2.2.3. Regulation “by” platforms	30
2.2.4. Regulation “on” platforms	32
2.3. Defining Content Moderation: a Legal Perspective	33
2.3.1. The content moderation definition in the DSA.....	34
2.3.2. Copyright content moderation: working definition.....	36
2.4. The Structures of Copyright Content Moderation: a sociological perspective.....	38
2.5. “Online platforms” engaged in content moderation.....	44
2.5.1. EU law terminology: a brief tour.....	44
2.5.2. Other platform terminologies.....	52
2.6. Defining “access to culture”.....	53
2.6.1. “Access to culture” from an interdisciplinary perspective: a possible approach	54
2.6.2. The descriptive dimension of access to culture in content moderation	55
2.6.3. The normative dimension of the concept of access to culture	57
2.7. Methods.....	58
2.7.1. Doctrinal Legal Research: EU Level Mapping and Comparative Legal Research	58
2.7.2. Social science methods	60
3. Legal Mapping at EU Level	73
3.1. Pre-existing legal framework: the interplay between the InfoSoc and e-Commerce Directive	73
3.1.1. The evolution of the right of communication to the public	74
3.1.2. Injunctions and liability exemptions	78

3.1.3. Direct liability and liability exemptions at a crossroads	82
3.2. The road to the new Directive	84
3.3. Article 17 CDSMD: Brief Overview	87
3.4. Article 17 CDSMD in depth	89
3.4.1. The concept of Online Content-Sharing Service Provider (OCSSPs)	89
3.4.2. The Authorisation Dimension: Direct liability and merger of restricted acts	92
3.4.3. Relation to the hosting liability exemption in the e-Commerce Directive	95
3.4.4. Best efforts to obtain an authorization (also as a condition for liability exemption)...	96
3.4.5. The liability exemption mechanism proper: preventive/proactive and reactive measures	98
3.4.6. Proportionality assessment and factors	100
3.4.7. Special regime for (small and) new OCSSPs.....	101
3.4.8. Substantive and procedural safeguards.....	102
3.4.9. Privacy and Data Protection.....	112
3.5. The CJEU Judgment in Case C-401/19 and the normative hierarchy of art. 17: User rights and safeguards, preventive measures and permissible filtering	113
3.5.1. Before the judgment in Case C-401/19: the discussion on user rights and safeguards vs preventive measures	113
3.5.2. The CJEU Grand Chamber Judgement in C-401/19 – Republic of Poland vs Commission and Council.....	120
3.5.3. The implications of Case C-401/19 for copyright content moderation	123
3.6. Interface with the DSA: brief reference.....	126
4. Legal Mapping at National Level: Comparative Analysis	133
4.1. Preliminary information.....	133
4.2. Key findings of the first phase questionnaire	135
4.2.1. Hosting service providers as <i>users</i> of copyright-protected content.....	135
4.2.2. Hosting service providers as <i>intermediaries</i> for access to copyright-protected content	
139	
4.2.3. End-users.....	146
4.3. Key findings of the second phase questionnaire	152
4.3.1. Legislative history.....	152
4.3.2. Definitions	162
4.3.3. Authorization	165
4.3.4. Liability	166
4.3.5. Safeguards (exceptions and limitations; procedural safeguards).....	173
4.4. Summary and conclusion	179
5. Mapping of Online Platforms' Structures of Copyright Content Moderation	185

5.1. How are copyright content moderation rules organized by platforms into public documents?	186
5.2. Which copyright content moderation rules do different platforms employ to regulate copyright, and how have they changed over time?	189
5.2.1. Copyright content moderation rules' two main categories.....	189
5.2.2. Case Studies	206
5.3. How do platforms' automated copyright content moderation systems work?	259
5.3.1. Usage of automated copyright content moderation.....	259
5.3.2. Overview of Rights Manager, Content ID and Audible Magic	261
5.3.3. Case study: Facebook Inc.'s Rights Manager	273
5.4. Discussion.....	283
5.4.1. Complexification and Opacification	284
5.4.2. Platformisation and Concentration.....	286
5.5. Interim Conclusions	288
6. Conclusions and Policy Recommendations.....	290
6.1. Conclusions	290
6.2. Recommendations for future policy actions.....	300
REFERENCES	303
Literature	303
National Reports Experts (Chapter 4)	316
Institutional Documents	317
Court of Justice of the EU (CJEU) Judgements and Advocate General (AG) Opinions.....	318
European Court of Human Rights (ECtHR) Judgements	320
National Judgements	320
Table of Legislation (International and EU)	323
Annexes.....	326
Annex I. National Legal Questionnaires and related documents	327
Annex I/A. Phase 1 Questionnaire National Legal Mapping	328
Annex I/B. Phase 2 Questionnaire National Legal Mapping	331
Annex I/C. Relevant national norms for the transposition of the CDSMD	336
Annex I/D. Leading academic sources and documents of judicial or administrative authorities related to the national transposition of art. 17 CDSMD.....	338
Annex II. Codebook Used in The Analysis of Platforms' T&Cs	342
Annex III. List of questions about Rights Manager sent to Facebook.....	346
Annex IV. Rights Manager's application form.....	351

ACRONYMS

AI	Artificial Intelligence
CDSMD	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
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CMO	Collective Rights Management Organisation
DMCA	Digital Millennium Copyright Act
DSA	Digital Services Act (as approved by the European Parliament by legislative resolution of 5 July 2022 on the proposal for a regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC (COM(2020)0825 – C9-0418/2020 – 2020/0361(COD))
DSM	Digital Single Market
e-Commerce	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 [2000] OJ L178/1
Directive	
EC	European Commission
ECL	Extended Collective License(s)
ECS	European Copyright Society
E&Ls	Exception and /or limitations
Enforcement	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 157, 30.4.2004)
Directive	
EP	European Parliament
EU	European Union
IGF	Internet Governance Forum
InfoSoc Directive	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
IP	Intellectual Property
ISSPs	Information society service providers
NTD	Notice-and-takedown

NSD	Notice-and-staydown
OCSSP	Online content-sharing service provider
P2B	Platform to Business
Technical Standards Directive	Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (Text with EEA relevance) OJ L 241, 17.9.2015, p. 1–15
TEU	Treaty on the European Union
T&Cs	Terms and Conditions
TRIPS	Agreement on Trade Related Aspects in Intellectual Property
UGC	User-generated content
UDHR	Universal Declaration of Human Rights
VLOP	Very Large Online Platform
WBM	Internet Archive's WayBack Machine
WIPO	World Intellectual Property Organisation
WCT	WIPO Copyright Treaty
WPPT	WIPO Performances and Phonograms Treaty

LIST OF TABLES

Table 1. Relationship SQRs and Chapters/Deliverables.....	28
Table 2. Sample of 15 platforms chosen to be analysed. Source: Authors.	63
Table 3 Total number of versions collected ("C") and analysed ("A") of eight kinds of police-like documents, for mainstream, alternative and specialised platforms.....	187
Table 4. Copyright content moderation rules' normative types, their addressees, prescriptive intensities and verbs that best describe them. Source: Authors.....	190
Table 5. List of users' rights regarding copyright content moderation. Source: Authors.....	191
Table 6. List of platforms' rights regarding copyright content moderation. Source: Authors.	192
Table 7. List of platforms' obligations regarding copyright content moderation. Source: Authors...	193
Table 8. List of users' obligations regarding copyright content moderation. Source: Authors.....	194
Table 9. List of platforms' expectations about users regarding copyright content moderation. Source: Authors.....	195
Table 10. List of platforms' principles regarding copyright content moderation. Source: Authors..	196
Table 11. List of procedures regarding copyright content moderation. Source: Authors.....	196
Table 12. List of copyright content moderation rules' subjects. Source: Authors	197
Table 13. List of platforms' infringement avoidance rules. Source: Authors.	198
Table 14. List of platforms' manual content removal rules. Source: Authors.....	199
Table 15. List of platforms' automated moderation rules. Source: Authors.....	200
Table 16. List of copyright dispute rules. Source: Authors.	201
Table 17. List of penalties rules. Source: Authors.....	202
Table 18. List of copyright exceptions rules. Source: Authors.....	203
Table 19. List of transparency rules. Source: Authors.	205
Table 20. List of monetisation rules. Source: Authors.....	205
Table 21. Facebook's content moderation rules with the number of mentions to them, 2004-2006. Source: Authors.	211
Table 22. Facebook's content moderation rules, with the number of mentions to them and core rules highlighted in light orange, 2006-2009. Source: Authors.....	212
Table 23. Facebook's content moderation rules, with the number of mentions to them, 2009-2016. Source: Authors.	214
Table 24. Facebook's content moderation rules, with the number of mentions to them, 2016-2020. Source: Authors.	217
Table 25. SoundCloud's copyright content moderation rules, with the number of mentions to them, 2007-2011. Source: Authors.	225
Table 26. SoundCloud's copyright content moderation rules, with the number of mentions to rules and the core rules highlighted in light orange, 2011-2014. Source: Authors.....	226

Table 27. SoundCloud's copyright content moderation rules, with the number of mentions to them, 2016-2020. Source: Authors	228
Table 28. PornHub's copyright content moderation rules, with the number of mentions to them, 2007-2009. Source: Authors.....	235
Table 29. PornHub's copyright content moderation rules, with the number of mentions to them and the core rules highlighted in light orange, 2010-2014. Source: Authors.....	236
Table 30. PornHub's copyright content moderation rules, with the number of mentions to them, 2015-2019. Source: Authors.....	237
Table 31. PornHub's copyright content moderation rules, with the number of mentions to them, 2019-2020. Source: Authors.....	239
Table 32. FanFiction's copyright content moderation rules, with the number of mentions to them, 2005-2008. Source: Authors	246
Table 33. FanFiction's copyright content moderation rules, with the number of mentions to them, and the core rules highlighted in light orange, 2009-2020. Source: Authors.....	247
Table 34. Movement's copyright content moderation rules, with the number of mentions to them, 2010-2006. Source: Authors	253
Table 35. DTube's copyright content moderation rules, with the number of mentions to them, 2019. Source: Authors	258
Table 36. DTube's copyright content moderation rules, with the number of mentions to them, 2019-2020. Source: Authors.....	258
Table 37. List of the automated copyright content moderation systems employed by a selection of mainstream, alternative and specialised platforms. Source: Authors.....	259
Table 38. Overview of Rights Manager, Content ID and Audible Magics application and identification procedures. Source: Authors	262
Table 39. Overview of Rights Manager, Content ID and Audible Magics automated actions, disputes protocols and business models. Source: Authors.....	263

LIST OF FIGURES

Figure 1. ISSPs Functions e-Commerce Directive.....	47
Figure 2. OCSSPs in the context of ISSPs.....	49
Figure 3. Intermediary service provider categories DSA (excluding online search engines).....	50
Figure 4. OCCSSPs as online platforms in DSA framework	51
Figure 5. Overlap between DSA and CDSMD	128
Figure 6. Example of overlap between regulatory regime in the case of OCSSPs.....	129
Figure 7. Number of Facebook's kinds of public documents, rules and mentions to rules related to copyright content moderation, 2004-2020. Source: Authors	206
Figure 8. Proportions of Facebook's copyright content moderation rules, grouped according to their normative type, 2004-2020. Source: Authors.....	208
Figure 9. Proportions of mentions to Facebook's copyright content moderation rules, grouped according to their normative type, 2004-2020. Source: Authors.....	209
Figure 10. Proportions of Facebook's copyright content moderation rules, grouped according to their subject, 2004-2020. Source: Authors.....	210
Figure 11. Proportion of mentions to Facebook's copyright content moderation rules, grouped according to their subject, 2004-2020. Source: Authors.....	210
Figure 12. Number of SoundCloud's kinds of public documents, rules and mentions to rules related to copyright content moderation, 2007-2020. Source: Authors.	221
Figure 13. Proportions of SoundCloud's copyright content moderation rules, grouped according to their normative type, 2007-2020. Source: Authors.....	222
Figure 14. Proportions of mentions to SoundCloud's copyright content moderation rules, grouped according to their normative type, 2007-2020. Source: Authors.....	223
Figure 15. Proportions of SoundCloud's copyright content moderation rules, grouped according to their subject, 2007-2020. Source: Authors.....	224
Figure 16. Proportions of mentions to SoundCloud's copyright content moderation rules, grouped according to their subject, 2007-2020. Source: Authors.....	224
Figure 17. Number of PornHub's kinds of public documents, rules and mentions related to copyright content moderation, 2007-2020. Source: Authors.....	231
Figure 18. Proportions of PornHub's copyright content moderation rules, grouped according to their normative type, 2007-2020. Source: Authors.....	232
Figure 19. Proportions of mentions PornHub's copyright content moderation rules, grouped according to their normative type, 2007-2020. Source: Authors.....	233
Figure 20. Proportions of PornHub's copyright content moderation rules, grouped according to their subject, 2007-2020. Source: Authors.....	234
Figure 21. Proportions of mentions PornHub's copyright content moderation rules, grouped according to their subject, 2007-2020. Source: Authors.....	234

Figure 22. Number of FanFiction's kinds of public documents, rules and mentions to rules related to copyright content moderation, 2000-2020. Source: Authors.....	242
Figure 23. Proportions of FanFiction's copyright content moderation rules, grouped according to their normative type, 2000-2020. Source: Authors.....	243
Figure 24. Proportions of mentions FanFiction's copyright content moderation rules, grouped according to their normative type, 2020. Source: Authors.....	244
Figure 25. Proportions of FanFiction's copyright content moderation rules, grouped according to their subject, 2000-2020. Source: Authors.....	245
Figure 26. Proportions of mentions to FanFiction's copyright content moderation rules, grouped according to their subject, 2000-2020. Source: Authors.....	245
Figure 27. Number of Diaspora's kinds of public documents, rules and mentions to rules related to copyright content moderation, 2010-2020. Source: Authors.....	250
Figure 28. Proportions of Diaspora's copyright content moderation rules, grouped according to their normative type, 2010-2020. Source: Authors.....	251
Figure 29. Proportions of mentions to Diaspora's copyright content moderation rules, grouped according to their normative type, 2010-2020. Source: Authors.....	251
Figure 30. Proportions of Diaspora's copyright content moderation rules, grouped according to their subject, 2010-2020. Source: Authors.....	252
Figure 31. Proportions of mentions to Diaspora's copyright content moderation rules, grouped according to their subject, 2010-2020. Source: Authors.....	252
Figure 32. Number of DTube's kinds of public documents, rules and mentions to rules related to copyright content moderation, 2019-2020. Source: Authors.....	254
Figure 33. Proportions of DTube's copyright content moderation rules, grouped according to their normative type, 2019-2020. Source: Authors.....	255
Figure 34. Proportions of mentions DTube's copyright content moderation rules, grouped according to their normative type, 2019-2020. Source: Authors.....	256
Figure 35. Proportions of DTube's copyright content moderation rules, grouped according to their subject, 2019-2020. Source: Authors.....	257
Figure 36. Proportions of mentions DTube's copyright content moderation rules, grouped according to their subject, 2019-2020. Source: Authors.....	257
Figure 37. Diagram of Rights Manager's application process, as of September 2021. Source: Authors.....	274
Figure 38. Screenshot of our application rejection e-mail from Rights Manager, with personal details redacted. Source: Authors	277
Figure 39. Diagram of Rights Manager's copyright violation identification and action processes, as of September 2021. Source: Authors.....	278
Figure 40. Diagram of Rights Manager's dispute process between two reference file uploaders, as of September 2021. Source: Authors.....	282
Figure 41. Diagram of Rights Manager's process between reference file owner and content uploader. Source: Authors	283

PREFACE AND ACKNOWLEDGEMENTS

This research is part of the reCreating Europe project, which has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No. 870626. This report describes the results of the research carried out in the context of Work Package (WP) 6 on the mapping of the EU legal framework and intermediaries' practices on copyright content moderation and removal. The report is an updated and extended version of deliverable *D.6.2. Final Report on mapping of EU legal framework and intermediaries' practices on copyright content moderation and removal*, which includes our research in the following tasks: Tasks T.6.1.1 (EU Level Mapping); Task T.6.1.2 (Comparative National Level Mapping); Task T.6.1.3 (Private Regulations by Platforms: ToS, Community Guidelines).

Due to highly dynamic nature of the legislative process and judicial developments in our field of research, we decided to extend and update the initial version of this report so as to reflect the following developments: the Grand Chamber judgement of the Court of Justice of the EU on Case C-401/19 - *Poland v Parliament and Council* (26 April 2022), national implementations of the Copyright in the Digital Single Market Directive (2019/790), as examined by our national experts in a second phase of national questionnaires we ran; the final approval of the Digital Services Act Regulation, resulting from a European Parliament legislative resolution of 5 July 2022. As regards the latter, since at the time of writing this Regulation has not yet been published in the Official Journal of the European Union, we make reference throughout this report to the numbering of provisions as listed in the European Parliament's legislative resolution.

The nature of the research described in this report is that of a mapping exercise, on which the subsequent evaluative work in WP6 will be developed, in particular the deliverables D.6.3 (*Final Evaluation and Measuring Report - impact of moderation practices and technologies on access and diversity*) and D.6.4 (*Best Practices and Policy Recommendations Brief*). As such, we are cautious to delimit our normative analysis and recommendations to what follows clearly from our mapping analysis. The majority of the research for this report was carried between the 2020 and 2021, with the exception of the aforementioned extensions and updates, which were concluded by July 2022. The empirical research of the report, mostly reflected in Chapter 5, was concluded in 2021.

The ideas and arguments that form the basis of this report have been iterated gradually by the authors over the course of several years of scholarly work, including during the period of this research project. Parts of the report are reproduced or adapted from previously published or forthcoming work. We identify these clearly with footnotes in the respective sections and subsections of this report.

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The Authors,

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EXECUTIVE SUMMARY

This mapping Report addresses the following main research question: how can we map the impact on access to culture in the Digital Single Market (DSM) of content moderation of copyright-protected content on online platforms?

After an introduction, **Chapter 2** develops a conceptual framework and interdisciplinary methodological approach to examine copyright content moderation on online platforms and its potential impact on access to culture. The analysis clarifies our terminology, distinguishes between platform “governance” and “regulation”, elucidates the concept of “online platform”, and positions our research in the context of regulation “of”, “by” and “on” platforms. Our legal analysis focuses on the regulation “of” platforms, predominantly through EU and national law. Our empirical analysis focuses on a subset of the regulation “by” platforms, namely (1) the rules they set to moderate copyright-protected content – their terms and conditions (T&Cs), and (2) the systems that platforms deploy to automatically moderate and enforce copyright through computational techniques, such as content recognition and filtering/blocking tools.

This chapter also advances a working definition of “copyright content moderation”, which builds on the concept of “content moderation” in the Digital Services Act (DSA). In doing so, we highlight the fact that many content moderation activities are not explicitly regulated in EU copyright law. Hence, the regulation of such activities is mostly left to the complementary application of other instruments (e.g., the DSA), national legislators’ margin of discretion, and – perhaps predominantly – private ordering by online platforms. Our research shows that EU copyright law mostly focuses on certain measures aimed at addressing the availability or accessibility of content, such ex ante filtering, blocking or removal of content. This results in regulatory gaps in the coverage of other copyright content moderation activities, in particular rules on measures: (1) affecting the visibility and monetization of content or (2) addressing a user’s ability to provide information, e.g., relating to the termination or suspension of his account.

Finally, we briefly outline a possible approach to define access to culture for purposes of content moderation, highlighting the descriptive and normative dimensions of the concept. The *descriptive dimension* posits that the “quality” of copyright content moderation is correlated to access to culture, because access to culture is considered embedded in the existing copyright framework. Since this framework is assumed to strike the appropriate balance between exclusivity in copyright protection and access to culture, any variation in that balance – beyond the margin of interpretation allowed by law – will impact on access to culture. The focus of our approach is on the “downstream” issue of

mitigation of errors in content moderation (i.e., false positives and false negatives). This is particularly relevant in the context of EU copyright law, since the crux of the balance sought by the Advocate General (AG) and the Court of Justice of the EU (CJEU) in case C-401/19 – on the validity of art. 17 of Copyright in the Digital Single Market Directive (CDSMD) – is placed on whether ex ante filtering measures can be deployed while avoiding the risks of over-blocking (and false positives) to platform users' right to freedom of expression.

The *normative dimension*, on the other hand, rejects the notion that the existing copyright framework strikes the optimal balance between exclusivity in copyright protection and access to culture. The model suggests that substantive law relevant in the field of copyright can be amended in a way that changes the balance with the result that it further increases access to culture by providing more freedoms to third parties to use and disseminate protected works, without encroaching on the legitimate interest of copyright holders. The actual practices of content moderation by platforms are affected by the state-enacted law (including case law) that platforms are subject to, which determines their “autonomy space” in determining such practices. Under this framework, adjustments to state-enacted law can affect the content moderation practices of platforms either by narrowing down their autonomy space (e.g., by broadening the scope of liability for platforms) or by raising the costs of acting outside the autonomy space (e.g., introducing more severe sanctions and more effective remedies). Both the descriptive and normative approach are useful to frame and understand EU copyright law's approach to regulating content moderation by platforms. These approaches will be further developed in a subsequent evaluation report.

Chapter 3 carries out a mapping of copyright content moderation by online platforms at secondary EU law level. The chapter starts with an analysis of the baseline regime from which art. 17 CDSMD departs from, which we call the pre-existing *acquis*. EU law has been subject to a high level of harmonization stemming from many directives on copyright and related rights, the interpretation of which is determined by the case law of the CJEU. In particular, the legal status of copyright content moderation by online platforms under this regime is mostly set by the Court's interpretation of arts. 3 and 8(3) InfoSoc Directive – on direct liability for communication to the public and injunctions against intermediaries – and arts. 14 and 15 e-Commerce Directive – on the hosting liability exemption and the prohibition on general monitoring obligations. We explain this case law and its implications for platform liability and content moderation obligations up to the Court's Grand Chamber judgment in *YouTube and Cyando*, and how developments contributed to the proposal and approval of art. 17 CDSMD. Setting aside the political nature of legislative processes, from a systematic and historical perspective, art. 17 CDSMD and subsequently the DSA can be seen as the result of efforts in EU law

and its interpretation by the Court for the last 20 years to adapt to technological developments and the changing role and impact of platforms on society. The result has been an “enhanced” responsibility for platforms, characterized by additional liability and obligations regarding content they host, as well as an increased role of fundamental rights – especially of users – in the legal framework.

The heart of the analysis in this chapter is the complex legal regime of art. 17 CDSMD, which we examine in light of existing scholarship, the Commission’s Guidance (COM/2021/288 final), and the AG Opinion and Court’s Grand Chamber judgment in Case C-401/19. Our analysis sets out in detail the different components of this hybrid regime, including:

- The creation of the new legal category of “online content-sharing service providers” (OCSSPs), a sub-type of hosting service providers under the e-Commerce Directive, and “online platforms” under the DSA;
- The imposition of direct liability on OCSSPs for content they host and provide access to;
- The merged authorization regime for acts of OCSSPs and their uploading users, provided the user act does not generate significant revenue;
- The *lex specialis* nature of art. 17 in relation to art. 3 InfoSoc Directive and art. 14 e-Commerce Directive, which is endorsed explicitly by the Commission’s Guidance and AG Opinion in C-401/19, and in our view also implicitly by the Court in the same judgment;
- The relationship between the prohibition on general monitoring obligations in art. 15 e-Commerce and art. 17(8) CDSMD, where we argue that the latter may be understood as being of merely declaratory nature;
- The complex liability exemption mechanism that comprises best efforts obligations on OCSSPs (to obtain an authorization and to impose preventive and reactive measures) in art. 17(4); and
- The substantive and procedural safeguards in the form of exceptions or limitations (E&Ls) or “user rights” and in-/out-of-platform (complaint and redress mechanisms in art. 17(7) and (9).

Our analysis addresses multiple points of uncertainty in this regime, some of which will no doubt be subject to litigation at the national level and likely the CJEU. It is however worth highlighting the following aspects, as they also reflect possible points of improvement of this regime, from the perspective of copyright content moderation.

First, whether an online platform is subject to the pre-existing regime (as updated by the DSA) or the new regime in art. 17 CDSMD will depend on whether it qualifies as an OCSSP. Our research shows that there is significant legal uncertainty as regards this qualification, even despite the Commission’s Guidance. To be sure, certain large-scale platforms, especially with video-sharing features (e.g. YouTube, Meta/Facebook, Instagram), clearly qualify as OCSSPs. Others will also clearly be excluded from the scope of art. 17 because they are covered by the carve-outs in art. 2(6) CDSMD. Still, there remains a significant grey area, which affects both larger platforms and (especially) medium-sized and small platforms. The main reason is that the definition includes a number of open-ended concepts (“main purpose”, “large amount”, “profit-making purpose”) that ultimately require a case-by-case assessment of what providers qualify as an OCSSP. Furthermore, even where it can be established that

a platform falls within the scope of the legal definition, it might remain unclear to what extent (i.e., for which services) it does so. The outcome might well be that the same provider is subject to art. 17 CDSMD for certain services and the pre-existing regime for others, resulting in significant complexity in determining liability regimes and respective content moderation obligations.

Second, a crucial part of our analysis of platforms' liability and copyright content moderation obligations refers to the normative hierarchy of art. 17 CDSMD. We provide a critical analysis of how the Commission's Guidance has attempted to address this hierarchy and strike the balance between the competing rights and interests of rightsholders, platforms and users, drawing from the arguments in the AG Opinion and the Court's Grand Chamber judgment in case C-401/19. We identify the following important implications from the judgement.

- The Court recognizes that art. 17(7) includes an obligation of result. As such, Member States must ensure that these E&Ls are respected despite the preventive measures in paragraph (4), qualified as "best efforts" obligations. This point is reinforced by the Court's recognition that the mandatory E&Ls, coupled with the safeguards in paragraph (9), are "user rights", not just mere defences.
- The Court rejects the possibility of interpretations of art. 17 that rely solely on ex post complaint and redress mechanisms as a means to ensure the application of user rights. That was for instance the position defended by certain Member States during the hearing before the Court and in their national implementations. Instead, the judgment clarifies that Member States' laws must limit the possibility of deployment of ex ante filtering measures; assuming that occurs, the additional application of ex post safeguards is an adequate means to address remaining over-blocking issues.
- The Court states unequivocally that only filtering/blocking systems that can distinguish lawful from unlawful content without the need for its "independent assessment" by OCSSPs are admissible. Only then will these measures not lead to the imposition of a prohibited general monitoring obligation under art. 17(8) CDSMD. Furthermore, these filters must be able to ensure the exercise of user rights to upload content that consists of quotation, criticism, review, caricature, parody, or pastiche. Considering the Court's statements in light of the previous case law and current market and technological reality, we conclude that only content that is "obviously" or "manifestly" infringing – or equivalent content – may be subject to ex ante filtering measures. Beyond those cases, for instance as regards purely "earmarked content", the deployment of ex ante content filtering tools appears to be inconsistent with the judgment's requirements.
- It remains unclear whether this reasoning applies more broadly to other types of illegal content beyond copyright infringement. If it does, it might help to shape the scope of prohibited general monitoring obligations versus permissible "specific" monitoring, with relevance for future discussions on the DSA. In drawing these lines, caution should be taken in the application of the "equivalent" standard in *Glawischnig-Piesczek*, which likely requires a stricter interpretation for filtering of audio-visual content in OCSSPs.

Finally, we provide a brief analysis of the interplay between art. 17 CDSMD and the potentially applicable provisions of the DSA to OCSSPs.¹ Departing from the observation that a platform may qualify as an OCSSPs under the CDSMD and an “online platform” (and “very large online platform”) under the DSA, we conclude that the DSA will apply to OCSSPs insofar as it contains rules that regulate matters not covered by art. 17 CDSMD, as well as specific rules on matters where art. 17 leaves a margin of discretion to Member States. This includes, to varying degrees, rules in the DSA relating to the liability of intermediary providers and to due diligence obligations for online platforms of different sizes. Importantly, we consider that such rules apply even where art. 17 CDSMD contains specific (but less precise) regulation on the matter. In our view, although there is legal uncertainty in this regard, such rules include both provisions in the DSA’s liability framework and in its due diligence obligations (e.g., as regards the substance of notices, complaint and redress mechanisms, trusted flaggers, protection against misuse, risk assessment and mitigation, and data access and transparency).

In light of the above, one important conclusion from our analysis concerns the emergence of a bifurcated legal framework for online platforms engaging in copyright content moderation. On the one hand, OCSSPs are subject to the regime of art. 17 CDSMD as regards liability and content moderation. On the other hand, non-OCSSPs are subject to the pre-existing regime under the InfoSoc and e-Commerce Directives (and soon the DSA), as interpreted by the CJEU (most recently in *YouTube and Cyando*). Although the regimes have similarities – and can be approximated by the Court’s interpretative activity – they are structurally different. This divergence may lead to further fragmentation, on top of the fragmentation that is to be expected by the national implementations of art. 17 CDSMD. To this we must add the application of the horizontal rules on content moderation liability and obligations arising from the DSA. In sum, the multi-level and multi-layered EU legal landscape on copyright content moderation that emerges from our mapping analysis is extremely complex.

Relatedly, as noted, certain copyright content moderation issues of relevance remain unregulated in the copyright *acquis*, namely rules on measures: affecting the visibility and monetization of content; and addressing a user’s ability to provide information, e.g., relating to the termination or suspension of his account. From our perspective, the issue of monetization is the most glaring regulatory gap, since monetization actions play a central and financially consequential role in platforms’ content moderation practices. We return to this point in our recommendations. Still as regards regulatory

¹ On this topic, we refer to our parallel research, which offers an in-depth analysis. See João Pedro Quintais and Sebastian Felix Schwemer, ‘The Interplay between the Digital Services Act and Sector Regulation: How Special Is Copyright?’ (2022) 13 European Journal of Risk Regulation 191.

gaps, it is important to underscore the complexity of the legal determinations and judgments required to assess human and algorithmic copyright content moderation practices. This strongly suggests a need for better transparency and access to data from platforms. Thus, serious consideration must be given to the potential application to OCSSPs and other copyright platforms of the DSA's transparency provisions, as well as to national solutions that impose transparency and data access obligations on OCSSPs and non-OCSSPs hosting protected content. In this regard, the German transposition law provides an promising blueprint in Section 19(3) UrhDaG (on rights to information).

Chapter 4 follows up on the EU level analysis with the comparative legal research at national level., based on legal questionnaires carried out in two phases with national experts in ten Member States. The key findings of the first phase questionnaire (pre-CDSMD implementation date) are as follows:

- Most Member States conceptualized service providers that store and give the public access to a large amount of protected content uploaded by their users; but the direct liability of such service providers was far from uniformly treated. E-Commerce, criminal and civil law concepts are alternatively or complementarily applied; and such liability is completely missing in some countries. The new regime in art. 17 CDSMD will therefore require the introduction of new mechanisms in most Member States studied.
- There appears to be a need for the transformation of the liability regime of OCSSPs in the Member States' laws. So far, injunctions, secondary liability, safe harbour and content moderation practices were mainly present in the analysed countries, unlike complaint-and-redress mechanisms, which were regulated only in a small number of Member States. Art. 17 CDSMD will require the implementation of all of these elements through amendments in the legal systems of Member States.
- End-users might in theory be directly liable for unauthorized uploading of protected subject matter to OCSSPs' systems, but such liability is rarely enforced in practice. Art. 17 CDSMD will also tend to push OCSSPs to authorize online users, and Member States' practices regarding end-user activities won't need to be amended significantly. On the other hand, several Member States will need to make more significant changes related to end-user flexibilities, user rights, and complaint-and-redress mechanisms.

The key findings of the second phase questionnaire (post the deadline for CDSMD implementation) are as follows.

- The implementation of art. 17 CDSMD (or the related legislative proposals) took place in nine of the Member States under analysis, with important differences as regards the implementation of the primary building blocks of art. 17: the economic rights affected; the new liability regime; or the balancing of fundamental rights of stakeholders. Such diversity suggests that the initial goal of the CDSMD to harmonize certain aspects of copyright in the digital single market might not be met, leading instead to a fragmented legal landscape.
- Nine of the Member States under analysis have implemented (or were in the process of implementing) art. 17. They can be grouped into three tiers: (1) the German and the Swedish models show above-the-average detail in the implementation of the new regime, with a special focus on the strengthened protection of user rights and detailed liability mechanisms; (2) the Estonian, French and the Dutch legislation applies a smaller number of individual solutions; (3) Denmark, Hungary, Ireland and Italy took a rather restrictive approach through an almost verbatim transplantation of art. 17 CDSMD. It is almost certain that all national

legislative institutions shall reconsider their domestic rules to make their laws fully compatible with the CJEU ruling in case C-401/19.

Our comparative research also flagged certain conflicting statements in the Commission's and the CJEU's view on the proper method of implementation and substance of the national laws that are consequential for national implementations, especially as regards compatibility with fundamental rights. The studied national solutions seem to be rather limited in terms of, e.g., the priority of user rights over content filtering. Despite that, it is important to note that there is still no consensus on the proper method of transposition of art. 17, namely as regards the question of whether it is preferable to follow a (near) verbatim or more sophisticated implementation of the provision. Still, considering the Commission's Guidance, the AG Opinion and the CJEU judgment in C-401/19, there are strong arguments that national implementations must go some way beyond quasi-verbatim transpositions. In light of the above, it is plausible that a number of preliminary references on different core aspects of art. 17 CDSMD will find their way to the CJEU in the short to medium term.

Chapter 5 mapped out the copyright content moderation structures adopted by 15 social media platforms over time, with a focus on their T&Cs (rules) and automated systems. The analysis suggests that two processes may explain these structures' development. The first is termed *complexification/opacification*. Our empirical work indicates that virtually all 15 platforms' T&Cs have become more intricate, in various ways and to different extents. Over time, more (kinds of) rules were introduced or made public, and these rules were communicated in increasingly more diverse sets of documents. These documents were changed and tweaked several times, producing sometimes a plethora of versions, often located in a dense web of URLs. We therefore conclude that the way platforms organize, articulate and present their T&Cs matters greatly. For one, under increasing public and policy pressure, platforms have felt the need to express and explain their practices and rules of operation, and they have done so with complex and greatly varying documentation. For observers, although this provides more information about platforms, it nevertheless makes understanding the trajectory of platforms and their T&Cs extremely challenging. For example, with YouTube as a major actor when it comes to copyright, our database of their highly fragmented T&Cs has not resulted robust enough to allow for a precise longitudinal examination of their rules. In that way, the very organization and presentations of T&Cs should be understood as one element of platforms' governance of content. Substantially, we demonstrated that complexification can be radically distinct, depending on which platforms one considers. Very large ones, such as Meta/Facebook, experienced an almost continuous and drastic transformation; smaller ones, such as Diaspora, have barely changed. Yet, when a change occurred, it made those sets of rules more difficult to comprehend.

Whilst our analysis did not take a longitudinal take on automated copyright content moderation systems, their emergence and eventual transformation into a central governance tool for various platforms is, in itself, an important element of broader complexification processes. These systems work at a scale that is hard to comprehend, through computational operations that are technically intricate, and under largely unjustified and seemingly arbitrary protocols on, e.g., how to appeal decisions. In other words, they are remarkably opaque, as are many of the T&Cs we studied. Our analysis points out that while in some cases some complexification might be impossible to avoid, opacification is by no means necessary or necessarily justifiable. From this perspective, then, the imposition by law of rules on platforms' internal content moderation procedures and their transparency is sensible and desirable.

The second process is *platformisation/concentration*. By categorizing rules into what we termed "normative types", we argue that various platforms in our sample altered their rules so as to give themselves more power over copyright content moderation, usually by increasing the number of their obligations and rights, which were, in turn, largely aligned with their own interests, logics and technologies. We suggested that this could be interpreted as a particular example of the broader phenomenon of "platformisation". But this transformation is not unidirectional. For platformisation enhances not only platforms' power but also their responsibilities over content moderation. It was curious to note, therefore, that while emboldening their normative legitimacy to control copyright, platforms did not necessarily alter their discursive focus on users-oriented rules. As with complexification, platformisation has been experienced differently by different platforms and deepened by the rise of automated copyright content moderation systems, which may severely impair ordinary users' ability to participate in and challenge removal decisions. Our research also suggests that this platformisation process might end up giving more power to large rightsholders, to the detriment of essentially smaller rightsholders and creators, as well as other users.

RECOMMENDATIONS FOR FUTURE POLICY ACTIONS

- Considering the potential for legal uncertainty and fragmentation of the digital single market as regards copyright content moderation, we recommend that the Commission reviews its Guidance on art. 17 CDSMD (COM/2021/288 final) in order to provide clearer guidelines on the definition of OCSSPs, especially for small and medium-sized online platforms.
- National legislators should review their national transpositions of art. 17 CDSMD to fully recognize the nature of the exceptions and limitations in paragraph (7) as "user rights", rather than mere defences.

- We further recommend that the Commission reviews its Guidance in order to provide guidelines from the perspective of EU law as to the concrete implications of a “user rights” implementation of paragraph (7) in national laws. This should include, to the extent possible, concrete guidance on what type of actions users and their representatives (e.g., consumer organisations) may take against OCSSPs to protect their rights.
- National legislators should review their national transpositions of art. 17 CDSMD to ensure that *ex post* complaint and redress mechanisms under paragraph (9) are not the only means to ensure the application of user rights, but rather a complementary means, in line with the Court’s judgment in Case C-401/19.
- We further recommend that the Commission’s Guidance is updated to fully reflect the Court’s approach in case C-401/19, as regards the complementary role of complaint and redress mechanisms under paragraph (9).
- The Commission should review its Guidance to clearly align it with the Court’s judgment in case C-401/19, namely by clarifying that: (1) OCSSPs can only deploy *ex ante* filtering/blocking measures if their content moderation systems that can distinguish lawful from unlawful content without the need for its “independent assessment” by the providers; (2) such measures can only be deployed for a clearly and strictly defined category of “manifestly infringing” content; and (3) such measures cannot be deployed for other categories of content, such as “earmarked content”. Member States should further adjust their national implementations of art. 17 CDSMD to reflect these principles.
- In implementing these principles, the Commission and Member States could take into consideration the approach proposed by the AG Opinion on how to limit the application of filters to manifestly infringing or “equivalent” content, including the consequence that all other uploads should benefit from a “presumption of lawfulness” and be subject to the *ex ante* and *ex post* safeguards embedded in art. 17, notably judicial review. In particular, the AG emphasized the main aim of the legislature to avoid over-blocking by securing a low rate of “false positives”. Considering the requirements of the judgment, in order to determine acceptable error rates for content filtering tools, this approach implies that the concept of “manifestly infringing” content should only be applied to uploaded content that is identical or nearly identical to the information provided by the rightsholder that meets the requirements of art. 17(4) (b) and (c) CDSMD.
- The Commission should review its Guidance to clarify which provisions in the DSA’s liability framework and due diligence obligations Chapters apply to OCSSPs despite the *lex specialis* of art. 17 CDSMD, within the limits of the Commission’s competence as outlined in art. 17(10) CDSMD.
- At EU level, EU institutions and in particular the Commission should explore to what extent copyright *acquis* already contains rules addressing content moderation actions relating to

monetization of copyright-protected content on online platforms (e.g., in arts. 18 to 23 CDSMD), and to what extent policy action is needed in this area. Further research is needed specifically on the imbalanced nature of the contractual relationship of online platforms and uploading users, as well as in the transparency and fairness of their remuneration.

- At EU level, EU institutions and in particular the Commission should explore the application of the DSA's provisions on transparency and access to data to OCSSPs and non-OCSSPs hosting copyright protected content, as well study and if adequate propose EU level action that imposes transparency and access to data obligations on online platforms regarding their copyright content moderation activities. Inspiration could be drawn by the design and implementation of the German national transposition law under Section 19(3) UrhDaG as regards rights to information. In that context, special care should be taken to assess the potential negative effects of requiring researchers to reimburse the platforms' costs related to complying with such requests. To the extent possible, the Commission should advance recommendations in this direction in its revised version of the Guidance on art. 17 CDSMD.

1. INTRODUCTION²

This Report describes the results of the research carried out in the context of WP6 on the mapping of the EU legal framework and intermediaries' practices on copyright content moderation and removal. The nature of the research described in this report is that of a mapping exercise, on which the subsequent evaluative work in WP6 is developed, in particular the deliverables D.6.3 (Final Evaluation and Measuring Report - impact of moderation practices and technologies on access and diversity) and D.6.4 (Best Practices and Policy Recommendations Brief).

This mapping report consists of six chapters. This Chapter 1 includes a brief introduction and outline of the Report. Chapter 2 identifies our research questions, sets out our conceptual framework and methodology. The main research question of this Mapping Report is as follows:

- How can we map the impact on access to culture in the Digital Single Market (DSM) of content moderation of copyright-protected content on online platforms?

For the purposes of this Report, we divide this research question in the following seven sub-research questions (**SQR**).

- SQR(1): How to conceptualise and approach from a methodological perspective the interdisciplinary analysis of content moderation of copyright-protected content on online platforms and its impact on access to culture in the DSM?
- SQR(2): How is the private and public regulatory framework for content moderation for online platforms structured?
- SQR(3): How do the various elements of that regulatory framework interact?
- SQR (4): How are copyright content moderation rules organized by platforms into public documents?
- SQR (5): Which copyright content moderation rules do different platforms employ to regulate copyright, and how have they changed over time?
- SQR (6): How do platforms' automated copyright content moderation systems work?
- SQR(7): How are the various elements of the regulatory framework and the online platforms' Terms and Conditions etc. likely to impact access to culture in DSM?

Chapter 3 carries out a legal mapping of the topic of this report at EU level. This corresponds to our work on Task T.6.1.1 (EU Level Mapping). Our focus here is the legal regime of art. 17 of the Copyright in the Digital Single Market Directive (**CDSMD**).³ To explain this complex provision and its implications, we first provide some context on the legal regime that precedes the CDSMD. We then briefly explain the legislative process leading to the adoption of the Directive, followed by a snapshot of the legal

² All authors contributed to this chapter.

³ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130/92 (CDSMD).

regime, including remarks relating to the European Commission’s stakeholder consultations and Guidance on art. 17, and the action for annulment of art. 17 initiated by the Polish government in Case C-401/19, which Grande Chamber judgment by the Court of Justice of the EU (**CJEU**) was published on 26 April 2022.⁴ We then offer a detailed analysis of art. 17, with an emphasis on its liability regime and rules with implication for copyright content moderation by OCSSPs. We briefly allude to the interface of art. 17 CDSMD with the Digital Services Act (DSA)⁵, which final version was agreed in the concluding stages of this Report.

Chapter 4 then follows with a detailed analysis of the findings of our comparative legal research at national level. The findings are based on two legal questionnaires carried out with national experts in ten Member States. This corresponds to our work on Task T.6.1.2 (Comparative National Level Mapping). The comparative legal questionnaire was designed to run in two main periods or phases. The *phase one* questionnaire collected and analysed legal data from the period preceding the implementation deadline of the CDSMD. As such, it focused on the status quo in this field of law. The *phase two* questionnaire was dedicated to the national implementations of art. 17 CDSMD, and the consequences of such implementation, and was carried out after the implementation deadline of the Directive. The phase one and two questionnaires aimed to allow a comparison of the legal environment of the service providers at issue in the pre- and post-implementation periods of the CDSMD. The collected data highlighted both the similarities and, in some cases, remarkable differences in the Member States’ legal systems both before and after art. 17 CDSMD, which cast doubt on the effectiveness of the provision for EU harmonisation in this field.

Chapter 5 uses qualitative methods to map out the copyright content moderation structures of key social media platforms, with a focus on their Terms and Conditions (rules) and automated systems. This corresponds to the empirical research carried out in the context of Task T.6.1.3 (Private Regulations by Platforms: ToS, Community Guidelines). The chapter first presents empirical findings regarding which kinds of public documents and rules have been adopted by a sample of 15 platforms, categorised as *mainstream* (Facebook, YouTube, Instagram, Twitter, SoundCloud), *alternative* (Diaspora, Mastodon, DTube, Pixelfed, Audius) and *specialised* (Vimeo, Twitch, Pornhub, FanFiction, Dribble). It also provides an in-depth longitudinal examination of how the copyright content

⁴ Case C-401/19, Republic of Poland v European Parliament and Council of the European Union, 26.04.2022, ECLI:EU:C:2022:297 (Poland v Parliament and Council).

⁵ Digital Services Act (as approved by the European Parliament by legislative resolution of 5 July 2022 on the proposal for a regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC (COM(2020)0825 – C9-0418/2020 – 2020/0361(COD)) (DSA). Since at the time of writing this Regulation has not yet been published in the Official Journal of the European Union, we make reference throughout this report to the numbering of provisions as listed in the European Parliament’s legislative resolution.

moderation rules of six case studies (Facebook, SoundCloud, PornHub, FanFiction, Diaspora, and DTube) changed since these platforms' launch, as well as a comparison between three automated copyright content moderation systems: Content ID (YouTube), Audible Magic (several platforms), and Rights Manager (Facebook), with a thorough description of the last one. Then, the chapter suggests that two dual processes seem to mark the evolution of platforms' copyright content moderation structures: (1) over time, these structures became more complex (more rules, spread on more types of documents), and opaquer (harder to access and understand); and (2) the control over copyright content moderation tilted strongly towards platforms themselves, a development that helped concentrate power in the hands of both platforms and large rights holders, at the expense of ordinary users and creators. While not equally true to all platforms we analysed, *complexification/opacification*, and *platformisation/concentration* seem to be some of the clearest developments in the recent history of private regulation of copyright content moderation.

Finally, Chapter 6 concludes with a summary of our analysis and recommendations for future policy actions.

2. CONCEPTUAL FRAMEWORK, METHODOLOGY AND METHODS⁶

This chapter identifies our interdisciplinary research questions, develops a conceptual framework, and explains our methods. The analysis proceeds as follows. We first outline our main research question and sub-questions (2.1). The remaining sections explain our methodology, conceptual framework and specific methods. We start by framing content moderation in the context of the regulation “of”, “by” and “on” platforms (2.2). We then develop a working definition of “copyright content moderation” from a legal perspective (2.3), discuss the structures of copyright content moderation from a sociological angle (2.4), examine the concept of online platform (2.5), and elucidate our approach and framing of “access to culture” (2.6). We conclude the chapter by explain the specific legal and empirical research methods used to answer our research questions (2.7).

2.1. RESEARCH QUESTIONS

The main research question of this Mapping Report is as follows:

- How can we map the impact on access to culture in the DSM of content moderation of copyright-protected content on online platforms?

For the purposes of this Report, the main research question is divided in the following sub-research questions (SQR).

- SQR(1): How to conceptualise and approach from a methodological perspective the interdisciplinary analysis of copyright-protected content on online platforms and its impact on access to culture in the DSM?
- SQR(2): How is the private and public regulatory framework for content moderation for online platforms structured?
- SQR(3): How do the various elements of that regulatory framework interact?
- SQR (4): How are copyright content moderation rules organized by platforms into public documents?
- SQR (5): Which copyright content moderation rules do different platforms employ to regulate copyright, and how have they changed over time?
- SQR (6): How do platforms’ automated copyright content moderation systems work?
- SQR(7): How are the various elements of the regulatory framework and the online platforms’ Terms and Conditions etc. likely to impact access to culture in DSM?

SQR(1) is addressed in the subsequent sections in this Chapter 2. The approach developed here informs the subsequent legal and empirical analysis. SQRs(2) and (3) are addressed from a descriptive legal perspective – as a mapping exercise – in Chapters 3 (at EU law level) and 4 (at national level).

⁶ All authors contributed to this chapter.

SQRs (4), (5) and (6) are addressed in Chapter 5, building on the empirical methods described in this Chapter 2. SQR(7) is only framed but not addressed in this Report, since it will be the core of a subsequent normative assessment (D.6.3.) based on our mapping research here. For ease of reference, Table 1 provides a schematic representation of this relationship.

Table 1. Relationship SQRs and Chapters/Deliverables

SQR		Chapter / Deliverable
1	How to conceptualise and approach from a methodological perspective the interdisciplinary analysis of content moderation of copyright-protected content on online platforms and its impact on access to culture in the DSM?	2
2	How is the private and public regulatory framework for content moderation for online platforms structured?	3 (EU Level)
3	How do the various elements of that regulatory framework interact?	4 (National Level)
4	How are copyright content moderation rules organized by platforms into public documents?	5
5	Which copyright content moderation rules do different platforms employ to regulate copyright, and how have they changed over time?	5
6	How do platforms' automated copyright content moderation systems work?	5
7	How are the various elements of the regulatory framework and the online platforms' Terms and Conditions etc. likely to impact access to culture in DSM?	D.6.3

To answer these research questions, we develop and use a specific methodology, including an underlying conceptual framework and terminology (see sections 2.2 to 2.6) – and research methods (2.7). Because of the complex nature of the social science methods used in our research, that specific section contains not only a description of such methods but also a more detailed explanation of the underlying methodology (see 2.7.2).

2.2. CONTENT MODERATION IN THE CONTEXT OF REGULATION OF, BY AND ON PLATFORMS

In this section we begin to address our first sub-research questions:

- SQR(1): How to conceptualise and approach from a methodological approach the interdisciplinary analysis of content moderation of copyright-protected content on online platforms and its impact on access to culture in the DSM?

The framing for our analysis is that the regulatory context of platforms be understood along three dimensions, namely the regulation *of*, *by* and *on* platforms. We explain this and associated terms in greater detail below.

2.2.1.(PLATFORM) GOVERNANCE AND (PLATFORM) REGULATION

Before moving further, it is important to disentangle the concepts of platform *regulation* and platform *governance*, since the latter is also used often in the analysis of content moderation.⁷ From our perspective, the (scholarly) debate on “platform regulation” and “platform governance”, as well as the broader scholarly debate on “regulation” and “governance” concepts, are not necessarily interconnected. The more recent terms of “platform regulation” and “platform governance” rather seem to emerge as concepts in each field that studies these topics.

Our aim is therefore to clarify our conceptual approach and how it relates to approaches followed in different scholarly traditions. “Regulation” and “governance” are terms often used interchangeably, sometimes without further clarification regarding their demarcation or conceptual meaning.⁸ In general terms, governance refers to broader processes of ordering whereas regulation is the narrower term that describes intentional and usually goal-directed interventions, often of a legal nature.⁹ Others differentiate regulation and governance: regulation regards the substantive rules, whereas governance relates to the institutional framework for rule-setting.¹⁰

In the work of media and legal scholars researching on platforms, the terms are also often used interchangeably.¹¹ Yet, platform governance often indicates a slightly broader scope of investigation that “capture[s] all of the many facets of how a social network governs the activity of its participants”¹²

⁷ See, e.g., on concept of platform governance and its relationship to content moderation Robert Gorwa, ‘What Is Platform Governance?’ (2019) 22 Information, Communication & Society 854; Robert Gorwa, Reuben Binns and Christian Katzenbach, ‘Algorithmic Content Moderation: Technical and Political Challenges in the Automation of Platform Governance’ (2020) 7 Big Data & Society 2053951719897945; Christian Katzenbach and Lena Ulbricht, ‘Algorithmic Governance’ (2019) 8 Internet Policy Review <<https://policyreview.info/concepts/algorithmic-governance>> accessed 27 January 2021.

⁸ Cf. for a discussion Jeanette Hofmann, Christian Katzenbach and Kirsten Gollatz, ‘Between Coordination and Regulation: Finding the Governance in Internet Governance’ (2017) 19 New Media & Society 1406.

⁹ Julia Black, ‘Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes’ (2008) 2 Regulation & Governance 137.

¹⁰ See e.g. Robert Baldwin, Martin Cave and Martin Lodge, ‘Introduction: Regulation—the Field and the Developing Agenda’, *The Oxford Handbook of Regulation* (2010) <<https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199560219.001.0001/oxfordhb-9780199560219-e-1>> accessed 17 February 2022; Christel Koop and Martin Lodge, ‘What Is Regulation? An Interdisciplinary Concept Analysis’ (2017) 11 Regulation & Governance 95.

¹¹ See, e.g., Tarleton Gillespie, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions That Shape Social Media* (Yale University Press 2018).

¹² Robert Gorwa, ‘The Shifting Definition of Platform Governance’ Centre for International Governance Innovation <<https://www.cigionline.org/articles/shifting-definition-platform-governance>> accessed 21 April 2021.

and not only factual rulemaking. This appears to resemble earlier discussions for instance in the “Internet Governance” literature.¹³

In the following, we explain in greater detail what is meant by regulation “of”, “on” and “by” platforms for the purposes of this report.¹⁴

2.2.2. REGULATION “OF” PLATFORMS

By regulation “of” platforms we refer to legislation and soft law of a public nature applicable to online platforms.¹⁵ In other words, the regulation is induced and influenced, at least to a certain degree, by actors other than the platform. This category would also encompass industry standards and other coordinated self-regulation, for example compliance with Santa Clara Principles on transparency and accountability in content moderation.¹⁶ Importantly, such regulation “of” platforms will not always have binding legal effect.

In this report, our focus is on the legal rules that shape the processes, norms and technologies that meet our definition of “content moderation” for certain types of online platforms. For example, in EU law, regulation of platforms would include the rules in: art. 17 CDSMD; arts. 12 to 15 e-Commerce Directive; the Recommendation (EU) 2018/334 on measures to effectively tackle illegal content; and many of the rules governing online platforms in the DSA. Our analysis in **Chapters 3 and 4** focuses on this type of regulation at the EU and national levels, respectively.

2.2.3. REGULATION “BY” PLATFORMS

Regulation *by* platforms refers to content moderation rules, technologies and processes adopted by “platforms” proper, i.e., a form of private ordering. This type of regulation can fit into two broad

¹³ See, e.g. Lee A Bygrave and Jon Bing (eds), *Internet Governance: Infrastructure and Institutions* (Oxford University Press 2009) <<https://oxford.universitypressscholarship.com/10.1093/acprof:oso/9780199561131.001.0001/acprof-9780199561131>> accessed 17 February 2022.

¹⁴ Related distinctions on modalities of regulation have been proposed in other areas of cyberlaw, see e.g. in the context of software, James Grimmelmann, ‘Regulation by Software’ (2005) 114 Yale Law Journal 1719; Lawrence Lessig, ‘The New Chicago School’ (1998) 27 The Journal of Legal Studies 661. More recently also by social scientists in relation to platform governance, see Tarleton Gillespie, ‘Regulation of and by Platforms’, *The SAGE Handbook of Social Media* (SAGE Publications Ltd 2018) <<https://sk.sagepub.com/reference/the-sage-handbook-of-social-media/i2081.xml>> accessed 17 February 2022.

¹⁵ NB the reference to public nature is meant to exclude e.g. MoUs from the scope of regulation *of* platforms; they are instead examples of regulation *by* platforms.

¹⁶ ‘Santa Clara Principles on Transparency and Accountability in Content Moderation’ (*Santa Clara Principles*) <<https://santaclaraprinciples.org/images/santa-clara-OG.png>> accessed 20 January 2022.

categories. First, Terms of Service and similar documents (Community/Policy Guidelines, etc.) adopted by platforms. Some authors go as far as to refer to terms of service as “platform law”.¹⁷

Second, regulation by platforms can be carried out through technological devices or code, such as in the case of algorithmic moderation systems (e.g., for filtering of illegal content). In this respect, we recognize that there exists an underexplored gap between what is stated in the substantive norms in terms of service and how algorithmic systems moderate content on platforms. Nevertheless, in the context of our empirical research we focus on selected terms of service and other norms that shape the processes, norms and technologies that meet our definition of “content moderation”. In EU law, this would include for instance what is covered by the definition of “terms and conditions” in the DSA:

*‘terms and conditions’ means all terms and conditions or clauses, irrespective of their name or form, which govern the contractual relationship between the provider of intermediary services and the recipients of the services.*¹⁸

For the purposes of this report, we will adopt this definition of **terms and conditions or “T&C”** to refer to all the terms and conditions or clauses, irrespective of their name or form, which govern the contractual relationship between the provider of intermediary services and the recipients of the services, namely those referring to copyright content moderation (defined below at 0) and examined in the context of our research.

The scope and meaning of regulation “by” platforms are shaped by the regulation “of” platforms. For example, in EU law, terms and conditions and similar norms are (or will be post-DSA) bound by the legal framework on what qualifies as “illegal content”, i.e., “any information, which, in itself or in relation to an activity, including the sale of products or the provision of services, is not in compliance with Union law or the law of any Member State, irrespective of the precise subject matter or nature of that law.”¹⁹ Importantly, copyright infringing content is one type of illegal content. Furthermore, the regulation “by” platforms, including the actual moderation practices of the platforms, is shaped

¹⁷ David Kaye, *Speech Police: The Global Struggle to Govern the Internet* (Columbia Global Reports 2019). More broadly see, e.g. Luca Belli and Jamila Venturini, ‘Private Ordering and the Rise of Terms of Service as Cyber-Regulation’ (2016) 5 Internet Policy Review <<https://policyreview.info/articles/analysis/private-ordering-and-rise-terms-service-cyber-regulation>> accessed 17 February 2022.

¹⁸ Art. 2(q) DSA. See also the more detailed definition of “terms and conditions” in art. 2(10) P2B Regulation. For an analysis of art. 12 DSA proposal, see Naomi Appelman, João Pedro Quintais and Ronan Fahy, ‘Article 12 DSA: Will Platforms Be Required to Apply EU Fundamental Rights in Content Moderation Decisions?’ (DSA Observatory) <<https://dsa-observatory.eu/2021/05/31/article-12-dsa-will-platforms-be-required-to-apply-eu-fundamental-rights-in-content-moderation-decisions/>> accessed 28 August 2021; Naomi Appelman, João Pedro Quintais and Ronan Fahy, ‘Using Terms and Conditions to apply Fundamental Rights to Content Moderation’ (Verfassungsblog) <<https://verfassungsblog.de/power-dsa-dma-06/>> accessed 7 October 2021.

¹⁹ Art. 2(g) DSA.

by the underlying regime that allocates the liability for copyright infringement between the platform and their users.

On the other hand, the regulation by platforms will to some extent influence and implement in practice the regulation of platforms. In this sense, T&Cs may determine for instance: (i) open concepts advanced by law to assess whether content is illegal (e.g., regarding certain copyright exceptions and limitations that require assessment of context); and (ii) for content that does not qualify as illegal, what constitutes for each platform harmful or otherwise objectionable content, which they may limit on their services.

Our empirical analysis in Chapter 5 focuses on this type of regulation.

2.2.4. REGULATION “ON” PLATFORMS

Finally, regulation “on” platforms refers to content moderation actions and processes performed by online platforms (including their employees or subcontractors, which we refer to as “human moderators”) within the specific framework set out by the platform.²⁰ This would also comprise the moderation performed by e.g., administrators of groups in accordance with the rights and responsibilities delegated by the platform itself. This term therefore refers to the procedural, organisational/institutional dimensions and factual implementation of the platforms’ self-regulation.

Naturally, this framework is shaped by the regulation “of” and “by” platforms described above. One example is the human-in-the-loop (human review) requirement in art. 17 CDSMD as an ex-post safeguard in the context of complaint and redress mechanisms.²¹

Our research does not directly address this type of regulation. Nevertheless, as pointers for future research we identify aspects at different stages aspects of the regulation “of”/“by” platforms that may affect the regulation “on” platforms.

²⁰ See, for early influential work on this topic, Sarah T Roberts, *Content Moderation* (2017) <<https://escholarship.org/uc/item/7371c1hf>> accessed 28 April 2021; Sarah T Roberts, *Behind the Screen* (Yale University Press 2019) <<https://yalebooks.yale.edu/book/9780300235883/behind-screen>> accessed 17 February 2022.

²¹ See art. 17(9), second paragraph CDSMD: “...Where rightholders request to have access to their specific works or other subject matter disabled or to have those works or other subject matter removed, they shall duly justify the reasons for their requests. Complaints submitted under the mechanism provided for in the first subparagraph shall be processed without undue delay, and decisions to disable access to or remove uploaded content shall be subject to human review”. On this provisions, see e.g. João Pedro Quintais and others, ‘Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics’ (2020) 10 JIPITEC <<https://www.jipitec.eu/issues/jipitec-10-3-2019/5042>>; Sebastian Schwemer and Jens Schovsbo, ‘What Is Left of User Rights? –Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime’ in Paul Torremans (ed), *Intellectual Property Law and Human Rights*, (4th edition, Wolters Kluwer 2020).

2.3. DEFINING CONTENT MODERATION: A LEGAL PERSPECTIVE

“Content moderation” is a broad concept with fuzzy borders. Without being exhaustive, it is possible to illustrate this point by identifying a variety of definitions that fall within a wide spectrum of activities by platforms.

On the one hand, some authors advance broader – or at least more general – definitions. For instance, in an influential article, Grimmelmann defines content moderation as a *broad set of governance mechanisms* “that structure participation in a community to facilitate cooperation and prevent abuse.”²² Roberts, for her part, views it as “the organized practice of screening user-generated content (UGC) posted to Internet sites, social media and other online outlets, in order to determine the appropriateness of the content for a given site, locality, or jurisdiction.”²³ Bloch-Webha similarly defines it as “the set of practices that online platforms use to screen, rank, filter, and block user-generated content”.²⁴ Finally, Gillespie et al. have recently defined the term as “the detection of, assessment of, and interventions taken on content or behaviour deemed unacceptable by platforms or other information intermediaries, including the rules they impose, the human labour and technologies required, and the institutional mechanisms of adjudication, enforcement, and appeal that support it”.²⁵

On the other hand, some authors advance stricter – or at least narrower – definitions. Gorwa, Binns and Katzenbach, for instance, propose to define algorithmic commercial content moderation “as systems that classify user-generated content based on either matching or prediction, leading to a decision and governance outcome (e.g. removal, geo-blocking, account takedown).”²⁶ This is a narrower definition of moderation than espoused by authors above, since Gorwa, Binns and Katzenbach investigate only systems that make decisions about content and accounts (exerting “hard

²² James Grimmelmann, ‘The Virtues of Moderation’ (2015) 17 Yale Journal of Law and Technology <<https://digitalcommons.law.yale.edu/yjolt/vol17/iss1/2>>. See also Giovanni De Gregorio, ‘Democratising Online Content Moderation: A Constitutional Framework’ (2020) 36 Computer Law & Security Review 105374. (building on Grimmelmann’s definition).

²³ Roberts (n 20). cf. Sarah Myers West, ‘Censored, Suspended, Shadowbanned: User Interpretations of Content Moderation on Social Media Platforms’ (2018) 20 New Media & Society 4366; Robyn Caplan, ‘Content or Context Moderation?’ (Data & Society 2018) <<https://datasociety.net/library/content-or-context-moderation/>> accessed 21 February 2022.

²⁴ Hannah Bloch-Wehba, ‘Automation in Moderation’ (2020) 53 Cornell International Law Journal 41.

²⁵ Tarleton Gillespie and others, ‘Expanding the Debate about Content Moderation: Scholarly Research Agendas for the Coming Policy Debates’ (2020) 9 Internet Policy Review <<https://policyreview.info/articles/analysis/expanding-debate-about-content-moderation-scholarly-research-agendas-coming-policy>> accessed 14 September 2021.

²⁶ Gorwa, Binns and Katzenbach (n 7).

moderation”) and exclude the litany of “soft” moderation systems (recommender systems, norms, design decisions, architectures) that form the base of e.g., Grimmelmann’s moderation taxonomy.²⁷

In this report, while taking these definitions as a background, we develop our own working definition of “copyright content moderation”, built on the legal definition advanced in the DSA.²⁸

2.3.1.THE CONTENT MODERATION DEFINITION IN THE DSA

The only example of a definition of content moderation in EU law is found in the DSA:

*‘content moderation’ means the activities, automated or not, undertaken by providers of intermediary services aimed, in particular, at detecting, identifying and addressing illegal content or information incompatible with their terms and conditions, provided by recipients of the service, including measures taken that affect the availability, visibility, and accessibility of that illegal content or that information, such as demotion, demonetisation, disabling of access to, or removal thereof, or the recipients’ ability to provide that information, such as the termination or suspension of a recipient’s account.*²⁹

The definition must be seen within its context of the DSA and would not preclude deviating definitions of “content moderation” in other areas.³⁰

It is useful to break down this definition into a positive (what is covered by the definition) and a negative scope (what is excluded from it).

Regarding its *positive scope*, “content moderation” covers activities of intermediary service providers.³¹ In other words, it applies to several types of intermediaries across the “stack” beyond the application layer³², not just to types of hosting service providers.

²⁷ Gorwa, Binns and Katzenbach (n 7).

²⁸ In this effort we will largely rely on the text of the legal proposal and not make reference to legal doctrine.

²⁹ Art. 2(p) DSA.

³⁰ An example for this is, e.g., the varying definitions in secondary EU legislation of a specific type of online intermediary, online search engine, in EU legislation, see Sebastian Felix Schwemer, Tobias Mahler and Håkon Styri, ‘Liability Exemptions of Non-Hosting Intermediaries: Sideshow in the Digital Services Act?’ (2021) 8 Oslo Law Review 4.

³¹ The definition of providers of intermediary services in the DSA comprises services relating to ‘mere conduit’, ‘caching’ and ‘hosting’ (art. 2(f)), continuing the e-Commerce Directive’s structure.

³² In the engineering community, networks often are described in layers, which each relate to a separate functional level of the network, cf., e.g. the Open Systems Interconnection (OSI) model. See ‘OSI Model’, , Wikipedia (2022) <https://en.wikipedia.org/w/index.php?title=OSI_model&oldid=1072600519> accessed 20 February 2022. We refer to the OSI model merely as a reference point for the notion of “stack”, which is used with different meanings in different fields.

In the second place, content moderation relates to *actions or activities that have a certain purpose* (“aimed at”), namely detecting, identifying and addressing either illegal content or information incompatible with the T&Cs of intermediary service providers, which could also include provisions on harmful content.³³

Third, in line with the scope of the DSA regulation, the *content at issue must be provided by the recipients of the service*.³⁴ In other words, the concept refers to content originating from the user and not the provider itself. For online platforms, at the current state of the technology, this is mostly content uploaded by users.

Fourth, the definition is merely *indicative and non-exhaustive*. It is an open clause that lists a range of measures that qualify as “content moderation”. This open definition comprises a general clause and different types of examples. The general definition states that content moderation includes measures that affect availability, visibility and accessibility *of that illegal content or that information*.³⁵ There are then two sets of examples of such measures. One set refers to measures on content or information: demotion, disabling access, and removal. The other exemplifies measures that relate to the user/account: termination of user account; suspension of user account.³⁶

In contrast to this broad and open positive scope, the DSA does not offer much in the way of negative delimitation of the definition. However, from the structure of definitions and legal obligations in the DSA, we note that the notion of “content moderation” appears to exclude “recommender systems”, which are defined as

*fully or partially automated system used by an online platform to suggest or prioritise in its online interface specific information to recipients of the service, including as a result of a search initiated by the recipient of the service or otherwise determining the relative order or prominence of information displayed;*³⁷

³³ By “harmful” content we mean that content that the platform defines as objectionable but that from a legal perspective is legal. This type of content is sometimes referred to as “lawful but awful”. See e.g., Eric Goldman and Jess Miers, ‘Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules’ (2021) 1 Journal of Free Speech Law 191, 194.

³⁴ Art. 2(b) DSA: ‘recipient of the service’ means any natural or legal person who uses the relevant intermediary service.

³⁵ It is also possible to conceptualise these measures to some extent as content moderation “remedies”. On this topic, under US law, see Eric Goldman, ‘Content Moderation Remedies’ [2021] Michigan Technology Law Review, Forthcoming <<https://papers.ssrn.com/abstract=3810580>> accessed 23 March 2021.

³⁶ NB that some of these examples are not fully technology neutral. For instance, the definition presupposes a recipient’s account that can be terminated or suspended, which may not be the case e.g., for platforms that are built on more decentralized systems.

³⁷ Art. 2(o) DSA.

In principle, the *action or measure of recommendation* that is taken by a provider when using a recommender system could be viewed as a measure that affects availability, visibility and accessibility of content in an “online platform”.³⁸ However, the concept of recommender system appears to be defined neutrally as applying to the operation of automated recommendation services for *all types of content* through an online interface, whereas “content moderation” targets measures aimed at disabling *illegal or harmful content* that infringe terms and conditions of an information society provider.

Another question is whether activities performed under the notice-and-action regime for hosting³⁹ would be considered “content moderation” in the meaning of the definition. On the one hand, the definition in art. 2(p) DSA refers to “activities undertaken by providers of intermediary services” that are “aimed at detecting, identifying and addressing” *inter alia* illegal content. A narrow reading of this provision could lead to the conclusion that it covers only activities that go *beyond* notice-and-action mechanisms required by law. But since the “disabling of access to” or “removal” of illegal content is covered by the definition, it is difficult to argue against the conclusion that also notice-and-action mechanisms (including e.g., trusted notifier/flagger arrangements) are considered content moderation.⁴⁰ This latter reading is also supported in the recitals, which notes that content moderation *includes* “the measures taken as a result of the application and enforcement of their terms and conditions.”⁴¹ Consequently, it also makes sense that measures resulting from or related to legal obligations to remove content are covered by the concept of “content moderation”.

2.3.2. COPYRIGHT CONTENT MODERATION: WORKING DEFINITION

For the purposes of this Report, we adopt as a working definition an adjusted version of that which is advanced in the DSA.

- ‘copyright content moderation’ means the activities, automated or not, undertaken by providers of hosting services – either as consequence of a legal notice-and-action obligation or as voluntary activity – aimed, in particular at detecting, identifying and addressing content or information that is illegal under EU copyright law and is incompatible with their T&Cs, provided by recipients of the service, including measures taken that affect the availability, visibility and accessibility of that illegal content or that information, such as demotion, demonetisation,
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³⁸ See e.g. on this topic Sebastian Felix Schwemer, ‘Recommender Systems in the EU: From Responsibility to Regulation’ (2022) 1 *Morals & Machines* 60.

³⁹ Art. 14 e-Commerce Directive and 5 DSA respectively.

⁴⁰ See generally on the concept of “trusted flagger” Naomi Appelman and Paddy Leerssen, ‘On “Trusted Flaggers”’ [2022] Yale ISP-WIII 1.

⁴¹ Recital 39 DSA.

disabling of access to, or removal thereof, or the recipients' ability to provide that information, such as the termination or suspension of a recipient's account.

It is important to briefly explain some adjustments to our definition, as compared to that advanced in the DSA. First, the content that is moderated must be protected by copyright (works) or related rights (other subject matter). We will only examine content moderation of other types of content (e.g., hate speech, terrorist content, etc.) to the extent necessary and relevant to the discussion on copyright-protected content.

Second, our focus is on providers of hosting services, a term which comprises online platforms. This will exclude other information society service providers (i.e., the provision of non-hosting services) related to functions of "mere conduit" and "caching".⁴² Although we explain this in further detail below in section 2.5, it is important to note here that (copyright) content moderation may also take place at other levels of the "stack", which directly affects the availability of content by providers of hosting services.⁴³ Importantly, for non-hosting service providers the moderation of content is not a legal consequence of the liability exemption regime.

Despite the relevance of content moderation activities outside hosting, our focus on providers of (especially user-upload) hosting services and copyright allow us to capture the most relevant players and activities for purposes of our research question, namely online content-sharing service providers (**OCSSPs**) under art. 17 CDSMD, and "online platforms" in the DSA.

Third, although we consider them to be covered by the definition of "content moderation", we will not investigate recommendation activities made by platforms via their recommender systems. Admittedly, the recommendation of content may very well have significant impact on access to culture (see below) in general, for example in relation to niche repertoires. Yet we delimit our study to forms of content moderation where the consequence is not increased visibility but unavailability of content. The reason for this is two-fold: firstly, from a copyright-perspective, the primary question to date relates to the availability/unavailability of copyright-protected content. Secondly, it is especially this form of moderation that has been in the focus by policy- and law-making at the EU level in the area of copyright.

⁴² See arts 12 and 13 e-Commerce Directive, as well as the definitions in art. 2(f) DSA.

⁴³ A prominent example outside copyright is the suspension of a right-wing website *The Daily Stormer* by the content delivery network Cloudflare. There exist for example MoU and trusted notifier/flagger arrangements with non-hosting intermediaries, see Schwemer, Mahler and Styri (n 30); Sebastian Felix Schwemer, 'Trusted Notifiers and the Privatization of Online Enforcement' (2019) 35 Computer Law & Security Review 105339.

In our view, our working definition is consistent with existing (and future) EU law and it both sufficiently precise and flexible to enable the type of mapping exercise and exploratory interdisciplinary research undertaken in this report.

2.4. THE STRUCTURES OF COPYRIGHT CONTENT MODERATION: A SOCIOLOGICAL PERSPECTIVE

From the perspective of the empirical research in this report, we take a sociological understanding of platforms' copyright content moderation and define it as a more or less stable ensemble of structures.

The concept of structure is overly used but rarely defined. Perhaps the clearest theoretical articulation of it was proposed by Sewell.⁴⁴ By reviewing and critiquing the work of key social theorists, Sewell advances his own definition of structures as composed of two kinds of elements. On the one hand, he argues, structures are made of symbolic and virtual *schemas*, not only the “binary oppositions that make up a given society's fundamental tools of thought, but also the various conventions, recipes, scenarios, principles of action, and habits of speech and gesture built up with these fundamental tools”.⁴⁵ *Resources*, on the other hand, are not symbolic but actual, and comprise both non-human (“objects, animate and inanimate, naturally occurring or manufactured”) and human (“physical strength, dexterity, knowledge”) elements, which are used to “enhance or maintain power” and are “unevenly distributed”.⁴⁶ Structures retain some level of independence but are continuously shaping one another, Sewell posited.

How can we translate this conceptualization to platforms' regulation of copyright? In this context, *schemas* might include the bundle of abstract normative assumptions that various actors (platforms, users, states) hold of what copyright is, whom it serves, and how it should or not be protected and enforced. There is much to be said – and studied – about these schemas. Yet, this report focuses on the *resources* that *platforms* create and employ to regulate copyright. There are innumerable elements that could be understood as platforms' copyright content moderation resources: what their owners or executives and employees know about copyright legislation, their computational skills, the physical devices and computational code that underpins platforms' interfaces, the actions taken by platforms' controllers and employees, to name a few.

⁴⁴ Sewell William H, ‘A Theory of Structure: Duality, Agency, and Transformation’ (1992) 98 American Journal of Sociology 1.

⁴⁵ Sewell (n 44) 8.

⁴⁶ Sewell (n 44) 9–10.

Two kinds of resources appear to be particularly relevant, though. Firstly, the (platform's) *rules* that copyright content moderation are based on. Here, rules should not be mistaken for unsaid social norms. Rather, they are the “publicly fixed codifications”⁴⁷ in which platforms explain to users, regulators and – to some extent – their own employees how copyright content moderation is and ought to be executed in their services. As noted above, we refer to these “house rules” as T&Cs.

Rules play a dual role, which is simultaneously *normative* and *performative*. Evidently, they are a central element in the definition of what is permitted and prohibited to not only users but platforms themselves. For even when these provisions do not explicitly define what platforms ought to do, they unavoidably make platforms responsible for their nature (are these rules ethical, legal, realistic?) and enforcement (do platforms follow their own precepts?). That is, the very public codification of what counts as an acceptable conduct creates expectations of accountability that are potentially mutual, even if radically inequitable. Since normativity is inherent to rules, our empirical analysis understands that the very examination of which copyright content moderations provisions are employed by platforms suffices to map out their normative role.

The second role is less evident and deserves further clarification. Our argument is that, by the virtue of being public, these rules are, inevitably, an organizational performance.⁴⁸ When a platform publishes its T&Cs, it most certainly takes into consideration how others will understand them, and the ways in which this understanding will reflect back on opinions and assumptions about the platforms. Rules *might* lead users (or at least influence them) to leave or join a social network, prompt policymakers to seek legal action or refrain from doing so, attract and repel potential employees and investors. In fact, rules will shape how people understand a platform even if the platform does not consciously approach such rules as a performance. For what a platform is depends considerably on what it aspires to be, and rules unavoidably suggest such telos.

Performativity directs our attention to the discursive aspects of rules. Put another way, how these provisions are conveyed matters. Our empirical research highlights two of those discursive aspects that, in our view, seem to be particularly relevant in the context of digital platforms. One of them refers to the rules' location, i.e., the sort of public documents whereby platforms choose to communicate their codes – termed here as Terms and Conditions or T&Cs. While this expression often refers to documents whose language resembles that of formal contracts (e.g., Terms of Service), it means here any public document drafted and published by platforms with the intention to

⁴⁷ Sewell (n 44) 8.

⁴⁸ Tarleton Gillespie (n 11).

communicate their rules. Different T&Cs-related documents enjoy different statuses and visibilities. It is reasonable to suppose, for instance, that a provision buried in a Help page, which is usually written in an informal manner, might not be understood by users as authoritative as a provision published in a much more traditional document such as the Terms of Service or Community Guidelines. At the same time, it might also be that the Help page provision might at least be read – while those in the Terms of Service most likely will never be seen by most users. Second, there is the issue of how much emphasis a platform gives to a certain rule in their documents. It is likely that different rules are understood by companies as being more important than others, and thus, as deserving more prominence. One way of assessing the discursive prominence of a rule is measuring how many times such provision is mentioned in the documents of a given platform. It is logical to assume that a rule that appears only once in one version of a given document and then vanishes is considered by the platform as less relevant than a rule that is mentioned several times in several documents for several years. This is not to say that users will indeed perceive rules that are more often mentioned as necessarily more important, of course. But from the perspective of the platforms, the one our research considers, charting these emphases via the number of mentions offers an entry point into platforms' priorities and concerns.

The second structure our empirical research investigates is the systems that platforms deploy to automatically enforce copyright. By this we mean the ways in which companies can automatically identify and remove supposedly infringing content through computational techniques, in particular filtering through matching and “fingerprinting” techniques.

Our interest in these systems stems from their sheer practical relevance. The enforcement of copyright in the digital sphere was an early challenge of internet regulation and has become one of the first use-cases for the employment of large-scale algorithmic content moderation systems. While online copyright enforcement practices were initially shaped by laws such as the Digital Millennium Copyright Act (**DMCA**) under US law⁴⁹, the algorithmic copyright enforcement systems developed in the past two decades have extended well beyond what is legally mandated, and they operate in a largely automated fashion. Over time, these systems have become the primary structures of some platforms' copyright content moderation efforts. Yet, in contrast to rules, these systems are not a

⁴⁹ On which, see generally Matthew Sag, ‘Internet Safe Harbors and the Transformation of Copyright Law’ (2017) 93 Notre Dame Law Review <<https://papers.ssrn.com/abstract=2830184>> accessed 1 September 2021; Pamela Samuelson, ‘Pushing Back on Stricter Copyright ISP Liability Rules’ [2020] Michigan Technology Law Review, Forthcoming <<https://papers.ssrn.com/abstract=3630700>> accessed 13 July 2020.

typical or single resource; they are far from trivial. Thus, it seems necessary to clarify in more depth how scholars have defined and criticized these systems.

Generally, automated copyright content moderation systems (sometimes called simply if vaguely “copyright filters”) employ algorithms to automatically identify copyrighted works within a set of content, and to enforce the will of rights holders by carrying out predefined actions, such as blocking, monitoring or monetising the detected piece of content. The emergence of these systems has been described as part of a broader shift towards algorithmic content moderation and algorithmic law enforcement by online intermediaries.⁵⁰ In the special case of copyright enforcement, the rise of these automated systems has been at least in part facilitated or made possible by regulatory factors such as the DMCA in the US (in 1998), which led to an immense volume of takedown requests sent by copyright owners to online platforms, especially those mainstream large-scale platforms originating from the US.⁵¹ In Europe, the turn towards this type of enforcement measures was at least partially enabled (for notice-and-action measures) by the implementation of the 2000 e-Commerce Directive, in particular through the application of the liability exemptions or “safe-harbours” for providers of hosting services, as better described in Chapter 3. To be sure, actual deployment of automated moderation tools appears to have started only later, as the technological solutions available to platforms developed sufficiently to enable their application.

Prompted in part by these legal developments and increasing pressure from rightsholders, social media platforms such as YouTube (in-house) and digital technology companies such as Audible Magic and Pex (as third-party providers) started to develop their own solutions for how to deal with copyright-protected content.⁵² Eventually, these systems evolved beyond a mere notice-and-takedown approach to the incorporation of notice-and-stay down and pre-emptive filtering mechanisms. This evolution has been described as a “shift from an ex-post to an ex-ante system of technological enforcement of the law”.⁵³ In recent years, this development has been further amplified through the proposal and eventual adoption of art. 17 CDSMD, which as we detail below strongly incentivizes or even requires the adoption of preventive measures by online platforms, namely, to

⁵⁰ Maayan Perel (Filmar) and Niva Elkin-Koren, ‘Accountability in Algorithmic Copyright Enforcement’ (2016) 19 Standford Technology Law Review 473.

⁵¹ Perel (Filmar) and Elkin-Koren (n 50).

⁵² See *infra* Chapter 5.

⁵³ Maria Lilla Mongnani, ‘Virtues and Perils of Algorithmic Enforcement and Content Regulation in the EU - A Toolkit for a Balanced Algorithmic Copyright Enforcement’ (2020) 11 Journal of Law, Technology, & the Internet 1. See also Thomas Riis and Sebastian Felix Schwemer, ‘Leaving the European Safe Harbor, Sailing Towards Algorithmic Content Regulation’ (2019) 22 Journal of Internet Law 1.

filter ex ante uploaded content for copyright-protected content.⁵⁴ This provision has been described as the “*de facto* imposition”⁵⁵ of the use of automated systems for online platforms.

A variety of concerns have been raised about the employment of these systems. A first set of problems has been identified in relation to their lack of accountability. As Maayan Perel and Niva Elkin-Koren lay out, this is evidenced by (i) a lack of transparency regarding the ways in which these systems operate and which content they block, (ii) a lack of due process, i.e., the absence of standardized and legally mandated redress mechanisms, which allow users to dispute algorithmic decisions, as well as (iii) a lack of public oversight.⁵⁶ Another problematic factor about accountability is seen in the convergence of the hitherto separate functions of law enforcement and adjudication powers in the hands of private companies.⁵⁷ The introduction of automated copyright enforcement has hence been described as “an example of a controversial institutional shift from public to private modes of regulation”.⁵⁸

In this way, automated copyright content moderation systems are seen a potential threat to the protection of fundamental rights. Indeed, “the use of opaque codes to implement discretionary legal doctrines that effectively adjudicate online content, at the hands of private, profit-maximizing mega-players, can have worrying impacts over freedom of speech and the rule of law”.⁵⁹ Specifically, these criticisms concern the possibility of overenforcement, i.e., the erroneous removal of content because of automated decision-making. In the US, the inability of algorithmic fingerprinting to recognise valid copyright exceptions such as fair use has been described as the “*de facto* loss of the fair use exception”⁶⁰ – a problem to which no automated solution appears to exist.⁶¹ In Europe, as discussed below, much of the same freedom of expression-based concerns have led to challenge before the CJEU on the validity of art. 17, as well as to an interpretation of the provision that recognised the normative superiority of exceptions and limitations in paragraph (7) – as obligations of result – over preventive measures in paragraph 4 (as obligations of best efforts), as well as the requirement of ex

⁵⁴ See *infra* Chapter 3.

⁵⁵ Schwemer and Schovsbo (n 21).

⁵⁶ Perel (Filmar) and Elkin-Koren (n 50).

⁵⁷ Perel (Filmar) and Elkin-Koren (n 50) 481.

⁵⁸ ‘Playing with Machines: Using Machine Learning to Understand Automated Copyright Enforcement at Scale - Joanne E Gray, Nicolas P Suzor, 2020’ 2 <<https://journals.sagepub.com/doi/full/10.1177/2053951720919963>> accessed 3 September 2021.

⁵⁹ Perel (Filmar) and Elkin-Koren (n 50).

⁶⁰ Dan L Burk, ‘Algorithmic Fair Use’ (2019) 86 University of Chicago Law Review 283.

⁶¹ Burk (n 60) 306.

ante safeguards to prevent the negative consequences from the implementation of preventive measures of filtering content by platforms.⁶²

Studies have furthermore problematized the potential negative effects of over blocking on cultural diversity.⁶³ As Sabine Jacques and colleagues point out regarding YouTube's Content ID, the automated nature of algorithmic fingerprinting can result in "a chilling effect on creativity, diversity and more generally, citizen participation in a democratic society".⁶⁴

Finally, authors have mentioned the risk of built-in biases and the deepening of power imbalances that favour the interests of specific user groups at the expense of others. As it has been argued about Content ID, the system was developed in cooperation between YouTube and large rights holder organizations.⁶⁵ It is not a surprise, then, that large rights holders are said to greatly benefit from these systems, largely against the interests of ordinary users and less powerful creators, in areas such as dispute resolution mechanisms⁶⁶ and monetisation.⁶⁷⁶⁸

These theoretical premises lead us to propose the empirical sub-research questions (SQR) in this research, which we restate below, with additional remarks:

- How are copyright content moderation rules organized by platforms into public documents? (SQR4)

In not making assumptions about the location of rules, we realised that there are various ways in which these rules could be organised into public documents. This organizational element also matters if we are to consider users' ability to access and know platforms' copyright content moderation rules.

- Which copyright content moderation rules do different platforms employ to regulate copyright, and how have they changed over time? (SQR5)

⁶² See infra Chapter 3.

⁶³ S Jacques and others, 'The Impact on Cultural Diversity of Automated Anti-Piracy Systems As Copyright Enforcement Mechanisms: An Empirical Study of YouTube's Content ID Digital Fingerprinting Technology' (2017).

⁶⁴ Jacques and others (n 63) 29.

⁶⁵ Rebecca Tushnet, 'All of This Has Happened before and All of This Will Happen Again: Innovation in Copyright Licensing' [2014] Georgetown Law Faculty Publications and Other Works <<https://scholarship.law.georgetown.edu/facpub/1459>>.

⁶⁶ Jacques and others (n 63).

⁶⁷ Grosse Ruse-Khan and Henning, 'Automated Copyright Enforcement Online: From Blocking to Monetization of User-Generated Content' (Cambridge University Press 2021) <<https://papers.ssrn.com/abstract=3565071>> accessed 8 May 2020.

⁶⁸ On how the legal regime of art. 17 CDSMD, which incentivizes automated content moderation, favors big rights holders, see Martin Husovec and João Quintais, 'Too Small to Matter? On the Copyright Directive's Bias in Favour of Big Right-Holders' in Tuomas Mylly and Jonathan Griffiths (eds), *Global Intellectual Property Protection and New Constitutionalism. Hedging Exclusive Rights*. (OUP 2021) <<https://papers.ssrn.com/abstract=3835930>> accessed 3 May 2021.

Considerations about organization aside, one of our main goals was to understand what these rules are. This involves analysing the number of rules (and mentions to rules) over time. We do that using rules' *normative types*, *subjects*, and *normative periods* – expressions we explain below in Chapter 5.

- How do platforms' automated copyright content moderation systems work? (SQR6)

This question aims to map out the different systems used by platforms to moderate copyright-protected content automatically and explain, in as much detail as our data allow, how these systems work. By "work" here we mean not merely their mechanics but also the (unequal) relationships between users, platforms and rights holders they enable.

2.5. “ONLINE PLATFORMS” ENGAGED IN CONTENT MODERATION

The focus of our analysis is on copyright content moderation carried out by (or in the context of the services of) what can be broadly defined as a specific type of internet “intermediary”, namely user-upload online “platforms”. The exact meaning and scope of these and associated terms varies across legal areas within information law, case law and scholarship. Moreover, the meaning of these terms is currently in flux, as the DSA advances a set of new concepts that reshapes and adds to pre-existing legal concepts. It is therefore important to be precise about the type of intermediaries or platforms that are the object of our analysis, while placing them in the proper legal and interdisciplinary context. Our starting point is that the focus of our research is on “copyright content moderation” at the *hosting* layer of the stack. This perspective guides the following analysis.

2.5.1. EU LAW TERMINOLOGY: A BRIEF TOUR

A good departure point for analysis is the often-cited OECD definition of “Internet Intermediaries” as those that:

*“bring together or facilitate transactions between third parties on the Internet. They give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties”.*⁶⁹

This broad definition covers a wide range of online service providers. In contrast, there exists no uniform definition or concept of “intermediary” in EU law. To be sure, the term is mentioned in several legislative texts with relevance to copyright, namely in EU secondary legislation. For example,

⁶⁹ Karine Perset, ‘The Economic and Social Role of Internet Intermediaries’ (OECD Publishing 2010) 171 <<https://ideas.repec.org/p/oec/stiaab/171-en.html>> accessed 20 February 2022.

intermediaries are addressed in art. 8(3) InfoSoc Directive and art. 11 Enforcement Directive, laying out civil remedies for infringements of intellectual property (IP) rights in the form of injunctions.⁷⁰ There is also a reference to “intermediary service providers” in the title of section 4 of the e-Commerce Directive, which regulates the liability exemptions or “safe-harbours” for the provision of different intermediary services, as further explained below.⁷¹

In addition, the CJEU appears to use the notion of intermediary in a broad manner. It was, for example, used by the Court for different types of service providers and services:⁷² a search engine’s advertising service;⁷³ an online sales platform;⁷⁴ a social networking platform;⁷⁵ Internet access providers;⁷⁶ a provider of an open Wi-Fi network.⁷⁷

Importantly, the notion intermediary is not relied upon in the context of the intermediary liability framework of the e-Commerce Directive. Instead, a related term that anchors much of the discussion of Internet intermediaries in EU law is that of “service provider” of “information society services”.⁷⁸ This term underpins the e-Commerce Directive⁷⁹ and is defined in the Technical Standards Directive.⁸⁰ The latter Directive advances the following complex autonomous definition of information society “service”:⁸¹

⁷⁰ See, e.g., recitals 33 and 59, and arts 5(1)(a) and 8(3) Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130/92 (InfoSoc Directive); art. 11 Enforcement Directive.

⁷¹ See section 4 e-Commerce Directive, arts 12-15. See also references to “intermediary” or “intermediaries” in recitals 14, 40, 45, 50.

⁷² See J van Hoboken and others, *Hosting Intermediary Services and Illegal Content Online: An Analysis of the Scope of Article 14 ECD in Light of Developments in the Online Service Landscape* (BrusselsEuropean Commission 2018) <<https://dare.uva.nl/search?identifier=db3fa078-e225-4336-95ec-5d6f25731799>> accessed 23 August 2020; Sebastian Felix Schwemer, ‘On Domain Registries and Unlawful Website Content: Shifts in Intermediaries’ Role in Light of Unlawful Content or Just Another Brick in the Wall?’ (2018) 26 International Journal of Law and Information Technology 273.

⁷³ CJEU, 23 March 2010, case C-236/08 -Google France SARL and Google Inc. v Louis Vuitton Malletier SA et al(Google France/Louis Vuitton).

⁷⁴ CJEU, 12 July 2011, case C-324/09 -L’Oréal SA and Others v eBay International AG and Others (L’Oréal/Ebay)

⁷⁵ CJEU, 16 February 2012, case C-360/10 -Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV(Netlog).)

⁷⁶ CJEU, 16 May 2009, case C-557/07 LSG v Tele2; CJEU, 24 November 2011, case C-70/10, Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) (Scarlet Extended)

⁷⁷ CJEU, 15 September 2016, case C-484/14 Tobias Mc Fadden v Sony Music Entertainment Germany GmbH (McFadden)

⁷⁸ Riordan for example, notes that the “information society service concept” is “a slightly narrower category than the field of internet services at large, but it remains a very broad genus, and may be wider than the class of persons who can be said to act as internet intermediaries”. See Jaani Riordan, *The Liability of Internet Intermediaries* (Oxford University Press 2016) 387.

⁷⁹ See the definitions in art. 2(a) and (b) E-Commerce Directive

⁸⁰ Art. 2(a) E-Commerce Directive defines “information society services” as “services within the meaning of Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC”. The current version of the Technical Standards Directive is Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (Technical Standards Directive).

⁸¹ Art. 1(1)(b) Technical Standards Directive.

(b) ‘service’ means any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

For the purposes of this definition:

- (i) ‘at a distance’ means that the service is provided without the parties being simultaneously present;*
- (ii) ‘by electronic means’ means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means;*
- (iii) ‘at the individual request of a recipient of services’ means that the service is provided through the transmission of data on individual request.*

An indicative list of services not covered by this definition is set out in Annex I.

The mentioned Annex I provides an “indicative”, i.e., non-exhaustive list of services not covered by the above definition, either because they are not considered to be provided “at a distance”, “by electronic means”, or “at the individual request of the recipient of services”.⁸² Information society service providers (**ISSPs**) can therefore be considered a type of Internet Intermediaries.

The e-Commerce Directive further stipulates three specific *functions* of ISSPs in the context of liability exemptions or “safe-harbours”, namely the provision of services related to: “mere conduit”; “caching”, and hosting.⁸³ They can be represented as follows.

⁸² Annex I Technical Standards Directive. On the criteria and potential grey areas see e.g. Content and Technology (European Commission) Directorate-General for Communications Networks and others, ‘Legal Analysis of the Intermediary Service Providers of Non-Hosting Nature: Final Report’ (Publications Office of the European Union 2020) 29–30 <<https://data.europa.eu/doi/10.2759/498182>> accessed 22 February 2022.

⁸³ See arts 12 to 15 e-Commerce Directive.

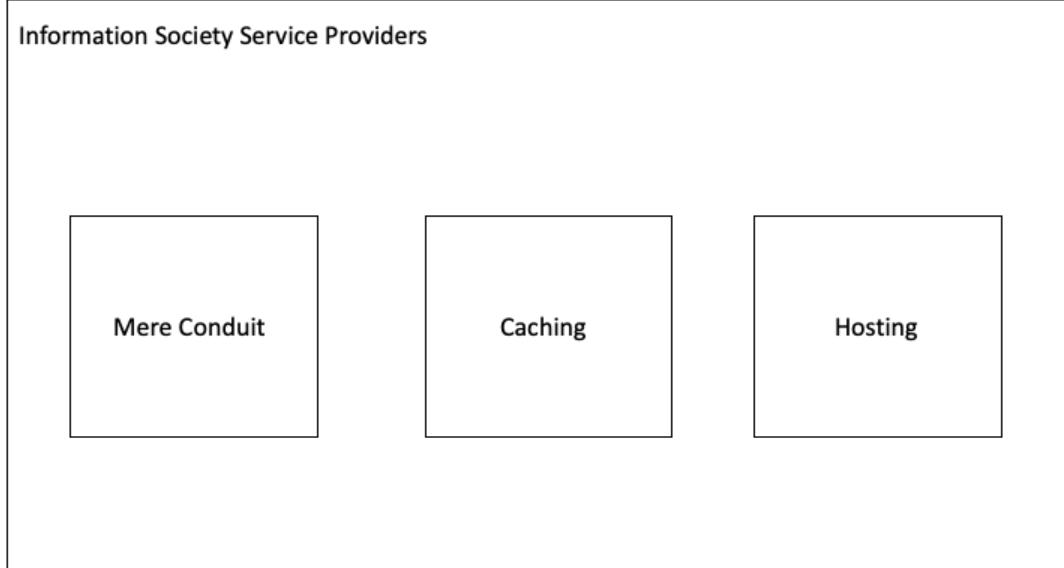


Figure 1. ISSPs Functions e-Commerce Directive

These functions are relevant at different levels of the “stack” and performed by different service providers. For our purposes, we are exclusively interested in the type of intermediaries that provide hosting services, i.e., those that provide an “information society service... that consists of the storage of information provided by a recipient of the service.”⁸⁴ In particular, we focus on those providers that host copyright-protected content. Considering the broad variety of copyright-protected works this includes *inter alia* music, audio-visual content, text, images, programming code, or any combination thereof.

In sociological (and some legal) scholarship, such providers are often referred to also “user-upload” or “user-generated content platforms”, or merely “platforms”. But this commonly used terminology is not necessarily accurate from a legal standpoint.

Take for instance the Regulation of Platform-to-Business Relations (**P2B Regulation**)⁸⁵, which refers frequently to the “online platform economy”. Without defining “platform”, the P2B Regulation seems

⁸⁴ Art. 14(1) E-Commerce Directive.

⁸⁵ Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (**P2B Regulation**).

to relate it to the provision of “online intermediation services”⁸⁶, which does not necessarily overlap with the notion of provider of hosting services.⁸⁷

The notion of hosting services, as we note below, has been refined by the CJEU in the context of abundant case law, *inter alia* on the enforcement of IP rights, in a complex articulation of the liability exemptions in the e-Commerce Directive and rules on exclusive rights and enforcement in the InfoSoc and Enforcement Directives.⁸⁸

To complicate things further, the 2019 CDSMD introduced a new legal concept, which is at the heart of this research: “online content-sharing service providers” or OCSSPs. As we explain below, art. 17 CDSMD creates a new regime for OCSSPs.⁸⁹ While this concept is new to the copyright *acquis*, OCSSPs do not appear to constitute a new category of service providers in a technological or business sense. Rather, this is a new legal category covering a type of provider of hosting services whose activities were – until the implementation date of the CDSMD – regulated in different legal instruments, such as for our purposes, the e-Commerce Directive (especially art. 14), the InfoSoc Directive (especially arts. 3 and 8) and the Enforcement Directive (especially arts. 5 and 11).⁹⁰ The placement of OCSSPs within the context of the functions of ISSPs in the e-Commerce Directive can be represented as follows.

⁸⁶ NB that the term is distinguished from that of “online search engine” in art. 2(5) P2B Regulation: “‘online search engine’ means a digital service that allows users to input queries in order to perform searches of, in principle, all websites, or all websites in a particular language, on the basis of a query on any subject in the form of a keyword, voice request, phrase or other input, and returns results in any format in which information related to the requested content can be found”.

⁸⁷ See art. 2(2) and (3) P2B Regulation: “(2) ‘online intermediation services’ means services which meet all of the following requirements: (a) they constitute information society services within the meaning of point (b) of Article 1(1) of Directive (EU) 2015/1535 of the European Parliament and of the Council (12); (b) they allow business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded; (c) they are provided to business users on the basis of contractual relationships between the provider of those services and business users which offer goods or services to consumers; (3) ‘provider of online intermediation services’ means any natural or legal person which provides, or which offers to provide, online intermediation services to business users. NB after potentially “competing” definitions: e.g., “digital service” in Art. 4(5) NIS Directive and Art. 2 Directive 2019/770.

⁸⁸ See *infra* at 3.1.

⁸⁹ See *infra* at 3.4.1. OCSSPs are defined in art. 2(6), with further guidance in recitals 62 and 63.

⁹⁰ NB there is room to argue that the specific nature of the legal definition of OCSSP affects the nature of its “hosting function”.

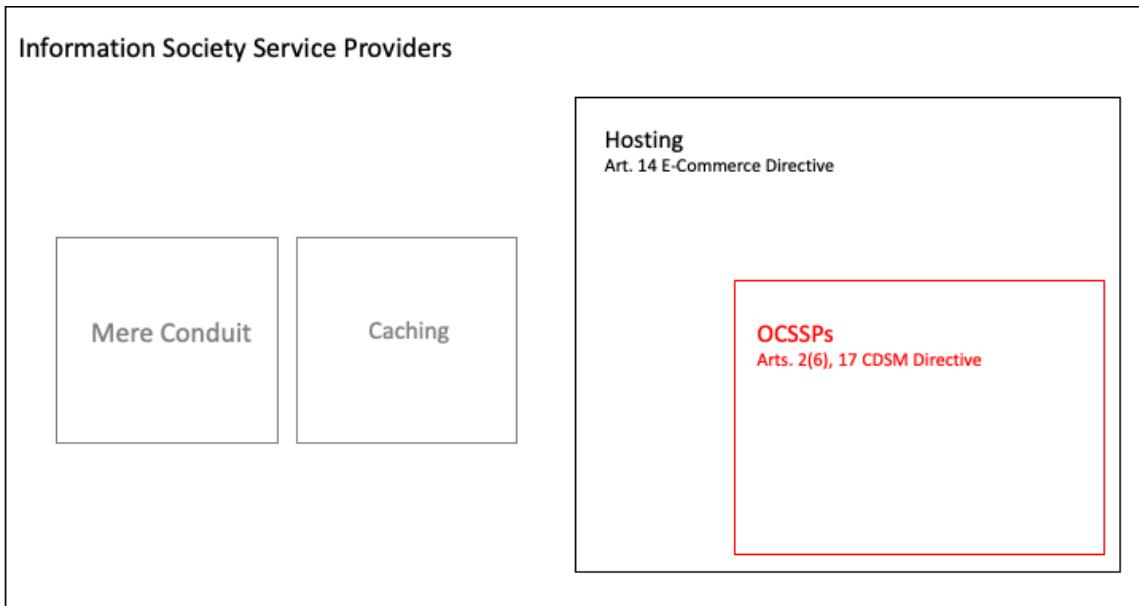


Figure 2. OCSSPs in the context of ISSPs

Finally, it is important to note that much of the terminology discussed above in connection with the e-Commerce Directive is subject to discussion and change in the context of the DSA. Although this will likely not (directly) affect the more recent definitions and regimes set forth in the CDSMD (such as OCSSP) and the P2B Regulation, it will certainly affect or at least further nuance the conceptualisation and legal treatment of ISSPs as it was developed in the e-Commerce Directive.

In fact, the DSA advances a host of new notions that restructure the pre-existing legal framework. While retaining the definition of “information society service”⁹¹ the DSA makes a distinction between the following categories of service providers, from general to increasingly more specific: (1) intermediary services, (2) hosting services, (3) online platforms and online search engines, and (4) very large online platforms (**VLOPs**) and very large online search engines. For the purposes of our subsequent analysis, we will focus on online platforms and not on online search engines.

⁹¹ Art. 2(a) DSA.

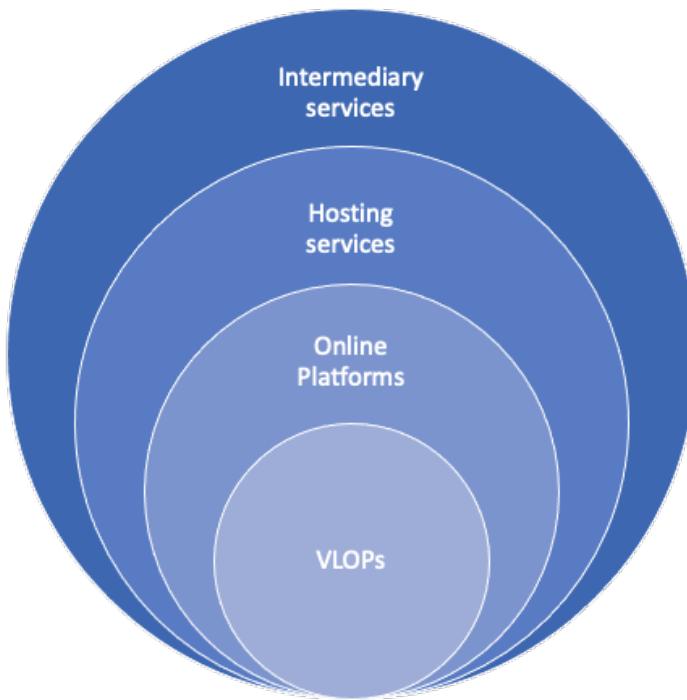


Figure 3. Intermediary service provider categories DSA (excluding online search engines)⁹²

Intermediary services as are defined as services of “mere conduit”⁹³, “caching”⁹⁴ and hosting⁹⁵. In addition to the aforementioned narrower categories of hosting services, online platforms and VLOPs, intermediary services also include, according to the European Commission’s press release accompanying the DSA proposal, services “offering network infrastructure: Internet access providers, domain name registrars [sic]”.⁹⁶

⁹² Image adapted from: European Commission, ‘The Digital Services Act: Ensuring a Safe and Accountable Online Environment - Which Providers Are Covered?’ (European Commission - European Commission) <https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en> accessed 21 February 2022.

⁹³ A “mere conduit” service is one that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network. Art. 2(f) DSA.

⁹⁴ Art. 2(f) DSA.

⁹⁵ A “caching” service ‘caching’ service that consists of the transmission in a communication network of information provided by a recipient of the service, involving the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients upon their request. Art. 2(f) DSA.

⁹⁶ European Commission, ‘The Digital Services Act: Ensuring a Safe and Accountable Online Environment - Which Providers Are Covered?’ (n 92). (“Which providers are covered?”). NB that the correct reference should probably be to Internet “registries” rather than “registrars”.

Hosting services are those that consist of the storage of information provided by, and at the request of, a recipient of the service.⁹⁷ They include also the subsequent categories of online platforms and VLOPs.

“Online platforms” are defined as “providers of a hosting service which, at the request of a recipient of the service, stores and disseminates to the public information, unless that activity is a minor and purely ancillary feature of another service or a minor functionality of the principal service and, for objective and technical reasons, cannot be used without that other service, and the integration of the feature or functionality into the other service is not a means to circumvent the applicability of this Regulation”.⁹⁸ In simple terms, VLOPs are those online platforms that provide their services to a number of average monthly active recipients of the service in the EU equal to or higher than 45 million and which have so been formally designated by the Commission.⁹⁹ As we explain below¹⁰⁰, the definition of OCSSP in the CDSMD covers online platforms and VLOPs (see representation in Figure 4).

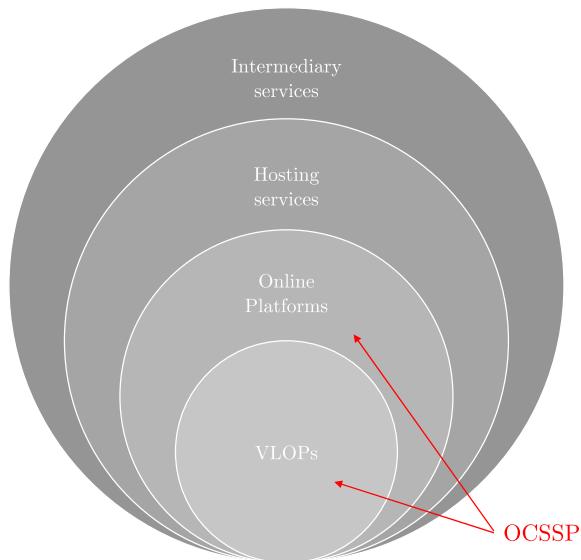


Figure 4. OCSSPs as online platforms in DSA framework

⁹⁷ Art. 2(f) DSA.

⁹⁸ Art. 2(h) DSA.

⁹⁹ Art. 25 DSA.

¹⁰⁰ See infra at 3.6.

2.5.2. OTHER PLATFORM TERMINOLOGIES

There exist many different studies on platforms, both in digital and analogue contexts. Instead of an in-depth analysis, suffice it here to point towards some selected literature. With regards to digital platforms, de Reuver, Sørensen & Basole (2018) identify three main features, namely: (i) platforms are technologically mediated; (ii) platforms enable interactions between different types of users; (iii) platforms allow those types of users to implement specific activities.¹⁰¹

The IGF Coalition on Platform Responsibility, a multistakeholder group under the auspices of the UN Internet Governance Forum, has suggested a broad definition of platform as “any applications allowing users to seek, impart and receive information or ideas according to the rules defined into a contractual agreement.”¹⁰²

Sociologists of technology and media scholars’ definitions tend to be mostly concerned with the politics of platforms’ discourses, materiality and business models. Gillespie’s seminal paper indicated how digital technology firms themselves employ the term from contrasting angles: “*computational*, (as) something to build upon and innovate from; *political*, (as) a place from which to speak and be heard; *figurative*, in that the opportunity is an abstract promise as much as a practical one; and *architectural*, [as something; designed as an open-armed, egalitarian facilitation of expression, not an elitist gatekeeper with normative and technical restrictions]”.¹⁰³

Others noted that the novel complexity of platforms poses a challenge to any attempt to define them. As *markets*, Bratton argues, platforms distribute resources and individuals; as *states*, they govern the interactions between these resources and individuals, but on a global scale. And yet they are neither markets nor states. Bratton offers then his own “working definition”, according to which a “platform” is “[a] standards-based technical-economic system that simultaneously distributes interfaces through their remote coordination and centralizes their integrated control through that same coordination”.¹⁰⁴

Bratton’s conceptualization points to what various other sociological definitions have in common: platforms should be understood as “systems”. These systems are not isolated from each other, Van

¹⁰¹ Mark de Reuver, Carsten Sørensen and Rahul C Basole, ‘The Digital Platform: A Research Agenda’ (2018) 33 Journal of Information Technology 124.

¹⁰² Luca Belli, Primavera de Filippi and Nicolo Zingales, ‘IGF Coalition on Platform Responsibility: Recommendations on Terms of Service and Human Rights’ (IGF Coalition on Platform Responsibility 2015) <<https://www.intgovforum.org/cms/documents/igf-meeting/igf-2016/830-dcpr-2015-output-document-1/file>>.

¹⁰³ ‘The Politics of “Platforms” - Tarleton Gillespie, 2010’ 352 <<https://journals.sagepub.com/doi/10.1177/1461444809342738>> accessed 20 February 2022.

¹⁰⁴ Benjamin H Bratton, *The Stack: On Software and Sovereignty* (MIT Press 2016) 171.

Djick, Poell & de Wall posit, but are part of larger environments. In this way, an online platform might be defined as “programmable digital architecture designed to organize interactions between users... corporate entities and public bodies[, and] . . . geared toward the systematic collection, algorithmic processing, circulation, and monetization of user data” which, in conjunction with others, form a “platform ecosystem, . . . an assemblage of networked platforms, governed by a particular set of mechanisms . . . that shapes everyday practices”.¹⁰⁵ An example of “ecosystem” is the one formed mostly by “Big Tech” companies (Alphabet, Apple, Meta/Facebook, Amazon, and Microsoft), they say.¹⁰⁶

Another concept that is commonly used in connection with online platforms is “infrastructure”. Both online platforms and infrastructures share several characteristics, “including embeddedness, a degree of invisibility, extensibility, and broad coverage”.¹⁰⁷ But equating platforms with infrastructure would be a mistake. Surely, most “influential” platforms are “infrastructural”, as they “they form the heart of the ecosystem upon which many other platforms and apps can be built”.¹⁰⁸ However, platforms might also play “sectoral” roles, serving “a particular sector or niche, such as news, transportation, food, education, health, finance, or hospitality”.

Gillespie’s (2018) conceptualization brings platform’s complexity and systemic and infrastructural components into a single definition. He contends that “platforms are sociotechnical assemblages and complex institutions” which, as online sites, “a) host, organize, and circulate users’ shared content or social interactions for them b) without having produced or commissioned (the bulk of) that content c) built on an infrastructure, beneath that circulation of information, for processing data for customer service, advertising, and profit.”¹⁰⁹

2.6. DEFINING “ACCESS TO CULTURE”

Our main research question refers to the concept of “access to culture” in the DSM. This is in line with the broader focus of the *reCreating Europe* project on a “culturally diverse, accessible, and creative Europe”.¹¹⁰ To assess the role of intermediaries (platforms) and their copyright content moderation’s

¹⁰⁵ José van Dijck, Thomas Poell and Martijn de Waal, *The Platform Society* (Oxford University Press 2018) 4 <<https://oxford.universitypressscholarship.com/10.1093/oso/9780190889760.001.0001/oso-9780190889760>> accessed 20 February 2022.

¹⁰⁶ van Dijck, Poell and de Waal (n 105) 4.

¹⁰⁷ Jean-Christophe Plantin and others, ‘Infrastructure Studies Meet Platform Studies in the Age of Google and Facebook’ (2018) 20 *New Media & Society* 293.

¹⁰⁸ van Dijck, Poell and de Waal (n 105) 12–13.

¹⁰⁹ Gillespie, 2018. Gillespie (n 14).

¹¹⁰ reCreating Europe, ‘ReCreating Europe - The Project: Discover the 4 Pillars of ReCreating Europe’ <<https://www.recreating.eu/the-project/>> accessed 25 February 2022.

impact on a culturally diverse, accessible and creative Europe within the remit of the reCreating Europe project, it is necessary to locate our research in the context of these concepts already at the stage of mapping. These perspectives constitute the basis for and will be revisited in the evaluation stage of the ReCreating Europe project.

Cultural diversity, accessibility and creativity are cornerstones of the EU. Art. 3(3) of the Treaty on European Union (**TEU**), for example, sets out that the Union “shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.” Instead of providing an in-depth analysis of the concepts and their deep and rich history, however, we focus on the dimensions most relevant for the analysis of online platforms engaging in copyright content moderation.

The further analysis is based on our hypothesis that *cultural diversity* is both a property of as well as in an interdependent relationship with *access to culture*. Similarly, possibilities for unfolding *creativity* are in an interdependent relationship with access to culture. In the following, we focus on our analysis on access to culture.

2.6.1. “ACCESS TO CULTURE” FROM AN INTERDISCIPLINARY PERSPECTIVE: A POSSIBLE APPROACH

At an international level, it is possible to identify a basis for a concept of access to culture as it relates to copyright in art. 27 of the UN Universal Declaration of Human Rights (**UDHR**). Art. 27 states that

- (1) *Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits’.*¹¹¹
- (2) *Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.’*

In simple terms, from a legal technical perspective, copyright law predominantly *excludes access* to protected works for the purpose appropriating economic value from those works. Since many expressions of cultural phenomena and artifacts are protected by copyright, there is an inherent conflict of interests between copyright and access to culture. In EU law, as interpreted by the CJEU, this is complicated by a relatively low threshold of originality for the copyright protection of works,

¹¹¹ Cf. art. 15 of the International Covenant on Economic, Social and Cultural Rights.

broad exclusive rights and enforcement measures recognised to rights holders, and relatively narrow exceptions and limitations to the benefit of users.¹¹²

Online platforms constitute an important gateway for accessing protected content. The stress field of copyright-protected content and online platforms also concerns several fundamental rights in the Charter of Fundamental Rights of the European Union (**CFREU**)¹¹³, such as the right to property (art. 17(2) CFREU), the rights to privacy and data protection (arts 7 and 8 CFREU), the rights to freedom of expression (art. 11 CFREU), freedom of arts (art. 13 CFR), and the freedom to conduct a business (art. 16 CFREU).

For the purpose of the following analysis, we distinguish between two dimensions of the concept of “access to culture” in relation to copyright content moderation by online platforms: a descriptive dimension (2.6.2); and a normative dimension of the concept (2.6.3). From each dimension we derive two different models against which to assess the impact of copyright content moderation on access to culture.

2.6.2. THE DESCRIPTIVE DIMENSION OF ACCESS TO CULTURE IN CONTENT MODERATION

Train (1991) notes that “[r]egulation in the real world is far from optimal, and it is perhaps unrealistic to believe that it ever will be”.¹¹⁴ Nonetheless, for the analysis of the descriptive dimension of access to culture, we set out the following assumption for our basic analytical model: We assume that the EU copyright framework regarding substantive rights as well as the framework for intermediaries represent a point of “optimal” regulation.¹¹⁵

Transferred to the context of copyright content moderation¹¹⁶ by online platforms this means the following: The “quality” of copyright content moderation is correlated to access to culture, because

¹¹² There is ample scholarship describing these aspects. For recent overviews, see e.g. Eleonora Rosati, *Copyright and the Court of Justice of the European Union* (Oxford University Press 2019); Tito Rendas, *Exceptions in EU Copyright Law: In Search of a Balance Between Flexibility and Legal Certainty* / Wolters Kluwer Legal & Regulatory (Kluwer Law International 2021).

¹¹³ See, e.g., recital 84 CDSMD: “This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter. Accordingly, this Directive should be interpreted and applied in accordance with those rights and principles.”

¹¹⁴ Kenneth Train, *Optimal Regulation: The Economic Theory of Natural Monopoly* (MIT Press 1991) 297.

¹¹⁵ By “optimal” regulation we mean in this context that the framework strikes the *appropriate* balance between conflicting interests and fundamental rights, namely by recognizing time-restricted (exclusive) rights and corresponding exceptions and limitations. By “appropriate” we mean the balance that was struck as a result of the normal operation of a democratic legislative process. In other words, we do not mean to pass a value judgment on the desirability of such balance from the perspective of any normative theory or viewpoint about copyright law.

¹¹⁶ The use of copyright moderation for non-copyright purposes and the use of non-copyright moderation (e.g. privacy) for copyright purposes is not addressed in the following.

access to culture (as per the definition above) is considered embedded in the existing copyright framework. Since the existing framework is assumed to strike the appropriate balance between exclusivity in copyright protection and access to culture, any variation in that balance – beyond the margin of interpretation allowed by law – will impact on access to culture.

Consequently, both excessive and insufficient content moderation will have a negative impact on access to culture. Simply put, excessive content moderation by platforms restricts access to culture. Conversely, insufficient content moderation increases access to culture, but in a harmful way because it encroaches on the legitimate interest of copyright holders and thus distorts the optimal balance. In other words: the smaller the difference between actual content moderation performed by intermediaries and the correct application of the legal framework, the smaller the negative impact on access to culture.

This “quality” of content moderation can in simple terms be described in terms of correct and false results. For simplicity, in the following we differentiate between illegal content (infringement of copyright) and legal content (no infringement of copyright). Suffice it here to note that we can differentiate between two sets of outcomes. In the first set of outcomes, error is absent. In the second set, errors arise in instances where, firstly, legal content is taken down and, secondly, where illegal content is not taken down. Based on the above hypothesis then, both types of errors are detriment to the access of culture.

This simplified model, which will be explored in depth in the context of the evaluation based on this present mapping analysis, might be useful because it allows us to compartmentalise the specific issues of copyright content moderation by online platforms: the focus is consequently on the “downstream” issue of mitigation of errors in content moderation. In this context, both ex ante obligations as well as ex post procedural redress mechanisms will become relevant.¹¹⁷ Such simplification, however, comes with several drawbacks. Chief among them the fact that it does not consider the normative aspects of copyright law. It is, for example, far from certain that outcomes (i.e., takedown of illegal content), or over- and under-enforcement will always have a negative effect on access to culture. Furthermore, this model does not account for the uncertainty associated with the margin of discretion that platforms may have when designing their content moderation T&Cs – what we call regulation “by” platforms – or other means such as licensing.

¹¹⁷ What is meant by these ex ante and ex post measures from a legal perspective in the context of art. 17 CDSMD is explained in Chapter 3.

This normative “upstream” dimension of access to culture therefore challenges the assumption on which our descriptive model is based, reintroducing the complexity regarding the copyright-balance as such. We address this in the following section.

2.6.3. THE NORMATIVE DIMENSION OF THE CONCEPT OF ACCESS TO CULTURE

In the model based on the normative dimension of the concept of access to culture, the notion that the existing copyright framework strikes the optimal balance between exclusivity in copyright protection and access to culture is rejected. The model does not exclusively focus on the copyright framework but also on other parts of law that affect the *de facto* regulation of copyright-protected subject matter and in particular the liability regime that intermediaries are subject to. The model suggests that substantive law relevant in the field of copyright can be amended in a way that changes the balance with the result that it further increases access to culture by providing more freedoms to third parties to use and disseminate copyright-protected works, without encroaching on the legitimate interest of copyright holders.

The actual practices of content moderation by platforms are affected by the state-enacted law that platforms are subject to. In this context, “state-enacted” law refers to statute and case law. In essence, this is what we describe above as regulation “of” platforms. In order to elaborate on the interrelationship between the practices of platforms and state-enacted law, we introduce the concept of “autonomy space”.

Autonomy spaces refers to the margin of discretion or space within which legal actors may act autonomously under applicable law. In essence, this corresponds to what we describe above as regulation “by” platforms. In parts of state-enacted law where public policy protection plays a minor role, the autonomy space or margin of discretion for platforms to engage in content moderation is wide. Conversely, in parts of state-enacted law where public policy protection is dominant the autonomy space is narrow.

Outside the autonomy spaces, private parties such as intermediaries are not allowed to act, as their conduct – their content moderation activity – is qualified as unlawful. Parties are not actually

prevented from acting outside autonomy spaces; but if they do, they will face certain costs in the form of legal sanctions or remedies.¹¹⁸

If state-enacted law is amended for the purpose of changing the practices of intermediaries, this can be done in two ways. Either by narrowing down the autonomy space (e.g., by broadening the scope of liability for platforms) or by raising the costs of acting outside the autonomy space (e.g., introducing more severe sanctions and more effective remedies). Again, this perspective will be taken up in the subsequent evaluation based on this mapping analysis.

2.7. METHODS

In this section we identify the methods used in the legal and interdisciplinary research carried out so far. This includes two main components. First, multi-level doctrinal legal analysis, focusing on mapping of copyright content moderation rules in EU law and select national laws, the latter through comparative legal research (2.7.1). Second, empirical research on copyright content moderation by online platforms (2.7.2).

2.7.1. DOCTRINAL LEGAL RESEARCH: EU LEVEL MAPPING AND COMPARATIVE LEGAL RESEARCH

Our legal analysis in this report is comprised of descriptive and normative doctrinal legal research aimed at the EU and national level mapping of copyright content moderation rules. For the EU level mapping, the scope of our analysis is delimited to EU law, and in particular the copyright *acquis* and adjacent legal instruments interpreted in light of international law. This means that the analysis covers the EU copyright *acquis*, which is mainly comprised of Directives, and its interpretation by the CJEU. The most relevant instruments in this respect are the InfoSoc Directive, the CDSMD, the e-Commerce Directive, and the DSA. The relevant international legal framework includes the Berne Convention, the TRIPS Agreement, the WIPO Copyright Treaty (WCT), and the WIPO Performances and Phonograms Treaty (WPPT).¹¹⁹ The primary means of research is desk research.

¹¹⁸ Thomas Riis, *User Generated Law: Re-Constructing Intellectual Property Law in a Knowledge Society* (Edward Elgar Publishing 2016).

¹¹⁹ Berne Convention for the Protection of Literary and Artistic Works, opened for signature Sept. 9, 1886, 828 U.N.T.S. 221 (Berne Convention); Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S.299 (TRIPS Agreement); WIPO Copyright Treaty, Dec. 20, 1996, 2186 U.N.T.S. 121 (WCT); WIPO Performances and Phonograms Treaty, 1996 O.J. (L 89) (WPPT).

In addition to the EU level mapping, we carry our national level mapping through comparative legal analysis.¹²⁰ This included both desk research and questionnaires completed by national experts in selected Member States. Our comparative research addresses on the legal status of OCSSPs at EU level, with a focus on rules related to liability and content moderation that have a potential impact on accessing cultural goods and information.

Our comparative legal research adopts van Hoecke's idea of "toolbox", rather than a fixed methodological roadmap.¹²¹ Within this toolbox, we mainly rely on the functional,¹²² contextual,¹²³ and, consequently, the common core¹²⁴ methods. These aim to look at the effects and the "living" nature of the law, with special regards to the specific national regulatory sources and – to a certain degree – private ordering mechanisms, as well as the impact on access to culture and content diversity.

The focal point of the research is art. 17 CDSMD. Our aim is not to reveal the legislative history of art. 17, but to focus on the probable impacts on content moderation, accessibility of user-generated content (**UGC**) and the liability of platforms. By applying the comparative legal method, the following questions must be defined: (i) why to compare, (ii) what to compare, (iii) how to compare.

First, on why to compare (i), it is undeniable that OCSSPs play a crucial role in the "platform-driven economy."¹²⁵ In this environment, it is inevitable to understand their legal position prior to formulating any policy or recommendation that might bring unwanted restrictions on platforms.¹²⁶ Second, regarding what to compare (ii), the new statutory framework drawn by art. 17 provides an opportunity to map the existing framework to understand the extent of the changes to the existing legal framework required by the new rules. Third, on how to compare (iii), we have selected a

¹²⁰ H Patrick Glenn, 'The Aims of Comparative Law', *Elgar Encyclopedia of Comparative Law* (Second Edition, Edward Elgar Publishing 2012) <<https://www.elgaronline.com/view/edcoll/9781849804158/9781849804158.00009.xml>> accessed 21 February 2022; Lutz-Christian Wolff, 'Artificial Intelligence Ante Portas: The End of Comparative Law?' (2019) 7 *The Chinese Journal of Comparative Law* 484, 491.

¹²¹ Mark Van Hoecke, 'Methodology of Comparative Legal Research' [2015] Law and Method <<https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001>> accessed 20 February 2022.

¹²² According to van Hoecke, this method practically means that "rules and concepts may be different, but that most legal systems will eventually solve legal problems in a similar way". This method allows for the looking for functional equivalents and differences in various legal systems. Compare to Hoecke (n 121) 9.. On the "functionalism" of comparative law see especially Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung: Auf dem Gebiete des Privatrechts* (3., neubearbeitete edition, Mohr Siebeck 1996).

¹²³ This method focuses on the political-technological-economic environment, which formed the body of the law; it necessitates the empirical observation of case law and more. Compare to. Hoecke (n 121) 16–18.

¹²⁴ This method "looks for commonalities and differences between legal systems in view of the question to what extent harmonization on certain points would be possible among the compared legal systems or the question how a European rule (...) could be interpreted in such a way that it fits best the different national traditions". Compare to Hoecke (n 121) 21.

¹²⁵ Andrej Savin, 'Regulating Internet Platforms in the EU - The Emergence of the "Level Playing Field"' (2018) 34 *Computer Law & Security Review* 1215.

¹²⁶ Savin (n 125).

representative sample of ten Member States for comparison. Common features of these countries are the EU membership and similar level of legal development. What is different on the other hand are the economic, social and legal characteristics, including their size (small, medium and large Member States), as well as their role and relevance in the European copyright and platform discourse.

Furthermore, in order to map the pre- and post-CDSMD (steps taken by the selected jurisdictions in the implementation of art. 17) regulatory environment and practices regarding both court cases and platform control, a two-phase questionnaire was designed. The details of the first-phase questionnaire and the interim findings of the research are included in Chapter 4. The questionnaires are reproduced in Annex I.

2.7.2. SOCIAL SCIENCE METHODS

In this section, we explain and justify our methodological decisions and strategies concerning the collection and analysis of data about companies' copyright content moderation structures, namely, *rules* and *automated copyright content moderation systems*, as explained above¹²⁷.

Our approach is based on three main decisions. First, we took an open-ended and inductive perspective. The goal was to collect *all* platforms' public documents that could be understood as concerning the regulation of copyright content moderation. This decision both drastically expanded the projects' dataset and unveiled the importance of this organizational aspect for the very governance regimes we wanted to understand. Also, different social media platforms might have multiple functionalities, designs, goals and users. This comparative element addresses the possibility that these variations can be linked with a diverse range of copyright content moderation structures. Furthermore, while all platforms of our sample had they own rules, not all of them used automated moderation systems. Our work provides an overview of the most important existing rules and enforcing systems, comparing and contrasting them. Finally, we assumed that there was much to be gained from the investigation of how the copyright content moderation structures evolved over time. This longitudinal approach greatly expanded the analytical potential of the project: platforms' rules are constantly changing; our work helps interrogate the nature of these shifts. Importantly, uncertainties about the collected data led us to not extend this longitudinal approach to the automated copyright content moderation systems.

¹²⁷ On which, see infra Chapter 5.

This sub-section begins by explaining the criteria used to select which platforms we should investigate (2.7.2.1). This is followed by an analysis of how we collected and qualitatively analysed data (2.7.2.2 and 2.7.2.3). It closes with a brief reflection on the limitations and ethical issues that we considered during our research (2.7.2.4).

2.7.2.1. BUILDING A SAMPLE OF PLATFORMS: MAINSTREAM, ALTERNATIVE AND SPECIALISED PLATFORMS

In face of the growing number of social media platforms and the project's constraints, we decided to focus on 15 platforms (see Table 3). They were selected through a purposive sampling procedure. This sampling was driven by two main criteria – *relevance* and *diversity* – and generated three different sets of platforms that we label *mainstream*, *alternative*, and *specialised*. First and foremost, our choice was guided by the *relevance* of a given platform, in particular for European citizens. For our purposes, the relevance of a given platform was primarily a function of the number of users of such platform. Figures matter because very large services are also central channels to access and produce culture, attracting the interest of ordinary users, creators, large rights holders and policymakers. There is no thoroughly reliable and verifiable public record of users' numbers by platforms. We opted for what we judged was the best possible approximation. Using data compiled by StatCounter¹²⁸, we found that *Facebook*, *Twitter*, *YouTube* and *Instagram* were among the top platforms for market share in Europe. To counterbalance the dominance of American-based companies, we also added the Berlin-based music sharing platform *SoundCloud*. While we could have included other global giants with strong European presence, such as *Tumblr*, *TikTok*, and *Pinterest*, time limitation led us to cap this group of what we term “mainstream social media platforms” to five services.¹²⁹ Such limitation was important, largely, because we wanted to analyse other sorts of platforms.

This is related to our second criterion: *diversity* – a central concept to the wider *reCreating Europe* project. First, we wanted to understand whether and how what we term “alternative social media platforms” (as opposed to those classified as “mainstream”) regulate copyright content moderation differently. These “alternative” platforms share some characteristics: (1) their computational infrastructure is usually decentralised (e.g., users may be able to tweak or even control the design of the platform, and content moderation decisions are not necessarily made by any single controller); and (2) many are predominantly non-commercial and do not dependent on the

¹²⁸ StatCounter Global Stats, ‘Social Media Stats Europe’ (*StatCounter Global Stats*) <<https://gs.statcounter.com/social-media-stats/all/europe>> accessed 21 February 2022.

¹²⁹ Whereas we are lining the classification of mainstream to the number of users this classification also aligns well with these platforms' organization size and structure, as well as revenue.

datafication of users' actions (i.e., the commercial exploitation of user's data via ad-driven business models). These much smaller platforms might not be "relevant" in the sense described above, since their number of users rarely surpasses the dozens of thousands. Yet, our initial assumption was that, in examining them, we could encounter diverse copyright content moderation structures, organized in different ways, than those of mainstream platforms.

There is a plethora of alternative platforms, and many of them experiment a transient existence. We selected five platforms whose core functionalities could be compared coherently to mainstream ones. To be sure, we do not claim that this group of five are the most important alternative platforms.¹³⁰ They are treated in this report merely as key examples. Following this direction, we chose to investigate: (1) *DTube*, which positioned itself as an alternative to audio-visual platforms, such as YouTube; (2) *Audius*, a blockchain-based service focussed on musical content, as SoundCloud is; (3) *Diaspora* and (4) *Mastodon*, widely described as "ethical" replacements of all-purpose large platforms, such as Facebook and Twitter, respectively¹³¹; and (5) *Pixelfed*, an alternative to picture-based platforms such as Instagram.

However, diversity is not necessarily limited to platforms that are explicitly designed and defined as "alternatives". There are platforms that while being mainstream in some respects – centralized, commercial, having significant revenues, large number of users, and dealing with large amounts of copyright-protected content – cater to some particular types of users and creators. We classify these as *specialised platforms*.

Our assumption was that, at least in principle, this particularity could also be connected to diverse copyright structures, but in a way that is fundamentally different from that of alternative platforms. The decision of which specialised platforms we should look at was based on the following criteria: number of users, variety of kinds of creators, and comparability with at least some of the mainstream and alternative platforms we selected. We ended up focussing on: (1) game streaming platform *Twitch*; (2) the video-sharing platform *Vimeo*, which aims to offer a more sophisticated experience than YouTube and is quite popular amongst visual artists and professionals; (3) *FanFiction*, an older platform where ordinary people can post and archive fiction based on characters and stories from copyright-protected works, such as "Harry Potter" and "Twilight"; (4) *Dribbble*, an image-centred platform that is mainly used by designers; and (5) *PornHub*, a highly popular pornographic video-

¹³⁰ However, Diaspora and Mastodon have generated much journalistic buzz, in particular after the so-called post-2016 "techlash".

¹³¹ Mastodon and Diaspora have different "pods", that is, smaller platforms within the larger platform, a decision had to be made also about which of these pods we would look into. We decided to focus on their two main pods.

sharing platform that has attracted sex workers and ordinary users interested in posting their own material.

Table 2. Sample of 15 platforms chosen to be analysed. Source: Authors.

Online Platforms		
Mainstream	Alternative	Specialised
Facebook	Diaspora	Twitch
YouTube	DTube	Vimeo
Twitter	Mastodon	FanFiction
Instagram	Pixelfed	Dribble
Sound Cloud	Audius	Pornhub

This sample of 15 platforms served our research in different ways. When analysing broader structures (such as the of rules and automated systems), we were able to look into the entirety of the sample. Yet, given the extension and complexity of the data we collected and examined qualitatively, deeper analyses could only be done in relation to a subset of platforms, in the form of case studies. Chapter 5 explains the decisions on these case studies.

2.7.2.2. DATA COLLECTION

Having decided which platforms we would investigate, a second task involved deciding how to collect data that could answer the empirical sub-research questions (SQR) (4), (5) and (6), reproduced below for ease of reference.

- SQR (4): How are copyright content moderation rules organized by platforms into public documents?
- SQR (5): Which copyright content moderation rules do different platforms employ to regulate copyright, and how have they changed over time?
- SQR (6): How do platforms' automated copyright content moderation systems work?

Our goal of *mapping out* selected platforms' copyright content moderation rules and automated copyright content moderation systems demanded, mainly, the direct analysis of platforms' public

documents. Auxiliary approaches were also employed. Procedures regarding the research of rules and systems followed different approaches, as explained next.

A) COPYRIGHT CONTENT MODERATION RULES

Instead of focussing on documents that have been already studied as regulating copyright, such as those expressly labelled as “Terms of Service”, we assumed that all T&Cs-related public documents could, in principle, be somehow related to copyright content moderation. Therefore, the initial goal was to investigate *all* versions of all public documents of those 15 platforms, from the day the platforms were created until 31 December 2020 – when our data collection ended.

To collect these documents, we resorted to platforms’ websites and, mainly, Internet Archive’s WayBack Machine (**WBM**), the largest online archive of websites’ previous impressions. Before we explain how we used the WBM, it is worth clarifying how this archive works. Beginning in 1996, the Internet Archive (the organization behind the WBM) had by December 2020 collected over 475 billion webpages.¹³² The WBM use “crawler” software to download and store all publicly available data about websites, producing a snapshot of a given page at a given moment. Yet, not all the history of all websites is stored in the WBM. There are three main reasons for this: “some sites may not be included because the automated crawlers were unaware of their existence at the time of the crawl”; others “were not archived because they were password protected, blocked by robots.txt, or otherwise inaccessible to our automated systems”; and finally, “site owners might have also requested that their sites be excluded” from the WBM”.¹³³ In short, the WBM is the best tool to access previous versions of websites – but it is also unavoidably flawed. Ultimately, it might be impossible to know what, after all, the archive does *not* contain.

There’s a rich literature that uses the WBM to amass large quantities of data about websites’ T&Cs. These studies typically cast a very wide net as their goal is to produce high level insights about how the private regulation of the Internet as whole has changed over the years. Amos et al (2020)^{134/135} examine privacy policies often with the goal of understanding the effect of certain new legislations on

¹³² Jenica Jessen, ‘Looking Back on 2020’ (*Internet Archive Blogs*, 19 December 2020) <<http://blog.archive.org/2020/12/19/looking-back-on-2020/>> accessed 20 February 2022.

¹³³ ‘Using The Wayback Machine’ (*Internet Archive Help Center*) <<https://help.archive.org/hc/en-us/articles/360004651732-Using-The-Wayback-Machine>> accessed 20 February 2022.

¹³⁴ Ryan Amos and others, ‘Privacy Policies over Time: Curation and Analysis of a Million-Document Dataset’ [2021] Proceedings of the Web Conference 2021 2165.

¹³⁵ George R Milne and Mary J Culnan, ‘Using the Content of Online Privacy Notices to Inform Public Policy: A Longitudinal Analysis of the 1998-2001 U.S. Web Surveys’ (2002) 18 The Information Society 345.

websites' T&Cs.¹³⁶ Yet, we could not find a study with our particular focus: to make of sense of the rules that social media platforms use to regulate copyright content moderation. Therefore, while not technically innovative, our collection procedures are original.

Through our inductive approach, we quickly learned that what counts as platform T&Cs could hardly be limited to documents that resemble legal contracts – specifically, Terms of Service and Privacy Agreements (sometimes called Data Policy). For years now, platforms have used some sort of Community Guidelines, Help pages and various specific kinds of public documents (e.g., Principles) to further specify the rules that users should comply with when using their services. Thus, these documents would have to be gathered, too – in addition to the said more explicit contractual terms. Also, there was a number of documents that the (non-legal) literature only rarely paid attention to: law enforcement guidelines and Cookies Policy. In sum, platform's T&Cs were far from centralized, homogenous or stable. Names of T&Cs and their URLs changed and expanded over time, without any transparent explanation. This unexpected fragmentation both imposed additional hurdles, as we explain below, and can be a finding in itself, as we explore in Chapter 5.

The data collection followed some basic procedures for all platforms¹³⁷:

- We visited the platforms' corporate websites and checked whether and how documents were displayed and archived.
- Using keywords (mainly, "policy", "copyright", "content moderation", "regulation"), we searched for and saved corporate publications of interest.
- If the platform provided no comprehensive, reliable change log of its documents, we resorted to the WBM. Using a pre-existing list of URLs of the original versions of three kinds of T&Cs (Terms of Service, Privacy Agreement and Community Guidelines)¹³⁸, we located and saved all unique versions of all documents we could find. "Unique version" is defined here as the version containing at least one change in the T&Cs text that somehow modified any of the platform's rules – not only copyright content moderation.
- We strived to find the exact day that a given new version was archived in the WBM. To do so, we used online text comparison software¹³⁹ to manually compare the first archived version of a given document to the latest version of the same document in a given year. If there was no substantive change, we then moved to compare it with the latest version of the same document in the next year, and so on, until we found a substantive change. When this sort of

¹³⁶ Thomas Linden and others, 'The Privacy Policy Landscape After the GDPR' (2020) 2020 Proceedings on Privacy Enhancing Technologies 47.

¹³⁷ Eventually, we also used WBM's API to automatically collect hundreds of versions at once. Yet, this procedure was not systematically followed for all platforms of our sample; what is more, no document was added to our sample without passing through a manual check to be sure that it was a unique version.

¹³⁸ This initial list was part of Kirsten Gollatz's doctoral work, partially developed at the HIIG.

¹³⁹ Mostly, 'Text Compare! - An Online Diff Tool That Can Find the Difference between Two Text Files' <<https://text-compare.com/>> accessed 17 February 2022. and 'Diffchecker' <<https://www.diffchecker.com/diff#>> accessed 17 February 2022. which work essentially the same.

change was found, we then tried to ascertain its date by establishing, in this order, the year, semester, trimester, month and, finally, day of the change – although on many occasions the archive was too incomplete to allow us to be confident of even the year of the change.¹⁴⁰

- When necessary, we annotated the URLs of the relevant hyperlinks of a document with the aim of constructing a map of all URLs of all T&Cs – what amounted to a sort of manual crawling.
- We finally searched the URLs of the resulting map in the WBM, saving all available versions.

The relative simplicity of these steps might obscure how convoluted, uneven and time-consuming the data collection was. The more we browsed the WBM and platforms' own websites, the clearer it became that several platforms' T&Cs landscape is acutely fragmented into a web of pages, sub-pages and sub-subpages, each one with its own URL. This imposed a methodological challenge. For the WBM seemingly tends not to archive many of the URLs of the various sub-pages and sub-subpages that platforms created over time to explain their T&Cs. In total, after discarding the collection of types of T&Cs that, we realised, do not explicitly regard copyright at all (e.g., Privacy Policy), we collected 626 versions of relevant versions published by the 15 platforms of our sample since the early 2000s (see Table 6 in Chapter 5).

The sheer number of versions, the limitations of our project, and the inconsistent nature of the available data, led us to adjust our research. First, due to time and resources constraints, we analysed 318 of the 626 documents collected. The difference between these numbers is explained by two decisions, which aimed at making the analysis feasible and our conclusions as valid as possible: (1) to focus on two temporal points: 30 of June and 31 of December of each year; that is, if a given document of a given platform changed more than once during a given semester, only the version standing at the end of the semester was analysed; (2) not to examine YouTube's huge and highly fragmented collection of "Copyright Policy" documents – selected available versions of their Terms of Service, Community Guidelines and Help pages were examined, though.

This second decision warrants further explanation. More than demanding more time than we had to complete this element of the project, the examination of these versions could also lead to misleading conclusions. Since WBM's often had only one or two versions of the various URLs that YouTube created to host the pages and sub-pages of their T&Cs, our collection of these versions, while large in absolute numbers, was likely incomplete. With more time, it would be possible to curate this sub-collection, something that we plan to do in the future. Furthermore, of all platforms of our sample, YouTube appears to be the most researched one. Focussing on other services could generate new insights, we judged.

¹⁴⁰ On this point, see our analysis infra in Chapter 5.

The other way in which these methodological difficulties shaped our research concerns the very understanding of what “mapping” platforms’ copyright content moderation structures should mean. If platforms’ rules are spread-out through various documents, located at different spaces of services’ websites, as we learnt during the data collection, their very organization of rules into documents should be understood as one element of platforms’ T&Cs. For this component will affect whether and how users can see these rules, and the discursive status these rules may enjoy. Put another way, making sense of which kinds of documents exist is, in itself, relevant – hence, our decision to pose *SQR(4): How are copyright content moderation rules organized by platforms into public documents?*

Time limitations led us to use case studies to present our data. We focus on six platforms, two per group of services (see the three groups in Table 3 above). When choosing which services should be discussed in depth, we took into consideration two main elements. To ensure that our conclusions would be as accurate as possible, we privileged the platforms with the most complete collection of collected documents. Thus, for instance, while YouTube is a hugely important actor when it comes to copyright, our database of their highly fragmented T&Cs is not robust enough to allow for a precise longitudinal examination of their rules, as we said above. Secondly, we wanted to make sure that platforms represented the diversity of their group. Instead of, say, examining two platforms with similar functionalities, models and audiences, we sought to detail services that had contrasting technical approaches to regulating copyright. In so doing, this case studies showcase most rules our analysis has found. Following these criteria, we chose the following case studies: Facebook and SoundCloud (mainstream platforms); Diaspora and DTube (alternative platforms); and Pornhub and FanFiction (specialised platforms).

B) AUTOMATED COPYRIGHT CONTENT MODERATION SYSTEMS

When deciding how to examine platforms’ documents on automated copyright content moderation systems, we early on realised that a longitudinal approach was either too unreliable (in the case of YouTube) or largely unnecessary (in the case of Facebook and Instagram). Documents regarding YouTube’s Content ID, which was launched in 2006, are mostly buried in the companies’ “Copyright Policy” section – which, as we explained in the previous section, is deeply fragmented, casting credible doubts on the completeness of WBM’s collection of their various pages and sub-pages. It is certainly possible to discuss these older documents. But our confidence in the possibility of a rigorous reconstruction of this trajectory, with our methods at least, was low. Facebook and Instagram’s shared system, Rights Manager, in contrast, is much younger – it was made public in 2016. A preliminary analysis of the older documents we could find on WBM did not surface differences that, we judged, were important enough to justify a longitudinal analysis.

Therefore, the data collection happened between June and August 2021 and involved accessing and gathering a range of different publicly accessible materials in which the companies describe their systems, such as Help pages, blog posts, presentations, documents, webpages, videos and patent applications. Before, in order to understand which platform employed these systems, we visited the webpages of all 15 services to learn which one of them discussed in their webpages the eventual use of these systems. To do so, we read their current T&Cs and searched their websites using with some keywords, namely “copyright”, “intellectual rights”, and “fingerprinting”.

When analysing the material, which is self-reported and often played a promotional role, we were confronted with a high degree of opacity. Their information is blatantly incomplete, and the language is often vague, leaving a lot of room for interpretation and several unanswered questions.

We tried then different data collection approaches. First, we decided that, at least in relation to our case study (Facebook’s Rights Manager), we should try to directly approach the platform to clarify several aspects of that system. On 9 July 2021, we contacted, via e-mail, a representative of Facebook with a list of 61 questions (see Annex III). They pertain, for instance, to the criteria that a content owner has to fulfil in order to be granted access to the system, the inner workings of the fingerprinting process, the details of the monetisation processes and potential ways for disputing the decisions of these automated systems. The representative redirected our questions to a public policy officer with a focus on IP and media policy for EMEA (Europe, Middle East and Africa), who agreed to answer. Facebook sent a response in writing, also via e-mail, on 15 September 2021, and further clarifications were added in a follow-up email correspondence and an online-meeting. Their answers did provide additional information to the publicly available material, but also left questions unresolved.

Second, we repurposed a non-private Facebook Page, not active and with almost no original content, to test how long it would take for Facebook to reject / accept an application to Rights Manager. We also wanted to know if Facebook would provide any insights on why the application was accepted / rejected and if there is any information about a possible dispute of an eventual rejection. Importantly, the page we used had been created years ago by one of the authors for his personal use, and not for the purposes of this study.

2.7.2.3. DATA ANALYSIS

Again, procedures used to analyse data concerning copyright content moderation rules and automated copyright content moderation systems differed considerably and are thus divided into two subsections.

A) COPYRIGHT CONTENT MODERATION RULES

Usually, longitudinal studies of changes of websites' T&Cs (e.g., the proportion of websites that have certain T&Cs or which of their T&Cs mention certain topics) employ computational techniques of textual analysis. However, our case was considerably different. First, given our focus on social media platforms, our database was smaller – and, thus, more analytically manageable. Second, since we were interested in mapping out of which *rules* different platforms employ to regulate copyright content moderation, and how these rules changed over time and across companies, our approach could hardly be quantitative. For what counts as a “rule” in a document is not necessarily apparent. Much of the documents’ texts are non-normative, and their normative elements do not necessarily follow the same syntax or employ the same words. To put it differently, rules had to be inferred through human interpretation.

These conditions posed considerable hurdles to standard computational tools of textual analysis¹⁴¹ and invited qualitative methods. In light of our goal of mapping out these rules, we opted for a method that could allow us to chart their general characteristics. Hence, with the help of the manual text analysis software NVivo, we conducted a thematic analysis, a method of “pattern recognition within the data, where emerging themes become the categories for analysis”¹⁴² through the “careful reading and re-reading of the data”¹⁴³. In our case, the “emerging themes” corresponded to, mainly, particular *rules*. That is to say, we did not begin our analysis using any pre-defined rule as classifiers; rather, these rules emerged inductively from our reading of the documents, being iteratively changed and refined in the process until they became clear categories that we could use to classify our data. The analysis followed some steps:

- **1. Creation a readable database.** When importing documents to NVivo, we assigned them certain metadata: date, kind of document, and name of the platform.
- **2. Familiarisation with the data.** Both during the data collection or in the beginning of the data analysis, we read extensive excerpts of the documents so as to understand some of its general characteristics.
- **3. Focus on copyright.** Each document was read and only the elements that we understood as somehow pertaining to copyright content moderation were coded and separate for further analysis.
- **4. Development of the coding frame.** Initially using SoundCloud’s documents as a pilot, we developed a coding frame, which was slowly enhanced. The crux of our work, meaning the drafting and re-drafting of said rules, was far from linear. Rather, rules emerged out of an iterative reading of the data, and were changed several times before stable formats could be defined. It is important

¹⁴¹ Whether properly trained machine learning algorithms can perform this analysis is an interesting methodological avenue that we did not pursue.

¹⁴² Jennifer Fereday and Eimear Muir-Cochrane, ‘Demonstrating Rigor Using Thematic Analysis: A Hybrid Approach of Inductive and Deductive Coding and Theme Development’ (2006) 5 International Journal of Qualitative Methods 80, 82.

¹⁴³ Fereday and Muir-Cochrane (n 142).

to stress that only rarely these rules were explicit in the texts we read. More often, creating them involved considerable amounts of interpretation, a relevant observation in terms of replicability of our research. The most important difficulty regards specificity, that is, how many rules a given document excerpt contains. Since one rule (e.g., “Users must respect copyrights”) might contain different specific determinations (e.g., “users must only post their own content”, “users should not post content they do not have rights over”, etc) coders might arrive at different conclusions regarding how many rules a particular excerpt contains and, naturally, which rules these are. As a rule of thumb, we strived to balance specificity and comprehensiveness, and tried to keep the terms used by platforms. Returning to the example we just used, while it is possible to say that “Users must respect copyrights” is in fact composed of those particular and potentially different specific provisions, we coded all of them as part of the same, main provision. There is no single, all-encompassing way to cogently make sense of the large and diverse set of rules we found. To attain our goal of *mapping out* platforms’ provisions – as opposed to an exhaustive examination of the documents’ texts, we also decided to create intermediary themes around which rules could be organized. At the end of our analysis, our coding frame contained eight top-level themes (the kinds of documents where platforms’ copyright rules are located), 15 intermediary themes (the kinds of rules we found, in terms of *normative types* and *subject*, terms explained in Chapter 5) and 95 lower-level themes, which correspond to the actual rules that, according to our work, regulate copyright content moderation in the 15 platforms examined (see Annex II).

- **5. Report initial results.** On several occasions, after finishing the analysis of one kind of document in a specific platform, we wrote short reports which described the findings, including how characteristics and rules have changed over time and compiled insights elicited during the analysis, including explanatory ones. The goal was to arrive at certain findings gradually and avoid being overwhelmed by the complexity of the data.
- **6. Making sense of change and mentions.** Once all data was coded, we employed NVivo’s “Explore” functionality to create coding/thematic matrixes, which were exported as spreadsheets for further analysis. These analyses focussed on, in addition to the rules (grouped by normative type, subject and normative period), the number of mentions (“references”, as they are called by the NVivo system) to them. “Mention”, for our purposes, could entail for instance a single sentence or a whole paragraph. As long as rules’ statements were uttered independently in the document, they were counted as unique mentions. To assess how rules and mentions fluctuated over time, we employed, mainly, descriptive statistics.
- **7. Report final results.** Based on steps 4-6 above, we wrote up answers to our research questions. At this final stage, our broader evaluation frames were how copyright content moderation rules changed (1) over time and (2) across different platforms.

B) AUTOMATED COPYRIGHT CONTENT MODERATION SYSTEMS

Since (1) the amount of data we were dealing with regarding automated copyright content moderation systems was much smaller, (2) we did not want to trace these systems’ historical evolution, and (3) we did not want to identify their rules in a formal manner but merely explain how these systems work, no systematic analysis of the accessed and collected documents was carried out. Instead, we merely transposed and reorganized the information found in the documents we accessed or collected, enriched by the information directly provided by Facebook over e-mail. Our findings are,

thus, based on the information contained in the pages and the email, not on insights arising from formal textual analysis, as in the case of copyright content moderation rules.

As with copyright content moderation rules, however, we judged that it would be useful to provide at least one case study, in which we could discuss an automated copyright content moderation system in-depth. We chose Rights Manager, which serves both Meta-owned Facebook and Instagram, as it is both highly relevant, in terms of affected users, and, to date, rarely researched.

2.7.2.4. LIMITATIONS

While reflecting our best efforts, our empirical analysis has some important limitations, which relate to our data collection, analysis and conceptual choices.

First and foremost, our data is unlikely to be complete, due to the limitations of the WBM and platforms' websites, as explained above. The collection of T&Cs versions of some platforms appeared to be more complete than others, however. In particular, findings about YouTube should be taken cautiously, as we decided not to examine most of their "Copyright Policy" versions¹⁴⁴ Moreover, several platforms, notably Facebook, YouTube and Instagram, have country- or region-specific versions of their T&Cs. This posed a problem since the WBM neither groups websites into country-specific pages nor allows researchers to know whether these differing versions exist. Therefore, it is likely that versions tailored specifically to the EU are missing from our archive. Finally, as we discovered during our work, copyright content moderation structures are always changing. Our insights should be considered as valid to December 2020 (in relation to rules) and September 2021 (in relation to automated copyright content moderation systems). In regards to Facebook's answers to our questions, it is important to remember that we had no means to independently validate the accuracy of the information given that is not otherwise publicly accessible. That is, while coming from the company itself, their answers are not *necessarily* complete, up-to-date, or true.

As to our data analysis, it should be noted that, despite our efforts to make our process transparent, the strongly interpretative nature of our thematic analysis makes it is likely that other coders would arrive at a different set of rules, and/or code the same excerpts differently. This is a natural and arguably unavoidable consequence of the sort of qualitative analysis our research questions demanded. We are confident, however, that eventual disagreements would not be substantial enough to contradict our top-level conclusions.

¹⁴⁴ See Section 2.7.2.2 above.

An additional limitation is conceptual. In this study, we take “rules” to mean both the public and written statements that are explicitly defined as “rules” by platforms themselves. It might be possible, however, that platforms’ actual rules regarding copyright are simply different from those they decided to make public. That is, platforms’ copyright content moderation might involve internal and informal “rules” that remain beyond the reach of our methods. One prominent example is the set of “rules” that structure how “rules” are internally discussed and defined – platforms’ policymaking. Studying this process is key but would depend on the benevolence of platforms’ controllers, who would have to accept to be observed and interviewed. Another example, mentioned above (in 2.2), is the recognition that there might be a difference between what is stated in public documents and how algorithmic content moderation systems are actually deployed. Therefore, we cannot guarantee that our conclusions correspond to the *real* deployment of these systems. That said, given the increasing legal obligations on platform’s attached to T&Cs and the need to justify content moderation decisions based on such T&Cs, these issues will likely have reduced impact for the purposes of our legal analysis.

2.7.2.5. ETHICAL CONCERNS

Throughout our data collection and analysis, we were vigilant about possible ethics issues that could emerge from our work. Since we were mainly studying public documents of large corporations, we could not identify any potential harm caused by our research to any subject. Given the public interest that drives our work, we firmly believe this research can be considered as fair use of platforms’ T&Cs – thus, there was no need to seek their formal approval. Furthermore, since no deception was involved in our repurposing of a real and previously created Facebook page to test Rights Manager’s application process, this method cannot be said to be detrimental to the company.

3. LEGAL MAPPING AT EU LEVEL¹⁴⁵

This chapter carries out a legal mapping of copyright content moderation by online platforms at secondary EU law level. This chapter aims to answer the following sub-research questions (SQRs), from an EU law perspective.

- SQR (2): How is the private and public regulatory framework for content moderation for online platforms structured?
- SQR (3): How do the various elements of that regulatory framework interact?

Our main focus here is the legal regime of art. 17 CDSMD. To explain this complex regime and its implications, we first provide some context on the legal regime that precedes the CDSMD (3.1). We then briefly explain the legislative process leading to the adoption of the Directive (3.2). In order to provide a blueprint for the legal analysis of art. 17, we first provide snapshot of the legal regime (3.3). This is followed by some preliminary remarks that are crucial for the interpretation of the provision, namely relating to the European Commission's stakeholder consultations and Guidelines on art. 17, and the action for annulment of art. 17 initiated by the Polish government in Case C-401/19. We then provide a detailed analysis of art. 17, with an emphasis on its liability regime and rules with implication for copyright content moderation by OCSSPs (3.4). We then provide a reflection on the normative hierarchy of the provision's rules on user rights and safeguards vs preventive measures (especially ex ante filters), in light of the Commission's Guidance, and the AG Opinion and CJEU judgement in Case C-401/19, including the implications of said judgement (3.5). We conclude the chapter with a reference to the interface between art. 17 CDSMD (3.6), where we point readers to detailed a detailed analysis of that topic out by some of the authors of this report in the context of the reCreating Europe project.¹⁴⁶

3.1. PRE-EXISTING LEGAL FRAMEWORK: THE INTERPLAY BETWEEN THE INFOSOC AND E-COMMERCE DIRECTIVE¹⁴⁷

Before delving into the new regime of OCSSPs, it is important to set the baseline regime from which art. 17 CDSMD departs from. EU law has been subject to a high level of harmonization stemming from many directives on copyright and related rights, the interpretation of which is determined by CJEU

¹⁴⁵ The main authors of this Chapter are João Pedro Quintais and Sebastian Felix Schwemer

¹⁴⁶ Quintais and Schwemer (n 1).

¹⁴⁷ Part of this section reproduces parts of and relies on João Pedro Quintais, 'The New Liability Paradigm for Online Platforms in EU Copyright Law [Forthcoming]' (Edward Elgar 2022); João Quintais and Christina Angelopoulos, 'YouTube and Cyando, Joined Cases C-682/18 and C-683/18 (22 June 2021): Case Comment' [2022] Auteursrecht 46.

case law. This copyright *acquis Communautaire* often surpasses international minimum standards of protection. For our purposes, the most relevant instruments preceding the CDSMD are the 2001 InfoSoc Directive and the 2000 e-Commerce Directive. This section explains how the relevant provisions in these directives have been interpreted to impose liability on online platforms that host and provide access to copyright-protected content/materials, and how such interpretation ultimately led to art. 17 CDSMD.

3.1.1.THE EVOLUTION OF THE RIGHT OF COMMUNICATION TO THE PUBLIC

The InfoSoc Directive implements the WIPO Treaties into EU law and adapts it to the information society.¹⁴⁸ It recognizes exclusive rights applicable to online use, namely reproduction and communication to the public (including making available), as well as number of exceptions or limitations to the same.¹⁴⁹ The case law of the CJEU traditionally interprets the exclusive rights broadly and the exceptions strictly.¹⁵⁰

Particularly important in this context is the Court's case law on the right of communication to the public in art. 3 InfoSoc Directive. This provision grants authors a broad right of communication to the public, including making available (paragraph 1) and related right holders a narrower right of making available (paragraph 2). The distinction is justified because the directive leaves intact specific rights of communication recognized for the related rights holders elsewhere in the *acquis*.¹⁵¹

The exclusive right applies to communication at a distance, covers online use and is not subject to exhaustion.¹⁵² The "making available" prong applies to interactive "on-demand" use (e.g., uploading), but does not require reception or access of the work by the public.¹⁵³

¹⁴⁸ Recitals 15, 19, 61 InfoSoc Directive.

¹⁴⁹ Arts. 2-5 InfoSoc Directive.

¹⁵⁰ See e.g. João Pedro Quintais, *Copyright in the Age of Online Access: Alternative Compensation Systems in EU Law* (Kluwer Law International 2017); Rendas (n 112).

¹⁵¹ See Art. 4 SatCab Directive and Art. 8 Rental and Lending Rights Directive, which remain applicable by virtue of Art. 1(2)(b) and (c) InfoSoc Directive.

¹⁵² Recital 25 InfoSoc Directive. See e.g. CJEU, 15 March 2012, case C-135/10 Società Consortile Fonografici (SCF) v Marco Del Corso (SCF), para. 59; CJEU, 26 March 2015, case C-279/13 C More Entertainment AB v Linus Sandberg (C More Entertainment), para. 26; CJEU, 19 December 2019, case C-263/18 Nederlands Uitgeversverbond en Groep Algemene Uitgevers tegen Tom Kabinet Internet BV e.a. (Tom Kabinet)

¹⁵³ Art. 3(3) and Recital 29 InfoSoc Directive. NB since the judgments in Coditel I and II, the CJEU has considered communication to the public to be a service and, therefore, not subject to exhaustion.

There is a vast body of CJEU case law on the right and concept of communication to the public across different directives, including its applicability online.¹⁵⁴ It is beyond the scope of this chapter to examine this case law in detail. However, it is important to highlight some of the main conclusions from these judgments, since they have direct bearing on our analysis.

First, the right must be interpreted broadly.¹⁵⁵ Second, “communication to the public” is an autonomous concept of EU law.¹⁵⁶ Third, communication to the public involves different types of activities both offline and online. In the online context, the Court has confirmed that the exclusive right applies to myriad uses: the “live streaming” or broadcasting by a third party over the Internet of signals from commercial television broadcasters (*ITV Broadcasting*); the provision of “clickable links” giving access to protected works (*Svensson*); the provision of framing links to protected works (*BestWater*); the direct broadcast of a sporting fixture on an Internet site (*C More Entertainment*); the posting of hyperlinks to works on third party websites without the right holder’s consent (*GS Media*); the sale of multi-media players with pre-installed add-ons that contain hyperlinks to websites making available works to the public without the consent of the right holders (*Filmspeler*); the provision of an online peer-to-peer (p2p) platform that enables the sharing of protected files without the consent of right holders (*Ziggo*); the embedding, by means of the technique of framing, in a third-party website page, of freely accessible protected content on another website, where that embedding circumvents technical protection measures (*VG Bild Kunst*); and the uploading by users of a p2p networks of media files containing a protected work (*Mircom*).¹⁵⁷

Interestingly, in one of the latest and crucial instalments of this case law, the Court ruled that a video-sharing platform (YouTube) or a file-hosting and -sharing platform (Upload), “on which users can illegally make protected content available to the public, does not make a ‘communication to the

¹⁵⁴ See generally, João Pedro Quintais, ‘Untangling the Hyperlinking Web: In Search of the Online Right of Communication to the Public’ (2018) 21 *The Journal of World Intellectual Property* 385; Eleonora Rosati, ‘When Does a Communication to the Public Under EU Copyright Law Need to Be to a “New Public”?’ [2020] *European Law Review* <<https://papers.ssrn.com/abstract=3640493>> accessed 26 May 2021.

¹⁵⁵ See recital 23 InfoSoc Directive. See: CJEU, 7 March 2013, case C-607/11 *ITV Broadcasting Ltd v TVCatchUp Ltd (ITV Broadcasting)*, para. 20 (and case-law cited therein); OSA, para. 23;

70 CJEU, 19 November 2015, case C-325/14 *SBS Belgium NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM)*, para. 14; CJEU, 31 May 2016, case Case C-117/15, *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA)(Reha Training)*, para. 36.

¹⁵⁶ CJEU, 7 December 2006, case C-306/05, *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA (Rafael Hoteles)*, para. 31.

¹⁵⁷ See: CJEU, 7 March 2013, case C-607/11 (*ITV Broadcasting*); CJEU, 13 February 2014, case C-466/12, *Nils Svensson v Retriever Sverige AB (Svensson)*; CJEU, 21 October 2014, case C-348/13, *BestWater International GmbH v Michael Mebes and Stefan Potsch (BestWater)*; C-279/13 (*C More Entertainment*); CJEU 8 September 2016, case C-160/15, *GS Media BV v Sanoma Media Netherlands BV and Others (GS Media)*; CJEU, 26 April 2014, case C-527/15, *Stichting BREIN v Jack Frederik Wullums (Filmspeler)*; CJEU, 14 June 2017, *Stichting Brein v Ziggo (Ziggo)*; CJEU, 9 March 2021, *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz (VG Bild Kunst)*; CJEU, 17 June 2021, case C-597/19, *Mircom International Content Management & Consulting (M.I.C.M.) Limited v Telenet BVBA, (Mircom)*

public' of that content, within the meaning of that provision, unless it contributes, beyond merely making that platform available, to giving access to such content to the public in breach of copyright."¹⁵⁸

In any case, the Court's case law has significantly expanded the scope of the right of communication to the public, and as a result the scope of primary or direct liability for copyright infringement in EU law.¹⁵⁹ In doing so, the Court has engaged in a veritable legal jiu-jitsu, namely through the development of criteria and conditions to interpret art. 3 InfoSoc Directive. These can be summarized as follows.

A use triggers the exclusive right if it meets two cumulative conditions: it is (1) an act of communication (2) to the public. An "act of communication" (1) in this sense has at least two pre-requisites or sub-criteria. First, there must be "indispensable role" of the user for that act to take place.¹⁶⁰ In addition, the intervention of that user must be deliberate. This means for instance that a "platform operator makes an "act of communication" when it intervenes, in full knowledge of the consequences of its action, to give its customers access to a protected work, particularly where, in the absence of that intervention, those customers would not, in principle, be able to enjoy the broadcast work".¹⁶¹

That act is made "to the public" (2) if it reaches an indeterminate and fairly large number of recipients as potential beneficiaries of the communication. In addition, the public in question must either be a "new public" (i.e., a public not considered by the copyright holder when they authorized the initial communication) or a public reached through a separate or specific technical means.

In parallel to these cumulative conditions, the CJEU sometimes refers to the profit-making nature or purpose of the communication and other complementary and interdependent factors or sub-criteria, which are taken into consideration to varying degrees in order to make an individual assessment of the concept of communication to the public.¹⁶²

¹⁵⁸ CJEU 22 June 2021, Joined Cases C-682/18 and C-683/18, Frank Peterson v Google LLC, YouTube Inc., YouTube LLC, Google Germany GmbH (C-682/18), and Elsevier Inc. v Cyando AG (C-683/18), (*Youtube and Cyando*)

¹⁵⁹ Giancarlo Frosio, 'It's All Linked: How Communication to the Public Affects Internet Architecture' (2020) 37 Computer Law & Security Review 105410; 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?' [2020] Zeitschrift für Geistiges Eigentum/Intellectual Property Journal (ZGE/IPJ) <<https://papers.ssrn.com/abstract=3572040>> accessed 17 April 2020; Quintais, 'Untangling the Hyperlinking Web' (n 154).

¹⁶⁰ C-682/18 and C-683/18, *YouTube and Cyando*, paras. 66–68.

¹⁶¹ C-682/18 and C-683/18, *YouTube and Cyando*, para. 68.

¹⁶² For a detailed analysis of the case law developing this conceptual framework, see Quintais, 'Untangling the Hyperlinking Web' (n 154). See also, incorporating latter case law, Rosati, 'When Does a Communication to the Public Under EU Copyright Law Need to Be to a "New Public"?' (n 154).

Most of the Court's interpretative activity expanding the scope of this exclusive right takes place in the analysis of two separate criteria, pre-requisites or sub-factors: "deliberate intervention" and the "new public". Under the shadow of these criteria, the Court has steadily included the consideration of elements of knowledge, commerciality, and technological restrictions in the assessment of primary or direct liability.¹⁶³ To be precise, after a steady stream of cases where the court mostly developed in great minutiae the new public criterion (from *Svensson* to *VG Bild Kunst*), some of the most recent case law has taken aim at a refinement of the concept of "deliberate intervention" (*Mircom* and *YouTube and Cyando*).

Although this report does not examine the intricacies of this case law, it is important to emphasize an important development in the later cases. In particular, the fact that they clearly import mental elements into the assessment of "act of communication" requirement of the concept of communication to the public – something that had only previously been done with any level of detail for the "new public" criterion. For instance, the Court in *Mircom* clarified the legal status of uploading in the context of a p2p network using the BitTorrent protocol, especially as regards the act of the uploading user. In essence, the CJEU states that if it is established (as a factual matter) by the national court that the user is aware of how the software works (i.e., that it automatically uploads pieces of files that have been downloaded by the user), and if the user has not actively turned off the "automatically upload" feature, then that user's conduct is capable of constituting an act of making available. In a departure from the AG Opinion in this case¹⁶⁴, the Court requires a mental element when assessing the conduct of the user, i.e., that s/he acts "in full knowledge of the consequences of what he or she is doing".¹⁶⁵ This shift is even more pronounced in *YouTube and Cyando*, as further explained below at 3.1.3.

These later judgments therefore solidify the Court's gradual transformation of the right, away from a traditional strict liability paradigm, incorporating elements that are more typical of the analysis of

¹⁶³ See e.g. Jane C Ginsburg and Luke Budiardjo, 'Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives' (2018) 41 Columbia Journal of Law & the Arts 153; Christina Angelopoulos and João Pedro Quintais, 'Fixing Copyright Reform: A Better Solution to Online Infringement' (2019) 10 JIPITEC 147. On the consideration of technical protection measures as a precondition for the application of art. 3 in certain online scenarios, see C-392/19, *VG Bild-Kunst*. For commentary on the latter case, see Sebastian Felix Schwemer, 'Linking: Essential Functionality on the Internet and Never-Ending Story?' in M Rosenmeier (ed), *Festskrift til Jørgen Blomqvist (Ex Tuto, 2021)*, pp. 623–640 (Ex Tuto 2021) <<https://papers.ssrn.com/abstract=3844548>> accessed 11 October 2021.

¹⁶⁴ CJEU, 17 December 2020, Case C-597/19, *Mircom International Content Management & Consulting (M.I.C.M.) Limited v Telenet BVBA (Mircom)*, Opinion of Advocate General Szpunar, paras 54–61, suggesting that actual knowledge of the consequences of the act of uploading by the user was not relevant since in this situation such knowledge concerned not an intermediary service provider (as in the preceding case law) but end-users carrying out an initial and autonomous act of communication.

¹⁶⁵ C-597/19, *Mircom*, para. 49.

intermediary, secondary or accessory liability.¹⁶⁶ As a result, the Court has eroded the lines between direct/primary and secondary/intermediary/accessory liability in EU copyright law, especially as it regards the activities of online platforms hosting and providing access to copyright-protected content. This development that is at the heart of call for new legal rules for online platforms, which were eventually adopted in art. 17 CDSMD.

Still, to properly understand this development, we must first briefly examine two other pieces of legal puzzle in EU copyright law, namely the rules on injunctions in the InfoSoc Directive and the liability exemption for hosting service providers in the e-Commerce Directive. These are discussed in the following sub-section.

3.1.2. INJUNCTIONS AND LIABILITY EXEMPTIONS

The first additional element of the legal puzzle is the InfoSoc Directive's provisions on sanctions and remedies, and in particular the rule in art. 8(3) obligating Member States to ensure that rights holders can apply for injunctions against intermediaries whose services are used by a third party to infringe copyright, even if the intermediary is not itself directly liable for infringement (and, thus, for damages under art. 8(1) and (2)).¹⁶⁷

Art. 8(3) has played a significant role in determining the liability of providers of intermediary services and articulates the liability exemptions for intermediaries in the e-Commerce Directive. Although it is up to national law to determine the scope and procedures to seek injunctions, the same is limited *inter alia* by the operation of fundamental rights recognized in the CFREU. This implies that an injunction must strike a fair balance between conflicting fundamental rights: to copyright as property, on the one hand (art. 17(2) CFREU); and to the protection of personal data and privacy of Internet users, their freedom to receive and impart information, and intermediary service provider's freedom to conduct a business (respectively, arts. 7, 8, 11 and 16 CFREU).¹⁶⁸

¹⁶⁶ Christina Angelopoulos, 'Harmonising Intermediary Copyright Liability in the EU: A Summary' in Giancarlo Frosio (ed), *The Oxford Handbook of Online Intermediary Liability* (Oxford University Press 2020) <<https://papers.ssrn.com/abstract=3685863>> accessed 26 May 2021.

¹⁶⁷ NB art.8(3) InfoSoc Directive remains applicable despite the existence of a provision on injunctions in Article 11 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (Enforcement Directive) [2004] OJ L157 (hereafter Enforcement Directive). Despite the Enforcement Directive generally regulating interlocutory injunctions against intermediaries, the regulation of such injunctions for copyright infringement is dealt with by art. 8(3) InfoSoc Directive.

¹⁶⁸ Charter of Fundamental Rights of the European Union, art. 52, 2000 O.J. (C 364) 1, 21 (EC) (hereinafter Charter). On the CJEU case law on fair balancing in the copyright field see e.g. Christina Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis* (Kluwer Law International 2016); Martin Husovec, *Injunctions against Intermediaries in the European Union: Accountable but Not Liable?* (Cambridge University Press 2017)..

The second additional element of the legal puzzle refers to the e-Commerce Directive's rules on intermediary liability.¹⁶⁹ In EU law, there is no comprehensive harmonization of intermediary *liability*. A noted, the e-Commerce Directive contains conditional liability *exemptions*, or “safe harbours”, for certain types of intermediary services involving claims for damages: mere conduit (or access), caching, and hosting.¹⁷⁰ The directive further contains a prohibition on the imposition by Member States on intermediary service providers of general monitoring obligations.¹⁷¹ Under this regime, intermediaries may still be required to take measures against the infringement of copyright, since it remains possible to subject intermediaries to injunctions (e.g., under the InfoSoc Directive) and duties of care.¹⁷²

The interpretation of this constellation of provisions is incredibly complex and far from settled.¹⁷³ In its case law on the topic, the CJEU has noted that safe harbours require a sufficient degree of “neutrality” from the intermediary. This approach creates a grey area for the qualification of certain web 2.0 platforms as “neutral”/ “passive” vs “active” intermediaries for the purposes of the hosting safe harbour.¹⁷⁴

The approach finds its legal basis in Recital 42 of the e-Commerce Directive, according to which the directive's safe harbours are applicable only if the provider's activities are of “a mere technical, automatic and passive nature”. For instance, in *Google France/Louis Vuitton*, this meant that a platform should play a “neutral” role regarding the data it stores to enjoy safe harbour protection.¹⁷⁵ When a provider plays “an active role of such a kind as to give it knowledge of, or control over, the data stored”, it falls outside of the scope of safe-harbour protection.¹⁷⁶

The distinction between “active and “passive” role in this context is unclear. The CJEU has provided some guidance in this respect. Thus, in *L'Oréal/eBay* the Court stated that if the online sales platform eBay assists users in “optimising the presentation of the offers for sale in question or promoting those offers”, it does not merely play a neutral role but must be considered an active service provider.¹⁷⁷

¹⁶⁹ See, generally, Riordan (n 78).

¹⁷⁰ Arts 12-14 e-Commerce Directive.

¹⁷¹ Art. 15 e-Commerce Directive.

¹⁷² See arts. 13(2), 14(3), 18 e-Commerce Directive.

¹⁷³ Christina Angelopoulos and Martin Senftleben, ‘An Endless Odyssey? Content Moderation Without General Content Monitoring Obligations’ (IViR; CIPIL 2021) <<https://papers.ssrn.com/abstract=3871916>> accessed 24 June 2021.

¹⁷⁴ The approach finds its legal basis in Recital 42 e-Commerce Directive, according to which the directive's safe harbours are applicable only if the platform's activities are of “a mere technical, automatic and passive nature”. In its case law, the CJEU has applied art. 14 of this directive to a search engine's advertising service, an online sales platform, and a social networking platform. See C-236/08, C237/08 & C-238/08, *Google France/Louis Vuitton*; C-324/09, *L'Oreal/Ebay*; C-360/10, *Netlog*. See generally van Hoboken and others (n 72).

¹⁷⁵ C-236/08, C237/08 & C-238/08, *Google France/Louis Vuitton* para. 114.

¹⁷⁶ C-236/08, C237/08 & C-238/08, *Google France/Louis Vuitton*, para. 120.

¹⁷⁷ C-324/09, *L'Oreal/Ebay*, para. 116.

However, the mere fact that eBay “sets the terms of its service, is remunerated for that service and provides general information to its customers” does not mean it plays an active role.¹⁷⁸ By contrast, in *Google France/Louis Vuitton*, the role played by a service provider in the drafting of a commercial message which accompanies an advertising link or in the establishment or selection of keywords was considered relevant in determining whether the provider is active or passive.¹⁷⁹

A further aspect of the legal framework is controversial. Art. 15 e-Commerce Directive (supported by Recital 47) requires that a distinction be made between “general” monitoring obligations and obligations to monitor in “specific” cases. Whereas the earlier would be prohibited, the latter would be permitted. In *L'Oréal/eBay*, the CJEU found that “active monitoring of all the data of each of a [service provider's] customers in order to prevent any future infringement of intellectual property rights” is not allowed under art. 15.¹⁸⁰ In line with *L'Oréal/eBay*, the CJEU found in *Scarlet Extended* and *Netlog* that requiring a platform to actively monitor “almost all the data relating to all of its service users in order to prevent any future infringement of intellectual-property rights” is also prohibited under art. 15.¹⁸¹

But in a later case of *Eva Glawischnig-Piesczek*, which concerns not copyright but *defamation*, the Court took a different approach. In this judgement, the Court accepts that a hosting service provider may monitor all or most of the information uploaded by users if there is a court order identifying a “specific” illegality. Furthermore, the content at issue must be identical or “equivalent” to the content of information which was previously declared to be unlawful. The CJEU however identified a number of constraints on such monitoring, namely that it is: (1) “limited to information conveying a message the content of which remains essentially unchanged compared with the content which gave rise to the finding of illegality and containing the elements specified in the injunction; and (2) “the differences in the wording of that equivalent content, compared with the wording characterising the information which was previously declared to be illegal, are not such as to require the host provider to carry out an independent assessment of that content”.¹⁸² This suggests for instance that such a specific injunction must be carefully delimited and tailored, as well as susceptible to be implemented via automated means by the provider, i.e., without a human in the loop making the decision.

¹⁷⁸ C-324/09, *L'Oreal/Ebay* para. 115. See also C-236/08, C237/08 & C-238/08, *Google France/Louis Vuitton*, para. 116.

¹⁷⁹ C-236/08, C237/08 & C-238/08, *Google France/Louis Vuitton*, para 118.

¹⁸⁰ C-324/09, *L'Oreal/Ebay*, para. 139.

¹⁸¹ C-360/10, *Netlog*, para 38. See also C-70/10, *Scarlet Extended*, para. 40.

¹⁸² Case C-18/18, *Eva Glawischnig-Piesczek v Facebook Ireland Limited* (3 October 2019), ECLI:EU:C:2019:821 (operative part).

It is not clear whether and to what extent the reasoning in *Glawischnig-Piesczek* applies to copyright law as well, especially given the differences in assessment of defamation via a short textual post on a social media network vs audio-visual material in a video-sharing platform.¹⁸³ Furthermore, considering all the above case law, it also remains unclear – in the framework of the e-Commerce Directive – precisely what type of “specific” (as opposed to “general”) monitoring duties may be lawfully imposed on providers to prevent infringement, namely in what concerns pro-active measures like filtering.¹⁸⁴

YouTube and Cyando, the most recent judgement relevant to our analysis, has also not fully elucidated this point. As noted by Angelopoulos¹⁸⁵, the Court re-states pre-*Glawischnig-Piesczek* case law when it concludes that: “measures that consist in requiring a service provider to introduce, exclusively at its own expense, a screening system which entails general and permanent monitoring in order to prevent any future infringement of intellectual property rights [is] incompatible with Article 15(1) of the Directive on Electronic Commerce”.¹⁸⁶ On this basis, the Court goes on to conclude for the validity of the current German law that conditions the obtaining of an injunction under the national version of art. 8(3) InfoSoc Directive to the requirements that: (1) rights holders to notify a host service provider of infringements on their platform; and (2) that the intermediary fails to intervene expeditiously in order to remove and/or block access to the content in question, and to ensure that such infringements do not recur.¹⁸⁷ Importantly, the Court does not rely on *Glawischnig-Piesczek* for its interpretation or conclusion on general monitoring obligations, leaving the matter to be ultimately clarified in future cases.¹⁸⁸

¹⁸³ In this respect, see [Favalle 2021] concluding that “it is not legally viable to implement the same norms on such different areas of law [copyright infringement vs hate speech/defamation] as the consequences of these norms infringements are incomparable.”

¹⁸⁴ Contrast e.g. Jan Bernd Nordemann, ‘The Functioning of the Internal Market for Digital Services: Responsibilities and Duties of Care of Providers of Digital Services’ (European Parliamentary IMCO Committee 2020) <[https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2020\)648802](https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2020)648802)>. with Christina Angelopoulos, ‘Study on Online Platforms and the Commission’s New Proposal for a Directive on Copyright in the Digital Single Market’ (Greens/EFA Group 2017) Report <<https://www.repository.cam.ac.uk/handle/1810/275826>> accessed 28 May 2021.

¹⁸⁵ Christina Angelopoulos, ‘YouTube and Cyando, Injunctions against Intermediaries and General Monitoring Obligations: Any Movement?’ (*Kluwer Copyright Blog*, 9 August 2021) <<http://copyrightblog.kluweriplaw.com/2021/08/09/youtube-and-cyando-injunctions-against-intermediaries-and-general-monitoring-obligations-any-movement/>> accessed 5 October 2021.

¹⁸⁶ C-682/18 and C-683/18, *YouTube and Cyando*, para. 135.

¹⁸⁷ C-682/18 and C-683/18, *YouTube and Cyando*, operative part. The Court further concludes that this law strikes a fair balance between the competing fundamental rights provided the conditions at issue do “not result in the actual cessation of the infringement being delayed in such a way as to cause disproportionate damage to the rightholder”, which is for the national court to determine.

¹⁸⁸ But see CJEU, 15 July 2021, Case C-401/19, Poland v Parliament and Council, Opinion of Advocate General Saugmandsgaard Øe, (hereafter AG Opinion C-401/19, Poland), paras 111-115, arguing that the standard for general monitoring obligations for copyright cases has indeed been changed in the wake of *Glawischnig-Piesczek*.

As explained below, art. 17 CDSMD aims to a certain extent to target this uncertainty, namely by incentivizing – within certain constraints – proactive preventive measures to curtail copyright infringement. However, the new regime does not necessarily add clarity to this complex question.¹⁸⁹

3.1.3. DIRECT LIABILITY AND LIABILITY EXEMPTIONS AT A CROSSROADS

The analysis of the pre-existing legal framework shows a trend towards expanding direct liability for communicating works to the public to cover players other than those that are the source or origin of the act of communication, often through the introduction of a multi-factor analysis comprising mental elements. This expansion has taken place in the shadow of the horizontal rules on e-Commerce Directive's safe-harbours and their interpretation by the Court, in a dialectic relationship between the sector specific (InfoSoc Directive) and horizontal (e-Commerce Directive) rules as they apply online platforms hosting and providing access to copyright-protected content.

Thus far, the expansion of the scope of art. 3 InfoSoc Directive has stopped short of clearly extending direct liability to mainstream hosting platforms, such as those covered by the new regime as OCSSPs.¹⁹⁰ This conclusion is clear from the multiple judgments that qualify them as hosting service providers under art. 14 E-Commerce Directive, and is confirmed by the Court's judgment in *YouTube and Cyando* and the AG Opinion in Case C-401/19.

YouTube and Cyando is particularly relevant for our analysis here. The judgement joined two cases. The first concerned the video-sharing platform operated by YouTube and takedown and stay down requests of phonograms uploaded by its users. The second has as a defendant a file-hosting and -sharing platform (Uploaded) operated by Cyando, and concerned files uploaded by users and hosted on Uploaded and accessible to the public via links in third-party websites (link collections, blogs, forums), some of which contained unauthorized copies of works. This complex judgment involved the joint interpretation of arts. 3(1) and 8(3) InfoSoc Directive (regarding direct liability for communication to the public and injunctions, respectively), art. 14 e-Commerce Directive (regarding indirect liability and hosting safe harbours) and arts. 11 and 13 Enforcement Directive (concerning damages). As the Court was careful to note, this judgment did not concern the interpretation of art. 17 CDSMD¹⁹¹, even

¹⁸⁹ See infra at 3.4.

¹⁹⁰ Martin Husovec and João Pedro Quintais, 'How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms under the Copyright in the Digital Single Market Directive' (2021) 70 GRUR International 325.

¹⁹¹ C-682/18 and C-683/18, *YouTube and Cyando*, para. 59.

if this new provision will henceforth govern the liability of at least some of the providers covered in the judgment, such as YouTube.

For our purposes here, the key question is whether *YouTube and Cyando* leads to an identical liability regime (under the InfoSoc and e-Commerce Directives) as that of art. 17 CDSMD. The answer is that it clearly does not. In simple terms, the Court rules that providers such as YouTube and Uploaded are in principle not directly liable for copyright infringements resulting from uploads by their users. The crux of the analysis is found in the “act of communication” requirement, and in particular the “deliberate intervention” criterion. The Court states that end-users make the (primary) act of communication; the platform does play an “indispensable role” but not necessarily “deliberate”. To assess whether there is a “deliberate intervention”, the Court develops a multi-factor test.¹⁹²

For instance, there is a deliberate intervention if the platform operator, despite general or constructive knowledge of illegal content available via its platform, refrains from putting in place the appropriate technological measures that can be expected from a reasonably diligent operator in its situation in order to counter credibly and effectively such infringements. It is also relevant that such operator: (1) participates in selecting protected content illegally communicated to the public, and provides tools on its platform specifically intended for the illegal sharing of such content; or, alternatively, (2) knowingly promotes such sharing, which may be attested by the fact that it has adopted a financial model that encourages users illegally making available infringing content on its platform.¹⁹³

The Court further notes that for purposes of finding a “deliberate intervention” it is not enough to establish that the provider has “general knowledge” of illegal content on platform, or the mere profit-making nature of platform.¹⁹⁴ The later point is important as the Court sets aside the application of the *GS Media* rebuttable presumption of knowledge to this effect and clarifies that no such analogy is possible.¹⁹⁵ On the other hand, it is clarified that “actual knowledge” via a sufficient substantiated notice, followed by the lack of appropriate (i.e., not expeditious) action by the platform provider is sufficient to establish a “deliberate intervention”.¹⁹⁶ In this way, the Court attempt to align its

¹⁹² C-682/18 and C-683/18, *YouTube and Cyandoparas* 84ff.

¹⁹³ C-682/18 and C-683/18, *YouTube and Cyando*, para. 84.

¹⁹⁴ C-682/18 and C-683/18, *YouTube and Cyando*, paras 85ff.

¹⁹⁵ C-682/18 and C-683/18, *YouTube and Cyando*, paras 89.

¹⁹⁶ C-682/18 and C-683/18, *YouTube and Cyando*, para. 85.

assessment of direct liability with its prior considerations on the “active” role of intermediaries under art. 14 e-Commerce Directive.¹⁹⁷

In the end, it will be up to national Courts to assess the different factors to establish whether a platform operator carries out a deliberate intervention leading to direct liability. But in the present case the Court concludes that on the basis of the facts presented neither YouTube nor Uploaded would be liable for communicating works to the public.¹⁹⁸ At least in one national decision following this judgment, the Austrian Supreme Court relied on *YouTube and Cyando* to conclude that YouTube, qualified as a hosting service provider, was not liable for copyright infringements by its uploading users provided it had not been notified of the infringing works on its service.¹⁹⁹

As we shall see, both the underling complexity in the assessment of direct vs intermediary liability under this regime and the exclusion of direct liability for platform providers like YouTube are in stark contrast with the novel rules in art. 17 CDSMD. The result is a bifurcation of legal regimes for online platforms hosting copyright-protected content, translating into different rules for OCSSPs vs non-OCSSPs. In any case, it is important to note that art. 17 CDSMD preceded the judgment in *YouTube and Cyando*. In the light of then-existing case law, the new provision was demanded by right holders to effectuate a change in the existing legal landscape, forcing OCSSPs outside the scope of the hosting safe harbour and into licensing agreements with OCSSPs under the threat of direct liability for their core activities.²⁰⁰

3.2. THE ROAD TO THE NEW DIRECTIVE

The story of the CDSMD can be traced back to the Public Consultation on the Review of EU Copyright Rules, held between December 2013 and March 2014.²⁰¹ The consultation covered a broad range of issues on the application of EU copyright rules in the digital environment. The consultation produced thousands of responses, summarized by the Commission in a report published in July 2014.²⁰² This report was followed by a leaked Commission “white paper” in June 2014²⁰³ and the Communication

¹⁹⁷ See considerations *supra* at 3.1.2

¹⁹⁸ C-682/18 and C-683/18, *YouTube and Cyando*, paras 92 ff.

¹⁹⁹ Rainer Schultes and Alexander Schnider, ‘Austrian Supreme Court Finds YouTube Not Responsible for Copyright Infringements by Users’ (*Kluwer Copyright Blog*, 31 May 2022) <<http://copyrightblog.kluweriplaw.com/2022/05/31/austrian-supreme-court-finds-youtube-not-responsible-for-copyright-infringements-by-users/>> accessed 14 July 2022.

²⁰⁰ Husovec and Quintais (n 190). (and references cited therein).

²⁰¹ Commission, “Public Consultation on the Review of EU Copyright Rules” (2013) (On file with the authors).

²⁰² Commission, “Report on the responses to the Public Consultation on the Review of the EU Copyright Rules”, Directorate General Internal Market and Services, Directorate D – Intellectual property, D1 – Copyright (July 2014) (On file with the authors).

²⁰³ Commission, White Paper, “A Copyright Policy for Creativity and Innovation the European Union” (2014), <https://www.dropbox.com/s/0xcflgrav01tqlb/White%20Paper%20internal%20draft%29%20%281%29.PDF>.

“Towards a modern, more European copyright framework” in December 2015, which explicitly stated the intention to regulate content-sharing platforms.²⁰⁴

The proposal for a directive was published in September 2016 by the Commission.²⁰⁵ The process followed the ordinary legislative procedure, which places the European Parliament and the Council of the European Union on equal footing, meaning that a separate process for assessing the proposal took place within each institution. At the Council, there was an agreement on 25 May 2018 on an amended version of the proposal, which set forth the Council’s position and provided the basis for its negotiating mandate.²⁰⁶ At the EU Parliament, five Committees were involved in the discussions, ending with the JURI (Legal Affairs) Committee, which voted on a compromise version on 20 June 2018.²⁰⁷ After some resistance,²⁰⁸ the text eventually made it to the stage of trilogue negotiations, concluded on 13 February 2019. The surviving compromise text was approved by the EU Parliament on 26 March.²⁰⁹ It was then approved by the Council on 15/17 April by a qualified majority.²¹⁰ Six countries voted against, issuing statements that either criticize the legislative text or lay out some interpretative guidelines on the most contentious issues.²¹¹

The legislative process was mired in controversy and heavily lobbied from all sides. The brunt of the criticism of the Directive focused on the new press publishers’ right (then art. 11, now art. 15) and the so-called “value gap” or “upload filters” provision (then art. 13, now art. 17). This criticism included civil society protests²¹² reminiscent of the ACTA debate, opposition by digital rights NGOs²¹³ and

²⁰⁴ Commission, “Towards a modern, more European copyright framework”, COM(2015) 626 final (9.12.2015), p. 10.

²⁰⁵ Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM/2016/0593.

²⁰⁶ Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market – Agreed negotiating mandate, ST 9134 2018 INIT.

²⁰⁷ EDRI, ‘Press Release: MEPs Ignore Expert Advice and Vote for Mass Internet Censorship’ (*European Digital Rights (EDRI)*, 20 June 2018) <<https://edri.org/our-work/press-release-meps-ignore-expert-advice-and-vote-for-mass-internet-censorship/>> accessed 17 February 2022.

²⁰⁸ *European Parliament News*, ‘Parliament to review copyright rules in September’ (5 June 2018) <http://www.europarl.europa.eu/news/en/press-room/20180628IPR06809/parliament-to-review-copyright-rules-in-september> [Accessed 9 July 2019].

²⁰⁹ CREATe Centre: University of Glasgow, ‘Copyright Directive Approved at Plenary Vote’ (*CREATE Blog*, 26 March 2021) <<https://www.create.ac.uk/copyright-directive-approved-at-plenary-vote/>> accessed 17 February 2022.

²¹⁰ European Commission, ‘Press Release: Copyright Reform Clears Final Hurdle: Commission Welcomes Approval of Modernised Rules Fit for Digital Age’ (*European Commission - European Commission*, 15 April 2019) <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2151> accessed 22 February 2022.

²¹¹ See Draft Directive of the European Parliament and of the Council on copyright and related rights in the Digital Single Market amending Directives 96/9/EC and 2001/29/EC (first reading) – adoption of the legislative act – statements (2019). For an excellent timeline of the legislative process, see CREATe Centre: University of Glasgow, ‘EU Copyright Reform: Evidence on the Copyright in the Digital Single Market Directive’ <<https://www.create.ac.uk/policy-responses/eu-copyright-reform/>> accessed 17 February 2022.

²¹² Felix Reda, ‘EU Copyright Reform: Our Fight Was Not in Vain’ (*Felix Reda*, 18 April 2019) <<https://felixreda.eu/2019/04/not-in-vain/>> accessed 22 February 2022.

²¹³ European Liberties, ‘Article 13 Open Letter – Monitoring and Filtering of Internet Content Is Unacceptable’ (*Liberties.eu*, 16 October 2017) <<https://www.liberties.eu/en/stories/delete-article-thirteen-open-letter/13131>> accessed 22 February 2022.

Internet luminaries,²¹⁴ and multiple expert statements²¹⁵ by research institutes and academics. On balance, however, the lobbying by rights holders' representatives – especially publishers, the recording industry and (music) collecting societies – appears to have been the most intense and effective, often outweighing empirical research in support of opposite views.²¹⁶

The CDSMD is one of the longest instruments in the copyright *acquis*, with 86 recitals and 32 articles. It is divided into five titles: general provisions (I), measures to adapt exceptions and limitations to the digital and cross-border environment (II), measures to improve licensing practices and ensure wider access to content (III), measures to achieve a well-functioning marketplace for copyright (IV), and final provisions (V). The table below summarises the Directive's structure. The second chapter of Title IV contains the much-debated art. 17²¹⁷, which we examine next.

Table 4. Structure CDSMD

Title	Chapter	Articles	Recitals (Indicative)
I. General provisions	-	1, 2	1–4
II. Measures to adapt exceptions and limitations to the digital and cross-border environment	-	3 to 7	5–29
III. Measures to improve licensing practices and ensure wider access to content	1. Out-of-commerce works and other subject matter	8 to 11	30–43
	2. Measures to facilitate collective licensing	12	44–50
	3. Access to and availability of audiovisual works on video-on-demand platforms	13	51–52
	4. Works of visual art in the public domain	14	53
IV. Measures to Achieve a Well-Functioning Marketplace for Copyright	1. Rights in publications	15, 16	54–60
	2. Certain uses of protected content by online services	17	61–71
	3. Fair remuneration in exploitation contracts of authors and performers	18 to 23	72–81

²¹⁴ Danny O'Brien and Jeremy Malcolm, '70+ Internet Luminaries Ring the Alarm on EU Copyright Filtering Proposal' (*Electronic Frontier Foundation*, 12 June 2018) <<https://www.eff.org/deeplinks/2018/06/internet-luminaries-ring-alarm-eu-copyright-filtering-proposal>> accessed 22 February 2022.

²¹⁵ CREATe, 'The Copyright Directive: Articles 11 and 13 Must Go – Statement from European Academics in Advance of the Plenary Vote on 26 March 2019' (*CREATe Blog*, 24 March 2019) <<https://www.create.ac.uk/blog/2019/03/24/the-copyright-directive-articles-11-and-13-must-go-statement-from-european-academics-in-advance-of-the-plenary-vote-on-26-march-2019/>> accessed 22 February 2022.

²¹⁶ See Corporate Europe Observatory, 'Copyright Directive: How Competing Big Business Lobbies Drowned out Critical Voices' (*Corporate Europe Observatory*, 10 December 2018) <<https://corporateeurope.org/en/2018/12/copyright-directive-how-competitng-big-business-lobbies-drowned-out-critical-voices>> accessed 22 February 2022. On this topic, see also *Re:Publica 2019 – Martin Kretschmer: European Copyright Reform: Is It Possible?* (2019) <<https://www.youtube.com/watch?v=ZyujNlpxu9k>> accessed 22 February 2022. and B Farrand, "Towards a Modern, More European Copyright Framework", or, How to Rebrand the Same Old Approach? (2019) 41 European Intellectual Property Review 65.

²¹⁷ For analysis of this provision during the legislative process, see, e.g., Angelopoulos, 'Study on Online Platforms and the Commission's New Proposal for a Directive on Copyright in the Digital Single Market' (n 184); Martin Senftleben and others, 'The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform' (2018) 40 European Intellectual Property Review 149.

Title	Chapter	Articles	Recitals (Indicative)
V. Final Provisions	-	24 to 32	82–86

3.3. ARTICLE 17 CDSMD: BRIEF OVERVIEW

As Dusollier notes, art. 17 is the “monster provision” of the new directive, “both by its size and hazardousness”.²¹⁸ There is perhaps no better testament to this than the wealth of legal scholarship that already exists on art. 17.²¹⁹ In order to understand the provision, it is useful to have a high-level overview of its legal regime, before diving into the details. This is what we propose to do in this section.

Art. 17 applies to OCSSPs. These are defined in art. 2(6) CDSMD, with further guidance in recitals 62 and 63. OCSSPs are providers of an information society service whose main purposes is to store and give the public access to a large amount of protected content by its users, provided it organises and promotes that content for profit-making purposes. The definition also contains a number of exclusions aimed at services that are either not aimed primarily at giving access to copyright-protected content and/or are primarily not for-profit.

As noted, while this concept is new to the copyright *acquis*, OCSSPs do not appear to constitute a wholly new category of service providers in a technological or business sense. Rather, this is a new legal category covering a type of provider of hosting services whose activities or functions were previously currently regulated in different legal instruments, such as the e-Commerce, InfoSoc and Enforcement Directives.

²¹⁸ Séverine Dusollier, ‘The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a Few Bad Choices, and an Overall Failed Ambition’ (2020) 57 Common Market Law Review 979.

²¹⁹ There is already significant scholarship art 17. See e.g. Leistner (n 159); Axel Metzger and others, ‘Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market into National Law – Comment of the European Copyright Society’ (European Copyright Society 2020) European Copyright Society Opinion ID 3589323 <<https://papers.ssrn.com/abstract=3589323>> accessed 4 July 2020; Sebastian Felix Schwemer, ‘Article 17 at the Intersection of EU Copyright Law and Platform Regulation’ (2020) 3/2020 Nordic Intellectual Property Law Review <<https://papers.ssrn.com/abstract=3627446>> accessed 4 July 2020; 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’ (2019) 10 JIPITEC <<https://www.jipitec.eu/issues/jipitec-10-2-2019/4914>>; Giancarlo Frosio, ‘Reforming the C-DSM Reform: A User-Based Copyright Theory for Commonplace Creativity’ [2020] IIC - International Review of Intellectual Property and Competition Law <<https://doi.org/10.1007/s40319-020-00931-0>> accessed 4 July 2020; Maxime Lambrecht, ‘Free Speech by Design – Algorithmic Protection of Exceptions and Limitations in the Copyright DSM Directive’ (2020) 11 JIPITEC <<http://www.jipitec.eu/issues/jipitec-11-1-2020/5080>>; Gerald Spindler, ‘The Liability System of Art. 17 DSMD and National Implementation – Contravening Prohibition of General Monitoring Duties?’ 10 JIPITEC 334; Krzysztof Garstka, ‘Guiding the Blind Bloodhounds: How to Mitigate the Risks Art. 17 of Directive 2019/790 Poses to the Freedom of Expression’, *Intellectual Property and Human Rights* (4th edn, Kluwer Law International 2019) <<https://papers.ssrn.com/abstract=3471791>> accessed 8 April 2020; Dusollier (n 218); Jan Bernd Nordemann and Julian Wiblinger, ‘Art. 17 DSM-RL – Spannungsverhältnis Zum Bisherigen Recht?’ [2020] GRUR 569; Husovec and Quintais (n 190); Husovec and Quintais (n 68).

In simple terms, art. 17 states that OCSSPs carry out acts of communication to the public when they give access to works/subject matter uploaded by their users. As a result, these providers become directly liable for their users' uploads. They are also expressly excluded in paragraph (3) from the hosting safe harbour for copyright relevant acts, previously available to many of them under art. 14(1) e-Commerce Directive. Arguably, this makes Article 17 *lex specialis* to the E-Commerce Directive.

The provision then introduces a complex set of rules to regulate OCSSPs, including a liability exemption mechanism in paragraph (4), and a number of what can be referred to as mitigations measures and safeguards. The liability exemption mechanism is comprised of best efforts obligations for preventive measures, including those aimed at filtering content *ex ante*, at notice and stay-down, and at notice and takedown.²²⁰

Among the mitigations measures and safeguards that art. 17 includes we find the following. First, the requirements of a proportionality assessment and the identification of relevant factors for preventive measures.²²¹ Second, a special regime for small and new OCSSPs.²²² Third, a set of mandatory exceptions akin to user rights or freedoms that are designed as obligations of result expressly based on fundamental rights.²²³ Fourth, a clarification that art. 17 does not entail general monitoring – a similar prohibition to that set out in art. 15 e-Commerce Directive.²²⁴ Fifth, a set of procedural safeguards, including an in-platform complaint and redress mechanism and rules on out of court redress mechanisms.²²⁵

Finally, art. 17(10) tasks the European Commission (EC) with organising stakeholder dialogues to ensure uniform application of the obligation of cooperation between OCSSPs and rights holders and to establish best practices regarding the appropriate industry standards of professional diligence. These stakeholder dialogues have resulted in the publication of Commission Guidance on the interpretation of art. 17.²²⁶ We discuss the Guidance below, as well as its implications in key parts of

²²⁰ Art. 17(4) (b) and (c) CDSM Directive.

²²¹ Art. 17 (5) CDSM Directive.

²²² Art. 17 (6) CDSM Directive.

²²³ Art. 17 (7) CDSM Directive.

²²⁴ Art. 17(8) CDSM Directive. See, on this topic, Martin Senftleben and 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' (IViR; CIPIL 2020) <<https://papers.ssrn.com/abstract=3717022>> accessed 29 October 2020.

²²⁵ Art. 17(9) CDSM Directive.

²²⁶ Communication from the Commission to the European Parliament and the Council, Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market, COM/2021/288 final (hereafter "Guidance Art 17 CDSMD"). For early analysis of the Guidance Art. 17 CDSM Directive, see João Pedro Quintais, 'Commission's Guidance on Art. 17 CDSM Directive: The Authorisation Dimension' (*Kluwer Copyright Blog*, 10 June 2021)

the legal regime of art. 17. However, a few points should be made already at this stage. First, the Guidance was adopted as a Communication and is therefore not binding.²²⁷ Furthermore, as the Guidance itself states, it might have to be reviewed in light of the CJEU judgement in C-401/192.²²⁸ In fact, the Opinion of the Advocate General (AG) in that case suggests that key aspects of the Guidance might not be in conformity with fundamental rights.²²⁹ Although the same criticism is not explicitly made by the Court in the judgment, it appears clear (as we argue below) that at least some parts of the Guidance are at odds with the judgment.²³⁰ Still, the Guidance is a rich document that is bound to influence national implementations, including on the topics of copyright content moderation of the relationship between platforms and users.

In sum, as regards the relationship between platforms and users, art. 17 mostly sets rules for (certain types of) content moderation by platforms. These moderation actions result from the application of best efforts obligations vis-à-vis rights holders to apply preventive measures, a pre-condition for platforms to benefit from a liability exemption regarding content uploaded by users. Such measures must be applied with respect for users' rights embodied in certain freedom of expression-based exceptions. As we explain below, this will in principle require national laws to recognize the need for platforms to adopt ex ante safeguards, since ex post complaint and redress mechanisms are insufficient to ensure the respect of user rights.

3.4. ARTICLE 17 CDSMD IN DEPTH

3.4.1. THE CONCEPT OF ONLINE CONTENT-SHARING SERVICE PROVIDER (OCSSPS)²³¹

<<http://copyrightblog.kluweriplaw.com/2021/06/10/commissions-guidance-on-art-17-cdsm-directive-the-authorisation-dimension/>> accessed 17 August 2021; Julia Reda and Paul Keller, 'European Commission Back-Tracks on User Rights in Article 17 Guidance' (*Kluwer Copyright Blog*, 4 June 2021) <<http://copyrightblog.kluweriplaw.com/2021/06/04/european-commission-back-tracks-on-user-rights-in-article-17-guidance/>> accessed 24 June 2021; Christophe Geiger and Bernd Justin Jütte, 'Towards a Virtuous Legal Framework for Content Moderation by Digital Platforms in the EU? The Commission's Guidance on Article 17 CDSM Directive in the Light of the YouTube/Cyando Judgement and the AG's Opinion in C-401/19' [2021] European International Property Review <<https://papers.ssrn.com/abstract=3889049>> accessed 17 August 2021.

²²⁷ See arts. 288 and 290 of the Treaty on the Functioning of the European Union (TFEU).

²²⁸ Guidance Art. 17 CDSMD (n. 226), p. 1.

²²⁹ See C-401/19, AG Opinion C-401/19, *Poland v Parliament and Council*, paras 221-223.

²³⁰ See infra at 3.5

²³¹ This section relies and develops upon Husovec and Quintais (n 190). and Quintais, 'The New Liability Paradigm for Online Platforms in EU Copyright Law [Forthcoming]' (n 147).

Article 17 CDSMD regulates OCSSPs. These are defined in Art. 2(6) as service providers with a profit-making purpose that store and give the public access to a large amount of works or other subject matter uploaded by their end-users, which they organise and promote. Recital 62 gives further guidance on how to interpret the definition, in particular the importance of a relevant service's substitution effects and of a case-by-case assessment of a provider's profit-making purposes.

There is no doubt that the definition of OCSSP includes well-known user-upload or user-generated content video-sharing platforms like YouTube. It probably also includes social networking platforms with similar functionalities (e.g., Facebook), although some authors point out that certain aspects in the legal definition raise doubts in this regard.²³²

The scope of the definition is further clarified by a *non-exhaustive* list of exclusions in art. 2(6), which includes electronic communication services (e.g., Skype), providers of business-to-business cloud services and cloud services (e.g., Dropbox), online marketplaces (e.g., eBay), not-for profit online encyclopaedias (e.g., Wikipedia), not-for-profit educational and scientific repositories (e.g., ArXiv.org), and open-source software developing and sharing platforms (e.g., GitHub). Not all the types of excluded platforms listed follow neatly from the application of the definition. Some of them are undoubtedly the result of lobbying and political expediency. However, the exclusions share one or both of the following characteristics: (a) the main activity of these services is *not* giving access to protected content; and (b) the listed services are (at least at time of writing) wholly or predominantly not for-profit.²³³

A further aspect in the definition is noteworthy. Recital 62 contains an ambiguous reference to piracy websites that would at first glance open the door to exclude them from the definition of OCSSP. However, a closer reading suggests otherwise. Piracy websites can qualify as OCSSPs but are subject to a stricter regime according to the recital, since they would not be able to benefit from the special liability exemption mechanism in art. 17(4). As a result, if a piracy website qualifies as an OCSSP, it would be strictly liable without the possibility of benefiting from the liability exemption mechanism in paragraph (4).²³⁴

²³² See Metzger and others (n 11) 2-4; Dusollier (n 11).

²³³ This aligns with recital 62 CDSMD, which states that the definition 'should not include services that have a main purpose other than that of enabling users to upload and share a large amount of copyright-protected content with the purpose of obtaining profit from that activity.'

²³⁴ On art 17(4), see *infra* at 3.4.4–3.4.5. Recital 62 CDSMD states that "the liability exemption mechanism provided for in this Directive should not apply" to piracy websites.

While this concept is new to the copyright *acquis*, OCSSPs do not appear to constitute a wholly new category of service providers in a technological or business sense. Rather, this is a new legal category covering a type of provider of hosting services whose activities or functions were previously regulated in different legal instruments, such as the e-Commerce, InfoSoc and Enforcement Directives. However, the legal design of art. 17 CDSMD constitutes a new development. Until now, EU copyright law did not attach liability to a legally specified category of providers, but rather on the basis of acts (communication to the public) and services or functions (hosting). Now, direct liability for communication to the public is attached to the legal qualification of a provider as an OCSSP.

For the analysis of this new legal category, it is instructive to critically look at the Commission's Guidance, which dedicates a separate section to the topic.²³⁵

First, the Guidance states that the concept of OCSSP is maximum harmonization: Member States may not widen or reduce the scope of application of the definition in art. 2(6). Apparently clear on its face, the statement is problematic insofar as the Guidance itself is unclear about the actual scope of the concept. The inherent incentive for Member States is for a verbatim transposition. However, that would not suffice, since the Guidance states that Member States should transpose into their laws the elements in Recitals 61, 62 and 63. But since the elements in the recitals are to some extent open to interpretation, it remains unclear what exactly is the scope of the OCSSP definition, from which Member States cannot deviate from. As an example, Recital 63 explicitly requires a case-by-case assessment of what providers qualify as an OCSSP.

To mitigate these concerns and add clarity for national legislators, the Guidance addresses each requirement of the OCSSP definition. First, on the requirement on "main purpose" of the service provider, it states that that main purpose (or one of the main purposes) must mirror the chief or predominant function or role of service provider. This assessment "should be technology and business model neutral in order to be future proof."²³⁶

Second, on the requirement that a service provider must store a "large amount" of protected content, Members States should "refrain from quantifying" that amount in national law due to risk of fragmentation of national approaches. Consequently, this too must be assessed on a case-by-case basis, combining elements mentioned in Recital 63.²³⁷

²³⁵ Guidance Art. 17 CDSMD (n. 226), pp.3-5 (Section III).

²³⁶ Guidance Art. 17 CDSMD (n. 226), p. 4.

²³⁷ Guidance Art. 17 CDSMD (n. 226), p. 5. NB it remains unclear if all the elements in the recital must be combined in the assessment.

Third, on the requirement that the service provider pursues a “profit-making purpose” when organizing or promoting content, it is not enough that the provider is an economic operator or to look at its legal form. Profits must be connected to “organisation and promotion of the content uploaded by the users in a manner to attract a wider audience”, e.g., via advertisement next to uploaded content.²³⁸ In addition, certain activities are insufficient to qualify as for profit. These include receiving a fee from users to cover the operating costs of hosting their content or soliciting donations.²³⁹

Finally, in an interesting legal twist in the Commission’s interpretation, the Guidance states that if a provider offers multiple services, then there is a need for *service-by-service* analysis to assess whether it qualifies as an OCSSP.²⁴⁰ With this statement, the Guidance attempts to walk a legal tightrope by trying to fit logic of art. 2(6), which is focused on defining a certain type of service provider to whom direct liability is attributed, with traditional liability analysis under copyright law, which focuses on acts, services or functions by/of providers.

In fairness, the Guidance does a good job of aligning the new regime with the existing framework and CJEU case law on communication to the public. However, it cannot square the circle. Such an effort can at best approximate the regimes and improve their consistency. It cannot change the fact that the arts. 2(6) and 17 CDSMD mark a conceptual departure from previous law on how to attribute liability to a sub-set of online service providers. In short, in the new regime, if a provider is an OCSSP, then direct liability follows; in the old regime, if an act of a provider qualifies as communication to the public, then direct liability follows. How a provider is qualified as an OCSSP depends *inter alia* on several open-ended factors; some of these may be similar to the factors developed by the Court to establish direct liability in the pre-existing regime. Still, the structural differences in legal design of both are undeniable, and they translate into distinct approaches to the attribution of liability.

3.4.2. THE AUTHORISATION DIMENSION: DIRECT LIABILITY AND MERGER OF RESTRICTED ACTS²⁴¹

²³⁸ Guidance Art. 17 CDSMD (n. 226), p. 5.

²³⁹ Guidance Art. 17 CDSMD (n. 226), p. 5.

²⁴⁰ Guidance Art. 17 CDSMD (n. 226), p. 5.

²⁴¹ This section reproduces parts of and relies on Quintais, ‘The New Liability Paradigm for Online Platforms in EU Copyright Law [Forthcoming]’ (n 147).

As the Commission’s Guidance recognises, art. 17 “creates a legal basis” for rightsholders to authorise the use of their works when uploaded by users. It is therefore more than a “clarification” of the existing law, as it changes the pre-existing legal framework, namely vis-à-vis art. 3 InfoSoc Directive.²⁴²

There has been discussion in scholarship surrounding the legal nature of art. 17. Four interpretative options exist: (a) art. 17 is fully encompassed in the minimum international standard; (b) art. 17 is fully encompassed in the EU standard of art. 3 InfoSoc Directive, as interpreted by the CJEU; (c) art. 17 introduces a special right; (d) art. 17 introduces a *sui generis* right.²⁴³ A special right would mean that although the scope of acts it covers is *within* the pre-existing scope of the right of communication to the public in art. 3 InfoSoc Directive, it follows a separate regime with its own particular rules. Conversely, a new (*sui generis*) right would mean that it amounts to a wholly new right of communication to the public, which extends the concept beyond the already broad EU notion of the communication to the public in art. 3 InfoSoc Directive as interpreted by the CJEU.²⁴⁴ In its Guidance, the Commission endorses Option (c) by stating that art. 17 is *lex specialis*, and rejects other options, including that the provision introduces a new right.²⁴⁵

An important consequence of the *lex specialis* nature of art. 17 is that the provision requires specific implementation into national law. That is to say, it is not possible for Member States to rely on their previous implementation of art. 3 InfoSoc Directive. In this regard, a key aspect of the legal regime is that OCSSPs provide access to content originating from user uploads. As a result, national laws must explicitly introduce “specific conditions” that reflect this composite nature of the act of communication.²⁴⁶ Building on the qualifications above, it is important to further explore the concept and scope of the authorisations mentioned in arts. 17(1) and (2).

An initial consideration in the interpretation of art. 17(1) is that does not define “authorisation”, which is viewed as an open-ended concept. Member States can therefore provide for different authorisation models.²⁴⁷ In the second place, in line with the Guidance, it is argued that the acts of communication/making available to the public in art. 17(1) include any necessary reproductions for

²⁴² Guidance Art. 17 CDSMD (n. 226), p. 2. The point is clear from the statement that art. 17 is *lex specialis* to arts. 3 InfoSoc Directive and 14 e-Commerce Directive.

²⁴³ Husovec and Quintais (n 190).

²⁴⁴ Husovec and Quintais (n 190).

²⁴⁵ Guidance Art. 17 CDSMD (n. 226), p. 3.

²⁴⁶ Guidance Art. 17 CDSMD (n. 226), p. 2.

²⁴⁷ Guidance Art. 17 CDSMD (n. 226), pp. 5-6. An interesting clarification in this respect is that the concept of authorisation does not require a remunerative counter performance. Indeed, it is also acceptable that an authorisation is given for free (e.g., as with Creative Commons licenses) for “data or promotional activities”. *Id.*, p. 6.

those purposes.²⁴⁸ In other words, there is a functional merger between reproduction and communication to the public. The result is that no separate permission is required for reproductions in this context.²⁴⁹

From these statements it results that certain authorisation models are possible for the right in art. 17(1). This is the case, first, of individual and voluntary forms of collective licensing, provided the requirements of the Collective Rights Management Directive²⁵⁰ are met.²⁵¹ It is also the case for collective licensing with extended effect, provided the authorisation at issue is compliant with the requirements of art. 12 CDSMD, as transposed into national law.²⁵²

More controversial is the question of whether mandatory collective licensing and statutory licensing are viable authorisation models, since they are not voluntary for rightsholders, or at the very least do not include an opt-out safeguard. Some of us have argued elsewhere that this should be a possibility if it is accepted that the right in art. 17(1) is *lex specialis*, since this theoretically opens the door for non-voluntary and hybrid authorisation models, within certain limits, namely the *effet utile* of the provision.²⁵³ The Commission's Guidance is silent in this respect, seemingly not endorsing this option. However, this possibility seems to have been rejected by the CJEU in its judgement in Case C-401/19 – Poland v Parliament and Council, when stating that the contractual freedom of rights holders should not be affected by the new regime, and that “rightholders should not be obliged to give an authorisation or to conclude licensing agreements.”²⁵⁴

As regards art. 17(2), the objective of this provision is legal certainty for as many uploading users as possible. The provision states that authorisations obtained by OCSSPs shall also cover acts carried out

²⁴⁸ Guidance Art. 17 CDSM Directive (n. 226), pp. 5-7. Relatedly, the Guidance states that it should be possible for rightholders to not grant an authorisation to OCSSPs for acts of communication to the public under art. 17. See also Recital 61 CDSMD , making reference to contractual freedom.

²⁴⁹ Arguably, a similar conclusion could be drawn from some of the CJEU case on communication to the public, namely CJEU, 7 August 2018, Case C-161/17, Land Nordrhein-Westfalen v Dirk Renckhoff (*Renckhoff*). On which, see Tatiana Synodinou, ‘The Renckhoff Judgment: The CJEU Swivels the Faces of the Copyright Rubik’s Cube (Part I)’ (*Kluwer Copyright Blog*, 27 September 2018) <<http://copyrightblog.kluweriplaw.com/2018/09/27/renckhoff-judgment-cjeu-swivels-faces-copyright-rubiks-cube-part/>> accessed 20 October 2021.

²⁵⁰ Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

²⁵¹ Guidance Art. 17 CDSMD (n. 226), pp. 6-7. NB at least in the context of individual agreements, the Guidance encourages Member States to use, establish or maintain voluntary mechanisms to facilitate agreements between rightsholders and OCSSPs , perhaps nodding at mechanisms similar to those envisaged in art. 13 CDSMD. See *id.*, p.6. On the topic of authorization models for the right in art. 17, see also Husovec and Quintais (n 190).

²⁵² Guidance Art. 17 CDSMD (n. 226), pp. 6-7. See also on the validity of CLEE as an authorization model in this area, Husovec and Quintais (n 190).

²⁵³ For a detailed argument, see Husovec and Quintais (n 190).

²⁵⁴ Case C-401/19 – Poland v Parliament and Council, para. 61

by users of the services. The scope of the authorisation for these users extends to all their uploading acts that are: (1) for a non-commercial purpose; or (2) generating non-significant revenues.

In defining these concepts, Member States are told not to pre-set quantitative thresholds for “significant revenues”. This means that these concepts must be defined pursuant to a case-by-case analysis.²⁵⁵ One important clarification is that if the user has explicit authorisation to upload content, there is no need for additional authorisation to the OCSSP.²⁵⁶ This subsequent availability is within the scope of the initial authorisation, and *not* a presumption in favour of OCSSPs.²⁵⁷ In other words, and as argued elsewhere, art. 17(2) merges the act of OCSSP with the non-commercial acts of their users. Once an authorisation is granted, these acts cannot be split.²⁵⁸ This is a clear distinction from the pre-existing regime, where acts of platforms and users were assessed separately, and could only under specific scenarios and interpretations be considered functionally merged.

The final dimension of the authorisation mechanism in art. 17 relates to the obligation of best efforts to obtain an authorisation in art. 17(4)(a). We address this below at 3.4.4.

3.4.3.RELATION TO THE HOSTING LIABILITY EXEMPTION IN THE E-COMMERCE DIRECTIVE

The relation between the art. 17 CDSMD regime and the horizontal e-Commerce Directive is relevant in at least two dimensions: firstly, the relation between the hosting liability exemption in art. 14 e-Commerce Directive and the novel regime in art. 17(4) CDSMD; and secondly, the relation between the prohibition of general monitoring in art. 15 e-Commerce Directive and art. 17(8) CDSMD. The second dimension is addressed below at 3.4.8.2

As for the first dimension, we recall here what was described above regarding art. 14 e-Commerce Directive and the Courts interpretation thereof.²⁵⁹ In this respect, art. 17(3) CDSMD is clear. If an act of an OCSSP is covered by art. 17(1) and (2), then the hosting liability exemption in art. 14(1) does not apply to that act. In other words, the OCSSP is directly liable without the possibility of benefiting from the liability exemption for hosting service providers in the e-Commerce Directive. For acts of those

²⁵⁵ Guidance Art. 17 CDSMD (n. 226), p.7.

²⁵⁶ See Recital 69 CDSMD.

²⁵⁷ Guidance Art. 17 CDSMD (n. 226), pp. 7-8. However, the Guidance adds that it is up to rightsholders to expressly exclude subsequent uploading from the authorisation to end-users. To do so, the Commission encourages sharing of information to prevent blocking of legitimate uses.

²⁵⁸ See, for a detailed analysis of the consequences of this qualification, Husovec and Quintais (n 190).

²⁵⁹ See supra at 3.1.2–3.1.3.

same online platforms that do not fall under the scope of arts. 17(1) and (2) – especially the hosting of illegal content that is not copyright infringement – art. 14 e-Commerce Directive remains applicable.²⁶⁰ The logic conclusion of this regime, therefore, is that art. 17 is not only *lex specialis* to art. 3 InfoSoc Directive, but also to art. 14 e-Commerce Directive.²⁶¹

3.4.4. BEST EFFORTS TO OBTAIN AN AUTHORIZATION (ALSO AS A CONDITION FOR LIABILITY EXEMPTION)²⁶²

The liability exemption mechanism on art. 17(4) CDSMD encompasses a series of *cumulative* “best efforts” obligations to: (a) obtain an authorisation; (b) ensure unavailability of specific protected content; and (c) put in place notice and take down and notice and stay down mechanisms. This section focuses on first obligation (a), which is also a complete novelty as compared to the pre-existing regime under art. 3 InfoSoc Directive. Indeed, this obligation has a dual role: it qualifies the extent of the authorisation requirement for OCSSPs in art. 17(1); and is the first condition OCSSPs must meet to benefit from the liability exemption in art. 17(4).

Three important clarifications on best efforts obligations result from the Commission's Guidance. First, “best efforts” is an autonomous concept of EU law. Second, “best efforts” obligations are hierarchically inferior to the obligations of result in arts. 17(7), (8) and (9). Third, the proportionality principle in 17(5) should “be considered” when assessing *all* best efforts obligations in 17(4). This latter consideration is particularly important to protect OCSSPs’ freedom to conduct a business in art. 16 CFREU.²⁶³

According to the Commission, the obligation of “best efforts” to obtain authorisation in 17(4)(a) requires case-by-case analysis of actions of OCSSPs to seek out and/or engage with rightsholders. More concretely, a minimum threshold of that obligation is that OCSSPs engage proactively with rightsholders that can be easily identified and located, notably those with broad catalogues, such as collective rights management organisations (**CMOs**). On the flipside, OCSSPs should not be expected to proactively seek out rightsholders “not easily identifiable by any reasonable standard”.²⁶⁴

²⁶⁰ Art. 17(3) CDSMD , second subparagraph.

²⁶¹ Guidance Art. 17 CDSMD (n. 226), p. 2.

²⁶² This section reproduces parts of and relies on Quintais, ‘The New Liability Paradigm for Online Platforms in EU Copyright Law [Forthcoming]’ (n 147).

²⁶³ Guidance Art. 17 CDSMD (n. 226), p. 8.

²⁶⁴ Guidance Art. 17 CDSMD (n. 226), p.9. To facilitate this, the Guidance suggests that Member States may encourage development of registries of rightholders to be consulted by OCSSPs, in compliance with data protection rules Id. p. 9 On how the structure of art. 17 favors big rights holders, see Husovec and Quintais (n 68).

The Guidance further notes that the obligations under art. 17(4)(a) should be asymmetric depending on the OCSSP in question. In simplified terms, larger OCSSPs (“with a big audience in several or all Member States”) must seek out “high number of rightholders”, at least for the content that is predominant on their services. OCSSPs that are smaller, i.e., with a limited or national audience, must seek at least CMOs and “possibly a few other easily identifiable rightholders.” Those small and new OCSSPs covered by art. 17(6) must also seek out licenses, although the extent of their obligations should be assessed on a case-by-case basis with consideration for the principle of proportionality. In any case, smaller OCSSPs must provide contact details to potential licensees and engage with these if contacted by them.²⁶⁵

Against this basic set-up, the Guidance states that refusals to negotiate or unreasonable refusals to license by rightsholders result in OCSSPs meeting their obligation to seek authorisation under art. 17(4)(a). However, it is up to OCSSPs to demonstrate this, which might be challenging in practice, at least in the context of individual licensing deals.²⁶⁶ A relevant wrinkle is suggested for cases where a type of content is present but not common or prevalent on a certain platform. Here, OCSSPs do not need to proactively seek out licenses but must still “engage” with rightsholders that offer them.²⁶⁷

This point is trickier than it seems. At first glance, it is legally sound, since art. 17(1) leads to direct liability for protected content hosted by OCSSPs. Therefore, where the content is identified, it is susceptible of licensing. But if content is less common or prevalent on a service, then an OCSSP might have no interest in hosting it and could therefore legitimately choose to take it down (e.g., under art. 17(4)(c)). However, the structure of the provision means that in order to benefit from a liability exemption, OCSSPs must demonstrate best efforts under 17(4)(a).

What the Guidance is saying then is that OCSSP must make best efforts to license content in which they might not be at all interested. Seen in this light, this is quite a far-reaching statement, perhaps inconsistent with the proportionality provision in art. 17(5) CDSMD and providers’ freedom to conduct a business in art. 16 CFREU.

Reading the Guidance, it is unclear whether OCSSPs they have an obligation to license the less common or prevalent content under the same terms as the content that is core to their platform. If yes, then the only difference in this scenario is that OCSSPs are not required to proactively seek authorisation. On the other hand, and as potential mitigation on this obligation, it could be argued

²⁶⁵ Guidance Art. 17 CDSMD (n. 226), p.9.

²⁶⁶ Guidance Art. 17 CDSMD (n. 226), pp. 9-10.

²⁶⁷ For criticism, see Quintais, ‘Commission’s Guidance on Art. 17 CDSM Directive’ (n 226).

that this content is of less importance and value to the OCSSPs. Therefore, the obligation on OCSSPs pursuant to art. 17(4)(a) should be modulated accordingly, e.g., requiring a lower remuneration.

One key criterion to assess compliance with the obligation in art. 17(4)(a) is that licensing terms “should be fair and keep a reasonable balance between both parties” and be subject to the payment of “appropriate remuneration”.²⁶⁸ As a result, OCSSPs must accept to conclude licenses that are “offered on fair terms” and maintain “a reasonable balance between the parties”. Whether art. 17(4)(a) ends up in practice as a “best efforts” obligation or a more far-ranging obligation to license will depend on how these “fair terms” and “reasonable balance” are ultimately defined and applies to different OCSSPs and types of content.²⁶⁹

3.4.5. THE LIABILITY EXEMPTION MECHANISM PROPER: PREVENTIVE/PROACTIVE AND REACTIVE MEASURES²⁷⁰

Assuming OCCSPs are able to demonstrate best efforts to obtain an authorization, they must then comply with the additional requirements of art. 17(4)(b) and (c) to benefit from a liability exemption for the user-uploaded content they host. As noted, these obligations relate to preventive/proactive and reactive measures.

For preventive or proactive measures, OCSSPs must first receive from rights holders “relevant and necessary information”, upon which they must either carry out “best efforts to ensure the unavailability of specific works” (4(b)) or ensure the works already taken down do not resurface on the platform (4(c)). The first obligation provides clear incentives for the adoption of ex-ante filtering measures, what some have called “upload filters”; the second institutes a notice-and-stay down (**NSD**) regime, also labelled “re-upload filters”. Differently, the other measure foreseen in paragraph art. 17 (4)(c) is reactive: OCSSPs must put in pace a notice-and-takedown (**NTD**) system, pursuant to which they must act “expeditiously” to remove or disable access to content they host upon receiving a

²⁶⁸ Guidance Art. 17 CDSMD (n. 226), p.10. The Guidance takes this to mean, first, that “fair terms” are to be assessed on a case-by-case basis. In addition, a fair licensing deal means that OCSSP must be transparent about criteria used to identify and remunerate use of works, including as regards the use of content recognition technology. See also Recital 61 CDSMD.

²⁶⁹ Guidance Art. 17 CDSMD (n. 226), p.10. The situation is clearer and perhaps less problematic for licenses that are negotiated with CMOs, which must comply with the requirements of art. 16 of the Collective Rights Management Directive. Arguing that “[f]or that reason alone, it might be worth seriously exploring collective authorisation models for the right in art. 17”, see Quintais, ‘Commission’s Guidance on Art. 17 CDSM Directive’ (n 226).

²⁷⁰ This section reproduces parts of and relies on Quintais, ‘The New Liability Paradigm for Online Platforms in EU Copyright Law [Forthcoming]’ (n 147).

“sufficiently substantiated notice from the rightholders”.²⁷¹ This regime is like that existing previously under art. 14 e-Commerce Directive.

All obligations of best efforts must be interpreted in accordance with the principle of proportionality and the factors described in art. 17(5) CDSMD: the type, the audience and the size of the service and the type of protected content uploaded by their users; and the availability of suitable and effective means and their cost for OCSSPs. Furthermore, art. 17(6) partially exempts from this regime OCSSPs that are “new service providers with small turnover and audience”. Such OCSSPs must only comply with mitigated obligations to benefit from the liability exemption mechanism in paragraph (4).²⁷²

On *preventive or proactive measures*, the Commission’s Guidance states that information is considered “relevant” if it is at least “accurate about the rights ownership of the particular work or subject matter in question”. The consideration of whether it is “necessary” is trickier, and it will vary on the technical solutions deployed by OCSSPs; in any case, such information must allow for the effective application of the providers’ solutions, where they are used.²⁷³

The Guidance also provides some detail on how such *preventive or proactive measures* should be implemented. Any measures deployed by OCSSPs must follow “high industry standards of professional diligence”, to be assessed especially against “available industry practices on the market” at the time, including technological solutions. OCSSPs have flexibility only in choosing between available solutions, assuming such choice exists on the market.²⁷⁴

When discussing current market practices that emerged from the Stakeholder Dialogues, the Guidance highlights content recognition based on fingerprinting as the main example, although recognising that is not the market standard for smaller OCSSPs.²⁷⁵ Other technologies identified include hashing, watermarking, use of metadata and keyword search; these can also be used in combination.²⁷⁶ Such technologies are sometimes developed in-house (e.g., YouTube’s ContentID or Meta/Facebook’s Rights Manager), and other times acquired from third parties (e.g., from Audible Magic or Pex).

²⁷¹ See Guidance Art. 17 CDSMD (n. 226), pp.14-16, suggesting that what constitutes a “sufficiently substantiated notice” in this respect should follow the Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online C/2018/1177, points 6–8.

²⁷² On the interpretation of art. 17(6), see Guidance Art. 17 CDSMD (n. 226), pp. 16-17.

²⁷³ Guidance Art. 17 CDSMD (n. 226), p.14 (providing examples related with “fingerprinting” and “metadata-based solutions”).

²⁷⁴ Guidance Art. 17 CDSMD (n. 226), p.12.

²⁷⁵ Guidance Art. 17 CDSMD (n. 226), p. 12.

²⁷⁶ Guidance Art. 17 CDSMD (n. 226), pp. 12-13.

Ultimately, whether an OCSSP complies with its best efforts obligations regarding proactive measures will depend on a multi-factor case-by-case assessment considering paragraphs (5), (7) and (9), and including: the consideration of the asymmetric nature of the obligations (depending on size and type of platform); the cost assessment of available technological solutions; and the type of content hosted by the platform and in relation to which a measure is deployed.²⁷⁷

This brief tour of the liability exemption mechanism in art. 17(4) is sufficient to explain how it stands apart from the pre-existing regime of copyright liability for online platforms under art. 3 InfoSoc Directive. One crucial difference is that the new regime embeds a multi-pronged liability exemption mechanism within the scheme of direct or primary liability for OCSSPs. This mechanism contains several original features: cumulative best efforts requirements; a gateway requirement of best efforts to obtain an authorisation as a pre-condition for the exemption; clear preventive/proactive obligations to avoid availability of notified content in the first place, and to prevent its reappearance (NSD); reactive obligations in the form of an NTD scheme that is located within the assessment of direct liability as opposed to intermediary or secondary liability; a clear identification of the proportionality principle and assessment factors for the best efforts obligations; a mitigated regime for small and new OCSSPs; and the specific requirement to comply with substantive and procedural safeguards in arts. 17(7) and (9), both discussed in greater detail below.²⁷⁸ The “hybrid character” of art. 17 in general²⁷⁹, and of its liability exemption mechanism, highlight the turn of the EU legislator towards a new liability paradigm for copyright content-sharing platforms.

As we note below, the Commission’s Guidance provides several recommendations on how to implement the preventive measures in art. 17(4) in a manner that is compliant with the obligations in the rest of the provision, namely paragraph (7). As it is also argued below, and in line with the AG Opinion and the Court’s judgement in Case C-401/19, it is questionable whether this aim was achieved.

3.4.6. PROPORTIONALITY ASSESSMENT AND FACTORS²⁸⁰

Art. 17(5) CDSMD states that several elements shall be part of the assessment when determining whether an OCSSP complies with the obligations in order to benefit from the liability exemption provided for in art. 17(4).

²⁷⁷ Guidance Art. 17 CDSMD (n. 226), pp. 13-14.

²⁷⁸ On the latter, see Quintais and others (n 21); Garstka (n 219); Schwemer and Schovsbo (n 21).

²⁷⁹ Leistner repeatedly refers the hybrid character of the provision. See Leistner (n 159) 8, 23, 34.

²⁸⁰ This section reproduces parts of and relies on Schwemer, ‘Article 17 at the Intersection of EU Copyright Law and Platform Regulation’ (n 219) 419.

A first group of elements relates to the specific OCSSP, namely its type, audience, size of the service and type of works or other subject matter uploaded by the users. A second group of elements relates to the broader and more general “availability of suitable and effective means and their cost for service providers.”²⁸¹ Additionally, the lengthy recital 66 supplements that “account should be taken of whether the service provider has taken all the steps that would be taken by a diligent operator to achieve the result of preventing the availability of unauthorized works (...) taking into account best industry practices and the effectiveness of the steps taken (...) as well as the principle of proportionality”.

Thus, even if an online platform falls under the scope of art. 17, the specific circumstances both in relation to the platform itself and the broader industry standards as well as the proportionality of the “means”, will have to be considered. Importantly, given that there is no specific reference to art.17(4)(a) or (b) exclusively, this “specific circumstances test” is also to be applied also in relation to the NTD and NSD mechanisms contained in art. 17(4)(c). This is also the conclusion of the Commission’s Guidance, which endorses the application of the same criteria for these measures as those advanced for the preventive measures under art. 17(4)(b).²⁸²

This could be, for example, of relevance for online discussion fora, start-ups or small or medium-sized OCSSPs, which cannot benefit from a softer liability exemption regime once they have been operating for more than three years. In any case, it is noted that art. 17(5) – and the principle of proportionality – must be taken into consideration when interpreting the provision on in art. 17(6) on the special regime for small and new OCSSPs, namely in assessing whether such providers complied with their best efforts obligations regarding preventive measures.²⁸³

3.4.7. SPECIAL REGIME FOR (SMALL AND) NEW OCSSPS

Art. 17(6) contains a partial exception to the liability regime in paragraph (4), to the benefit of OCSSPs that are “new service providers with small turnover and audience”.²⁸⁴ These small and new providers

²⁸¹ For specific suggestions on how to interpret these factors in the context of art. 17(4) CDSMD, see Guidance Art. 17 CDSMD (n. 226), pp. 13-14.

²⁸² See Guidance Art. 17 CDSMD (n. 226), p. 15.

²⁸³ See Guidance Art. 17 CDSMD (n. 226), p.17.

²⁸⁴ On art. 17(6), see Guidance Art. 17 CDSMD (n. 226), pp. 16-17. NB art. 16 DSA contains also a somewhat similar exclusion from due diligence obligations applicable to online platforms, but to the benefit of online platforms who qualify as micro or small enterprises within the meaning of the Annex to Recommendation 2003/361/EC.

remain covered by the regime in art. 17 but are subject to mitigated obligations in order to benefit from the liability exemption mechanism.²⁸⁵

Art. 17(6) and recital 67 CDSMD identify two scenarios in which OCSSPs are exempted from *some* of the preventive obligations in art. 17(4)(b) and (c). First, OCSSPs that are under three years old and have an annual turnover below EUR 10 million are only subject to the NTD obligation in art. 17(4)(c). Second, OCSSPs that meet the conditions of the first scenario and additionally have more than 5 million monthly unique visitors, are also subject to the NSD obligations art 17(4)(c).²⁸⁶ As noted, in both scenarios these obligations must be assessed considering the principle of proportionality in art. 17(5).²⁸⁷

Importantly, this mitigated regime does not affect the availability of other remedies against small and new OCSSPs, since these providers remain subject to the same remedies as larger platforms. In particular, they are still subject to injunctions under art. 8(3) InfoSoc Directive if their services are used by a third-party user to infringe copyright.²⁸⁸

3.4.8. SUBSTANTIVE AND PROCEDURAL SAFEGUARDS

In order to mitigate the potential negative effects of the preventive measures on users and platforms' fundamental rights, the remainder of art. 17 introduces the following substantive and procedural safeguards, which we analyse in this subsection: mandatory exceptions and limitations (**E&Ls**) or "user rights" (3.4.8.1); a prohibition on general monitoring obligations (3.4.8.2); and procedural or ex post safeguards (3.4.8.3).

3.4.8.1. MANDATORY EXCEPTIONS AND LIMITATIONS OR USER RIGHTS²⁸⁹

²⁸⁵ See Schwemer, 'Article 17 at the Intersection of EU Copyright Law and Platform Regulation' (n 219), noting that only very new services will be able to benefit from this eased liability exemption regime even though the respective criteria have been described as covering SMEs during the legislative process. Germany, in its statement accompanying its vote in the Council, for example underlined that it aims to clarify that services like blogs and online fora as well as messenger services like WhatsApp fall out of the scope of Article 17. See Council of the European Union, Statement by Germany, (5 April 2019), point 6, p. 4.

²⁸⁶ See recital 66 CDSMD, stating that visitors from across the EU must be considered when calculating this threshold. N.B. some of the thresholds used to define the exclusion scenarios are taken from other legislative instruments: art 16(2) CRM Directive; and Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (Text with EEA relevance) (notified under document number C(2003) 1422) ([2003] OJ L124/36).

²⁸⁷ See supra at 3.4.6 and Guidance Art. 17 CDSMD (n. 226), p.17.

²⁸⁸ Recital 66, first paragraph, third sentence CDSMD. For a detailed analysis of the legal regime of injunctions in art 8(3) InfoSoc Directive, see Husovec (n 168).

²⁸⁹ This section reproduces parts of, relies on and develops prior research from some of authors of this report, namely: Quintais and others (n 21); Schwemer and Schovsbo (n 21).

The CDSMD acknowledges the general importance of fundamental rights, e.g., in recital 84, where it stipulates broadly:

"This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter. Accordingly, this Directive should be interpreted and applied in accordance with those rights and principles."

In addition, the Directive comes with specific safeguards regarding users. Recital 70 notes:

"The 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. Users should be allowed to upload and make available content generated by users for the specific purposes of quotation, criticism, review, caricature, parody or pastiche. That is particularly important for the purposes of striking a balance between the fundamental rights laid down in the Charter of Fundamental Rights of the European Union ('the Charter'), in particular the freedom of expression and the freedom of the arts, and the right to property, including intellectual property. Those exceptions and limitations should, therefore, be made mandatory in order to ensure that users receive uniform protection across the Union. It is important to ensure that online content-sharing service providers operate an effective complaint and redress mechanism to support use for such specific purposes."²⁹⁰

The Explanatory Memorandum accompanying the proposal for the Directive commented on the role of mitigation measures:

'the Directive has a limited impact on the freedom to conduct a business and on the freedom of expression and information, as recognised respectively by Articles 16 and 11 of the Charter, due to the mitigation measures put in place and a balanced approach to the obligations set on the relevant stakeholders'.²⁹¹

²⁹⁰ Emphasis added.

²⁹¹ See European Commission, Proposal for a Directive on copyright in the Digital Single Market, COM/2016/0593 final - 2016/0280 (COD), Explanatory Memorandum p. 9. See also European Commission, Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, Brussels, 14.9.2016 SWD(2016) 301 final, Part 1, pp. 154-155, noting that '[t]he freedom of expression and information may be affected negatively in cases where the services limit user uploaded content in an unjustified manner (e.g., when an exception or a limitation to copyright applies or the content is in public domain) or when the technologies fail to identify the content correctly'.

The most distinct feature relates to this latter point, namely the balancing within art. 17(7) (addressed in this section) and (9), which was only introduced relatively late in the legislative process. Art. 17(7) reads:

"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, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation.

Member States shall ensure that users in each Member State are able to rely on any of the following existing exceptions or limitations when uploading and making available content generated by users on online content-sharing services:

- (i) *quotation, criticism, review;*
- (ii) *use for the purpose of caricature, parody or pastiche."*

Art. 17(7) includes a general and a specific clause on E&Ls. The general clause is contained in the first sub-paragraph, which states that the preventive obligations in 4(b) and (c) should not prevent that content uploaded by users is available on OCSSPs if such an upload does not infringe copyright, including if it is covered by an E&L.²⁹² The second paragraph of art. 17(7) includes a special regime for certain E&Ls: (i) quotation, criticism, review; (ii) use for the purpose of caricature, parody or pastiche.²⁹³ Additionally, art. 17(9) requires that OCSSPs inform users in their terms and conditions of the user's right to use works under E&Ls.²⁹⁴

In our view, the reference in the provision to uploaded material that does not infringe copyright and related rights as mentioned in the general clause includes at least the following: (i) material in the public domain; (ii) material subject to an (express or implied) license; (iii) material covered by an E&L, whether in this Directive or in art. 5 InfoSoc Directive (if implemented by the national law).²⁹⁵

²⁹² This should be read in combination with the statement in Article 17(9) to the effect that the CDSMD "shall in no way affect legitimate uses, such as uses under exceptions or limitations provided for in Union law". In this respect, Recital 70 emphasizes the need for the preventive obligations to be implemented without prejudice to the application of E&Ls, "in particular those that guarantee the freedom of expression of users". See Quintais and others (n 21).

²⁹³ These were optional E&L in arts. 5(3)(d) and (k) InfoSoc Directive, which have not been implemented in all Member States; where they have, the implementations differ.

²⁹⁴ Article 17(9) para. 4 CDSMD.

²⁹⁵ In situations of conflict between art. 17(7) CDSMD and art. 5 InfoSoc Directive, along with other scholars, we argue that the former creates an obligation under EU law to implement national E&Ls that offer the minimum user privileges to which art. 17(7) refers. See Quintais and others (n 21).

On the special regime for certain E&Ls, Recital 70 (first subparagraph) explicitly recognizes that these are particularly important to strike a balance under the CFREU between the right to intellectual property (art. 17(2)) and two fundamental freedoms/rights in particular: freedom of expression (art. 11) and freedom of the arts (art. 13). In this way, the legislator awards special status to these E&L due to their basis in fundamental rights.²⁹⁶

Furthermore, the second paragraph of art. 17(7) operates a change in legal qualification of the E&Ls it covers as compared to the InfoSoc Directive, since such exceptions become mandatory in the context of their application under art. 17.²⁹⁷ This has led some scholars – including among the authors of this report – to argue that these E&Ls should be qualified as user rights or freedoms, and that Member States and courts must ensure that they remain fully operative even in the context of licensing arrangements or the application of preventive measures under art. 17(4)(b) and (c).²⁹⁸

It has further been suggested that in order to ensure the systematic and conceptual consistency of the E&Ls in the InfoSoc Directive and CDSMD, the concepts of “quotation”, “criticism”, “review”, “caricature”, “parody” and “pastiche” in art. 17(7) should be considered autonomous concepts of EU law. This would ensure that such concepts would be interpreted consistently across both directives. In this line, CJEU case law on the concepts of parody and quotation parody” and “quotation” in the InfoSoc Directive as autonomous concepts of EU Law in a number of judgements.²⁹⁹ The same should be done for the remaining concepts in art. 17(7), namely pastiche, in order to ensure the effectiveness of that provision.³⁰⁰

In fact, it is suggested that combined broad interpretation and national implementation of the concepts in the E&Ls in art. 17(7) would cover most transformative types of user-generated content uploaded by users to OCSSP, such as remixes and mashups.³⁰¹

²⁹⁶ See Quintais and others (n 21).

²⁹⁷ See the text of the provision – “shall ensure” – and Recital 70 (first subparagraph), which states that such E&L “should, therefore, be made mandatory in order to ensure that users receive uniform protection across the Union.”

²⁹⁸ Quintais and others (n 21). (further arguing that this interpretation is not precluded by the reference to “existing exceptions” in art. 17(7), and that it is supported by a systematic and teleological interpretation of the CDSM Directive).

²⁹⁹ See: CJEU, 1 December 2011, Case C-145/10, Eva-Maria Painer v Standard VerlagsGmbH and others (Painer); CJEU, 3 September 2014, Case C-201/13, Johan Deckmyn, Vrijheidsfonds VZW v Helena Vandersteen, and others (Deckmyn); CJEU, 29 July 2019, Case C-469/17, Funke Medien NRW GmbH v Bundesrepublik Deutschland (Funke Medien); CJEU, 29 July 2019, Case C-476/17, Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben (Pelham); and CJEU, 29 July 2019, Case C-516/17, Spiegel Online GmbH v Volker Beck (Spiegel Online). From those judgements emerges an interpretation of the corresponding E&Ls, which recognizes their fundamental rights justification, clarifies their requirements for application, and restricts the ability of national lawmakers to further restrict their scope. See Quintais and others (n 21).

³⁰⁰ See Quintais and others (n 21). For pastiche in particular, see Martin Senftleben, “Bermuda Triangle – Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market” (2019) 41 European Intellectual Property Review 480.

³⁰¹ Quintais and others (n 155).

3.4.8.2. PROHIBITION ON GENERAL MONITORING OBLIGATIONS

As noted in section 3.1 above, art. 15 e-Commerce Directive sets out a prohibition on the imposition on general monitoring obligations, which has been subject to extensive interpretation by the CJEU, most recently in *Eva Glawischnig-Piesczek and YouTube and Cyando*. The previous analysis also highlights the multiple open questions surrounding the Court's interpretation, namely as to where to draw the line separating prohibited general monitoring from permissible "specific" monitoring, as well as to the applicability of the interpretation of the Court in *Glawischnig-Piesczek* to the area of copyright.

Against this background art. 17(8) para. 1 states, at first glance, rather declaratory fashion that "[t]he application of this Article shall not lead to any general monitoring obligation." The concrete stress test for this provision lies in its articulation with art. 17(4)(c). In this respect, the Commission states that "Member States should also bear in mind that Article 17(4) is subject to the obligations... in Article 17(8), whereby Article 17 should not be transposed or applied in a way, which leads to any general monitoring obligation."³⁰² It is apparent from the historical background of the CDSMD, the Commission's Guidance and the Court's judgment in C-401/19, that the primary means to comply with the obligations set out in art. 17(4)(c) as regards preventive measures is with proactive technological measures, i.e., content recognition systems and tools.³⁰³ The question that arises therefore is whether such tools are compatible with the prohibition on general monitoring obligations in paragraph (8).

The question is particularly relevant since a closer look at art. 17(8) shows that the provision prohibits not only Member States from mandating general monitoring obligations, but also clearly focuses on the "application" of art. 17. In other words, OCSSPs *themselves* are restricted from applying measures that constitute a general monitoring obligation. The point is striking since online platforms have in some instances voluntarily employed monitoring mechanisms, which is not prohibited by art. 15 e-Commerce Directive.³⁰⁴

³⁰² Guidance Art. 17 CDSMD (n. 226), p.8.

³⁰³ Schwemer, 'Article 17 at the Intersection of EU Copyright Law and Platform Regulation' (n 219) 428. Regarding Case C-401/19, *Poland v Parliament and Council*, see *infra* at 3.5.

³⁰⁴ A related question is whether intermediaries when voluntarily engaging in such behaviour – sometimes referred to as "good Samaritan" action – and thus having gained "actual knowledge of illegal activity or information" lose their liability exemption, if firstly not acting expeditiously according to art. 14(1)(b) e-Commerce Directive and secondly are not considered passive. Recommendation (EU) 2018/334 stipulates in recital 26, for example, reiterates that "in its Communication of 28 September 2017 on tackling illegal content online, the Commission has set out its view that taking such voluntary proactive measures does not automatically lead to the hosting service provider concerned losing the benefit of the liability exemption provided for in Article 14 of Directive 2000/31/EC.". In the literature, it has been debated whether implementation of voluntary measures gradually influence the standard of liability by erosion, for example when the de facto practice of such measures changes the diligent economic operator concept. See, e.g., Riis and Schwemer (n 53) 12–13.

As discussed, art. 17(4)(c) refers to “high industry standards of professional diligence”, which the Commission has interpreted as referring *inter alia* to content recognition technologies used by OCCSPs. Given that some of the large OCSSPs already had content recognition technologies in place for more than a decade, it is difficult to reconcile these two perspectives. It is clearly not the intent of the legislator that these pre-existing models, like YouTube’s ContentID, should be rendered unlawful by the Directive. But if that is the case, then the logical conclusion is that from the legislator’s perspective, such content recognition technologies do not lead to general monitoring. One opening for such a reading could be to rely on the fact art. 17(4)(b) and (c) rely on information provided by rights holders – respectively, “relevant and necessary information” and a “sufficiently substantiated notice”. From a conceptual perspective, however, such reading overlooks whether it is even technically feasible to perform such check on previously identified works without checking all works that are being uploaded.³⁰⁵

It is instructive to look at the legislative history of art. 17 to better understand its relationship to arts. 14 and 15 e-Commerce Directive. The Council’s Legal Service noted that there is no hierarchy between secondary legislative acts and is governed “in accordance with the principles of ‘lex specialis derogat legi generali’ and ‘lex posterior derogat legi prior’”.³⁰⁶ Based on this logic, it deemed the introduction of the measures foreseen in the then-art. 13 of the Commission’s proposal as “not legally problematic”, and that they could be considered as “a lex specialis or as a ‘monitoring obligation in a specific case’ and ‘duty of care’ for the [OCSSP] concerned”.³⁰⁷ The Council’s Legal Service seems, however, to avoid the point that also the *lex posterior* or *lex specialis* needs to strike a fair balance between competing fundamental rights. Thus, implicitly this view seems to assume that art. 15 e-Commerce Directive, if prohibiting such measures as anticipated by the Directive, fails to strike that balance in the first place and comes with a bias of valuing users’ fundamental rights higher than rights holders’ fundamental rights.

The final version of art. 17 avoided taking a stance on this conceptual question by clarifying in art. 17(8) that “[t]he application of this Article shall not lead to any general monitoring obligation”. This statement must be understood as more than the mere lip service to critics of the Directive. Since the

³⁰⁵ Schwemer, ‘Article 17 at the Intersection of EU Copyright Law and Platform Regulation’ (n 219) 429. In this regard, it is noteworthy that a German report from December 2019, for example, comes to the conclusion that the duty to license leads to a proactive control of all content on a platform and is in contradiction with the jurisprudence of the CJEU in relation to the prohibition of general monitoring. See in this respect Spindler (n 219).

³⁰⁶ Council of the European Union, Contribution of the Legal Service to Working Party on Intellectual Property, Brussels 11 October 2017, 13140/17 LIMITE, para. 23, p. 16.

³⁰⁷ Council of the European Union, Contribution of the Legal Service to Working Party on Intellectual Property, Brussels 11 October 2017, 13140/17 LIMITE, para. 30, p. 20.

judgements in *Scarlet Extended* and *Netlog*, we know in the context of injunctions that filtering all information of all users constitutes a general monitoring obligation and the respective filtering systems do not strike a fair balance between the competing fundamental rights.³⁰⁸ In relation to the freedom to conduct business by OCSSPs, it has been argued by the Legal Service of the Council, however, that the provision in question is compatible with the CJEU's findings in *Scarlet Extended* and *Netlog*, because the OCSSP would not have to determine itself whether the content is copyright infringing or not given that the obligation is restricted to works identified by rightsholders. As discussed above, the case law from *L'Oréal v eBay to Glawischnig-Piesczek* has opened for filtering of identical and equivalent future content of identical or equivalent future infringements. Importantly, the Court notes that this refers only to similar infringements that do not "require the host provider to carry out an independent assessment of the content".³⁰⁹

Considering the above, what is then the legal nature of art. 17(8) CDSMD vis-a-vis art. 15 e-Commerce Directive? In answering this question, Angelopoulos and Senftleben lay our different interpretative options, eventually concluding that art. 17(8) "contains a further manifestation of the overarching principle expressed in Article 15(1) [e-Commerce Directive]: an unspecific, general content monitoring obligation would be excessive and incompatible with EU law".³¹⁰ In a previous work, one of us has alternatively suggested, along the lines of our analysis above, that art. 17(8) does not necessarily introduce a *new* general monitoring prohibition but is rather a declaratory provision vis-a-vis the obligation of art. 15 e-Commerce Directive.³¹¹ In addition, according to that analysis, art. 17(8) would extend the general monitoring obligation beyond Member States and also to OCSSPs.³¹²

It will be perhaps necessary for the Court to clarify this conceptual discussion in future judgments. However, the Commission's Guidance does offer something in this regard. The Guidance states that, "[w]hilst the concept of general monitoring is not defined in Article 17 (8), it is expressed therein in the same terms as in Article 15 of Directive 2000/31. However, when applying Article 17(8) first paragraph the context, scheme and objective of Article 17 and the special role of [OCSSPs] providers under this provision should be considered."³¹³ In other words, according to the Commission, art. 17(8) does not necessarily introduce a new general monitoring obligation in the *acquis* separate from art.

³⁰⁸ See supra at 3.1.

³⁰⁹ Schwemer, 'Article 17 at the Intersection of EU Copyright Law and Platform Regulation' (n 219) 420.

³¹⁰ Angelopoulos and Senftleben (n 173).

³¹¹ Schwemer, 'Article 17 at the Intersection of EU Copyright Law and Platform Regulation' (n 219).

³¹² Schwemer, 'Article 17 at the Intersection of EU Copyright Law and Platform Regulation' (n 219).

³¹³ Guidance Art. 17 CDSM Directive (n. 226), p.22.

15 e-Commerce Directive. But the Commission does expect that the interpretation of what constitutes general monitoring is adjusted to consider the specific regime of art. 17.

In attempting to strike this balance and ensure the substantive and procedural safeguards in paragraphs (7) and (9), the Commission advances a set of recommendations in its Guidance as to what types of automated content filtering measures are permissible or not. We examine these below in greater detail.

3.4.8.3. PROCEDURAL OR EX POST SAFEGUARDS³¹⁴

Besides the copyright-internal balancing system of E&Ls in paragraph (7) and the prohibition of general monitoring obligations in paragraph (8), art. 17 also foresees what Schwemer and Schovsbo (2020) refer to as “an institutionalized system of checks and balances in form of procedural safeguards”.³¹⁵

These mechanisms do not concern substantive copyright, but rather its exercise and are foreseen at several levels: (i) at the platform level, (ii) at the out-of-court level, and (iii) at the judicial authority or court level.

“At the platform level, Member States are in art. 17(9) mandated to provide that OCSSPs “put in place an *effective and expeditious complaint mechanism* that is available to users of their services in the event of disputes over the disabling of access to, or the removal of, works or other subject matter uploaded by them”.³¹⁶ The mechanisms of this first procedural safeguard are further circumscribed in art. 17(9), second sub-paragraph, where it is stated that complaints “shall be processed without undue delay, and decisions to disable access to or remove uploaded content shall be subject to human review”.³¹⁷ The latter human review-criterion implies that everything leading up to a dispute can be

³¹⁴ This section relies on and develops prior research from some of authors of this report, namely: Quintais and others (n 21); Schwemer and Schovsbo (n 21).

³¹⁵ Schwemer and Schovsbo (n 21).

³¹⁶ Emphasis added. Note that the requirement is on Member States, compared to the ensuring of unavailability which is on the platforms. This first aspect resembles the Commission’s original proposal from September 2016, where it suggested in Article 13(2) that ‘Member States shall ensure that the service providers ... put in place complaints and redress mechanisms that are available to users in case of disputes over the application of the measures ...’. See European Commission, Proposal for a Directive on copyright in the Digital Single Market, COM/2016/0593 final - 2016/0280 (COD), art. 13.

³¹⁷ Emphasis added. On a critique of the “elastic timeframe” see Senftleben (n 300). In its Council vote, Germany suggests the timeframe to be understood ‘as rapidly as possible’, see Draft Directive of the European Parliament and of the Council on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (first reading), Statements (Council of the European Union, 15 April 2019) <https://data.consilium.europa.eu/doc/document/ST-7986-2019-ADD-1-REV-2/en/pdf> (Statement by Germany, point 7).

processed by the platform in an automated fashion by algorithms.³¹⁸ It is further specified in recital 70 that these mechanisms should allow “users to complain about the steps taken with regard to their uploads, *in particular* where they could benefit from an *exception or limitation* to copyright in relation to an upload to which access has been disabled or that has been removed”.³¹⁹

Furthermore, the provision stipulates a justification-duty on rights holders. The reasons for a rights holder’s request to make content unavailable needs to be “duly justified”.³²⁰ The decision at this level remains with the platform, but as Senftleben notes, ‘[t]he underlying legal assessment, however, is likely to be cautious and defensive ... [and] a generous interpretation of copyright limitations serving freedom of expression seems unlikely, even though a broad application of the right of quotation and the parody exemption would be in line with CJEU jurisprudence’.³²¹ In other words, there is a risk of overenforcement.³²²

In addition to the platform-based procedural safeguards, also out-of-court redress mechanisms for the impartial settlement of disputes are to be put in place by Member States.³²³ This out-of-court mechanism is “without prejudice to the rights of users to have recourse to efficient judicial remedies”.³²⁴ Specifically in relation to E&Ls, “Member States shall ensure that users have access to a court or another relevant judicial authority to assert the use of” the same.³²⁵ Member States enjoy a considerable amount of discretion when implementing the procedural safeguards and such

^{318.} See similarly Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online, 6.3.2018, [2018] L 63/50, points 20 and 27 in relation to proactive measures on human oversight and in the context of data protection see, e.g., Article 22(3) GDPR.

³¹⁹ Recital 70 (emphasis added).

^{320.} Article 17(9) sub-para. 2 CDSMD.

^{321.} See Senftleben (n 300).

³²² For empirical work on overenforcement, see, e.g., Jennifer M Urban, Joe Karaganis and Brianna Schofield, ‘Notice and Takedown: Online Service Provider and Rightsholder Accounts of Everyday Practice’ (2017) 64 J. Copyright Soc’y 371; Kris Erickson and Martin Kretschmer, ‘Empirical Approaches to Intermediary Liability’ in Giancarlo Frosio (ed), *Oxford Handbook on Intermediary Liability Online* (OUP 2019) <<https://papers.ssrn.com/abstract=3400230>> accessed 22 February 2022; Sharon Bar-Ziv and Niva Elkin-Koren, ‘Behind the Scenes of Online Copyright Enforcement: Empirical Evidence on Notice & Takedown’ (2017) 50 Connecticut Law Review <<https://papers.ssrn.com/abstract=3214214>> accessed 22 February 2022. Specifically in the context of YouTube and parodies, see Kris Erickson and Martin Kretschmer, “This Video Is Unavailable”: Analyzing Copyright Takedown of User-Generated Content on YouTube’ (2018) 9 JIPITEC <<https://papers.ssrn.com/abstract=3144329>> accessed 17 January 2022; Jacques and others (n 63). For a recent overview of existing studies in this areas, see also Daphne Keller and Paddy Leerssen, ‘Facts and Where to Find Them: Empirical Research on Internet Platforms and Content Moderation’, *Social Media and Democracy: The State of the Field and Prospects for Reform* (Cambridge University Press 2019) <<https://papers.ssrn.com/abstract=3504930>> accessed 4 May 2021.

^{323.} Art. 17(9) sub-para. 2 CDSMD.

^{324.} Art. 17(9) sub-para. 2 CDSMD.

^{325.} Art. 17(9) sub-para. 2 CDSMD.

mechanisms might also be informed by the stakeholder dialogues and the Commission's guidance on the application of art. 17.³²⁶

Conceptually, it is unclear whether these procedural safeguards should be understood as independent additions to the E&L safeguards or rather as a further specification of those safeguards. Recital 70 CDSMD puts art. 17(9) in the context of situations where '*in particular* [users] could benefit from an exception or limitation' (emphasis added). Thus, one the one hand, the existence of these specific safeguards relating to the institutional setting can be interpreted as an attempt to create procedural transparency and safeguards. Without such setup, user rights might end up under- or even unenforced. The existing regime under the e-Commerce Directive does not directly impose any restrictions on platforms on what content they remove. Seen in a broader European intermediary liability exemption perspective, where the NTD regime based on art. 14 e-Commerce Directive has lacked a counter-notice idea or general procedural safeguards, such attempt is to be welcomed, as it strengthens the enforcement of user rights vis-à-vis content moderation practices by large online platforms. On the other hand, however, their very existence implies an understanding of art. 17(7) that the prevention mechanisms foreseen in – or incentivized by – art. 17(4) CDSMD will inevitably lead to false-positives, i.e., to situations where platforms will falsely take-down or block content which is covered by a E&L.³²⁷ In other words, it can also be understood as an admission that – in practice – automatically distinguishing copyright infringements from legitimate uses will be a challenging exercise.

At least from the lawmaker's perspective, procedural safeguards *in themselves* are seen as a means of mitigating negative impact on fundamental rights. Already the Commission's Impact Assessment accompanying the Proposal from 2016, for example, noted that procedural safeguards will mitigate the negative impact on freedom of expression and information.³²⁸ However, as noted by some

³²⁶ Art. 17(10) CDSMD reads: 'As of 6 June 2019 the Commission, in cooperation with the Member States, shall organize stakeholder dialogues to discuss best practices for cooperation between online content-sharing service providers and rightholders. ... When discussing best practices, special account shall be taken, among other things, of the need to *balance fundamental rights* and of the use of exceptions and limitations. For the purpose of the stakeholder dialogues, users' organizations shall have access to adequate information from online content-sharing service providers on the functioning of their practices with regard to paragraph 4' (emphasis added).

³²⁷ In the Council vote, Germany lays outs its reading of Article 17(7) and (8) 'that protective measures must not impede the permitted use of protected content', see Draft Directive of the European Parliament and of the Council on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (first reading), Statements (Council of the European Union, 15 April 2019) <https://data.consilium.europa.eu/doc/document/ST-7986-2019-ADD-1-REV-2/en/pdf> (Statement by Germany, point 7). To this point see also European Commission, Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, Brussels, 14.9.2016 SWD(2016) 301 final, Part 1, pp. 153 ff.

³²⁸ European Commission, Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, Brussels, 14.9.2016 SWD(2016) 301 final, Part 1, p., pp. 153-154, reading '[t] his negative impact should be mitigated by the fact that the services would be obliged to put in place the necessary procedural safeguards for the users which in the majority of cases already exist in the related context of notice and take down requests.'

authors, the legislative text evolved since then to include the user rights or freedoms embodied in art. 17(7), in essence due to the recognition that ex post complaint and redress mechanisms were insufficient per se to safeguard users' fundamental rights.³²⁹ Similarly, Germany in its Statement accompanying its Council vote notes that "[e]ach permanent 'stay down' mechanism ('uploadfilter') must comply with the principle of proportionality. Procedural guarantees could be considered, for example, when users notify that they are lawfully uploading content from third parties."³³⁰ In other words, the procedural safeguards are a weight on the scale of the fundamental rights balance.

Considering this analysis, and as noted above, in a context where content recognition technologies are incapable of ensuring the effective application of E&L in art. 17(7), the normative hierarchy of art. 17 – and the need to respect fundamental rights and freedoms of users – indicates the need for ex ante safeguards in the implementation of art. 17.³³¹ We explore this topic in greater detail below at 3.5 in light of the CJEU judgement in C-401/19.

3.4.9.PRIVACY AND DATA PROTECTION

Finally, art. 17 mentions that the Directive shall not lead to any identification of individual users nor to the processing of personal data, except in accordance with the e-Privacy Directive (2002/58/EC) and the GDPR (Regulation (EU) 2016/679). The question is not clear, especially as regards the application of preventive measures under art. 17(4) and the complaint and redress mechanism under art. 17(9) and the potential that these have for the identification and processing of personal data.³³² In fact, concerns in this regard were raised during the legislative process by the German Data Protection authority, the European Data Protection Board and some commentators. In response, the reference above was added to art. 17(9). In addition, the Guidance contains several references in this respect, including the somewhat circular statement that

³²⁹ See e.g. Paul Keller, 'Article 17: (Mis)Understanding the Intent of the Legislator' (*Kluwer Copyright Blog*, 28 January 2021) <<http://copyrightblog.kluweriplaw.com/2021/01/28/article-17-misunderstanding-the-intent-of-the-legislator/>> accessed 4 May 2021. Providing recommendation on how to enable ex ante safeguards, see Quintais and others (n 21).

³³⁰ Draft Directive of the European Parliament and of the Council on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (first reading), Statements (Council of the European Union, 15 April 2019) <https://data.consilium.europa.eu/doc/document/ST-7986-2019-ADD-1-REV-2/en/pdf> (Statement by Germany, point 8).

³³¹ See, in this line, Quintais and others (n 21); Christophe Geiger and Bernd Justin Jütte, 'Platform Liability Under Art. 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match' [2021] GRUR International <<https://academic.oup.com/grurint/advance-article-abstract/doi/10.1093/grurint/ikab037/6169057?redirectedFrom=fulltext>> accessed 4 May 2021; Martin Husovec, 'Over-Blocking: When Is the EU Legislator Responsible?' (LSE 2021) Working Paper <<https://papers.ssrn.com/abstract=3784149>> accessed 4 May 2021.

³³² See Christoph Schmon, 'Copyright Filters Are On a Collision Course With EU Data Privacy Rules' (*Electronic Frontier Foundation*, 3 March 2020) <<https://www.eff.org/it/deeplinks/2020/02/upload-filters-are-odds-gdpr>> accessed 8 April 2020.

When implementing Article 17, the Member States need to respect the Union’s data protection acquis, in particular with regard to possible technological measures taken by service providers in cooperation with rightholders under Article 17(4) and in the context of complaints and redress mechanism for users under Article 17(9). The Member States should ensure the correct application of these rules when transposing Article 17.³³³

This topic is outside the scope of the present report, since it does not directly relate to copyright liability and content moderation. But it is important to flag that further research is needed in this regard, especially as regards the compliance of preventive measures under art. 17 with the provision on automated decision making under art. 22 GDPR.

3.5. THE CJEU JUDGMENT IN CASE C-401/19 AND THE NORMATIVE HIERARCHY OF ART. 17: USER RIGHTS AND SAFEGUARDS, PREVENTIVE MEASURES AND PERMISSIBLE FILTERING

3.5.1. BEFORE THE JUDGMENT IN CASE C-401/19: THE DISCUSSION ON USER RIGHTS AND SAFEGUARDS VS PREVENTIVE MEASURES

The above constellation of provisions on preventive measures and substantive rights and safeguards translates into a normative hierarchy that is embedded art. 17. This hierarchy is crucial to how OCSSPs must carry out copyright content moderation. This sub-section first examines the primacy of user rights (as obligations of result) over preventive measures (as obligations of best efforts) in the overall scheme of art. 17. It further investigates how the Commission’s Guidance has attempted to address this hierarchy and strike the balance between the competing rights and interests of rightsholders, platforms and users, while contrasting this with the AG Opinion in C-401/19. The following subsection will then examine the Court’s judgement.

A key feature of the legal design of art. 17 is that paragraph (7) translates into an obligation of result. Member States must ensure that these E&Ls are respected despite the preventive measures in art. 17(4). This matters because paragraph (4) merely imposes “best efforts” obligations. The different nature of the obligations, underscored by the fundamental rights-basis of paragraph (7)³³⁴, indicates

³³³ Guidance Art. 17 CDSMD (n. 226), p. 3.

³³⁴ See e.g., recital 70 CDSMD.

a normative hierarchy between the higher-level obligation in paragraph (7) and the lower-level obligation in paragraph (4).

This is relevant not only for legal interpretation of art. 17 in general but also for the assessment of content moderation obligations in this legal regime. For instance, this legal understanding justifies the view that to comply with art. 17 it is insufficient to rely on *ex post* complaint and redress mechanisms in art. 17(9). It is also required to have *ex ante* safeguards that avoid the over blocking of uploaded content by filtering content technologies used by OCSSPs that are incapable to carry out the type of contextual assessment required under art. 17(7).³³⁵

In addressing the normative tension between user rights and preventive measures, while attempting to operationalise art. 17, the Commission's Guidance advances a set of recommendations for Member States to implement these parts of the provision, in an attempt to balance the competing rights and interests of rightsholders, platforms and users. The Guidance recognises many of the key aspects highlighted in our analysis so far, including the *lex specialis* nature of art. 17 vis-a-vis art. 3 InfoSoc and art. 14 e-Commerce Directive, the primacy of user rights (as obligations of result) over preventive measures (as obligations of best efforts), the need to avoid that preventive measures result in general monitoring (albeit considering the specific regime of art. 17), and the need to ensure effective *ex post* procedural safeguards.

In the scheme of the Guidance, some of the potential problems deriving from the application of preventive measures for fundamental rights can be addressed through a cautious and nuanced interpretation of arts. 17(4)(b) and (c), also considering the factors in art. 17(5).³³⁶ Still, the Guidance states clearly that *ex ante* safeguards are needed due to the different nature of the obligations in paragraphs (4) and (7), considering the current capabilities of content recognition tools used by platforms to implement preventive and proactive measures, namely under art. 17(4)(b). Since these tools work predominantly through algorithmically matching uploaded content with the "relevant and necessary information" provided by rightsholders, they are incapable of recognising legitimate uses, like those identified in paragraph (7). Hence, in order to ensure application of user rights, it is not sufficient to rely solely on the *ex post* complaint and redress mechanism set out in art. 17(9).³³⁷

³³⁵ See Quintais and others (n 21); Husovec (n 331); Geiger and Jütte (n 331). See also, agreeing with this interpretation, Guidance Art. 17 CDSMD (n. 226), pp. 2-3.

³³⁶ See above at 3.4.5 and 3.4.6.

³³⁷ Guidance Art. 17 CDSMD (n. 226), p.20.

The Guidance therefore suggests that automated filtering and blocking measures are “in principle” only admissible for two categories of content: (1) “manifestly infringing” content and (2) “earmarked” content.³³⁸ Conversely, uploaded content that is “not manifestly infringing, should in principle go online and may be subject to an ex post human review when rightsholders oppose by sending a notice.”³³⁹

What constitutes “manifestly infringing” content is not exactly clear, despite the Commission’s optimistic view that this is a “reasonable practical standard to determine whether an upload should be blocked or go online, and to ensure the respect for Article 17(7), taking into account the existing limitations of technology.”³⁴⁰ The Guidance advances criteria and some bright line rules on how to assess this category. For instance, “[e]xact matches of entire works or of significant proportions of a work should normally be considered manifestly infringing”, whereas content where a “user has significantly modified the work in a creative manner, for example by adding elements to a picture to create a ‘meme’, would generally not be manifestly infringing (this example may be covered by the parody exception)”. But a closer reading of these criteria and rules leaves doubts as to whether the threshold for categorising uploads as “manifestly infringing” is not too low, especially since this category would cover also “complex cases where additional criteria or a combination of criteria may need to be taken into account”. This is hardly a harbinger of legal certainty for a category that should be strictly delimited due the potential risks it poses to freedom of expression.³⁴¹

The second category of content for which automated filtering and blocking measures are admissible pursuant to the Guidance – “earmarked” content – is even more controversial. This category: (1) “should be limited to cases of high risks of significant economic harm, which ought to be properly justified by rightholders”; and (2) refers to content that “is particularly time sensitive”, such as “pre-released music or films or highlights of recent broadcasts of sports events” but not excluding “[o]ther types of content”.³⁴²

³³⁸ Guidance Art. 17 CDSMD (n. 226), pp.20, 23.

³³⁹ Guidance Art. 17 CDSMD (n. 226), p. 20. NB OCSSPs “should inform rightholders without undue delay that the content has been put online”; if rightsholders object, the OCSSP “should carry out a swift ex post human review for a rapid decision as to whether the content should remain online or be removed”.

³⁴⁰ Guidance Art. 17 CDSMD (n. 226), pp. 21-22.

³⁴¹ According to the Guidance, “the identification of manifestly infringing content and other content by automated means does not represent a legal assessment of the legitimacy of an upload, including whether it is covered by an exception. Therefore, the criteria applied to operate this distinction should not have an impact on the best efforts to be made by service providers to obtain an authorisation under Article 17.4 (a).” Guidance Art. 17 CDSMD (n. 226), pp. 20ff. This is noteworthy because, as we note below in the text, the Guidance takes the opposite view regarding “earmarked” content.

³⁴² Guidance Art. 17 CDSMD (n. 226), pp. 22 and fn. 34.

It is crucial to note that earmarked content does not need to also qualify as “manifestly infringing” content. The two categories may overlap in practice, but that is not a requirement under the Guidance. In fact, they are designed predominantly as distinct categories. This aspect, together with the somewhat vague definition of the requirements on rightsholders to “earmark” content, has led to strong criticism by scholars as to the compatibility of this part of the Guidance with the fundamental right to freedom of expression. Reda and Keller, for instance, call it “loophole big enough to drive a truck through”³⁴³, whereas Geiger and Jütte note that this it risks “watering down user rights”.³⁴⁴ It is hard to disagree.

If content is earmarked by rightsholders in the context of providing the “relevant and necessary information” to OCSSPs pursuant to art. 17(4)(b), then providers should – “when proportionate and where possible, practicable – carry out “a rapid ex ante human review... of the uploads containing such earmarked content”. While this human review is carried out, the content remains (at least temporarily) blocked. Leaving aside the consideration that this potentially burdensome requirement on OCSSPs is questionable from the perspective of its compliance with fundamental right to conduct a business in art. 16 CFREU, it appears in to be in direct contradiction with CJEU case law. If we accept the application of *Glawischig-Piesczek* to copyright, then the constraints that judgment imposes on “specific” monitoring of “equivalent” content should apply to “earmarked” content. One of such constraints, as noted above at 3.1.2, is that providers should not be required to carry out an independent assessment of such content. In other words, for such monitoring to be accepted, it should be susceptible of implementation via automated means. The requirement of “rapid ex ante human review” would rarely if ever meet this condition, even if cushioned by references to proportionality and practicality, especially since many of these cases might require complex contextual independent assessments by human reviewers considering the specificities of national laws implementing art. 17.

The consequences for OCSSPs are spelled out clearly in the Guidance. Providers are presumed to have not complied with their best efforts obligations and “be held liable for copyright infringement if they have made available uploaded content disregarding the information provided by rightsholders, including – as regards content that is not manifestly infringing content - the information on earmarked content.”³⁴⁵ It is difficult to imagine a stronger incentive on OCSSPs not to preventively filter all

³⁴³ Reda and Keller (n 226).

³⁴⁴ Geiger and Jütte (n 226). Geiger and Jütte contain a detailed analysis, that we subscribe to, of points of criticism to this part of the Commission’s Guidance.

³⁴⁵ Guidance Art. 17 CDSMD (n. 226), p. 23.

content that is “earmarked” by rights holders, in addition to content that is identified as “manifestly infringing”.

In light of the above, it is concluded that the internal scheme of art. 17 poses potential risks to the fundamental right to freedom of expression, particularly as regards the best efforts obligations on preventive measures in art. 17(4(b) and (c). Such risks were already clear from the text of art. 17, even before the Commission’s Guidance potentially circumscribed them to the categories of “manifestly infringing” and “earmarked” content.

These concerns with freedom of expression were at the basis for an action for annulment by Poland filed against art. 17.³⁴⁶ Before diving into the Court’s judgment, it is instructive to reflect on the Opinion by AG Saugmandsgaard Øe. This is a rich and nuanced Opinion, which examines in detail many of the concerns surrounding art. 17, and it is beyond the scope of this section to provide a detailed analysis of the entirety of the AG’s analysis. Rather, we limit ourselves to examining its main arguments in contrast to the Commission’s Guidance on issues that are crucial for copyright content moderation in the scheme of art. 17.³⁴⁷

As a general description, it can be said that the Opinion by AG Øe delineated the scope of permissible filtering of users’ uploads.³⁴⁸ While acknowledging that OCSSPs will have to deploy filtering and content-recognition systems to comply with their best efforts obligations, the AG relies on the judgement in *Glawischnig-Piesczek* to argue that any filtering must be “specific” to the content and information at issue, so as to not run afoul of the prohibition of general monitoring obligations in art. 15 e-Commerce Directive (and 17(8) CDSMD).³⁴⁹ However, such filtering must be proportionate and avoid the risk of chilling effects on freedom of expression through over blocking; in order to do so, it must be applied only to manifestly infringing or “equivalent” content.³⁵⁰ All other uploads should

³⁴⁶ Case C-401/19, *Poland v Parliament and Council*. Arguing that the Court should invalidate art. 17 on these ground, see Geiger and Jütte (n 331); Husovec (n 331). See also Case C-401/19, *Poland v Parliament and Council*, Opinion of Advocate General Saugmandsgaard Øe delivered on 15 July 2021, ECLI:EU:C:2021:613 (hereafter AG Opinion C-401/19, , *Poland v Parliament and Council*).

³⁴⁷ For further analysis, see e.g. Bernd Justin Jutte and Giulia Priora, ‘On the Necessity of Filtering Online Content and Its Limitations: AG Saugmandsgaard Øe Outlines the Borders of Article 17 CDSM Directive’ (*Kluwer Copyright Blog*, 20 July 2021) <<http://copyrightblog.kluweriplaw.com/2021/07/20/on-the-necessity-of-filtering-online-content-and-its-limitations-ag-saugmandsgaard-oe-outlines-the-borders-of-article-17-cdsm-directive/>> accessed 6 October 2021; Geiger and Jütte (n 226).

³⁴⁸ Jutte and Priora (n 347).

³⁴⁹ AG Opinion C-401/19, , *Poland v Parliament and Council*, paras 112-114 and 196, citing the Court’s judgment in Case C-18/18, *Eva Glawischnig-Piesczek v Facebook Ireland Limited* (3 October 2019), ECLI:EU:C:2019:821. On the topic of general monitoring obligations in the context of EU copyright law, see Angelopoulos and Senftleben (n 173); Angelopoulos, ‘YouTube and Cyando, Injunctions against Intermediaries and General Monitoring Obligations’ (n 185).

³⁵⁰ AG Opinion C-401/19, , *Poland v Parliament and Council*, paras 196 ff. In this respect the Opinion deviates from and strongly criticizes the Commission’s Guidance, which suggests a separate category of “earmarked” content susceptible of filtering, with lesser safeguards. See *Id.*, para 223 and Guidance Art. 17 CDSMD (n. 226), pp. 22-24. For criticism, see Reda and Keller (n 226); Geiger and Jütte (n 226).

benefit from a “presumption of lawfulness” and be subject to the *ex-ante* and *ex post* safeguards embedded in art. 17, notably judicial review.³⁵¹

Diving into the details, the Opinion is particularly relevant for our analysis in that it offers counter arguments – and even an explicit rejection – of key aspects of the Commission’s Guidance in relation to permissible *ex ante* or preventive filtering measures.³⁵²

First, according to the AG, such measures should only be allowed for “manifestly infringing” content. But crucially, this category is viewed in narrower terms by the AG than those set out in the Guidance. The AG states that³⁵³

[OCSSPs] may be obliged to detect and block only content which is ‘identical’ and ‘equivalent’ to that subject matter, that is to say, content the unlawfulness of which seems manifest in the light of the ‘relevant and necessary’ information provided by the rightholders. In such cases, since an infringement is highly probable, that content may be presumed to be illegal. It is therefore proportionate to block it preventively, with the onus being on the users concerned to demonstrate its lawfulness – for example, that they have a licence, or that the work is in fact in the public domain – in the context of the complaint mechanism. In short, the ‘best efforts’ imposed on sharing service providers under the contested provisions consist of blocking those manifest infringements.

Conversely, in all ambiguous situations – short extracts from works included in longer content, ‘transformative’ works, and so forth – in which, in particular, the application of exceptions and limitations to copyright is reasonably conceivable, the content concerned cannot be the subject of a preventive blocking measure.

The main difference here is that the AG’s interpretation leaves little room (as compared to the Guidance) to include in this category – and therefore to preventively filter/block – content in relation to which there is ambiguity as to its infringing nature.

The AG is clear that OCSSPs should not subject “transformative” content to preventive filtering. Such content may be privileged by an E&L and must be subject to “independent assessment” by OCSSPs in order to “evaluate the context of those uses”. To allow preventive filtering by OCSSPs of this type of content would lead to an “unacceptable risk of ‘over-blocking’”. Such questions must therefore “be

³⁵¹ AG Opinion C-401/19, , *Poland v Parliament and Council*, para 193.

³⁵² For a similar analysis, see Geiger and Jütte (n 226).

³⁵³ AG Opinion C-401/19, , *Poland v Parliament and Council*, paras 205-206 (footnotes omitted).

left to the Court”.³⁵⁴ This is also the interpretation that is most consistent with the prohibition of general monitoring obligations in art. 17(8) CDSMD.³⁵⁵ To be sure, this a significant departure from the Guidance, as it recognises a much more prominent role to courts in adjudicating disputes under art. 17. Relatedly, the Opinion also recognises a more prominent role to supervisory authorities than the Guidance.³⁵⁶

The AG emphasizes that it is crucial to ensure that the error rate of “false positives” resulting from the deployment of content recognition tools by OCSSPs “should be as low as possible”. Hence, where “it is not possible, in the current state of technology... to use an automatic filtering tool without resulting in a ‘false positive’ rate that is significant, the use of such a tool should... be precluded under” art. 17(7).³⁵⁷ In the AG’s view, it would be disproportionate to apply these tools for ex ante filtering of “all – more questionable – cases of any potential damage caused, for example, by ‘transformative’ content that may or may not fall within the scope of the [E&Ls] to copyright, which is not in direct competition with the original protected subject matter”; rather, such an application would “risk causing ‘irreparable’ damage to freedom of expression”.³⁵⁸ This is especially true since copyright protection is not absolute and rightsholders are left with an array of measures to protect their rights in relation to such “equivocal content”.³⁵⁹ This ensures “a ‘fair balance’ between the measures imposed on users, in some cases, to be able to upload their content and those required of rightholders, in other cases, to have content removed.”.³⁶⁰

Finally, the strongest divergence between the AG Opinion and the Guidance is in relation to the category of “earmarked” content. In a “postscript” to his Opinion, the AG notes that after the draft of his Opinion, two important documents were published: the judgement in *YouTube and Cyando* and the Commission’s Guidance.³⁶¹ As to the first, examined in detail above at 3.1, the AG considers that it is consistent with his Opinion in the present case.³⁶² As to the Guidance, the AG states the following in relation to “earmarked” content:³⁶³

³⁵⁴ AG Opinion C-401/19, , *Poland v Parliament and Council*, para. 203

³⁵⁵ AG Opinion C-401/19, , *Poland v Parliament and Council*, paras 194-203.

³⁵⁶ AG Opinion C-401/19, , *Poland v Parliament and Council*, paras 211-212, concluding: “... In view of the importance of those solutions for users’ freedom of expression, they must not be defined by those private parties alone in a way which lacks transparency, rather the process should be transparent and under the supervision of public authorities.” . See, making an identical point, Geiger and Jütte (n 226).

³⁵⁷ AG Opinion C-401/19, , *Poland v Parliament and Council*, para. 214.

³⁵⁸ AG Opinion C-401/19, , *Poland v Parliament and Council*, para. 216 (referring back to para. 188).

³⁵⁹ AG Opinion C-401/19, , *Poland v Parliament and Council*, paras 217-218.

³⁶⁰ AG Opinion C-401/19, , *Poland v Parliament and Council*, para. 219.

³⁶¹ AG Opinion C-401/19, *Poland v Parliament and Council*, para. 219.

³⁶² AG Opinion C-401/19, *Poland v Parliament and Council*, para. 221.

³⁶³ AG Opinion C-401/19, *Poland v Parliament and Council*, para. 222 (footnote omitted).

However, that guidance also states, in an unprecedented fashion, that rightholders should have the possibility to ‘earmark’ subject matter the unauthorised uploading of which ‘could cause significant economic harm to them’. Those providers should exercise particular diligence with regard to such subject matter. It is further stated that they would not be fulfilling their ‘best efforts’ obligations if they allowed content reproducing that same subject matter to be uploaded despite such ‘earmarking’. If this is to be understood as meaning that those same providers should block content ex ante simply on the basis of an assertion of a risk of significant economic harm by rightholders – since the guidance does not contain any other criterion objectively limiting the ‘earmarking’ mechanism to specific cases– even if that content is not manifestly infringing, I cannot agree with this, unless I alter all the considerations set out in this Opinion.

In essence, the AG rejects the compatibility with fundamental rights of the Guidance’s approach to “earmarked” content that is not also “manifestly infringing”. For the reasons offered above, including those advanced by the AG, we agree with this view. As discussed below, the same conclusion seems to result from the Court’s judgement in C-401/19.

3.5.2.THE CJEU GRAND CHAMBER JUDGEMENT IN C-401/19 – REPUBLIC OF POLAND VS COMMISSION AND COUNCIL³⁶⁴

In simple terms, the main issue before the Court was the validity of the preventive measures required by art. 17(4) (b) and (c) in fine in light of the right to freedom of expression and information recognized in art. 11 CFREU; in the alternative, should these provisions not be severable from art. 17 as a whole, the Republic of Poland asked the Court to annul art. 17 in its entirety.

As a preliminary remark, it is noted that the Court for the most part followed the lead of the AG in his Opinion. Like the AG, it considered that art. 17 can only be assessed in its entirety, meaning that points (b) and (c), in fine, of paragraph (4) should not be assessed separately.³⁶⁵

As a departure point, the Court confirmed that art. 17 requires OCSSPs to de facto carry out a prior review of uploaded content in cases where rights holders have provided “relevant and necessary information”, as required by paragraph (4)(a).³⁶⁶ Importantly, the Court recognizes that depending on

³⁶⁴ This sub-section is based on João Pedro Quintais, ‘Article 17 Survives, but Freedom of Expression Safeguards Are Key: C-401/19 – Poland v Parliament and Council’ (*Kluwer Copyright Blog*, 26 April 2022) <<http://copyrightblog.kluweriplaw.com/2022/04/26/article-17-survives-but-freedom-of-expression-safeguards-are-key-c-401-19-poland-v-parliament-and-council/>> accessed 22 July 2022.

³⁶⁵ C-401/19, Poland v Parliament and Council, para 21.

³⁶⁶ C-401/19, Poland v Parliament and Council, para 53.

the scale of the task (i.e. “on the number of files uploaded and the type of protected subject matter in question, and within the limits set out in Article 17(5)”), review of uploads by OCSSPs requires automatic recognition and filtering tools. As the Court noted, “neither the defendant institutions nor the interveners were able, at the hearing before the Court, to designate possible alternatives to such tools.” Therefore, in certain cases – and certainly for the largest platforms (e.g., YouTube and Meta) – automated content filtering is required to comply with the best efforts obligations in art. 17(4) CDSMD. In other words, at least where it matters most, art. 17 requires what critics have labelled as “upload filters”.

For the Court, such a prior review and filtering is liable to restrict an important means of disseminating online content. Thus, the specific liability regime in art. 17, especially its paragraph (4), entails a limitation on the exercise of the right to freedom of expression and information of users of those content-sharing services, as guaranteed by art. 11 CFREU and art. 10 ECHR.³⁶⁷

But the Court considers that such a limitation is justified in light of the test in art. 52(1) CFREU, which requires any limitation on the exercise of the rights and freedoms recognised by that Charter must be provided for by law and respect the essence of those rights and freedoms.³⁶⁸

In essence, the Court considers the limitation on freedom of expression imposed by art. 17(4) justified in relation to legitimate objective pursued by art. 17, namely that of ensuring a high level of protection for rights holders under art. 17(2) CFREU.³⁶⁹ In a passage that to some extent summarizes a key part of the Court’s proportionality analysis, it is stated that

*the liability mechanism referred to in Article 17(4)... is not only appropriate but also appears necessary to meet the need to protect intellectual property rights. In particular, although the alternative mechanism proposed by the Republic of Poland, under which only the obligations laid down in point (a) and the beginning of point (c) of Article 17(4) would be imposed on [OCSSPs], would indeed constitute a less restrictive measure with regard to exercising the right to freedom of expression and information, that alternative mechanism would, however, not be as effective in terms of protecting intellectual property rights as the mechanism adopted by the EU legislature.*³⁷⁰

³⁶⁷ C-401/19, , Poland v Parliament and Council, paras 55, 58, 82.

³⁶⁸ C-401/19, *Poland v Parliament and Council*, paras 63 et seqs, referring to the principle of proportionality.

³⁶⁹ C-401/19, Poland v Parliament and Council, para 69.

³⁷⁰ C-401/19, Poland v Parliament and Council, para 84.

The Court then advances six arguments why the limitation imposed by art. 17(4) of freedom of expression is justified and does not disproportionately restrict the right to freedom of expression and information of users of those services.³⁷¹

First, following the AG, it considers that the EU legislature laid down clear and precise limits for preventive measures by excluding, in particular, measures which filter and block lawful content when uploading. In this regard, a filtering system that cannot make a distinction between lawful and unlawful content would not be consistent with the requirements of art. 17 and the fair balance between competing rights and interests.³⁷²

Second, art. 17 provides that users will be authorised, by national law, to upload content generated by themselves for purposes like parody or pastiche (paragraph 7), as well as be informed by OCSSPs that they can use works under exceptions or limitations (paragraph 9).³⁷³ In this context, it is noteworthy that the Court explicitly calls these exceptions “user rights”.³⁷⁴

Third, the liability regime requires the provision by rightsholders of “relevant and necessary information” (paragraph (4)(b)) or a “sufficiently substantiated notification” (paragraph (4)(c) in fine), a precondition which the Court believes “protects the exercise of the right to freedom of expression and information of users who lawfully use those services.”³⁷⁵

Fourth, art. 17(8) clarifies that its application must not lead to any general monitoring obligation. This is “an additional safeguard for ensuring that the right to freedom of expression and information of users of [OCSSPs] is observed”, meaning that such providers “cannot be required to prevent the uploading and making available to the public of content which, in order to be found unlawful, would require an independent assessment of the content by them in the light of the information provided by the rightholders and of any exceptions and limitations to copyright”.³⁷⁶ As such, OCSSPs must not be forced into making “an independent assessment of the content” in order to determine its lawfulness, e.g. by contrasting the information provided by rightsholders with applicable exceptions.³⁷⁷

³⁷¹ C-401/19, Poland v Parliament and Council, 84 et seq.

³⁷² C-401/19, Poland v Parliament and Council, paras 85-86.

³⁷³ C-401/19, Poland v Parliament and Council, paras 86-88.

³⁷⁴ C-401/19, Poland v Parliament and Council, para 88.

³⁷⁵ C-401/19, Poland v Parliament and Council, para 89.

³⁷⁶ C-401/19, Poland v Parliament and Council, para 90.

³⁷⁷ C-401/19, *Poland v Parliament and Council*, paras 90-92, applying inter alia by analogy, C-18/18, *Glawischnig-Piesczek*, paras 41–46.

Fifth, the different procedural safeguards introduced by art. 17(9) are adequate to address the situations of over-blocking.³⁷⁸

Sixth, pursuant to art. 17(10), the Commission carried out stakeholder dialogues and produced a Guidance to supplement the system of safeguards provided for in art. 17(7) to (9), which inter alia (i) took special account of the need to balance fundamental rights and of the use of E&Ls; and (ii) provided users' organisations with access to adequate information from OCSSPs on the functioning of their practices with regard to art. 17(4).³⁷⁹

In light of these considerations, the Court concludes that the design of art. 17 includes appropriate safeguards to ensure, in accordance with art. 52(1) CFREU, the right to freedom of expression and information of the users of those services (art. 11 CFREU), and a fair balance between that right of users and the right to intellectual property (art. 17(2) CFREU).³⁸⁰ Still, the Court cautions Member States that when transposing art. 17 they must implement it in such a way as to strike a fair balance to be struck between the various fundamental rights. In addition, "the authorities and courts of the Member States must not only interpret their national law in a manner consistent with that provision but also make sure that they do not act on the basis of an interpretation of the provision which would be in conflict with those fundamental rights or with the other general principles of EU law, such as the principle of proportionality".³⁸¹

3.5.3.THE IMPLICATIONS OF CASE C-401/19 FOR COPYRIGHT CONTENT MODERATION³⁸²

The first important implication of the judgement is that the Court recognizes that art. 17(7) includes an *obligation of result*. This means that Member States must ensure that these E&Ls are respected despite the preventive measures in paragraph (4), qualified as mere "best efforts" obligations. As noted, the different nature of the obligations, underscored by the fundamental rights-basis of the exceptions, indicates a normative hierarchy between the higher-level obligation in paragraph (7) and the lower-level obligation in paragraph (4). This point, already recognized by the AG and in the Commission's Guidance, is reinforced by the Court's recognition – in line with a 2019 academic

³⁷⁸ C-401/19, Poland v Parliament and Council, paras 93-95.

³⁷⁹ C-401/19, Poland v Parliament and Council, para 96.

³⁸⁰ C-401/19, Poland v Parliament and Council, paras 98 para 98.

³⁸¹ C-401/19, Poland v Parliament and Council, para 99.

³⁸² This subsection is based on João Pedro Quintais, 'Between Filters and Fundamental Rights: How the Court of Justice Saved Article 17 in C-401/19 - Poland v. Parliament and Council' (*Verfassungsblog*, 04 2022) <<https://verfassungsblog.de/filters-poland/>> accessed 22 July 2022.

recommendation³⁸³ – that the mandatory E&Ls, coupled with the safeguards in paragraph (9), are “user rights”, not just mere defences.³⁸⁴ Although the legal ramifications of this (affirmative) “rights” qualification will have to be developed over time³⁸⁵, the Court puts this controversy to rest and sets the stage for the subsequent interpretation of the liability regime in art. 17.

The second and related main implication of the judgment is that the Court rejects the possibility of interpretations of art. 17 that rely solely *ex post* complaint and redress mechanisms as a means to ensure the application of user rights.³⁸⁶ That was for instance the position defended by France, Spain and Portugal during the hearing before the Court. Instead, the judgment clarifies that Member States’ laws must first and foremost limit the possibility of deployment of *ex ante* filtering measures; assuming that occurs, the additional application of *ex post* safeguards is an adequate means to address remaining over-blocking issues. This conclusion should be welcomed, especially in light of existing evidence that complaint and redress mechanisms are seldom used by users.³⁸⁷

The question that arises then is what is the scope of permissible filtering under art. 17. Here, it is important to contrast the judgment with the Commission’s Guidance and the AG Opinion. As noted, the Guidance states that automated filtering and blocking measures are “in principle” only admissible for “manifestly infringing” and “earmarked” content. Although the Guidance could do a better job of defining “manifestly infringing”, the concept nevertheless aligns with CJEU case law, especially *Glawischnig-Piesczek*’s reference to “identical or equivalent” content. Conversely, the novel and ill-defined category of “earmarked” content does not reflect existing case law. As explained, this categorisation, especially the endorsement of filtering of “earmarked” content *that is not manifestly infringing*, was not only subject to significant criticism by academics, but was also explicitly rejected by AG Øe in his Opinion.

³⁸³ Quintais and others (n 21).

³⁸⁴ C-401/19, *Poland v Parliament and Council*, paras 86–88.

³⁸⁵ On this topic, see Tito Rendas, ‘Are Copyright-Permitted Uses “Exceptions”, “Limitations” or “User Rights”? The Special Case of Article 17 CDSM Directive | Journal of Intellectual Property Law & Practice | Oxford Academic’ (2022) 17 *Journal of Intellectual Property Law & Practice* 54.

³⁸⁶ C-401/19, *Poland v Parliament and Council*, paras 85–95. See also Martin Senftleben, ‘The Meaning of “Additional” in the Poland Ruling of the Court of Justice: Double Safeguards – Ex Ante Flagging and Ex Post Complaint Systems – Are Indispensable’ (*Kluwer Copyright Blog*, 1 June 2022) <<http://copyrightblog.kluweriplaw.com/2022/06/01/the-meaning-of-additional-in-the-poland-ruling-of-the-court-of-justice-double-safeguards-ex-ante-flagging-and-ex-post-complaint-systems-are-indispensable/>> accessed 22 July 2022.

³⁸⁷ See e.g. Urban, Karaganis and Schofield (n 322). For instance, the 2021 YouTube Transparency Report shows that out of more than 700 million Content ID claims made in the first half of 2021, only 0.5% were disputed by the uploader. See YouTube, ‘YouTube Copyright Transparency Report’ (YouTube 2021) <<https://blog.youtube/news-and-events/access-all-balanced-ecosystem-and-powerful-tools/>> accessed 20 January 2022.

Against this background, the Court states unequivocally that only filtering/blocking systems that can distinguish lawful from unlawful content without the need for its “independent assessment” by OCSSPs are admissible; only then will these measures not lead to the imposition of a prohibited general monitoring obligation under art. 17(8) CDSMD.³⁸⁸ Furthermore, these filters must be able to ensure the exercise of user rights to upload content that consists of quotation, criticism, review, caricature, parody, or pastiche. On this point, it is noteworthy that the judgment explicitly endorses by reference the AG Opinion.³⁸⁹ In those passages, AG Øe delimits the scope of permissible filtering and blocking measures deployed by OCSSPs, stating *inter alia* that “they must not have the objective or the effect of preventing such legitimate uses” that providers must “consider the collateral effect of the filtering measures they implement”, as well as “take into account, *ex ante*, respect for users’ rights”.

But how to ensure this? As the Guidance notes, existing content recognition tools for larger platforms are based on fingerprinting. Such tools are sometimes developed in-house (e.g., YouTube’s Content ID or Meta’s Rights Manager), and other times acquired or licensed from third parties (e.g., Audible Magic or Pex). However, as major platforms have admitted during the stakeholder dialogues, their tools cannot assess the contextual uses required by user rights in art. 17(7).³⁹⁰

In our view, when considering of the Court’s statements in light of the previous case law and current market and technological reality, the logical conclusion is that only content that is “obviously” or “manifestly” infringing – or equivalent content – may be subject to *ex ante* filtering measures. Beyond those cases, for instance as regards purely “earmarked content”, it is difficult to see how the use of *ex ante* content filtering tools is consistent with the judgment’s requirements.

How to precisely define the categories of “obviously” or “manifestly” infringing content is up for discussion. The AG Opinion offers interpretative guidelines on how to limit the application of filters to manifestly infringing or “equivalent” content³⁹¹, with the consequence that all other uploads should benefit from a “presumption of lawfulness” and be subject to the *ex-ante* and *ex post* safeguards embedded in art. 17, notably judicial review.³⁹² In particular, the AG emphasized the main aim of the legislature to avoid over-blocking by securing a low rate of “false positives”. Still, the concrete

³⁸⁸ C-401/19, *Poland v Parliament and Council*, paras 85–86, 90–92, applying *inter alia* by analogy, C-18/18, *Glawischnig-Piesczek*, paras 41–46.

³⁸⁹ C-401/19, *Poland v Parliament and Council*, para. 85, referring to the AG Opinion at paras. 164, 165, 191–193.

³⁹⁰ Paul Keller, ‘Article 17 Stakeholder Dialogue: What We Have Learned so Far – Part 1’ (*Kluwer Copyright Blog*, 13 January 2020) <<http://copyrightblog.kluweriplaw.com/2020/01/13/article-17-stakeholder-dialogue-what-we-have-learned-so-far-part-1/>> accessed 7 May 2021.

³⁹¹ AG Opinion C-401/19, *Poland v Parliament and Council*, paras. 196 ff.

³⁹² AG Opinion C-401/19, *Poland v Parliament and Council*, para. 193.

definition of what are acceptable error rates for content filtering tools will also vary according to the technology and market paradigm at the moment of assessment.

It also remains to be seen whether this reasoning applies more broadly to other types of illegal content beyond copyright infringement. If it does, it might help to shape the scope of prohibited general monitoring obligations versus permissible “specific” monitoring, with relevance for future discussions on the DSA. In drawing these lines, caution should be taken in the application of the “equivalent” standard in *Glawischnig-Piesczek*, which likely requires a much stricter interpretation for filtering of audio-visual content in OCSSPs than textual defamatory posts on Facebook.

3.6. INTERFACE WITH THE DSA: BRIEF REFERENCE

The DSA plays will play a significant role in the future of copyright content moderation in the EU. In the context of the recreating Europe project, some of the authors of this report carried out and published separate research on the interplay between art. 17 CDSMD and the DSA, both as a of a peer-reviewed journal article³⁹³ and an opinion of the European Copyright Society.³⁹⁴ Although these analyses reflected on the DSA proposal text, the main findings remain valid for the final version of the Regulation. For a detailed analysis of this topic, we refer readers to those sources. Below in this section we provide a brief summary of the main conclusions from that research insofar as they are relevant for this report.

The DSA proposal was published on 15 December 2020 and approved by the European Parliament in July 2022.³⁹⁵ The DSA is a regulation that is meant *inter alia* as “REFIT”³⁹⁶ of certain parts of the e-Commerce Directive. Other than the different legal nature of the proposed instrument – Regulation vs Directive – the DSA has a broader scope than the e-Commerce Directive³⁹⁷ and sets up a much more detailed procedural framework. The DSA is divided into five chapters: general provisions (I), liability of

³⁹³ Quintais and Schwemer (n 1).

³⁹⁴ Alexander Peukert and others, ‘European Copyright Society: Comment on Copyright and the Digital Services Act Proposal’ (European Copyright Society 2022) <<https://europeancopyrightsocietydotorg.files.wordpress.com/2022/01/2022-01-17-ecs-comment-on-copyright-and-the-digital-services-act-proposal-3.pdf>>.

³⁹⁵ See European Parliament legislative resolution of 5 July 2022 on the proposal for a regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC (COM(2020)0825 – C9-0418/2020 – 2020/0361(COD), P9_TA(2022)0269, https://www.europarl.europa.eu/doceo/document/TA-9-2022-0269_EN.html#title2 for the text adopted by the EP on 5 July 2022. At time of writing, the final version of the DSA had not yet been published in the Official Journal.

³⁹⁶ European Commission, ‘REFIT – Making EU Law Simpler, Less Costly and Future Proof’ (*European Commission - European Commission*) <https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-less-costly-and-future-proof_en> accessed 22 February 2022. On the legislative history, see, e.g., Sebastian Felix Schwemer, ‘Digital Services Act: A Reform of the E-Commerce Directive and Much More’ in A Savin (ed), *Research Handbook of EU Internet Law [Forthcoming]* (Edward Elgar 2022).

³⁹⁷ See art. 1 DSA.

providers of intermediary services (II), Due diligence obligations for a transparent and safe online environment (III), Implementation, Cooperation, Sanctions and Enforcement (IV), and final provisions.

With regard to copyright-protected material and online platforms, the DSA matters at two levels. On a first level, because it replaces the e-Commerce Directive, the DSA's rules on liability framework and obligations will apply to all those providers that do not qualify as OCSSPs. On a second level, the application of the DSA is less obvious, namely its application to OCSSPs, which are covered by the liability regime in art. 17 CDSMD. Both art. 17 CDSMD as well as multiple provisions of the DSA impose obligations on how online platforms deal with illegal information. Whereas art. 17 CDSMD targets copyright infringing content, the DSA targets illegal content in general, including that which infringes copyright. As noted by the European Copyright Society, however, "copyright enforcement online is a major issue in the context of the DSA, and the DSA will be of utmost importance for the future of online copyright in the EU"; in no small part, this is because "[e]mpirically, copyright law accounts for most content removal from online platforms, by an order of magnitude".³⁹⁸

But the question remains as to how the DSA's rules would interact with existing sector-specific *lex specialis* rules set forth in art. 17 CDSMD. At first glance, these regimes do not appear to overlap as the rules on copyright are *lex specialis* to the DSA. A closer look shows a more complex and nuanced picture. In short, our analysis concludes that the DSA will apply to OCSSPs insofar as it contains rules that regulate matters not covered by art. 17 CDSMD, as well as specific rules on matters where art. 17 leaves margin of discretion to Member States. This includes, to varying degrees, rules in the DSA relating to the liability of intermediary providers and to due diligence obligations for online platforms of different sizes. Importantly, we consider that such rules apply even where art. 17 CDSMD contains specific (but less precise) regulation on the matter. Some additional detail is needed to understand these conclusions and integrate them with our previous analysis in this report.

The potential overlap between the DSA and art. 17 CDSMD is visualized in the Venn-diagram below.

³⁹⁸ Peukert and others (n 394) 2. A good illustration is provided in YouTube's first ever transparency report. For instance, during the first half of 2021, there were over 730 million unique claims or copyright removal requests made through the platform's ContentID system. See YouTube (n 387) 5.

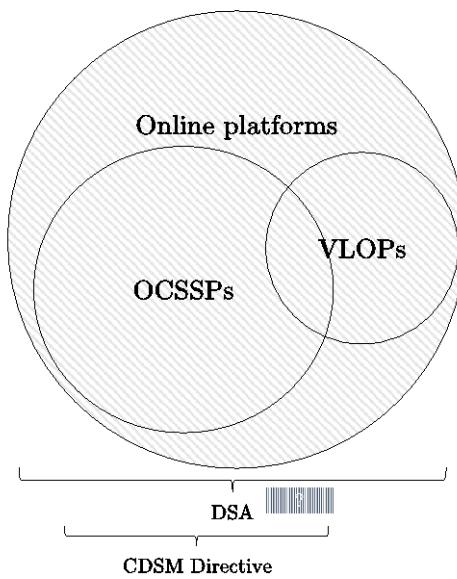


Figure 5. Overlap between DSA and CDSMD

Importantly, the special “copyright”-regime for OCSSPs *only* relates to the *copyright*-relevant portion of an online platform that qualifies as an OCSSP. Art. 17(3) subpara. 2 CDSMD states clearly that the hosting safe harbour of art. 14 e-Commerce Directive –and correspondingly that in art. 5 DSA– still applies to OCSSPs “for purposes falling outside the scope of this Directive.” Consider the example of YouTube, which qualifies as OCSSP. If the relevant information or content it hosts relates to copyright, art. 17 CDSMD applies. If the relevant information, however, relates to hate speech or child sexual abuse material or any other illegal information or content³⁹⁹, the e-Commerce Directive’s – and correspondingly DSA’s – hosting liability exemption is the place to look. In other words, YouTube would be considered an OCSSP (in the context of copyright) and also a VLOP (in the context of other information).

³⁹⁹ Art. 2(g) DSA.

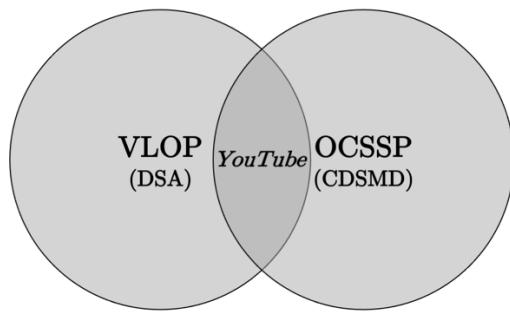


Figure 6. Example of overlap between regulatory regime in the case of OCSSPs

In examining the rules applicable to the relationship between different legal regimes we conclude that the specific rules and procedures contained in art. 17 for OCSSPs are likely considered *lex specialis* to the DSA.⁴⁰⁰ Conversely, the DSA will apply to OCSSPs insofar as it contains: (i) rules that regulate matters not covered by art. 17 CDSMD; and (ii) specific rules on matters where art. 17 leaves margin of discretion⁴⁰¹ to Member States. As we demonstrate in our research⁴⁰², whereas category (i) is more or less straightforward, category (ii) is more challenging.

The DSA contains a bifurcated approach to regulation. On the one hand, Chapter II sets out a regime for the liability of providers of intermediary services. This regime distinguishes between *functions*, namely ‘mere conduit’, ‘caching’ and hosting. It is in essence a revamped version of the existing rules on liability exemption (also known as safe harbours) and ban on general monitoring in arts. 12 to 15 e-Commerce Directive.⁴⁰³ The main differences are the addition of a “Good Samaritan”-like rule in art. 6⁴⁰⁴, and provisions on orders to act against illegal content (art. 8) and to provide information (art. 9). On the other hand, Chapter III sets out horizontal due diligence obligations for a transparent and safe online environment.⁴⁰⁵ This regime distinguishes between categories of providers, by setting out asymmetric obligations that apply in a tiered way to different categories of providers of information society services. As a starting point, the liability exemption regime, on the one hand, and the due diligence obligations, on the other hand, are separate from each other. In other words: the availability

⁴⁰⁰ One could also reflect upon the chronological order of the legislative acts in the vein of a *lex posteriori derogate (legi) priori* interpretation. However, since the CDSMD was only adopted as late as April 2019 and since there is no indication of such intention in the preparatory works, we refrain from further exploring this perspective.

⁴⁰¹ A different set of questions, notably around primacy of EU law, would arise if Member States lack that discretion.

⁴⁰² See Quintais and Schwemer (n 1); Peukert and others (n 394).

⁴⁰³ See also art. 71 DSA.

⁴⁰⁴ On which, see Aleksandra Kuczerawy, ‘The Good Samaritan That Wasn’t: Voluntary Monitoring under the (Draft) Digital Services Act’ (*Verfassungsblog*, 12 January 2021) <<https://verfassungsblog.de/good-samaritan-dsa/>> accessed 5 May 2021. (noting that the provision “aims to eliminate existing disincentives towards voluntary own-investigations undertaken by internet intermediaries” but that “it is questionable whether facilitating more voluntary removals is actually beneficial from the perspective of users and their right to freedom of expression.”)

⁴⁰⁵ Arts. 10 to 37 DSA.

of a liability exemption is not dependent on compliance with due diligence obligations and vice-versa.⁴⁰⁶

As noted, when contrasting the definitions and regimes in the DSA and CDSMD, it is clear that the notion of OCSSPs covers at least (certain) online platforms and VLOPs. The legal question that arises is to what extent the proposed DSA's liability rules (in Chapter II) and the asymmetric obligations (in Chapter III) apply to OCSSPs as online platforms or VLOPs.

As regards the liability regime, our main conclusions are as follows:⁴⁰⁷

- The liability regime in the DSA is partly excluded for OCSSPs.
- Since the hosting safe harbour (art. 5 DSA) is meant to replace art 14 e-Commerce Directive, its application is set aside by the express reference in art. 17(3) CDSMD.
- The prohibition on general monitoring obligations in art. 7 DSA, which aims to replace the similar prohibition in art. 15 e-Commerce Directive, appears to not be touched by the CDSMD, since art. 17(8) CDSMD can be understood as being of a merely declaratory nature.
- The application of rule in art. 6 DSA on “[v]oluntary own-initiative investigations and legal compliance” in this scenario is unclear. In short, there appears to be limited space for this provision in light of the specific rules imposed on OCSSPs in art. 17(4)(b) and (c) CDSMD. However, it should be noted that certain voluntary measures by OCSSPs could go beyond the required “best efforts”, and would therefore not trigger liability, provided they are within the limits imposed by art. 17(7)–(9) CDSMD.
- Finally, the rules on orders against illegal content and orders to provide information in arts. 8 and 9 DSA may apply to OCSSPs. Art. 8 DSA, in particular, sets out a detailed regime not available elsewhere to OCSSPs. This would seem to apply despite art. 8(3) InfoSoc Directive. The reason is that art. 8(3) InfoSoc Directive applies to intermediaries that are not directly liable for the content they host. This is not the case of OCSSPs, who by virtue of the legal regime in art. 17(1) CDSMD are directly liable for the content they host and is publicly available.

As regards due diligence obligations for OCSSPs, our research did not exam in depth all potential obligations that apply to online platforms and VLOPs in the DSA. Instead, our focus was on selected key obligations that apply to both categories and might be relevant for OCSSPs. This includes certain due diligence obligations for all providers of intermediary services (arts. 10-13), online platforms (arts. 14-24), and VLOPs and very large online search engines (arts. 25-33).⁴⁰⁸

⁴⁰⁶ Note, however, e.g. Art.14(3) DSA (“Notices referred to in this Article shall be considered to give rise to actual knowledge or awareness for the purposes of Article 5 in respect of the specific item of information concerned where they allow a diligent provider of hosting services to identify the illegality of the relevant activity or information without a detailed legal examination.”)

⁴⁰⁷ For a detailed analysis, see Quintais and Schwemer (n 1).

⁴⁰⁸ We do not examine or make further reference in this report the regime applicable to very large online search engines. On the status of search engine providers as addressees of the DSA and its copyright implications, see Peukert and others (n 394).

As a preliminary remark, we see no obstacle to the application to OCSSPs of general obligations⁴⁰⁹ that extend all intermediary services on points of contact, legal representatives, terms and conditions⁴¹⁰, and transparency reporting. This includes the obligations set out in arts. 10 to 13 (with aggravation in arts. 23, and 33 DSA). Furthermore, since art. 17 CDSMD focuses on the disabling of illegal information and not the recommendation or promotion of information, the relevant rules in the DSA on recommender systems (art. 29) should also fully apply to OCCSPs.⁴¹¹

As with the liability framework, there is some uncertainty on the extent to which due diligence obligations apply to OCSSPs. In short, our analysis concludes the following:⁴¹²

- Parts of the rules on notice and action (art. 14) and statement of reasons (art. 15) should apply to OCSSPs, e.g., the detailed regime on the substance of the notice, which is not found in art. 17 CDSMD.
- Arts. 17 and 18 DSA set forth a detailed internal complaint mechanism as well as out-of-court dispute settlement. Art. 17(9) CDSMD also mandates such mechanisms for the specific genus of OCSSPs, but in a much less detailed fashion. In our view, arts. 17 and 18 DSA should apply to OCSSPs to fill the gaps left open by the vaguer rules on the complaint and redress in art. 17(9) CDSMD. We argue this would have the result of forcing platforms that qualify as OCSSPs and VLOPs to align their copyright redress mechanisms with their remaining illegal content moderation systems covered by the DSA, thereby raising their level of procedural *ex post* safeguards in this area.
- The DSA also imposes an obligation for online platforms to collaborate with *certain* trusted flaggers/notifiers in art. 19 DSA. This status is awarded, supervised and revoked by the relevant Digital Services Coordinator of the Member States. Despite the regime in art. 17 CDSMD, trusted flaggers should play an important role on OCCSPs also for the flagging of copyright-protected material. In fact, in the context of larger OCSSPs, trusted flaggers/notifiers already play a crucial but often opaque role in the privatization of online content (copyright and other) moderation and enforcement.⁴¹³ In our view, the applicability of art. 19 DSA in the context of OCSSPs depends at least to some extent on the question whether the notice-and-action mechanism in art. 14 DSA applies to OCSSPs. Importantly, the DSA does not prevent “voluntary” trusted notifier arrangements, which would be outside the scope of art. 19 and the supervision of the Digital Services Coordinator. This gap is, however, partly tackled by art. 20 DSA.
- Art. 20 DSA refers to measures and protection against misuse, which we consider to be a crucial provision mitigate misuse both by users and by any type of flaggers, probably excluding “trusted flaggers” (regulated by art. 19) but including flaggers covered by “voluntary” trusted notifier arrangements with platforms. Because the provision directly references arts. 14 and 17 DSA, the application of art. 20 to OCSSPs depends on whether art. 14 and (at least part of) art. 17 DSA apply

⁴⁰⁹ Chapter III, Section 1 DSA, with certain further adjustments of the obligations for specific intermediary services.

⁴¹⁰ Art. 12 DSA obliges intermediary service *inter alia* to provide information on content moderation including algorithmic decision making and human review. Art. 19(9) subpara. 4 CDSMD, too, stipulates a duty on OCSSPs to inform in users in their terms and conditions, however, only with respect to the possibility to use copyright-protected works under copyright limitations and exceptions provided for in the copyright acquis.

⁴¹¹ See art. 29 DSA. See also Schwemer, ‘Recommender Systems in the EU: From Responsibility to Regulation’ (n 38).

⁴¹² For a detailed analysis, see Quintais and Schwemer (n 1).

⁴¹³ See generally Schwemer, ‘Trusted Notifiers and the Privatization of Online Enforcement’ (n 43).

the *lex specialis* of art. 17 CDSMD. In the absence of specific regulation in this regard in art. 17 CDSMD, we argue that art. 20 DSA should be fully applicable to copyright misuse.

- VLOPs are subject to certain specific due diligence obligations, *inter alia*, risk assessment (art. 26) and risk mitigation (art. 27). The functioning and use made of the services of very-large OCSSPs (e.g., YouTube, Facebook, Instagram) might come with systemic risks, e.g., “dissemination of illegal content” (including copyright infringement) or “negative effects for the exercise” of fundamental rights including freedom of expression. Since the CDSMD does in no way address these issues, we do not see any argument that precludes the application of arts. 26 and 27 (as well as other relevant provision such as data access) to VLOPs that are also OCSSPs.⁴¹⁴ The same reasoning holds for other relevant obligations, such as data access and transparency.

One main outcome of our analysis on the liability framework is the potential complexity arising out of the DSA-CDSMD legal puzzle, which has practical consequences for how platforms can and should design their content moderation systems in light of both the DSA and the CDSMD. In part, this problem is unavoidable and stems from the different nature of the legal instruments at issue (Directive vs Regulation), the territorial nature of copyright, and the potential issues arising therefrom from the perspective of multi-layered enforcement. For instance, one unresolved question in our research relates to the tension between the territorial approach of art. 17 CDSMD, e.g., for the attribution of liability, as contrasted with the “country of origin” approach in the DSA, i.e., the principle that states that a service provider company follow the legislation of its country of establishment. In other words, the complementary application of the DSA to OCSSPs will mean that for different aspects of copyright content moderation in the same platform, there might be different applicable laws, which introduces yet another layer of complexity. To be sure, there is space for the Commission to contribute improve legal certainty in this area by explicitly addressing the issue of the topic of the interface with the DSA in a revision of its Guidance on art. 17 CDSMD.

⁴¹⁴ See, similarly, as regards risk mitigation Peukert and others (n 394) 10–11.

4. LEGAL MAPPING AT NATIONAL LEVEL: COMPARATIVE ANALYSIS⁴¹⁵

This chapter carries out a legal mapping of copyright content moderation by online platforms at the national level in selected EU Member States. This chapter aims to answer the following sub-research questions (**SQR**), *from a national law perspective*.

- SQR (2): How is the private and public regulatory framework for content moderation for online platforms structured?
- SQR (3): How do the various elements of that regulatory framework interact?

The chapter starts with preliminary information on the questionnaire that forms the basis of the national level mapping (4.1). It then summarises the key findings from the responses by national experts during the first and second phase questionnaires (4.2 and 4.3). It concludes with a brief summary of the analysis (4.4).

4.1. PRELIMINARY INFORMATION

In line with the methodology introduced at 2.7.1 we collected data related to the legal status of information society service providers (**ISSPs**) in connection to the CDSMD. The data involves responses to legal questionnaires by national respondents from ten selected EU Member States.⁴¹⁶ The questionnaires are reproduced in Annex I.

The comparative legal questionnaire was designed to run in two main periods or phases. The *phase one* questionnaire collected and analysed legal data from the period preceding the implementation deadline of the CDSMD. As such, it focused on the status quo in this field of law. The *phase two* questionnaire was dedicated to the national implementations of art. 17 CDSMD, and the consequences of such implementation, and was carried out after the implementation deadline of the Directive. The phase one and two questionnaires aimed to allow a comparison of the legal environment of the service providers at issue in the pre- and post-implementation periods of the CDSMD.

The questionnaires' focus is on ISSPs that store or host copyright-protected content uploaded by the users or recipients of the service. As explained in detail in Chapter 3, art. 17 CDSMD creates a new

⁴¹⁵ The main authors of this Chapter are Péter Mezei and István Harkai.

⁴¹⁶ These countries are Denmark (DEN); Estonia (EST); France (FRA); Germany (GER); Hungary (HUN); Ireland (IRL); Italy (ITA); the Netherlands (NED); Portugal (POR); Sweden (SWE).

regime for a subset of hosting service providers, OCSSPs. Our questionnaires focus on ISSPs that host copyright-protected content, with a particular emphasis on OCSSPs.

The first phase questionnaire was formulated between September and December 2020. At the same time, the national reporters were selected. The first phase questionnaire consisted of four main chapters. *Chapter I* focused on hosting service providers as *users* of copyright-protected content (as such, theoretically subject to direct liability for their services). *Chapter II* focused on hosting service providers as *intermediaries* for access to copyright-protected content (as such, theoretically subject to indirect liability for their services). *Chapter III* addressed legal issues related to end-users (as such, theoretically subject to direct liability for their own activities). Finally, *Chapter IV* requested the provision of preliminary information related to the steps of implementation of art. 17 CDSMD in the national reporters' countries.

The selected national reporters received the questionnaire on 2 December 2020, and the submission date was 22 January 2021. As the COVID pandemic has limited the availability of several national reporters, some of the responses were submitted to us as late as 19 February 2021. Two of the ten reports were declared to be complete by the research team, no changes were requested related to these reports. Eight national reporters were required to slightly amend/clarify their responses. The updated versions were submitted to us as late as 11 April 2021. Where necessary, our summary highlights the key developments with respect to the implementation of art. 17 CDSMD.

The second phase questionnaire was dedicated to the national implementations of art. 17 CDSMD in ten selected EU Member States. The questionnaire allowed a comparison of the legal environment of the service providers at issue in the post-implementation period (following 7 June 2021) of the CDSMD. The second phase questionnaire was formulated between September and December 2021. The same national reporters were contacted who responded to the first phase questionnaire in early 2021. The questionnaire consisted of five main chapters. *Chapter I* focused on the legislative history of the implementation of art. 17 CDSMD. *Chapter II* analysed how Member States have transplanted certain definitions related to art. 17. *Chapter III* addressed the new authorization regime under art. 17. *Chapter IV* requested the provision of information related to the new liability regime (that might kick in case of the lack of authorization by the OCSSPs). Finally, *Chapter V* discussed how Member States have regulated safeguards (E&Ls, as well as procedural safeguards) to balance the interests of end-users.

The selected national reporters received the questionnaire on 24 January 2022, and the submission date was 31 March 2022. As the COVID pandemic has limited the availability of several national

reporters, some of the responses were submitted to us as late as 16 May 2022. Other than asking for some minor clarifications, all reports were declared to be complete upon submission.

This Chapter intends to provide for a thorough analysis and comparison of the national reports, including the detailed analysis of the statutory provisions and case law of the selected Member States.

4.2. KEY FINDINGS OF THE FIRST PHASE QUESTIONNAIRE

This section includes the main findings from the first phase national questionnaires. For clarity purposes, the analysis follows the structure of the questionnaire, which is reproduced in Annex I.

4.2.1. HOSTING SERVICE PROVIDERS AS USERS OF COPYRIGHT-PROTECTED CONTENT

This sub-section refers to the question contained in *Chapter I* focused on hosting service providers as *users* of copyright-protected content.

- Question 1. Is there a legal definition or specific legal regime in your country for information society service providers that store and give the public access to a large amount of protected content⁴¹⁷ uploaded by their users?

The majority (eight) of national reporters noted that the legal definition related to service providers that store and give the public access to a large amount of protected content uploaded by their users is included in/covered by their countries' e-Commerce legislation.⁴¹⁸ In *Sweden*, ISSPs shall normally be considered as intermediaries, which fall within the ambit of various Swedish laws.⁴¹⁹ None of these laws include, however, any express definition of intermediaries. In *Estonia*, ISSPs in general are defined by the local e-Commerce Law,⁴²⁰ but there is no specific definition for ISSPs that store and give access to a large amount of protected content uploaded by their users. Similarly, the e-commerce law in *Portugal* defines only "online intermediary service providers" in a general sense,⁴²¹ and offers no definition for ISSPs storing UGC. Two reports answered in the negative to this question.⁴²²

⁴¹⁷ We used the short-hand "protected content" to refer to works or other subject-matter protected by copyright or related/neighbouring rights laws.

⁴¹⁸ Report Phase 1 *France* [L. No. 2004-575, 21 June 2004 (LCEN), §6.I.2]; Report Phase 1 *Ireland* [S.I. No. 68/2003 – European Communities (Directive 2000/31/EC) Regulations 2003]; Report Phase 1 *Italy* [D.Lgs. 9 April 2003, no.70, §2; 14-17]; Report Phase 1 *Portugal*; Report Phase 1 *Sweden*; Report Phase 1 *Estonia*; Report Phase 1 *Hungary* [2000. évi CVIII. törvény, §2(lc)]; Report Phase 1 *Denmark* (E-handelsloven, LOV nr 227 af 22/04/2002, §16].

⁴¹⁹ These Swedish statutes are on copyright law [Lag (1960:729); hereinafter URL]; on e-commerce law [Lag (2002:562)] and on the responsibility for electronic bulletin boards (BBS) [Lag (1998:112)].

⁴²⁰ Report Phase 1 *Estonia* [Infoühiskonna teenuse seadus §2(1)].

⁴²¹ Report Phase 1 *Portugal* [Decree-Law no. 7/2004 of January 7; §4(5)].

⁴²² Report Phase 1 *Netherlands*; Report Phase 1 *Germany*.

- Question 2. Are “good faith” hosting service providers⁴²³ directly or primarily liable under copyright law or general civil law for providing access to protected content uploaded by their users? If yes, please explain.

Based on the responses of the national reporters to this question, Member States might be ordered in four distinct groups.

In the case of the first group of three countries, the reporters generally affirmed the direct or primary liability of good faith service providers under copyright law or general civil law for providing access to protected content uploaded by their users.⁴²⁴ Two of these reports confirmed the applicability of criminal law provisions against the service providers as well.⁴²⁵ At the same time, two of the three reporters expressly stated that such a direct liability has little practical relevance in their country.⁴²⁶ In *Germany*, direct liability applies to perpetrators and participants alike. The national reporters, however, noted that the liability of participants (“Teilnehmerhaftung”) is rarely relevant for service providers. The reporters also noted that case law exists in Germany that forms the basis of primary liability of good faith hosting platforms for the sharing of UGC, if the platform presents the content to the public in such a way that it appears to be its own (“Zu-Eigen-Machen”);⁴²⁷ however, the German reporters argued that this case law applies only in certain circumstances and arguably cannot be applied to video content sharing platforms such as YouTube.

Another four reporters answered in the negative, but indicated that direct liability applies either under the domestic e-Commerce law;⁴²⁸ or in a “round-about manner”, through the application of various obligations stemming from the Copyright Act, Information Society Services Act (e-Commerce Act) and the Law of Obligations Act.⁴²⁹

⁴²³ In Case C-610/15, the CJEU, by focusing on The Pirate Bay, concluded that “those operators, by making available and managing an online sharing platform such as that at issue in the main proceedings, intervene, with full knowledge of the consequences of their conduct, to provide access to protected works, by indexing on that platform torrent files which allow users of the platform to locate those works and to share them within the context of a peer-to-peer network.” (Para. 36.) At the same time, in Joined Cases C-682/18 and C-683/18, Advocate General Øe has differentiated between service providers, like The Pirate Bay, and other service providers who have no direct intent to infringe copyright law. This questionnaire calls the latter group “good faith” hosting service providers.

⁴²⁴ Report Phase 1 *Portugal*; Report Phase 1 *Sweden*; Report Phase 1 *Germany* [the German reporters nevertheless remarked that the terminology of “direct/primary or indirect/secondary liability” is not used in German law. Instead of these, the two key concepts are “Täter- oder Teilnehmerhaftung” (liability of perpetrators and participants) and “Störerhaftung” (liability for breach of duty of care)].

⁴²⁵ Report Phase 1 *Portugal*; Report Phase 1 *Sweden*.

⁴²⁶ Report Phase 1 *Sweden*; Report Phase 1 *Germany*.

⁴²⁷ BGH, 12 Nov 2009, I ZR 166/07, GRUR 2010, 616 para. 22-29 – marions-kochbuch.de; confirmed by BGH, 16 May 2013, I ZR 216/11, GRUR 2013, 1229 para. 31 – Kinderhochstühle im Internet II.

⁴²⁸ Report Phase 1 *Italy* [Decree 60/2003, §16 and 17]; Report Phase 1 *Hungary* [2001. évi CVIII. törvény, §10 and 13]; Report Phase 1 *France* [LCEN, §6.I.2. and §6.I.5.].

⁴²⁹ Report Phase 1 *Estonia*.

In *Italy*, case law confirms the direct liability of active providers.⁴³⁰ The Italian reporters nevertheless noted that the local case law shows inconsistencies, too. For instance, hosting providers “presumed to carry out a merely technical, automatic and passive activity”, and declared not liable on this basis.⁴³¹ A hosting provider was considered “active”, hence liable, if it carried out an “activity that goes beyond services of merely technical, automated and passive nature, and engages in active behaviour, thus joining other parties in the infringement”.⁴³² At times this is described as “manipulation or transformation of the information or of the content”.⁴³³ Hosting providers were deemed to act as a de facto content provider, and were thus held liable, if they transformed the uploaded content into “new” products by organizing, indexing and commercially exploiting the videos uploaded by its users.⁴³⁴ Relevance was also given to their “economic profits and advertising activities accompanying the organized presentation and displaying of [users’] content”.⁴³⁵ The notion of active hosting provider was at times found to be misleading and detached from the reality of hosting services.⁴³⁶ Online encyclopaedias were deemed passive hosting providers, as “they limit themselves to host information given by the users”.⁴³⁷ Furthermore, in Italy, hosting providers are always declared liable if they behave negligently by failing to promptly respond to users’ notices,⁴³⁸ react with removal/blocking of infringing content⁴³⁹ and/or notify the authorities.⁴⁴⁰ The Italian case law shows inconsistencies as regards to the “sufficient or necessary” awareness of the hosting service provider.⁴⁴¹

Another two respondents – the Netherlands and Ireland – provided a negative answer to the question.⁴⁴²

⁴³⁰ E.g., Tribunal of Turin, First Civil Section, Order, 6 May 2014 (docket n. 38113/2013).

⁴³¹ E.g., Tribunal of Turin, First Civil Section, Order, 6 May 2014 (docket n. 38113/2013).

⁴³² E.g., Court of Civil Cassation, First Section, Decision of 19 March 2019 n. 7708 (original text: “attività che esula da un servizio di ordine meramente tecnico, automatico e passivo, e pone, invece, in essere una condotta attiva, concorrendo con altri nella commissione dell’illecito”).

⁴³³ Tribunal of Rome, 10 January 2019, n.693 (““manipolazione o trasformazione delle informazioni o dei contenuti trasmessi o memorizzati””).

⁴³⁴ E.g., Tribunal of Turin, First Civil Section, 7 April 2017, n.1928 (docket n.38112/2013); Tribunal of Turin, First Civil Section, Order, 23 June 2014 (docket n. 15218/2014); Tribunal of Rome, Order, 16 December 2009 (docket n. 54218/2008); Tribunal of Rome, 27 April 2016, n.8437; Court of Appeal of Rome, 29 April 2017, n. 2833 (docket n. 24716/2012).

⁴³⁵ Tribunal of Milan, 9 September 2011, n.10893. Original text of the quote: “(...) trae sostegno finanziario in ragione dello sfruttamento pubblicitario connesso alla presentazione (organizzata) di tali contenuti.”.

⁴³⁶ E.g., Court of Appeal of Milan, 7 January 2015, n.29 (docket nr. 3821/2011).

⁴³⁷ Tribunal of Rome, First Civil Section, 9 July 2014, n. 4986 (docket n. 70572/09). Original text of the quote: “(...) in quanto si limita ad offrire ospitalità ad informazioni fornite dal pubblico degli utenti.”

⁴³⁸ E.g., Tribunal of Milan, 9 September 2011, n.10893 (*RTI vs. Yahoo!*); Tribunal of Rome, 27 April 2016, n. 8437.

⁴³⁹ E.g., Tribunal of Rome, 10 January 2019, n. 693; Tribunal of Rome, 15 February 2019, n. 3512.

⁴⁴⁰ E.g., Tribunal of Milan, 11 June 2018 (docket nr.51624/2017).

⁴⁴¹ E.g. Tribunal of Milan, 9 September 2011, n.10893 (*RTI vs. Yahoo!*); Tribunal of Rome, order of 16 December 2009; Tribunal of Rome, order of 11 February 2010.; Tribunal of Rome, IX Section, 16 June 2011 (docket n. 58871/2010); Court of Appeal of Milan, 7 January 2015, n. 29 (docket nr. 3821/2011); Tribunal of Turin, Order, 3 June 2015 (*Delta vs Dailymotion*) (docket n. 11343/2015); Tribunal of Rome, 12 July 2019, n. 14757.; Court of Appeal of Rome, 19 February 2018, n.1065.

⁴⁴² Report Phase 1 *Netherlands*; Report Phase 1 *Ireland*.

Finally, the *Danish* report has highlighted that the contributory liability of The Pirate Bay per the Danish Supreme Court's decision in case Ugeskrift for Retsvæsen, 2010.2221H, does not seem to be applicable since the CJEU's ruling in *The Pirate Bay* case.

- Question 3. Besides direct licensing, is there any method, mechanism, or model of authorization in your country that covers the uploading of protected content by end-users to the platforms of hosting service providers?

The majority (eight) of the national reporters answered negatively to the question.⁴⁴³ *Sweden* and *Germany* have a special regime in place.

- Question 3.1. If yes, could you please describe the model, including the legal basis, mechanism, the scope of protected content and rights covered, beneficiaries, and sectoral variations?

In *Sweden*, since 2013, the Copyright Act provides for a general extended collective licensing (ECL) mechanism within any specified area of use, covering any relevant economic rights. It is thus open to any market actor. The Copyright Act nevertheless expressly indicates typical fields for ECL: the use by public authorities, business, organisations to meet internal needs for information; for the purpose of teaching; for the benefit of archives and libraries; and in relation to radio and TV broadcasts.

In *Germany*, uploading of protected content by end-users can be covered by usual E&Ls. Furthermore, under Art. 51 of the Collecting Societies Act (VGG), the competence of the collecting society to administer the rights related to out-of-commerce works, even if the right holder has not concluded an agreement with the collecting society. This regime is similar to, albeit a bit more limited than the system envisaged by art. 8 CDSMD.

- Question 3.2. Please indicate the leading cases which are dealing with the direct liability of service providers.

The *Swedish* national reporter indicated the existence of several relevant judgments, but also added that due to the persuasive force of preparatory works of the copyright and e-commerce laws, civil case

⁴⁴³ Report Phase 1 *Netherlands*; Report Phase 1 *France*; Report Phase 1 *Ireland*; Report Phase 1 *Italy*; Report Phase 1 *Portugal*; Report Phase 1 *Estonia*; Report Phase 1 *Hungary*; Report Phase 1 *Denmark*. The Dutch report nevertheless noted that it is unclear whether an "umbrella licensing agreements" cover UGC contents or not. The Estonian reporter noted that "self-moderation" is the closest analogy to the issue at hand. The Danish report also noted that extended collective licensing is a "different angle" solution to the same issue.

law is “scarce”, but criminal cases exist.⁴⁴⁴ The *German* national report also indicated the existence of three relevant judgments in this field.⁴⁴⁵

The French and Estonian national reports also referred to some cases (in France: “*Radioblog*”,⁴⁴⁶ “*Les Dissimulateurs*”,⁴⁴⁷ and “*Clearstream*”;⁴⁴⁸ the ECtHR *Delfi*⁴⁴⁹ case originated from Estonia) that are related to the upload of contents by end-users to online platforms. These are nevertheless either nor directly relevant in a copyright environment (e.g., *Delfi*) or do not put any alternative authorization obligation on intermediaries (as in the French cases).

4.2.2. HOSTING SERVICE PROVIDERS AS *INTERMEDIARIES* FOR ACCESS TO COPYRIGHT-PROTECTED CONTENT

This sub-section refers to the question contained in *Chapter II of the first phase questionnaire* focused on hosting service providers as intermediaries for access to copyright-protected content.

- Question 4. Does your country allow rights holders to apply for an injunction against service providers for copyright-infringing content uploaded by third-party users of the service?

The vast majority (nine) of the reporters⁴⁵⁰ answered the question affirmatively. In *Germany*, injunctions are inapplicable in cases where art. 10 of the E-Commerce Act (TMG) applies to the case at hand.

- Question 4.1. If yes, could you please cite the relevant legal requirements, provision(s), and leading case law?

⁴⁴⁴ Leading Swedish cases include *BBS Case* (Supreme Court, Case B 363-95; NJA 1996 s. 79; which judgment served the basis for the legislative work on the BBS Act of 1998); *Wikimedia* [Patent and Market Court, Case PMT 8448-14]; *Dreamfilm* [Göta Court of Appeal, Case B 1565-17]; *Swefilmer* [Court of Appeal for Western Sweden, Case B 3142-17]; *Rarat* [Patent and Market Court of Appeal, Case B 10356-18]. In these cases, the competent courts did not consider the application of the e-commerce act.

⁴⁴⁵ BGH, 13 Sept 2018, I ZR 140/14, GRUR 2018, 1132 – YouTube; BGH, 20 Sept 2018, I ZR 53/17, GRUR 2018, 1239 – uploaded; BGH, 12 Nov 2009, I ZR 166/07, GRUR 2010, 616 – marions-kochbuch.de; confirmed by BGH, 16 May 2013, I ZR 216/11, GRUR 2013, 1229 – Kinderhochstühle im Internet II.; OLG Düsseldorf, 8 Nov 2011, I-20 U 42/11, ZUM 2012 – Embedded Content, 327; OLG Hamburg, 29 Sept 2010, 5 U 9/09, ZUM 2011, 500 – Sevenload; OLG Hamburg, 1.7.2015, 5 U 87/12 ZUM-RD 2016, 83 –YouTube; OLG München 28 Jan 2016, 29 U 2798/15, GRUR 2016, 612 – Allegro barbaro. From these, the uploaded and the YouTube cases reached the ECJ, which – following the closure of the completion of national reports – published its judgment in YouTube and Cyando.

⁴⁴⁶ CA Paris, pôle 5, ch. 12, 22 March 2011, *SPPF et SCPP v. société Mubility, Benoît et Jean-Louis T.; Crim.*, 25 September 2012, n° 11-84.224, *Radioblog*, D. 2012. 2444.

⁴⁴⁷ Civ. 1re, 12 July 2012, n° 11-13.666, *Google v. Bac Films, The Factory et Canal+* (« *Les Dissimulateurs* »).

⁴⁴⁸ Civ. 1, 12 July 2012, no. 11-13.669, *Google v. Bac Films*.

⁴⁴⁹ *Delfi AS v. Estonia* (2015) ECtHR 64669/09.

⁴⁵⁰ Report Phase 1 *Netherlands*; Report Phase 1 *France*; Report Phase 1 *Ireland*; Report Phase 1 *Italy*; Report Phase 1 *Portugal*; Report Phase 1 *Sweden*; Report Phase 1 *Estonia*; Report Phase 1 *Hungary*; Report Phase 1 *Denmark*.

The nine national reporters duly covered the relevant national rules on the applicability of injunctions. There are two main groups of countries regarding the regulation of the framework of injunctions. In the majority (seven) of these countries,⁴⁵¹ the local copyright act has exclusive or special rules on injunctions; in two countries (Denmark and Estonia)⁴⁵² however, general administrative/procedural codes cover the provisions on injunctions.

In *Italy*, rightsholders who have reason to fear the violation or continuation of violation of their rights may ask for a declaratory judgment or an injunction against the infringer or the intermediary, whose service was used to commit the infringement. The judge can impose a sum due for the violation or the non-compliance of the injunction.⁴⁵³ In *Portugal*, the Copyright and Related Rights Code includes a special regime for interlocutory injunctions that might be applied against infringers or intermediaries for the infringement or the reasonable fear that someone will cause damages that would be serious or difficult to repair.⁴⁵⁴ In *Hungary*, the Hungarian Copyright Act regulates that rightsholders shall be in a position to apply for an injunction against direct infringers and such intermediaries – including ISSPs – whose services are used by third parties to infringe copyright.⁴⁵⁵ The relevant remedies are the obligation to cease providing services and the provision/disclosure of data.⁴⁵⁶ These special copyright rules are based on/backed by the general rules of the Civil Procedure Code on injunctions.⁴⁵⁷ In *the Netherlands*, the Dutch Civil Code provides explicitly that a service provider's eligibility for invoking the safe harbour for hosting does not affect the possibility for right holders to obtain a court order to terminate or prevent an infringement, or an injunction for the removal or disabling of access to infringing content.⁴⁵⁸ Moreover, the Dutch Copyright Act stipulates that, upon application by the author, Dutch courts may order a hosting service provider whose services are used by a third party to infringe copyright, to cease and desist from providing the services that are used for that infringement.⁴⁵⁹ In *Ireland*, rightsholders might apply for an injunction against intermediaries under the Copyright and Related Rights Act since 2012.⁴⁶⁰ In *Sweden*, injunctions might be issued against infringers and intermediaries alike under the Swedish Copyright Act;⁴⁶¹ injunctions shall be flexible,

⁴⁵¹ Report Phase 1 *Italy*; Report Phase 1 *Portugal*; Report Phase 1 *Hungary*; Report Phase 1 *Netherlands*; Report Phase 1 *Ireland*; Report Phase 1 *Sweden*; Report Phase 1 *France*.

⁴⁵² Report Phase 1 *Denmark*; Report Phase 1 *Estonia*.

⁴⁵³ Legge Italiana sul Diritto d'Autore, Law 22 April 1941, n.633, §156 and 163(1), as amended by D.Lgs no. 140 of 16 March 2006, IPRED.

⁴⁵⁴ Copyright and Related Rights Code, §210-G.

⁴⁵⁵ 1999. évi LXXVI. törvény, §94(1) and §95(3), (4) and (6), respectively.

⁴⁵⁶ Ibid, at §94(1)(b) and (d).

⁴⁵⁷ 2016. évi CXXX. törvény, §§103-107.

⁴⁵⁸ Dutch Civil Code, §6:196c(5).

⁴⁵⁹ Dutch Copyright Act, §26d.

⁴⁶⁰ Copyright and Related Rights Act of 2000 as amended, §40(5A)(a).

⁴⁶¹ URL, §53b.

delimited and clearly formulated, and they cannot exceed what is justified in a specific case. Hence, open injunctions are not allowed. In *France*, injunctions might be applied under the IP Code and the E-Commerce Act.⁴⁶²

In *Denmark*, rightsholders might apply for an injunction under the general rules of the Danish Administration of Justice Act.⁴⁶³ The Danish national reporters further added that Denmark has missed to implement Article 15 of the E-Commerce Directive on the prohibition of general monitoring obligation. The Danish national reporters note that such a failure of implementation can have direct relevance with respect to injunctions, too. In *Estonia*, injunctions might be applied for the violation of copyright or related rights in line with the Law of Obligations Act,⁴⁶⁴ and in compliance with the procedural rules under the Code of Civil Procedure Law.⁴⁶⁵

Seven of these reporters indicated the existence of case law relevant to the field.⁴⁶⁶ However, in four of the above countries⁴⁶⁷ the relevant case law has focused on injunctions against The Pirate Bay's bad faith service; and hence such case law is less relevant for the purposes of our research.

The *Irish* national reporter further added that the significance of the Irish case law lies in the recognition of the supremacy of EU law when it came to injunctive relief against service providers by the Court of Appeal. The position under the Irish law of equity is such that in order for an injunction of this type to be granted, the intermediary must be engaged in some sort of wrongdoing. No question of wrongdoing arises in these good faith situations, so under Irish law, no injunction would traditionally have been granted. The recent Court of Appeal case law has altered this position. The *Swedish* national reporter further added that the local case law is mainly from the field of criminal

⁴⁶² CPI, §336-2; LCEN, §6.I.8.

⁴⁶³ The Danish Administration of Justice Act, §§413-414.

⁴⁶⁴ Estonian Law of Obligations Act, §1055(3).

⁴⁶⁵ Estonian Civil Procedure Code, §386.

⁴⁶⁶ Report Phase 1 *Netherlands* [Court of Appeals of The Hague, 28 January 2014, ECLI:NL:GHDHA:2014:88, Ziggo & XS4ALL/Stichting Brein; final judgment on the blocking of The Pirate Bay's website: Court of Appeals of Amsterdam, 2 June 2020, ECLI:NL:GHAMS:2020:1421]; Report Phase 1 *France*; Report Phase 1 *Ireland* [Sony Music Entertainment Ireland Ltd v UPC Communications Ireland Ltd No.1 [2015] IEHC 317; Sony Music Entertainment Ireland Ltd v UPC Communications Ireland Ltd No.2 [2015] IEHC 386; Sony Music Entertainment Ireland Ltd & Ors v UPC Communications Ireland Ltd [2016] IECA 231]; Report Phase 1 *Italy* [Tribunal of Milan, Sez. Spec. Materia impresa, Orders of 11 and 18 June 2018 (docket nr.51624/2017); Tribunal of Milan, Order of 8 May 2017 (docket nr.11837/2017)]; Report Phase 1 *Portugal* [Judgment of the Intellectual Property Court of 24 February 2015, Proc. no. 153/14.OYHLSB]; Report Phase 1 *Sweden* [*The Pirate Bay* (Svea Court of Appeal, case B 4041-09); *Dreamfilm* (Göta Court of Appeal, Case B 1565-17); *Swefilmer* (Court of Appeal for Western Sweden, Case B 3142-17); *Rarat* (Patent and Market Court of Appeal, Case B 10356-18)]; Report Phase 1 *Denmark* [TDC, U2006.1474H; *The Pirate Bay*, U.2010.2221H].

⁴⁶⁷ Report Phase 1 *Netherlands*; Report Phase 1 *Italy*; Report Phase 1 *Denmark*; Report Phase 1 *Sweden* (Swedish case law nevertheless includes cases against other intermediaries, too).

law. There is also another layer of case law, where injunctions are sought against internet service providers to block access to the given infringing intermediaries' service.⁴⁶⁸

The two remaining reporters (Estonia and Hungary) reported no published domestic case law on this issue.⁴⁶⁹

- Question 5. Are hosting service providers indirectly or secondarily liable under copyright law or general civil law for providing access to content uploaded by their users?

The national reports indicate the existence of two main groups here. The majority of countries (seven) have an affirmative answer to this question.⁴⁷⁰ The *Dutch* national reporters noted, however, that the indirect liability of service providers only arises if it does not fall under the safe harbour of the e-Commerce act. The *Irish* reporter added that Irish law requires joint tort feasance to establish primary liability through joint common design. The *Swedish* reporter stressed the criminal law dimension of secondary liability. On the other hand, the Swedish report also stressed that Swedish courts tend to consider the *social benefits* of certain acts, and absolve defendants from liability, if the respective act does more good than cause harm. This criterion was tested (but practically denied) in *The Pirate Bay* case. The national reporter notes that good faith service providers might be able to rely on this doctrine; although the reporter is sceptical of the relevance of the doctrine since it was completely ignored by the PMÖD in the *B2 Bredband* case, which was the first ever website blocking injunction case in Sweden.

Hosting providers are not indirectly or secondarily liable under copyright law or general civil law for providing access to content uploaded by their users in the minority of countries (Germany, Italy and Hungary).⁴⁷¹

- Question 5.1. If yes, could you please cite the relevant legal requirements, provision(s), and leading case law?

The seven national reporters, answering to Question 5 affirmatively, duly covered the relevant national rules on the applicability of injunctions (in line with Question 4). Six reporters indicated the

⁴⁶⁸ E.g. *B2 Bredband* (PMÖD, case PMT 11706-15) concerning final website blocking injunction [granted]; *Telia* (PMÖD, case PMÖ 9945-18) concerning interim website blocking injunction [denied]; *Elsevier* (PMÖD, case PMÖ 7648-19) concerning interim website blocking injunction [granted]; *Telia dynamic injunction* (PMÖD, case PMT 13399-19) concerning final dynamic website blocking injunction [granted]; *Black Internet* (Svea Court of Appeals, case Ö 7131-09) concerning interim (blocking) injunction against ISP of TPB [granted].

⁴⁶⁹ Report Phase 1 *Estonia*; Report Phase 1 *Hungary*.

⁴⁷⁰ Report Phase 1 *Netherlands*; Report Phase 1 *Ireland*; Report Phase 1 *Portugal*; Report Phase 1 *Sweden*; Report Phase 1 *Germany*; Report Phase 1 *Denmark*; Report Phase 1 *Estonia*.

⁴⁷¹ Report Phase 1 *Germany*; Report Phase 1 *Italy* (although the Italian respondent noted that the development of "active provider" doctrine might be indirectly relevant in this field); Report Phase 1 *Hungary*.

existence of case law relevant to the field,⁴⁷² and one reporter (Estonia) reported no published domestic case law on this issue.⁴⁷³

- Question 6. Does your country have any regime in place for the moderation of infringing content by hosting service providers?⁴⁷⁴

Countries show a diverse picture in this regard. On the one hand, the majority (seven) of the reporters responded affirmatively.⁴⁷⁵ From them the *Swedish* reporter noted that such regime applies “to a limited extent”; the *Estonian* report stated that the regime is “mostly self-regulatory”; the *German* reporters noted that a mixed (statutory and case law) regime applies; and the *Dutch* reporters noted that the system is not based on law, but indirectly on duty of care. The three other countries responded negatively (Ireland, Italy and Denmark);⁴⁷⁶ although the Irish reporter highlighted that *Ireland* might move to this direction by a pending implementation bill on the AVMS Directive; and the *Italian* reporters coined the issue at hand as “a recurring idea”.

- Question 6.1. If yes, describe whether the regime is statutory, co-regulatory, self-regulatory, and/or best practices-based?

From the seven national reporters, three (France, Sweden and Hungary)⁴⁷⁷ declared the regime purely statutory; one (Portugal)⁴⁷⁸ declared it to be a mixture of statutory and self-regulatory; one

⁴⁷² Report Phase 1 *Netherlands* [Dutch Supreme Court, 7 June 2019, ECLI:NL:HR:2019:849, Stichting BREIN/News-Service Europe, Nederlandse Jurisprudentie 2019, no. 250, para. 4.4.2 and 4.7]; Report Phase 1 *Ireland* [EMI v Eircom [2010] IEHC 108; *EMI Records Ireland Ltd v UPC Communications Ireland Ltd* [2010] IEHC 377]; Report Phase 1 *Portugal* [compare to case law mentioned in Question 2]; Report Phase 1 *Sweden* [compare to case law mentioned in Question 3 and 4]; Report Phase 1 *Germany* [there is plenty of cases from Germany; the national reporters flagged the following leading judgments: BGH, 13 Sept 2018, I ZR 140/14, GRUR 2018, 1132 para. 46-52 – YouTube; BGH, 20 Sept 2018, I ZR 53/17, GRUR 2018, 1239 para. 41 – uploaded; BGH, 26 July 2018, I ZR 64/17, GRUR 2018, 1044 – Dead Island; BGH, 21 Sept 2017, I ZR 11/16, GRUR 2018, 178 – Vorschaubilder III]; Report Phase 1 *Denmark* [Ugeskrift for Retsvæsen, 2010.2221H].

⁴⁷³ Report Phase 1 *Estonia*.

⁴⁷⁴ Such regimes include e.g. preventive measures (e.g. for filtering and blocking content) and notice-and-action rules (e.g. notice-and-notice, notice-and-takedown, notice and stay-down, notice-and-notice, etc.).

⁴⁷⁵ Report Phase 1 *France*; Report Phase 1 *Portugal*; Report Phase 1 *Sweden*; Report Phase 1 *Estonia*; Report Phase 1 *Hungary*; Report Phase 1 *Germany*; Report Phase 1 *Netherlands*.

⁴⁷⁶ Report Phase 1 *Ireland*; Report Phase 1 *Italy*; Report Phase 1 *Denmark*.

⁴⁷⁷ Report Phase 1 *France* [in line with LCEN]; Report Phase 1 *Sweden* [in line with the BBS Act and the E-Commerce Act]; Report Phase 1 *Hungary* [in line with the E-Commerce Act].

⁴⁷⁸ In *Portugal*, on the one hand, Decree-Law 7/2004, §18 applies to these questions. Under these rules, an administrative agency, ANACOM, was also founded. The national reporter also noted that these rules apply in a broader scope, they also cover actions against sexual abuse materials. On the other hand, the national reporter informed about the self-regulatory Memorandum of Understanding concluded by rightholder representatives, the General Inspection of Cultural Activities (IGAC), the Portuguese Association of Telecom Operators, the Portuguese Directorate-General for Consumers, the organization responsible for the .pt domain registrations (DNS.PT), the anti-piracy group MAPINET, advertising associations and consumer associations on 30 July 2015. The Memorandum of Understanding targeted the facilitation of the blocking of copyright-infringing websites. A new agreement was concluded in 2018. Since this second agreement came into force in January 2019, the national reporter added, approximately 13.000 illegal streams of national football championship matches have been identified. Of these, approximately 1.000 temporary blockings have been refused by MAPINET and IGAC, while the remaining ones have been carried out.

(Germany)⁴⁷⁹ declared it to be a mixture of statutory and case law; one (Estonia)⁴⁸⁰ found it mainly self-regulatory; and another report (the Netherlands)⁴⁸¹ stated the relevance of duty of care in this field.

- Question 6.2. If yes, is such a regime applicable to exclude the liability of platforms for storing and giving access to contents uploaded by their users?

The majority (six) reporters answered in the negative;⁴⁸² and four of the national respondents answered affirmatively on this question.⁴⁸³

- Question 6.3. If yes, do the obligations for service providers result from a duty of care, or any other legal construct?

Countries show a diverse picture in this regard. Three countries have a purely statutory regime (France, Sweden, Estonia);⁴⁸⁴ and three other countries have a system based purely on duty of care (the Netherlands, Portugal and Germany).⁴⁸⁵ Hungary has a mixed system (having a statutory basis and requiring the compliance with the duty of care). Finally, three other respondents answered negatively to this question (Ireland, Italy and Denmark).⁴⁸⁶

- Question 6.4. If yes, does the existing regime include complaint and redress (C&R) mechanisms? If so, please briefly explain these.

The majority (seven) of respondents answered negatively to this question.⁴⁸⁷ Portugal and Hungary have a system that include a C&R mechanism. In Germany, a mixed system exists. On the one hand, it is conceivable that the duty of care requires C&R, although no case law has confirmed this yet. On the other hand, the “Netzwerkdurchsetzungsgesetz”, which only applies to UGC that violates offences (e.g., incitement, libel) under the Criminal Code, explicitly requires the application of C&R in the relevant cases. Albeit not directly relevant for copyright law, these rules serve as a model for the upcoming DSA. The German reporters also added that similar provisions have been introduced into § 10a-§ 10c of the German E-Commerce Act (TMG) in November 2020.

⁴⁷⁹ Report Phase 1 Germany [where the statutory basis is found in the E-Commerce Act].

⁴⁸⁰ Report Phase 1 Estonia [the national reporter adds that the Information Society Services Act does not contain detailed rules on the notice-and-take-down procedure].

⁴⁸¹ Report Phase 1 Netherlands.

⁴⁸² Report Phase 1 Netherlands; Report Phase 1 Ireland; Report Phase 1 Italy; Report Phase 1 Portugal; Report Phase 1 Sweden; Report Phase 1 Denmark.

⁴⁸³ Report Phase 1 France; Report Phase 1 Germany; Report Phase 1 Estonia; Report Phase 1 Hungary.

⁴⁸⁴ Report Phase 1 France; Report Phase 1 Sweden; Report Phase 1 Estonia.

⁴⁸⁵ Report Phase 1 Netherlands; Report Phase 1 Portugal; Report Phase 1 Germany.

⁴⁸⁶ Report Phase 1 Ireland; Report Phase 1 Italy; Report Phase 1 Denmark.

⁴⁸⁷ Report Phase 1 Netherlands; Report Phase 1 France; Report Phase 1 Ireland; Report Phase 1 Italy; Report Phase 1 Sweden; Report Phase 1 Estonia; Report Phase 1 Denmark.

- Question 7. Did your country introduce any liability exemption or “safe harbour” provisions for the benefit of search engines or linking service providers?⁴⁸⁸

The majority (seven) of respondents reported the existence of such safe harbour regime for at least one of the two services.⁴⁸⁹ The exact scope of these regimes is, however, very diverse. In three countries, statutory provisions cover both types of ISSPs (Italy, Portugal and Estonia).⁴⁹⁰ In *Hungary*, the e-Commerce Act expressly covers search engines, but not linking service providers. In *Sweden*, statute law indirectly (through interpretation) covers search engines, but such interpretation is questionable regarding linking service providers. Finally, in *France* and *Germany*, such safe harbour regime applies to search engines, but only under case law.

In the three other countries, no such safe harbour regime applies (the Netherlands, Ireland and Denmark).⁴⁹¹

- Question 7.1. If yes, how do courts apply concurring safe harbour provisions regarding service providers offering mixed services (e.g., a platform with both hosting and search/linking functions)? Please cite leading case law.

Only one national report has stated that there is relevant case law to this question. Under the *Italian Reti Televisive Italiane S.p.A. v. Yahoo!* case, the Supreme Court distinguished the position of Yahoo Video! host from the position of Yahoo! as a search engine. In the case of Yahoo Video!, the Supreme Court excluded the application of the safe harbour provision, judging its conduct as active and thus triggering direct liability. On the contrary, it refused to hold liable Yahoo! as a search engine, arguing that the mere indexing and linking constitutes a neutral *caching* activity which shields the ISP from liability. The Italian Supreme Court also added that the service provider is not expected to remove allegedly infringing materials only based on rightsholders' notice or claim in court, since the neutral position of the caching service provider causes the removal obligation to arise only in case of explicit

⁴⁸⁸ Compare to art. 21(2) e-Commerce Directive: “[i]n examining the need for an adaptation of this Directive, the report shall, in particular, analyse the need for proposals concerning the liability of providers of hyperlinks and location tool services, “notice and take down” procedures and the attribution of liability following the taking down of content. The report shall also analyse the need for additional conditions for the exemption from liability, provided for in Articles 12 and 13, in the light of technical developments, and the possibility of applying the internal market principles to unsolicited commercial communications by electronic mail”.

⁴⁸⁹ Report Phase 1 *Italy*; Report Phase 1 *Portugal*; Report Phase 1 *Estonia*; Report Phase 1 *Hungary*; Report Phase 1 *Sweden*; Report Phase 1 *France*; Report Phase 1 *Germany*.

⁴⁹⁰ Report Phase 1 *Italy* (“caching”); Report Phase 1 *Portugal* (“content association services”); Report Phase 1 *Estonia* (“information storage service”).

⁴⁹¹ Report Phase 1 *Netherlands* (although the reporters stated that under the Dutch case law, the quotation exception used to cover online search results; the legitimacy of such case law has, however, become questionable since the CJEU’s ruling in *Pelham*); Report Phase 1 *Ireland*; Report Phase 1 *Denmark*.

judicial order. A more recent Italian judgement of the Supreme Court confirmed the legal qualification of search engines as caching services.⁴⁹²

- **Question 7.2.** If yes, which right(s) are users infringing?⁴⁹³

Countries show a diverse picture in this regard. In two countries, the right of reproduction, communication to the public and making available to the public might be infringed.⁴⁹⁴ The *Estonian* report stated that the right of reproduction and making available to the public might be infringed. In *Portugal*, the right of communication to the public might be infringed. In *Sweden*, none of these rights might be infringed. The *German* and *Danish* reports indicated that such liability is not applicable. In *Italy*, however, the judicial wording in ISP liability cases generally limits itself to the “copyrights or related rights/the specific copyrights alleged by the right holder/the fundamental right of intellectual property” (“diritti d'autore o diritti connessi/diritti d'autore specificatamente allegati dall'autore/il diritto fondamentale alla proprietà intellettuale”). No specific reference is made to any exclusive right in particular.

This question is not relevant under the laws of *France* and *Ireland*. Nevertheless, the *Irish* reporter noted that “if reform occurs, it would be reasonable to assume that the making available right naturally will come into play and also the reproduction right in line with sections 39 [and] 40 of the CRRA Act”.

4.2.3.END-USERS

This sub-section refers to the question contained in *Chapter III* of the questionnaire focused on end-users of online platforms hosting and providing access to copyright protected content.

- **Question 8.** Are end-users directly liable under copyright law for uploading content to the services of ISSPs without authorisation?

The responses to this question unanimously confirm that end-users are directly liable under copyright law for uploading copyright-protected content to the services of information society service providers without authorisation.

- **Question 8.1.** If yes, which right(s) are users infringing?⁴⁹⁵

⁴⁹² Cass. civ. Sez. I, 19/03/2019, n. 7709. Re.Te.lt. S.p.A. c. Ya.In.

⁴⁹³ E.g. reproduction and/or communication/making available to the public.

⁴⁹⁴ Report Phase 1 *Netherlands*; Report Phase 1 *Hungary*.

⁴⁹⁵ E.g. reproduction and/or communication/making available to the public. Please note that the questionnaire intends to focus solely on the period that follows the implementation of the InfoSoc Directive.

Countries show a diverse picture in this regard. Half (five) of the countries reported that users might infringe the right of reproduction and making available to the public by the unauthorized uploading of contents.⁴⁹⁶ Similarly, but with a bit different terminology, users might infringe the right of reproduction or “representation” under *French* copyright law. In two countries (Portugal and Denmark), the users’ acts might run against the right of making available to the public.⁴⁹⁷ In the *Netherlands*, such activity is covered by the “openbaarmaking” right. In *Hungary*, users might infringe right(s) communication or making available to the public. The national reporter also added that until the content reaches public, the private copying exception covers uploads to private folders.

- Question 8.2. If yes, could you please cite the relevant legal provision(s) and leading case law?

The national reporters duly cited the relevant national rules.

Four national reporters indicated the existence of case law in this field. The Dutch report noted that case law speaks against large scale users, if their identity can be obtained; criminal law shall also be applicable in the *Netherlands*. The *French* report highlighted that the case law precedes the amendments of August 1, 2006 of the French Copyright Act,⁴⁹⁸ on the one hand, and a portion of case law stems from the field of criminal law,⁴⁹⁹ on the other hand. The *Swedish* respondent introduced a rich case law in this field.⁵⁰⁰ In *Germany*, according to the prevailing opinion, the reproduction in the context of uploading to a server for the purpose of online use is a subordinate preparatory act in preparation for making the work available to the public. However, it remains an independent use of the work, even if it is followed by making it available to the public, and is not consumed by this act of use. Thus, making a work available to the public is a further use of the work following the reproduction based on the reproduced work.⁵⁰¹ On the other hand, when the fixing of works for the purpose of making them available to the public impairs the copyright holder's right of reproduction within the meaning of Section 16 UrhG, such acts can be prosecuted independently.⁵⁰²

⁴⁹⁶ Report Phase 1 *Ireland*; Report Phase 1 *Italy*; Report Phase 1 *Sweden* (although the reporter noted that preparatory uploads might be treated to meet the temporary acts of reproduction exception); Report Phase 1 *Germany* (where the reporter also noted that reproduction is a “subordinate preparatory act in preparation for making the work available to the public”); Report Phase 1 *Estonia*.

⁴⁹⁷ Report Phase 1 *Portugal*; Report Phase 1 *Denmark*.

⁴⁹⁸ TGI Vannes, 29 avril 2004; TGI Pontoise, 2 février 2005; TGI Meaux, 21 avril 2005; TGI Bordeaux, 10 mai 2005; TGI Toulouse, 10 mai 2005; TGI Créteil, 19 mai 2005; TGI Bayonne, 15 novembre 2005.

⁴⁹⁹ T. corr. Vannes, 29 Apr. 2004, CCE 2004. Comm. 86, note Caron. T. corr. Pontoise, Feb. 2, 2005, D. 2005. 1435 note Legros.

⁵⁰⁰ Besides the above mentioned *BBS* case, the national reporter flagged the existence of the following judgments from the copyright law arena: *Blog photograph* (PMÖD, Case B 10527-18); and from the field of criminal law (all cases reflected P2P filesharing activities): Svea Court of Appeals, Case B 2160-12; Göteborg District Court, Case B 16995-11; Göta Court of Appeals, Case B 838-14. End-users were found liable for communication contents available to the public in all of these cases.

⁵⁰¹ OLG München, 29 April 2010, 29 U 3698/09, GRUR-RR 2011, p. 1, 2 et seq. – Videodateien.

⁵⁰² BGH, 19. January 2017, I ZR 242/15, GRUR 2017, p. 390, para. 28 – East Side Gallery; BGH, 10. January 2019, I ZR 267/15, GRUR 2019, p. 813, para. 47 ff. – Cordoba II.

- Question 9. Did your Member State implement the E&Ls on quotation, criticism, review and caricature, parody, and pastiche set forth in arts. 5(3)(d) and 5(3)(k) InfoSoc Directive?

Countries show a diverse picture in this regard. In the majority (six) of countries, the answer was affirmative to both groups of E&Ls.⁵⁰³ In two countries, only quotation, criticism, review is covered by the effective domestic norms (Portugal and Hungary).⁵⁰⁴ Finally, in two other countries, quotation, criticism, review is covered by the effective domestic copyright law, and caricature, parody, and pastiche is covered indirectly, through case law (Sweden and Denmark).⁵⁰⁵

- Question 9.1. If yes, please briefly describe how they were implemented.

All reporters duly described how the domestic legislation implemented the respective E&Ls. Quotation has been present in all Member States for decades. The implementation of the caricature, parody and pastiche exceptions shows, however, a more diverse picture. In four countries,⁵⁰⁶ such E&Ls were duly implemented by legislation. In Germany,⁵⁰⁷ no express harmonization occurred, but another – indirect – rule could be applied for a long time. In three countries (Italy, Denmark and Sweden),⁵⁰⁸ the existence of these E&Ls is based on case law. Finally, two countries (Portugal and Hungary)⁵⁰⁹ have failed to implement these E&Ls before the implementation of the CDSMD.

- Question 9.2. If yes, can these E&Ls effectively cover end users' uploading activities in your country?

Countries show a diverse picture in this regard. The majority (six) of the reporters responded that E&Ls can theoretically cover end-users' uploading activities.⁵¹⁰ The *German* report noted that the relevant E&L for quotation, criticism, review theoretically applies to end users' activities, but concerns exist regarding the applicability of rules related to parody. (As indicated earlier, the CDSMD implementation

⁵⁰³ Report Phase 1 *Netherlands*; Report Phase 1 *France* (where the reporter highlighted that the wording of the French IP Code and the InfoSoc Directive is not identical in this regard); Report Phase 1 *Ireland* (where the reporter noted that parody is covered only since 2019); Report Phase 1 *Italy*; Report Phase 1 *Germany* [where the reporter noted that parody is currently covered only via UrhG §24(1); the pending CDSM implementation will change the normative basis of parody, according to which §24 will be repealed and a new statutory permission will be introduced for parody]; Report Phase 1 *Estonia*.

⁵⁰⁴ Report Phase 1 *Portugal* [where the reporter noted that "original" parodies are granted copyright protection on their own; these rules are, however, distinct from Article 5(3)(k) of the InfoSoc Directive and the ECJ preliminary judgment in *Deckmyn*]; Report Phase 1 *Hungary*.

⁵⁰⁵ Report Phase 1 *Sweden* (where the reporter noted that the relevant case law was published post-*Deckmyn*); Report Phase 1 *Denmark*.

⁵⁰⁶ Report Phase 1 *Ireland* [the implementation happened only in 2019]; Report Phase 1 *France*; Report Phase 1 *Netherlands*; Report Phase 1 *Estonia*.

⁵⁰⁷ Report Phase 1 *Germany* (the legitimacy of §24 of the German Copyright Act has been seriously questioned by the *Pelham* judgment of the CJEU; the German legislation has addressed the parody issue during the implementation of the CDSM Directive; compare to the new §51a of the German Copyright Act).

⁵⁰⁸ Report Phase 1 *Italy*; Report Phase 1 *Denmark*; Report Phase 1 *Sweden*.

⁵⁰⁹ Report Phase 1 *Portugal*; Report Phase 1 *Hungary* (although Hungary has inserted the caricature, parody and pastiche exceptions as a part of the implementation process of the CDSM Directive).

⁵¹⁰ Report Phase 1 *Netherlands*; Report Phase 1 *France*; Report Phase 1 *Ireland*; Report Phase 1 *Portugal*; Report Phase 1 *Estonia*; Report Phase 1 *Hungary*.

will clarify these concerns by introducing a new statutory permission or “user right” for parody uses.) The *Swedish* reporter noted that due to moral rights concerns, the applicability of E&Ls in this field is not straightforward. In Italy, the answer to the question was negative, but the reporters noted that “this [answer] is based on a rather scant case law”. The remaining four reporters answered to the negative.

- Question 9.3. If yes, could you please cite the leading case law on the application of these E&Ls in an online environment?

Half (five) of the national reporters indicated the existence of case law on E&Ls,⁵¹¹ but the majority of these judgments are less relevant for the application of these provisions in the online environment.

- Question 10. In your country, are L&Es treated as:
- Question 10.1. Defences against infringement claims? If yes, please explain.

The majority (seven) of the reporters answered affirmatively,⁵¹² and two answered negatively (Estonia and Denmark).⁵¹³ The *German* reporters noted that German copyright law does not recognize “defences” as a dogmatic category, but the Federal Court of Justice (BGH) understands “barriers” as grounds for justification, when it writes: “The encroachment on copyright would not be unlawful if the defendant could successfully invoke the barrier provision of § 52 b p. 1 and 2 UrhG”.⁵¹⁴

- Question 10.2. Subjective or affirmative rights to use protected content? If yes, please explain.

Countries show a diverse picture in this regard. In three countries, E&Ls work as *subjective rights* (Italy, Sweden and Germany);⁵¹⁵ and in one country (Estonia)⁵¹⁶ they work as *affirmative rights*. Two reporters responded that E&Ls might theoretically work as *subjective or affirmative rights, but this is*

⁵¹¹ Report Phase 1 *Netherlands* (“*Mercis and Bruna v. Punt*”); Report Phase 1 *France* (where the reporter noted that no distinction exists between online and offline uses; “Decision of 19 December 2014”); Report Phase 1 *Sweden* [*Metal Pole* (PMÖD, Case PMT 1473-18); Swedish tiger (PMD, Case B 7348-20; pending at PMÖD)]; Report Phase 1 *Germany* (where the reporter noted that the case law is not connected to UGC); Report Phase 1 *Italy* (the national reporters called this case law “scant”).

⁵¹² Report Phase 1 *Netherlands*; Report Phase 1 *France*; Report Phase 1 *Ireland* (“fair dealing defence”); Report Phase 1 *Italy*; Report Phase 1 *Portugal*; Report Phase 1 *Sweden* (as the national reporter noted, there is a sensible inconsistency on this field: some provisions are called as “limitations”, others are coined as “rights”; L&Es are, in practice, defences in Sweden); Report Phase 1 *Hungary*.

⁵¹³ Report Phase 1 *Estonia*; Report Phase 1 *Denmark*.

⁵¹⁴ BGH, 20 September 2012, I ZR 69/11, GRUR 2013, 503, para 9 – *Elektronische Leseplätze*.

⁵¹⁵ Report Phase 1 *Italy* [Tribunal of Rome, Specialized Intellectual Property Section, Order 16 December 2009, stating that “If there is considerable amount of commercial advertising on the webpages where the illegally inserted videos appear, neither the right to report for information purpose nor the right to criticize or discuss can be validly invoked.”]; Report Phase 1 *Sweden*; Report Phase 1 *Germany*.

⁵¹⁶ Report Phase 1 *Estonia*.

not confirmed by case law yet (Ireland and Hungary).⁵¹⁷ Finally, four more reports answered this question in the negative.⁵¹⁸

- **Question 10.3. Other? Please explain.**

The *Danish* reporter has elaborated an answer for this question. According to the Danish report, answering question 10 turned out to be difficult, as there is no distinction between ‘defences’ and ‘affirmative rights’ in Danish law. Some rules are declaratory, i.e., can be deviated from by contract, others are mandatory in character (e.g., exhaustion). Apart from exhaustion, it is disputed which E&Ls are mandatory and which are declaratory.

- **Question 11. Is there any generally applicable C&R mechanism for the benefit of users of hosting service providers to ensure the exercise of L&Es in general, or for the specific L&Es of quotation, criticism, review, and caricature, parody, pastiche?**

The majority (seven) of the reporters answered negative to this question.⁵¹⁹ In two countries, such C&R mechanism applies (Portugal and Hungary).⁵²⁰ In *Germany*, a C&R mechanism applies indirectly. The French national reporter noted that Article L. 331-31(2) of the CPI only designates a public authority, called *Haute Autorité pour la diffusion des œuvres et la protection des droits sur internet* (HADOPI), to ensure that technological protection measures do not prevent beneficiaries of certain E&Ls from taking advantage of them (notably by providing the HADOPI with a competence to determine modalities of the exercise of the E&Ls concerned). The E&Ls of quotation, criticism, review, and caricature, parody, pastiche are not among these.

- **Question 11.1. If yes, does such mechanism exist as a result of (i) statute or case law or (ii) private practices of hosting service providers?**

In *Portugal* and *Hungary*, the C&R mechanism exists as a result of statutory law; and in *Germany* it indirectly exists as a combination of interpretation of contracts in light of fundamental rights (“*mittelbare Grundrechtsbindung*”) and private practices, e.g., Content ID by YouTube.

⁵¹⁷ Report Phase 1 *Ireland*; Report Phase 1 *Hungary*.

⁵¹⁸ Report Phase 1 *Netherlands*; Report Phase 1 *France*; Report Phase 1 *Portugal* [as the national reporter elaborated: “From a substantive perspective, users do not have actual control over the protected work. From a procedural perspective, users have no available legal action to ensure the enforcement of this entitlement and, as such, cannot require courts to impose upon rightholders a given action or omission with a view to satisfying their interests.”]; Report Phase 1 *Denmark*.

⁵¹⁹ Report Phase 1 *Netherlands*; Report Phase 1 *France* (where the national reporter noted that some discussion of HADOPI’s role regarding technical protection measures does exist); Report Phase 1 *Ireland* (where the national reporter noted that “no policy mandated mechanism exists”); Report Phase 1 *Italy*; Report Phase 1 *Sweden*; Report Phase 1 *Estonia*; Report Phase 1 *Denmark*.

⁵²⁰ Report Phase 1 *Portugal* (“interim dispute resolution”); Report Phase 1 *Hungary* (notice-and-take-down system under E-Commerce Law).

- Question 11.2. If yes, can you describe this mechanism?⁵²¹

The three national reporters mentioned above (Portugal, Hungary and Germany) duly summarized the functioning of these C&R mechanisms.

In *Portugal*, Article 18 of the Decree-Law 7/2004 establishes a regime of provisional dispute resolution concerning infringing content made available via hosting providers and/or content association services (e.g., search engines). The regime provides an administrative entity (ANACOM – the National Telecommunications Authority) with the competence to decide provisionally if certain content should be removed or if access to specific information should be blocked. The aim is to obtain the rapid resolution of this kind of disputes, where the slowness of the judicial decision-making process may have harmful consequences, particularly for those who are affected by the maintenance of illegal content online. Under this provision, where the unlawfulness is not manifest, hosting providers are not obliged to remove or disable the disputed content just because an interested party claims that there is an infringement. In such cases, the interested party may appeal to the administrative authority, which will present a provisional solution within 48 hours and communicate it immediately to the intervening parties by electronic means. It is also provided that anyone with a legal interest in preserving the content online may, under the same terms, resort to the administrative authority to dispute a removal decided by the hosting providers. Whatever the decision, no responsibility will fall on the administrative authority, nor on the intermediary provider for having removed, or not, the content, as long as the lawfulness or unlawfulness of the content is not manifest. It is expressly established that the use of this dispute resolution mechanism is without prejudice to the possibility of seeking judicial redress, even if simultaneously.

In *Hungary*, the E-Commerce Act includes a detailed C&R mechanism (Art. 13(6)-(8)). The general right to object against the removal of protected subject-matter upon the notification of rights holders shall be lodged in a private document with full probative force or in an authentic instrument at the service provider within 8 days upon the receipt of the information on content removal. The document shall consist of various substantive elements (identification of content; statement that the user's activity was not illegal). Upon receipt of the objection, the service provider shall expeditiously restore access to the contested content and inform the rights holder about the restoration. If the rights holder still wants to remove the contested content, she shall initiate a court proceeding. (It is the rights holder's task to inform the service provider about the outcome of any court proceedings.)

⁵²¹ E.g. counter-notice; human oversight; flagging; time limits for responses etc.

In *Germany*, the reporter made reference to systems used by providers like YouTube and Meta/Facebook, which have been previously described in this report.

4.3. KEY FINDINGS OF THE SECOND PHASE QUESTIONNAIRE

This section includes the main findings from the national responses to the second phase questionnaires. For clarity purposes, the analysis follows the structure of the questionnaire, which is reproduced in Annex I.

4.3.1. LEGISLATIVE HISTORY

This sub-section analysis the answers provided on the question of Chapter I of the second phase questionnaire on the legislative history of the implementation of art. 17 CDSMD in the selected Member States.

- **Question 1. Summarize the legislative history of the implementation of art. 17 CDSMD in your country**

Eight of the selected ten Member States had implemented art. 17 CDSMD by the time of the submission of the respective national report. The two remaining countries, where the implementation did not take place are Sweden and Portugal. In *Sweden*, a proposal of the Ministry of Justice served the basis of the analysis of the Swedish national reporter. In *Portugal*, the implementation process was abandoned after the collapse of the Portuguese government in 2021 (which was followed by new elections in the country), and hence the Portuguese national report is limited to a small outline of the initial draft of the Portuguese government.

Five of the eight countries implemented art. 17 in the form of *statute* (either as a new, independent statute, or as an amendment to the existing copyright act).⁵²² Art. 17 was introduced in *France* via government decree based on a delegation law, in *Ireland* via statutory instrument (ministerial order), and in *Italy* via government decree based on a delegation act.

Five national reporters stated that the national legislator has reflected the European Commission's Guidance on Art. 17 and the Opinion of AG Øe in Case C-41/19.⁵²³ In fact, only countries that

⁵²² Report Phase 2 *Denmark*; Report Phase 2 *Estonia*; Report Phase 2 *Germany*; Report Phase 2 *Hungary*; Report Phase 2 *Netherlands*.

⁵²³ Report Phase 2 *Estonia*; Report Phase 2 *France*; Report Phase 2 *Italy*; Report Phase 2 *Portugal* (the Portuguese report focused only on a draft proposal that was abandoned due to the dissolution of the Portuguese Parliament); Report Phase 2 *Sweden*. The judgment of the CJEU's Great Chamber in Case C-401/19, *Poland v Parliament and Council* was published on 26 April 2022. As the majority of national reporters submitted their reports before the publication of the judgment, the present analysis lacks the discussion whether Member States could take the judgment into consideration when implementing Article 17.

implemented (or took steps towards implementing) the CDSMD after the publication of the Communication and the Opinion of AG Øe could take these resources into consideration.

The legislative history of the selected EU Member States (listed in alphabetic order) is, in greater detail, the following.

(1) Denmark

On 18 December 2020, the Danish Ministry of Culture sent a draft of the proposed changes to the law on intellectual property rights to the Danish Committee of Culture.⁵²⁴ On 18 January 2021, Joy Mogensen, Minister of Culture, sent a revised draft to the Committee of Culture. On 26 March 2021, Joy Mogensen officially proposed the bill to implement EU directives into Danish law.⁵²⁵ The proposed changes of law are identified as “LF 205”.⁵²⁶ On 13 April 2021, the proposal is referred to the Parliament’s Committee of Culture. On 19 May 2021 the Committee of Culture held a hearing on the current proposed changes. On 26 May 2021, the Committee of Culture submitted its consideration on the proposed bill with minor changes. On 31 May 2021, an amendment was proposed by politician Jens Rohde (KD), who was MEP when the CDSMD was negotiated in the European Parliament, to OHL § 52 c, section 1. The amendment was a clarification of the definition for “online content-sharing service provider” and expanded the term to include providers which organize and promote for the purpose of both direct and indirect profit. The amendment was partly reflected in the updated bill. On 3 June 2021, after minor, mainly formal, amendments and clarifications the bill was passed and took into effect.⁵²⁷ Notably, other parts of the CDSMD currently remain unimplemented.

(2) Estonia

In Estonia, the coordination of the national implementation was started by the Ministry of Justice in October 2020, and completed the next month. On 5 April 2021, the draft implementation bill was submitted to the Parliament by the Government of Estonia. Following various readings in the Parliament, the procedure was closed and the bill was adopted on 8 December 2021. The act that incorporated art. 17 CDSMD in the Estonian Copyright Act⁵²⁸ was sent to the President of Estonia on 9 December 2021. The act was announced on 20 December 2021, and it was published on 27 December 2021.⁵²⁹

(3) France

⁵²⁴ The full committee can be viewed on <https://www.retsinformation.dk/eli/ft/202014L01367> at the bottom of the page.

⁵²⁵ See <https://www.retsinformation.dk/eli/ft/20201XX00921>.

⁵²⁶ See <https://www.retsinformation.dk/eli/ft/202012L00205>.

⁵²⁷ See <https://www.retsinformation.dk/eli/ft/202013L00205>.

⁵²⁸ The Estonian Copyright Act (as amended) is available via <https://www.riigiteataja.ee/en/eli/513012022002/consolide>.

⁵²⁹ See <https://www.riigiteataja.ee/eelnoud/menetluskaik/JUM/20-1276>.

The implementation strategy of the CDSMD in France has been divided into multiple parts concerning separate provisions of the Directive. Regarding art. 17, the French government initially referenced the corresponding French implementation proposal and final texts as the “*loi relatifs à la communication audiovisuelle et à la souveraineté culturelle à l’ère numérique*” (law relating to audio-visual communication and cultural sovereignty in the digital age).⁵³⁰ On 5 December 2019, an initial draft text was published, including two provisions (arts. 16 and 17 in the French draft text) pertaining to the implementation of aspects of art 17 CDSMD.⁵³¹

On 29 January 2020, in collaboration with the CNC⁵³² and the HADOPI⁵³³, the CSPLA⁵³⁴ released its report advising the French Ministry of Culture regarding the implementation of art. 17 CDSMD into French law.⁵³⁵ On 2 March 2020, at the first reading of the draft text, several amendments were suggested, including those which would have had an impact on the protection of user’s rights, but were ultimately unacknowledged in the draft text.⁵³⁶

In April 2020, the legislative process regarding the draft law was stopped due to the COVID-19 crisis. The French legislators changed tactics regarding the implementation of art. 17. Instead of transposing the law via ordinary legislative procedure, French legislators opted for the use of a delegation law to empower the government to pass implementing provisions by decree more rapidly (i.e., no

⁵³⁰ These modifications are made to loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication. See <https://www.legifrance.gouv.fr/loda/id/LEGITEXT000006068930/#:~:text=33-,L'Autorit%C3%A9%20de%20r%C3%A9gulation%20de%20la%20communication%20audiovisuelle%20et%20num%C3%A9rique,d'information%20politique%20et%20g%C3%A9n%C3%A9rale>.

⁵³¹ Proposal text: https://www.assemblee-nationale.fr/dyn/15/textes/15b2488_projet-loi. Note that in the proposed French text, Art. 16 regards modifications to the law with respect to copyright, whereas Art. 17 regards modifications to the law with respect to neighboring rights (using identical text). Accompanying Press Release: <https://www.gouvernement.fr/conseil-des-ministres/2019-12-05/communication-audiovisuelle-et-souverainete-culturelle-a-l-e>.

⁵³² Centre national du cinéma et de l’image animée (National Centre for Cinema and the Moving Image).

⁵³³ The Haute autorité pour la diffusion des œuvres et la protection des droits sur Internet (High Authority for the Dissemination of Works and the protection of Rights on the Internet) was a governmental agency tasked with the implementation of the HADOPI law, among other administrative functions. It has since merged its activities with the CSA (Conseil supérieur de l’audiovisuel, Superior Audiovisual Council) in France to become a new independent administrative agency since 1 January 2022, ARCOM (l’Autorité publique française de régulation de la communication audiovisuelle et numérique, Regulatory Authority for Audiovisual and Digital Communication).

⁵³⁴ The Conseil supérieur de la propriété littéraire et artistique (Superior Council of Literary and Artistic Property) is an independent advisory body to the French Ministry of Culture.

⁵³⁵ The Report broadly supports the European legislator’s drafting of the Art. 17 CDSM Directive, and rejects many of the criticisms leveled against Art. 17, generally reflecting the overall stance of the French government. See CSPLA, “Mission Report: Towards more effectiveness of copyright law on online content sharing platforms: overview of content recognition tools and possible ways forward” 29 January 2020, p. 110-114. See <https://www.culture.gouv.fr/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-proteges-par-les-plateformes-de-partage-en-ligne-etat-de-l-art-et-propositions>.

⁵³⁶ List of amendments suggested, 2 March 2020: <https://www.assemblee-nationale.fr/dyn/15/amendements/2488/CION-CEDU/AC884>. For a critical commentary on the amendments tabled during the first reading of the French draft text, see COMMUNIA, “Article 17: Amendments in first reading – analysis” COMMUNIA DSM Directive Implementation Portal, <https://www.notion.so/Art-17-Amendments-in-first-reading-analysis-0c96b70e1d474bed94e83be51bd204ab>.

Parliamentary debate).⁵³⁷ On 7 July 2020, the DDADUE law was introduced,⁵³⁸ and during the meeting of the Senate on 8 July, the approved provisional text empowered the French government to amend the Intellectual Property Code (CPI) in order to transpose certain provisions of the CDSMD (art. 24 bis 2°).⁵³⁹ No subsequent amendments were made to this text. On 7 October 2020, the DDADUE law was read by the National Assembly,⁵⁴⁰ and adopted.⁵⁴¹ On 4 December 2020, the DDADUE law was officially published, and the provision regarding the Government's authority to transpose arts. 17-23 of the CDSMD changed to art. 34.⁵⁴²

On 12 May 2021, French PM and Ministry of Culture officially published ordonnance n° 2021-580 regarding the transposition of art. 17 CDSMD, among other provisions, set to enter into force on 7 June 2021.⁵⁴³ Chapter I (arts. 1-3) of the ordonnance are in specific reference to art. 17.⁵⁴⁴ According to the minutes of the Council of Ministers of 25 August 2021, the ordonnance was planned to be supplemented by decree “which will specify in particular the practical methods for determining the providers of online content sharing services concerned by the new provisions of the ordinance”.⁵⁴⁵ With regard to the audience threshold and the notion of “large amount”, the core provisions of the ordonnance were supplemented with art. R136-1 (in force since 22 October 2021), created by art. 1 of the Decree of the Conseil d'Etat of 20 October 2021.⁵⁴⁶ The notion of “large amount” is further developed by the Order of the Ministry of Culture of 20 October 2021.

(4) Germany

⁵³⁷ In France, the method of transposing EU Directives into national law can differ depending on whether the provision falls within the domain of the law or the domain of the regulation.

⁵³⁸ Diverses dispositions d'adaptation au droit de l'Union européenne en matière économique et financière, “various provisions for adaptation to European Union law in economic and financial matters”. See: https://www.senat.fr/enseance/2019-2020/553/Amdt_23.html

⁵³⁹ Article 24 bis (nouveau). <https://www.senat.fr/petite-loi-ameli/2019-2020/553.html>.

⁵⁴⁰ <https://www.assemblee-nationale.fr/dyn/15/comptes-rendus/seance/session-ordinaire-de-2020-2021/seance-du-mercredi-07-octobre-2020#P2215616>.

⁵⁴¹ https://www.assemblee-nationale.fr/dyn/15/textes/l15t0487_texte-adopte-seance.

⁵⁴² LOI n° 2020-1508 du 3 décembre 2020 portant diverses dispositions d'adaptation au droit de l'Union européenne en matière économique et financière (1), https://www.legifrance.gouv.fr/jorf/article_jo/JORFARTI000042607142.

⁵⁴³ “Ordonnance n° 2021-580 du 12 mai 2021 portant transposition du 6 de l'article 2 et des articles 17 à 23 de la directive 2019/790 du Parlement européen et du Conseil du 17 avril 2019 sur le droit d'auteur et les droits voisins dans le marché unique numérique et modifiant les directives 96/9/CE et 2001/29/CE” <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043496429>.

⁵⁴⁴ “Chapitre Ier: Transposition des dispositions du 6 de l'article 2 et de l'article 17 de la directive 2019/790 (Arts. 1 à 3)” <https://www.legifrance.gouv.fr/jorf/id/JORFSCTA000043496430>.

⁵⁴⁵ <https://www.gouvernement.fr/conseil-des-ministres/2021-08-25#droit-d-auteur-et-droits-voisins>.

⁵⁴⁶ <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000044229253>

A first public consultation regarding the implementation of the CDSMD collected stakeholders' opinions in 2019.⁵⁴⁷ The first "discussion draft" of the separate new law implementing art. 17 was published on 24 June 2020.⁵⁴⁸ Most discussed in this draft was the classification of art. 17 within the system of copyright law and its implementation in a separate body of law. To ensure users' possibility to take advantage of exceptions and limitations contained in art. 17(7), exemptions for "machine-verifiable legally permitted uses" and the possibility of "pre-flagging" content before uploading it were introduced.⁵⁴⁹ Following a public consultation,⁵⁵⁰ a Draft bill for an Act to adapt copyright law to the requirements of the Digital Single Market ("Referentenentwurf")⁵⁵¹ was published on 13 October 2020. In this draft, the so-called "pre-check" mechanism was introduced, limiting flagging options and minor uses to content matched by rightholder information. A third Public Consultation on the Draft Bill of 13 October 2020, which was held until 6 November 2020,⁵⁵² was followed by the Draft bill of the Federal Government of Germany ("Regierungsentwurf")⁵⁵³ on 3 February 2021. A Public Hearing of the Parliament's Legal Affairs Committee on the Draft Bill took place on 12 April 2021. Subsequently, a FAQ document was published by the Federal Ministry of Justice on 7 June 2021,⁵⁵⁴ summarizing the then-current situation and explaining the draft bill. On 19 May 2021, the proposed bill passed the Judiciary Committee with a few minor changes, particularly related to direct compensation of creators by OCSSPs.⁵⁵⁵

⁵⁴⁷ Information on the public consultation and answers collected can be accessed on the website of the Federal Ministry of Justice and Consumer Protection: https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/DE/Konsultation_Umsetzung_EU_Richtlinien_Urheberrecht.html.

⁵⁴⁸ 1st Discussion draft for a Second Act to adapt copyright law to the requirements of the Digital Single Market ("Diskussionsentwurf"), available on the website of the Federal Ministry of Justice and Consumer Protection: https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/DE/Gesetz_II_Anpassung-Urheberrecht-dig-Binnenmarkt.html.

⁵⁴⁹ Cf. §§ 8, 12, 16 of the 1st Discussion draft ("Diskussionsentwurf") of 24.06.2020.

⁵⁵⁰ First Public Consultation on the 1st draft until July 31st, 2020, a collection of all opinions submitted is available on the website of the Federal Ministry of Justice and Consumer Protection: https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/DE/Gesetz_II_Anpassung-Urheberrecht-dig-Binnenmarkt.html;jsessionid=8292E47D5B312BFF1E06EC1BBE8FD221.1_cid289?nnn=6712350.

⁵⁵¹ Draft bill for an Act to adapt copyright law to the requirements of the Digital Single Market ("Referentenentwurf"), available on the website of the Federal Ministry of Justice and Consumer Protection: https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_Urheberrecht.pdf?blob=publicationFile&v=7.

⁵⁵² A collection of all opinions submitted is available on the website of the Federal Ministry of Justice and Consumer Protection: https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/DE/Gesetz_Anpassung-Urheberrecht-dig-Binnenmarkt.html.

⁵⁵³ Draft bill of the Federal Government of Germany of 03.02.2021, available on the website of the Federal Ministry of Justice and Consumer Protection: https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_Gesetz_Anpassung_Urheberrecht_digitaler_Binnenmarkt.pdf?blob=publicationFile&v=5, published in Bundestagsdrucksache (BT-Drs. 19/27426 on 09.03.2021), available under <https://dserver.bundestag.de/btd/19/274/1927426.pdf>.

⁵⁵⁴ Available on the website of the Federal Ministry of Justice and Consumer Protection: https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_Gesetz_Anpassung_Urheberrecht_digitaler_Binnenmarkt_FAQ.pdf?blob=publicationFile&v=5;jsessionid=8292E47D5B312BFF1E06EC1BBE8FD221.1_cid289?blob=publicationFile&v=5.

⁵⁵⁵ Recommendation for a resolution and report by the Committee on Legal Affairs and Consumer Protection on the German government's draft bill for an act to adapt copyright law to the requirements of the digital single market of 19.05.2021, BT-Drs. 19/29894 available at <https://dserver.bundestag.de/btd/19/298/1929894.pdf>.

The final law, called Copyright Service Provider Act (UrhDaG),⁵⁵⁶ was enacted on 28 May 2021 [passed by Parliament (Bundestag) on 20 May 2021; by the Federal Assembly (Bundesrat) on 28 May 2021⁵⁵⁷] and promulgated on 4 June 2021, as part of the Act to adapt Copyright Law to the Requirements of the Digital Single Market.⁵⁵⁸ The UrhDaG entered into force on 1 August 2021.

(5) Hungary

The Hungarian Ministry of Justice, in close collaboration with the Hungarian Intellectual Property Office (HIPO), prepared the first, publicly not available version of the implementation draft by the end of summer of 2019. In line with this draft, the Ministry of Justice and HIPO organized six preparatory public consultation meetings on key areas of the CDSMD. Shortly after the COVID-19 pandemic reached Hungary, the Parliament declared a state of danger. Based on this, the Government was granted the right to temporarily legislate via government decrees from as early as 30 March 2020. As a part of that, a decree was published on 16 April 2020⁵⁵⁹ to implement Article 5 CDSMD. The implementation took its final form by the acceptance of Act LVIII of 2020 on 16 June 2020 on the cessation of the state of danger.⁵⁶⁰ This law has transposed the rules of the government decree into the national Copyright Act. This way, Hungary became the first Member State of the EU to implement art. 5.

The preparations for the implementation of the rest of the CDSMD did not stop during the pandemic. The first (full) draft bill was published on 7 May 2020 and a public consultation took place between May and June 2020.⁵⁶¹ The Ministry of Justice and the HIPO, based on more than 100 responses, published an amended draft bill on 31 July 2020. This version was offered for a targeted (semi-public) consultation in August 2020, with a deadline to submit comments on the draft by 14 August 2020.⁵⁶² Taking into consideration the recommendations at this stage, a third version was submitted for a final semi-public consultation on 17 February 2021, with a deadline to submit comments on the draft by 1

⁵⁵⁶ In German: Gesetz über die urheberrechtliche Verantwortlichkeit von Diensteanbietern für das Teilen von Online-Inhalten (Urheberrechts-Diensteanbieter-Gesetz - UrhDaG).

⁵⁵⁷ Press release of the Federal Assembly of 04.06.2021, available at <https://www.bundesrat.de/DE/plenum/bundesrat-kompakt/21/1005/69.html#top-69>.

⁵⁵⁸ The text of the Act as promulgated 4 June 2021 (in German) is available here: https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/BgbI_NetzDG.html;jsessionid=8292E47D5B312BFF1E06EC1BBE8FD221.1_cid289?nn=6712350; a working translation of the Copyright Service Provider Act ("UrhDaG", Article 3 of the Act, transposing Article 17 of the DSM Directive) in English can be found here: https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/UrhDaG_ENG.html;jsessionid=8292E47D5B312BFF1E06EC1BBE8FD221.1_cid289?nn=6712350.

⁵⁵⁹ Hungarian Government Decree No. 125/2020 (IV.16.).

⁵⁶⁰ The law entered into force on June 18, 2020.

⁵⁶¹ Compare to <http://copyrightblog.kluweriplaw.com/2020/06/22/an-update-on-the-hungarian-implementation-process-of-the-cdsm-directive/> (in English).

⁵⁶² Compare to <https://copy21.com/2020/08/comments-on-the-new-draft-to-implement-the-cdsm-and-the-satcab-directives/> (in English).

March 2021. The bill was finally submitted to the Hungarian Parliament on 31 March 2021.⁵⁶³ The Parliament passed the bill with 136 yeas, 29 nays, and 1 abstain on 28 April 2021. Act XXXVII of 2021 was published on 6 May 2021 and entered into force on 1 June 2021,⁵⁶⁴ a few days before the official transposition day of the CDSMD.

(6) Ireland

Following public consultations on art. 17, Ireland opted not to transpose the CDSMD by way of a primary act, but rather by way of statutory instrument (S.I) – a ministerial order that acts as secondary legislation under the auspices of the Department of Business, Enterprise and Innovation. This is a common approach in Ireland to implement its obligations under EU law.⁵⁶⁵ As such, Ireland's implementation of the CDSMD, and in particular art. 17 is a "cut and paste" from the Directive. As the approach adopted was by way of S.I. – no parliamentary or public scrutiny occurred, of the general approach to transposition and, for present purposes, art. 17.

The timeline of the implementation was as follows. On 25 September 2019, the Department website⁵⁶⁶ issued a consultation paper on arts. 13-17.⁵⁶⁷ On 24 May 2021, the Department issued an information note on its approach to transposition indicating that – following a consideration of stakeholder input arising from the consultation paper(s) and legal advice – it had opted for transposition by S.I.⁵⁶⁸ On 12 November 2021, Ireland transposed the CDSMD by way of S.I. with the Minister for Enterprise, Trade and Employment signing the European Union (Copyright and Related Rights in the Digital Single Market) Regulations 2021 (S.I. No. 567 of 2021) implementing the CDSMD.⁵⁶⁹ The instrument was published on 19 November 2021, amending the Copyright and Related Rights Act 2000 (CRRA 2000).⁵⁷⁰

(7) Italy

In Italy, the European Delegation Act is one of the two instruments for adapting to EU law introduced by Law No 234 of 24 December 2012, which implemented an organic reform of the rules governing

⁵⁶³ Compare to <https://copy21.com/2021/04/nem-aprilisi-trefa-a-parlament-elott-a-cdsm-es-satcab-atultetesi-javaslat/> (in Hungarian).

⁵⁶⁴ Magyar Közlöny, Issue 81/2021, pp. 3184-3197. Available at <https://magyarkozlony.hu/dokumentumok/526334b033ec56dda7906378ca38c272f80fb231/letoltes>. -The justifications of the act were published in *Indokolások Tára*, Issue 58/2021, pp. 680-709.

⁵⁶⁵ According to the national reporter, this solution also lacks transparency on the internal deliberations that occur within the government department as to the form and scope of the S.I.

⁵⁶⁶ See <https://enterprise.gov.ie/en/Consultations/Public-consultation-transposition-of-Directive-EU-2019-790.html>.

⁵⁶⁷ See <https://enterprise.gov.ie/en/Consultations/Consultations-files/Consultation-transposition-Copyright-Directive-EU-2019-790-Articles-13-17.pdf>.

⁵⁶⁸ See <https://drive.google.com/file/d/1bicGtD8AqV5P7adZwAnv0548Rsw5Y2a0/view>.

⁵⁶⁹ See <https://www.irishstatutebook.ie/eli/2021/si/567/made/en/print>.

⁵⁷⁰ See <https://www.irishstatutebook.ie/eli/2000/act/28/enacted/en/pdf>.

Italy's participation in the formation and implementation of EU legislation and policies. Paragraph 4 of art. 29 provides that the President of the Council of Ministers or the Minister for European Affairs, in agreement with the Minister for Foreign Affairs and the other Ministers concerned, shall submit to the Senate of the Republic and the Chamber of Deputies a draft European delegation law, indicating the reference year. The deadline for submission shall be 28 February each year. Pursuant to art. 32(1) of Law No 234 of 2012, the draft delegation law lays down – with reference to certain European Union acts – specific principles and guiding criteria to be followed by the Government in the exercise of the delegation, in addition to those contained in the directives to be implemented and to the general principles of delegation. Once the delegation law is approved, the Government can issue the Legislative Decree to amend the existing law.

On 29 October 2020 the European Delegation Law was approved by the Senate and sent to the Chamber of Deputies.⁵⁷¹ The Delegation Law was approved on 31 March 2021, by the Chamber of Deputies but the text needed to be approved again by the Senate due to an amendment on a part not related with the CDSMD. The final approval from the Senate was given on 20 April 2021.⁵⁷² Art. 9 of the proposal for Delegation Law contained the guiding principles and criteria for the implementation of the CDSMD. Specifically, letter n) and o) individuated the criteria / guiding principles for implementing art. 17.

The European delegation law, Law no. 53 of 22 April 2021, was published in the Official Gazette on 23 April 2021 (General Series no. 97) and entered into force on 8 May 2021.⁵⁷³ On 5 August 2021 the n.32 Council of Ministers approved, in preliminary examination, the draft legislative decree for the "Implementation of Directive (EU) 2019/790". The draft of the legislative decree was then forwarded to the Chamber of Deputies and the Senate of the Republic so that the opinions of the competent parliamentary bodies could be expressed.⁵⁷⁴

The Council of Ministers finally approved the draft legislative decree of the Copyright Directive on 4 November 2021. The Decreto Legislativo (legislative decree) 8 novembre 2021, n. 177, intitolato (entitled) "*Attuazione della direttiva (UE) 2019/790 del Parlamento europeo e del Consiglio, del 17*

⁵⁷¹ See <http://documenti.camera.it/leg18/pdl/pdf/leg.18.pdl.camera.2757.18PDL0119340.pdf>.

⁵⁷² See https://www.senato.it/leg/18/BGT/Schede/Ddliter/testi/53883_testi.htm?fbclid=lwAR1xugG0JpUspT7Rn4V_AeuK_1kxtEHxQt7m8Et57cX0jSrbKtCBRFT2a7A.

⁵⁷³ See <https://www.infoparlamento.it/Pdf>ShowPdf/8349>.

⁵⁷⁴ Governmental act n. 295 ("Schema di legge" / Draft proposal) / iter before Deputy chamber: <http://documenti.camera.it/apps/nuovosito/attigoverno/Schedalavori/getTesto.ashx?file=0295.pdf&leg=XVIII#pagemode=none>. Governmental act n. 295 ("Schema di legge" / Draft proposal) / iter before the Senate: <https://www.senato.it/leg/18/BGT/Schede/docnonleg/43105.htm>. Explanatory memorandum ("relazione illustrativa"): http://documenti.camera.it/apps/nuovosito/attigoverno/Schedalavori/getTesto.ashx?file=0295_F001.pdf&leg=XVIII#page mode=none.

aprile 2019, sul diritto d'autore e sui diritti connessi nel mercato unico digitale e che modifica le direttive 96/9/CE e 2001/29/CE“ was published in the Gazzetta Ufficiale Serie Generale (Official Gazzette, general series) n. 283 of 27 November 2021. Art. 7 of the decree implemented art. 17 CDSMD.⁵⁷⁵

(8) The Netherlands

Art. 17 CDSMD has been implemented in arts. 29c-29e of the Dutch Copyright Act (DCA). Pursuant to art. 19b Dutch Neighbouring Rights Act (DNRA), these provisions apply mutatis mutandis in the context of neighbouring rights. The key steps of the legislative process to implement art. 17 were the following. The draft Dutch National Implementation Bill accompanied by a draft Explanatory Memorandum was published for consultation of interested parties on 2 July 2019.⁵⁷⁶ The Dutch National Implementation Bill⁵⁷⁷ and the Explanatory Memorandum⁵⁷⁸ of it were published on 11 May 2020. The Bill of amendment was published on 7 October 2020;⁵⁷⁹ and the revised Dutch National Implementation Bill was made available to the public on 17 November 2020.⁵⁸⁰ Article 17 was finally implemented by the Dutch National Implementation Act (DNIA) of 16 December 2020;⁵⁸¹ and entered into force on 18 December 2020.⁵⁸²

(9) Portugal

Portugal did not have an active proposal to implement art. 17 CDSMD at the time of the submission of the national report. This does not mean that there were no steps towards implementing the new provisions. A draft transposition proposal – described as an almost verbatim copy of art 17⁵⁸³ – has

⁵⁷⁵ See https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2021-11-27&atto.codiceRedazionale=21G00192&elenco30giorni=false.

⁵⁷⁶ See <https://www.internetconsultatie.nl/autoursrecht>.

⁵⁷⁷ See Kamerstukken II 2019/20, 35454, 2, <https://zoek.officielebekendmakingen.nl/kst-35454-2.html>.

⁵⁷⁸ See Kamerstukken II 2019/20, 35454, 3, <https://zoek.officielebekendmakingen.nl/kst-35454-3.html>.

⁵⁷⁹ See Kamerstukken II 2020/21, 35454, 7, <https://zoek.officielebekendmakingen.nl/kst-35454-7.html>.

⁵⁸⁰ See Kamerstukken I 2020/21, 35454, A, <https://zoek.officielebekendmakingen.nl/kst-35454-A-n1.html>.

⁵⁸¹ See Wet van 16 december 2020 tot wijziging van de Auteurswet, de Wet op de naburige rechten, de Databankenwet en de Wet toezicht en geschillenbeslechting collectieve beheersorganisaties auteurs- en naburige rechten in verband met de implementatie van Richtlijn (EU) 2019/790 van het Europees parlement en de Raad van 17 april 2019 inzake auteursrechten en naburige rechten in de digitale eengemaakte markt en tot wijziging van de Richtlijnen 96/9/EG en 2001/29/EG, Stb. 2020, 558, <https://zoek.officielebekendmakingen.nl/stb-2020-558.html>.

⁵⁸² See Besluit van 18 december 2020 tot vaststelling van het tijdstip van inwerkingtreding van de Implementatiewet richtlijn auteursrecht in de digitale eengemaakte markt, Stb. 2020, 559, <https://zoek.officielebekendmakingen.nl/stb-2020-559.html>.

⁵⁸³ This, as admitted in the bill's preamble, was a “conscious option” made by the legislator, weighing the risk of annulment caused by the Polish challenge in C-401/19. On the positive side, the proposal contained a (general, not Art. 17-limited) parody exception, which the legislator had failed to implement at the time of the InfoSoc transposition, and it expressly stated that users of OCSSPs could rely on *any* exception when uploading content. On the negative side, Art. 175-C(1)(a), which corresponded to Art. 17(4)(a), referred to “every effort” instead of the more balanced requirement of “best efforts”, and Article 17(8), stating (however uselessly) that the regime should not lead to any general monitoring obligation, was not implemented.

been submitted to the Parliament in September 2021. Draft Bill no. 114/XIV was approved in the meeting of the Council of Ministers of 23 September 2021, having been submitted to the Parliament on 28 September 2021. The proposal's preamble expressly stated that it would be submitted to public consultation. The public consultation period lasted until 21 November 2021. Shortly thereafter, however, the Portuguese Parliament was dissolved due to a political crisis caused by the rejection of the 2022 State Budget, leading to the expiry of the proposal. This means that the proposal will have to be resubmitted in the new parliamentary term. The elections took place on 30 January 2022 and the new Government has taken office already. The resubmission of the proposal did not, however, happen as of 21 April 2022, when the national reporter closed its report.

(10) Sweden

The standard procedure in Sweden to implement EU directives involves a public consultation procedure. Whilst every member of the public is entitled to participate, certain actors (especially public authorities) are required to participate and answer the request for comment in the consultation. The public consultation is normally based on a proposal for implementation that is published by the Ministry of Justice (a Ds publication). In some situations, the Government may decide to initiate an official inquiry, ending with an official governmental report (SOU), that precedes the proposal from the Ministry of Justice.

Initially, in case of the CDSMD and in particular the art. 17 regime no such official governmental inquiry was initiated, following an assessment that the two-year period between adoption and implementation would not provide sufficient space for such necessary work having regard to the complexity of the regime. Somewhat differently from the norm, however, the publication of the proposal by the Ministry of Justice was preceded by extensive work within a special working group that was set up immediately after adoption of the Directive. Later on, however, in May 2021 an official inquiry was initiated (Dir. 2021:31) focusing on authors' and performers' possibilities to obtain remuneration for the making available of their works and performances under existing law, and on alternative dispute resolution schemes (relating to art. 21 CDSMD). The deadline for the designated investigator to complete the report was 12 May 2022.

The major steps of the legislative history to implement art. 17 were the followings. On 31 May 2019 the Ministry of Justice commenced implementation work by setting up a working group (called *referensgrupp*) initially consisting of 83 different actors (public authorities, various stakeholders, and individuals). The list of invited parties was published on the same day in document

Ju2019/01732/L3.⁵⁸⁴ The working group had an introductory meeting 18 June 2019, and a first substantive meeting, regarding art. 17, was held on 24 September 2019. In preparation for this meeting the Ministry of Justice published a request for comment within the working group on art. 17 with reasoned descriptions. The objective of this request was to make it easier for invited parties to provide comments on how the provisions should be implemented. Deadline for submission was 25 October 2019.⁵⁸⁵ On 21 October 2019 the Ministry of Justice published a request for comment within the working group on arts. 13, 14, 15 (including its relation to Article 17), and 16 CDSMD involving reasoned descriptions. Deadline for submission was 22 November 2019. Further meetings were held on 22 October 2019 and 19 November 2019. On 8 October 2021 the Ministry of Justice published its proposal for implementation of the CDSMD.⁵⁸⁶ This initiated the public consultation procedure with a deadline of 13 December 2021. As a matter of legislative draftsmanship, the Ministry of Justice proposes to introduce a new Chapter 6 b in the Copyright Act (URL) that implements Article 17. On 11 January 2022 the Cabinet Office published a preliminary schedule of coming bills according to which the CDSMD-bill was to be presented on 5 April 2022.

4.3.2. DEFINITIONS

This sub-section focuses on the questions contained in Chapter II of the second phase questionnaire, and collected information on the implementation of certain central definitions of the new regime in art. 17.

- Question 2.1. How did your country implement the following concepts/expressions of art. 17 CDSMD? Highlight if there is any difference between the rules or terminology of the Directive and your domestic law.
 1. “Online content-sharing service providers” (OCSSPs)?⁵⁸⁷
 - a. Did your country expressly exclude
 - i. service providers e.g., B2B cloud services, cyberlockers, not-for-profit online encyclopaedias etc., from the scope of the new liability and exemption regime,⁵⁸⁸ or
 - ii. piracy websites
 - from the scope of the new liability and exemption regime?

The majority of the reporters responded that the implementation of the definition of OCSSPs took place almost verbatim in their countries. The *French* reporters noted that the “for profit-making

⁵⁸⁴ The final amount of involved parties was eventually larger as parties could join in the process.

⁵⁸⁵ It should be noted that in the meantime the European Commission launched its stakeholder meetings.

⁵⁸⁶ See Ds 2021:30 Upphovsrätten på den digitala inre marknaden.

⁵⁸⁷ Art. 2(6), Recital 61-62 CDSMD.

⁵⁸⁸ Compare to Recital 62 CDSMD.

purposes” prong of art. 2(6) CDSMD was transposed in France as “in order to make a profit, direct or indirect”;⁵⁸⁹ which the national reporters called to be an insignificant difference. *Sweden* proposed the implementation of the definition as envisaged by art. 2(6) and the recitals of the CDSMD in a concise way. According to 52 i § URL, OCSSPs would cover “information society services of which the main purpose is to store and give the public access to large amounts of protected subject matter uploaded by its users, if (1) the service organises and promotes the protected subject matter for profit-making purposes, and (2) the service plays an important role on the content market by competing with other types of online content services”.

In *Estonia*,⁵⁹⁰ *France*,⁵⁹¹ *Germany*,⁵⁹² *Ireland*,⁵⁹³ *Italy*⁵⁹⁴ and the *Netherlands*⁵⁹⁵ the service providers specified by recital 62 were excluded directly by the law (including statutory instruments/government decrees); while in *Hungary* such exclusion was only clarified by the justification of the act.⁵⁹⁶ The *Danish* law and the *Swedish* proposal did not expressly exclude such service providers. As the Swedish reporter noted, such exclusion is considered unnecessary and could increase the risks of uncertainty with respect to those service providers that fall outside of the scope of the new regime.⁵⁹⁷

Piracy websites were expressly excluded from the new regime in *France*⁵⁹⁸ and *Germany*.⁵⁹⁹

- Question 2.2. “Large amount of copyright-protected works or other protected subject matter uploaded by the users”?
 - b. **Did your country require taking into consideration any factor other than those listed in Recital 63 when assessing “large amount”?⁶⁰⁰**

In the majority of countries, the legislation did not require the taking into consideration of any factor other than those listed in Recital 63 when it is about the large amount of copyright-protected works or other protected subject matter uploaded by the users.

In *France*, art. L137-1 CPI requires the taking into consideration the “type of uploaded works” as well. At the same time, the CPI clarifies that the modalities of the establishment of “large amount” shall be

⁵⁸⁹ Art. L137-1 CPI.

⁵⁹⁰ Estonian Copyright Act §57(3).

⁵⁹¹ Art. L137-1 CPI. The French reporters noted that the CPI transplanted the reference to cloud services slightly differently. Unlike the CDSM Directive that speaks of “own use” regarding cloud services, the CPI includes a reference to “strictly personal use”.

⁵⁹² UrhDaG § 3. The list included in this section is, however, only exemplary, as indicated by the wording “in particular” in § 3.

⁵⁹³ Section 18 S.I. 567/2021.

⁵⁹⁴ Art. 102 sexies paragraph 2) Decreto Legislativo 8 novembre 2021, n 177.

⁵⁹⁵ Art. 29c(9) DCA and Article 1(s) DNRA.

⁵⁹⁶ Justification to Art. 57/A HCA. See *Indokolások Tára*, Issue 58/2021, p. 698.

⁵⁹⁷ Swedish national report, Answer to Question II.1.

⁵⁹⁸ Art. 137-1 and L219-1 CPI.

⁵⁹⁹ UrhDaG §1(4).

⁶⁰⁰ “The assessment of whether an online content-sharing service provider stores and gives access to a large amount of copyright-protected content should be made on a case-by-case basis and should take account of a combination of elements, *such as the audience of the service and the number of files of copyright-protected content uploaded by the users of the service.*”

defined by a decree of the Conseil d'Etat. The decree was adopted on 20 October 2021, and it is now codified in Art. R 136-1 CPI. The decree requires the case-by-case analysis of the “large amount”, and states that “[t]he large amount of works or protected subject matter mentioned in art. L. 137-1 [CPI] may be deemed to have been reached when the service's audience exceeds a threshold set by order of the minister responsible for culture and the number of content files uploaded by users of the service exceeds one of the thresholds set by that order.” The Order of the Ministry of Culture of 20 October 2021, mentioned by the decree of the Conseil d'Etat, sets the following thresholds:

Article 1: “The audience threshold mentioned in Article R. 136-1 of the Code of Intellectual Property is set at 400,000 unique visitors in France per month per online public communication service calculated on the basis of the last calendar year.”

Article 2: “The thresholds concerning the number of content files uploaded by users mentioned in Article R 136-1 of the same Code are given in the Annex to this Order.”

The thresholds of the Annex are as follows:

Type of work included in the content file	Number of content files
Audio-visual works	100
Radio works, including podcasts	100
Musical works	5 000
Works of visual arts	10 000
Written works, including press articles and audiobooks	100
Video games	100
Contents including all types of works	10 00

The *Swedish* reporter noted that the Swedish Ministry of Justice’s proposal treats the concept of “large amount” flexibly, letting its construction be governed by an overall assessment.⁶⁰¹ The Ministry does, however, suggest in general terms that “large amount” requires consideration of what type of content is being made available. According to the Ministry it is possible that a certain amount of a particular type of work may satisfy the criterion while simultaneously the same amount of another type of work

⁶⁰¹ Ds 2021:30, p. 136-137.

might not necessarily do it. No particular example is provided in the reasoned proposal, but the view is that the term requires both a quantitative and qualitative assessment.⁶⁰²

- Question 2.3. “Adequate information on the functioning of their practices with regard to the cooperation referred to in 17(4)?”⁶⁰³

Almost all national reporters noted that the implementation of (or the proposal to implement) this provision was almost verbatim. In *France*, “adequate” was replaced by “pertinent and precise information”; and in *Sweden*, the proposal omits the term “adequate”, but requires the disclosure merely of “information” on the functioning of OCSSP’s practices with regard to the cooperation under art. 17(4) CDSMD.

4.3.3. AUTHORIZATION⁶⁰⁴

This sub-section analyses the questions contained in Chapter III of the second phase questionnaire on how the new authorization regime under art. 17 CDSMD has been implemented by the selected Member States.

- Question 3. Did your country’s law necessitate authorization for (1) communication to the public and/or (2) making available to the public of copyright-protected works and/or other protected subject matter uploaded by the users?

In six of the nine countries⁶⁰⁵ both rights are covered either directly (mentioned expressly) or indirectly. In *France*, arts. L137-2 I and L219-2 I require authorization for communication to the public in the broadest sense, so that this term encompasses making available to the public, too. (At the same time, the French CPI also necessitates the authorization of the reproduction of protected subject matters.) Similarly, the *German* reference to the authorization of communication to the public is applied in the broadest sense, including not only making available to the public right, but also the broadcasting and any other forms of communication to the public of protected subject matters. In the *Netherlands*, the right of “openbaarmaking” encompasses both the right of communication and making available to the public.

Unlike the six other countries, the *Estonian* implementation refers only to the right of communication to the public, and there is no literal reference to the authorization of making available to the public right regarding user uploads. The *Hungarian* law necessitates only the authorization of the making available to the public of protected subject matter. The *Swedish* proposal uses the term

⁶⁰² Ds 2021:30, p. 283.

⁶⁰³ Art. 17(8) CDSMD.

⁶⁰⁴ Art. 17(1); Recital 61 CDSMD.

⁶⁰⁵ Report Phase 2 *Denmark*; Report Phase 2 *France*; Report Phase 2 *Germany*; Report Phase 2 *Ireland*; Report Phase 2 *Italy*; Report Phase 2 *Netherlands*.

“communication to the public”,⁶⁰⁶ but it suggests to apply the new authorization regime only to on-demand uses (making available to the public) with the exception of linking activities.

- Question 4. Did your country’s law allow for the authorization of the contents uploaded by the users via means other than licensing agreements?⁶⁰⁷

All countries other than Germany and Sweden responded negatively to this question. In *Sweden*, the Ministry of Justice listed specific examples in its proposal that are based on the Commission’s guidance. These are: individual or collective agreements, ECL, or gratuitous consent.⁶⁰⁸ The *German* reporters also mentioned consent as an alternative authorization option.

- Question 5. Did the relevant collective rights management organisation(s) amend its (their) yearly tariff announcement(s) to reflect the new authorization regime?

Only the Hungarian national reporters responded positively to this question. In Hungary, the competent CMOs have accepted their tariffs for the year 2022, which were published in the annex of the official gazette (*Magyar Közlöny*) of Hungary on 30 December 2021.⁶⁰⁹

4.3.4. LIABILITY

This sub-section refers to the questions contained in Chapter IV of the second phase questionnaire on the new liability regime under art. 17 CDSMD.

- Question 6. How did your country qualify the new liability provisions of art. 17(4), e.g., *sui generis*, *lex specialis* or other regime?

The terminology of the nine countries shows a significant difference in this regard. A great number of countries⁶¹⁰ do not qualify the new liability regime at all, although the Italian national reporters noted that the new provisions resemble a form of “quasi-strictly direct liability scheme”. In *Denmark*, the preparatory works of the implementation law described the relevant provision as “conditional exemption from liability”. In *Germany*, while the Government’s explanatory statement assumed that the new provisions are *lex specialis* to the InfoSoc Directive, the prevailing opinion in the German literature is that the system is a “liability privilege”. The *Hungarian* implementation and the *Swedish* proposal classify the regime as *lex specialis*. Finally, in *Estonia*, to complicate the terminology to the

⁶⁰⁶ Ds 2021:30, p. 141.

⁶⁰⁷ Art. 17(1) second sentence CDSMD: “An online content-sharing service provider shall therefore obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, *for instance by concluding a licensing agreement*, in order to communicate to the public or make available to the public works or other subject matter.” See further Recital 64 CDSMD.

⁶⁰⁸ Ds 2021:30, p. 144.

⁶⁰⁹ Hivatalos Értesítő, Issue 66/2021, pp. 6066-6135. Available at <http://www.kozlonyok.hu/kozlonyok/Kozlonyok/12/PDF/2021/66.pdf>.

⁶¹⁰ Report Phase 2 France; Report Phase 2 Ireland; Report Phase 2 Italy; Report Phase 2 Netherlands.

most extreme, the system is coined as a “new *sui generis* exclusive right that works as a *lex specialis* to the existing law”.

- Question 7. How did your country implement the term “best efforts” ...

- a. per Article 17(4)(a);⁶¹¹

- b. per Article 17(4)(b);⁶¹²

- c. per Article 17(4)(c)?⁶¹³

The majority of national reporters reported on the literal transposition of “best efforts” in all the three cases.⁶¹⁴ There are, however, a few countries, where the implementation went differently.

In Germany, “best efforts” per art. 17(4)(c) was literally transposed, but “best efforts” per art. 17(4)(a) and (b) were implemented uniquely. UrhDaG § 4 para. 1 sentence 2 reads as follows:

“[r]ights of use pursuant to paragraph 1 sentence 2 shall

1. *apply to content which, by its nature, the service provider obviously reproduces publicly in more than negligible quantities,*
2. *cover a substantial repertoire in terms of works and rightholders*
3. *cover the territorial scope of this Act, and*
4. *enable use on reasonable terms and conditions.”*

In this context, the UrhDaG does not provide for a best efforts outcome obligation. Whether the service provider has made the best possible efforts to acquire contractual rights of use must be assessed in the case of infringement on the basis of a comprehensive consideration of the individual case, taking into account the principle of proportionality. The service provider must actively approach only representative rightholders known to it and domestic collecting societies; otherwise, the rightholders must take the first step. The German reporters argued that this interpretation is a concretization of the principle of proportionality in conformity with EU law and has the additional advantage that it creates legal certainty; but it finds no model in the Directive. The reporters therefore concluded that it is questionable whether § 4 para. 1 sentence 2 is a permissible concretization of the

⁶¹¹ “[M]ade **best efforts** to obtain an authorisation”.

⁶¹² “[M]ade, *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”.

⁶¹³ “[A]cted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made **best efforts** to prevent their future uploads in accordance with point (b)”.

⁶¹⁴ Report Phase 2 Denmark; Report Phase 2 Estonia; Report Phase 2 France; Report Phase 2 Ireland; Report Phase 2 Italy; Report Phase 2 Netherlands.

requirement of "best possible efforts". The German reporters also noted that "best efforts in accordance with high industry standards of professional diligence" per art. 17(4)(b) CDSMD was incorrectly transposed to German law. The German term "high standards customary in the industry" was applied with regards to both the acquisition of licenses and the qualified blocking on unlawful materials, even if the CDSMD necessitates that only with regards to the qualified blocking.

In *Hungary*, "best efforts" is generally replaced by "az adott helyzetben általában elvárható legnagyobb gondosság", translated to English in the unofficial translations of the HCA (see in Annex I) as "best efforts within reason under the circumstances". The Hungarian terminology aims to reflect the common standard of the Hungarian Civil Code on diligence. The unofficial English translation of the HCA applies the CDSMD's language ("best efforts"), but translates the official Hungarian statutory language incorrectly. The term "gondosság" means "diligence" in English. The Hungarian expression "az adott helyzetben általában elvárható legnagyobb gondosság" might be better translated as "the greatest diligence usually expected under the given circumstances". No doubt the latter translation is longer, but it reflects the meaning of the Hungarian standard much better. The Hungarian law replaced "best efforts" in all the three cases with the Hungarian diligence standard. Hence, the transposition of art. 17(4)(b) necessitates some kind of "verbal gymnastics". The following table summarizes the language issues with the text:

CDSMD	Official Hungarian version of the HCA	Unofficial translation of the HCA	Unofficial translation of the HCA by the national reporters
in accordance with high industry standards of professional diligence, best efforts...	a szakmai előírásokra és szokásokra tekintettel az adott helyzetben általában elvárható legnagyobb gondossággal...	in accordance with high industry standards of professional diligence, best efforts within reason under the circumstances...	in accordance with industry regulations and usages, the greatest diligence usually expected under the given circumstances...

The table clearly indicates that while the unofficial translation tries to comply with the official English version of the CDSMD, and also consequently translates best efforts as "best efforts within reason under the circumstances", the official Hungarian statutory language misplaces the requirement of diligence. Under the official transposition, diligence is not part of the high industry standards, but part of best efforts (which best efforts are otherwise used in Hungarian as diligence themselves). Furthermore "high" is missing from the Hungarian text, and "mere" industry standards – without any qualification – are required to be taken into consideration. Furthermore, standards are translated as

“előírások és szokások”, which might be translated officially as “(industry) regulations and usages”. In short, the Hungarian implementation tried to comply with both the Directive’s novel terminology and the existing Hungarian civil law standards, but the final wording – at least with respect to art. 17(4)(b) – is slightly incorrect.

Finally, in *Sweden*, the relevant standards are proposed to be implemented only for ex-ante intervention.⁶¹⁵ The Ministry of Justice noted in its proposal that “best efforts” constitutes an independent concept of EU law and that the term ought to be construed in light of the objectives and text of art. 17 taken as a whole.⁶¹⁶ The Ministry of Justice proposed therefore that service providers shall take such measures they can reasonably be required to take (sv. vidta de åtgärder som skäligen kan krävas).⁶¹⁷ According to the Ministry of Justice, such a standard better expresses that the service providers’ obligations in this regard are not absolute.⁶¹⁸

- Question 8. Did your country limit liability per art. 17(4) CDSMD only to special contents (e.g., manifestly infringing materials)?

The majority of the countries implemented the liability regime of art. 17(4) without any reference to the legal nature of the content uploaded by the end-users.⁶¹⁹ There are special provisions in this regard in the German UrhDaG and in the Swedish ministerial proposal, and the Dutch law pays close attention to the proportionality principle.

In *Germany*, §12 para. 2 UrhDaG suspends the liability of OCSSPs for the communication to the public of “presumably authorized” materials in line with § 9 para. 1 and 2 UrhDaG. Materials can be classified as presumably authorized, if the content in question contains less than half of the copyrighted work, combines it with other content, and is either a case of Marginal Use according to § 10 UrhDaG or is flagged by the user as non-infringing according to § 11 UrhDaG. Marginal Use according to § 10 UrhDaG requires non-commercial use or use that generates only an insignificant income and sets limits for maximum use, i.e., up to 15 seconds per video or audio, up to 160 characters per text and up to 125 kilobytes per photographic work. § 11 UrhDaG allows users to flag content as non-infringing according to § 5 UrhDaG.

In *Sweden*, the proposal of the Ministry of Justice of 52 o § 1 st. assumes that automatic blocking shall only be used with regards to content with can be assumed “with a high degree of certainty” (sv. med en hög grad av sannolikhet) to infringe copyright. As such, under the proposed 52 I §, a service is

⁶¹⁵ Ds 2021:30, p. 154.

⁶¹⁶ Ds 2021:30, p. 150-151.

⁶¹⁷ URL 52 I § 1 st.

⁶¹⁸ Ds 2021:30, p. 151.

⁶¹⁹ Report Phase 2 *Denmark*; Report Phase 2 *Estonia*; Report Phase 2 *France*; Report Phase 2 *Hungary*; Report Phase 2 *Ireland*; Report Phase 2 *Italy*.

expected to act when it is clear that (or that there is no doubt as to whether) the content is infringing copyright.⁶²⁰ Moreover, the Ministry of Justice recognises that the duty to prevent uploads is not absolute in scope⁶²¹ and that users' interests of being able to upload lawful content should come before the requirement to prevent unlawful content.⁶²² In addition, with regards to ex-post measures, the service is expected to act mainly on the basis of the contents of the substantiated notification; i.e. it ought to follow from the notification that the relevant content is clearly infringing.⁶²³

Finally, in the *Netherlands*, the law does not limit liability to special contents, but the law, based on the proportionality principle, assumes that automatic filtering shall not be too broadly applied, and shall be limited to cases of "likely infringement".⁶²⁴

- Question 9. Did your country introduce any special requirements regarding the notification of OCSSPs by right holders (e.g., earmarking; sufficiently substantiated notice)?

All countries implemented the requirement of the CDSMD regarding the submission of a sufficiently substantiated notice to the OCSSPs, but only two countries seem to develop this provision in a more extended manner.

First, in *Germany*, "trustworthy right holders" (presumably a type of trusted flaggers or notifiers) can also initiate the preliminary blocking of "presumably authorized" contents under § 14 para. 4 UrhDaG, where the trustworthiness of a right holder shall be assessed by the OCSSPs themselves. The German academia uniformly argue that the notice shall also include the proof that the right holder is entitled to the rights to the affected content; and that only the exact right holder can provide the necessary references to the content, but a notification via a third party is not sufficient.

In *Sweden*, the ministerial proposal intends to balance such notification requirement by, on the one hand, leaving it open what exact information the service provider shall be given in order to identify, match and filter the unauthorized contents; and, on the other hand, the type of information to be submitted shall also be in conformity with the technology that is reasonably available to the service provider. As the national reporter noted, if a service provider has no resources to apply the most expensive and latest technology for ex ante filtering purposes, the submission of information that is adapted to the said technology shall not satisfy the prescribed requirement.

⁶²⁰ Ds 2021:30, pp. 288 regarding ex-post measures and 291 regarding ex-ante measures.

⁶²¹ Ds 2021:30, p. 157.

⁶²² Ds 2021:30, p. 156 regarding ex-ante measures and 158 regarding ex-post measures.

⁶²³ Ds 2021:30, p. 158.

⁶²⁴ Kamerstukken II 2020/21, 35454, 6, p. 6, 9, 28 (<https://zoek.officielebekendmakingen.nl/kst-35454-6.html>).

- Question 10. When assessing the compliance of OCSSPs with the exemption rules under art. 17(4), did your country require taking into account any elements other than those listed in art. 17(5) CDSMD?⁶²⁵

Countries implemented the elements listed in art. 17(5) almost verbatim. The *German* national reporters indicated that certain expressions of the UrhDaG vaguely concretize parts of these elements (e.g. related to “large amount” or “large audience”), and the *Swedish* reported mentioned that since the implementation proposal expects service providers to act to prevent the use unlawful contents but shall prevent the blocking of lawful contents, these provisions of art. 17(5) – to be implemented in 52 o § – shall be applied in line with the safe harbour requirements of the law as well.

- Question 11.1. How did your country implement the following elements/terms of the complaint and redress mechanism:⁶²⁶
 - “effective and expeditious”;

The *Estonian*,⁶²⁷ *French*,⁶²⁸ *Hungarian*,⁶²⁹ *Irish*,⁶³⁰ *Italian*⁶³¹ national laws include a literal transposition of this rule. In *Sweden*, the proposal entirely skips the reference to these terms,⁶³² however, 52 q § shall be read in conjunction with 52 l §, and hence it covers necessary burdens to safeguard users’ interests. In *Denmark*⁶³³ and the *Netherlands* “expeditious” is omitted. Indeed, the Dutch approach to implement the three prongs of art. 17(9) was to combine them into a single obligation of the OCSSPs to issue “an effective decision without undue delay and subject to human review” in issues concerned.⁶³⁴ Furthermore, the Dutch law also applies the same standard for the (external) appeals lodged against the (internal) decision of the OCSSPs.⁶³⁵ The *German* law⁶³⁶ is rather developed in this regard. As the national reporters noted, the complaints procedure shall not only be expeditious and effective, but also free-of-charge, user-friendly, including domestic delivery options for documents and titles, shall take place electronically via the mechanism provided by the OCSSP, and the burdens of the complaint procedure shall be borne by the service provider. The *Italian* reporters noted that

⁶²⁵ Art/ 17(5) CDSMD: “In determining whether the service provider has complied with its obligations under paragraph 4, and in light of the principle of proportionality, the following elements, **among others**, shall be taken into account:

(a) the type, the audience and the size of the service and the type of works or other subject matter uploaded by the users of the service; and

(b) the availability of suitable and effective means and their cost for service providers.”

⁶²⁶ Art. 17(9) CDSMD.

⁶²⁷ Estonian Copyright Act § 57(2)(2).

⁶²⁸ Art. L137-4 III and Art. L2129-4 III CPI.

⁶²⁹ HCA 57/G. § (1).

⁶³⁰ Section 23(1) S.I. 567/2021.

⁶³¹ Art. 102 decies para. 2. Decreto Legislativo 8 novembre 2021, n 177.

⁶³² URL 52 q § 1 st.

⁶³³ Danish Copyright Act Art. 52c(6).

⁶³⁴ Art. 29(c)(7) second sentence DCA.

⁶³⁵ Art. 29(c)(7) third sentence DCA.

⁶³⁶ UrhDaG § 14.

the AGCOM is expected to issue a guideline regarding the expeditious and effective complaint redress mechanisms (which did not occur until the submission of the Italian national report).

- **Question 11.2. (...)**
 - “undue delay”

The term “undue delay” was implemented by five member states (*Denmark*,⁶³⁷ *Germany*,⁶³⁸ *Hungary*,⁶³⁹ *Ireland*⁶⁴⁰ and the *Netherlands*⁶⁴¹) ad litteram. The *Hungarian* national reported noted that the relevant terminology is coherent with the Hungarian E-Commerce Act’s terms, and, hence, the latter applies to equal “undue delay” with 12 hours. In *Germany*, the UrhDaG clarifies that “undue delay” means maximum one week. Similarly, the *Swedish* proposal – which uses “expeditiously” (“skyndsamt”) for “undue” – maximises the deadline for this obligation in seven days.⁶⁴² The *Estonian* and the *Italian* Copyright Act completely omits this expression; and the *French* language uses “unjustified” instead of “undue”.⁶⁴³

- **Question 11.3. (...)**
 - “human review” [viewed from a substantive (WHAT should/can humans do) and procedural perspective (at WHAT STAGE of the service should human review be present); as well as WHO exactly can execute such review]?

The term “human review” was implemented by five member states (*Denmark*,⁶⁴⁴ *Estonia*,⁶⁴⁵ *France*,⁶⁴⁶ *Germany*,⁶⁴⁷ *Hungary*,⁶⁴⁸ *Ireland*,⁶⁴⁹ *Italy*⁶⁵⁰ and the *Netherlands*⁶⁵¹) ad litteram and without any clarification as regards to the content or means of either “human” or “review”. In *Germany*, the UrhDaG necessitates human review only at the appeals stage. The UrhDaG also allows OCSSPs to “outsource” the carrying out of such procedures.⁶⁵² The *Swedish* proposal – which uses “physical review” (“fysisk granskningi”) for “human review” – necessitates such human involvement in the process in case it determines that the access to the content is not restored (in other words, decisions favouring the users are not required to be reviewed by humans).⁶⁵³

⁶³⁷ Danish Copyright Act Art. 52c(6).

⁶³⁸ UrhDaG § 14(3).

⁶³⁹ HCA 57/G. § (3).

⁶⁴⁰ Section 23(3) S.I. 567/2021.

⁶⁴¹ Art. 29(c)(7) second sentence DCA.

⁶⁴² URL 52 q § 3 st.

⁶⁴³ Art. L137-4 III and Art. L2129-4 III CPI.

⁶⁴⁴ Danish Copyright Act Art. 52c(6).

⁶⁴⁵ Estonian Copyright Act § 57(2)(4).

⁶⁴⁶ Art. L137-4 III and Art. L2129-4 III CPI.

⁶⁴⁷ UrhDaG § 14(3).

⁶⁴⁸ HCA 57/G. § (3).

⁶⁴⁹ Section 23(3) S.I. 567/2021.

⁶⁵⁰ Art. 102 decies para. 1. Decreto Legislativo 8 novembre 2021, n 177.

⁶⁵¹ Art. 29(c)(7) second sentence DCA.

⁶⁵² UrhDaG § 15.

⁶⁵³ URL 52 q § 3 st.

4.3.5.SAFEGUARDS (EXCEPTIONS AND LIMITATIONS; PROCEDURAL SAFEGUARDS)

This sub-section focuses on the questions contained in Chapter V of the second phase questionnaire on the safeguards as envisaged by art. 17 CDSMD.

- Question 12. Did your country introduce any ex ante safeguard against over blocking under art. 17(4) CDSMD? If so, what are the prerequisites of the application of such safeguard?

The national norms of the selected Member States show divergence in this regard. While the majority of the national respondents answered negatively,⁶⁵⁴ there are a few countries where ex ante safeguards against over blocking lawful materials is introduced.

The *Swedish* national reporter indicated that standards of OCSSPs' safe harbour under 52 I § (service providers shall take such measures they can reasonably be required to take) and obligations under 52 o § (automatic blocking shall only be used with regards to content with can be assumed "with a high degree of certainty" to infringe copyright) and under 52 p § 2 (right to make available content for purposes of caricature, parody, pastiche, quotation, criticism, review as well as any other non-infringing purposes) and 3 st. (inform users about the right pursuant to 52 p § 2 st.) shall function as ex ante safeguards against over blocking contents by OCSSPs.

It is nevertheless the *German* legislation that introduced the broadest ex ante safeguards to protect end-user interests against over blocking contents by OCSSPs. Under the UrhDaG, in order to meet the proportionality requirements of the CDSMD, the avoidance of disproportionate blocking of presumably authorized uses by automated procedures⁶⁵⁵ is regulated. In line with § 9 para. 1 and 2, contents "presumably authorized by law" despite the match with information provided by the right holder are contents that contain less than half of the protected source material, it combines the fragment with other contents and is either a marginal use (under § 10) or is flagged by the end-user as a non-infringing one (under § 11).⁶⁵⁶ A use is marginal, if – besides being smaller than the half of the original content – it is non-commercial or generates only an insignificant income and it is up to 15 seconds per video or audio, up to 160 characters per text or up to 125 kilobytes per photographic work. If the use is not marginal as prescribed by § 10, but meets the requirements of § 9, the end-user might flag the content as non-infringing under § 11 if the OCSSP's automatic screening system

⁶⁵⁴ Report Phase 2 *Denmark*; Report Phase 2 *Estonia*; Report Phase 2 *France*; Report Phase 2 *Hungary*; Report Phase 2 *Ireland*; Report Phase 2 *Italy*; Report Phase 2 *Netherlands*.

⁶⁵⁵ As such, non-automated blocking mechanisms are unaffected by UrhDaG §§ 9 to 12.

⁶⁵⁶ Communication to the public of such contents might still be terminated by a complaint procedure in line with UrhDaG § 14.

concluded with a blocking order. The end-user might pre-flag the content when it is uploaded to the OCSSPs system, but the end-user is also allowed to “post-flag” a content to be lawful after it has been challenged by the right holder. In the latter case, when the content is challenged by the right holder, it shall remain available on the OCSSPs’ system for 48 hours before it is blocked so that the end-user can post-flag the content as lawful. The OCSSP must immediately inform the right holder about the public communication of a presumably permitted upload and point out the right to lodge a complaint under § 14.⁶⁵⁷ Until a decision is reached within the internal complaints procedure according to § 14 UrhDaG the content in question must remain online per § 9 para. 1. § 12 para 2 UrhDaG exempts service providers from copyright liability for the communication to the public of presumably permitted uses and is thus lex specialis to § 1 para. 2 clause 1 UrhDaG.⁶⁵⁸ The procedure under § 14 para. 4 also applies if it is a subsequent blocking request and the content is deemed to be presumed permitted use for up to 48 hours even without a declaration by the user under § 11 para. 2 UrhDaG-E. Even during this period, the rightholder can demand immediate blocking after being informed pursuant to § 9 para. 3 when filing a complaint, if the economic impairment justifies this.⁶⁵⁹ Another exception to the rules for presumably authorized uses exists for so-called "trustworthy rightholders "with the "red-button mechanism".

- Question 13. Did your country introduce any sanctions, mechanisms or procedures against the breach of user rights by OCSSPs' content moderation practices?

Once again, the Member States show a split, with the majority of the countries (*Denmark, Hungary, Ireland, Italy and the Netherlands*) not introducing any sanctions, mechanisms or procedures against the breach of user rights by OCSSPs' content moderation practices;⁶⁶⁰ but a few countries have special rules in place in this regard.

In *Estonia*, under § 57 (1) to (3), the Consumer Protection and Technical Regulatory Authority has the right to issue a compliance notice to the OCSSP and requires the performance of its obligation. Upon non-compliance with the compliance notice, the Authority may impose a non-compliance levy that might be up to 50,000 euros.

In *France*, according to art. L137-4, IV and L219-4, IV CPI, the ARCOM, in response to user's complaint, could prescribe the measures necessary to remedy the blocking or removal of content. Competences

⁶⁵⁷ Draft bill of the Federal Government of Germany of 03.02.2021 (“Regierungsentwurf”), BT-Drs. 19/27426, p. 140.

⁶⁵⁸ Ibid., p. 142.

⁶⁵⁹ Ibid., p. 144.

⁶⁶⁰ Report Phase 2 *Denmark*; Report Phase 2 *Hungary*; Report Phase 2 *Ireland*; Report Phase 2 *Italy*; Report Phase 2 *Netherlands*.

of the ARCOM are further explained in art. L331-32 CPI (e.g., the competence to inflict penalties for non-execution of its injunction), art. 331-56, VI CPI and Art. 331-60 CPI.

In *Germany*, non-compliant behaviour by OCSSPs can be challenged according to § 18 para. 6 UrhDaG by “a registered association whose purpose is to promote the interests of users on a non-commercial and not merely temporary basis”. An activity is not commercial if it is not aimed at generating income as the association is essentially financed from its own resources, in particular from membership fees, public funding and donations. The activity is not merely temporary if it is intended to be permanent, i.e., for longer than one year. The association is entitled to injunctive relief if the OCSSP has repeatedly blocked permitted uses by mistake. As § 18 para. 4 UrhDaG puts it: “[a]fter an abusive blocking request in respect of works in the public domain or works whose use is authorized by anyone free of charge, service providers must ensure, to the best of their ability and in accordance with section 1 (2), that these works are not blocked again.” The association can also use injunctive relief to claim that the OCSSP is not fulfilling its obligation under § 7 para. 2 clause 1. Accordingly, the OCSSP must ensure that content uploaded by users, the use of which is permitted by law or which does not infringe copyright, is available. This duty is breached not only if the OCSSP repeatedly blocks the same content incorrectly, but also if it incorrectly blocks different content. If the OCSSP repeatedly violates this duty, it can be required by the association to take organizational precautions to ensure that this does not happen again in the future. An OCSSP may also violate its obligation under § 7 para. 2 UrhDaG by not imposing measures under § 18 paras. 1, 2 UrhDaG against alleged rightholders. Insofar as the requirements for sanctions are met, the service provider is obliged to impose them.

Finally, in *Sweden*, 52 r § proposes that OCSSPs are liable to compensate the harm that is caused by its intentional or negligent disregard of its obligations under 52 o § and a user suffers harm as a result of that. Moreover, pursuant to the proposed 52 s §, if a service disregards its obligations in 52 o § or 52 q 1 st. or 3 st., a court may issue an injunction on penalty of a fine against the service to take corrective action. 52 s § 2 st. provides moreover that proceedings for such an injunction may be initiated by a user or by an organisation representing users (such as a consumer organisation). Lastly, 52 u § clarifies that a term limiting the user rights recognised in the Chapter is null and void.

- Question 14. Are quotation, criticism, review, and use for the purpose of caricature, parody or pastiche treated to be “user rights” following the implementation of art. 17 CDSMD by your legislation?⁶⁶¹

The *Danish*, the *French*, the *German*, the *Hungarian*, the *Italian*, and the *Dutch* reporters answered this question to the negative. In Denmark, art. 17(7) CDSMD was introduced via Section 52c(10) as an

⁶⁶¹ Art. 17(7)(a)-(b) CDSMD.

exception applicable to upload and make available user generated contents classified as caricature, parody or pastiche on OCSSPs systems, but this rule is neither treated to be a general parody exception or a user right in Denmark. In Germany, the national reporters pointed out that the dogmatic classification of art. 17(7) E&Ls as implemented in § 5 para. 1 UrhDaG are unclear. Since both the user's acts of exploitation and their exemption by limitations are governed by the UrhG, § 5 para. 1 UrhDaG has primarily a clarifying function with regard to users. If one does not regard the UrhDaG as a regulatory regime under copyright law of its own kind, but merely as a lex specialis complement to the UrhG, then the limitations mentioned in § 5 para. 1 UrhDaG follow directly from the UrhG itself, in particular from §§ 51, 51a UrhG. Limitations as contained in §§ 51, 51a UrhG are not user rights but a statutory permission or legal freedom.

The E&Ls in art. 17(7) are considered to be user rights in *Estonia*,⁶⁶² *Ireland*⁶⁶³ and in *Sweden*.⁶⁶⁴

- Question 14.1. If yes, did your country also grant user right status to exceptions and limitations other than those listed in art. 17(7)?

From the countries that treat art. 17(7) E&LS to be user rights, this question was answered to the positive by the *Estonian* and the *Swedish* national reporter.⁶⁶⁵ In *Ireland*, the user rights status has not been legislated outside of the scope of art. 17(7).

- Question 15. Did your country introduce quotation, criticism, review, and use for the purpose of caricature, parody or pastiche newly under the CDSMD?

In *Denmark*,⁶⁶⁶ *Germany*,⁶⁶⁷ *Italy*⁶⁶⁸ caricature, parody and pastiche were introduced in line with the CDSMD, and the *Swedish* proposal also recommends such introduction of the parody, caricature and pastiche exceptions (even if there is case law that accepted the legality of such uses in Sweden).⁶⁶⁹

The *Hungarian* legislation newly implemented parody, caricature, pastiche, and criticism and review.⁶⁷⁰ The *Estonian*, the *French*, the *Irish* and the *Dutch* national reporters answered this question in the negative.

- Question 15.1. If yes, did your country introduce the new exception(s) and limitation(s)

⁶⁶² Compare to Estonian Copyright Act §19(1) 1 and 7 via §57(5). Chapter IV of the Estonian Copyright Act on the exceptions and limitations on copyright does not include the term “criticism”, unlike Chapter VIII on related rights.

⁶⁶³ In 2019, the Copyright and Other Intellectual Property Provisions Act 2019 amended s.52(5) of the CRRA 2000 by way of s.13 to include caricature, parody and pastiche within the fair dealing exception. (S.51 CRRA covers criticism and review, s.52(4) covers quotation.)

⁶⁶⁴ URL 52 p § 2 st.

⁶⁶⁵ The Swedish noted that these user rights are not absolute in the sense that the sharing of contents via OCSSPs system might be prevented on grounds other than copyright, e.g. hate speech.

⁶⁶⁶ Danish Copyright Act Section 52c(10).

⁶⁶⁷ UrhG § 51a. The German national reporters noted that these exceptions were subsumed into UrhG § 24 until the CJEU’s *Pelham* judgment (C-476/17) necessitated the German legislation to repeal UrhG § 24.

⁶⁶⁸ Art. 102 nonies paragraph 2 Decreto Legislativo 8 novembre 2021, n 177.

⁶⁶⁹ URL 52 p § 1 st.

⁶⁷⁰ HCA 34/A.§.

- i. in general (as part of the already existing system of exceptions and limitations, and hence applicable to offline and any non-OCSSPs-related uses) or
- ii. in specific (relevant only for uses made via OCSSPs' systems)?

The new exceptions and limitations are introduced as general rules (as part of the already existing system of exceptions and limitations, and hence applicable to offline and any non-OCSSPs-related uses) in *Germany* and in *Hungary*; and specific ones (relevant only for uses made via OCSSPs systems) in *Denmark*, *Italy* as well as under the *Swedish* proposal.

- Question 16. Did your country implement the prohibition of general monitoring obligations with the same or different meaning as included in art. 15 of the E-Commerce Directive?⁶⁷¹

The prohibition of general monitoring obligation under art. 17(8) first sentence CDSMD was implemented in *Estonia*⁶⁷² and the *Netherlands*⁶⁷³ with the same meaning as included in art. 15 of the e-Commerce Act. In *France*, the newly introduced rule states as follows: “[t]he provider of the service of sharing of content online acts on the sole basis of pertinent and necessary information or of the notifications made directly or indirectly via a designated third party by the rightholders”.⁶⁷⁴ *Hungary*,⁶⁷⁵ *Ireland*⁶⁷⁶ and *Italy*⁶⁷⁷ have literally transposed the prohibition, but did not clarify the interplay between the two regimes.

In *Germany*, art. 17(8) first sentence is not transposed in either the UrhDaG or the updated UrhG. Also, the draft's justification mentioned only art. 17(8) subpara. 2, not Article 17(8) first sentence. The German reporters noted that the transposition of art. 17(8) first sentence was not perceived to be necessary, taking into account the transposition of art. 15 e-Commerce Directive in § 7 para. 2 TMG. According to general opinion, this provision is to be understood as that service providers (therein contained OCSSP's) have no general obligation to monitor. This is the exact wording of art. 17(8) first sentence CDSMD, so that an additional transposition of this provision within the UrhDaG would have seemed redundant. Also, the interpretation of the provisions of §§ 7-10 TMG must not only be based on national law, but must also, and in particular, take into account the values of EU law. This applies of course, foremost to art. 15 E-Commerce Directive.

Similarly, to the German situation, the implementation of the prohibition of general monitoring obligation did not take place expressly in *Denmark*, but there is no clarification to the lack of this rule in the justification of the Danish implementation law. The national reporters noted that the same

⁶⁷¹ Art. 17(8) first sentence CDSMD.

⁶⁷² Estonian Copyright Act §56(7).

⁶⁷³ DCA art. 29c(6).

⁶⁷⁴ Art. L 137-2, III, 4 and L219, III, 4 CPI.

⁶⁷⁵ HCA 57/E.§ (6).

⁶⁷⁶ Section 21(3) S.I. 567/2021.

⁶⁷⁷ Article 102 septies paragraph 4 Decreto Legislativo 8 novembre 2021, n 177.

happened to art. 15 of the e-Commerce Directive Act, where, however, the legislation argued that there is no need to implement any prohibition like that as Danish law was already in line with the e-Commerce Directive's goals. Similarly, the *Swedish Ministry of Justice* proposes not to implement art. 17(8) first sentence at all, viewing it instead as a reminder to Member States and a rule pursuant to which art. 17 cannot be implemented in such a way as to result in a general monitoring obligation.⁶⁷⁸

- Question 17. Did your country impose any broader transparency obligations on platforms than what art. 17(8) requires, e.g., related to users or public authorities or affecting information other than related to the "functioning of their practices"?⁶⁷⁹

Once again, the Member States show a split, with the majority of the countries not imposing any broader transparency obligations on platforms than what art. 17(8) requires;⁶⁸⁰ but a few countries have special rules in place in this regard.

In *France*, the respective rule of the CDSMD was implemented with modest extras, though unrelated to other parties, e.g., users or public authorities. Art. L137-3, 1 and L219-3, 1 CPI require the provision of information on the "type" of the measures undertaken as well, and states that this obligation "shall be without prejudice to more detailed obligations concluded in a contract between the service providers".

In *Germany*, the rights to information in § 19 para. 1 and para. 2 UrhDaG implement the requirement of art. 17(8) (2) CDSMD. These rules are broader than the Directive as they also allow for the right to grant access to research data, which is designed to protect the users' freedom of expression and information under art. 11 and the freedom of science under art. 13 CFREU. Pursuant to subsection 3, sentence 1, all rightholders defined as research organizations in § 60d (2) UrhG (in line with art. 2 para 1 CDSMD). Furthermore, the claim is also available to the individual researchers who belong to the research organisation, whereas there is no restriction to a particular subject area. The right of access pursuant to para. 3 sentence 1 has two prerequisites. First, data access must be granted for the purpose of scientific research; second, the granting of access must not conflict with any overriding interests of the service provider worthy of protection. The service provider must grant the authorized party access to data on its use of procedures for the automated and non-automated detection and blocking of content. The claim thus goes further than the rightholders' right to information under para. 2 in two respects. First, the access claim concerns not only the functioning of the blocking procedures under Sections 7 and 8, but all content recognition and blocking processes, regardless of whether the

⁶⁷⁸ Ds 2021:30, pp. 166-167.

⁶⁷⁹ Art. 17(8) second sentence CDSMD.

⁶⁸⁰ Report Phase 2 *Denmark*; Report Phase 2 *Estonia*; Report Phase 2 *Hungary*; Report Phase 2 *Ireland*; Report Phase 2 *Italy*; Report Phase 2 *Netherlands*.

service provider performs these procedures automatically or not. Second, the claim under para. 3 goes beyond the right to information under subsection 2 in that the service provider is not required to provide information, but must grant access to the data. Finally, para. 3 sentence 2 gives a claim for reimbursement of costs to which any service provider is entitled who has granted data access to an authorized person pursuant to para. 3 sentence 1.

In *Sweden*, the proposed 52 n § requires OCSSPs to provide information on the measures that they take pursuant to the safe harbour rules under 52 l § to rightholders as well as to users at their request. The information provided should be sufficiently specific and transparent to understand how the tools work and to be able to form their own opinion of how the service fulfils its respective obligations relative each category. The Ministry of Justice states in its proposal that the OCSSP should describe which technological solutions are used, including if third party technology is used, and their average efficiency level.⁶⁸¹ 52 o § 2 st. also contains an obligation to expeditiously inform users when access to content is disabled.

- Question 18. Did your country introduce any mechanism to check whether OCSSPs comply with their obligation to inform users in their terms and conditions that they can use works and other subject matter under exceptions or limitations to copyright and related rights provided for in Union law?⁶⁸²

Finally, and once again, the Member States show a split, with all the countries but Sweden not introducing any mechanism to check whether OCSSPs comply with their obligation to inform users in their terms and conditions that they can use works and other subject matter under exceptions or limitations to copyright and related rights provided for in Union law. The German national reporters noted that the practical use of the relevant § 5 para. 3 UrhDaG is unclear, opening the possible doors for litigation by consumer associations or users alike.

Importantly, in Sweden, the Ministry's proposal includes no mechanism to check whether a service complies with its obligation to inform users in the terms and conditions. Instead, users or their representative organisations are entitled to specific remedies that a court may issue pursuant to 52 s § (injunction). Moreover, pursuant to 52 r §, users may also be entitled to compensation (damages).

4.4. SUMMARY AND CONCLUSION

⁶⁸¹ Ds 2021:30, p. 293.

⁶⁸² Art. 17(9) last sentence CDSMD.

The first phase questionnaire collected and analysed data on four distinct groups of issues to acquire comparable knowledge on the pre-implementation status quo of ten selected Member States' copyright regime.

Part I was dedicated to *hosting service providers as users of copyright-protected content*. Here, our first key finding is that most of the Member States has already conceptualized service providers that store and give the public access to a large amount of protected content uploaded by their users via the domestic e-Commerce laws; but the direct or primary liability of such service providers was far from uniform in the Member States. E-Commerce, criminal and civil law concepts are alternatively or complementarily applied in these countries; and several national reporters noted the lack of such liability at all. At the same time, most countries noted that besides direct licensing, there is no other meaningful method, mechanism or model of authorization in place to cover the upload of protected content by end-users to the service providers' servers. As such, the new (art. 17-based) regime of the CDSMD will lead to brand new mechanisms in the Member States that service providers shall comply with.

Part II of the first phase questionnaire collected information on *hosting service providers as intermediaries for access to copyright-protected content*. Most respondents confirmed that injunctions against service providers are duly applicable to tackle the upload of copyright-infringing content by third-party users of the service, irrespective of service providers' liability for the unlawful activities of end-users.

The Member States show a sensible difference (seven vs three) with respect to the question of indirect or secondary liability of service providers for (passive) hosting of contents uploaded by third-party users of the service. Similarly, seven respondents out of ten affirmed the existence of content moderation regimes. Among them, however, the picture is diverse in the sense that the existing regime is purely statutory in four countries; a mixture of statutory and case law in one country; mainly self-regulatory in another country; and the duty of care dominates a final country. Conversely, seven out of ten countries have *no law or case law-based complaint-and-redress (C&R) mechanism in place yet*. In essence, this means that most of the Member States have already gathered some form of experience with content moderation; however, most countries lack such knowledge with respect to C&R mechanisms – both of which are conceptual elements of the system set up in art. 17 CDSMD (see Chapter 3).

Seven countries also have existing safe harbour provisions for the benefit of search engines and/or linking service providers, with only three countries having both safe harbour concepts.

Part III focused on *end-users*. The national respondents unanimously confirmed that end-users are directly liable under copyright law for uploading copyright-protected content to the services of online platforms without authorisation. The exact right(s) that end-users might infringe in such a case do(es), however, significantly differ in the Member States. The most relevant are the right of reproduction, communication or making available to the public, as would be expected; with notable terminological and conceptual differences in France (“representation”) and the Netherlands (“openbaarmaking”).

Countries show a diverse picture regarding the implementation of the E&Ls for quotation, criticism, review and caricature, parody, and pastiche as set forth in arts. 5(3)(d) and 5(3)(k) InfoSoc Directive. Countries unanimously implemented the provision for quotation, criticism, and review. The E&L for caricature, parody, and pastiche: has been implemented statutorily in six countries; is applied indirectly, through case law, in two countries; and has not been implemented at all in two other countries so far. Against this background, art. 17(7) CDSMD seems to necessitate regulatory changes in several countries.

Responses were, however, more diverse with respect to the question, whether the said E&Ls can be effectively applied with respect to end-users’ uploading activities. The majority (six out of ten) of responses were affirmative; but respondents generally expressed that due to the lack of case law, such conclusion is mainly based on the theoretical interpretation of law. Eight reporters declared that E&Ls represent “defences” against infringement claims.

A much more diverse picture is visible with respect to the question whether E&Ls represent (in alternative or in addition to defences) “subjective” or “affirmative” rights. In three countries, E&Ls work as subjective rights; and in Estonia they work as affirmative rights. Two other reporters responded that E&Ls might theoretically work as subjective or affirmative rights, but this is not confirmed by case law yet. Four reporters denied that E&Ls are subjective or affirmative rights. This seems to suggest that the “user right approach” of the CDSMD – via mandatory non-overridable E&Ls in art. 17(7) – might result a conceptual change in a sensible number of Member States. Seven out of ten respondents reported that no C&R mechanism exists for the benefit of users of hosting service providers to ensure the exercise of E&Ls in general, or for the specific cases of quotation, criticism, review, and caricature, parody, pastiche. This means that a sensible number of Member States shall introduce the novel regime of the CDSMD.

The *second phase questionnaire* collected and analysed data on five distinct groups of issues to acquire comparable knowledge on the implementation of art. 17 CDSMD in the ten selected Member States.

Our questionnaire shows that the implementation of art. 17 CDSMD (or the proposal of it) took place in the nine analysed Member States with sensible differences.

A significant number of the elements of the new regime were almost uniformly transplanted; with mainly minor grammatical differences (e.g., regarding “for profit-making nature”, “adequate”, “best efforts” or “undue”) or differences due to a given Member States’ legal system (especially under civil law or e-commerce law). Only a few countries focused on the means of authorization; and only Hungarian CMOs were quick enough to accept the new tariffs covering art. 17 uses. These elements of art. 17 might, however, have secondary importance in the overall assessment of the new regime (e.g., whether service providers specified by recital 62 CDSMD or piracy sites are excluded from the scope of OCSSPs).

The implementation of the primary building blocks of art. 17 CDSMD, i.e.

- the *economic rights affected* (e.g., with some countries covering only on-demand uses even if OCSSPs are capable to host live streams, too);
- the *new liability regime* (e.g., the qualification of the new system could not be more diverse, ranging from lex specialis to liability privilege to conditional exemption from liability” to “new *sui generis* exclusive right that works as a lex specialis to the existing law”, or to no qualification at all); or
- the *balancing of fundamental rights of stakeholders* (e.g., whether the parody E&L is applicable generally in all cases or specifically only in an art. 17 CDSMD scenario; whether E&Ls are considered to be user rights; whether the prohibition on general monitoring obligations per art. 17(8) first sentence was expressly transposed,

show a diverse picture. Such diversity suggests that the initial goal of the EU to harmonize certain aspects of copyright in the digital single market might lead to a rather fragmented copyright in a digital single market.

The nine analysed countries might be grouped into three tiers. In tier one, the German and the Swedish models show above-the-average detail in the implementation of the new regime, with a special focus on the fortified protection of user rights and detailed liability mechanisms. In tier-two, the Estonian, French and the Dutch legislation applies a smaller number of individual solutions. For instance, Estonia allows for the use of non-compliance levy if OCSSPs do not comply with statutory obligations. France legislated on the concept of “large amount”; allows ARCOM to prescribe remedies against unjustified blocking or content removal, and introduced broader transparency obligations. Finally, the Netherlands regarding the limitation of liability to “likely infringing” contents. In tier three, Denmark, Hungary, Ireland and Italy took a rather restrictive approach by the almost verbatim transplantation of the new provisions. Needless to say, this three-tier system is not insisting any qualitative ranking among the countries. There is nothing to say that the German or Swedish approach

is the right one or they are correct in their entirety; indeed, maybe ad litteram implementations comply with the envisaged system better. It is almost certain, however, that all national legislative organs shall reconsider their domestic rules to make their laws fully compatible with the CJEU ruling in Case C-401/19.

Neither the Commission's Guidance nor the AG Opinion or the final judgment of the CJEU in C-401/19 played any role in the implementation process in the "early bird" transplants of the CDSMD. Some of the countries purposefully wanted to meet the initial deadline to transpose the Directive in their national laws. For them, these resources, which were published quite late in the process, were simply not available yet. Other countries waited with the implementation until the end of 2021 (whereas some have not implemented the Directive yet), and could reflect these documents during the transposition process.

It is nevertheless hard to decide whether the Guidance, the Opinion and the judgment, read together, can provide for a uniform blueprint for national implementations. Although we have carried out a detailed analysis of the Commission's Guidance, AG Opinion and Court judgement in C-401/19 in Chapter 3, it is important to flag that there are certain conflicting statements in the Commission's and the CJEU's view on the proper method of implementation and substance of the national laws. This is the case especially as regards: (1) the balance of ex ante/ex post filtering mechanisms, where the CJEU stressed that the presence of ex ante safeguards is necessary to respect fundamental rights of end-users; and (2) the "earmarking" requirement. Furthermore, it is clear that the CJEU has prioritized the proper functioning of user rights under art. 17(7) over filtering illegal contents under art. 17(4). The CJEU's judgment thus appears to require that Member States implement the new regime in a fundamental rights compliant manner. As of now, various national solutions seem to be rather limited in terms of the said priority of user rights over content filtering. Early commentators of the CJEU judgment also have differing views on the proper way of transposition of the new regime. This is case, for instance, of the level playing field for Member States to transplant art. 17, that is, whether Member States shall transpose the CDSMD literally or with certain sophistication (flexibility), is viewed differently by e.g., Rosati and Senftleben.⁶⁸³

In sum, except if some novel legislative clarification comes from the competent EU institutions (whereas the review of the Commission's Guidance seems to be inevitable), it is plausible that art. 17

⁶⁸³ Compare Rosati's and Senftleben's view on this. See Eleonora Rosati, 'What Does the CJEU Judgment in the Polish Challenge to Article 17 (C-401/19) Mean for the Transposition and Application of That Provision?' (*The IPKat*, 05 2022) <<https://ipkitten.blogspot.com/2022/05/what-does-cjeu-judgment-in-polish.html>> accessed 4 August 2022. and Senftleben (n 386).

will lead to a number of preliminary references.⁶⁸⁴ These proceedings will most probably affect the interpretation of the newly introduced autonomous concepts of the CDSMD; on the compliance of the national transpositions with the EU law, especially in a fundamental rights dimension; and on the exact scope of user rights per art. 17(7) and (9).⁶⁸⁵

⁶⁸⁴ Quintais, ‘Between Filters and Fundamental Rights: How the Court of Justice Saved Article 17 in C-401/19 - Poland v. Parliament and Council’ (n 382).

⁶⁸⁵ See the discussion above at 3.5 and the literature cited therein.

5. MAPPING OF ONLINE PLATFORMS' STRUCTURES OF COPYRIGHT CONTENT MODERATION⁶⁸⁶

This chapter carries out a comparative mapping of online platforms' structures of copyright content moderation. The Chapter builds on the conceptual framework in Chapter 2, in particular the understanding of copyright content moderation as composed of different structures, which explains our present focus on rules and automated moderation systems. The aim of the chapter is to answer the following empirical sub-research questions (SQR).

- SQR (4): How are copyright content moderation rules organized by platforms into public documents?
- SQR (5) Which copyright content moderation rules do different platforms employ to regulate copyright, and how have they changed over time?
- SQR (6): How do platforms' automated copyright content moderation systems work?

The chapter focuses on our empirical findings and is organised so as tackle each of the three sub-research questions proposed above.

Section 5.1. presents the findings regarding the evolution of kinds of public documents the 15 platforms of our sample published over time to communicate the rules that regulate copyright content moderation.

Sections 5.2.1 and 5.2.2 consider copyright content moderation rules. Section 5.2.1 discusses some of the general characteristics of the rules we identified in relation to all the 15 platforms we examined. We posit that provisions might be grouped according to at least two broad categories: *normative types* (whether they are rights, obligations, expectations, procedures, or principles); and *subjects* (the particular topics they address). This section does not systematically break down rules by platform nor comment on how these kinds have changed over time. However, in offering an overview of all rules found during the analysis of the 15 platforms' documents, it provides a useful panorama about what copyright content moderation provisions *are* and, perhaps more important, *can be*.⁶⁸⁷ In this sense,

⁶⁸⁶ The main authors of this Chapter are João Carlos Magalhães and Christian Katzenbach. Adrian Kopps and Tom Sühr provided research assistance.

⁶⁸⁷ In a previous iteration of this Chapter, we also mentioned a third category: the *directness* of a given rule, that is, whether the rule directly regulates copyright (*direct rules*) or if regulates copyright as an *indirect rule*. The former is characterized by an explicit discursive link with copyright-related topics; they mention terms such as "copyright", "intellectual property", and "license". The latter consists of vaguer provisions that aim to regulate a much wider range of actions, which may or may not be related to copyrights. While we coded documents for this category, we ultimately decide that the current report should focus on direct rules, as indirect rules' meaning is much more diffuse.

these two categories are treated here as both empirical findings and analytical constructs that facilitated our mapping exercise.

Section 5.2.2 tackles the longitudinal analysis of six case studies (Facebook, SoundCloud, PornHub, FanFiction, Diaspora and DTube). We explain how the copyright content moderation rules of these platforms changed over time through the analysis of the two categories unpacked in Section 5.2.1. The section presents and explores descriptive statistics of the presence / absence of these kinds of rules over time and, to grasp discursive aspects, how many times these provisions are mentioned. A more qualitative approach is used to group platforms' rules into particular time periods – what we term *normative periods*. Our strategy was to look for meaningful appearances, continuities, and deletions of these rules, that is, temporal patterns that could suggest the existence of more or less homogenous eras in the development of those six companies' provisions. This approach inevitably entails some simplifications but also offers a synoptic angle to make sense of their copyright content moderation regimes. For the sake of clarity, some rules will be referred as *core rules*, that is, rules that were established in the first years of the platform and remained, in some form and shape, in place until the end of 2020 (the end of our data collection).

Finally, the Discussion section (5.3) argues that the evolution of platforms' copyright content moderation structures seems to be characterized by two sets of processes (complexification and opacification / platformisation and concentration), which have unfolded differently in relation to different platforms.

5.1. HOW ARE COPYRIGHT CONTENT MODERATION RULES ORGANIZED BY PLATFORMS INTO PUBLIC DOCUMENTS?

The first research question of this chapter (SQR4) interrogates the often taken for granted fact that copyright content moderation rules might be published in various kinds of public documents. Table 6 below condenses the information we used to gather to answer this question. It presents which kinds of public documents platforms have published to regulate copyright, the number of versions we collected and analysed and the year in which the first collected version was published. In total, we collected 626 versions, of which 318 were analysed (for more information on this, see Section 2.7.2). Let us reinforce that these should not be taken as encompassing all kinds of documents and versions these platforms have indeed published; we cannot guarantee that dates are accurate across the board, either.

Table 3 Total number of versions collected (“C”) and analysed (“A”) of eight kinds of police-like documents, for mainstream, alternative and specialised platforms⁶⁸⁸

		Terms of Service			Community Guidelines			Copyright Policy			Help pages (copyright)			Principles			Terms of Service of Enforcement System			Music Guidelines			Whitepaper			Total collected versions	Average versions per year	
		Y	C	A	Y	C	A	Y	C	A	Y	C	A	Y	C	A	Y	C	A	Y	C	A	Y	C	A			
Mainstream	Facebook	2004	27	21	2007	47	16	2007	8	8	2007	13	13	2009	3	3	2018	2	2	2018	1	1	Y	C	A	101	5,9	
	YouTube	2005	12	8	2006	27	11	2009	185	0	2007	17	17													241	15,1	
	Twitter	2006	16	12	2009	67	21				2009	7	7													90	6	
	Instagram	2011	3	3	2011	15	11				2012	8	7													26	2,6	
	SoundCloud	2008	7	6	2008	4	4				2010	14	14													25	1,9	
Alternative	Mastodon	2013	1	1	2018	1	1																			2	0,3	
	Pixelfed	2018	2	2	2019	1	1																			3	1	
	Diaspora	2013	1	1																						2	0,3	
	Dtube	2019	1	1																						2019	1	1
	Audius	2020	2	2							2020	1	1													2019	1	4
Specialised	Vimeo	2006	27	20	2008	10	10	2009	6	5	2005	15	15													58	3,4	
	FanFiction	2001	4	4	2005	2	2	2000	1	1																7	0,4	
	Twitch	2009	13	13	2014	10	10	2011	8	8																31	2,6	
	Dribble	2009	9	8	2013	10	10				2017	2	2													21	1,8	
	PornHub	2010	6	5				2007	6	6				2020	1	1											13	1,2
	Total		131	107		194	97		214	28		77	76		5	5		2	2		1	1		2	2	626		

That said, our analysis suggests that, over time, the 15 platforms of our sample have created a total of eight types of documents related to copyright content moderation. Below, we list and describe them.

1. **Terms of Service (or Terms of Use).** Typically, a contractual document written in legal jargon and focused on users' rights and obligations. At least Facebook has a Terms of Service that contemplates their automated copyright content moderation system, Rights Manager.
2. **Community Guidelines.** Commonly written in an informal (as opposed to legal) language, this kind of document tends to emphasise what users should not do.
3. **Particular documents (Copyright Policy, Music Guidelines, Principles).** Some documents appear to be focussed on one topic (e.g., copyright, the posting of music files) or a normative type (e.g., principles).
4. **Help pages** (in some cases, the Copyright Policy was archived by platforms as a Help page). Usually, copyright Help pages contain FAQs (Frequently Asked Questions) and information that is also explained in other documents. Many, however, present information that apparently cannot be found anywhere else in platforms' websites.
5. **Whitepapers.** In the case of two of the alternative platforms we investigated (namely, Audius and DTube), a considerable part of their rules was described in “whitepapers”. These papers appear to be needed because both platforms rely on blockchain technology to monetise and govern content.

⁶⁸⁸ This table includes the total number of versions collected (“C”) and analysed (“A”) of eight kinds of police-like documents, for mainstream, alternative and specialised platforms, with the year (“Y”) in which the first collected version of each kind of document was published and average number of collected versions per year and platform. Source: Authors.

These documents are rarely published at once. Typically, the T&Cs (often labelled as “Terms of Service” or a variation thereof) is the first to appear, often at the very launch of the service. Other documents usually come later, at a pace that varies from company to company, as Table 6 suggests. Facebook is the clearest example of this gradual expansion in the number of kinds of documents. From 2004 to 2007, the company seemingly had only a Terms of Service. Then, in 2007, they published their first versions of their Community Guidelines and Copyright Policy. Two years later, they decided to have a public chart of Principles and, in 2018, published another two documents: one regulating how users can post music and another on its automated copyright content moderation system – Rights Manager. (It might be that users of Instagram, which is owned by Facebook Inc., are also subjected to these specific documents; since we found these documents in URLs of Facebook.com, they appear here as pertaining to this platform.) This pattern is not universal, though. Consider Vimeo, which apparently published a Help page about copyrights even before having a Terms of Service.

Generally, while all services in our sample have published at least one version of a Terms of Service, the presence of other kinds of documents are unevenly distributed among the different kinds of platforms. Mainstream ones (Facebook, YouTube, Twitter, Instagram and SoundCloud) appear to be the best documented group. All have at some point published Community Guidelines and copyright Help pages, and two (Facebook and YouTube) also have a Copyright Policy. Specialised platforms (Vimeo, FanFiction, Dribble, Twitch and PornHub) are not so different. All but one service within this group (PornHub) have a document that is explicitly named Community Guidelines; only Dribble has not published at least one version of their Copyright Policy. Meanwhile, only two (Vimeo and Dribble) have Help pages dedicated to explaining copyright content moderation practices and conditions. The most obvious contrast is between both mainstream and specialised services and alternative ones (Mastodon, Pixelfed, Diaspora, DTube and Audius). Only two of the latter group (Mastodon and Pixelfed) have Community Guidelines and just Audius has a (very brief) Help page about Copyright. At the same time, alternative platforms that use blockchain to decentralize their services (such as Audios and DTube) have published whitepapers, as said above.

Different patterns seem to exist regarding the *number* of unique versions of documents we collected, an information that suggests how plastic platforms’ normative framework has been. In this regard, those three groups of platforms appear to matter less as Facebook, YouTube and Twitter seem to constitute a group of their own. They are, by far, the ones that have changed their T&Cs more often; the figures of other mainstream platforms (Instagram and SoundCloud) are closer to those of specialised ones, which, in turn, are higher than those of alternative services – although not by extraordinarily large margins.

Our data do not allow for any clear explanation of the reasons behind these differences. It seems important though to discuss some hypotheses, and in which ways our findings complicate them. The fact that mainstream platforms' copyright content moderation rules are so richly documented (many kinds of documents, high number of versions) suggests that the number of users might be a factor. The gradual increase in the kinds of documents might also be correlated with the growth of their user base. And yet Instagram, for instance, is not as well document as Vimeo, which has a fraction of users and has not grown so rapidly as Instagram has. Similarly, the age of a given platform is certainly an element to be considered but does not, by itself, determine these discrepancies. For instance: Instagram and Diaspora were both launched in 2010 but the former has published 26 versions of T&Cs-related documents, ten times as much as the latter. Legal regimes are also not so important, as all platforms are quasi global and, thus, essentially subjected to the same set of laws. Another, more credible factor appears to be the kind of content the service focuses on. Platforms that focus on audio-visual content (in our sample, YouTube, Vimeo and Twitch), which are more exposed to copyright legal complaints by powerful traditional media companies and well-organized professional classes (e.g., musicians), are all considerably covered by various kinds of documents and constantly tweaking their T&Cs. The contrast between audio-visual services and text-only platforms, such as FanFiction, is evident.

The next section tackles the second research question of this chapter (SQR5).

5.2. WHICH COPYRIGHT CONTENT MODERATION RULES DO DIFFERENT PLATFORMS EMPLOY TO REGULATE COPYRIGHT, AND HOW HAVE THEY CHANGED OVER TIME?

5.2.1. COPYRIGHT CONTENT MODERATION RULES' TWO MAIN CATEGORIES

Based on our analysis, we propose that platforms' copyright content moderation rules can be studied through at least two broad categories: *normative types* allow for a relational understanding of which actor ought (or not) to do what; *subjects* indicate platforms' assumptions about what copyright content moderation rules (should) regulate. The sections below further explain these terms.

5.2.1.1. NORMATIVE TYPES

The rules we studied aim to engage users and platforms in varying sorts of interaction, with particular levels of prescriptive intensity. The notion of *normative type* tries to capture these elements. Through an inductive process, we have found five *types*, as shown in Table 4 below.

Table 4. Copyright content moderation rules' normative types, their addressees, prescriptive intensities and verbs that best describe them. Source: Authors.

	Rule addressee(s)	Prescriptive intensity	Typical verb	Number
Rights	Platform or users	High	Can / Might	17 (users)
				15 (platforms)
Obligations	Platform or users	High	Must / Will	14 (users)
				18 (platforms)
Expectations	Users	Low	Should	20
Principles	Platform	Low	Aspire	2
Procedures	Platform, users or both	Highest	None	9

Surely, these five normative types, by themselves, are too generic to illuminate how exactly platforms regulate copyright content moderation. Yet, since they enable and constrain users and platforms in certain ways and with different intensity, these categories can be used as broad analytical frames to discuss the uneven regulation of those two actors (users and platforms) over time. Our assumption is that the *balance* between who and how is regulated is, by itself, meaningful. This will become clearer when we explore the balance between obligations, rights, expectations, principles and procedures in the copyright content moderation rules of our six case studies below.

Although we acknowledge the rich theories on many of these types, we chose to adopt a simpler, vernacular conceptualization of them. In what follows, we briefly explain what each normative type means and list the copyright content moderation rules that fall into it, commenting on the most important ones. It is important to note that most rules we identify below logically depend on a set of *unsaid* rules. For instance, if a platform is obliged to remove content, this is premised on platforms' right to do so, and users' obligation to accept this provision. Similarly, if users are given by the platform the right to appeal a copyright-related content removal, it goes without saying that the platform must provide them with the means for such appeal. It is, in principle, possible to unpack and map out all the unsaid rules which support explicit rules. Yet, given our interest in the discursive element of platforms' T&Cs, i.e., in what is openly said, we decided to not do so in this project.

A) RIGHTS

Rights are rules that say what either users or platforms *can* but might not necessarily do; they denote a potentiality. In sociological terms, to have a right is conducive to have the power to act or to refuse an obligation to act, and entails, thus, a particular freedom.

Rights are pervasive and appear central to platforms' copyright content moderation efforts. Some of the most important copyright content moderation rules are users' rights (Table 5). Provisions such as their right to report infringement and appeal copyright-related appear are part of virtually all 15 platforms' core rules – largely, because these rights are also guaranteed by laws such as the DMCA. Other users' rights are surprisingly absent from T&Cs – e.g., users' right to claim fair use, to which we will come back below. Numerically, though, most of the users rights we found are not core rules. They refer to specific platforms / documents – e.g., their right to apply DRM to their content (from Vimeo) and post remixes (SoundCloud) and moderate their own content directly (SoundCloud).

Table 5. List of users' rights regarding copyright content moderation. Source: Authors.

User can apply DRM on their content
Users can appeal copyright-related content removal
Users can appeal copyright-related penalties to account
Users can avoid liability for content removed by platforms
Users can decide on fair use claims
Users can disable download of their content to avoid copyright infringement
Users can earn cryptocurrency by posting their content
Users can moderate copyrighted content directly
Users can post content under fair use
Users can post remixes
Users can report copyright infringement
Users can report fake profiles who reported copyright infringement
Users can repost content that was falsely reported
Users can stop using automated copyright content moderation system at any time
Users can use and assign CC license to their content
Users can use automated content moderation to monetise, block and track access to content
Users can withdraw copyright report

Platforms' rights, on the other hand, do not appear to be as important as users': none of them can be said to be a core rule of platforms. As Table 6 suggests, most of them concern platforms' ability (but

not the obligation) to punish users in case they do not follow other copyright provisions: block account functionalities, deny refunds, disable access to automated content moderation systems, limit the visibility of infringing content, withhold payments etc. The most important penalties, as explained below, are particular kinds of platforms' obligations.

Table 6. List of platforms' rights regarding copyright content moderation. Source: Authors.

The platform can apply DRM technology
The platform can block account functionalities of copyright infringers
The platform can consider the nature of the copyright infringement when deciding on punishment
The platform can decide unilaterally on copyright infringement
The platform can deny refunds to users terminated due to copyright infringers
The platform can disable access to automated copyright content moderation in case of misuse
The platform can disable and suspend accounts who provide false information in copyright disputes
The platform can limit the visibility of content automatically identified as infringing copyright
The platform can modify and discontinue automated copyright content moderation system at any time
The platform can monitor users' compliance with automated copyright content moderation system
The platform can punish users who submit false information during copyright disputes
The platform can require from users evidence of their copyright over content
The platform can require more information during copyright disputes
The platform can restore content if copyright report is false or withdrew
The platform can withhold payments from users if they infringe copyrights

B) OBLIGATIONS

Obligations are rules that either users or platforms *must* comply with; in the case of users, obligations involve the threat of punishment (i.e., having one's account deleted); in the case of platforms, obligations expose them to legitimate accountability. Obligations can be positive (when they say that users/platforms *must* do something) or negative (when they say that users/platforms *must not* do something, a prohibition).

If rights are inherently empowering, obligations can be much more ambiguous. In a way, all obligations (and in particular prohibitions) necessarily represent a limit to users and platforms' freedom to act or refuse acting. At the same time, some positive obligations might well be portrayed as compulsory forms of power over other actors, typically platforms' power over users. In this way, these rules might both constrain and enable certain freedoms. To understand what we mean, consider some of the most important copyright content moderation rules of platforms' T&Cs – platforms' obligations, described

in Table 7. Core rules such as platforms' obligation to disable / suspend accounts and remove / block access to content due to copyright infringement are, in a way, a way of restricting platforms' freedom to act. After all, in principle, they cannot choose *not* to comply with their own obligations, at the risk of even behaving unlawfully. At the same time, these rules also empower platforms to exercise a considerable amount of control over users. Importantly, the wording of this sort of platform obligation is often vague, allowing a lot of wiggle room for companies to decide how exactly they will comply with these provisions.

Table 7. List of platforms' obligations regarding copyright content moderation. Source: Authors.

The platform must assist with copyright violations by third parties
The platform must decide on fair use claims
The platform must disable or suspend accounts due to copyright infringement
The platform must document notices of alleged copyright infringement
The platform must have a fair copyright content moderation system
The platform must have an automated copyright content moderation system that respects copyright exceptions
The platform must keep content online during automated copyright content moderation disputes
The platform must not count restored content as a strike
The platform must not decide unilaterally what is a copyright infringement
The platform must not scan private videos via automated copyright content moderation
The platform must not take copyright exceptions as a reason to restore video
The platform must notify parties during copyright disputes
The platform must publish a report on copyright content moderation
The platform must remove or block access to content due to copyright infringement
The platform must respect and protect copyright
The platform must restore accounts after strikes removal by users
The platform must restore content if report was false or withdrew
The platform must visually mark content taken down due to copyright reports

In contrast, users' obligations (see Table 8), are hardly empowering. They comprise some of the most important core rules we found. E.g., the provision that users must respect copyrights is arguably the central copyright content moderation rule all platforms' have in place, in both presence over time and number of mentions. Sometimes, it appears as a simple "Respect others people's copyrights"; other times, as the positive obligation to post only what the user has created herself or has the explicit rights over to post. Other key provisions include the obligation to be legally liable for infringing others'

copyrights and to provide accurate and complete information during copyright disputes. Other, less important and common users' obligations reflect particular platforms' peculiar aspects and designs – e.g., the idea that, in blockchain-empowered services, users must moderate copyright infringing content (Audius) or that users must use English during copyright disputes (mentioned in a recent Pornhub document).

Table 8. List of users' obligations regarding copyright content moderation. Source: Authors.

Users must act as copyright content moderators
Users must apply to get access to automated copyright content moderation system
Users must be legally entitled to report copyright infringement
Users must be liable for copyright infringement
Users must be solely responsible for enforcing their copyright
Users must become a registered DMCA agent
Users must file a lawsuit against alleged copyright infringer
Users must indemnify the platform regarding copyright infringement
Users must not interfere with anti-copyright infringement features
Users must not teach others how to violate copyright
Users must provide accurate information in copyright disputes
Users must provide the required information in copyright disputes
Users must respect copyrights
Users must use English in copyright disputes

C) EXPECTATIONS

While these two sorts of normative type apply to both platforms and users, others are presented as addressing only one kind of actor. *Expectations*, listed in Table 9 below, refer to actions that, from the perspective of the platform, users *should* but are not obliged to perform. These expectations might appear in terms that can be stronger (as if they were obligations) or weaker (as if they were friendly tips). But none of them can be enforced by the platform, nor lead to any sort of penalty. In this way, expectation is a soft attempt by platforms to direct users' conduct, a kind of incentive that allows for disagreement and agency.

Particular expectations are rarely part of platforms' core rules. More often, they come and go in the history of companies' T&Cs. Some of the most important ones, in terms of frequency of appearance, are those that prompt users to consult a lawyer if they are unsure about some aspect of copyright law,

and those that aim to make users self-reflexive about their own behaviours – such as thinking twice before reporting copyright infringement, claiming fair use and posting risky content.

Table 9. List of platforms' expectations about users regarding copyright content moderation. Source: Authors.

Users should act as copyright content moderators
Users should consult a lawyer on copyright
Users should contact owner of violated copyrighted content
Users should contact the platform if contact with apps on copyright violation doesn't work
Users should contribute their content to public domain
Users should give due credit
Users should officially copyright their content
Users should provide references to original work
Users should react to content instead of violating copyright
Users should report repeat infringers of copyright
Users should report violation of others' copyright
Users should repost content instead of infringe copyright
Users should specify their role in the uploaded content
Users should think twice before appealing copyright infringement report
Users should think twice before claiming fair use
Users should think twice before posting risky content
Users should think twice before reporting copyright infringement
Users should think twice before using CC-licensed content
Users should try to solve copyright dispute independently
Users should use an agent to report violation in case they are concerned with their information being shared with infringer

D) PRINCIPLES

Principles concern platforms' (not users') goals – what companies allegedly *aspire* to do and be. This normative type is often uttered in the form of vague corporate mission statements or promises, making it, in theory at least, easier for companies to deflect accountability when not complying with them. Principles have thus a low prescriptive intensity, and a strong performative component.

Maybe because of their haziness, principles about copyright content moderation in particular were also rare in our dataset: we found only two of them, as shown in Table 10 below. Furthermore, they appear in less than 20 documents of only three platforms – Facebook, Vimeo and SoundCloud.

Table 10. List of platforms' principles regarding copyright content moderation. Source: Authors.

The platform aspires to balance copyright and freedom of expression
The platform aspires to protect intellectual rights

E) PROCEDURES

Lastly, there are what we call *procedures*. Ostensibly, this normative type regards what happens and will happen in the relationship between platforms and users, as if platforms were describing unavoidable facts of their functioning, material possibilities and impossibilities, or external impositions (e.g., state regulation) which they did not create and cannot, thus, be accountable for – a key difference between this type and obligations.

Despite the neutral terms in which they are depicted, however, procedures – or companies' decision to mention them in public documents – are premised on and foster some notion of un/desirability. In fact, they are arguably the most intense normative type of the five we discussed so far, as they do not contemplate, discursively at least, the possibility of disobedience.

Procedures might address users, platforms or both, and be both positive (i.e., describe what *is* done) and negative (i.e., what *is not* done). But as Table 11 below makes clear, most procedures we found regard platforms' behaviour, ranging from rules regarding their functionalities (e.g., companies' choice not to employ DRM technologies) to content moderation practices (e.g., whether platforms use human moderators and automated copyright content moderation systems) to legal consequences of infringing actions.

Table 11. List of procedures regarding copyright content moderation. Source: Authors.

The platform cannot remove a content from another website or app
The platform does not employ DRM
The platform does not monetise copyrighted content
The platform does not remove or suspend copyright infringing content posted in it
The platform employs automated copyright content moderation
The platform employs human content moderation
The platform is not liable for copyright-related issues
The platform publicises information about copyright disputes
Users who falsely report copyright infringement risk suffering legal consequences

5.2.1.2. SUBJECTS

The second category we used to parse our rules concern the *subject* of platforms' copyright content moderation, that is, *what* these provisions actually regulate (see Table 12). This component might be more straightforward than normative types but their definition is not self-evident. Example: when platforms tell users to not violate others' copyright, they are essentially attempting to control users' posting behaviour. At the same time, in doing so, they are also trying to lead users to, themselves, enforce copyright. In view of this Chapter's goals, we took the second interpretative angle and clustered rules according to which area of copyright content moderation they refer to. Doing so allowed us to understand, generally, how companies define what their regulatory practice is, and chart the ways in which their concerns with copyright shifted across the years. Our analysis uncovered five macro subjects that copyright content moderation rules refer to: enforcement and, somewhat unexpectedly, transparency and monetisation.

Table 12. List of copyright content moderation rules' subjects. Source: Authors

Macro Subjects	Specific Subjects	Number of rules ⁶⁸⁹
Copyright enforcement	Infringement avoidance	18
	Manual content removal	12
	Automated moderation	10
	Disputes	23
	Penalties	19
	Exceptions	8
Transparency		3
Monetisation		3

The following sections describe both macro and specific subjects, along which the same rules listed in the previous section are reorganized.

A) COPYRIGHT ENFORCEMENT

⁶⁸⁹ Please note that one rule, on the use of automated content moderation system for monetisation purposes, appears in two subjects, "automated moderation" and "monetization", thus the discrepancy between the total numbers in Table xx and the total number of rules, which is 95.

Perhaps unsurprisingly given our interest in content moderation, most rules we identified (90/95) refer to copyright enforcement – vernacularly defined here as acts that aim to compel actors to comply with a provision. Yet, enforcement in itself is a multi-faceted subject, encompassing several specific subjects. We inductively further categorised those rules into five specific subjects, which roughly describe different enforcement techniques: *infringement avoidance*, *manual content moderation*, *automated content moderation*, *disputes*, *penalties*, and *exceptions*. We detail them in the following sections.

INFRINGEMENT AVOIDANCE

A central enforcement technique involves platforms' attempts to avoid any instance of copyright infringement in the first place (see Table 13).

Table 13. List of platforms' infringement avoidance rules. Source: Authors.

The platform aspires to balance copyright and freedom of expression
The platform aspires to protect intellectual rights
The platform can apply DRM technology
The platform does not employ DRM
The platform must respect and protect copyright
User can apply DRM on their content
Users can disable download of their content to avoid copyright infringement
Users must be solely responsible for enforcing their copyright
Users must not teach others how to violate copyright
Users must not interfere with anti-copyright infringement features
Users must respect copyrights
Users should give due credit
Users should officially copyright their content
Users should provide references to original work
Users should react to content instead of violating copyright
Users should repost content instead of infringe copyright
Users should specify their role in the uploaded content
Users should think twice before posting risky content

Of the 18 infringement avoidance rules we identified, 13 focus on users. Typically, these rules aim to prompt a sort of ex-ante self-governance. That is, users should read the rule and consciously moderate their own actions, without any intervention from the platform. Thus, the dominance of expectations

and users' obligations. The central provision of this subgroup is the one that establishes that users must not infringe others' copyrights. But the avoidance of infringement has other, more subtle facets – e.g., reflecting on the decision to post risky content, refrain from telling others how to violate copyright, avoid mistakes that can lead to unnecessary infringements etc. Some rules appear to be misguided in face of copyright law, such as the one that incentivizes users to give due credit, published by Mastodon and Dribble. Even if the goal is to create a friendly, honest relationship between, it is obvious that credit, by itself, does not avoid or offset copyright violations.

Whilst infringement avoidance tends to put the burden of regulation on the user, and leave the platform in a mostly passive and arguably comfortable role, some rules listed in Table 16 refer to the platform. Many platforms say explicitly that they also must ensure that they will not engage in infringing behaviour – a provision that is echoed in principles such as “The platform aspires to protect intellectual rights”. Other provisions refer to, e.g., DRM technologies, which aims to make copyright infringement materially impossible and is cited only in a set of documents published by Vimeo.

MANUAL CONTENT REMOVAL

Another important set of provisions address the manual removal of infringing content (see Table 14). For the sake of clarification, the expression “manual” is used here in contrast to the moderation systems centred on algorithmic fingerprinting – or “automated moderation”, the topic of the next section. Much of the “manual” work we refer to is actually dependent on various computational interfaces and processes.

Table 14. List of platforms' manual content removal rules. Source: Authors.

The platform can decide unilaterally on copyright infringement
The platform can restore content if copyright report is false or withdrew
The platform cannot remove a content from another website or app
The platform does not remove or suspend copyright infringing content posted in it
The platform employs human content moderation
The platform must not decide unilaterally what is a copyright infringement
The platform must remove or block access to content due to copyright infringement
The platform must restore content if report was false or withdrew
Users can moderate copyrighted content directly
Users must act as copyright content moderators
Users should act as copyright content moderators
Users must become a registered DMCA agent

If infringement avoidance focusses on users, content removal is, essentially, an activity carried out by platforms. The primary rule listed in Table 14 is the one that enables companies to remove infringing content, which is a core rule of various platforms of in sample and a requirement of the American law (DMCA). Other provisions concern procedures (such as the use of human moderators, and the material limitations of platforms' content removal capacity) and the provision on who, after all, can decide on copyright infringement – which platforms usually describe as involving not only them. The rules directed to users in this list are particular to platforms that have a decentralized content moderation system, such as DTube. In them, users are indeed expected to remove content, in which case they might need to even register as DMCA agents.

AUTOMATED MODERATION

Automated moderation rules are the rules of the algorithmic copyright enforcement systems that we will scrutinize in much more detail in Section 5.2.3. The provisions listed in Table 15 indicate the basic obligations, rights and procedures related to those systems. The central one is the very information that platforms employ automated copyright content moderation, something that is far from pervasive, as we will explain below. These rules point the capabilities and limitations of these systems, and the conditions that platforms and, chiefly, users must follow when operating them and within them. It is interesting to note how generic these rules are usually conveyed – e.g., they rarely explain how exactly their protocols are executed. This is representative of the deep opacity of these system, a point to which we return in this Chapter's Discussion Section 5.3.

Table 15. List of platforms' automated moderation rules. Source: Authors.

The platform can disable access to automated copyright content moderation in case of misuse
The platform can modify and discontinue automated copyright content moderation system at any time
The platform can monitor users' compliance with automated copyright content moderation system
The platform employs automated copyright content moderation
The platform must have a fair copyright content moderation system
The platform must have an automated copyright content moderation system that respects copyright exceptions
The platform must not scan private videos via automated copyright content moderation
Users can stop using automated copyright content moderation system at any time
Users can use automated content moderation to monetise, block and track access to content
Users must apply to get access to automated copyright content moderation system

COPYRIGHT DISPUTES

We define a copyright dispute the process that initiates when a user reports copyright infringement or challenges a content removal decision – either manual or automatic. This process is detailed in the law and much of the rules listed in Table 16 mirror such legal provisions, resulting in a fairly common set of obligations (e.g., platforms need to notify all parties, users must provide all the required information) and rights (the very possibility of reporting infringement, or companies' ability to restore content after a dispute is solved or abandoned). Other provisions are not part of any law, however.

They range from PornHub's peculiar requirement that users had to file their claims in English (which was patently detrimental to non-English speakers and did not last long) to the expectation that users should try to solve copyright issues without resorting to any formalized reporting / appeal protocol, as well as thinking twice before starting a dispute. This set of rules has become particularly prominent in large mainstream platforms' frameworks and seems to be an attempt to, more than simplify quarrels, reduce companies' responsibility over disputes that are costly in terms of human, financial and computational resources.

Table 16. List of copyright dispute rules. Source: Authors.

The platform can require from users evidence of their copyright over content
The platform can require more information during copyright disputes
The platform must assist with copyright violations by third parties
The platform must decide on fair use claims
The platform must keep content online during automated copyright content moderation disputes
The platform must notify parties during copyright disputes
Users can appeal copyright-related content removal
Users can report copyright infringement
Users can repost content that was falsely reported
Users can withdraw copyright report
Users must be legally entitled to report copyright infringement
Users must file a lawsuit against alleged copyright infringer
Users must provide accurate information in copyright disputes
Users must provide the required information in copyright disputes
Users must use English in copyright disputes
Users should consult a lawyer on copyright
Users should contact owner of violated copyrighted content
Users should contact the platform if contact with apps on copyright violation doesn't work
Users should report violation of others' copyright
Users should think twice before appealing copyright infringement report

Users should think twice before reporting copyright infringement
Users should try to solve copyright dispute independently
Users should use an agent to report violation in case they are concerned with their information being shared with infringer

PENALTIES

Finally, copyright enforcement is heavily dependent on a variety of *penalties*, listed in Table 17. We categorise as penalties any provision related to the punishments that users are subject to when they infringe copyrights or copyright-related rules. Penalties are similar to infringement avoidance provisions, as both aim to lead actors to refrain from infringing rules. Differently from infringement avoidance provisions, though, penalties specify the consequences (and conditions) of doing so.

Table 17. List of penalties rules. Source: Authors.

The platform can block account functionalities of copyright infringers
The platform can consider the nature of the copyright infringement when deciding on punishment
The platform can deny refunds to users terminated due to copyright infringers
The platform can disable and suspend accounts who provide false information in copyright disputes
The platform can limit the visibility of content automatically identified as infringing copyright
The platform can punish users who submit false information during copyright disputes
The platform can withhold payments from users if they infringe copyrights
The platform is not liable for copyright-related issues
The platform must disable or suspend accounts due to copyright infringement
The platform must not count restored content as a strike
The platform must restore accounts after strikes removal by users
Users can appeal copyright-related penalties to account
Users can avoid liability for content removed by platforms
Users can report fake profiles who reported copyright infringement
Users must be liable for copyright infringement
Users must indemnify the platform regarding copyright infringement
Users should report repeat infringers of copyright
Users who falsely report copyright infringement risk suffering legal consequences
Users who infringe others' copyrights risk suffering legal consequences

The provisions listed in Table 18 demonstrates how rich and central penalties can be platforms' copyright regulatory framework. They go much beyond the disablement of the account of repeat infringers, or the legal consequences that posting infringing content may entail, and encompass other, softer forms of punishments: blocking functionalities of the account, limiting visibility of users' content, and denying refunds (in case of platforms that offer paid services, such as SoundCloud). While defined as platforms' obligations, these rules materialize companies' power over users. Other provisions point to the restriction this power is subjected to. But these are less common and themselves limited. E.g., users are sometimes told they have the right to appeal the deletion of their account; but they are rarely – if ever – told whether they can appeal the reduction of their content's visibility.

COPYRIGHT "EXCEPTIONS"

While copyright "exceptions"⁶⁹⁰ are inherently linked with both manual and automated moderation rules, setting it apart from those subjects enables us to see in more detail the remarkable lack of interest that essentially all platforms in our sample appear to have in them – with the notable exceptions of Vimeo and SoundCloud, Twitter, Twitch, and YouTube.

Table 18. List of copyright exceptions rules. Source: Authors.

The platform must not take copyright exceptions as a reason to restore video
Users can decide on fair use claims
Users can post content under fair use
Users can post remixes
Users can use and assign CC license to their content
Users should contribute their content to public domain
Users should think twice before claiming fair use
Users should think twice before using CC-licensed content

The perhaps most important aspect of the provisions listed in Table 18 is the lack of any rule directly concerning platforms. For instance, no document we analysed say explicitly that platforms have the obligation to take into consideration exceptions, or that this is done at all.

⁶⁹⁰ "Exceptions" in the context of this section of the empirical research is a term used in the non-legal technical sense to refer to situations in which copyright is made somehow more flexible in the context of the operation of a platform's content moderation systems.

To be sure, many platforms do discuss fair use, particularly in their Help pages. Interestingly, they rarely do so in a normative manner. Typically, they explain what fair use is, in a distanced, scholarly manner, and point to some external resources so as users can “learn” more about it. But only rarely these explanations encompass any right, obligation, or procedure. The suggestion that fair use can be claimed by users is, at best, indirect.

When platforms do discuss copyright exception rules, these concern users. Users’ right to claim fair use might appear self-evident – but of the platforms we examined, only Twitter, YouTube and Vimeo, in some of their documents, appear to have mentioned it. The possibility of using and posting content under a Creative Content license appears only in YouTube and Vimeo’s documents; of publishing remixes is cited only by SoundCloud; and the suggestion that users contribute their content to the public domain appeared once in a 2006 version of Twitter’s Terms of Service.

TRANSPARENCY

Since copyright content moderation is, by definition, a form of rule enforcement, we did not anticipate that its regulation would involve provisions that do not regard enforcement of copyright per se. Yet, as we discovered, the rules around two other subjects, transparency and monetisation, are also important to understand how platforms regulate copyright content moderation, as this one and the next sections explain.

Transparency rules concern the provisions platforms follow to make information about their content moderation decisions somehow public (see Table 19). These rules are rare and have been adopted by few platforms. They comport two, indirect regulatory dimensions.

Some provisions seem to enable external actors (policymakers, researchers) to assess platforms’ removal actions and, at least in theory, hold them accountable. That is the case of Facebook, which is the only platform in our sample that publishes a report with data on how it processes copyright reports, take-downs and appeals. Twitter, Dribble and Vimeo say they send information about disputes to public databases, such as Lumen. Some PornHub’s documents claim the company “document(s)” notices of copyright infringement – albeit it is hard to understand what this sentence means, and no further clarification is given.

Another regulatory dimension of transparency rules, present in Twitter’s Terms of Service, is oriented towards users. Per this provision, the platform obliges themselves to mark content that have been taken down due to copyright infringement. While this is not said explicitly in the T&Cs, it is reasonable to assume that users’ who see this visual mark will be reminded of platforms’ ability to take down infringing content and, potentially, refrain from posting copyrighted content themselves.

Table 19. List of transparency rules. Source: Authors.

The platform must document notices of alleged copyright infringement

The platform must publish a report on copyright content moderation

The platform must visually mark content taken down due to copyright reports

The platform publicises information about copyright disputes

MONETISATION

Monetisation of content is the practice through which platforms share with some users the revenue generated by their content – regardless of who is posting it. There appear to exist two main models of monetisation among the sample of platforms we examined, as rules listed in Table 20 indicate. One is offered by YouTube, Facebook and PornHub, and made possible by their automated copyright enforcement systems – which, as Section 5.3 will explain, is often quite selective as to which user can benefit from it. In this case, economic resources are generated by ads linked with the content. We found at least one platform (Vimeo) that explicitly say that they do not monetise content. The other model is offered by platforms whose governance of content is done via blockchain, e.g., DTube and Audius, in which users can earn cryptocurrencies for posting their content, among other actions. Monetisation in this case is more complex, as platforms' cryptocurrencies might not have value outside of the platform.

Either way, monetisation may help regulate copyright content moderation as it can, in principle, disincentivise disputes and incentivize the upload of copyright-protected material by various users. That is, copyright owners might, instead of reporting infringement, allow others to post their content so as to receive the revenues that such use might generate – or post their content so as to earn cryptocurrencies. This regulatory consequence fits well most platforms' business model, which depends on and benefits from the free circulation of content.

Table 20. List of monetisation rules. Source: Authors.

The platform does not monetise copyrighted content

Users can use automated content moderation to monetise, block and track access to content

Users can earn cryptocurrency by posting their content

5.2.2.CASE STUDIES

After presenting the empirical findings related to all 15 platforms in our sample, we consider in the next sections the six case studies that we selected to carry out a longitudinal and comparative examination of the evolution of their copyright content moderation rules: Facebook, SoundCloud, PornHub, FanFiction, Diaspora, and DTube. The analyses of each of these six platforms contain (1) an overview of the evolution of the number of kinds of documents, rules and mentions to rules (2) an examination of the evolution of the relative proportions of rules *per normative type*; (3) a description of the evolution of the relative proportions of rules *per subject* and, finally, (4) a more detailed exploration of platforms' *normative periods*.

5.2.2.1. FACEBOOK

A) OVERVIEW

Of our six case studies, Facebook is the most complex, if one considers the sheer number of kinds of documents, rules and mentions to rules, and how they evolved between their launch, in 2004, and the end of 2020.

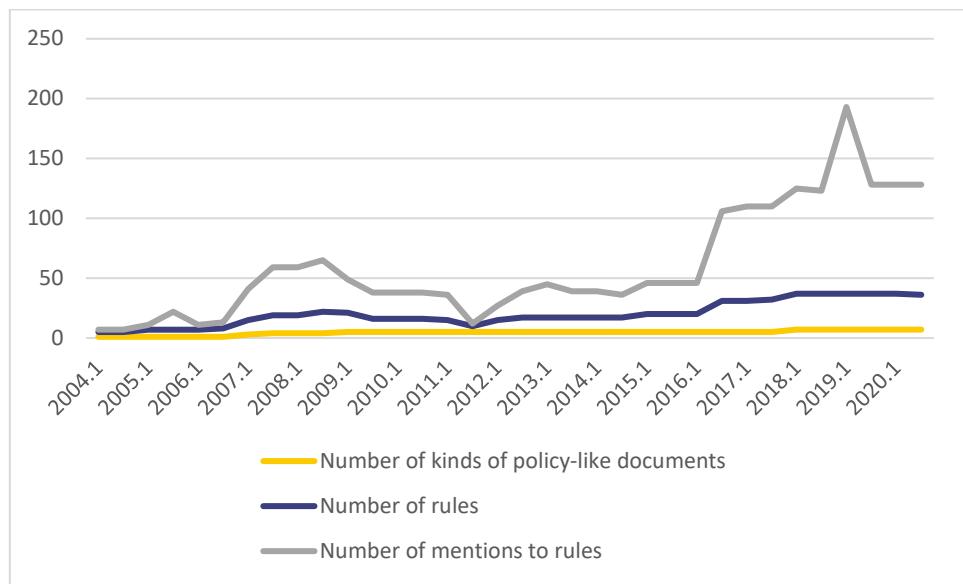


Figure 7. Number of Facebook's kinds of public documents, rules and mentions to rules related to copyright content moderation, 2004-2020. Source: Authors

As Figure 7 above suggests, these indicators all increased immensely and, mostly, steadily. The quantity of kinds of documents went from one to seven; of rules, from five to 36; and of mentions, from seven to 128. Logically, these numbers are roughly correlated: more documents will likely

contain more rules which will likely contain more mentions, a pattern that, to some degree, holds true for all platforms. But their evolution is not wholly symmetrical. It seems that, over time, Facebook decided to increase the *discursive* emphasis on copyright content moderation (thus, the jump in the number of mentions since 2016), which was not accompanied by a comparable growth in the number of rules or documents.

B) EVOLUTION OF FACEBOOK'S COPYRIGHT CONTENT MODERATION RULES, PER THEIR NORMATIVE TYPE

Figure 8 displays the evolution of the numbers of Facebook's content moderation rules, clustered according to their respective normative type. This chart suggests an acute fragmentation. The platform's normative framework, initially heavily reliant on one kind of rule (users' obligation), started in 2006 already to encompass other normative types and, by the end of 2020 almost evenly split into six kinds of provisions, each of which with a proportion between 20% and 10% of the total rules.

Within this fragmentation, some developments are quite clear and highly consequential. First, the fairly consistent decrease in the proportion of user's obligations, and the increase in the percentage of platforms' obligations. In 2004, when Facebook launched, copyright content moderation concerned primarily users: around 60% of all provisions described their obligations, e.g., not to violate others' copyright. This number decreased sharply until 2011, moderately in 2012 and has since remained mostly stable, fluctuating between 24% and 16%, as of December 2020. The percentage of platforms' obligations went through a somewhat similar, if inverted, process: rapid increase until 2011, slight decrease in 2012 and then relative stability, oscillating between 30% (2015/2016) and 20% (2020). It is not that users' burdens have factually decreased – in absolute terms, their obligations in fact went from 3 to 5; but the growth of platform's obligations was relatively much more pronounced, going from none to seven in around 16 years.

The evolution of the platform's rights is also noticeable. Until 2016, the documents we examined seemingly mentioned no such kind of rule whatsoever. In that year, however, four rights of platforms were included, mostly around the platform's ability – but not obligation – to impose certain penalties to copyright infringers. In 2018, this number increased to seven, making this kind of rule one of the most prevalent normative types in Facebook's framework by the end of 2020.

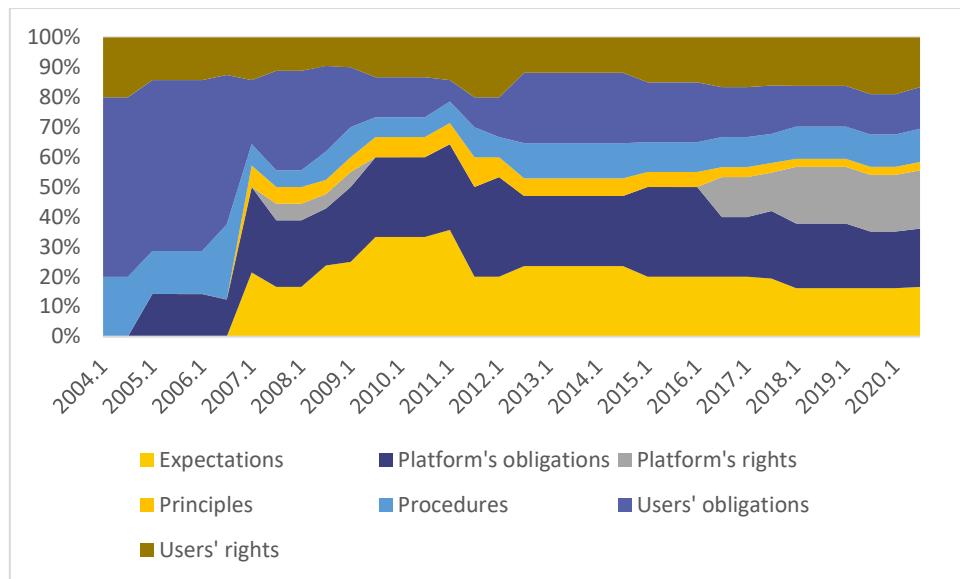


Figure 8. Proportions of Facebook's copyright content moderation rules, grouped according to their normative type, 2004–2020. Source: Authors.

The discursive development of Facebook's T&Cs is not quite the same as this normative evolution. As showed in Figure 9, the decrease of mentions to users' obligations seems to be less severe than that of the proportion of this kind of provision. In fact, the inversion between users' and platform's obligation did not quite materialize. At the end of 2020, mentions to users' obligations accounted for 30% of all mentions; the proportion of platform's duties amounted to 25%. Something similar can be said of the increase of platforms' rights, whose mentions increased in a much milder way than the sheer number of rules of this kind.

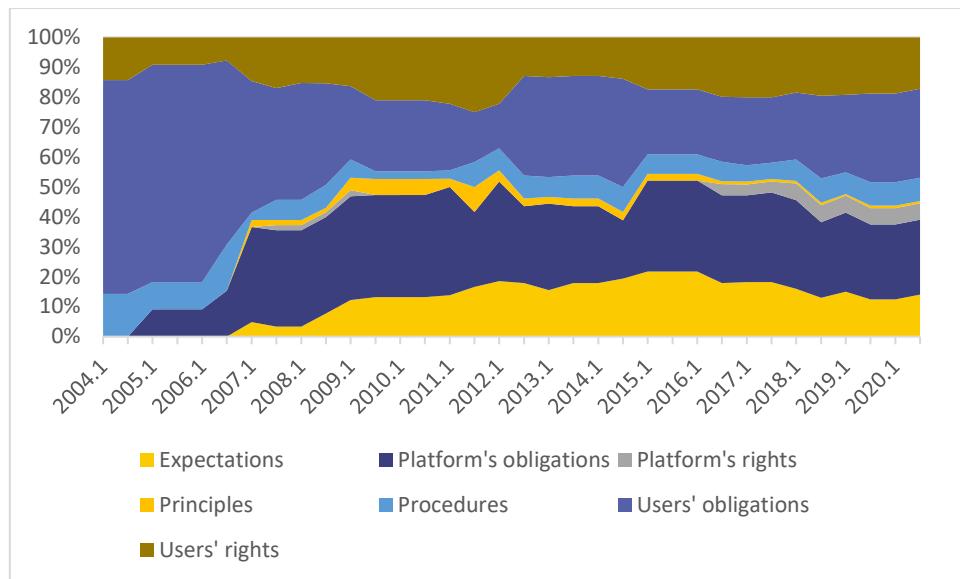


Figure 9. Proportions of mentions to Facebook's copyright content moderation rules, grouped according to their normative type, 2004-2020. Source: Authors.

C) EVOLUTION OF FACEBOOK'S COPYRIGHT CONTENT MODERATION RULES, PER THEIR SUBJECT

If we turn our attention to the subject of Facebook's copyright content moderation rules, we can also identify a sort of fragmentation. Figure 10 shows that, from 2004 to 2007, Facebook's framework concerned, mainly, infringement avoidance and, to a lesser extent, penalties and copyright disputes; then, in 2007, the organization published manual content removal provisions; and, in 2016, several other subjects were included, such as automated moderation, monetisation and transparency. Overall, the clearest development appears to concern the relative decrease in the proportion of rules on infringement avoidance, particularly since 2012, and the emergence of provisions that depend on the active intervention of the platform – such as, again, automated content moderation. To be clear, this discrepancy regards mainly how the number of different rules increased at different paces, since Facebook's infringement avoidance provisions actually went from three to four in 2016.

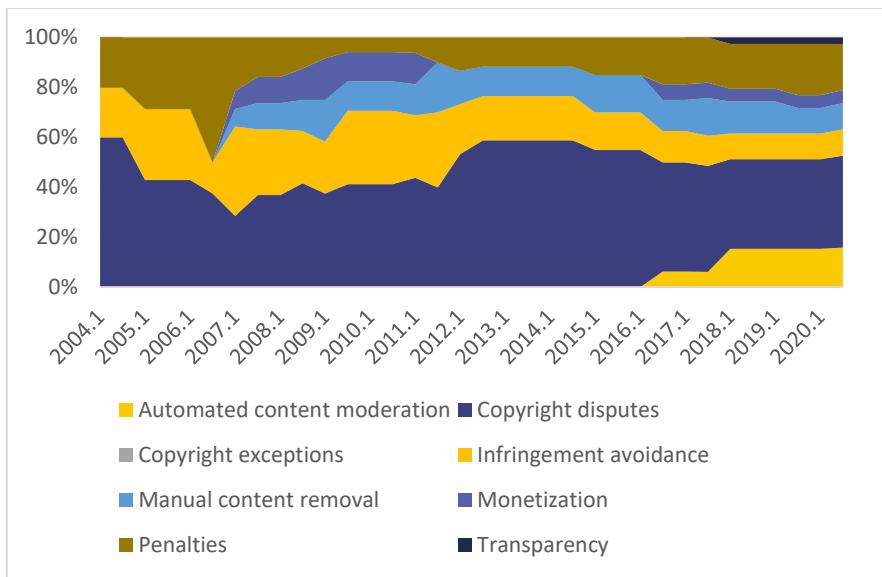


Figure 10. Proportions of Facebook's copyright content moderation rules, grouped according to their subject, 2004-2020. Source: Authors.

This tendency is strongly reinforced by Figure 11, on the percentage of mentions to rules. Mentions to infringement avoidance rules went from 36% (2011) to 12% (2020) of the total. At the same time, there is a sizable increase in the number of mentions to disputes, which almost doubled between 2011 (36%) and 2020 (64%), for instance. It suggests that not only Facebook became seemingly more concerned with disputes but also more concerned with *communicating* disputes provisions to users.

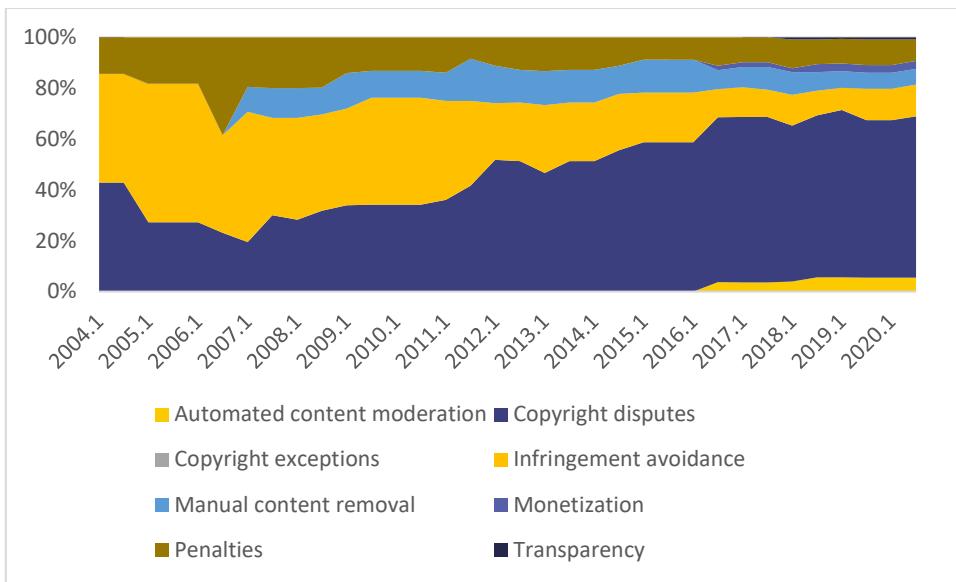


Figure 11. Proportion of mentions to Facebook's copyright content moderation rules, grouped according to their subject, 2004-2020. Source: Authors.

D) FACEBOOK'S NORMATIVE PERIODS

We move now into an examination of Facebook's various normative periods, which can be roughly divided into four moments, as described below.

2004-2006

In their first two years, Facebook's copyright content moderation rules were few (7, in total), and regarded, essentially, users' behaviour, as Table 21 indicates. According to them, both users and platforms had to avoid infringing copyrights, disputes were possible but only lightly specified, infringers could be potentially penalised – but in courts, not by the platform itself. Discursive focus was clearly on users' obligation to respect copyright: the number of mentions to this provision totalled around half – or more, depending on the semester – of all mentions.

Table 21. Facebook's content moderation rules with the number of mentions to them, 2004-2006. Source: Authors.

	2004.1				2006.1
Copyright disputes					
Users can report copyright infringement	1	1	1	2	1
Users must be legally entitled to report copyright infringement	1	1	1	2	1
Users must provide accurate information in copyright disputes	1	1	1	2	1
Infringement avoidance					
The platform must respect and protect copyright	0	0	1	2	1
Users must respect copyrights	3	3	5	10	5
Penalties					
Users must indemnify the platform regarding copyright infringement	0	0	1	2	1
Users who falsely report copyright infringement risk suffering legal consequences	1	1	1	2	1

What was *not* said in the documents we analysed is as important as the provisions that appear in them. It is remarkable that, for two years, Facebook's Terms of Services (their only document at the time) did not mention responsibilities such as of deleting infringing content, allowing for appeals of removal decisions and deleting the account of repeat infringers. In fact, no rule addressed how and

whether infringing content could be deleted. It might be that, in the background, the company followed these legal prescriptions – but they made an intentional decision to leave these restrictive measures outside of their public documents.

2006-2009

In the next three years, as Facebook grew into a major social media platform, their copyright content moderation rules went through a consolidation phase. In it, the platform finished publishing all their seven core provisions, highlighted in light orange in Table 22. In addition to users' right to report infringement of their copyright – and theirs and the platform's need to respect others' copyright⁶⁹¹ – Facebook fleshed out their initial bare-bones regime with four other provisions that would remain in place until at least the end of 2020. Regarding disputes, the company finally said that users could appeal content removal decisions and started mentioning that they would have to notify users' during disputes; as to content removal, their duty to delete infringing content firstly appeared in 2007, it seems, together with their obligation of deleting accounts of repeat infringers. At the same time, some rules disappeared for years from the documents we examined and cannot in our view to be defined as part of the platform's core framework – e.g., that users must be legally entitled to report copyright infringement, or that users must provide the required information in copyright disputes.

Table 22. Facebook's content moderation rules, with the number of mentions to them and core rules highlighted in light orange, 2006-2009. Source: Authors.

	2006.1	2006.2					2009.1
Copyright disputes							
The platform must notify parties during copyright disputes	0	0	1	3	3	3	1
Users can appeal copyright-related content removal	0	0	3	7	6	6	5
Users can report copyright infringement	1	1	3	3	3	4	3
Users must be legally entitled to report copyright infringement	1	1	0	0	0	0	0
Users must file a lawsuit against alleged copyright infringer	0	0	0	1	1	1	1
Users must provide accurate information in copyright disputes	1	1	0	1	1	1	1

⁶⁹¹ We assume that "The platform must respect and protect copyright" is a core rule of Facebook, despite being enigmatically deleted for a brief moment in the second semester of 2006.

Users must provide the required information in copyright disputes	0	0	0	1	1	1	0
Users should consult a lawyer on copyright	0	0	0	0	0	1	2
Users should contact owner of violated copyrighted content	0	0	1	1	1	1	1
Users should contact the platform if contact with apps on copyright violation doesn't work	0	0	0	0	0	1	1
Users should try to solve copyright dispute independently	0	0	0	0	0	1	1
Infringement avoidance							
Users must not interfere with anti-copyright infringement features	0	0	1	1	1	1	1
The platform aspires to protect intellectual rights	0	0	1	1	1	1	2
The platform must respect and protect copyright	1	0	2	3	3	5	6
Users must respect copyrights	5	5	16	17	18	17	9
Users should think twice before posting risky content	0	0	1	1	1	1	1
Manual content removal							
The platform can restore content if report is false or withdrew	0	0	0	1	1	1	1
The platform cannot remove a content from another website or app	0	0	0	0	0	1	1
The platform must remove or block access to content due to copyright infringement	0	0	4	6	6	5	4
The platform must restore content if report was false or withdrew	0	0	0	0	0	0	1
Penalties							
The platform must disable or suspend accounts due to copyright infringement	0	2	6	7	7	8	5
Users must indemnify the platform regarding copyright infringement	1	1	1	1	1	1	0
Users who falsely report copyright infringement risk suffering legal consequences	1	1	0	4	4	4	2
Users who infringe others' copyrights risk suffering legal consequences	0	1	1	0	0	0	0

By consolidation we also mean the establishment of a more specific framework, which explained in much more detail, and through five different kinds of documents, how the platform would proceed in case of copyright infringement. Consider provisions regarding disputes, whose number of rules went from three, in 2006, to ten, in 2009. By then, copyright owners were informed that they would have to be ready to file a lawsuit if they wanted to stay in a dispute after a take-down appeal, that content could be restored in case of a successful challenge to a complaint, that such challenge was indeed possible, among other rules. This is not to mention the addition of several expectations, which aimed to further modulate user's view and approach to disagreements over copyright. An important one is the idea that users should try to avoid formal disputes by trying to solve problems amongst themselves, which would become a mainstay of the platform's framework. In terms of penalties, the focus changed from the public/legal to the private/administrative sphere, as provisions about indemnification stopped being mentioned and Facebook's duty to disable infringers' accounts became discursively prominent. Another area that was dramatically expanded – or, rather, that began to be publicly discussed at all – concerned the manual removal of content. By 2009, the platform had determined both their powers (to remove and restore content⁶⁹²) and limitations (to remove content hosted by third parties, such as apps). Infringement avoidance was considerably beefed up as well, with the addition of new users' obligations (of not trying to interfere with anti-copyright infringement features) and expectations (to exert caution before posting). Overall, five years after their launch, while users still were the main subject of copyright infringement rules, the role of Facebook itself was more pronounced – a process that would increase in the next years.

2009-2016

Between and 2016, Facebook's copyright content moderation normative framework was to some degree simplified, without however undergoing any major changes in comparison with the preceding period, as shown in Table 23.

Table 23. Facebook's content moderation rules, with the number of mentions to them, 2009-2016. Source: Authors.

	2009.1	2009.2													2016.1
Copyright disputes															

⁶⁹² The action of restoring content was described as both a right and an obligation.

The platform must assist with copyright violations by third parties	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0
The platform must notify parties during copyright disputes	1	1	1	1	1	0	2	1	1	1	1	1	1	5	5	5			
Users can appeal copyright-related content removal	5	5	5	5	5	2	2	2	3	2	2	2	2	2	2	2	2	2	2
Users can report copyright infringement	3	3	3	3	3	1	3	3	3	3	3	3	3	5	5	5			
Users can repost content that was falsely reported	0	0	0	0	0	0	0	0	0	0	0	0	0	1	1	1			
Users must be legally entitled to report copyright infringement	0	0	0	0	0	0	1	2	2	2	2	2	2	2	2	2	2	2	2
Users must file a lawsuit against alleged copyright infringer	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Users must provide accurate information in copyright disputes	1	0	0	0	0	0	0	3	3	3	3	3	3	1	1	1			
Users must provide the required information in copyright disputes	0	0	0	0	0	0	0	2	2	2	2	2	2	1	1	1			
Users should consult a lawyer on copyright	2	1	1	1	1	0	0	3	3	3	3	3	3	3	3	3	3	3	3
Users should contact owner of violated copyrighted content	1	1	1	1	1	0	0	1	1	1	1	1	1	1	1	1	1	1	1
Users should contact the platform if contact with apps on copyright violation doesn't work	1	1	1	1	1	1	2	1	1	1	1	1	1	1	1	1	1	1	1
Users should report violation of others' copyright	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0
Users should try to solve copyright dispute independently	1	1	1	1	1	1	2	2	2	2	2	2	2	5	5	5			
Infringement avoidance																			
Users must not interfere with anti-copyright infringement features	1	1	1	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

The platform aspires to protect intellectual rights	2	2	2	2	1	1	1	1	1	1	1	1	1	1	1	1	1
The platform must respect and protect copyright	6	4	4	4	4	1	2	2	3	2	2	1	2	2	2		
Users must respect copyrights	9	8	8	8	8	2	3	6	8	6	6	6	6	6	6	6	6
Users should think twice before posting risky content	1	1	1	1	1	0	0	0	0	0	0	0	0	0	0	0	0
Manual content removal																	
The platform can restore content if copyright report is false or withdraw	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
The platform cannot remove a content from another website or app	1	1	1	1	1	1	2	1	1	1	1	1	1	2	2	2	
The platform must remove or block access to content due to copyright infringement	4	3	3	3	3	1	2	4	5	4	4	3	3	3	3	3	3
The platform must restore content if report was false or withdrew	1	0	0	0	0	0	0	0	0	0	0	0	1	1	1	1	
Penalties																	
The platform must disable or suspend accounts due to copyright infringement	5	5	5	5	5	1	2	3	4	3	3	2	2	2	2	2	2
The platform must not count restored content as a strike	0	0	0	0	0	0	0	0	0	0	0	0	1	1	1	1	
Users can report fake profiles who reported copyright infringement	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0
Users who falsely report copyright infringement risk suffering legal consequences	2	0	0	0	0	0	0	2	2	2	2	2	1	1	1	1	

Simplification affected infringement avoidance and manual content removal rules. In regard to both subjects, the company discarded – or at least stopped discussing – some less relevant rules, such as users' obligation to not interfere with anti-copyright infringement features and Facebook's right to restore content after the resolution of a dispute, an element that ended up covered by a similar

obligation. There also occurred a further specification of copyright disputes, and in particular user's obligations. Three of these rules ("Users must be legally entitled to report copyright infringement", "Users must provide accurate information in copyright disputes" and "Users must provide the required information in copyright disputes") reappeared in 2012 and did not leave Facebook's T&Cs until December 2020, at least. They reinstated key barriers for initiating a dispute that the analysed documents had stopped discussing at different points between 2007 and 2009.

Indeed, this period highlights the puzzling fluctuations of the platform's framework. Some provisions, as the ones we mentioned or platform's duty to restore previously removed content, come and go; other are cited only once, such as users' right to report profiles used to report copyright infringement, platform's obligation to assist users' when third parties illegally use their content, and the expectation that users should report the infringement of others' copyright. It is unclear what one should make of these movements.

2016-2020

Between the second semester of 2016 to the end of 2020, Facebook's copyright content moderation rules underwent a second profound transformation, comparable to that which happened between 2006 and 2009, as it can be noted in Table 24.

Table 24. Facebook's content moderation rules, with the number of mentions to them, 2016-2020. Source: Authors.

	2016.1	2016.2								2020.2
Automated moderation										
The platform can disable access to automated copyright content moderation in case of misuse	0	0	0	0	1	1	1	1	1	1
The platform can modify and discontinue automated copyright content moderation system at any time	0	0	0	0	1	1	1	1	1	1
The platform can monitor users' compliance with automated copyright content moderation system	0	0	0	0	1	1	1	1	1	1
The platform employs automated copyright content moderation	0	3	3	3	3	4	7	4	4	4
Users can stop using automated copyright content moderation system at any time	0	0	0	0	1	1	1	1	1	1

Users can use automated content moderation to monetise, block and track access to content	0	1	1	1	1	2	3	2	2	2
Copyright disputes										
The platform must notify parties during copyright disputes	5	15	15	15	15	14	26	16	16	17
Users can appeal copyright-related content removal	2	6	6	7	6	5	9	4	4	3
Users can report copyright infringement	5	10	12	11	12	13	19	13	13	13
Users can repost content that was falsely reported	1	2	2	2	2	2	3	2	2	2
Users can withdraw copyright report	0	2	1	1	1	1	2	1	1	1
Users must be legally entitled to report copyright infringement	2	4	6	6	7	7	10	6	6	6
Users must file a lawsuit against alleged copyright infringer	0	1	1	1	1	1	2	1	1	1
Users must provide accurate information in copyright disputes	1	4	4	4	6	8	11	8	8	8
Users must provide the required information in copyright disputes	1	7	6	6	6	12	18	13	13	13
Users should consult a lawyer on copyright	3	6	6	5	5	3	6	3	3	4
Users should contact owner of violated copyrighted content	1	2	3	3	3	3	5	3	3	3
Users should contact the platform if contact with apps on copyright violation doesn't work	1	1	1	1	1	1	2	1	1	1
Users should think twice before reporting copyright infringement	0	1	1	1	1	1	2	1	1	1
Users should try to solve copyright dispute independently	5	8	8	9	9	7	12	7	7	8
Infringement avoidance										
The platform aspires to protect intellectual rights	1	1	1	1	1	1	1	1	1	1
The platform must respect and protect copyright	2	3	3	3	5	4	5	4	4	4
Users must respect copyrights	6	7	8	7	8	6	9	10	10	10

Users should think twice before posting risky content	0	1	1	1	1	1	2	1	1	1
Manual content removal										
The platform can restore content if copyright report is false or withdraw	0	1	1	1	1	1	2	1	1	1
The platform cannot remove a content from another website or app	2	1	1	1	1	1	1	1	1	1
The platform must not decide unilaterally what is a copyright infringement	0	0	0	1	1	1	1	0	0	0
The platform must remove or block access to content due to copyright infringement	3	4	5	5	6	5	7	5	5	5
The platform must restore content if report was false or withdrew	1	3	3	3	3	2	4	2	2	2
Penalties										
The platform can block account functionalities of copyright infringers	0	1	1	1	1	1	2	1	1	1
The platform can consider the nature of the copyright infringement when deciding on punishment	0	1	1	1	1	1	2	1	1	1
The platform can punish users who submit false information during copyright disputes	0	1	1	1	1	1	2	1	1	1
The platform is not liable for copyright-related issues	0	0	0	0	2	2	2	2	2	2
The platform must disable or suspend accounts due to copyright infringement	2	3	3	3	3	2	3	2	2	1
The platform must not count restored content as a strike	1	3	3	3	3	2	4	2	2	2
Users can appeal copyright-related penalties to account	0	0	0	0	0	0	0	1	1	0
Users who falsely report copyright infringement risk suffering legal consequences	1	3	2	2	3	3	4	3	3	3

Two main developments marked this period. Firstly, the introduction of automated copyright content moderation. Facebook's Rights Manager system (which will be examined in detail in Section 5.3) was initially implemented in 2016, when, logically, users' right to benefit from it (what includes monetising

their content) was first published as a rule. For two years, this was the only normative element on Rights Manager present in the documents we examined. Over time, namely in 2018, the platform published various other rules that regulate the system, which were communicated mainly through the Rights Manager's own Terms of Service. Most of these other provisions were platform's rights: to disable access to the Rights Manager copyright content systems in case of misuse; modify and discontinue the system at any time; and monitor users' compliance with automated copyright content moderation system. These provisions empowered Facebook to curb and restrict Rights Manager usage via direct intervention. Surely, it is unlikely that, from 2016 to 2018, Facebook were unable to perform such intervention, as the seeming lack of *public* rules would suggest. Nonetheless, in finally making these rights explicit, the platform made them into possible grounds for accountability *and* prepared the legal terrain for scaling up Rights Manager.

The second main development concerned a widespread increase in the number of rules. The area that experienced the most intense increase densification was that of penalties – three (20016) to seven (2020) rules. These new rules represented an amplification and sophistication of the tools at the disposal of Facebook to punish users in the context of copyright violation. More than simply deleting the account of infringers, they could block account functionalities of copyright infringers and go after those who submit false information in disputes, while allowing themselves some leeway to decide on the exact nature of the punishment. They also reaffirmed that they should not be considered liable in case of copyright violation and mentioned users' right to appeal these penalties. It should be foregrounded, however, that this right was seemingly in place for just one year, in total. The other new rules appear to be less relevant and were either reinstatements of provisions that had been previously abandoned (e.g., "Users must file a lawsuit against alleged copyright infringer") or mentioned once and then dropped (e.g., "The platform must not decide unilaterally what is a copyright infringement").

Overall, when we compare Facebook's initial framework in 2004 with the one in place after 16 years, it becomes clear the astounding normative densification and sophistication that the platform's copyright content moderation provisions experienced. In this sense, Facebook is, among our six case studies, the most extreme example of what we will term *complexification*. Yet, this process affected all platforms we examined, including SoundCloud, the next case study.

5.2.2.2. SOUNDCLLOUD

A) OVERVIEW

The evolution of SoundCloud's copyright content moderation framework (see Figure 12) is comparable to that of Facebook: all indicators increased since the platform's launch, in the second semester of 2007 – but the growth of the number of mentions to rules has been much more intense. In fact, the number of kinds of public documents remained mostly stable, going from none in the first months of the platform, to two in 2008 and then three in 2011. Rules increased more than five-fold, starting at five and reaching 27 in 2018. Mentions to these provisions, in contrast, grew almost incessantly since 2008, and, in the second part of 2015, experienced an explosion. That is when SoundCloud's Help pages ballooned into a web of pages and subpages. Running as long as a 30-page document, in total, these pages repeatedly mention the same rules dozens of times – thus, the outstanding discrepancy between the number of mentions and of rules.

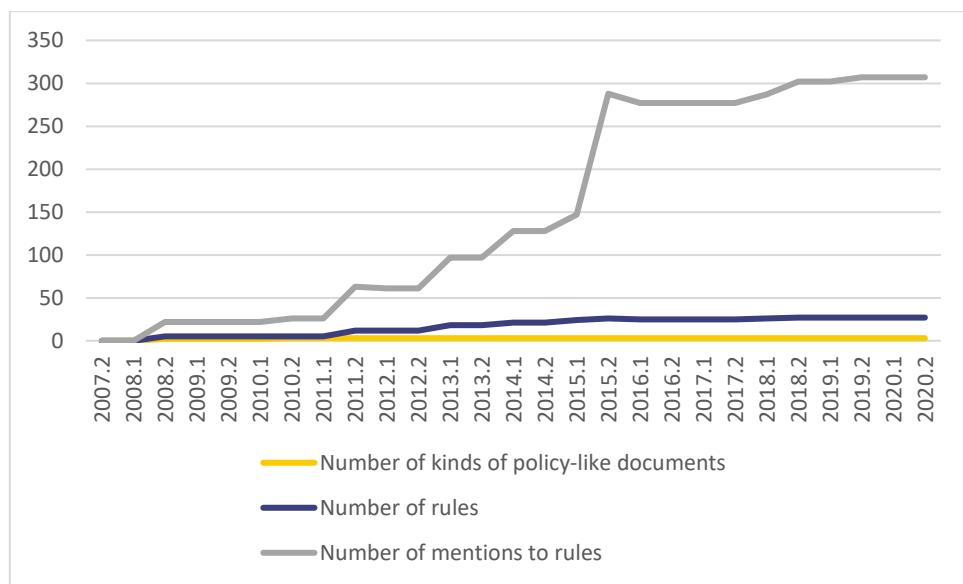


Figure 12. Number of SoundCloud's kinds of public documents, rules and mentions to rules related to copyright content moderation, 2007-2020. Source: Authors.

B) EVOLUTION OF SOUNDCLOUD'S COPYRIGHT CONTENT MODERATION RULES, PER THEIR NORMATIVE TYPE

While less convoluted, the evolution of the relative proportion of SoundCloud's copyright content moderation rules, when categorized per their normative type, is strikingly analogous to that of Facebook, as both seem to be marked by fragmentation and the progressive inversion of the main normative actor.

In their first three years, SoundCloud's framework was dominated by users' obligation (40%), with users' rights, procedures and expectations equally splitting the rest (see Figure 13). By 2015, however,

the platform's collection of rules had been considerably diversified, and contained all seven kinds of normative types, with a very strong focus on the platform's obligations (which first appeared only in 2011, though) and the percentage of users' obligations limited to only 15%. The increase in the proportion of platform's rights (again, similarly to Facebook) and the introduction of a principle in 2015 are also notable movements. From that year until 2020, at least, the picture remained mostly stable.

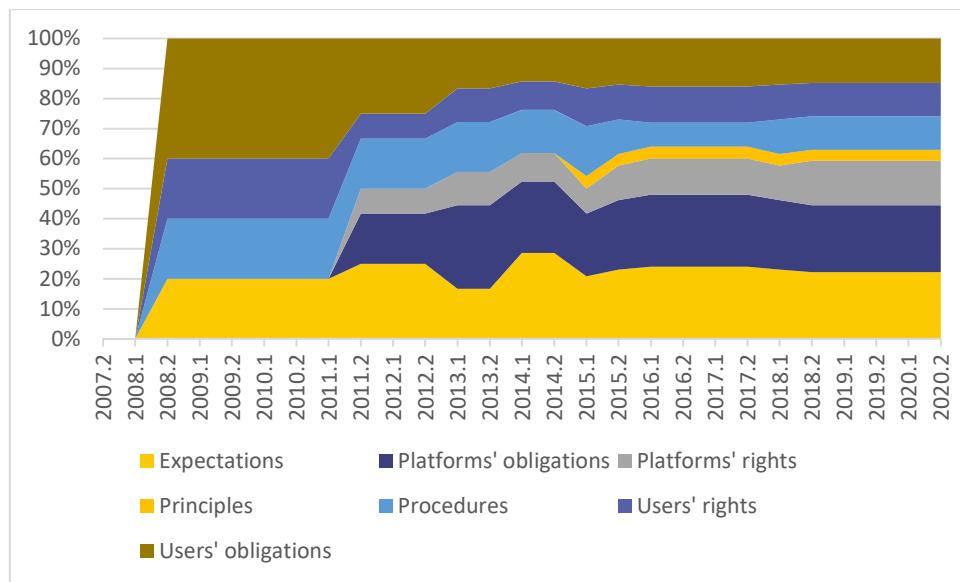


Figure 13. Proportions of SoundCloud's copyright content moderation rules, grouped according to their normative type, 2007-2020.

Source: Authors.

There is a substantial discrepancy between this normative development and the discursive emphasis SoundCloud's T&Cs put on different types of rules. Figure 14 demonstrates that the percentage of mentions to user's obligations remained overwhelmingly (and constantly) dominant. This is chiefly explained by the repetitions of users' duty to respect others' copyright: since 2015, this specific provision has been cited at least 55 times per year in the documents we analysed. Surely, from 2011 on, platforms' obligations started being cited more and more – but the increase in their proportion ate up mostly those of expectations and users' rights.

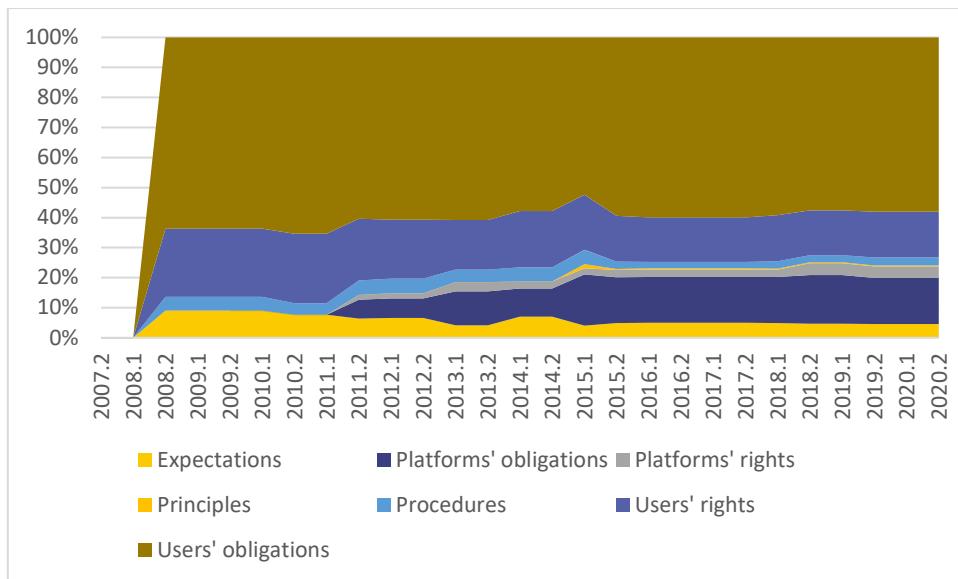


Figure 14. Proportions of mentions to SoundCloud's copyright content moderation rules, grouped according to their normative type, 2007-2020. Source: Authors.

C) EVOLUTION OF SOUNDCLOUD'S COPYRIGHT CONTENT MODERATION RULES, PER THEIR SUBJECT

Fragmentation also marked the evolution of the subjects covered by SoundCloud's copyright content moderation rules – another development that resembles that of Facebook. Figure 15 shows that, in their start, the platform's provisions regulated just disputes between users (50%) and the penalties that infringers could be subjected to (50%). In 2013, this framework already included both manual and automated moderation rules. At the end of 2020, no subject received more than 31% of the total provisions. In terms of emphasis, the introduction of new rules happened at the expense of the proportion of penalties and, mostly, copyright disputes – which however remained the dominant subject throughout the years we examined.

Discursively, the picture is quite similar, as it can be seen in Figure 16. The perhaps main difference regards the prevalence of mentions to copyright disputes provisions, which has been higher and decreased less intensely than that of the number of rules about the same subject. The opposite can be said about penalties, whose proportion of mentions was smaller and decreased more acutely than that of the relative number of provisions about it.

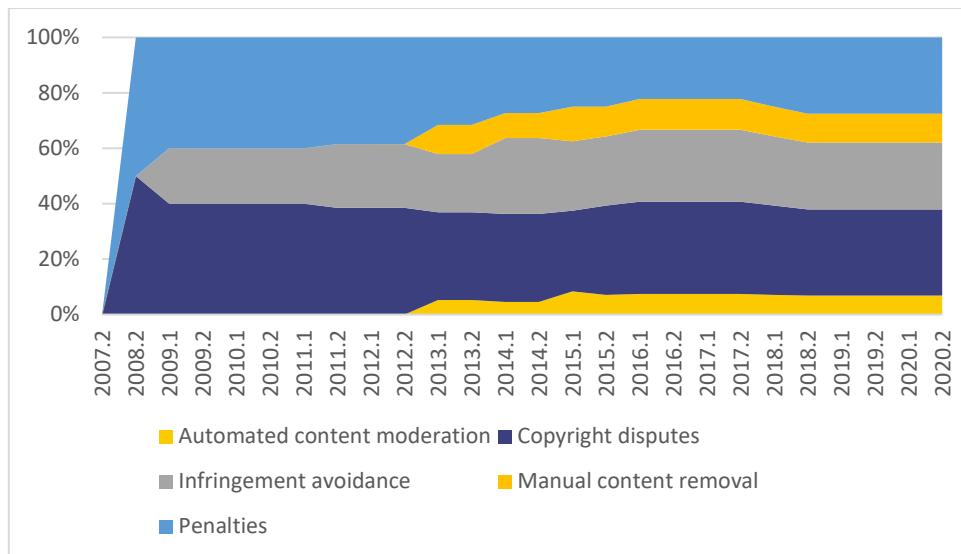


Figure 15. Proportions of SoundCloud's copyright content moderation rules, grouped according to their subject, 2007-2020. Source: Authors.

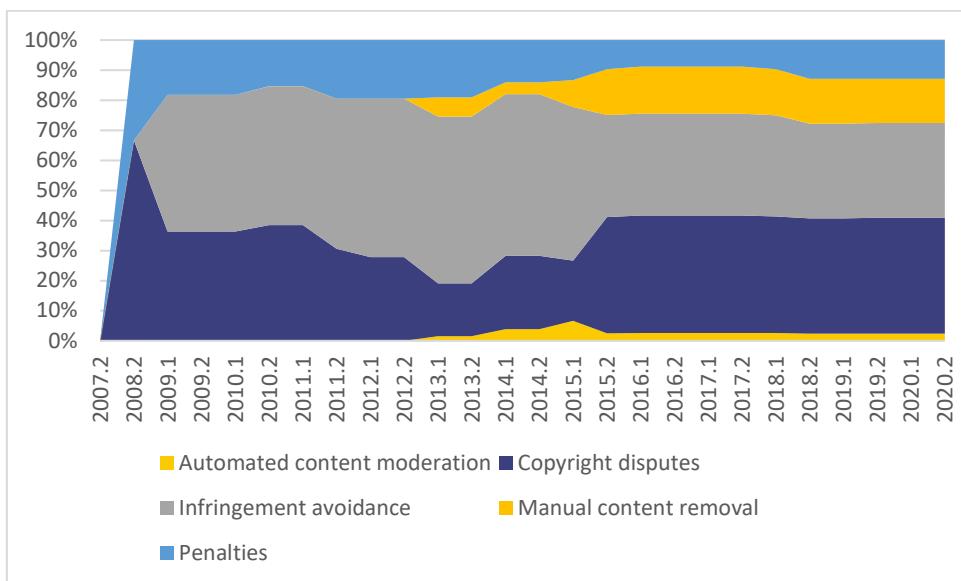


Figure 16. Proportions of mentions to SoundCloud's copyright content moderation rules, grouped according to their subject, 2007-2020. Source: Authors.

While the subjects of normative framework of both Facebook's and SoundCloud (the two mainstream platforms we are analysing in-depth) multiplied over time, this fragmentation is less intense in the case of the latter – which up to 2020 had no provision on monetisation and transparency, for instance. Likewise, SoundCloud did not diminish their discursive emphasis on infringement avoidance as much as Facebook apparently.

D) SOUNDCLOUD'S NORMATIVE PERIODS

Our analysis suggests that SoundCloud's copyright content moderation rules experienced three normative periods, which are detailed in the next sections.

2007-2011

SoundCloud's first normative period can be said to last more than three years (see Table 25). A notable aspect of SoundCloud's initial set of copyright content moderation rules is, in fact, its absence. In their first months, the platform simply had no publicly-available document – evidence, perhaps, of the amateurish nature of the platform in its beginning, something that was not uncommon in the Internet of the 2000s. When a framework was finally published, the focus appeared to be on the possibility of reporting copyright infringement and the legal consequences that users could experience if they lied during these disputes. While SoundCloud stated in that very first version that users would have to indemnify the platform if they infringed others' copyright, it is somewhat surprising that it took some time for SoundCloud to say explicitly that users had to respect others' copyright and could face legal trouble if they did not.

Table 25. SoundCloud's copyright content moderation rules, with the number of mentions to them, 2007-2011. Source: Authors.

	2007.2						2011.1
Copyright disputes							
Users can report copyright infringement	0	2	2	2	2	3	3
Users should report violation of others' copyright	0	2	2	2	2	2	2
Infringement avoidance							
Users must respect copyrights	0	0	5	5	5	6	6
Penalties							
Users must indemnify the platform regarding copyright infringement	0	1	1	1	1	1	1
Users who falsely report copyright infringement risk suffering legal consequences	0	1	1	1	0	0	0
Users who infringe others' copyrights risk suffering legal consequences	0	0	0	0	1	1	1

2011 – 2014

As with Facebook, however, years after the launch of the service, most of what can be said to be SoundCloud's core rules were still not mentioned. The consolidation of their framework would only take place between the second semester of 2011 and the first part of 2014, as seen in Table 26 below.

Table 26. SoundCloud's copyright content moderation rules, with the number of mentions to rules and the core rules highlighted in light orange, 2011-2014. Source: Authors.

	2011.1	2011.2					2014.1
Automated moderation							
The platform employs automated copyright content moderation	0	0	0	0	1	1	3
Copyright disputes							
The platform must notify parties during copyright disputes	0	2	2	2	2	2	4
Users can appeal copyright-related content removal	0	0	0	0	1	1	5
Users can report copyright infringement	3	5	4	4	4	4	4
Users must provide accurate information in copyright disputes	0	1	1	1	1	1	1
Users should consult a lawyer on copyright	0	2	2	2	2	2	3
Users should contact owner of violated copyrighted content	0	1	1	1	1	1	1
Users should report violation of others' copyright	2	0	0	0	0	0	0
Users should think twice before appealing copyright infringement report	0	0	0	0	0	0	1
Infringement avoidance							
The platform must respect and protect copyright	0	0	0	0	1	1	2
Users must not interfere with anti-copyright infringement features	0	2	2	2	2	2	2
Users must respect copyrights	6	15	#	#	#	#	34
Users should officially copyright their content	0	0	0	0	0	0	1
Users should repost content instead of infringe copyright	0	0	0	0	0	0	1
Users should think twice before posting risky content	0	1	1	1	1	1	2

Manual content removal							
The platform must remove or block access to content due to copyright infringement	0	0	0	0	3	3	1
The platform must restore content if report was false or withdrew	0	0	0	0	1	1	2
Penalties							
The platform can deny refunds to users terminated due to copyright infringers	0	0	0	0	2	2	2
The platform can disable and suspend accounts who provide false information in copyright disputes	0	1	1	1	1	1	1
The platform must disable or suspend accounts due to copyright infringement	0	2	2	2	4	4	3
Users must indemnify the platform regarding copyright infringement	1	1	1	1	2	2	2
Users who falsely report copyright infringement risk suffering legal consequences	0	2	2	2	2	2	2
Users who infringe others' copyrights risk suffering legal consequences	1	1	1	1	1	1	1

In this period, SoundCloud instituted key DMCA-based rules in an even more comprehensive manner than Facebook, regarding reporting, manual removals, notifications, and appeals. SoundCloud's consolidation period is considerably different from that of Facebook in other regards as well. Firstly, the platform started using an automated moderation system, seemingly provided by Audible Magic, relatively early – seven years after their launch, almost half the time that it took for Facebook to put their Rights Manager in place. Indeed, SoundCloud and YouTube are the only services in our sample that have the existence of an automated copyright enforcement system as a core provision of their framework. Another difference regards SoundCloud's relatively high number of core rules (16, or more than half of all the provisions that were in place at the end of 2020), which is an indication of the fact that their framework has been considerably stable, certainly more than that of Facebook (only seven out of a total of Facebook's 38 rules can be considered to be core ones, we concluded).

Generally, SoundCloud's copyright content moderation framework is unique in its focus on penalties. Not only they include a diverse range of kinds of punishments (from account disabling to the possibility of denying refunds to infringers – the platform offers a set of paid functionalities) but most their penalties appear to be core rules (Later, they would drop the reminder about the legal consequences of posting others' content but quickly reinstated it). It is also interesting that SoundCloud appears to

be quite keen on expectations, something relatively rare in the services we examined. This soft form of regulation encompasses two of their core rules.

2014-2020

After consolidating their core rules, SoundCloud spent six years, from 2014 to 2020, substantiating and sophisticating their framework. This third normative period, represented in Table 27, essentially built upon and expanded the previous one. That is, differently from Facebook, SoundCloud seems to have rarely abandoned rules permanently or for long time. Dropped provisions were largely minor, such as the expectation that users should think twice before appealing an infringement report.

The 2014-2020 expansion affected, mostly, copyright disputes. Of the three new rules of this kind, two seemingly aimed to restrict reporting and appeals. From 2014 on, users could only report the infringement of their own copyright and had to provide all the required information during a dispute. Surely, since these provisions are in line with the DMCA's, it is highly likely that most users were already obliged to, in practice, comply with them. That SoundCloud decided to make this explicit is meaningful, though.

Other additions seemed to make the platform's copyright content moderation more nuanced but did not make SoundCloud's framework fundamentally different. Consider the platform duty of having a fair automated moderation system – a vague provision which is likely a response to users' complaints against eventual mistakes made by their Audible Magic-based system. In terms of penalties, they gave themselves the right to also block account functionalities of infringers, and apply some kind of penalty to users who submit false information during disputes.

One movement that might be highlighted regards two provisions that attempted to decrease the burden of SoundCloud in the regulation of copyright content moderation. One, the expectation that, as much as possible, users should try to solve their disputes independently – similarly to Facebook. The other, the creation of functionalities that allowed users to directly take down content that they judged to be theirs.

Table 27. SoundCloud's copyright content moderation rules, with the number of mentions to them, 2016-2020. Source: Authors.

	2014.1	2014.2																2020.2
Automated moderation																		
The platform employs automated copyright content moderation	3	3	3	4	4	4	4	4	4	4	4	4	4	4	4	4	4	

The platform must have a fair copyright content moderation system	0	0	3	1	1	1	1	1	1	1	1	1	1	1
Copyright disputes														
The platform must notify parties during copyright disputes	4	4	5	7	6	6	6	6	7	9	9	8	8	8
Users can appeal copyright-related content removal	5	5	3	15	15	15	15	15	15	16	16	16	16	16
Users can report copyright infringement	4	4	5	10	10	10	10	10	10	10	10	10	10	10
Users must be legally entitled to report copyright infringement	0	0	1	5	5	5	5	5	5	5	5	7	7	7
Users must provide accurate information in copyright disputes	1	1	1	8	8	8	8	8	8	9	9	9	9	9
Users must provide the required information in copyright disputes	0	0	0	22	22	22	22	22	22	22	22	22	22	22
Users should consult a lawyer on copyright	3	3	2	6	6	6	6	6	6	6	6	6	6	6
Users should contact owner of violated copyrighted content	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Users should think twice before appealing copyright infringement report	1	1	0	0	0	0	0	0	0	0	0	0	0	0
Users should try to solve copyright dispute independently	0	0	0	2	2	2	2	2	2	2	2	2	2	2
Infringement avoidance														
The platform aspires to protect intellectual rights	0	0	2	1	1	1	1	1	1	1	1	1	1	1
The platform must respect and protect copyright	2	2	7	2	2	2	2	2	2	2	2	2	2	2
Users must not interfere with anti-copyright infringement features	2	2	2	2	2	2	2	2	2	2	2	2	2	2

Users must respect copyrights	34	34	32	57	55	55	55	55	56	56	56	56	56	56
Users should officially copyright their content	1	1	1	2	2	2	2	2	2	2	2	2	2	2
Users should repost content instead of infringe copyright	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Users should think twice before posting risky content	2	2	1	2	2	2	2	2	2	2	2	2	2	2
Manual content removal														
The platform employs human content moderation	0	0	1	0	0	0	0	0	0	0	0	0	0	0
The platform must remove or block access to content due to copyright infringement	1	1	6	11	11	11	11	11	11	12	12	12	12	12
The platform must restore content if report was false or withdrew	2	2	0	17	17	17	17	17	17	17	17	17	17	17
Users can moderate copyrighted content directly	0	0	1	2	2	2	2	2	2	2	2	2	2	2
Penalties														
The platform can block account functionalities of copyright infringers	0	0	0	0	0	0	0	0	0	3	3	3	3	3
The platform can deny refunds to users terminated due to copyright infringers	2	2	2	3	3	3	3	3	3	4	4	4	4	4
The platform can disable and suspend accounts who provide false information in copyright disputes	1	1	1	3	3	3	3	3	3	4	4	4	4	4
The platform can punish users who submit false information during copyright disputes	0	0	0	1	1	1	1	1	1	1	1	1	1	1
The platform must disable or suspend accounts due to copyright infringement	3	3	4	6	5	5	5	5	6	8	8	7	7	7

Users must indemnify the platform regarding copyright infringement	2	2	2	3	3	3	3	3	3	4	4	4	4	4
Users who falsely report copyright infringement risk suffering legal consequences	2	2	2	2	2	2	2	2	2	2	2	3	3	3
Users who infringe others' copyrights risk suffering legal consequences	1	1	1	1	0	0	0	0	1	1	1	1	1	1

Having examined our two case studies of mainstream platforms, the chapter moves into the analysis of specialised platforms, beginning by PornHub.

5.2.2.3. PORNHUB

A) OVERVIEW

As with Facebook and SoundCloud's, PornHub's copyright content moderation framework has become increasingly more complex: after starting seemingly without a public document, the platform saw their numbers of kinds of documents, rules and mentions to rules increase progressively from the launch of the platform, in 2007, until the end of 2020 (see Figure 17). Differently from the mainstream platforms we have just explored, though, PornHub's overall numbers are considerably smaller than those of Facebook and, in regards to mentions, of SoundCloud as well.

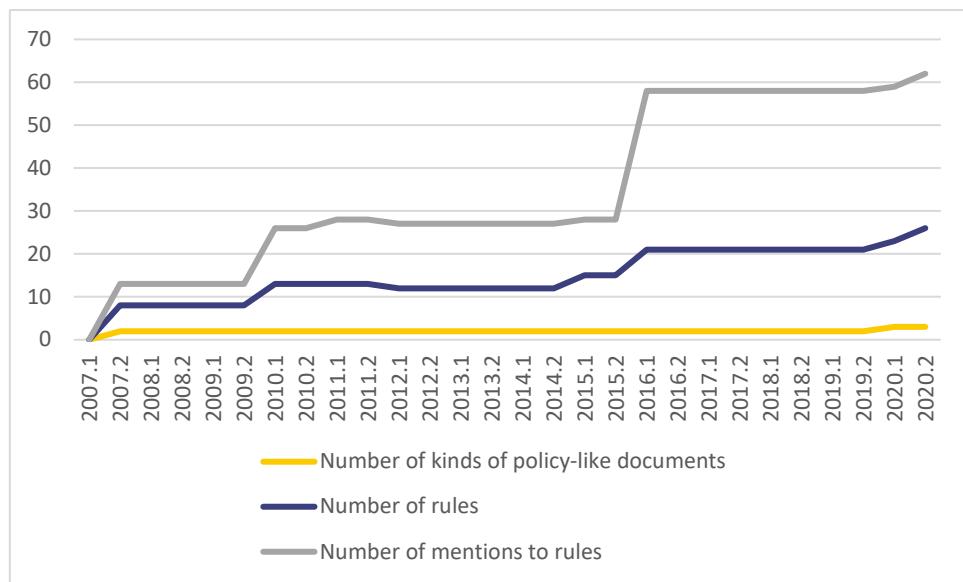


Figure 17. Number of PornHub's kinds of public documents, rules and mentions related to copyright content moderation, 2007-2020.

Source: Authors.

B) EVOLUTION OF PORNHUB'S COPYRIGHT CONTENT MODERATION RULES, PER THEIR NORMATIVE TYPE

Figure 18 indicates, again, a process of fragmentation – but with a decrease in the proportion of platform's obligations. PornHub's first copyright content moderation framework was considerably dominated by platform's obligations (it adopted both moderations and penalties right away), with users' obligations and procedures having smaller shares. While the absolute number of these normative types would either increase (for both forms of obligations) or remain the same (procedures), their percentage in relation to the whole collection of rules decreased significantly over time as the proportion of platforms and users' rights surged. By 2020, PornHub's framework was a mix of six different types, with users' obligations the most present one (31%). The appearance and then increase in the proportion of expectations points to other strategies used by the platform to regulate users' actions.

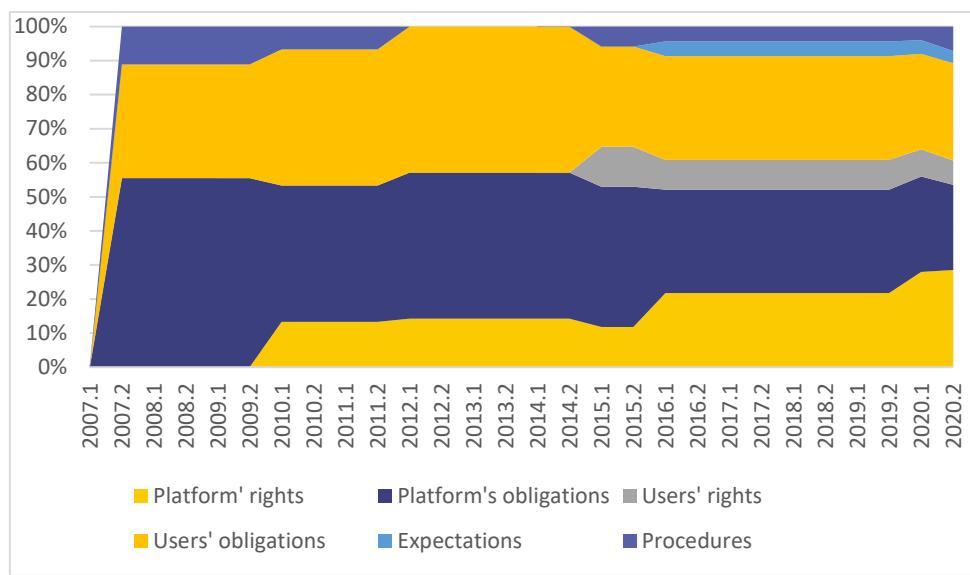


Figure 18. Proportions of PornHub's copyright content moderation rules, grouped according to their normative type, 2007-2020.

Source: Authors.

Discursively, however, Figure 19 suggests a different evolution. At their start, Pornhub T&Cs mentioned almost exclusively users' and platform's obligations. Over time, however, the proportions of citations to these types of rules diverged. Mentions to users' obligations became slightly more prevalent, despite a drop between 2014 and 2015; citations to platform's obligations, in contrast, decreased almost steadily, and, by 2020, represented half of the mentions they did in 2007. And yet, these two obligations still amounted to almost 70% of all mentions to copyright content moderation rules in 2020. That is, the discursive fragmentation was less prominent than the normative dispersal

we just commented on. Overall, it is worthy pointing out that PornHub's seems to be a remarkably restrictive framework for users: in the end of 2020, only 6% of their rules (or mentions to rules) regarded users' rights.

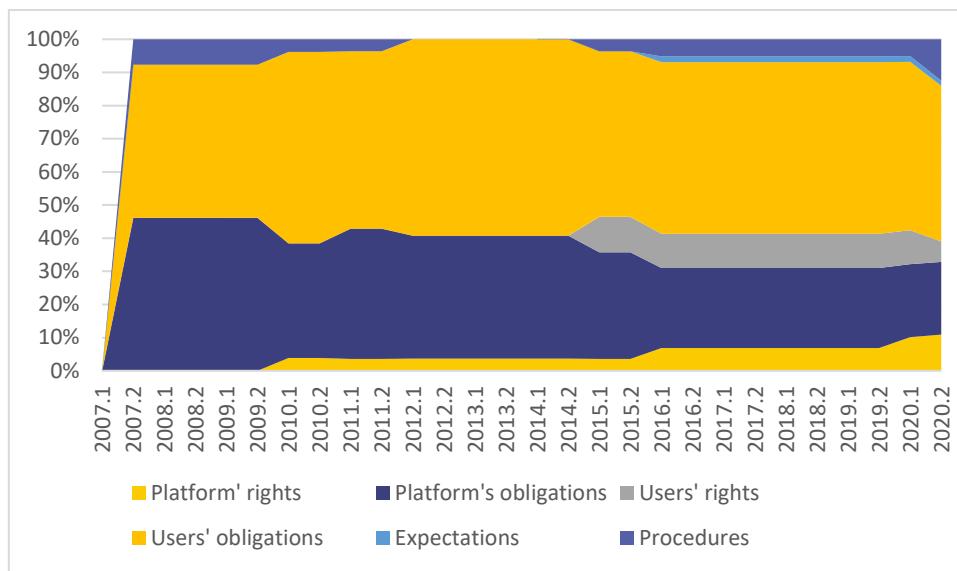


Figure 19. Proportions of mentions PornHub's copyright content moderation rules, grouped according to their normative type, 2007-2020. Source: Authors.

C) EVOLUTION OF PORNHUB'S COPYRIGHT CONTENT MODERATION RULES, PER THEIR SUBJECT

While, over time, PornHub's framework become more diverse also in terms of the subjects, as Figure 20 makes clear, this fragmentation appear to be much less acute than that of normative types. The areas that concentrated the largest proportion of rules have been, since their launch in 2007, copyright disputes and penalties, even though these subject's shares decreased from 50% to 34% and from 34% to 24%, respectively, between 2007 and 2020. The perhaps most notable developments are the increase in the proportion of infringement avoidance rules and the introduction of automated content removal provisions in 2020.

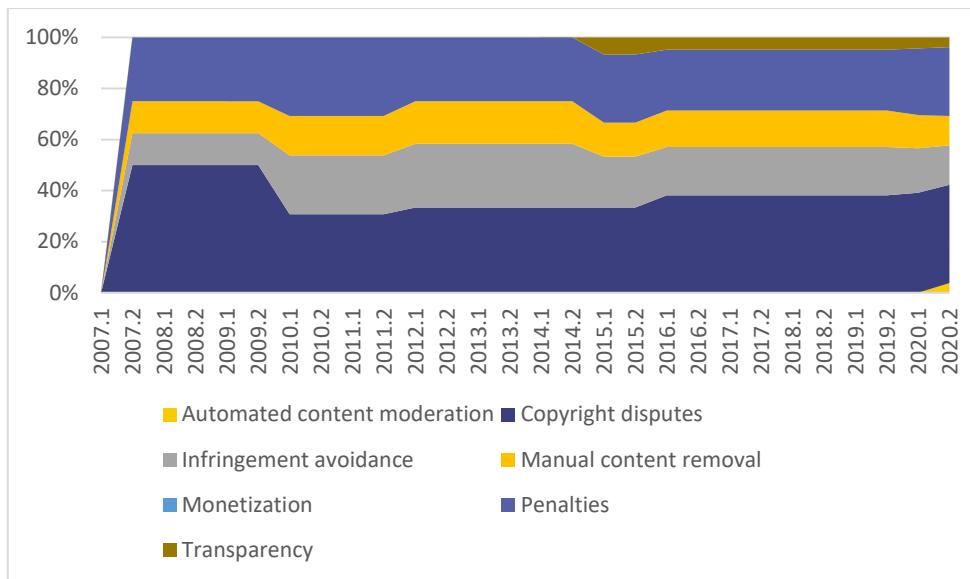


Figure 20. Proportions of PornHub’s copyright content moderation rules, grouped according to their subject, 2007-2020. Source: Authors.

In terms of mentions (Figure 21), the overall development is not really different. One element that might be highlighted is how, discursively at least, PornHub has put over time much more weight on infringement avoidance rules – mostly, as we discuss in the next the sections, provisions that aim to stop *users* – not platforms – from infringing copyright.

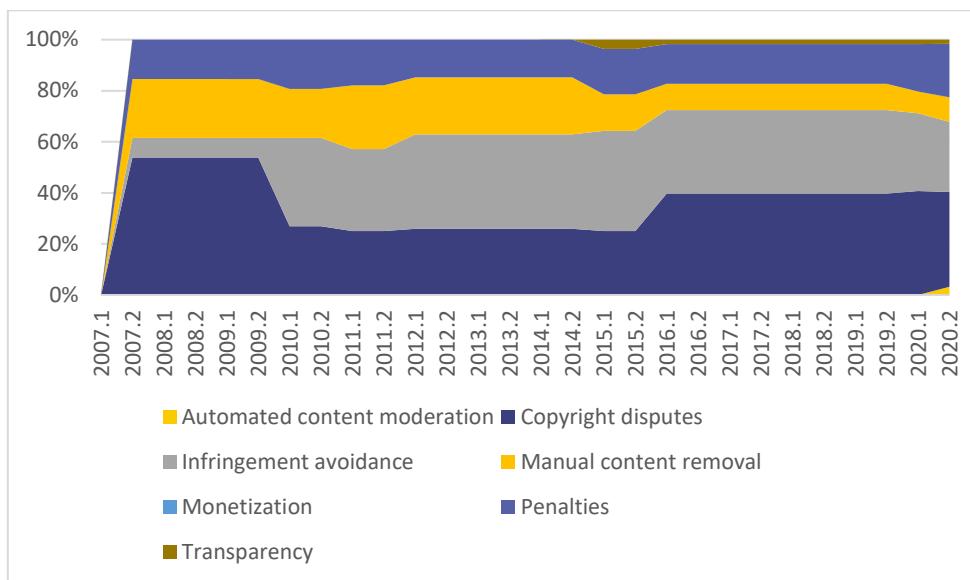


Figure 21. Proportions of mentions PornHub’s copyright content moderation rules, grouped according to their subject, 2007-2020. Source: Authors.

D) THE NORMATIVE PERIODS OF PORNHUB

As with SoundCloud, PornHub’s copyright content moderation framework is one that has grown almost steadily, as their four normative periods suggest.

2007-2009

After some months seemingly without any public document, in the second semester of 2007 PornHub put in place an initial copyright content moderation framework containing most of the key DMCA rules about disputes (the platform's obligation to notify parties, users' duties to provide accurate and complete information, as well as be legally entitled to report copyright infringement), moderation (the platform's obligation to remove infringing content) and penalties (the platform's duty to disable repeat infringers). In other words, this initial set of provisions were already quite strict as they made both infringements and the act of reporting infringements quite costly – at least if we compare them with the other platforms we analysed above. At the same time, as Table 28 shows, other primary rules were not mentioned at all – i.e., users' right to report infringement in their first place, or appeal a complaint, or their primary duty to respect others' copyright. Let us notice that considerable discursive emphasis was placed on the accuracy of the information users provided during copyright disputes: mentions to these rules made up around third of all mentions.

Table 28. PornHub's copyright content moderation rules, with the number of mentions to them, 2007-2009. Source: Authors.

	2007.1						2009.2
Copyright disputes	0						
The platform must notify parties during copyright disputes	0	1	1	1	1	1	
Users must be legally entitled to report copyright infringement	0	1	1	1	1	1	
Users must provide accurate information in copyright disputes	0	4	4	4	4	4	
Users must provide the required information in copyright disputes	0	1	1	1	1	1	
Infringement avoidance	0						
The platform must respect and protect copyright	0	1	1	1	1	1	
Manual moderation							
The platform must remove or block access to content due to copyright infringement	0	3	3	3	3	3	
Penalties							
The platform must disable or suspend accounts due to copyright infringement	0	1	1	1	1	1	
Users who falsely report copyright infringement risk suffering legal consequences	0	1	1	1	1	1	

2010-2014

Three years after being created, as Table 29 shows, PornHub added five new rules, consolidating their core rules and main framework. There was a specific concern with penalties: users who infringed copyright would not only see their accounts disabled but also be denied refunds – PornHub offers paid products. They also finally added multiple explicit mentions to users' need to respect others' copyright. Disputes, on the other hand, remained with the same provisions, an indication of how sturdily regulated this subject already was. In total, the platform arguably has 10 core rules. That might seem a lot but it does not cover other key provisions, which would only be added in the next round of changes.

Table 29. Pornhub's copyright content moderation rules, with the number of mentions to them and the core rules highlighted in light orange, 2010-2014. Source: Authors.

	2009.2	2010.1										2014.2
Copyright disputes												
The platform must notify parties during copyright disputes	1	1	1	1	1	1	1	1	1	1	1	1
Users must be legally entitled to report copyright infringement	1	1	1	1	1	1	1	1	1	1	1	1
Users must provide accurate information in copyright disputes	4	4	4	4	4	4	4	4	4	4	4	4
Users must provide the required information in copyright disputes	1	1	1	1	1	1	1	1	1	1	1	1
Infringement avoidance												
The platform must respect and protect copyright	1	1	1	1	1	1	1	1	1	1	1	1
Users must not interfere with anti-copyright infringement features	0	1	1	1	1	1	1	1	1	1	1	1
Users must respect copyrights	0	7	7	7	7	8	8	8	8	8	8	8
Manual moderation												
The platform must not decide unilaterally what is a copyright infringement	0	1	1	2	2	2	2	2	2	2	2	2
The platform must remove or block access to content due to copyright infringement	3	4	4	5	5	4	4	4	4	4	4	4

Penalties											
The platform can deny refunds to users terminated due to copyright infringers	0	1	1	1	1	1	1	1	1	1	1
The platform must disable or suspend accounts due to copyright infringement	1	2	2	2	2	2	2	2	2	2	2
Users must indemnify the platform regarding copyright infringement	0	1	1	1	1	1	1	1	1	1	1
Users who falsely report copyright infringement risk suffering legal consequences	1	1	1	1	1	0	0	0	0	0	0

2015-2019

Between 2015 and 2016, PornHub added nine new rules, leading their total to 21 (Table 30). Most of them regarded disputes. By now stating clearly that users could report copyright infringements, appeal moderation decisions and needed to file a lawsuit to keep a disputed content down, the platform's framework arguably contemplated – eight years after their launch – the main DMCA rules. Other additions regulated the restoration of taken down content, a reminder on the possible legal penalties of lying during copyright disputes, and a vague mention to "document" notices of copyright infringement – an apparent attempt to make their content moderation practices more transparent. Then, for more than three years, their set of rules would remain remarkably stable – until 2020.

Table 30. PornHub's copyright content moderation rules, with the number of mentions to them, 2015-2019. Source: Authors.

	2014.2	2015.1	2019.2									
Copyright disputes												
The platform must notify parties during copyright disputes	1	1	1	2	2	2	2	2	2	2	2	
Users can appeal copyright-related moderation	0	1	1	2	2	2	2	2	2	2	2	
Users can report copyright infringement	0	2	2	4	4	4	4	4	4	4	4	
Users must be legally entitled to report copyright infringement	1	0	0	3	3	3	3	3	3	3	3	
Users must file a lawsuit against alleged copyright infringer	0	0	0	1	1	1	1	1	1	1	1	

Users must provide accurate information in copyright disputes	4	1	1	7	7	7	7	7	7	7	7
Users must provide the required information in copyright disputes	1	2	2	3	3	3	3	3	3	3	3
Users should try to solve copyright dispute independently	0	0	0	1	1	1	1	1	1	1	1
Infringement avoidance											
The platform can apply DRM technology	0	0	0	1	1	1	1	1	1	1	1
The platform must respect and protect copyright	1	1	1	3	3	3	3	3	3	3	3
Users must not interfere with anti-copyright infringement features	1	1	1	2	2	2	2	2	2	2	2
Users must respect copyrights	8	9	9	13	13	13	13	13	13	13	13
Manual content removal											
The platform can restore content if copyright report is false or withdraw	0	0	0	1	1	1	1	1	1	1	1
The platform must not decide unilaterally what is a copyright infringement	2	2	2	1	1	1	1	1	1	1	1
The platform must remove or block access to content due to copyright infringement	4	2	2	4	4	4	4	4	4	4	4
Penalties											
The platform can deny refunds to users terminated due to copyright infringers	1	1	1	1	1	1	1	1	1	1	1
The platform can disable and suspend accounts who provide false information in copyright disputes	0	0	0	1	1	1	1	1	1	1	1
The platform must disable or suspend accounts due to copyright infringement	2	2	2	3	3	3	3	3	3	3	3
Users must indemnify the platform regarding copyright infringement	1	1	1	1	1	1	1	1	1	1	1

Users who falsely report copyright infringement risk suffering legal consequences	0	1	1	3	3	3	3	3	3	3
Transparency										
The platform must document notices of alleged copyright infringement	0	1	1	1	1	1	1	1	1	1

2020

PornHub's last wave of shifts came in 2020, and is shown in Table 31. Arguably, the most relevant shift concerned the introduction of an automated moderation system. While their system is not the focus of this report, it should be said that their documents suggest that PornHub outsourced to another company (Vobile) this functionality. Their T&Cs (namely, Terms of Service) offered only scant information on it, and asked users to contact Vobile themselves if they wanted to have their content protected via algorithmic fingerprinting. It is also worth mentioning Pornhub's yet another amplification of the possibilities of penalties. Users (in particular, pornographic creators) who infringed copyrights could not receive money from the platform's monetisation program (which apparently involved means other than algorithmic fingerprinting); the possibility of punishing those who submitted false information during copyright disputes also was established. Other additions include, e.g., the somewhat odd provision that forces users to communicate in English during disputes. Table 31 also makes clear the above-mentioned restrictiveness of PornHub's copyright content moderation T&Cs for users. Their only two rights are those to report infringements of their copyright and appeal removal of their content.

Table 31. PornHub's copyright content moderation rules, with the number of mentions to them, 2019-2020. Source: Authors.

	2019.2	2020.1	2020.2
Automated moderation	2		
The platform employs automated copyright content moderation	0	0	2
Copyright disputes			
The platform can require from users evidence of their copyright over content	0	1	1
The platform must notify parties during copyright disputes	2	2	2

Users can appeal copyright-related content removal	2	2	2
Users can report copyright infringement	4	4	2
Users must be legally entitled to report copyright infringement	3	3	3
Users must file a lawsuit against alleged copyright infringer	1	1	1
Users must provide accurate information in copyright disputes	7	8	8
Users must provide the required information in copyright disputes	3	2	2
Users must use English in copyright disputes	0	0	1
Users should try to solve copyright dispute independently	1	1	1
Infringement avoidance			
The platform can apply DRM technology	1	1	1
The platform must respect and protect copyright	3	2	2
Users must not interfere with anti-copyright infringement features	2	2	2
Users must respect copyrights	13	13	12
Manual content removal			
The platform can restore content if copyright report is false or withdraw	1	1	1
The platform must not decide unilaterally what is a copyright infringement	1	1	1
The platform must remove or block access to content due to copyright infringement	4	3	4
Penalties			
The platform can deny refunds to users terminated due to copyright infringers	1	1	1
The platform can disable and suspend accounts who provide false information in copyright disputes	1	1	1
The platform can punish users who submit false information during copyright disputes	0	0	1

The platform can withhold payments from users if they infringe copyrights	0	1	1
The platform must disable or suspend accounts due to copyright infringement	3	4	4
Users must indemnify the platform regarding copyright infringement	1	1	1
Users who falsely report copyright infringement risk suffering legal consequences	3	3	4
Transparency			
The platform must document notices of alleged copyright infringement	1	1	1

5.2.2.4. FANFICTION

A) OVERVIEW

Despite being the oldest platform in our sample (they started operating in 2000), FanFiction is hardly the most complex. As Figure 22 suggests, for more than four years they apparently had no publicly-accessible document. In the next 15 years, their copyright content moderation framework changed only twice, and not dramatically. Number of kinds of public documents remained stably low throughout this period (only 2), and the number of rules and mentions to rules shifted only slightly. Figures of these three indicators are considerably lower than those of Pornhub, SoundCloud and Facebook.

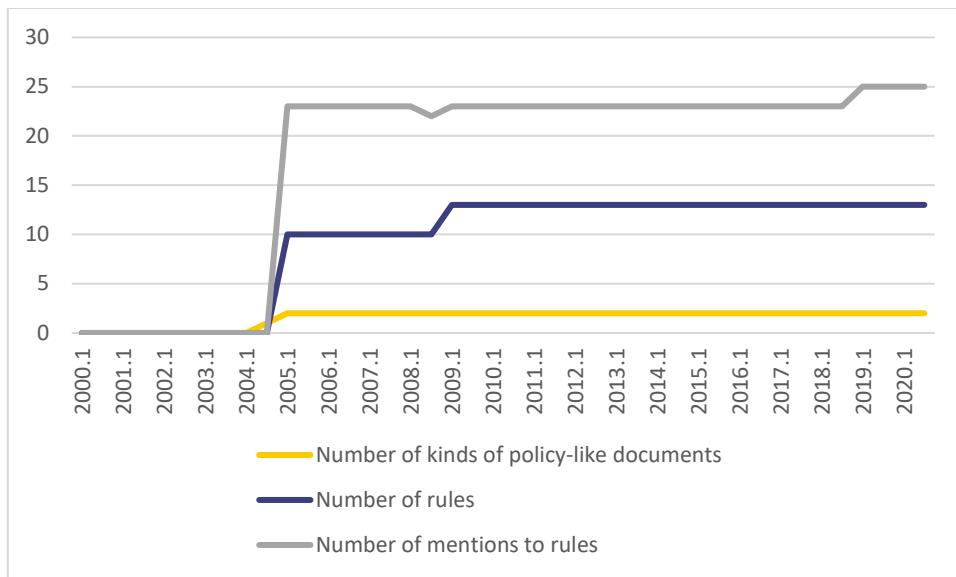


Figure 22. Number of FanFiction's kinds of public documents, rules and mentions to rules related to copyright content moderation, 2000-2020. Source: Authors.

B) EVOLUTION OF FANFICTION'S COPYRIGHT CONTENT MODERATION RULES, PER THEIR NORMATIVE TYPE

As Figure 23 suggests, FanFiction's has been, since the publication of their first T&Cs, focussed on users' obligations, whose proportion grew from 40% to 46% in 2009 and has since remained on the same level. In that year, the percentage of the platform's obligations increased, and replaced procedures as the second most prevalent normative type. One difference from what we saw so far is that no further fragmentation of normative type appears to have occurred – in fact, there's been a concentration around the platforms and users' obligations, which have made up more than 80% of the provisions since 2009.

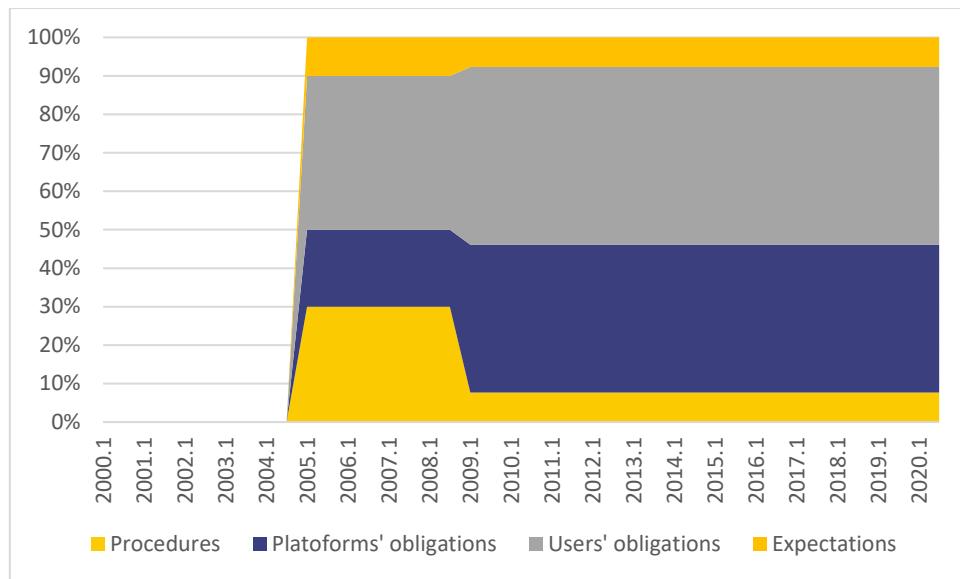


Figure 23. Proportions of FanFiction's copyright content moderation rules, grouped according to their normative type, 2000-2020.

Source: Authors.

This normative evolution is comparable to the discursive emphasis given by the platform to different normative types: (Figure 24) the proportion to mentions to users' obligations, alone, has amounted to 64% of all mentions since 2009. Citations to platform's obligations have also increased, and in 2020 represented around a quarter of all citations. Other normative types had little more than ten percent.

The platform's copyright content moderation rules have always been quite restrictive to users. There is simply no explicit mention to any users' right, not even their basic right to report the infringement of their copyright. This is not to say, of course, that FanFiction does not allow, in practice, such reporting (or other users' rights, as that of appealing the removal of their content). They might well allow it. Yet, their decision to not make this aspect more visible is obviously relevant.

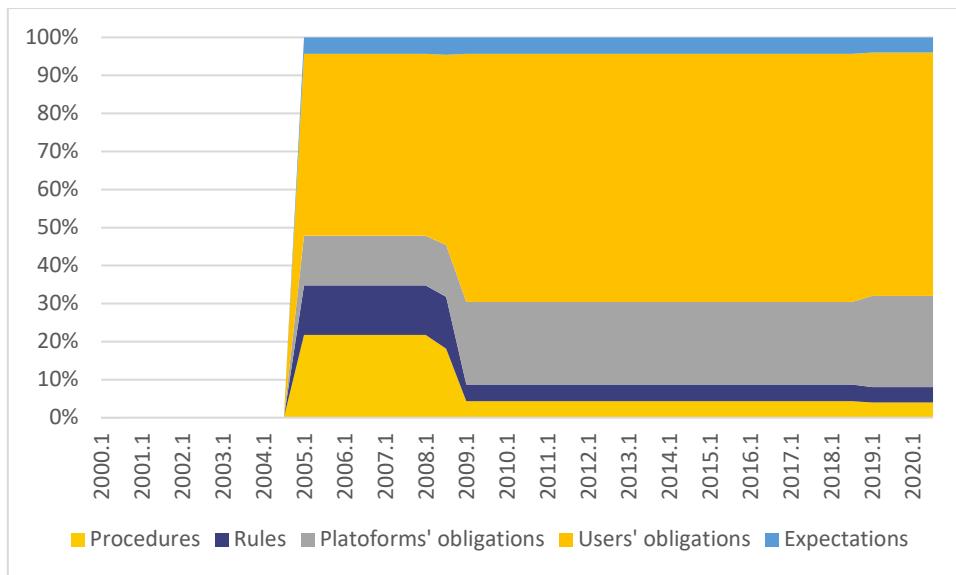


Figure 24. Proportions of mentions FanFiction's copyright content moderation rules, grouped according to their normative type, 2020.

Source: Authors.

C) EVOLUTION OF FANFICTION'S COPYRIGHT CONTENT MODERATION RULES, PER THEIR SUBJECT

As to FanFiction's copyright content moderation rules' subjects, the platform is clearly concerned with copyright disputes (despite a drop in their proportion in 2009, from 50% to 34%); infringement avoidance and penalties, which increased in 2009 and remained representing a little less than a quarter of all rules, come in second and third places in terms of relative presence, respectively (see Figure 25). Again, no clear fragmentation appears to have happened.

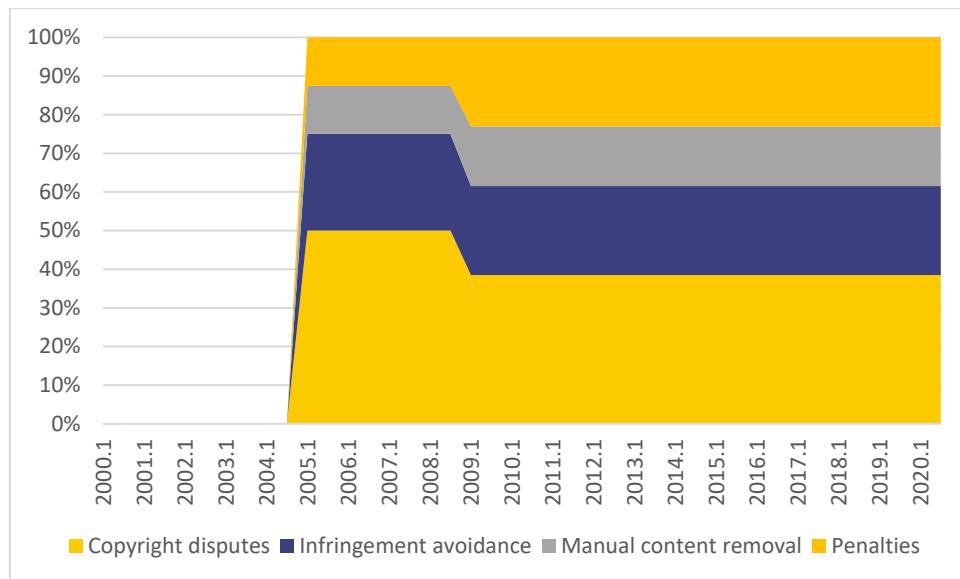


Figure 25. Proportions of FanFiction's copyright content moderation rules, grouped according to their subject, 2000-2020. Source: Authors.

When we look at the percentage of mentions to these rules, as shown in Figure 26, the picture is different, and a bit more convoluted, as citations to infringement avoidance have been au pair with those to copyright dispute. This seems to be related with the service's interest in the users' obligations, as we explain in the next sections.

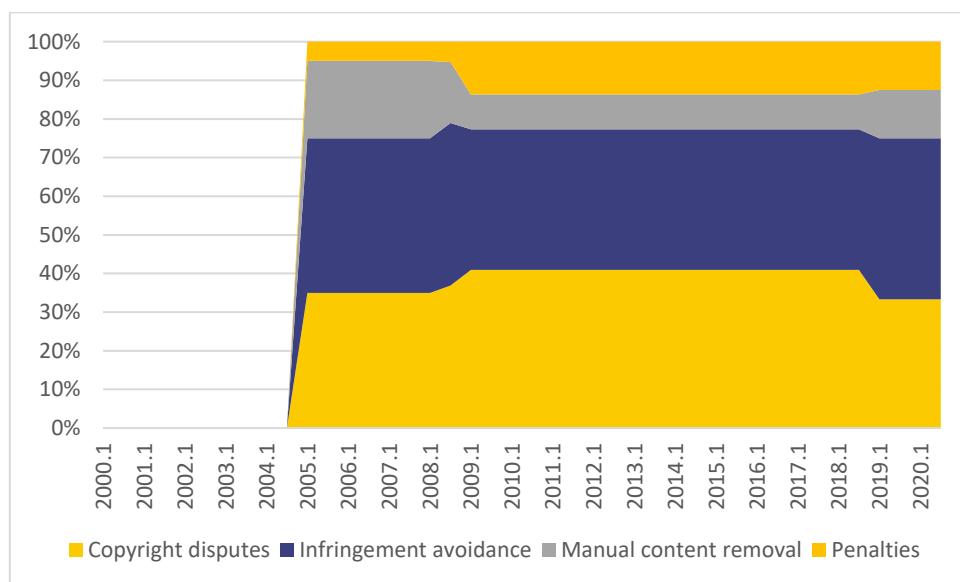


Figure 26. Proportions of mentions to FanFiction's copyright content moderation rules, grouped according to their subject, 2000-2020. Source: Authors.

D) THE NORMATIVE PERIODS OF FANFICTION

2000-2004

Other platforms started without a publicly-accessible document. But since in the case of FanFiction this situation lasted for more than four years, it seems fair to say that the absence of rules configures, in itself, this platform's first normative period.

2004-2008

When FanFiction published their T&Cs, their copyright content moderation framework lasted for more than four years. Similar to PornHub, FanFiction's first normative instalment contained basic DMCA rules (users' obligations to provide complete and accurate information during disputes, for instance), in addition to the foundational users' and the platform's duty to respect others copyright (Table 32). At the same time, also as PornHub, other fundamental rules were missing: the very users' rights to report copyright infringement and appeal content removals, or the platform's obligation to remove infringing content and disable the account of infringers. These would only be partially added in the next shift, in 2009.

Table 32. FanFiction's copyright content moderation rules, with the number of mentions to them, 2005-2008. Source: Authors.

	2004.2	2005.1	2008.2
Copyright disputes			
Users must be legally entitled to report copyright infringement	0	1 1 1 1 1 1 1 1 1	
Users must provide accurate information in copyright disputes	0	3 3 3 3 3 3 3 3 3	
Users must provide the required information in copyright disputes	0	2 2 2 2 2 2 2 2 2	
Users should report violation of others' copyright	0	1 1 1 1 1 1 1 1 1	
Infringement avoidance			
The platform must respect and protect copyright	0	3 3 3 3 3 3 3 3 3	
Users must respect copyrights	0	5 5 5 5 5 5 5 5 5	
Manual content removal			
The platform employs human content moderation	0	4 4 4 4 4 4 4 4 3	
Penalties			

Users who falsely report copyright infringement risk suffering legal consequences 0 1 1 1 1 1 1 1 1 1

2009-2020

The second (and last) normative period of FanFiction began in 2009, and lasted up to the end of the 2020, at least (Table 33). It saw the addition of two content removal rules (including the platform's obligation of removing infringing content) and two penalties (of note, another platform's duty: that of disabling infringers account) that, together, completed the platform's nine core rules. As mentioned before, it is curious to notice that, despite having several rules on copyright dispute, for instance, the FanFiction documents we examined simply do not mention explicitly users' right to report the violation of their copyright or appeal the removal of their content.

Table 33. FanFiction's copyright content moderation rules, with the number of mentions to them, and the core rules highlighted in light orange, 2009-2020. Source: Authors.

Users should report violation of others' copyright	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Users should think twice before reporting copyright infringement	0	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Infringement avoidance																														
The platform must respect and protect copyright	3	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Users must not interfere with anti-copyright infringement features	0	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Users must respect copyrights	5	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	8	8	8	8
Manual content removal																														
The platform employs human content moderation	3	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
The platform must not decide unilaterally what is a copyright infringement	0	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
The platform must remove or block access to content due to copyright infringement	0	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	2	2	2	2

5.2.2.5. DIASPORA

A) OVERVIEW

As with FanFiction, Diaspora seemingly had no publicly-accessible document for some years (2010 to 2012); and, after publishing their framework, no change seems to have occurred in neither their copyright content moderation rules nor the number of mentions to these rules; interestingly, the platform added in 2017 a Community Guidelines of sorts (see Figure 27). However, this new document did not discuss copyright content moderation at all.

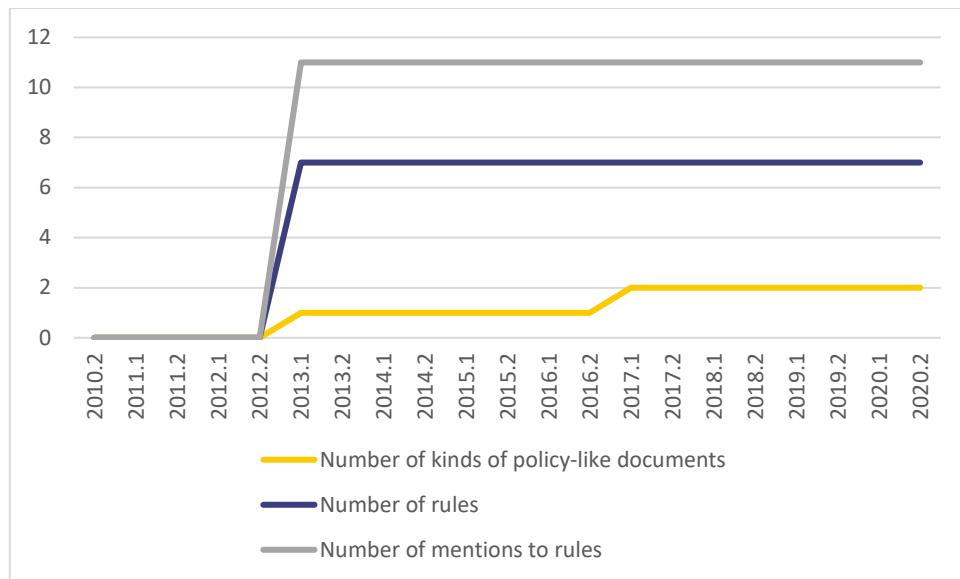


Figure 27. Number of Diaspora's kinds of public documents, rules and mentions to rules related to copyright content moderation, 2010-2020. Source: Authors.

B) EVOLUTION OF DIASPORA'S COPYRIGHT CONTENT MODERATION RULES, PER THEIR NORMATIVE TYPE

After the publication of their T&Cs, the proportions of the normative types in Diaspora's copyright content moderation rules did not undergo any change, as made clear in Figure 28. Their framework is a relatively simple one, with only three normative types, centred on the platform's obligations (over 45%), with users' obligations (29%) and rights (14%) taking up much of the rest. It is one of the few platforms in our sample that has no procedure in their framework. However, in terms of mentions (Figure 29), users' obligations have a much larger share (45%), easily surpassing that of the platform's obligations.

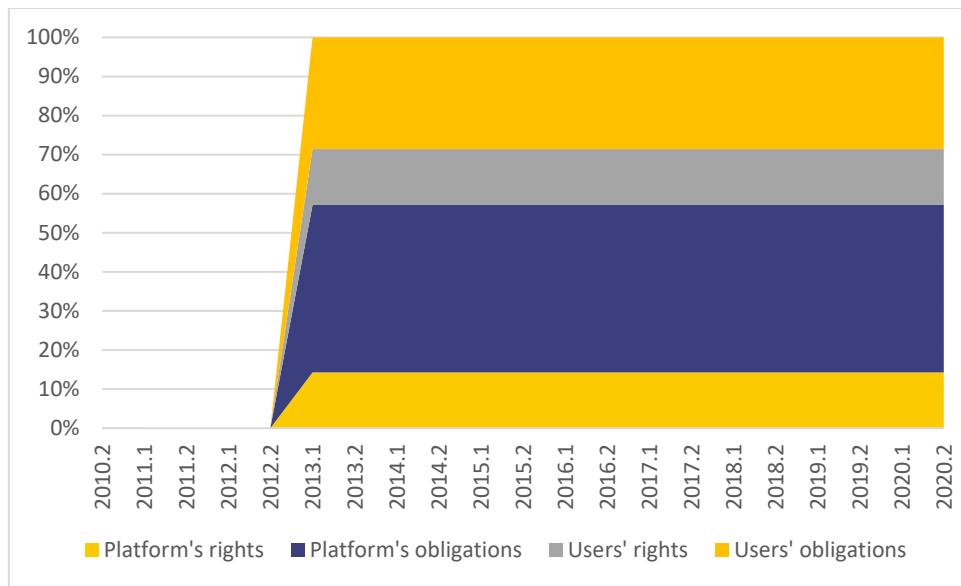


Figure 28. Proportions of Diaspora's copyright content moderation rules, grouped according to their normative type, 2010-2020.

Source: Authors.

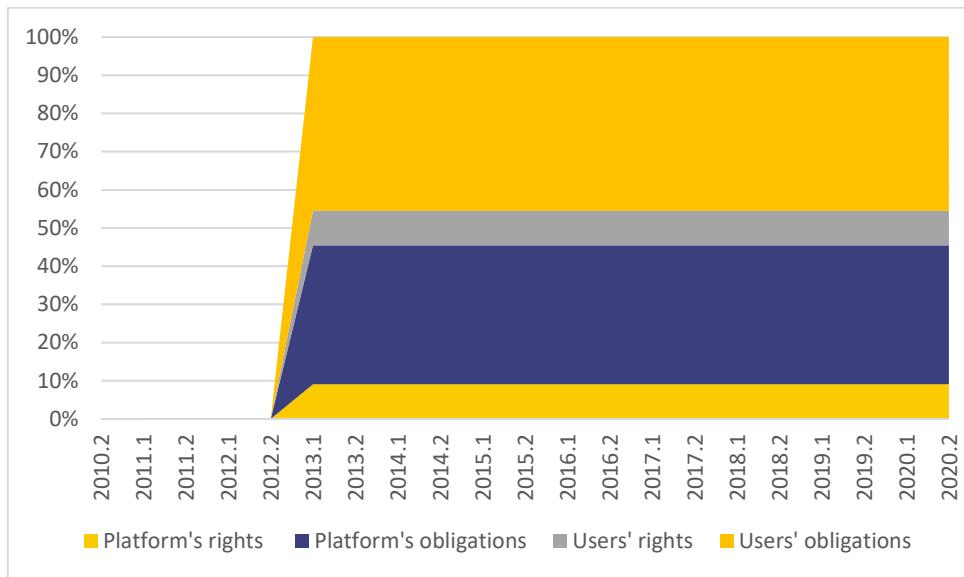


Figure 29. Proportions of mentions to Diaspora's copyright content moderation rules, grouped according to their normative type, 2010-2020. Source: Authors.

C) EVOLUTION OF DIASPORA'S COPYRIGHT CONTENT MODERATION RULES, PER THEIR SUBJECT

In terms of subjects, Diaspora's copyright content moderations rules have always been fragmented. Three areas have around 30% of the rules each (disputes, infringement avoidance and penalties); the others provision regard manual content removal, as Figure 30 shows. Again, when we consider only the proportions of mentions to these rules (Figure 31), the picture if not the same. Dispute and

infringement avoidance provisions represent around 4 in 10 rules each, and citations to penalties are much less common (around 13%) than the said percentage of penalty-related rules.

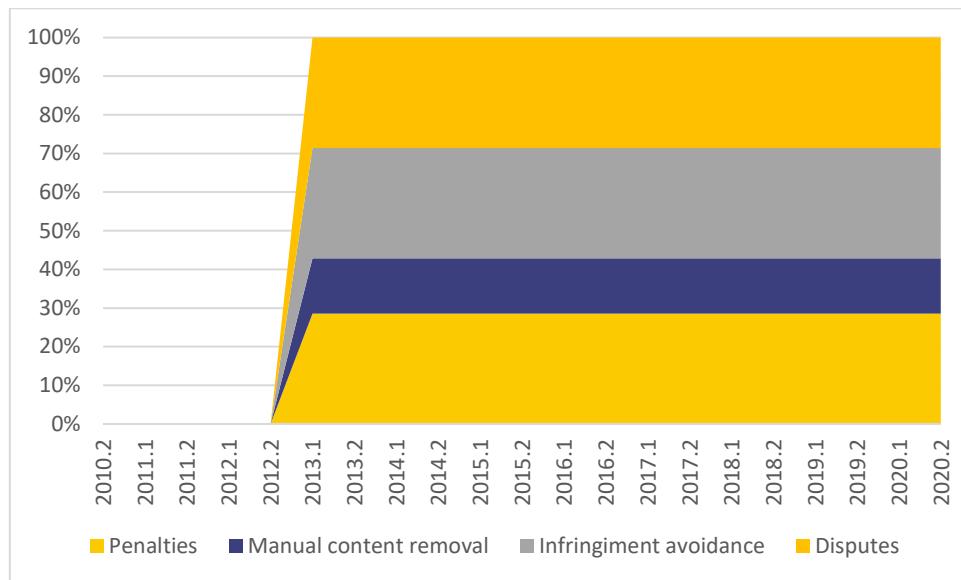


Figure 30. Proportions of Diaspora's copyright content moderation rules, grouped according to their subject, 2010-2020. Source: Authors

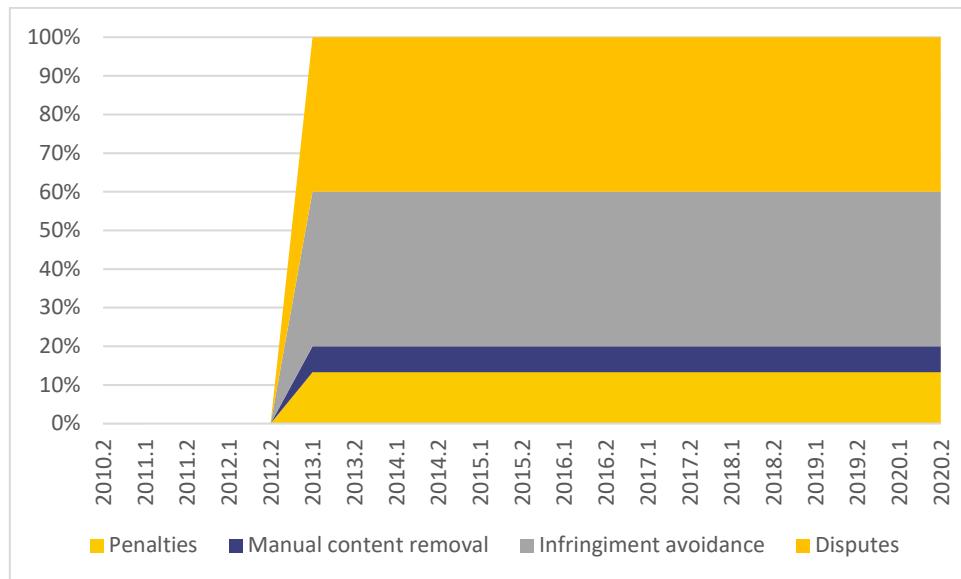


Figure 31. Proportions of mentions to Diaspora's copyright content moderation rules, grouped according to their subject, 2010-2020. Source: Authors.

D) THE NORMATIVE PERIODS OF DIASPORA

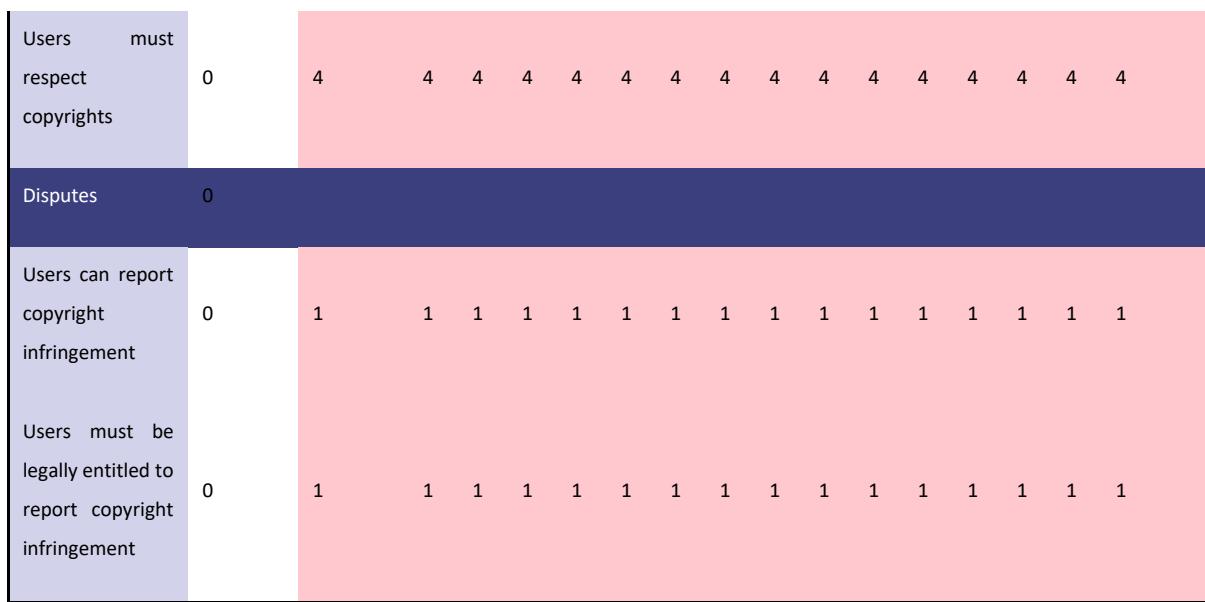
2010-2012

Given Diaspora's lack of any publicly-accessible documents in their first two years, we consider this to be their first normative period.

2012-2020

Diaspora's copyright content moderation framework contains some key rules: users' right to report the violation of their own copyright (but not to appeal content removal decisions) and obligation to respect copyright, the platform's obligation to remove infringing content and disable account of repeat infringers (see Table 34). As with most platforms we studied, Diaspora's discursive emphasis is on users' duty to respect copyright: mentions to this rule alone make up more than a third of all mentions to all rules.

Table 34. Movement's copyright content moderation rules, with the number of mentions to them, 2010-2006. Source: Authors



5.2.2.6. DTUBE

A) OVERVIEW

Finally, DTube is the newest platform of the 15 we analysed. Created in 2019, the platform has undergone only one major change, in the second semester of that year. As Figure 32 shows, changes in terms of numbers of kinds of documents, rules and mentions to rules have evolved essentially in parallel. Absolute numbers of these three indicators are comparable to those of Diaspora.

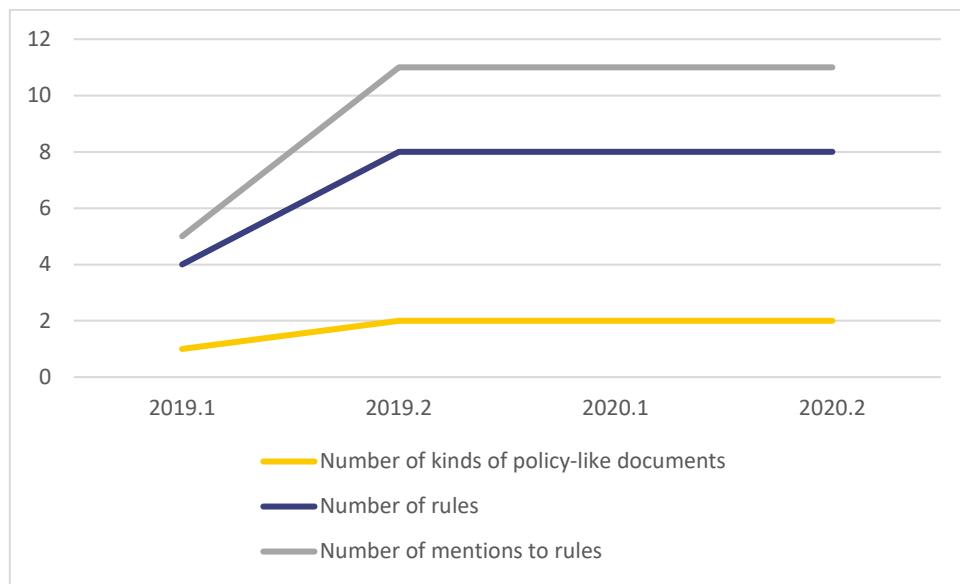


Figure 32. Number of DTube's kinds of public documents, rules and mentions to rules related to copyright content moderation, 2019-2020. Source: Authors.

B) EVOLUTION OF DTUBE'S COPYRIGHT CONTENT MODERATION RULES, PER THEIR NORMATIVE TYPE

Initially, DTube's copyright content moderation frame was equally divided into four normative types: users' rights, expectation, the platform's obligations and procedures. Then, a change in 2019 created new users' obligations, whose proportion increased more than ten percentage points, leading to the decrease in the percentage of platform's obligations and expectation, whose number did not grow, as shown in Figure 33.

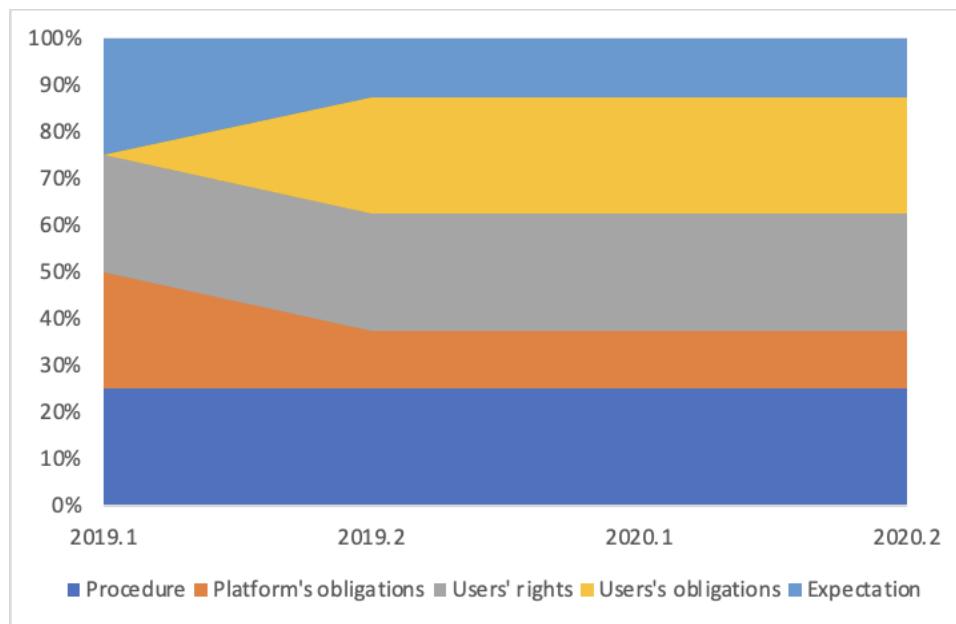


Figure 33. Proportions of DTube's copyright content moderation rules, grouped according to their normative type, 2019-2020. Source: Authors.

Figure 34 demonstrates that, yet again, the discursive development echoes without perfectly mirroring the normative ones. The 2019 shift caused an increase in the proportion of mentions to users' obligations (0% to 18%), surely, but this was not as intense as the one seen in the sheer number of rules of this kind.

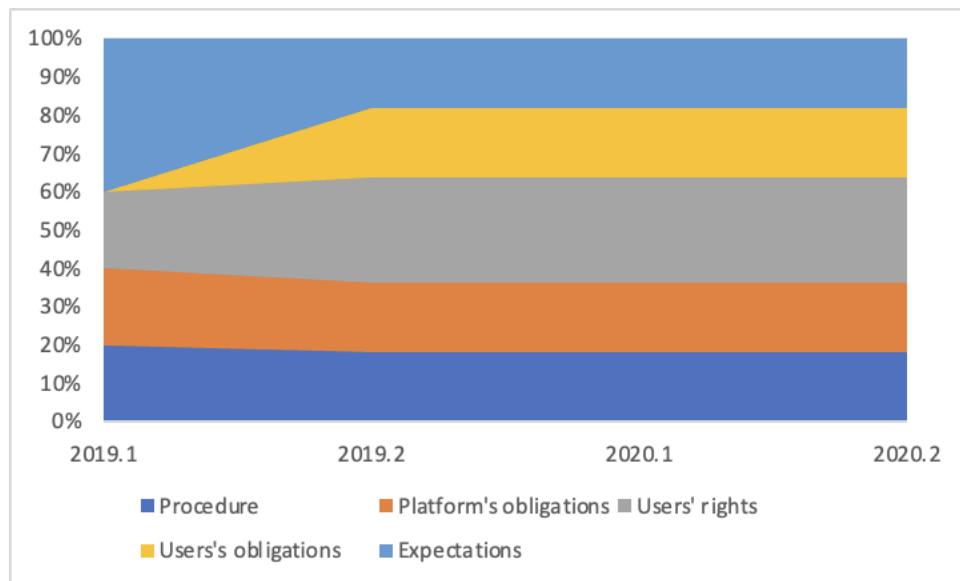


Figure 34. Proportions of mentions DTube's copyright content moderation rules, grouped according to their normative type, 2019-2020.

Source: Authors.

C) EVOLUTION OF DTUBE'S COPYRIGHT CONTENT MODERATION RULES, PER THEIR SUBJECT

When examined through the lenses of the subject they regulate, DTube's copyright content moderation rules show much more movement. Figure 35 demonstrates that, in their first versions, the platform's T&Cs concerned mainly manual content removal and, to a lesser extent, infringement avoidance and monetisation (in their case, via a blockchain-based cryptocurrency that can be used to recompensate users for their posts). Then, in 2019, the service published some new rules, mostly focussing on copyright disputes, which then became the most regulated subject, in proportional terms. Numbers of mentions to rules point to essentially the same conclusion, as it can be seen in Figure 36.

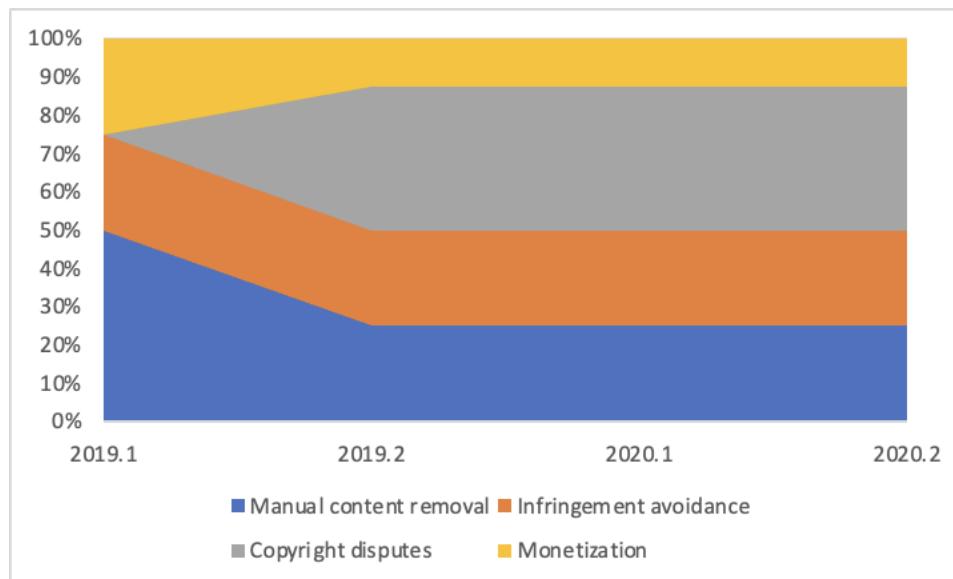


Figure 35. Proportions of DTube's copyright content moderation rules, grouped according to their subject, 2019-2020. Source: Authors.

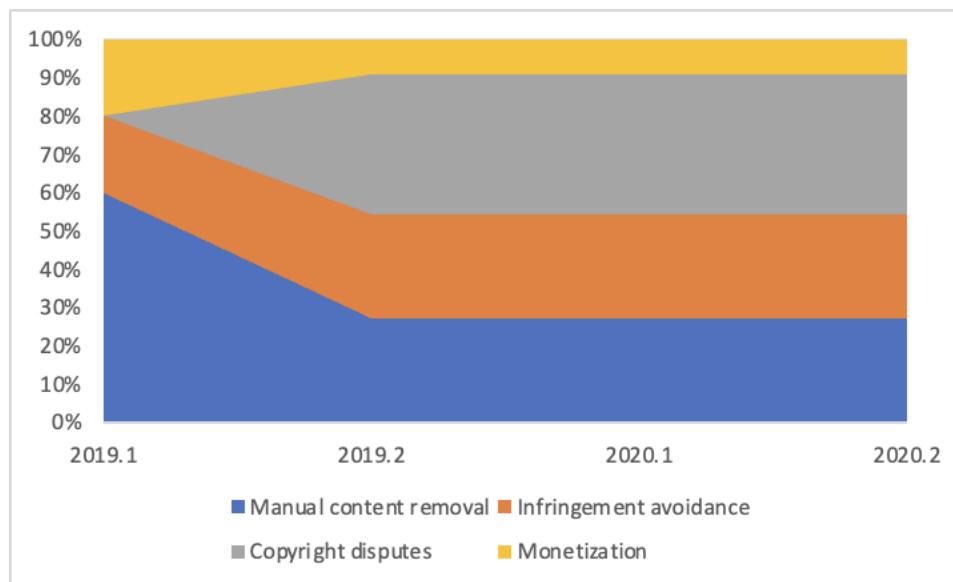


Figure 36. Proportions of mentions DTube's copyright content moderation rules, grouped according to their subject, 2019-2020. Source: Authors.

D) THE NORMATIVE PERIODS OF DTUBE

2019

DTube's first normative period had only four rules (see Table 35). While the platform could not, for legal reasons, ignore copyright regulation, it adopted a radically different approach to it. Instead of saying that they will govern copyright, DTube established as a procedure whereby they do not remove infringing content, and leave this task to users, in the form of an expectation – they should but are not obliged to do so. It also established since its creation a blockchain-based cryptocurrency whereby

users can potentially monetise their content. It is also notable, as mentioned above, how this initial set of provisions did not contemplate copyright disputes whatsoever. In this sense, DTube was unique in our set of case studies. This would quickly change, though, as explained next.

Table 35. DTube's copyright content moderation rules, with the number of mentions to them, 2019. Source: Authors.

	2019.1
Manual content removal	
The platform does not remove or suspend copyright infringing content posted in it	1
Users should act as copyright content moderators	2
Infringement avoidance	
The platform must respect and protect copyright	1
Monetisation	
Users can earn cryptocurrency by posting their content	1

2019-2020

Not long after being launched, DTube changed their framework. In a way, the shifts shown in Table 36 seem to suggest that the platform was attempting to make their framework more adequate to deal with typical copyright issues. Thus, one can see in this second instantiation three provisions that consider copyright disputes, such as users' right to report infringement, they duty to provide complete information, as well as the legal risks they suffer when lying during disputes.

Table 36. DTube's copyright content moderation rules, with the number of mentions to them, 2019-2020. Source: Authors.

	2019.1	2019.2	2020.1	2020.2
Manual content removal				
The platform does not remove or suspend copyright infringing content posted in it	1	1	1	1
Users should act as copyright content moderators	2	2	2	2
Infringement avoidance				

The platform must respect and protect copyright	1	2	2	2
Users must not interfere with anti-copyright infringement features	0	1	1	1
Copyright disputes				
Users can report copyright infringement	0	2	2	2
Users must provide the required information in copyright disputes	0	1	1	1
Users who falsely report copyright infringement risk suffering legal consequences	0	1	1	1
Monetisation				
Users can earn cryptocurrency by posting their content	1	1	1	1

5.3. HOW DO PLATFORMS' AUTOMATED COPYRIGHT CONTENT MODERATION SYSTEMS WORK?

The aim of this section is to provide an overview and analysis of the most important automated copyright content moderation systems, which are employed by social media platforms to automatically identify, block and monetise copyrighted content. After explaining which platforms of our sample employ this sort of system, we present an overview of the main existing systems (Content ID, Rights Manager and Audible Magic) in a comparative form. Then, Section 5.3.3 presents a detailed case study of Facebook's Rights Manager.

5.3.1. USAGE OF AUTOMATED COPYRIGHT CONTENT MODERATION

As Table 37 shows, most platforms 10 out of 15 platforms of our sample seemingly employ some kind of copyright content moderation system.

Table 37. List of the automated copyright content moderation systems employed by a selection of mainstream, alternative and specialised platforms. Source: Authors.

Platform	Automated Copyright Content Moderation System

Mainstream	
Facebook	Rights Manager + Audible Magic
Instagram	Rights Manager
YouTube	Content ID
SoundCloud	Audible Magic
Twitter	Unclear
Alternative	
Mastodon	None
Diaspora	None
Audius	None
DTube	None
Pixelfeld	None
Specialised	
Vimeo	Audible Magic
FanFiction	None
Twitch	Audible Magic
Dribble	None
PornHub	Vobile

While mainstream platforms all have developed some kind of system – Twitter has been testing algorithmic fingerprinting in live transmissions, and it is unclear whether they have used it in other instances – no alternative services have apparently done so. Amongst specialised platforms, those that focus on audio-visual content (Vimeo, Twitch and PornHub) have outsourced automated content

moderation to external providers, namely content recognition companies Vobile and Audible Magic; FanFiction and Dribble, specialised in texts and images, respectively, do not seem to utilise automated copyright content moderation. Audible Magic seems a particularly powerful actor in the social media sector, as they also provide services to two mainstream platforms, SoundCloud and Facebook. In the case of Facebook, Audible Magic operates in tandem with the company own system, Rights Manager, also utilized by Instagram, which is owned by Facebook Inc. The only other platform to have created their own system is of course Google's YouTube – Content ID.

The following sections discuss Rights Manager, Content ID and Audible Magic. Used to inspect posts of billions of users, these appear to be the three most important systems amongst the platforms in our sample and, arguably, of the social media platform market as a whole.

5.3.2.OVERVIEW OF RIGHTS MANAGER, CONTENT ID AND AUDIBLE MAGIC

Rights Manager has been developed by Facebook and was launched in April of 2016⁶⁹³. It can be used to manage copyrighted content across both Facebook and Instagram⁶⁹⁴. Content ID has been developed by Google and was launched in October of 2007⁶⁹⁵. In its original version, it was licensed by Audible Magic, which had been developing its system since it was founded in December of 1999⁶⁹⁶. Later, however, YouTube decided to develop their own solution.

When analysing the material, we found that the way in which these systems work can be most easily grasped when conceived of as four interrelated macro processes, namely: *application and content registration; identification and matching; automated actions; and disputes and conflicts*. We furthermore included a few categories about the underlying *business model* of these systems in the comparative analysis. The next sections explain these processes and categories in detail; Table 38 and Table 39 provide an overview of these systems' characteristics.

⁶⁹³ Facebook Inc., 'Introducing Rights Manager' (Facebook for Media, 12 April 2016) <<https://www.facebook.com/formedia/blog/introducing-rights-manager>> accessed 4 September 2021.

⁶⁹⁴ Facebook Inc., 'Protect Your Instagram Content with Rights Manager' (Business Help Center) <<https://www.facebook.com/login/>> accessed 4 September 2021.

⁶⁹⁵ Google Inc., 'History of Content Management' <<https://www.sites.google.com/a/pressatgoogle.com/youtube5year/home/history-of-copyright>> accessed 4 September 2021.

⁶⁹⁶ Audible Magic Corporation, 'History' (Audible Magic) <<https://www.audiblemagic.com/company/history/>> accessed 4 September 2021.

Table 38. Overview of Rights Manager, Content ID and Audible Magics application and identification procedures. Source: Authors

	User eligibility criteria	Types of media	Content eligibility criteria	Degree of automation	Channels for content registration	Database size	Main ACR technology	Measured characteristics	Identification & matching	Point of matching	Reported accuracy
Rights Manager	1. "Multiple pieces of original content" 2. Non-private Facebook page 3. User history of copyright violations	Video & Images; Audio files with Audible Magic	1. Exclusive rights 2. Distinctiveness of content 3. Individual reference file	Not fully automated	Submissions by rightsholders & authorized third-party organisations	No information	Fingerprinting: use of AI unclear	One can infer that pixel-level data is used	No information	Point of upload	No information
Content ID	1. "A substantial body of original material" 2. "Many previously submitted valid takedown requests"	Audio & Video	1. Exclusive rights 2. Frequent upload on YouTube	Unclear	Submissions by rightsholders & authorized third-party organisations	> 75 million reference files (07/2021) > 9,000 partners (07/2021)	Fingerprinting: possibly AI	No information	Continuously	99.7% identification rate for audio files (2016)	
Audible Magic	Any rightsholder	Audio & Video	1. Exclusive rights	Not fully automated	Submissions by rightsholders & authorized third-party organisations	> 100 million music tracks (02/2021) > 140,000 rightsholders (12/2019)	Fingerprinting: use of AI unclear	"Perceptual characteristics of the audio and video"	Audio: Rate, pitch, and tempo. Video: Quality degradation, frame rate changes, aspect ratio changes, graphic overlays	Point of upload	99.99 % identification rate: < 0.0001% false positives (2017)

Table 39. Overview of Rights Manager, Content ID and Audible Magics automated actions, disputes protocols and business models.

Source: Authors.

	Automated actions/Monetisation	Source of revenue	Disputes & conflicts	Primary customer	Business model			
	Users' options	Possible specifications	Application rejection dispute	Content registration dispute	Product			
Rights Manager	"Block", "Collect Ad Earnings" (only FB videos), "Monitor", "Manual Review", "Takedown" and "Display ownership link"	Viewer location, temporal overlap, specific users	No formalized dispute process	First content uploader has the last call	Appeal process for rejected match dispute Yes: The uploader has 7 days to file a dispute and the rights holder has 7 days to respond to the dispute.	April 2016 Yes	No Content creators of Facebook/Instagram or other parties who protect content of content creators	None
Content ID	"Block", "Monetize", "Track" and "Route for review"	Viewer location, temporal overlap	No formalized dispute process	Unclear	Yes: The rights holder has 30 days to respond	October 2007 Yes: The rights holder has 20 days to respond	No Large rightsholders	None
Audible Magic	"Allow", "Block" and "Monetize"	Viewer location, temporal overlap, platform	No information	"Audible Magic does not arbitrate any ownership disputes and any conflicts must be resolved between the two parties themselves."	Varies by platform	December 1999 Varies by platform	Yes Rights holders & Social media platforms	Licensing for rights holders, Back office administration for platforms, ACR for music aggregators/distributors and social media teams

5.3.2.1. APPLICATION AND CONTENT REGISTRATION

The first macro process (*application and content registration*) covers the different ways in which users and content can be registered with the respective copyright content moderation system. It therefore encompasses the *user eligibility criteria* that a rightsholder has to meet in order to be granted access to the system; the *types of media* which can be registered; the *content eligibility criteria*, i.e., the requirements that a piece of content has to fulfil in order to be eligible for protection via the automated system; the *degree* to which the application and registration process is *automated*; the different *channels* that exist for the registration and acquisition of content; and publicly available information about the *size of the underlying reference database*.

In terms of the user *eligibility criteria*, Audible Magic offers the most accessible out of the three examined systems, as it is open to “any qualified record label, music publisher, artist, movie or TV studio, big or small”⁶⁹⁷. Both Rights Manager and Content ID require applicants to own/control the rights over a certain quantity of content, although the exact threshold that an applicant must meet in order to access their systems remains unclear from the companies’ public documents.

The Help pages for Rights Manager only state that applicants need to “have multiple pieces of original content that you [they] want to protect”⁶⁹⁸, while the Content ID Help pages lays out that, in order to have her application approved, a user needs to control the rights over a “substantial body of original material”⁶⁹⁹. As an additional requirement, users of Rights Manager need to control a non-private Facebook page⁷⁰⁰. Facebook furthermore lists the respective user’s personal history of copyright infringements and violations as a user eligibility criterion⁷⁰¹, although it is unclear how exactly these past misdoings factor into the decision. For Content ID, YouTube list the previous submission of “many”⁷⁰² valid takedown requests, i.e., the “demonstrated need”⁷⁰³ of a rights holder as criteria,

⁶⁹⁷ Audible Magic Corporation, ‘Rightsholders Registration’ (Audible Magic) <<https://www.audiblemagic.com/rightholders-registration/>> accessed 4 September 2021.

⁶⁹⁸ Facebook Inc., ‘Rights Manager Eligibility’ (Business Help Center, 5 February 2021) <<https://www.facebook.com/business/help/705604373650775>> accessed 2 August 2021.

⁶⁹⁹ Google Inc., ‘Using Content ID’ (YouTube Help) <<https://support.google.com/youtube/answer/3244015?hl=en>> accessed 4 September 2021.

⁷⁰⁰ Facebook Inc., ‘Rights Manager Eligibility’ (n 698).

⁷⁰¹ Facebook Inc., ‘Rights Manager Eligibility’ (n 698).

⁷⁰² Google Inc., ‘Overview of Copyright Management Tools’ (YouTube Help) <https://support.google.com/youtube/answer/9245819?hl=en&ref_topic=9282364#zippy=%2Ccontent-id> accessed 4 September 2021.

⁷⁰³ Google Inc., ‘Qualify for Content ID’ (YouTube Help) <<https://support.google.com/youtube/answer/1311402>> accessed 4 September 2021.

stating that “copyright owners must have previously submitted many valid takedown requests and have the resources to manage Content ID”⁷⁰⁴.

All three of the analysed systems generally offer protection for video and audio content. Both Content ID and Audible Magic furthermore offer the automatic detection of audio files. In the case of Facebook, both Rights Manager and Audible Magic’s technology are used for the identification of audio files, with the distribution of labour between the two systems remaining unclear for observers.⁷⁰⁵ As the only one out of the observed systems, Rights Manager also offers an option to protect images.⁷⁰⁶

If a rightsholder is granted access to the system, the content which she wishes to protect has to fulfil certain criteria in order to be eligible for the protection. All three systems require users to confirm that they control the exclusive rights of the content that they are registering. The help pages for Rights Manager, furthermore list the *distinctiveness* of the content as a criterion, stating that “Your reference files must be sufficiently distinct from other reference files. It must be visually and audibly unlike other content”⁷⁰⁷. Facebook also prohibit compilations, mashups and countdown lists from being registered in Rights Manager, and requires users to provide individual reference files for each piece of content⁷⁰⁸. Content ID is the only one out of the three systems that links the eligibility of a piece of content for protection to the frequency of its copyright infringement on YouTube, stating that eligible content must be “frequently uploaded by the YouTube user community”⁷⁰⁹.

The exact degree to which the processes of application and content registration within the three systems are automated is not clear from the material that we analysed. In the case of Rights Manager and Audible Magic, however, human oversight is clearly involved in the application process. Facebook has stated that “rights holder requests for access are reviewed holistically (...) by a team of trained professionals”⁷¹⁰; Audible Magic asks potential new users to use a contact form and to engage with a “sales executive”; in the case of Content ID, it is unclear whether human oversight is involved.

⁷⁰⁴ Google Inc., ‘Overview of Copyright Management Tools’ (n 34).

⁷⁰⁵ Facebook Inc., ‘Copyright Management Tools’ (Facebook Business Help Center) <<https://www.facebook.com/login/?next=https%3A%2F%2Fwww.facebook.com%2Fbusiness%2Fhelp%2F932705380468613%3Fid%3D237023724106807>> accessed 4 September 2021.

⁷⁰⁶ Facebook Inc., ‘Copyright Management Tools’ (n 705).

⁷⁰⁷ Facebook Inc., ‘Content Eligible for Reference Files’ (Facebook Business Help Center) <<https://www.facebook.com/business/help/389834765475043>> accessed 2 August 2021.

⁷⁰⁸ Facebook Inc., ‘Content Eligible for Reference Files’ (n 707).

⁷⁰⁹ Google Inc., ‘Using Content ID’ (n 699).

⁷¹⁰ Facebook Inc., ‘Response to Questions about Rights Manager’.

All three systems acquire reference content through affirmative submissions by rights holders and through authorised third-party organisations. These organisations often offer rights holders to register their content with multiple automated copyright content moderation systems at the same time. The music distribution service “HAAWK” for instance, offers “full-service YouTube Content ID and Facebook/Instagram Rights Manager administration (...) for large rights holders that wish to optimize their claims and maximize their earnings”⁷¹¹. The company furthermore offers the “self-service rights management platform Identify”⁷¹², which is run by “a team of YouTube Certified Content ID specialists”⁷¹³. The latter service presents itself as a pathway for smaller rights holders to get their content protected via YouTube’s Content ID system.

Audible Magic proactively recommends the use of “delivery agent partners”⁷¹⁴ to its clients, stating that “[w]orking with a delivery agent saves the content owner from needing in-house resources with the technical skills required to implement Audible Magic fingerprinting software or delivering media files and metadata”⁷¹⁵. This stands somewhat in contrast to Audible Magic’s claim that “[i]ndividual creators of copyright content and small companies have the same opportunity as large companies to register their content with Audible Magic”⁷¹⁶ and that “[f]or even the smallest copyright entities or individuals, registration can be achieved free of charge through a simple drag-and-drop online process”⁷¹⁷. The fact that the aforementioned third-party providers exist shows how complex these systems have become and that there seems to be a demand for specialists who can help users navigate them.

Both Content ID and Audible Magic have released figures about the size of their reference file database; Facebook has not published such information. As of July 2021, the Content ID database contained over 75 million reference files from more than 9,000 “partners using Content ID”. As laid out above, these partners can be large rights holders or organisations that register content for other rights holders. Audible Magic announced in February 2021 that its database holds over 100 million music

⁷¹¹ HAAWK Inc., ‘HAAWK: Full Service YouTube Content ID & Facebook Rights Management’ (*HAAWK Rights Management*) <<https://www.haawk.com>> accessed 4 September 2021.

⁷¹² HAAWK Inc., ‘Identifyy: Self Service YouTube Content ID & Facebook Rights Manager’ (*HAAWK*) <<https://www.haawk.com>> accessed 4 September 2021.

⁷¹³ HAAWK Inc., ‘Identifyy’ (*Identifyy*) <<https://www.identifyy.com>> accessed 4 September 2021.

⁷¹⁴ Audible Magic Corporation, ‘Using a Content Delivery Agent Partner’ (*Audible Magic Support*, September 2020) <<https://support.audiblemagic.com/hc/en-us/articles/203628004-Using-a-content-delivery-agent-partner>> accessed 4 September 2021.

⁷¹⁵ Audible Magic Corporation, ‘Using a Content Delivery Agent Partner’ (n 714).

⁷¹⁶ Audible Magic Corporation, ‘Comment Regarding Section 512 Study United States Copyright Office’ 48 <<https://www.asktheeu.org/en/request/4465/response/14429/attach/5/Annex%201%20Gestdem%202017%204050%20v3.pdf>>.

⁷¹⁷ Audible Magic Corporation, ‘Comment Regarding Section 512 Study United States Copyright Office’ (n 716) 48.

tracks from over 400,000 labels and characterised the database as “the largest business-to-business rights-managed catalogue available”⁷¹⁸. The company has not released any information about the number of video files and the total number of reference files in its database.

5.3.2.1. IDENTIFICATION AND MATCHING

There is a range of existing technical solutions for the automatic identification of content such as hashing, watermarking, fingerprinting and AI-based or enhanced solutions⁷¹⁹. All of the three analysed systems employ *fingerprinting* as the main technology for content recognition. Fingerprinting algorithms analyse media files and produce a set of data – the digital fingerprint – which makes a piece of content uniquely identifiable, just as human fingerprints uniquely identify people. The digital fingerprint is then compared against a database with reference fingerprints to check if there is a match. It is very likely – and in the case of Content ID even reported⁷²⁰ – that the three systems are using artificial intelligence (AI) to perform and optimise at least some their system’s tasks. However, the companies do not offer any public information about this.

It is largely unclear which exact characteristics the three systems’ fingerprinting algorithms are analysing within a media item to produce the fingerprints for images, and audio and video files. In the case of Rights Manager and Content ID, there is no public information about the variables which are being measured during the fingerprinting process. For Rights Manager, however, it can be inferred that pixel-level data is used for image fingerprinting because Facebook states that certain colour gradients are not eligible as reference files.

Audible Magic has been open about the inner workings of its fingerprinting algorithms, laying out that it measures a number of “perceptual characteristics of the audio and video”⁷²¹. A 2004 article about audio fingerprints, which was published by three of Audible Magic’s employees, revealed that acoustical features such as loudness, pitch, brightness, bandwidth and inharmonicity are measured as part of Audible Magic’s fingerprinting technology⁷²². The 33 patents that the company currently holds similarly state that the acoustical features which are measured to produce audio fingerprints “may

⁷¹⁸ Audible Magic Corporation, ‘Audible Magic Surpasses 100 Million Tracks’ (*Audible Magic Press Releases*, 23 February 2021) <<https://www.audiblemagic.com/?p=6452>> accessed 4 September 2021.

⁷¹⁹ European Union Intellectual Property Office., *Automated Content Recognition: Discussion Paper. Phase 1, Existing Technologies and Their Impact on IP*. (Publications Office 2020) 4 <<https://data.europa.eu/doi/10.2814/52085>> accessed 4 September 2021.

⁷²⁰ John Paul Titlow, ‘YouTube Is Using AI to Police Copyright—to the Tune of \$2 Billion in Payouts’ *Fast Company* (13 July 2016) <<https://www.fastcompany.com/4013603/youtube-is-using-ai-to-police-copyright-to-the-tune-of-2-billion-in-payouts>> accessed 4 September 2021.

⁷²¹ ‘Technology’ (*Audible Magic Website*) <<https://www.audiblemagic.com/technology/>> accessed 4 September 2021.

⁷²² Thom Blum, Douglas Keislar and Erling Wold, ‘Audio Fingerprints: Technology and Applications’ (*Audio Engineering Society* 2004) 2 <<https://www.aes.org/e-lib/browse.cfm?elib=12872>> accessed 4 September 2021.

include loudness, pitch, bass, brightness, bandwidth, Mel-frequency coefficients (MFCCs)”⁷²³. There is no information about which characteristics Audible Magic analyses in video files.

The robustness of an automated copyright content moderation technology denotes its “capacity (...) to resist modification of degradation of the content to be recognised”⁷²⁴. It also represents one of the central categories for the evaluation of algorithms in general. For both Rights Manager and Content ID, there is no public information about the robustness of their systems to content modification. Audible Magic, however, has said that its fingerprinting technology is designed to handle “manipulations in rate, pitch, and tempo”⁷²⁵ as well as “video quality degradation, frame rate changes, aspect ratio changes, tickers and graphic overlays and more”⁷²⁶.

The point in time at which the matching between a piece of content and the reference file database occurs, represents another important comparative category. In the case of Rights Manager and Audible Magic, the matching occurs when a new file is being uploaded to the platform, i.e., at the “point of ingestion”⁷²⁷. Rights Manager’s help page makes it explicit that the system “isn’t retroactive” and “doesn’t detect videos that were posted before your reference files were uploaded”⁷²⁸. Content ID stands out in this regard because it does not only check content once at the point of upload but continuously while it is published on the platform. As research has shown, “Content ID matches can occur at any time. While many matches occur at time of upload, matches can be made when new content is added to the database or whenever the algorithm used by Content ID changes”⁷²⁹.

The *accuracy* of the analysed systems represents another central area of concern. It is generally used to describe “how the technology performs in terms of matching output and performing correct identifications or false negative/positive results”⁷³⁰. A false negative, here, means that a reference file in the database that should be identified does not get identified, while a false positive refers to the case in which a piece of content is erroneously matched with a reference file in the database. To our

⁷²³ Vance Ikezoye and others, ‘Temporal Fraction with Use of Content Identification’ 6.

⁷²⁴ European Union Intellectual Property Office. (n 719) 6.

⁷²⁵ Audible Magic Corporation, ‘Core Technology Data Sheet’ <https://www.audiblemagic.com/wp-content/uploads/2019/08/B_F_Core-Technology_012720.pdf>.

⁷²⁶ Audible Magic Corporation, ‘Core Technology Data Sheet’ (n 725).

⁷²⁷ Audible Magic Corporation, ‘Why Register Your Content with Audible Magic?’ (*Audible Magic Support*, March 2021) <<https://support.audiblemagic.com/hc/en-us/articles/201232220-Why-register-your-content-with-Audible-Magic->>

accessed 4 September 2021.

⁷²⁸ Facebook Inc., ‘About Rights Manager’ (Facebook) <<https://www.facebook.com/login/?next=https%3A%2F%2Fwww.facebook.com%2Fbusiness%2Fhelp%2F2015218438745640%3Fid%3D237023724106807>> accessed 4 September 2021.

⁷²⁹ Katharine Trendacosta, ‘Unfiltered: How YouTube’s ContentID Discourages Fair Use and Dictates What We See Online’ (A publication of the Electronic Frontier Foundation 2020) 9 <<https://www.eff.org/files/2020/12/10/unfiltered.pdf>>.

⁷³⁰ European Union Intellectual Property Office. (n 719) 6.

knowledge, Facebook has not reported any figures about the accuracy of Rights Manager. The most recent figure for Content ID is from 2016, when a YouTube spokesperson declared that the system is “99.7% precise for recordings on file”⁷³¹ but it is unclear whether this figure refers to false positives or false negatives or is specific to a certain type of media. Audible Magic has been the most open about the accuracy of its system, reporting an identification rate of 99.9%, with less than 0.1 % false negatives and less than 0.0001 % false positives⁷³².

5.3.2.2. AUTOMATED ACTIONS/MONETISATION

All three systems enable rights holders to define *automated actions* that are carried out when a match between a piece of user-uploaded content and a reference file occurs. Within Rights Manager, these actions are referred to as “match actions”⁷³³, within Content ID as “match policies”⁷³⁴ and within Audible Magic as “business rules”⁷³⁵.

All three systems give users the option to “block” their copyrighted content from being viewed by the platforms’ users once it is detected. They furthermore all allow users to “monetise” the detected content, with the exception of Rights Manager for Instagram, in which no monetisation option seems to exist⁷³⁶. Monetisation means that a piece of content will remain published but a share of the revenue, which is generated through the placement of advertisements in connection with the respective content, will flow to the rightsholder. The exact share of this revenue is unclear from the companies’ public documents but seems to vary by case.

⁷³¹ Hannah Karp, ‘Industry Out of Harmony With YouTube on Tracking of Copyrighted Music’ *Wall Street Journal* (28 June 2016) <<https://www.wsj.com/articles/industry-out-of-harmony-with-youtube-on-tracking-of-copyrighted-music-1467106213>> accessed 4 September 2021.

⁷³² Audible Magic Corporation, ‘Content Recognition Technology: Balancing the Needs of Online Platforms, Creators and Users’ (2017) 9 <<https://www.asktheeu.org/en/request/4465/response/14429/attach/5/Annex%201%20Gestdem%202017%204050%20v3.pdf>>.

⁷³³ Facebook Inc., ‘Response to Questions about Rights Manager’ (n 710) 3.

⁷³⁴ Google Inc., ‘Upload and Match Policies’ (*YouTube Help*) <<https://support.google.com/youtube/answer/107129>> accessed 4 September 2021.

⁷³⁵ Audible Magic Corporation, ‘What Is a Business Rule?’ (*Audible Magic Support*, September 2020) <<https://support.audiblemagic.com/hc/en-us/articles/360051594854-What-is-a-Business-Rule->>> accessed 4 September 2021.

⁷³⁶ Facebook Inc., ‘Match Rules for Instagram Content’ (*Facebook Business Help Center*) <<https://www.facebook.com/login/?next=https%3A%2F%2Fwww.facebook.com%2Fbusiness%2Fhelp%2F2207395956214446%3Fid%3D708699556338610https%253A%252F%252Fwww.facebook.com%252Fbusiness%252Fhelp%252F2207395956214446%253Fid%253D708699556338610>> accessed 4 September 2021.

Rights Manager and Content ID additionally offer users the option to “monitor”⁷³⁷/ “track”⁷³⁸a piece of video content. In both cases, this means that the video or image will stay public but statistics about its viewership are being shared with the rights holder⁷³⁹. These two systems also allow users to require a “manual review”⁷⁴⁰ before the automated action is carried out. The Right Manager, furthermore, gives users the option to place a promotional banner on matching user videos that links to a promotional destination of their choice”⁷⁴¹.

Within all three systems, the above-mentioned automated actions can be specified with regard to specific parameters such as the user location and the duration of the detected piece of content. The specification for the user location allows rights holders, for instance, to block a piece of content for the users in one country or territory and monetise it in another⁷⁴².to specify the minimum length or percentage of the overlap between an upload and a reference file that has to be reached in order for a match to be generated⁷⁴³. As the only system, the Rights Manager also gives user the option to authorise specific users and pages on Facebook and Instagram to post their content⁷⁴⁴.

Since Audible Magic is the only system that operates on different platforms, it also gives users the option to specify the automated actions that can be performed in the platform on which the content is detected.⁷⁴⁵

5.3.2.3. DISPUTES AND CONFLICTS

There are different points in time at which the decisions that are made by the described systems can be seen as incorrect or problematic by its users - i.e., either the rights holders or content uploaders -

⁷³⁷ Facebook Cooperation, ‘Match Rules in Rights Manager’ (*Facebook Business Help Center*) <<https://www.facebook.com/login/?next=https%3A%2F%2Fwww.facebook.com%2Fbusiness%2Fhelp%2F475548192814461%3Fid%3D708699556338610>> accessed 4 September 2021.

⁷³⁸ Google Inc., ‘What Are Policies?’ (*YouTube Help*) <<https://support.google.com/youtube/answer/107383>> accessed 4 September 2021.

⁷³⁹ Google Inc., ‘What Are Policies?’ (n 738); Facebook Cooperation (n 737).

⁷⁴⁰ Facebook Cooperation (n 737); Google Inc., ‘Route Claims for Manual Review’ (*YouTube Help*) <<https://support.google.com/youtube/answer/106966?hl=en>> accessed 4 September 2021.

⁷⁴¹ Facebook Inc., ‘Response to Questions about Rights Manager’ (n 710) 4.

⁷⁴² ‘How Content ID Works’ (*YouTube Help*) <<https://support.google.com/youtube/answer/2797370?hl=en#zippy=%2Cwhat-options-are-available-to-copyright-owners>> accessed 4 September 2021.

⁷⁴³ Google Inc., ‘Upload and Match Policies’ (n 734); Facebook Inc., ‘Customize Match Rules in Rights Manager’ (*Business Help Center*) <<https://www.facebook.com/business/help/2274387806175252>> accessed 2 August 2021; Audible Magic Corporation, ‘What Are Duration-Based Rules?’ (*Audible Magic Support*) <<https://support.audiblemagic.com/hc/en-us/articles/360045395174-What-are-duration-based-rules->>> accessed 4 September 2021.

⁷⁴⁴ Facebook Inc., ‘Response to Questions about Rights Manager’ (n 710) 3.

⁷⁴⁵ Audible Magic Corporation, ‘What Can I Do with My Content after It’s Registered?’ (*Audible Magic Support*) <<https://support.audiblemagic.com/hc/en-us/articles/203786094-What-can-I-do-with-my-content-after-it-s-registered->>> accessed 4 September 2021.

and hence become subject to a dispute. The dispute processes which are covered here are all non-DMCA disputes.

The first type of dispute which can arise concerns the rejection of a user's application to the system, i.e., an *application rejection dispute*. Neither Rights Manager nor Content ID appear to offer a formalized process for a user to dispute the decision of being rejected access to the system. Facebook, however, has stated that rejected users can apply again after seven days and that "there is no limit on the number of times a rights holder may request access to Rights Manager"⁷⁴⁶. Since Audible Magic states that any type of rights holder will receive access to their system, this sort of rejection does seem to apply to their system.

The second type of dispute concerns conflicting ownership claims over a piece of content that has been registered with an automated content moderation technology – *content registration dispute*. Although the users of all systems have to confirm that they control the exclusive rights of a reference file, such ownership conflicts can arise.

Rights Manager offers a formalized and automated dispute process for this case, in which the second uploader has 7 days to file a dispute and the first uploader has 7 days to respond to it⁷⁴⁷. How the dispute is solved if the first uploader rejects the dispute is unclear. Facebook only says that "if the first publisher rejects the dispute and the second publisher feels that this is a mistake"⁷⁴⁸

YouTube's Content ID also offers a formalized and automated process for conflicting ownership claims. Accepted users can request an "ownership transfer" from the content owner. After that, the first uploader has 30 days to accept or reject the transfer request⁷⁴⁹. What happens if the first uploader does not accept the request, is, again, unclear from the public information.

Audible Magic, on the other hand, does not offer a formalized and automated process for content registration disputes but asks users who realise that their content has already been registered with the system to contact their Helpdesk⁷⁵⁰. How exactly the process for resolving such conflicts unfolds is unclear from the public information. The company states that it would "properly investigate the

⁷⁴⁶ Facebook Inc., 'Response to Questions about Rights Manager' (n 710) 2.

⁷⁴⁷ Facebook Inc., 'Address Ownership Conflicts in Rights Manager' (Business Help Center) <<https://www.facebook.com/business/help/840557212788102>> accessed 2 August 2021.

⁷⁴⁸ Facebook Inc., 'Address Ownership Conflicts in Rights Manager' (n 747).

⁷⁴⁹ Google Inc., 'Resolve Ownership Transfer Requests' (YouTube Help) <<https://support.google.com/youtube/answer/7669195>> accessed 4 September 2021.

⁷⁵⁰ Audible Magic Corporation, 'Content I Own the Rights to Is Being Blocked?' (Audible Magic Support) <<https://support.audiblemagic.com/hc/en-us/articles/360051594954-Content-I-own-the-rights-to-is-being-blocked->>> accessed 4 September 2021.

issue”⁷⁵¹but also emphasizes that “Audible Magic does not arbitrate any ownership disputes and any conflicts must be resolved between the two parties themselves”⁷⁵²

The third type of dispute relates to the matches that occur in the automated moderation systems. Both Rights Manager and Content ID have built in *match dispute* processes for such cases. Since Audible Magic is not a platform itself, but instead offers a technological “solution” to different platforms, the exact implementation of a dispute process for matches that are generated through Audible Magic depends on the platform which is implementing the “solution”.

In the case of Rights Manager, the match dispute process gives the uploader seven days to file a dispute and claim that their content was erroneously matched; the rightsholder equally has 7 days to uphold the claim, release the claim or request a takedown of the video.⁷⁵³ After this, the user has another opportunity to appeal the decision. The final decision lays with the rights holders.⁷⁵⁴

The match dispute process in Content ID is structured in an equal fashion, although it contains one more loop of back and forth and gives both parties more time to respond to the other side. Here, copyright owners have 30 days to respond after an uploader has submitted a dispute to a Content ID claim⁷⁵⁵. The rights holder can then either release or reinstate the claim, submit a copyright takedown request (DMCA) or let the claim expire, in which case the claim will be released.⁷⁵⁶ If the copyright owner decides to hold onto the claim and the uploader still disagrees, she can file an appeal to the rejected dispute. Again, the rightsholder then has 30 days to either release the claim by actively agreeing with the appeal or by doing nothing, or to immediately request the takedown of a video under DMCA rules, or schedule a takedown request, which gives the uploader the chance to cancel his appeal within 7 days and thereby avoid a copyright strike⁷⁵⁷. In any case, and analogously to Rights Manager, the user identified as the rights holder has the final word on the process.

5.3.2.4. BUSINESS MODEL

In terms of the three systems’ business models, Rights Manager and Content ID have so far not been offered as a product and seem to have been developed by Facebook and YouTube for their internal

⁷⁵¹ Audible Magic Corporation, ‘Content I Own the Rights to Is Being Blocked?’ (n 750).

⁷⁵² Audible Magic Corporation, ‘Content I Own the Rights to Is Being Blocked?’ (n 750).

⁷⁵³ Facebook Inc., ‘Resolve Usage Disputes in Rights Manager’ (Business Help Center) <<https://www.facebook.com/business/help/2523148971045474>> accessed 9 August 2021.

⁷⁵⁴ Facebook Inc., ‘Resolve Usage Disputes in Rights Manager’ (n 753).

⁷⁵⁵ Google Inc., ‘Dispute a Content ID Claim’ (YouTube Help) <<https://support.google.com/youtube/answer/2797454?hl=en>> accessed 4 September 2021.

⁷⁵⁶ Google Inc., ‘Dispute a Content ID Claim’ (n 755).

⁷⁵⁷ Google Inc., ‘Dispute a Content ID Claim’ (n 755).

use only. Yet, automated copyright content moderation systems might financially benefit these companies enormously. For they can diminish the companies' legal exposure, incentivise rights-owners to maintain their content in the platform, and help attract creators that might be interested in monetising their content. The primary target group/customers for these systems, i.e., users of Rights Manager and Content ID are thus content creators on Facebook and YouTube.

Audible Magic stands out as the only service we examined that appears to sell its technology as a product. The company functions as an intermediary between rights holders and platforms and has sold its technology to a range of the most important platforms including Facebook, Vimeo and Soundcloud⁷⁵⁸, as we noticed before. Besides platforms, the company is also offering its system to other customer groups such as music aggregators and distributors, and social media teams who want to check their posts for copyright infringement.

Besides the actual content recognition technology, Audible Magic furthermore offers to conduct licensing and back-office operations such as processing royalty payments for rights holders and platforms. The service is hence looking to offer a "one-stop-shop solution for digital service providers and UGC hosting platforms looking to manage copyrighted content" which encompasses licensing, rights management, and royalty administration as well as industry-leading content identification services."⁷⁵⁹

5.3.3.CASE STUDY: FACEBOOK INC.'S RIGHTS MANAGER

After providing an overview of the three main systems developed and employed by social media platforms to automatically identify, block and monetise copyright infringing content, we offer in this Section a detailed analysis of one of those systems – Rights Manager. As explained above, Rights Manager was launched in April 2016 by Facebook Inc.⁷⁶⁰ and has since been deployed on both Facebook and Instagram platforms. As Table 38 and Table 39 above suggest, Rights Manager is not radically different from Google's Content ID, and retains several common traits with Audible Magic's technology. At the same time, despite its enormous importance, it remains, at the time of the writing (August and September 2021), essentially unstudied. Hence, our decision to use it as a case study.

⁷⁵⁸ Audible Magic Corporation, 'Customers and Partners' (*Audible Magic*) <<https://www.audiblemagic.com/customers-partners/>> accessed 4 September 2021.

⁷⁵⁹ Audible Magic Corporation, 'Audible Magic's Acquisition of MediaNet's Business FAQ' (*Audible Magic Support*) <<https://support.audiblemagic.com/hc/en-us/articles/360061786813-Audible-Magic-s-Acquisition-of-MediaNet-s-Business-FAQ>> accessed 4 September 2021.

⁷⁶⁰ Facebook Inc., 'Introducing Rights Manager' (n 693).

Our analysis looks into the four macro-processes outlined above: (i) *Application and content registration* (Who can access Rights Manager? What are the eligibility criteria? Which kind of content can be registered?); (ii) *Identification and matching* (How does Rights Manager find a match? What are the matching criteria?); (iii) Automated actions (Which actions can be specified to be carried out after a match occurs?); and (iv) *Disputes and conflicts* (How do conflicts of content ownership get resolved? Who has the last call in an ongoing dispute?). Each of these three macro processes consists of different sub-processes and can lead to different outcomes. This description aims not only to deepen and complement the information offered above but also to enable a consideration of the politics behind Rights Manager's main characteristics. By "politics" we mean the particular asymmetries between rights holders, regular users and platforms that stem from decisions on who can use Rights Manager, which content it protects, how the matching happens, and the possibility of dissenting and appealing.

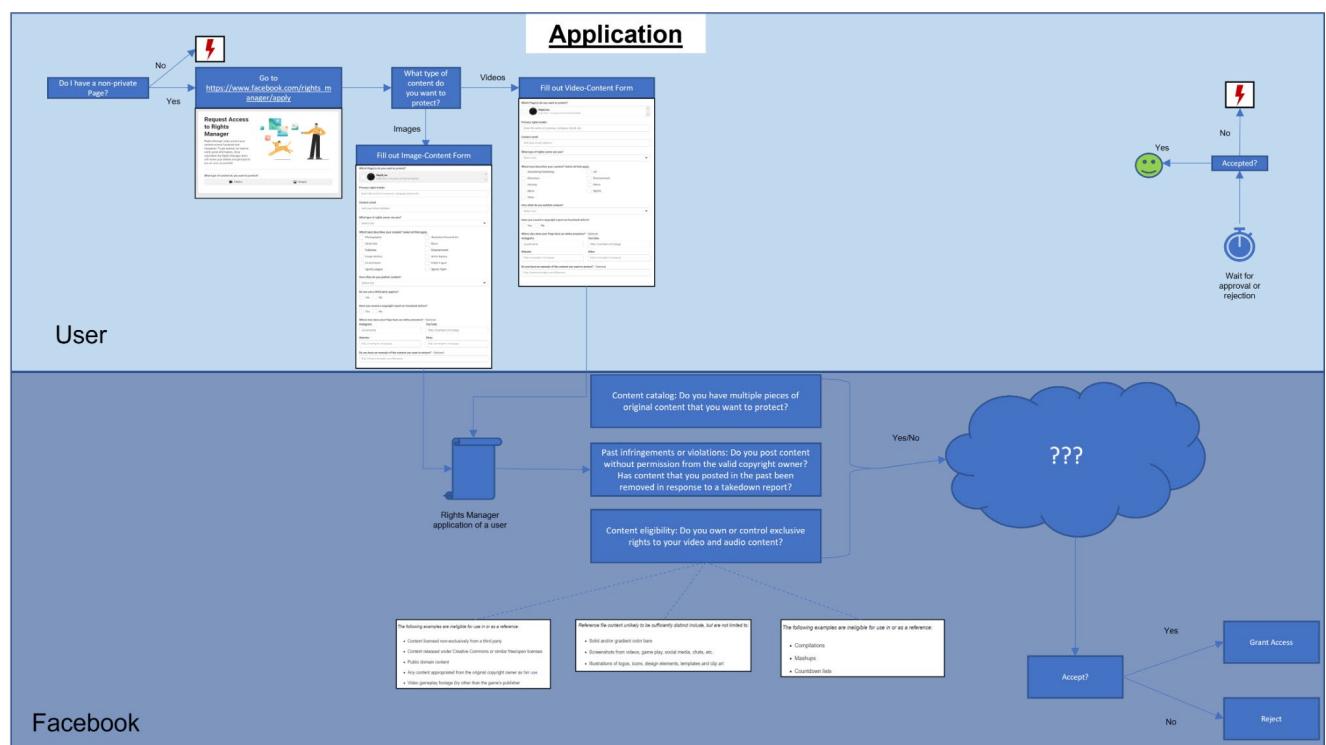


Figure 37. Diagram of Rights Manager's application process, as of September 2021. Source: Authors.

5.3.3.1. APPLICATION AND CONTENT REGISTRATION

As mentioned above, Rights Manager is not open to everyone. In order to be able to upload content to and benefit from the system, individuals and organisations must submit an application through which the company will allegedly "[...] verify that you [the applicant] have rights to enforce on

Facebook and Instagram.”⁷⁶¹ so as to grant access to Rights Manager. Figure 37 depicts our reconstruction of the Rights Manager application, which is composed of two main subprocesses: submission of application and decision on application.

A) SUBMISSION OF APPLICATION

In order to be able to access the application form, the applicant must, firstly, have a non-private page on Facebook. Without such a page, the application is materially impossible. Put another way, to be a user of Rights Manager one needs to be not a mere user of Facebook but a user who defines herself as “business”, “brand” or a “public figure” – the categories that Facebook itself establishes as applying to non-private pages⁷⁶². All content that is uploaded to Rights Manager must be linked to this page.

If the applicant already controls a page, or once such a page is created, two application forms exist: 1) an application form for image content and 2) an application form for video content. There is no application form that includes both types of media and since the application form forces the users to choose between “video” and “image”, it is not clear if applications for both types of content get treated as two different applications or as only one. Both forms have some common and some content specific form fields (see Annex IV). While some categories seem necessary (“type of rights owner”, “type of content”) others are less obvious (e.g., “how often” the applicant publishes content and whether the application has “issued a copyright report on Facebook before”). No explanation is given as to why the latter information is required, and how Facebook uses it to arrive at a decision on the application. It is also notable that at no moment the applicant is required to provide any material evidence of their rights over the content she claims to be hers. The field “Do you have an example of the content you want to protect?”, for instance, is optional.

B) DECISION ON APPLICATION

After filling the form, the applicant must submit the application which Facebook says is judged according to three criteria:

- “Content eligibility: Do you own or control exclusive rights to your video and audio content?
- Content catalogue: Do you have multiple pieces of original content that you want to protect?
- Past infringements or violations: Do you post content without permission from the valid copyright owner? Has content that you posted in the past been removed in response to a takedown report?”⁷⁶³

⁷⁶¹ Facebook Inc., ‘Rights Manager Eligibility’ (n 698).

⁷⁶² Facebook Inc., ‘Create a Facebook Page for Public Figures’ (*Facebook for Business*, 2021) <<https://en-gb.facebook.com/business/learn/lessons/create-facebook-page-public-figure>> accessed 2 August 2021.

⁷⁶³ Facebook Inc., ‘Rights Manager Eligibility’ (n 698).

A first observation regards the apparent disconnect between the information that the applicant is expected to submit when applying for Rights Manager and these criteria. It is unclear how Facebook can accurately answer these questions based only on the information provided in the application form that we have just described (see Annex IV). Information on content ownership and catalogue size is entirely self-reported – on which basis can Facebook decide they are not lying? The issue of past infringements, in turn, is nowhere to be found in the form. The only element of the form that touches on infringements seems to concern alleged infringements of the applicants' own copyrights (“Have you issued a copyright report on Facebook before?”). The chasm between what is required during the application and what is allegedly taken into consideration when judging such an application suggests that Facebook might independently look for information, and the application form might not be as relevant as it initially appears to be.

Second, it is important to underscore how vague the explanation about these criteria is in the documents we analysed. Facebook's own pages (including the business Help pages for the Rights Manager eligibility⁷⁶⁴ and the Rights Manager's Terms or Service⁷⁶⁵) do not present any further information regarding “content catalogue” and “past infringements or violations”, which leaves important questions unanswered. Examples: Does the expression “multiple pieces of original content” imply numerical thresholds that must be met by an applicant? If so, what are these thresholds? Do they vary depending on who the applicant is and the content she aims to protect? Does Facebook independently check whether the applicant has posted copyright infringing content? Do these infringing posts refer to Facebook and Instagram only – or do they encompass other platforms, such as YouTube?

In the case of “Content eligibility”, however, Facebook is a bit more specific. It provides three categories with examples of what constitutes eligible content. They are:

- Exclusive Rights: “When you use Rights Manager, you acknowledge that your organization owns or controls exclusive rights to the reference files you upload to Rights Manager for the applicable territories.”⁷⁶⁶

Examples of content which does not meet the exclusive rights criterion are non-exclusively licensed third-party content, open or free licensed content like those under a Creative commons license, video

⁷⁶⁴ Facebook Inc., ‘Rights Manager Eligibility’ (n 698).

⁷⁶⁵ Facebook Inc., ‘Rights Manager Terms’ (11 November 2020) <https://www.facebook.com/copyrights_terms> accessed 2 August 2021.

⁷⁶⁶ Facebook Inc., ‘Content Eligible for Reference Files’ (n 707).

game footage which is not distributed by the publisher of the video game itself, as well as those in the public domain.

- Distinct reference content: “Your reference files must be sufficiently distinct from other reference files. It must be visually and audibly unlike other content.”⁷⁶⁷

Facebook provides some examples of not “sufficiently distinct” content: Solid or gradient colour bars, screenshots from videos, game play, social media or chats, illustrations of logos, icons, design elements, templates and clip art.

- Individual references: “You must provide individual references for each piece of intellectual property.”⁷⁶⁸

This restriction affects compilations, mashups and countdown lists. For these, the content uploader has to specify which pieces they hold (or not) copyright over. For instance, when submitting a compilation of ten video clips, of which the uploader created only two, eight must be excluded from Rights Manager protection. The same applies to the music of the video.

In order to better understand this first macro process, we also submitted a test application to Rights Manager. Facebook’s response further highlighted the considerable opacity of the application procedures. Figure 38 below shows the rejection email we received, less than 12 hours after the application submission.

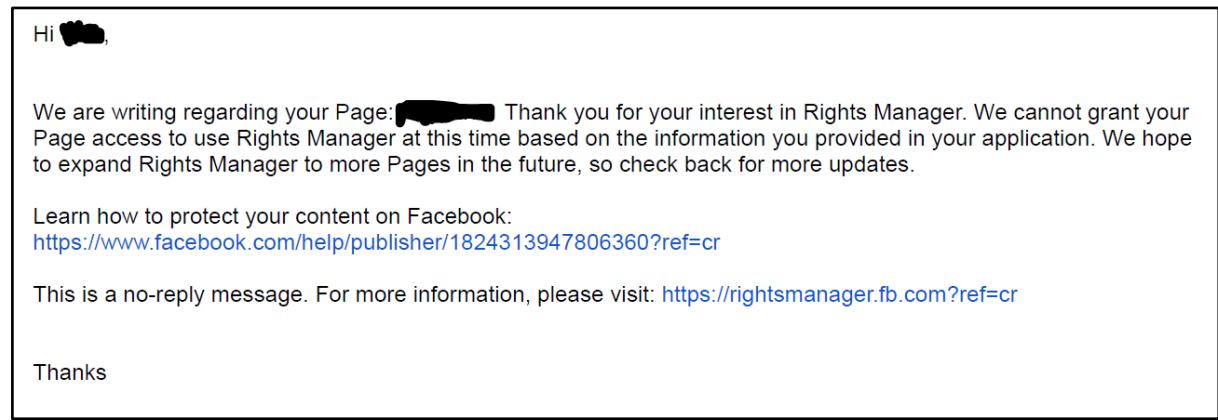


Figure 38. Screenshot of our application rejection e-mail from Rights Manager, with personal details redacted. Source: Authors

The non-reply message says that Facebook could not “grant access to use Rights Manager at this time based on the information you provided in your application” but raises the hopes that, “in the future”, Rights Manager could be expanded to “more Pages”. This terse explanation can hardly explain the

⁷⁶⁷ Facebook Inc., ‘Content Eligible for Reference Files’ (n 707).

⁷⁶⁸ Facebook Inc., ‘Content Eligible for Reference Files’ (n 707).

basis of the rejection: which “information” was taken into account (or was missing) is unclear. Also, if the application was rejected “at this time”, what would be needed to get accepted in the future? Meanwhile, the message seems to assign a central role to the applicant’s pages, about which Facebook might have much more information than that which was explicitly required in the forms. Furthermore, it is unclear how exactly the company arrives at these decisions. Given Facebook’s widespread reliance on automation and how relatively quickly the rejection was sent, it is also reasonable to suppose that algorithmic and perhaps machine learning systems are involved in the application decision. Facebook, however, has highlighted that “a team of trained professionals” is evaluating the application requests⁷⁶⁹.

5.3.3.2. IDENTIFICATION AND MATCHING

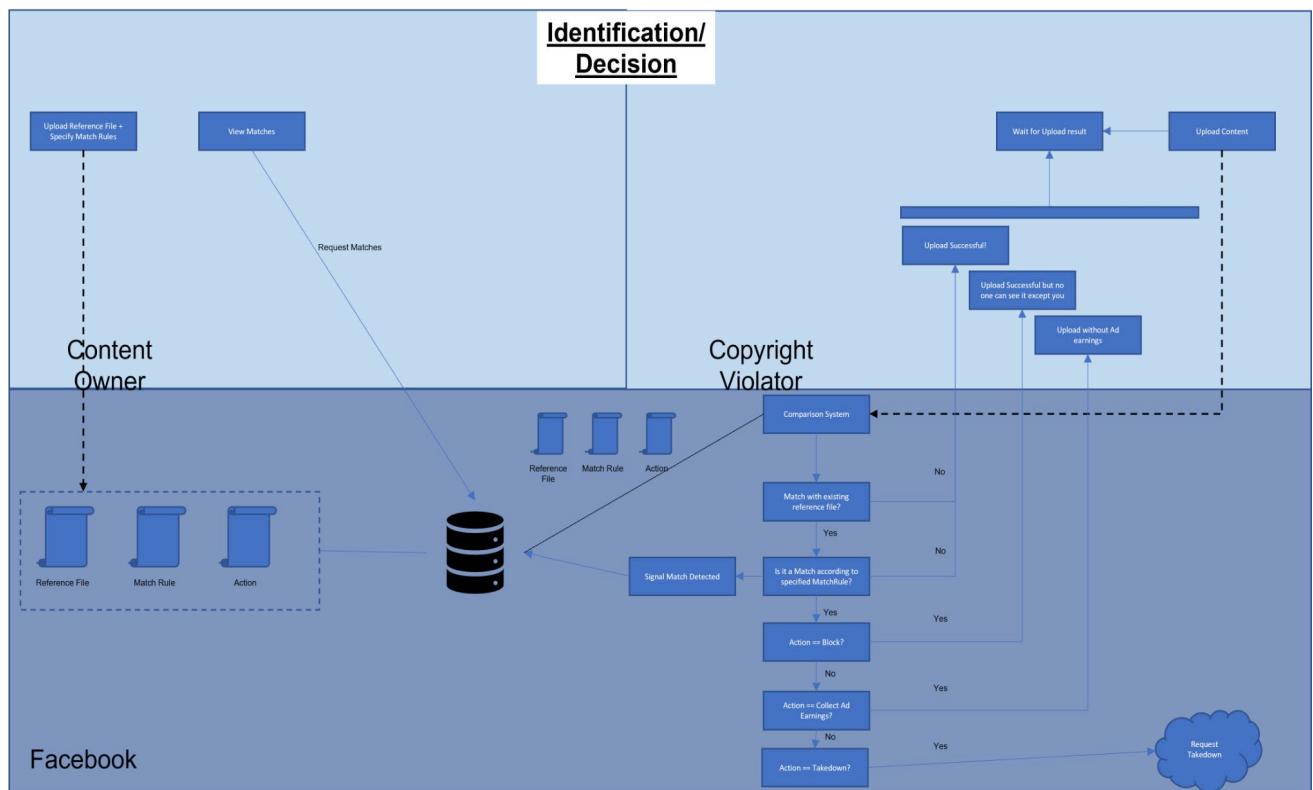


Figure 39. Diagram of Rights Manager’s copyright violation identification and action processes, as of September 2021. Source: Authors.

In this section we describe the second macro-process mentioned above: how Rights Manager can be used to protect original content and how the relations between two parties (reference file uploader

⁷⁶⁹. Facebook Inc., ‘Response to Questions about Rights Manager’ (n 710) 2.

and content uploader) work. This macro-process is composed of four sub-processes (see Figure 39): reference file upload, specification of match rules, specification of actions; and the actual matching.

A) REFERENCE FILE UPLOAD

Once applicants have access to Rights Manager, they can formally establish their ownership over content within the system by uploading what Facebook calls “a reference file”. The reference file is used by Rights Manager for the comparison with new content uploaded by other users. If the newly uploaded content is considered to be “sufficiently” similar to a reference file, it is marked as a *match*. Thus, in principle, the individual or organization who uploads a given content file as part of her reference file is, from the Rights Manager perspective, the owner of the content. (Disputes for reference file ownership and matches exist, though; they will be described in the next section.) A reference file must be eligible and can include images or videos. For videos, parts of the file can be excluded from the reference file. For example, an uploaded video with a length of five minutes might contain only three minutes of content that should be protected by Rights Manager. It is unclear whether there is a limit to the number of files that can be uploaded.

B) SPECIFICATION OF MATCH RULES

Once a reference file is successfully uploaded, users can specify what constitutes a match, under four general “dimensions” pre-established by Facebook: 1) “User dimension”; 2) “Geographical dimension”; 3) “Comparative dimension”; and 4) “Content dimension”⁷⁷⁰.

Let us unpack each of these “dimensions”. According to the user dimension, (1) a reference file uploader can authorise specific pages or accounts to use the content of the reference file. Further, geographical regions (2) can be included/excluded for viewers. Per the comparative dimension (3), reference file uploaders can specify the temporal overlap between the reference file and an uploaded content that will constitute a match, which in practice is a way of enabling copyright exceptions. For example, copyright owners might allow others to use parts of their video if their posts are not longer than 10 seconds. The content dimension (iv) only applies to videos and live videos. Here, a reference file uploader can specify whether they want to protect only the image or also the audio of their content. For example, if a user creates a video and adds background music from another artist, the user must exclude the audio when she uploads the video to Rights Manager since she does not hold the copyrights for the song but only for the video.

⁷⁷⁰ Facebook Inc., ‘Customize Match Rules in Rights Manager’ (n 743).

In sum, reference file owners can calibrate with some precision to what extent, where and who can use their content. Note that these rules do not only apply to public postings but also to private and/or restricted postings. Thus, the match rules enable copyright enforcement in areas where a user with no access rights to Rights Manager would not even notice copyright violations. Furthermore, the insights tool of Rights Manager enables precise calibration of too strict or too loose match rules (next to the effect of the applied actions).

C) MATCHING

Once the match rules and the automated actions, which are discussed below, are specified, Rights Manager system checks every new upload according to those parameters and automatically takes action. The system also checks existing content on the site when new reference files are uploaded. As explained by the company, Rights Manager scans “content from 72 hours prior to the ingestion of a reference file”, and it also scans “content retroactively on a rolling basis. This means that content may be scanned at any point following its upload to Facebook”.⁷⁷¹ Users whose upload triggers a match with a reference file have the option to dispute the match. We will discuss the dispute processes below at 5.3.2. Unfortunately, Facebook does not provide any information about the technical workings of the matching algorithm, data encoding or accuracy of the system.

D) AUTOMATED ACTIONS/MONETISATION

The last step to achieve a Facebook-Instagram-wide copyright protection of a reference file regards the specification of automated actions in case a match occurs. Five different actions are possible, all predefined by Facebook on a user interface⁷⁷² : (1) “Collect Ad Earnings”, i.e., monetisation for video content: the matched content can stay public but the reference file owner will collect earnings from advertisements linked with the content, although very few details are given – e.g., the exact share of the earnings due to rights holders is unclear; (2) “Monitor”: a video or image stays public but the reference file owner receives information about how it is performing; (3) “Block”: This prevents other users from viewing the matched content; (4) “Manual Review”: Lists the matching content in a separate “tab” for 30 days so the rights holder can decide on further actions; (5) “Takedown”: Request a takedown of the matching content. The difference between “Takedown” and “Block” is that a blocked video can still be viewed by the administrator of the uploader page. A “Takedown”, on the

⁷⁷¹ Facebook Inc, email to report authors, February 10, 2022. This information is different from the publicly available information on Rights Manager that states: “Rights Manager isn't retroactive. It doesn't detect videos that were posted before your reference files were uploaded.” (Facebook Inc, ‘Rights Manager Eligibility’)

⁷⁷² Facebook Inc., ‘Actions for Matching Content in Rights Manager’ (Business Help Center) <<https://www.facebook.com/business/help/1171020569731957>> accessed 2 August 2021.

other hand, is the deletion of the content from Facebook or Instagram – with the exception of the Rights Manager’s database, of course. Another option, which is explained in a different webpage than that of the first five possibilities, involves creating and displaying an “ownership link” on a matching video⁷⁷³. The “ownership link” which is displayed on a banner on the matched user video can link to a promotional destination of the rights holders’ choice⁷⁷⁴. For example, a reference file owner can flag content for monitoring and at the same time collect the ad earnings.

E) DISPUTES AND CONFLICTS

The fourth and last macro-process involves situations in which an individual or organisation does not agree with a Rights Manager’s decision and then files a dispute. Two types of disputes, which are treated here as sub-processes, seem to exist: an upload dispute and a match dispute.

F) CONTENT (REFERENCE FILE) REGISTRATION DISPUTE

First, conflicts might happen at the moment of registering content, i.e., the reference file upload. This occurs when an upload is rejected because the uploaded file is too similar to an existing reference file. In this case, Facebook places the two parties in contact with each other. Figure 40 shows the dispute process for this scenario, which is embedded in Rights Manager.

⁷⁷³ Facebook Inc., ‘Ownership Links in Rights Manager’ (*Facebook Business Help Center*) <<https://www.facebook.com/business/help/528858287471922>> accessed 2 August 2021.

⁷⁷⁴ Facebook Inc., ‘Response to Questions about Rights Manager’ (n 710).

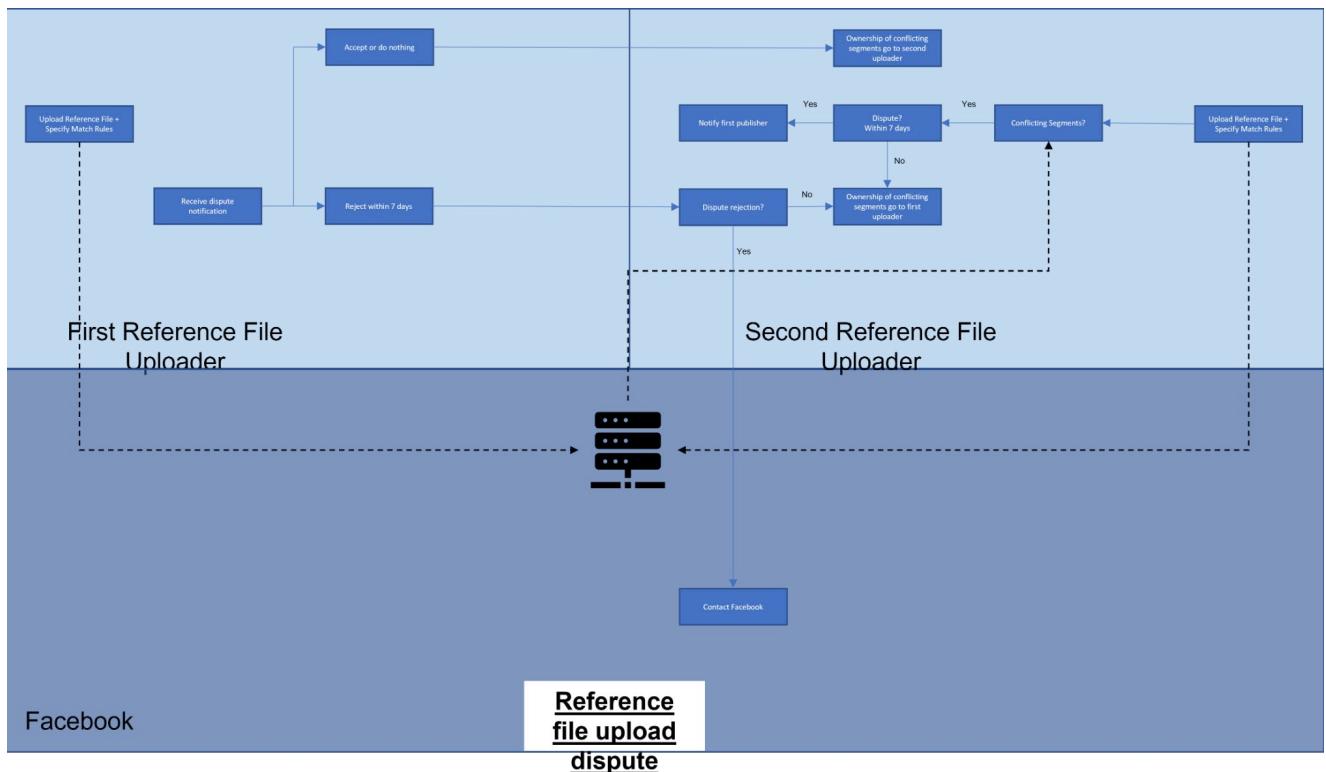


Figure 40. Diagram of Rights Manager's dispute process between two reference file uploaders, as of September 2021. Source: Authors.

If a reference file upload is rejected on these grounds, the second uploader can start the dispute process.⁷⁷⁵ The first reference file uploader has then the option to reject the dispute within 7 days, a unilateral decision that the second uploader does not appear to be able to appeal. During the dispute, the reference file of the second uploader will stay offline and will not be used to find matches on Facebook and Instagram. (It is unclear what happens with the eventual monetisation of the file during this dispute.) However, if the first reference file uploader does nothing within 7 days or accepts the dispute, the rights over the disputed content are assigned to the second reference file uploader. Again, no information is given on whether the first uploader can appeal this decision, e.g., in case the user accidentally missed the rejection deadline.

G) MATCH DISPUTE

Second, the dispute might happen when a user uploads a piece of content to Facebook or Instagram and it is flagged as a match with an existing reference file. Since two pieces of content might be similar but not a copyright violation, the content uploader has the option to dispute the match. Figure 41 depicts the process within Rights Manager/Facebook/Instagram to resolve those conflicts.

⁷⁷⁵ Facebook Inc., 'Address Ownership Conflicts in Rights Manager' (n 747).

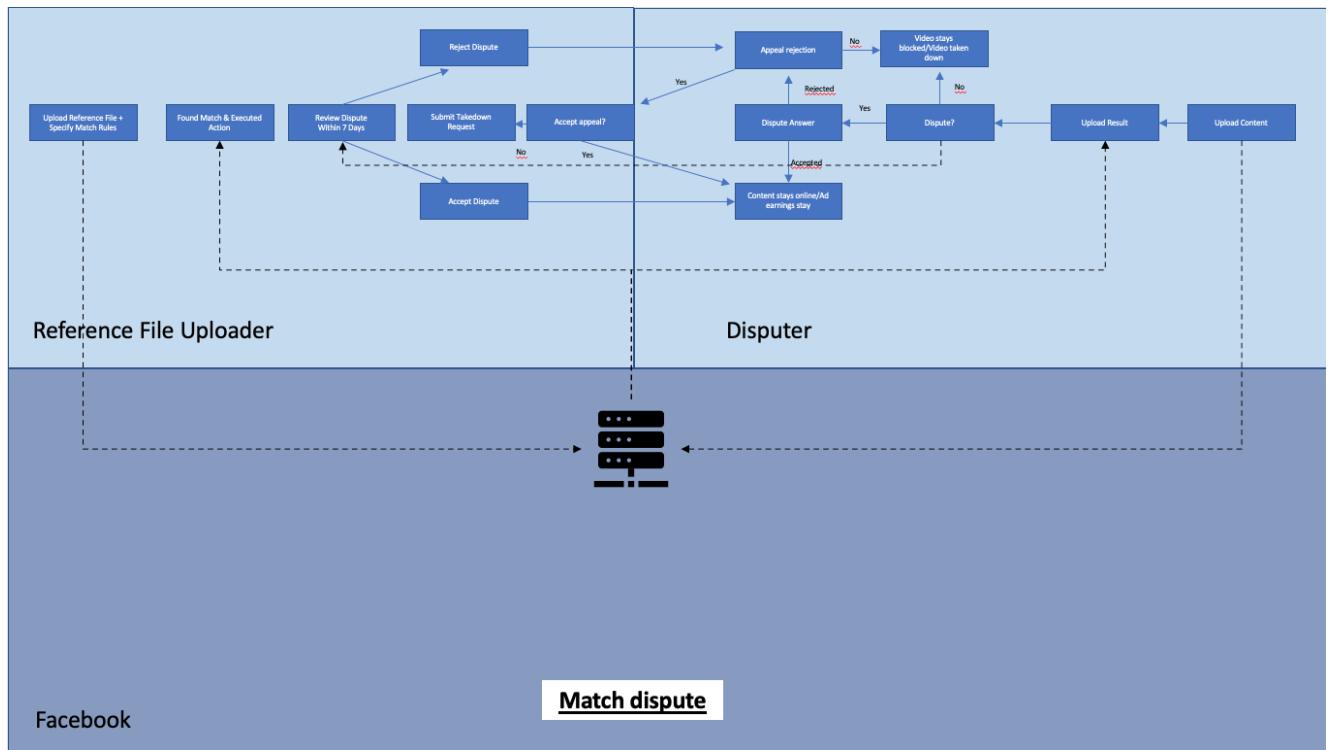


Figure 41. Diagram of Rights Manager's process between reference file owner and content uploader. Source: Authors.

As with the content registration dispute, the match dispute has to be filed the content uploader. The reference file owner then has 7 days to reject the dispute in which case the automated action (Block, Monetise, etc.) stays⁷⁷⁶. If the decision stays, the user can file an appeal in which case one has to “provide more information and justification” for the appeal⁷⁷⁷. In the final round, the rights holder has another chance to respond and can either release the claim or submit a takedown request⁷⁷⁸. The information about the appeals process was provided by Facebook directly to us but is not present in the publicly accessible documents about Rights Manager.

5.4. DISCUSSION

Whilst the empirical findings presented are, by themselves, the main elements of the mapping exercise this Chapter set out to do, they also support two interrelated conclusions on how platforms’ copyright content moderation structures have emerged, changed and consolidated in the past 20

⁷⁷⁶ Facebook Inc., ‘Resolve Usage Disputes in Rights Manager’ (n 753).

⁷⁷⁷ Facebook Inc., ‘Response to Questions about Rights Manager’ (n 710) 6.

⁷⁷⁸ Facebook Inc., ‘Response to Questions about Rights Manager’ (n 710) 6.

years. We name them *complexification & opacification* and *platformisation & concentration*. The rest of this section outlines these two dual processes, pointing out how different kinds of platforms experienced them.

5.4.1. COMPLEXIFICATION AND OPACIFICATION

First, *platforms' copyright content moderation structures became much more complex and opaquer over time*. This is perhaps the clearest conclusion of our analysis and can be observed from several analytical perspectives.

In terms of rules, complexification is everywhere. It is apparent in the steep increase in the number of kinds of documents, the progressive diversification in the normative types and subjects of rules, as well as the exponential growth of the very number of rules that platforms used to govern content in relation to copyright. These conclusions seem valid in both the normative and discursive senses – that is, mentions to rules also increased, often enormously so (e.g., SoundCloud's). Broadly speaking, a social media user in 2020 would have to navigate a considerably more intricate web of provisions, dispersed over many more documents and pages, than a user from the early 2000s, for instance. In the case of some platforms, such as Facebook and SoundCloud, complexification also includes the very pace of change and number of normative periods. And, yet, complexification of rules is, in some instances, still insufficient. Consider for instance how some platforms' framework still lacks a clear explanation of several aspects of copyright content moderation, such as how to appeal content removal decisions.

Whilst our analysis on automated copyright content moderation systems was not longitudinal, the appearance and eventual centrality of these systems point to a central moment in this complexification. Products such as Rights Manager, Content ID and Audible Magic's fingerprinting technologies contain their own form of complexity, which compounds that of rules. There is of course the technical sophistication of algorithmic fingerprinting, and of the auxiliary computational processes that it depends on (data collection, processing etc). But what our examination of these systems unveils is that their intricacy is also strongly associated with other macro processes which are hardly examined in the critical scholarship on these systems and cannot be reduced to fingerprinting itself. Consider the application process for Rights Manager, which involves a puzzling disconnect between the information required during submission and the (vague) eligibility criteria that supposedly informs a decision on access granting, as well as the apparently random ways in which users can or cannot appeal this system's rulings, for example.

Complexification is also useful to further problematize these systems. Often, they are simply called “copyright filters”. This term might seem intuitive. However, singling out computational filtering procedures can be misleading, our analysis highlights. Those systems might in fact be defined as composed of various sorts of human and non-human resources (fingerprinting processes, data, rules, users’ actions, interfaces), which are organized into multiple macro- and sub-processes, many of which do not appear to involve fingerprinting algorithms at all.

This is not to say complexification is not necessary – indeed, it is almost impossible to think of how a 2-billion-user platform like Facebook can function without a level of complexity that is naturally incomprehensible to individuals. What makes complexification troubling is its entanglement with opacification, which our research made quite clear. When copyright content moderation rules get fragmented into several kinds of documents, some of them hidden in Help pages that are many clicks away from the platform’s landing page, or dispersed into several documents that the user might not even be aware of, it is expected that users might have a harder time finding, knowing and understanding these provisions. The pace of changes also present challenges to user’s ability to know the rules that govern content moderation – is it reasonable to expect that they will be able to keep up with so many shifts? It is worth noticing that opacity might also be produced when rules are lacking, or their wording is too vague or generic. We have found some evidence of the former possibility when discussing platforms’ normative periods; the latter aspect would demand a much more thorough discursive analysis of platforms’ T&Cs, what this Chapter did not carry out.

An acute lack of transparency is also a defining trait of automated content moderation systems, and this is true not only to algorithmic fingerprinting. Consider the application for the Rights Manager system, for instance. Users are not informed what, after all, means a “sufficiently” distinct content and how many pieces of content they might need to have in order to be eligible. Regarding the matching itself, it is not clear what thresholds of similarity lead to a match, what the accuracy of the system is and if the system can be tricked by adversely manipulating the speed and/or pixels of video and image files.

While some level of complexification can be observed in all platforms of our sample, this process unfolded differently in distinct services. The copyright content moderation structures of mainstream and audio-visual specialised services appear to have become much more complex over time than those of alternative services. The latter have fewer rules, which concern fewer subjects through fewer normative types, and are explained in a smaller number of documents. Yet even Diaspora, one of the simplest platforms of our sample, experienced some complexification, as the very decision to publish a set of copyright content moderation rules demonstrates. Tellingly, no platform’s copyright content

moderation we analysed became *less* complex over time. Meanwhile, alternative services do seem to be much less opaque: they have fewer rules and kinds of documents, and do not seem to use automated systems. This might appear encouraging – but it is also hardly replicable. Alternative services' structures do not appear to be a viable model for larger services, with a whole different set of expectations and needs (e.g., content moderation at scale). Whether the same conclusion applies to blockchain-based monetisation systems, such as that of DTube, is unclear. This element, which this Chapter described only cursorily, might demand much more scholarly attention.

Complexification and opacification indicate that platforms' structures of copyright content moderation go way beyond the relatively straight-forward notification-and-take-down procedure. The largest and arguably most important services are engaged in a multi-layered process which are based on dozens of ever-changing rules fragmented into shape-shifting documents, and often determined by automated systems whose workings and protocols are essentially hidden from users' view and shielded from their actions. In the smallest platforms, structures usually encompass mostly a set of some rules, which have however grown (or at the very least emerged) over the years.

5.4.2. PLATFORMISATION AND CONCENTRATION

Second, *platforms' role in copyright content moderation became more important over time (platformisation), leading to a concentration of decision-making power and deepening inequalities between platforms/large rights holders and ordinary users/creators (what we call concentration)*. Platformisation and concentration are to some extent a by-product of complexification and opacification.

Generally, platformisation might be defined as “the penetration of the infrastructures, economic processes, and governmental frameworks of platforms in different economic sectors and spheres of life”⁷⁷⁹. This resonates with the empirical findings presented in this Chapter. Over time, platforms' copyright content moderation rules shifted power and responsibility to themselves; the emergence and widespread adoption of automated systems consolidated this process by enacting a normative framework that functions at the margins of – albeit not fully independently from – external legal frameworks. The structures of copyright content moderation, initially almost exclusively reliant on

⁷⁷⁹ Thomas Poell, David Nieborg and José van Dijck, ‘Platformisation’ (2019) 8 Internet Policy Review <<https://policyreview.info/concepts/platformisation>> accessed 18 February 2022.

laws such as the DMCA, were progressively expanded towards and conflated with platform's logics, technologies and interests -- including that of serving large rights holders.

Consider the changes in rules we examined above. Typically, these provisions were initially characterized by a focus on users' self-regulation: they were expected to be sure that their actions would violate others' copyright (including platform's). Over time, however, platform-oriented rules, such as platform's obligations and rights, became considerably more prominent. In other words, platforms' roles shifted over time, from one in which they worked as a mostly passive recipients of complaints to one that involved actively identifying and taking down content. This is particular true in relation to the two mainstream platforms we examined in depth (Facebook and SoundCloud) but is also visible in the case of PornHub (which saw an increase in the percentage of platform's rights) and FanFiction (whose proportion of platform's obligation experiences a considerable growth). In relation to alternative services, Diaspora's framework also focusses heavily on these obligations; DTube appears to be an exception, though, as most of their provisions concern users' rights and duties.

Platformisation does not mean that platforms have unambiguously embraced their controller role, which entail costly responsibilities and the possibility of accountability. In fact, platforms seem to have attempted not to attract much attention to their own new powers. Discursively, as we have shown in relation to Facebook and SoundCloud, for instance, the focus remained on users – their obligations and need to self-regulate. Moreover, these mainstream platforms tried, as much as possible, to remember users that they were expected to try to solve disputes on their own. The progressive restrictions imposed by these large platforms on the possibility of reporting copyright might also be understood as an attempt to relieve the administrative and legal burdens created by platformisation – without diminishing their powers in any real way.

Indeed, this power became more and more concentrated. The very fact that essentially all companies could expand the number of rules as they wished, following their own needs and logics, is evidence of that. But concentration means more than centralization of the control levers on the hands of platforms. It might be also described as the deepening of the chasm between ordinary users/creators and platforms/large rights holders.

Automated copyright content automated systems are key to cement these inequalities. This is obvious when one think of platform's ability to decide unilaterally the factors that underpin algorithmic fingerprinting – and, then, intentionally hide these factors from their publicly-available documents. But arguably as worrying as this are the high entry barriers instituted by platforms (in the case of Content ID and Rights Manager, for instance), which in practice prohibit ordinary users/creators to

even enjoy these systems' (alleged) technical sophistication. That the first uploader can have the upper hand during disputes, as we noted in regard to Rights Manager, might make these barriers more harmful, as cultural industry actors might be much more attentive to copyright issues than individual creators and ordinary people and, thus, more likely to upload disputable content to these systems. This is not to mention the diminished and poorly explained possibilities of disputing and appealing the decisions of these systems, which of course aggravate said unbalance.

Content upload restrictions are also a prominent evidence of power concentration in the context of copyright content moderation. In the case of Rights Manager, these restrictions appear at least partially linked with Facebook Inc.'s desire to keep the digital processes within their system simple and reduce possible disputes or unrightfully claimed copyrights of open intellectual property. However, in trying to avoid the submission of contents whose ownership is debatable, this sort of ex ante regulation precludes legitimate content from being protected. Logos, icons and design elements are not necessarily infringing. In fact, they constitute one of the best earning jobs on platforms such as Fiverr.⁷⁸⁰ The same arguably applies to video game-related content. Moreover, upload restrictions may end up artificially inflating any conclusion about how effective Rights Manager's fingerprinting is, even if this was not Facebook's intention. Inflated figures can have consequences to how the system is seen or not as legitimate by users, designers and policymakers. It is also unclear why Rights Manager only protects videos and images, and not, say, texts.

Final evidence of the disproportions between ordinary users/creators and platforms/large rights holders is the almost complete absence of copyright exception rules in the normative frameworks of the companies we analysed. The absence is so ample that it is actually hard to measure it, or to assess its evolution. Even alternative platforms, which in principle could be more open to doctrines such as fair use, appear to be silent about exceptions in their T&Cs.

5.5. INTERIM CONCLUSIONS

This Chapter mapped out the differing structures that mainstream, alternative and specialised social media platforms' employ to enact copyright content moderation. Zooming in on two prominent kinds of structures (the rules communicated in public documents and automated systems of enforcement)

⁷⁸⁰ fiverr.com, 'Freelancers on Fiverr Have Earned Over 2 Billion Dollars' (25 May 2021) <<https://investors.fiverr.com/press-releases/press-releases-details/2021/Freelancers-on-Fiverr-Have-Earned-Over-2-Billion-Dollars/default.aspx>> accessed 9 August 2021.

we showed that these structures make up normative, discursive and material frameworks that, complex and opaque, concentrate power in the hands of both platforms and large rights holders.

Lastly, let us tentatively note that legislation does not appear to be the determining factor in the evolution of platform's copyright content moderation structures. Surely, law is a necessary background element of the structures we studied, and as such have had almost certainly a continuous and diffuse effect on platforms' calculations, internal deliberation, decisions and actions. Yet the *distinct* trajectories of the platforms we studied were clearly not determined by the law alone. Not only because all platforms we analysed are roughly regulated by the *same* legislative frameworks but also because it seems hard to establish clear consistent causal links between the myriad shifts we identified and the legislative and case law developments in the area of copyright regulating these platforms over the past two decades. Our methodological choices do not allow us to answer conclusively what is, after all, associated with those differing developments. But size (very large platforms have much more complex copyright content moderation structures, and apparently have changed these structures much more often, than small ones) and main type of content (audio-visual platforms clearly put much more effort into their attempt to prevent copyright violations) seem to be at least as important as economic and governance models – one of the assumptions we had when we decided to include alternative platforms in our sample. The importance of those components is likely associated with the public and business pressures that having a very large number of users bring about, and the need to deal with large right holders in the movie and music industries, which have historically been particularly aggressive (and resourceful) in their attempts to enforce and defend their copyrights. As noted in Chapter 3, these elements are also key considerations in the legal assessment of the liability and copyright content moderation obligations of platforms in the context of EU copyright law (both in the context of CJEU case law on art. 3 InfoSoc Directive and in the scheme of art. 17 CDSMD), as well as in the broader context of platform regulation (e.g., as regards the asymmetric due diligence obligations in the DSA).

6. CONCLUSIONS AND POLICY RECOMMENDATIONS⁷⁸¹

In this final chapter, we first summarize our main conclusions and findings from our mapping analysis into content moderation of copyright-protected content on online platforms in the EU (6.1). On that basis, we outline our policy recommendations for EU and national policymakers (6.2). Importantly, this mapping analysis provides a basis for our subsequent normative and evaluative research, which will be the subject of a separate report.

6.1. CONCLUSIONS

This mapping Report consists of six chapters. The main research question of our mapping analysis is as follows: how can we map the impact on access to culture in the Digital Single Market (DSM) of content moderation of copyright-protected content on online platforms? We divide this question into multiple sub-research questions (SQR):

- SQR(1): How to conceptualise and approach from a methodological perspective the interdisciplinary analysis of content moderation of copyright-protected content on online platforms and its impact on access to culture in the DSM?
- SQR(2): How is the private and public regulatory framework for content moderation for online platforms structured?
- SQR(3): How do the various elements of that regulatory framework interact?
- SQR(4): How are copyright content moderation rules organized by platforms into public documents?
- SQR(5): Which copyright content moderation rules do different platforms employ to regulate copyright, and how have they changed over time?
- SQR(6): How do platforms' automated copyright content moderation systems work?
- SQR(7): How are the various elements of the regulatory framework and the online platforms' Terms and Conditions etc. likely to impact access to culture in DSM?

SQR1 to 6 are examined in this report, whereas SQR7 will be addressed in a future evaluation report.

Chapter 2 addresses SQR(1) by developing a conceptual framework and interdisciplinary methodological approach to examine copyright content moderation on online platforms and its potential impact on access to culture. The analysis clarifies our terminology, distinguishes between platform "governance" and "regulation", elucidates the concept of "online platform", and positions our research in the context of regulation "of", "by" and "on" platforms. Our legal analysis focuses on the regulation "of" platforms – predominantly through EU and national law – and our empirical analysis on a subset of the regulation "by" platforms. Regarding the latter, an effort is made to clarify the meaning of the structures of copyright content moderation that underpin our analysis, namely the

⁷⁸¹ All authors contributed to this chapter.

resources that platforms create and employ to regulate copyright. The main structure we focus on relates to the rules set by platforms to moderate copyright-protected content, mainly their terms and conditions (T&Cs), which we consider to play a dual role: normative and performative. A second structure we examine refers to the systems that platforms deploy to automatically moderate and enforce copyright through computational techniques, such as content recognition and filtering/blocking tools. Both structures are also examined later on from the perspective of EU law.

Building on the concept of “content moderation” in the Digital Services Act (DSA), the chapter further advances a working definition of “copyright content moderation” as

the activities, automated or not, undertaken by providers of hosting services – either as consequence of a legal notice-and-action obligation or as voluntary activity – aimed in particular at detecting, identifying and addressing content or information that is illegal under EU copyright law and is incompatible with their T&Cs, provided by recipients of the service, including measures taken that affect the availability, visibility and accessibility of that illegal content or that information, such as demotion, demonetisation, disabling of access to, or removal thereof, or the recipients’ ability to provide that information, such as the termination or suspension of a recipient’s account.

This concept, when seen in light of our subsequent analysis, elucidates the fact that many content moderation activities are not explicitly regulated in EU copyright law. Hence, the regulation of such activities is mostly left to the complementary application of other instruments (e.g., the DSA), national legislators’ margin of discretion, and – perhaps predominantly – private ordering by online platforms. Our research shows that EU copyright law mostly focuses on what could be understood as hard-line moderation of content items, namely certain measures aimed at addressing the availability or accessibility of content, such ex ante filtering, blocking or removal of content items. This results in regulatory gaps in the EU copyright law coverage of copyright content moderation activities. In particular, there are no explicit rules on measures: (1) affecting the visibility and monetisation of content or (2) addressing a user’s ability to provide information, e.g., relating to the termination or suspension of his account. As we note below in our recommendations, this regulatory gap should be further examined by policymakers, especially as regards monetisation activities.

Finally, in preparation of the evaluation of the results from the mapping analysis, we briefly outline a possible approach to define access to culture for purposes of content moderation, highlighting the descriptive and normative dimensions of the concept. The descriptive dimension posits that the “quality” of copyright content moderation is correlated to access to culture, because access to culture

is considered embedded in the existing copyright framework. Since the existing framework is assumed to strike the appropriate balance between exclusivity in copyright protection and access to culture, any variation in that balance – beyond the margin of interpretation allowed by law – will impact on access to culture. While obviously insufficient *per se*, this descriptive dimension is useful insofar as it provides a theoretical framework to compartmentalize the specific issues of copyright content moderation by online platforms. The focus of our approach is on the “downstream” issue of mitigation of errors in content moderation (*i.e.*, false positives and false negatives). This is particularly relevant in the context of EU copyright law, since the crux of the balance sought by the Advocate General (AG) and the Court in Case C-401/19 (on the validity of art. 17 CDSMD) is placed on whether ex-ante filtering measures can be deployed while avoiding the risks of over-blocking (and false positives) to platform users’ right to freedom of expression.

The normative dimension, on the other hand, rejects the notion that the existing copyright framework strikes the optimal balance between exclusivity in copyright protection and access to culture. The model suggests that substantive law relevant in the field of copyright can be amended in a way that changes the balance with the result that it further increases access to culture by providing more freedoms to third parties to use and disseminate copyright-protected works, without encroaching on the legitimate interest of copyright holders. The actual practices of content moderation by platforms are affected by the state-enacted law (including case law) that platforms are subject to, which determines their “autonomy space” in defining such practices. In other words, the legal regulation “of” platforms determines the space available for regulation “by” platforms. Under this framework, adjustments to state-enacted law can affect the content moderation practices of platforms either by narrowing down their autonomy space (*e.g.*, by broadening the scope of liability for platforms) or by raising the costs of acting outside the autonomy space (*e.g.*, introducing more severe sanctions and more effective remedies). Both the descriptive and normative approach are useful to frame and understand EU copyright law’s approach to regulating content moderation by platforms.

Chapter 3 carries out a mapping of copyright content moderation by online platforms at secondary EU law level. It aims to answer SQR(2) and SQR(3) from the perspective of EU law. The chapter starts with an analysis of the baseline regime from which art. 17 CDSMD departs from, which we call the pre-existing *acquis*. EU law has been subject to a high level of harmonization stemming from many directives on copyright and related rights, the interpretation of which is determined by the case law of the CJEU. In particular, the legal status of copyright content moderation by online platforms under this regime is mostly set by the Court’s interpretation of arts. 3 and 8(3) InfoSoc Directive – on direct liability for communication to the public and injunctions against intermediaries – and arts. 14 and 15

e-Commerce Directive – on the hosting liability exemption and the prohibition on general monitoring obligations. We explain this case law and its implications for platform liability and content moderation obligations up to the Court’s Grand Chamber judgment in *YouTube and Cyando*, and how developments contributed to the proposal and approval of art. 17 CDSMD. Setting aside the political nature of legislative processes, from a systematic and historical perspective, art. 17 CDSMD and subsequently the DSA can be seen as the result of efforts in EU law and its interpretation by the Court for the last 20 years to adapt to technological developments and the changing role and impact of platforms on society. The result has been an “enhanced” responsibility for platforms, characterised by additional liability and obligations regarding content they host, as well as an increased role of fundamental rights – especially of users – in the legal framework.

The heart of the analysis in this chapter is the complex legal regime of art. 17 CDSMD, which we carry out in light of existing scholarship, the Commission’s Guidance (COM/2021/288 final), and the AG Opinion and Court’s Grand Chamber judgment in Case C-401/19. Our analysis sets out in detail the different components of this hybrid regime, including:

- The creation of the new legal category of “online content-sharing service providers” (OCSSPs), a sub-type of hosting service providers under the e-Commerce Directive, and “online platforms” under the DSA;
- The imposition of direct liability on OCSSPs for content they host and provide access to;
- The merged authorization regime for acts of OCSSPs and their uploading users, provided the user act does not generate significant revenue;
- The *lex specialis* nature of art. 17 CDSMD in relation to art. 3 InfoSoc Directive and art. 14 e-Commerce Directive, which is endorsed explicitly by the Commission’s Guidance and AG the Opinion in C-401/19, and in our view implicitly by the Court in the same judgment;
- The relationship between the prohibition on general monitoring obligations in art. 15 e-Commerce and art. 17(8) CDSMD, where we argue that the latter may be understood as being of merely declaratory nature;
- The complex liability exemption mechanism comprises best efforts obligations on OCSSPs (to obtain an authorization and to impose preventive and reactive measures) in art. 17(4); and
- The substantive and procedural safeguards in the form of exceptions or limitations (E&Ls) or “user rights” and in-/out-of-platform (complaint and) redress mechanisms in art. 17(7) and (9).

Our analysis addresses multiple points of uncertainty in this complex regime, some of which will no doubt be subject to litigation at the national level and likely the CJEU. It is however worth highlighting the following aspects, as they also reflect possible points of improvement of this regime, from the perspective of copyright content moderation.

First, whether an online platform is subject to the pre-existing regime (as updated by the DSA) or the new regime in art. 17 CDSMD will depend on whether it qualifies as an OCSSP. Our research shows that there is significant legal uncertainty as regards this qualification, even despite the Commission’s Guidance. To be sure, certain large-scale platforms, especially with video-sharing features (e.g.,

YouTube, Meta/Facebook, Instagram), clearly qualify as OCSSPs. Others will also clearly be excluded from the scope of art. 17 because they will be covered by the definitional carve-outs in art. 2(6) CDSMD. Still, there remains a significant grey area, which affects both larger platforms and (especially) medium-sized and small platforms. The main reason is that the definition includes a number of open-ended concepts (“main purpose”, “large amount”, “profit-making purpose”) that ultimately require a case-by-case assessment of what providers qualify as an OCSSP. Furthermore, even where it can be established that a platform falls within the scope of the legal definition, it might remain unclear to what extent it does so. This is illustrated by the Guidance’s statement that if a provider offers multiple services, then there is a need for service-by-service analysis to assess whether it qualifies as an OCSSP. This approach, although understandable, introduces complexity in determining relevant services and subsequent attribution of liability. The outcome might well be that the same provider is subject to art. 17 CDSMD for certain services and the pre-existing regime for others. Once we scale up this issue to numerous platforms hosting copyright protected content, each providing different services, the complexity of determining liability regimes and respective content moderation obligations becomes clear.

Second, a crucial part of our analysis of platforms’ liability and copyright content moderation obligations refers to what we call the normative hierarchy of art. 17 CDSMD. We provide a critical analysis of how the Commission’s Guidance has attempted to address this hierarchy and strike the balance between the competing rights and interests of rightsholders, platforms and users, drawing from the arguments of AG Opinion and CJEU judgment in C-401/19.

The first important implication of the judgment is that the Court recognizes that art. 17(7) includes an obligation of result. As such, Member States must ensure that these E&Ls are respected despite the preventive measures in paragraph (4), qualified as “best efforts” obligations. This point, already recognized by the AG and in the Commission’s Guidance, is reinforced by the Court’s recognition that the mandatory E&Ls, coupled with the safeguards in paragraph (9), are “user rights”, not just mere defences.

The second and related main implication of the judgment is that the Court rejects the possibility of interpretations of art. 17 that rely solely on ex post complaint and redress mechanisms as a means to ensure the application of user rights. That was for instance the position defended by certain Member States during the hearing before the Court and in their national implementations. Instead, the judgment clarifies that Member States’ laws must first and foremost limit the possibility of deployment of ex ante filtering measures; assuming that occurs, the additional application of ex post safeguards is an adequate means to address remaining over-blocking issues. This conclusion should

be welcomed, especially in light of existing evidence that complaint and redress mechanisms are seldom used by users.

The third main implication of the judgment relates to the scope of permissible *ex ante* filtering by platforms. On this point, the Guidance states that automated filtering and blocking measures are “in principle” only admissible for “manifestly infringing” and “earmarked” content. However, the Court states unequivocally that only filtering/blocking systems that can distinguish lawful from unlawful content without the need for its “independent assessment” by OCSSPs are admissible; only then will these measures not lead to the imposition of a prohibited general monitoring obligation under art. 17(8) CDSMD. Furthermore, these filters must be able to ensure the exercise of user rights to upload content that consists of quotation, criticism, review, caricature, parody, or pastiche.

On this point, it is noteworthy that the judgment explicitly endorses by reference the AG Opinion, which states *inter alia* that filters “must not have the objective or the effect of preventing such legitimate uses”, and that providers must “consider the collateral effect of the filtering measures they implement”, as well as “take into account, *ex ante*, respect for users’ rights”. In our view, considering the Court’s statements in light of the previous case law and current market and technological reality, the logical conclusion is that only content that is “obviously” or “manifestly” infringing – or equivalent content – may be subject to *ex ante* filtering measures. Beyond those cases, for instance as regards purely “earmarked content”, the deployment of *ex ante* content filtering tools appears to be inconsistent with the judgment’s requirements.

It also remains to be seen whether this reasoning applies more broadly to other types of illegal content beyond copyright infringement. If it does, it might help to shape the scope of prohibited general monitoring obligations versus permissible “specific” monitoring, with relevance for future discussions on the DSA. In drawing these lines, caution should be taken in the application of the “equivalent” standard in *Glawischnig-Piesczek*, which likely requires a much stricter interpretation for filtering of audio-visual content in OCSSPs than textual defamatory posts on a social network.

Finally, we provide a brief analysis of the interplay between art. 17 CDSMD and the potentially applicable provisions of the DSA proposal to OCSSPs. On this topic, we refer readers to our parallel research, which offers an in-depth analysis. With regard to copyright-protected material and online platforms, the DSA matters at two levels. First, because it replaces the e-Commerce Directive, the DSA and its rules on liability and due diligence obligations will apply to all providers that do not qualify as OCSSPs. Second, and less obvious, the direct application of the DSA to OCSSPs covered by the liability regime in art. 17 CDSMD. Both art. 17 CDSMD and multiple provisions of the DSA impose obligations

on how online platforms deal with illegal information. Whereas art. 17 CDSMD targets copyright infringing content, the DSA proposal targets illegal content in general, including that which infringes copyright.

Departing from the observation that a platform may qualify as an OCSSP under the CDSMD and an “online platform” (and “very large online platform”) under the DSA, we conclude that the DSA will apply to OCSSPs insofar as it contains rules that regulate matters not covered by art. 17 CDSMD, as well as specific rules on matters where art. 17 leaves a margin of discretion to Member States. This includes, to varying degrees, rules in the DSA relating to the liability of intermediary providers and to due diligence obligations for online platforms of different sizes. Importantly, we consider that such rules apply even where art. 17 CDSMD contains specific (but less precise) regulation on the matter. In our view, although there is significant legal uncertainty in this regard, such rules include both provisions in the DSA’s liability framework and in its due diligence obligations (e.g., as regards the substance of notices, complaint and redress mechanisms, trusted flaggers, protection against misuse, risk assessment and mitigation, and data access and transparency).

In light of the above, one important conclusion from our analysis is the emergence of a bifurcated legal framework for online platforms engaging in copyright content moderation. On the one hand, OCSSPs are subject to the regime of art. 17 CDSMD as regards liability and content moderation. On the other hand, non-OCSSPs are subject to the pre-existing regime under the InfoSoc and e-Commerce Directives (and soon the DSA), as interpreted by the CJEU (most recently in *YouTube and Cyando*). Although the regimes have similarities – and can be approximated through the Court’s interpretative activity – they are structurally different. This divergence may lead to further fragmentation, on top of the fragmentation that is to be expected by the national implementations of the complex mechanisms in art. 17 CDSMD. To this we must add the application of the horizontal rules on content moderation liability and obligations arising from the DSA. In sum, the multi-level and multi-layered EU legal landscape on copyright content moderation that emerges from our mapping analysis is extremely complex.

Relatedly, as anticipated above, certain copyright content moderation issues of relevance remain unregulated in the copyright *acquis*, namely rules on measures: affecting the visibility and monetisation of content; and addressing a user’s ability to provide information, e.g., relating to the termination or suspension of his account. Although both categories are relevant, the issue of monetisation is in our perspective the most glaring regulatory gap, since “monetisation” actions play a central and financial consequential role in platforms’ content moderation practices. This topic should therefore be subject to further research and policy action in the near future.

Still as regards regulatory gaps, it is important to underscore the complexity of the legal determinations and judgments required to assess human and algorithmic copyright content moderation practices. This strongly suggests a need for better transparency and access to data from platforms. In these regards, both the pre-existing regime and art. 17 CDSM offers very little. As such, this is an area where serious consideration must be given to the potential application to OCSSPs and other copyright platforms of the DSA's transparency provisions, as well as to national solutions that impose on OCSSPs and non-OCSSPs transparency and data access obligations. In our view, the German transposition law provides an interesting blueprint in Section 19(3) UrhDaG in relation to rights to information.

Chapter 4 follows up on the EU level analysis with the comparative legal research at national level. It aims to answer SQR(2) and SQR(3) from the perspective of national law. The findings are based on legal questionnaires carried out in two phases with national experts in ten Member States, the first before the due date for implementation of the CDSMD and the second after that date. This corresponds to our work on Task T.6.1.2 (Comparative National Level Mapping).

The key findings of the first phase questionnaire are as follows. First, the majority of the Member States has conceptualized service providers that store and give the public access to a large amount of protected content uploaded by their users; but the direct liability of such service providers was far from uniform in the Member States. E-Commerce, criminal and civil law concepts are alternatively or complementarily applied; and such liability is missing in some countries at all. The new regime in art. 17 CDSMD will therefore require the introduction of new mechanisms in the majority of the Member States, as suggested by the Commission in its Guidance.

Second, the questionnaire indicated the need for the transformation of the liability regime of OCSSPs in the Member States' laws. So far injunctions, secondary liability, safe harbour and content moderation practices were mainly present in the analysed countries, unlike complaint-and-redress mechanisms, which were regulated in a small number of Member States. Art. 17 CDSMD will require the implementation of all of these elements, and hence Member States will be required to amend their legal system to a greater extent.

Third, the analysis highlighted that the end-users might be directly liable for unauthorized uploading of protected subject matter to OCSSPs systems, but such liability is rarely enforced in the Member States. Art. 17 CDSMD will also tend to push OCSSPs to authorize online users, and Member States' practices regarding end-user activities won't need to be amended significantly. On the other hand, several Member States will need to make more significant changes related to end-user flexibilities

(especially parody, caricature and pastiche) and complaint-and-redress mechanisms. Similarly, based on the national respondents' reactions, it is conceivable that the "user rights" approach of the CDSMD might require a conceptual change in the way copyright laws qualify end-users and their entitlements in many Member States.

The key findings of the second phase questionnaire – taking place after the implementation deadline for the CDSMD – are as follows. The implementation of art. 17 CDSMD (or the related legislative proposals) took place in nine of the analysed Member States with important differences. A significant number of the elements of secondary importance of the new regime were almost uniformly transplanted. To the contrary, the implementation of the primary building blocks of art. 17, i.e., the economic rights affected; the new liability regime; or the balancing of fundamental rights of stakeholders show a diverse picture. Such diversity suggests that the initial goal of the CDSMD to harmonize certain aspects of copyright in the digital single market might not be met, leaving instead a fragmented legal landscape.

These nine countries might be grouped into three tiers. In tier one, the German and the Swedish models show above-the-average detail in the implementation of the new regime, with a special focus on the strengthened protection of user rights and detailed liability mechanisms. In tier-two, the Estonian, French and the Dutch legislation contain a smaller number of individual solutions. In tier three, Denmark, Hungary, Ireland and Italy took a rather restrictive approach through an almost verbatim transplantation of art. 17 CDSMD. Importantly, this three-tier system is not meant to convey any qualitative ranking among the countries. It is almost certain that all national legislative institutions shall reconsider their domestic rules to make their laws fully compatible with the CJEU ruling in C-401/19.

Our comparative research also flagged certain conflicting statements in the Commission's and the CJEU's view on the proper method of implementation and substance of the national laws, as noted the findings above, which are consequential for national implementations. The CJEU's judgment requires that Member States implement art. 17 CDSMD in a fundamental rights compliant manner. As of now, various national solutions seem to be rather limited in terms of e.g., the priority of user rights over content filtering. Despite that, it is important to note that there is still no consensus on scholarship on the proper transposition method of art. 17, namely as regards the question of whether it is preferable to follow a (near) verbatim vs sophisticated implementation of the provision. With that being said, if one considers the Commission's Guidance, the AG Opinion and the CJEU judgment in case C-401/19, there are strong arguments that national implementations must go some way beyond quasi-verbatim transpositions.

Our findings indicate that it is plausible that a number of preliminary references on different aspects of art. 17 CDSMD will find their way to the CJEU in the short to medium term. These references will most probably focus on: interpretation of the newly introduced autonomous concepts of the CDSMD; the consistency of national transpositions with the EU law, especially in a fundamental rights dimension; and the exact scope and implications of “user rights” and respective safeguards under art. 17(7) and (9).

Chapter 5 mapped out the copyright content moderation structures adopted by 15 social media platforms over time, with a focus on their T&Cs (rules) and automated systems. This corresponds to the empirical research carried out in the context of Task T.6.1.3 (Private Regulations by Platforms: ToS, Community Guidelines). The chapter suggested that two dual processes seem to explain these structures’ development. The first is complexification/opacification. Our empirical work indicates that virtually all 15 platforms’ T&Cs have become more intricate, in various ways and to different extents. Over time, more (kinds of) rules were introduced or made public, and these rules were communicated in increasingly more diverse sets of documents. These documents were changed and tweaked several times, producing sometimes a plethora of versions, often located in a dense web of URLs. We therefore conclude that the way platforms organize, articulate and present their T&Cs matters greatly. For one, under increasing public and policy pressure, platforms have felt the need to express and explain their practices and rules of operation, and they have done so with complex and greatly varying documentation. For observers, although this provides more information about platforms, it nevertheless makes understanding the trajectory of platforms and their T&Cs extremely challenging. For example, with YouTube as a major actor when it comes to copyright, our database of their highly fragmented T&Cs has not resulted robust enough to allow for a precise longitudinal examination of their rules. In that way, the very organization and presentations of T&Cs should be understood as one element of platforms’ governance of content.

Substantially, we demonstrated that complexification can be radically distinct, depending on which platforms one considers. Very large ones, such as Meta/Facebook, experienced an almost continuous and drastic transformation; smaller ones, such as Diaspora, have barely changed. Yet, when a change occurred, it made those sets of rules more difficult to comprehend. Whilst our analysis did not take a longitudinal take on automated copyright content moderation systems, their emergence and eventual transformation into a central governance tool for various platforms is, in itself, an important element of broader complexification processes. These systems work at a scale that is hard to comprehend, through computational operations that are technically intricate, and under largely unjustified and seemingly arbitrary protocols on, e.g., how to appeal decisions. In other words, they are remarkably

opaque, as so many of the T&Cs we studied. The chapter pointed out that while in some cases some complexification might be impossible to avoid, opacification is by no means necessary or necessarily justifiable. From this perspective, then, the imposition by law of rules on platforms' internal content moderation procedures and their transparency is sensible and should prove beneficial.

The second process is *platformisation/concentration*. By categorizing rules into what we termed "normative types", the chapter argued that various platforms in our sample altered their rules so as to give themselves more power over copyright content moderation, usually by increasing the number of their obligations and rights, which were, in turn, largely aligned with their own interests, logics and technologies. We suggested that this could be interpreted as a particular example of the broader phenomenon of "platformisation". Nonetheless, the chapter argued that this transformation was by no means unidirectional. For platformisation enhances not only platforms' power but also their responsibilities over content moderation. It was curious to note, therefore, that while emboldening their normative legitimacy to control copyright, platforms did not necessarily alter their discursive focus on users-oriented rules. As with complexification, platformisation has been experienced differently by different platforms and deepened by the rise of automated copyright content moderation systems, which may severely impair ordinary users' ability to participate in and challenge removal decisions. That platformisation centralises power in the hands of platforms might be a truism – but our research also suggests that this process might end up giving more power to large rightsholders, to the detriment of essentially smaller rightsholders and creators, as well as other users. Nowhere this was clearer than in our study of Meta/Facebook's Rights Manager, which does not appear to be accessible for small creators, for instance, a non-algorithmic bottleneck that has been rarely studied from an empirical perspective.

6.2. RECOMMENDATIONS FOR FUTURE POLICY ACTIONS

This is an interdisciplinary mapping report, which will be followed by a normative and evaluative report. As such, the following recommendations are limited to the type of analysis carried out here and should be understood in that light.

- Considering the potential for legal uncertainty and fragmentation of the digital single market as regards copyright content moderation, we recommend that the Commission reviews its Guidance on art. 17 CDSMD (COM/2021/288 final) in order to provide clearer guidelines on the definition of OCSSPs, especially for small and medium-sized online platforms.

- National legislators should review their national transpositions of art. 17 CDSMD to fully recognize the nature of the exceptions and limitations in paragraph (7) as “user rights”, rather than mere defences.
- We further recommend that the Commission reviews its Guidance in order to provide guidelines from the perspective of EU law as to the concrete implications of a “user rights” implementation of paragraph (7) in national laws. This should include, to the extent possible, concrete guidance on what type of actions users and their representatives (e.g., consumer organisations) may take against OCSSPs to protect their rights.
- National legislators should review their national transpositions of art. 17 CDSMD to ensure that *ex post* complaint and redress mechanisms under paragraph (9) are not the only means to ensure the application of user rights, but rather a complementary means, in line with the Court’s judgment in case C-401/19.
- We further recommend that the Commission’s Guidance is updated to fully reflect the Court’s approach in case C-401/19, as regards the complementary role of complaint and redress mechanisms under paragraph (9).
- The Commission should review its Guidance to clearly align it with the Court’s judgment in C-401/19, namely by clarifying that: (1) OCSSPs can only deploy *ex ante* filtering/blocking measures if their content moderation systems that can distinguish lawful from unlawful content without the need for its “independent assessment” by the providers; (2) such measures can only be deployed for a clearly and strictly defined category of “manifestly infringing” content; and (3) such measures cannot be deployed for other categories of content, such as “earmarked content”. Member States should further adjust their national implementations of art. 17 CDSMD to reflect these principles.
- In implementing these principles, the Commission and Member States could take into consideration the approach proposed by the AG Opinion on how to limit the application of filters to manifestly infringing or “equivalent” content, including the consequence that all other uploads should benefit from a “presumption of lawfulness” and be subject to the *ex ante* and *ex post* safeguards embedded in art. 17, notably judicial review. In particular, the AG emphasized the main aim of the legislature to avoid over-blocking by securing a low rate of “false positives”. Considering the requirements of the judgment, in order to determine acceptable error rates for content filtering tools, this approach implies that the concept of “manifestly infringing” content should only be applied to uploaded content that is identical or nearly identical to the information provided by the rightsholder that meets the requirements of art. 17(4) (b) and (c) CDSMD.

- The Commission should review its Guidance to clarify which provisions in the DSA's liability framework and due diligence obligations Chapters apply to OCSSPs despite the *lex specialis* of art. 17 CDSMD, within the limits of the Commission's competence as outlined in art. 17(10) CDSMD.
- At EU level, EU institutions and in particular the Commission should explore to what extent the copyright *acquis* already contains rules addressing content moderation actions relating to monetization of copyright-protected content on online platforms (e.g., in arts. 18 to 23 CDSMD), and to what extent policy action is needed in this area. Further research is needed specifically on the imbalanced nature of the contractual relationship of online platforms and uploading users, as well as in the transparency and fairness of their remuneration.
- At EU level, EU institutions and in particular the Commission should explore the application of the DSA's provisions on transparency and access to date to OCSSPs and non-OCSSPs hosting copyright protected content, as well study and if adequate propose EU level action that imposes transparency and access to data obligations on online platforms regarding their copyright content moderation activities. Inspiration could be drawn by the design and implementation of the German national transposition law under Section 19(3) UrhDaG as regards rights to information. In that context, special care should be taken to assess the potential negative effects of requiring researchers to reimburse the platforms' costs related to complying with such requests. To the extent possible, the Commission should advance recommendations in this direction in its revised version of the Guidance on art. 17 CDSMD.

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ICESCR: UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series

TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, The Legal Texts: The Results of The Uruguay Round Of Multilateral Trade Negotiations 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994)

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CDSMD: 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

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Technical Standards Directive: Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services

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P2B Regulation: Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services

DSA: Digital Services Act (as approved by the European Parliament by legislative resolution of 5 July 2022 on the proposal for a regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC (COM(2020)0825 – C9-0418/2020 – 2020/0361(COD))

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Proposed DSA: Proposal for a Regulation of The European Parliament And Of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC COM/2020/825 (final)

ANNEXES

LIST OF ANNEXES

Annex I. National Legal Questionnaires and related documents

This Annex comprises the following elements

- Annex I/A - Phase 1 Questionnaire National Legal Mapping
- Annex I/B - Phase 2 Questionnaire National Legal Mapping
- Annex I/C – Relevant National norms for the transposition of the CDSMD
- Annex I/D – Leading academic sources and documents of judicial or administrative authorities related to the national transposition of art. 17 CDSMD

Annex II. Codebook Used in The Analysis of Platforms' T&Cs

Annex III. List of questions about Rights Manager sent to Facebook

Annex IV. Rights Manager's application form

ANNEX I. NATIONAL LEGAL QUESTIONNAIRES AND RELATED DOCUMENTS

This Annex comprises the following elements.

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- **Annex I/B** - Phase 2 Questionnaire National Legal Mapping
- **Annex I/C** – Relevant National norms for the transposition of the CDSMD
- **Annex I/D** – Leading academic sources and documents of judicial or administrative authorities related to the national transposition of art. 17 CDSMD

ANNEX I/A. PHASE 1 QUESTIONNAIRE NATIONAL LEGAL MAPPING

The Legal Status of Information Society Service Providers in the Pre- and Post-CDSM Directive Era

Preliminary information

The present questionnaire aims to collect data related to the legal status of some information society service providers in the implementation phase of Directive (EU) 2019/790 (CDSM Directive). The questionnaire runs in two main periods or phases.

The **phase one** questionnaire collects and analyses legal data from the period preceding the implementation deadline of the CDSM Directive. As such, it focuses on the status quo. The **phase two** questionnaire will be dedicated to the national implementations of Article 17 CDSM Directive, and the consequences of such implementation. The phase one and two questionnaires aim to allow a comparison of the legal environment of the service providers at issue in the pre- and post-implementation periods of the CDSM Directive.

The questionnaire's focus is on information society service providers that store or host copyright-protected content uploaded by the users or recipients of the service.

Article 17 CDSM Directive creates a new regime for a subset of hosting service providers, so-called online content-sharing service providers (OCSSP). These are defined in Article 2(6), with further guidance in recitals 62 and 63. While this concept is new to the copyright *acquis*, OCSSPs do not constitute a new category of service providers in a technological or business sense.

Various existing service providers fit the definition of OCSSP and their activities are currently regulated in different legal instruments, such as for our purposes: Directive 2000/31/EC (E-Commerce Directive); Directive 2001/29/EC (InfoSoc Directive); and the Directive 2004/48/EC (Enforcement Directive). These service providers are known under various names that sometimes correspond to (partially) overlapping legal concepts, e.g. "information society service providers", "hosting service providers", "intermediaries", or "platforms".

The present questionnaire therefore focuses on information society service providers that host copyright-protected content, with a particular emphasis on OCSSPs.

Whenever the questionnaire requests the provision of statutory texts, we kindly ask you to provide us the domestic language version and the official – if available – or unofficial English translation of the relevant norms.

Phase 1 Questionnaire: Pre-CDSM Directive Legal Landscape

Please respond with reference to the legal situation in your jurisdiction and applicable law by 22 January 2020.

I. Hosting service providers as *users* of copyright-protected content

1. Is there a legal definition or specific legal regime in your country for information society service providers that store and give the public access to a large amount of **protected content**⁷⁸² uploaded by their users?
2. Are “good faith” hosting service providers⁷⁸³ directly or primarily liable under copyright law or general civil law for providing access to protected content uploaded by their users? If yes, please explain.
3. Besides direct licensing, is there any method, mechanism or model of authorization in your country that covers the uploading of protected content by end-users to the platforms of hosting service providers?
 - 3.1. If yes, could you please describe the model, including: legal basis, mechanism, scope of protected content and rights covered, beneficiaries, and sectoral variations.
 - 3.2. Please indicate the leading cases which are dealing with direct liability of service providers.

II. **Hosting service providers as *intermediaries* for access to copyright-protected content**

4. Does your country allow rights holders to apply for an injunction against service providers for copyright infringing content upload by third-party users of the service?
 - 4.1. If yes, could you please cite the relevant legal requirements, provision(s) and leading case law?
5. Are hosting service providers indirectly or secondarily liable under copyright law or general civil law for providing access to content uploaded by their users?
 - 5.1. If yes, could you please cite the relevant legal requirements, provision(s) and leading case law?
6. Does your country have any regime in place for the moderation of infringing content by hosting service providers?⁷⁸⁴
 - 6.1. If yes, describe whether the regime is statutory, co-regulatory, self-regulatory, and/or best practices-based?
 - 6.2. If yes, is such regime applicable to exclude the liability of platforms for storing and giving access to contents uploaded by their users?
 - 6.3. If yes, do the obligations for service providers result from a duty of care, or any other legal construct?
 - 6.4. If yes, does the existing regime include a complaint and redress (**C&R**) mechanisms? If so, please briefly explain these.

⁷⁸² We use the short-hand “protected content” to refer to works or other subject matter protected by copyright or related/neighboring rights laws.

⁷⁸³ In Case C-610/15, the ECJ, by focusing on The Pirate Bay, concluded that “those operators, by making available and managing an online sharing platform such as that at issue in the main proceedings, intervene, with full knowledge of the consequences of their conduct, to provide access to protected works, by indexing on that platform torrent files which allow users of the platform to locate those works and to share them within the context of a peer-to-peer network.” (Para. 36.) At the same time, in Joined Cases C-682/18 and C-683/18, Advocate General Oe has differentiated between service providers, like The Pirate Bay, and other service providers who have no direct intent to infringe copyright law. This questionnaire calls the latter group “good faith” hosting service providers.

⁷⁸⁴ Such regimes include e.g. preventive measures (e.g. for filtering and blocking content) and notice-and-action rules (e.g. notice-and-notice, notice-and-takedown, notice and stay-down, notice-and-notice, etc.).

7. Did your country introduce any liability exemption or “safe harbour” provisions for the benefit of search engines or linking service providers?⁷⁸⁵
- 7.1. If yes, how do courts apply concurring safe harbour provisions regarding service providers offering mixed services (e.g. a platform with both hosting and search/linking functions)? Please cite leading case law?
- 7.2. If yes, which right(s) are users infringing?⁷⁸⁶

III. End-users

8. Are end-users directly liable under copyright law for uploading content to the services of information society service providers without authorisation?
- 8.1. If yes, which right(s) are users infringing?⁷⁸⁷
- 8.2. If yes, could you please cite the relevant legal provision(s) and leading case law?
9. Did your Member State implement the limitations and exceptions (**L&Es**) on quotation, criticism, review & caricature, parody, and pastiche set forth in arts. 5(3)(d) and 5(3)(k) InfoSoc Directive?
- 9.1. If yes, please briefly describe how they were implemented.
- 9.2. If yes, can these L&Es effectively cover end users’ uploading activities in your country?
- 9.3. If yes, could you please cite leading case law on the application of these L&Es in an online environment?
10. In your country, are L&Es treated as:
- 10.1. Defences against infringement claims? If yes, please explain.
- 10.2. Subjective or affirmative rights to use protected content? If yes, please explain.
- 10.3. Other? Please explain.
11. Is there any generally applicable C&R mechanism for the benefit of users of hosting service providers to ensure the exercise of L&Es in general, or for the specific L&Es of quotation, criticism, review, and caricature, parody, pastiche?
- 11.1. If yes, does such mechanism exist as a result of (i) statute or case law or (ii) private practices of hosting service providers?
- 11.2. If yes, can you describe this mechanism?⁷⁸⁸

⁷⁸⁵ Compare to art. 21(2) of the E-Commerce Directive: “[i]n examining the need for an adaptation of this Directive, the report shall in particular analyse the need for proposals concerning the liability of providers of hyperlinks and location tool services, “notice and take down” procedures and the attribution of liability following the taking down of content. The report shall also analyse the need for additional conditions for the exemption from liability, provided for in Articles 12 and 13, in the light of technical developments, and the possibility of applying the internal market principles to unsolicited commercial communications by electronic mail”.

⁷⁸⁶ E.g. reproduction and/or communication/making available to the public.

⁷⁸⁷ E.g. reproduction and/or communication/making available to the public. Please note that the questionnaire intends to focus solely on the period that follows the implementation of the InfoSoc-Directive.

⁷⁸⁸ E.g. counter-notice; human oversight; flagging; time limits for responses etc.

IV. Preparation for the implementation of Article 17 CDSM Directive

12. Did your country take any steps to implement Article 17 of the CDSM Directive by the submission date of your national report?
- 12.1. If yes, could you please provide a full text of the draft/accepted document containing the draft implementation text of Art. 17?
- 12.2. If yes, could you briefly describe how such proposal diverges from the text of the Directive regarding
- (a) The authorization by and liability of service providers;
 - (b) L&Es to the benefit of end-users;
 - (c) Compliance and overlap of new domestic copyright and existing e-commerce rules?

[Phase 1 Questionnaire ends here]

ANNEX I/B. PHASE 2 QUESTIONNAIRE NATIONAL LEGAL MAPPING

The Legal Status of Information Society Service Providers in the Pre- and Post-CDSM Directive Era

Preliminary information

The present questionnaire aims to collect data related to the legal status of some information society service providers before and after the implementation of Directive (EU) 2019/790 (CDSM Directive). The questionnaire runs in two main periods or phases.

The phase one questionnaire collected and analyzed the legal status quo of the period preceding the implementation deadline (June 7, 2021) of the CDSM Directive.

The present phase two questionnaire is dedicated to the national implementations of Article 17 CDSM Directive, and the consequences of such implementation. The phase one and two questionnaires allow a comparison of the changes of the legal environment of the service providers at issue in ten selected Member States of the European Union.

The questionnaire's focus is on information society service providers (ISSPs) that store or host copyright-protected content uploaded by the users or recipients of the service. Article 17 CDSM Directive created a new regime for a subset of ISSPs, so-called online content-sharing service providers (OCSSP). These are defined in Article 2(6), with further guidance in recitals 62 and 63. While this concept is new to the copyright *acquis*, OCSSPs do not constitute a new category of service providers in a technological or business sense.

Return the completed questionnaire to Péter Mezei (mezei.peter@szte.hu) and István Harkai (harkai.istvan@juris.u-szeged.hu).

Phase 2 Questionnaire: Post-CDSM Directive Legal Landscape

Please respond with reference to the legal situation in your jurisdiction and applicable law by 31 March 2022.

National reporters: NAME, AFFILIATION

The date of completion of the first version: DATE

I. Legislative history

Question 1. Summarize the *legislative history* of the implementation of Article 17 CDSM Directive in your country in max. 1-3 pages. Include all necessary data (dates, numbers etc.) related to all publicly available versions of the draft(s), bill(s) and the final source of law. Discuss to what extent, if any, did your country reflect the European Commission's Guidance on Article 17⁷⁸⁹ and the Opinion of AG Øe in the *Republic of Poland v. European Parliament* case⁷⁹⁰.

II. Definitions

Question 2. How did your country implement the following concepts/expressions of Article 17? Highlight if there is any difference between the rules or terminology of the Directive and your domestic law.

Question 2.1. “*Online content-sharing service providers*” (OCSSPs)?⁷⁹¹

Did your country expressly exclude

- i. service providers e.g. B2B cloud services, cyberlockers, not-for-profit online encyclopedias etc., from the scope of the new liability and exemption regime,⁷⁹² or
- ii. piracy websites

from the scope of the new liability and exemption regime?

Question 2.2. “*Large amount* of copyright-protected works or other protected subject matter uploaded by the users”?

⁷⁸⁹ COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market. See <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021DC0288>.

⁷⁹⁰ Case C-401/19. See https://curia.europa.eu/juris/document/document.jsf?docid=244201&text=&dir=&doctlang=EN&part=1&occ=first&mode=D_OC&pageIndex=0&cid=594734.

⁷⁹¹ Article 2(6), Recital 61-62.

⁷⁹² Compare to Recital 62.

Did your country require taking into consideration any factor other than those listed in Recital 63 when assessing “large amount”?⁷⁹³

Question 2.3. “Adequate information on the functioning of their practices with regard to the cooperation referred to in 17(4)?”⁷⁹⁴

III. Authorization⁷⁹⁵

Question 3. Did your country’s law necessitate authorization for (1) communication to the public and/or (2) making available to the public of copyright-protected works and/or other protected subject matter uploaded by the users?

Question 4. Did your country’s law allow for the authorization of the contents uploaded by the users via means other than licensing agreements?⁷⁹⁶

Question 5. Did the relevant collective rights management organisation(s) amend its (their) yearly tariff announcement(s) to reflect the new authorization regime?

IV. Liability

Question 6. How did your country qualify the new liability provisions of Article 17(4), e.g. *sui generis*, *lex specialis* or other regime?

Question 7. How did your country implement the term “best efforts”

per Article 17(4)(a);⁷⁹⁷

per Article 17(4)(b);⁷⁹⁸

⁷⁹³ “The assessment of whether an online content-sharing service provider stores and gives access to a large amount of copyright-protected content should be made on a case-by-case basis and should take account of a combination of elements, *such as the audience of the service and the number of files of copyright-protected content uploaded by the users of the service.*”

⁷⁹⁴ Article 17(8).

⁷⁹⁵ Article 17(1); Recital 61.

⁷⁹⁶ Article 17(1) second sentence: “An online content-sharing service provider shall therefore obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, *for instance by concluding a licensing agreement*, in order to communicate to the public or make available to the public works or other subject matter.” See further Recital 64.

⁷⁹⁷ “[M]ade **best efforts** to obtain an authorisation”.

⁷⁹⁸ “[M]ade, *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”.

per Article 17(4)(c)?⁷⁹⁹

Question 8. Did your country limit liability per Article 17(4) only to special contents (e.g. manifestly infringing materials)?

Question 9. Did your country introduce any special requirements regarding the notification of OCSSPs by right holders (e.g. earmarking; sufficiently substantiated notice)?

Question 10. When assessing the compliance of OCSSPs with the exemption rules under Article 17(4), did your country require taking into account any elements other than those listed in Article 17(5)?⁸⁰⁰

Question 11. How did your country implement the following elements/terms of the complaint and redress mechanism:⁸⁰¹

“effective and expeditious”;

“undue delay”;

“human review” [viewed from a substantive (WHAT should/can humans do) and procedural perspective (at WHAT STAGE of the service should human review be present); as well as WHO exactly can execute such review]?

V. Safeguards (exceptions and limitations; procedural safeguards)

Question 12. Did your country introduce any ex ante safeguard against overblocking under Article 17(4)? If so, what are the prerequisites of the application of such safeguard?

Question 13. Did your country introduce any sanctions, mechanisms or procedures against the breach of user rights by OCSSPs’ content moderation practices?

Question 14. Are quotation, criticism, review, and use for the purpose of caricature, parody or pastiche treated to be “user rights” following the implementation of Article 17 by your legislation?⁸⁰²

⁷⁹⁹ “[A]cted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made **best efforts** to prevent their future uploads in accordance with point (b)”.

⁸⁰⁰ Article 17(5): “In determining whether the service provider has complied with its obligations under paragraph 4, and in light of the principle of proportionality, the following elements, **among others**, shall be taken into account:

(a) the type, the audience and the size of the service and the type of works or other subject matter uploaded by the users of the service; and

(b) the availability of suitable and effective means and their cost for service providers.”

⁸⁰¹ Article 17(9)

⁸⁰² Article 17(7)(a)-(b).

If yes, did your country also grant user right status to exceptions and limitations other than those listed in Article 17(7)?

Question 15. Did your country introduce quotation, criticism, review, and use for the purpose of caricature, parody or pastiche newly under the CDSM Directive?

If yes, did your country introduce the new exception(s) and limitation(s)

in general (as part of the already existing system of exceptions and limitations, and hence applicable to offline and any non-OCSSPs-related uses) or

in specific (relevant only for uses made via OCSSPs' systems)?

Question 16. Did your country implement the prohibition of general monitoring obligation with the same or different meaning as included in Article 15 of the E-Commerce Directive?⁸⁰³

Question 17. Did your country impose any broader transparency obligations on platforms than what Article 17(8) requires, e.g. related to users or public authorities or affecting information other than related to the "functioning of their practices"?⁸⁰⁴

Question 18. Did your country introduce any mechanism to check whether OCSSPs comply with their obligation to inform users in their terms and conditions that they can use works and other subject matter under exceptions or limitations to copyright and related rights provided for in Union law?⁸⁰⁵

Appendix #1 [Compare to Appendix 1/C of the present report]

Provide us the domestic language version and the official or unofficial English translation of the relevant norms.

Appendix #2 [Compare to Appendix 1/D of the present report]

List (and if possible provide access to) your country's *leading academic sources and documents of judicial or administrative authorities* related to the substance and/or the implementation of Article 17.

⁸⁰³ Article 17(8) first sentence.

⁸⁰⁴ Article 17(8) second sentence.

⁸⁰⁵ Article 17(9) last sentence.

ANNEX I/C. RELEVANT NATIONAL NORMS FOR THE TRANSPOSITION OF THE CDSMD

Denmark

The final version of the clause § 52 c implementing art. 17 DSM-Directive:

<https://www.retsinformation.dk/eli/ft/202013L00205>

Unofficial English translation of the Danish law is available at the lead researcher.

Estonia

The legislative history can be viewed here:

<https://www.riigiteataja.ee/eelnoud/menetluskaik/JUM/20-1276>

<https://www.riigikogu.ee/tegevus/eelnoud/eelnou/d3d07943-9d1c-4ebe-94a4-8ae1ebdf7a68>

Estonian Copyright Act (Estonian version) <https://www.riigiteataja.ee/akt/128122021003>

Estonian Copyright Act (official English version) <https://www.riigiteataja.ee/en/eli/513012022002/consolide>

France

Articles L137-1, L137-2, L137-2-1, L137-3 and L137-4 CPI (transposing Art. 17 with regard to copyrighted works):

https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006069414/LEGISCTA000043497266/#LEGISCTA000043497266

Articles L219-1, L219-2, L219-3 and L219-4 CPI (transposing Art. 17 with regard to objects protected by related rights):

https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006069414/LEGISCTA000043497323/#LEGISCTA000043497323

Article R136-1 CPI:

https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000044230189/2022-03-14

Order of the Ministry of Culture of 20 October 2021 for the application of the Decree No. 2021-1369 of 20 October 2021 of the Conseil d'État modifying the Code of Intellectual Property and regarding certain provider of services of sharing of content online (Arrêté du 20 octobre 2021 pris pour l'application du décret n° 2021-1369 du 20 octobre 2021 portant modification du code de la propriété intellectuelle et relatif à certains fournisseurs de services de partage de contenus en ligne), NOR : MICB2128634A, JORF n°0246 du 21 octobre 2021, Texte n° 29, ELI: <https://www.legifrance.gouv.fr/eli/arrete/2021/10/20/MICB2128634A/jo/texte>

Article L122-5 CPI (on exceptions and limitations to copyright):

https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000037388886/

Article L211-3 CPI (on exceptions and limitations to related rights):

https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000038835794

English translation of the CPI on WIPO Lex: <https://www.wipo.int/edocs/lexdocs/laws/en/fr/fr467en.pdf>
(declared to be out-of-date and slightly incorrect translation by the national reporters)

Germany

Gesetz über die urheberrechtliche Verantwortlichkeit von Diensteanbietern für das Teilen von Online-Inhalten* (Urheberrechts-Diensteanbieter-Gesetz - UrhDaG) <https://www.gesetze-im-internet.de/urhdag/BJNR121500021.html>

A working translation of the Copyright Service Provider Act ("UrhDaG", Article 3 of the Act, transposing Article 17 of the DSM Directive) in English can be found here:

https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/UrhDaG_ENG.html;jsessionid=8292E47D5B312BFF1E06EC1BBE8FD221.1_cid289?nn=6712350

Hungary

1999. évi LXXVI. törvény a szerzői jogról: <https://net.jogtar.hu/jogsabaly?docid=99900076.tv>

No official translation available. Unofficial translation at hand with the lead researcher of the comparative report.

Ireland

European Union (Copyright and Related Rights in the Digital Single Market) Regulations 2021 (S.I. No. 567 of 2021) <https://www.irishstatutebook.ie/eli/2021/si/567/made/en/print>

Italy

DECRETO LEGISLATIVO (legislative Decree) 8 novembre 2021, n. 177, intitolato (entitled) "Attuazione della direttiva (UE) 2019/790 del Parlamento europeo e del Consiglio, del 17 aprile 2019, sul diritto d'autore e sui diritti connessi nel mercato unico digitale e che modifica le direttive 96/9/CE e 2001/29/CE" was published in the Gazzetta Ufficiale Serie Generale (Official Gazette, general serie) n. 283 of 27 November 2021. Article 7 implements article 17 CDSM

https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2021-11-27&atto.codiceRedazionale=21G00192&elenco30giorni=false

The Netherlands

Dutch National Implementation Act (DNIA) of 16 December 2020: Wet van 16 december 2020 tot wijziging van de Auteurswet, de Wet op de naburige rechten, de Databankenwet en de Wet toezicht en geschillenbeslechting collectieve beheersorganisaties auteurs- en naburige rechten in verband met de implementatie van Richtlijn (EU) 2019/790 van het Europees parlement en de Raad van 17 april 2019 inzake auteursrechten en naburige rechten in de digitale eengemaakte markt en tot wijziging van de Richtlijnen 96/9/EG en 2001/29/EG, Stb. 2020, 558, <https://zoek.officielebekendmakingen.nl/stb-2020-558.html>

Decree on the date of entry into force of the DNIA of 18 December 2020: Besluit van 18 december 2020 tot vaststelling van het tijdstip van inwerkingtreding van de Implementatiewet richtlijn auteursrecht in de digitale eengemaakte markt, Stb. 2020, 559, <https://zoek.officielebekendmakingen.nl/stb-2020-559.html>

Dutch Copyright Act (DCA) – present version: <https://wetten.overheid.nl/BWBR0001886/2021-06-07/>

Dutch Neighbouring Rights Act (DNRA) – present version: <https://wetten.overheid.nl/BWBR0005921/2021-06-07/>

Portugal

The abandoned draft proposal is available at the lead researcher.

Sweden

Proposal of the Ministry of Justice for implementation of the DSM Directive Ds 2021:30 Upphovsrätten på den digitala inre marknaden. Currently available at: <https://www.regeringen.se/rattsliga-dokument/departementsserien-och-promemorior/2021/10/ds-202130/>

ANNEX I/D. LEADING ACADEMIC SOURCES AND DOCUMENTS OF JUDICIAL OR ADMINISTRATIVE AUTHORITIES RELATED TO THE NATIONAL TRANSPOSITION OF ART. 17 CDSMD

France

Impact Study on Proposed Reform of French Law (implementing the CDSM Directive) "Projet de loi relatif à la communication audiovisuelle et à la souveraineté culturelle à l'ère numérique", 4 December 2019: https://www.legifrance.gouv.fr/contenu/Media/Files/autour-de-la-loi/legislatif-et-reglementaire/etudes-d-impact-des-lois/ei_art_39_2019/ei_mice1927829l_pjL_communication_audiovisuelle_et_souverainete_culturelle_ere_nu_merique_cm_5.12.2019.pdf

HADOPI, Recommandation n°1 de la Haute Autorité pour la diffusion des œuvres et la protection des droits sur internet relative aux mesures de protection des œuvres et objets protégés, prises par les fournisseurs de services de partage de contenus en ligne mentionnés à l'article L. 137-1 du code de la propriété intellectuelle:

https://www.hadopi.fr/sites/default/files/2021-12/2021_12_15_Hadopi_recommandation_mise_oeuvre_MTI.pdf

Other sources related to the recommendation: <https://www.hadopi.fr/ressources/etudes/travaux-prealables-mission-evaluation-mesures-techniques-protections-oeuvres-fournisseurs-services-partage-contenus>

ARCOM, Évaluation des mesures de protection des œuvres prises par les fournisseurs de services de partage de contenus en ligne : questionnaires aux titulaires de droits et aux services: <https://www.arcom.fr/evaluation-des-mesures-de-protection-des-oeuvres-prises-par-les-fournisseurs-de-services-de-partage-de-contenus-en-ligne-questionnaires-aux-titulaires-de-droits-et-aux-services>

CSPLA/Hadopi/CNC, "Rapport de la Mission vers une application effective du droit d'auteur sur les plateformes numériques de partage: Etat de l'art et propositions sur les outils de reconnaissance des contenus" (Report #1) 29 January 2020: <https://www.culture.gouv.fr/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-proteges-par-les-plateformes-de-partage-en-ligne-etat-de-l-art-et-propositions>

CSPLA/Hadopi/CNC, "Les Outils De Reconnaissance Des Contenus Sur Les Plateformes Numériques De Partage. Propositions Pour La Mise En Œuvre De L'article 17 De La Directive Européenne Sur Le Droit D'auteur" (Report #2), 19 January 2021: https://www.hadopi.fr/sites/default/files/sites/default/files/ckeditor_files/2021_01_19_Rapport_CSPLA_Hadopi_CNC_Outils_de_reconnaissance.pdf

Germany

Commentaries:

Dreier, Thomas/Schulze, Gernot, Urheberrechtsgesetz, 7. eds 2022, C.H.Beck

Beck'scher Onlinekommentar Urheberrecht, Ahlberg, Hartwig/Götting, Horst-Peter/Lauber-Rönsberg, Anne, 33th eds. 2022, C.H.Beck

Contributions:

Becker ZUM 2020, 681

Conrad/Nolte, ZUM 2021, 111

Dreier GRUR 2019, 771

Frey, MMR 2021, 671

Gerpott, MMR 2019, 420

Gielen/Tiessen EuZW 2019, 639

Grisse, JIPLP 2019, 887

Hofmann GRUR 2019, 1219

Hofmann ZUM 2020, 665

Kaesling/Knapp, MMR 2021, 11

Lambrecht JIPITEC 11 (2020), 68

Leistner ZUM 2020, 897

Metzger/Pravemann ZUM 2021, 288

Nordemann/Waiblinger GRUR 2020, 569

Schwartmann/Hentsch MMR 2020, 207

Senftleben ZUM 2019, 369

Stieper ZUM 2021, 387

Wandtke/Hauck ZUM 2020, 671

Hungary

BARANYI Róbert: De ki őrzi az őrzőket? A CDSM-irányelv szűrési mechanizmusa és a véleményszabadság, Iparjogvédelmi és Szerzői Jogi Szemle, 2021, 16(6), p. 32-64.

GRAD-GYENGE Anikó: A szerzői jogi reform vágya: az egyszerűsítés ideája a bonyolítás művészeteiben, Gazdaság és Jog, 2020, 28(7-8), p. 1-5.

LÁBODY Péter: Szerzői jogi „user-szabadságok” a globális tartalommegosztó platformokon, In Medias Res, 2021, 10(1), p. 118-127.

LÁBODY Péter: Algoritmikus szűrőmechanizmusok a szerzői jogok védelmében. In: Török Bernát – Ződi Zsolt (szerk.): A mesterséges intelligencia szabályozási kihívásai, Ludovika Egyetemi Kiadó, Budapest, 2021, p. 279-303.

TÖRÖK Bernát: Az alkotmányjog horizontális hatálya? In: Török Bernát – Ződi Zsolt (szerk.): A mesterséges intelligencia szabályozási kihívásai, Ludovika Egyetemi Kiadó, Budapest, 2021, p. 143-156.

Italy

AGCOM “parere” (opinion) on the scheme adopted in Italy: <https://www.agcm.it/dotcmsdoc/bollettini/2021/38-21.pdf>

Giusella Finocchiaro - Oreste Pollicino: IL RECEPIMENTO DELLA DIRETTIVA COPYRIGHT. IL CASO ITALIANO IN UNA PROSPETTIVA COMPARATA ED EUROPEA (PDF copy available at the lead researcher)

Marco Bassini – Giovanni De Gregorio: THE IMPLEMENTATION OF THE COPYRIGHT DIRECTIVE IN ITALY AND THE PROPER UNDERSTANDING OF THE ‘BEST EFFORTS’ CLAUSE (PDF copy available at the lead researcher)

Ireland

Department of Business, Enterprise and Innovation Consultation on Art.17 CDSM: <https://enterprise.gov.ie/en/Consultations/Consultations-files/Consultation-transposition-Copyright-Directive-EU-2019-790-Articles-13-17.pdf>

Department of Business, Enterprise and Innovation note on tranposition: <https://drive.google.com/file/d/1bicGtD8AqV5P7adZwAnv0548Rsw5Y2a0/view>

The Netherlands

Academic sources

A.M. van Aerde, ‘Richtsnoeren betreffende platformaansprakelijkheid: een goedbedoelde maar vergeefse poging houvast te bieden bij de toepassing van artikel 17 DSM-richtlijn’, Auteursrecht 2021-3, p. 143-144.

C. Angelopoulos, M. Senftleben & P. ten Thije, 'De reikwijdte van artikel 17 DSM-richtlijn in het licht van het verbod op algemene toezichtverplichtingen: een Odyssee', *Auteursrecht* 2021-3, p. 120-142.

C.B. van der Net, 'De Implementatiewet richtlijn auteursrecht in de digitale eengemaakte markt', *Ars Aequi* 2021, p. 619-623.

J.P. Quintais, G. Frosio, S.J. van Gompel, P.B. Hugenholtz, M. Husovec, B.J. Jütte & M. Senftleben, 'Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations From European Academics', *JIPITEC* 2019, vol. 10, no. 3, p. 277-282.

J.M.B. Seignette, 'Het nuttig effect van artikel 17', *AMI* 2020-6, p. 180-186.

M. Senftleben, 'Bermuda Triangle – Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market', *E.I.P.R.* 2019, 41(8), p. 480-490.

D.J.G. Visser, 'The article formerly known as 13', *AMI* 2019-3, p. 79-88.

Documents of judicial or administrative authorities

Full legislative process: <https://zoek.officielebekendmakingen.nl/dossier/35454>

The Danish, Estonian, Portuguese and Swedish national reporters did not report on any relevant documents of judicial or administrative authorities related to the substance and/or the implementation of Article 17.

ANNEX II. CODEBOOK USED IN THE ANALYSIS OF PLATFORMS' T&CS

High-level themes (kinds of documents)

- Terms of Use
- Community Guidelines
- Copyright Policy
- Help pages
- Principles
- Terms of Service (automated copyright content moderation systems)
- Music Guidelines
- Whitepaper

Intermediary themes (kinds of rules)

- Normative types
- Platform's obligations
- Expectations
- Platform's rights
- Principles
- Procedures
- Users' obligations
- Users' rights

Subjects

- Automated content moderation
- Copyrights disputes
- Copyright exceptions
- Infringement avoidance
- Manual content removal
- Monetisation
- Penalties
- Transparency

Low-level themes (copyright content moderation rules per se)

- Users should consult a lawyer on copyright
- Users should contact owner of violated copyrighted content
- Users should contact the platform if contact with apps on copyright violation doesn't work
- Users should contribute their content to public domain
- Users should give due credit
- Users should officially copyright their content
- Users should provide references to original work

Users should react to content instead of violating copyright
Users should report repeat infringers of copyright
Users should report violation of others' copyright
Users should repost content instead of infringe copyright
Users should specify their role in the uploaded content
Users should think twice before appealing copyright infringement report
Users should think twice before claiming fair use
Users should think twice before posting risky content
Users should think twice before reporting copyright infringement
Users should think twice before using CC-licensed content
Users should try to solve copyright dispute independently
Users should use an agent to report violation in case they are concerned with their information being shared with infringer
The platform must assist with copyright violations by third parties
The platform must decide on fair use claims
The platform must disable or suspend accounts due to copyright infringement
The platform must document notices of alleged copyright infringement
The platform must have a fair copyright content moderation system
The platform must have an automated copyright content moderation system that respects copyright exceptions
The platform must keep content online during automated copyright content moderation disputes
The platform must not count restored content as a strike
The platform must not decide unilaterally what is a copyright infringement
The platform must not scan private videos via automated copyright content moderation
The platform must not take copyright exceptions as a reason to restore video
The platform must notify parties during copyright disputes
The platform must publish a report on copyright content moderation
The platform must remove or block access to content due to copyright infringement
The platform must respect and protect copyright
The platform must restore accounts after strikes removal by users
The platform must restore content if report was false or withdrew
The platform must visually mark content taken down due to copyright reports
The platform can apply DRM technology
The platform can block account functionalities of copyright infringers
The platform can consider the nature of the copyright infringement when deciding on punishment
The platform can decide unilaterally on copyright infringement
The platform can deny refunds to users terminated due to copyright infringers
The platform can disable access to automated copyright content moderation in case of misuse
The platform can disable and suspend accounts who provide false information in copyright disputes
The platform can limit the visibility of content automatically identified as infringing copyright

The platform can modify and discontinue automated copyright content moderation system at any time
The platform can monitor users' compliance with automated copyright content moderation system
The platform can punish users who submit false information during copyright disputes
The platform can require from users evidence of their copyright over content
The platform can require more information during copyright disputes
The platform can restore content if copyright report is false or withdraw
The platform can withhold payments from users if they infringe copyrights
The platform aspires to balance copyright and freedom of expression
The platform aspires to protect intellectual rights
The platform cannot remove a content from another website or app
The platform does not employ DRM
The platform does not monetise copyrighted content
The platform does not remove or suspend copyright infringing content posted in it
The platform employs automated copyright content moderation
The platform employs human content moderation
The platform is not liable for copyright-related issues
The platform publicizes information about copyright disputes
Users who falsely report copyright infringement risk suffering legal consequences
Users who infringe others' copyrights risk suffering legal consequences
Users must act as copyright content moderators
Users must apply to get access to automated copyright content moderation system
Users must be legally entitled to report copyright infringement
Users must be liable for copyright infringement
Users must be solely responsible for enforcing their copyright
Users must become a registered DMCA agent
Users must file a lawsuit against alleged copyright infringer
Users must indemnify the platform regarding copyright infringement
Users must not interfere with anti-copyright infringement features
Users must not teach others how to violate copyright
Users must provide accurate information in copyright disputes
Users must provide the required information in copyright disputes
Users must respect copyrights
Users must use English in copyright disputes
User can apply DRM on their content
Users can appeal copyright-related content removal
Users can appeal copyright-related penalties to account
Users can avoid liability for content removed by platforms
Users can decide on fair use claims
Users can disable download of their content to avoid copyright infringement

Users can moderate copyrighted content directly

Users can post content under fair use

Users can post remixes

Users can report copyright infringement

Users can report fake profiles who reported copyright infringement

Users can repost content that was falsely reported

Users can stop using automated copyright content moderation system at any time

Users can use and assign CC license to their content

Users can use automated content moderation to monetise, block and track access to content

Users can withdraw copyright report

ANNEX III. LIST OF QUESTIONS ABOUT RIGHTS MANAGER SENT TO FACEBOOK

Questions about Rights Manager

Scope

1. Why does Rights Manager not protect audio files?
2. Why does Rights Manager not protect texts?

Eligibility

3. Does a user have to apply twice in order to have Rights Manager access for both image and videos?
4. How many “pieces of original content” does the applicant need to own / have the rights over in order to be eligible for the Rights Manager?
5. Do the eligibility criteria vary according to content format type (video/image)?
6. Do the eligibility criteria vary according to user type (individual vs. company)?
7. Do the eligibility criteria vary according to content category? (sports/entertainment/news)?
8. When judging whether an applicant has infringed/violated copyright in the past, does Facebook consider only the infringements/violations that happened within Facebook?
9. If Facebook considers infringements/violations that happened outside of Facebook, which databases/instances does it consult (e.g., judicial rulings)?
10. How exactly do past copyright infringements/violations factor into the decision process?

Decision about application

11. Is the decision about an application for the Rights Manager program fully automated?
12. If the decision about an application is partly or fully automated, which kind of algorithms are used?
13. If the decision about an application is partly or fully automated, which parameters do the algorithms use?
14. (*If applicable*) If the decision about an application is partly or fully automated, which data are used to train the algorithms?

15. If human actors participate in the decision about an application, who are these people? Are they Facebook employees or contractors?

16. If this decision about an application is semi-automated (meaning, if it involves both people and algorithms), what exactly is done by who in the process – _e.g., which steps are performed by humans, which steps are performed by algorithms?

17. Can the applicant appeal an eventual rejection to a Rights Manager application?

18. In case such an appeal exists, what are the requirements from the applicant – _what new document should the applicant submit, in how many days, etc.?

19. In case an appeal is impossible, does Facebook explain to the applicant the exact reason(s) of the rejection?

20. In case of a rejection, can an applicant apply again for access to the Rights Manager? If so, how many times?

Reference files database

21. Does Facebook check if the applicant is indeed the owner of the content she is claiming copyrights over?

22. Does Facebook use or process the Reference Files Content, or the collection of files uploaded as Reference Files, for any end *beyond* identifying and matching content of a particular Rights Manager user (for e.g., training algorithmic systems that are not primarily related to the Rights Manager system)?

23. In the “Rights Manager Terms”, it is said that “If Rights Manager surfaces a potential match in the applicable territory between your Reference File Content and content uploaded to a Facebook Product by a third party, and you elect to allow such content to remain on that Facebook Product (“Claimed Content”), you grant Facebook the authorisation and/or licence to the Claimed Content as described in the Facebook Terms” (our emphasis). In face of this provision, what does Facebook do with such “claimed content”? Can you please give examples (e.g., use it to train algorithmic systems that are not primarily related to the Rights Manager system)?

24. Does the Rights Manager’s reference file database only consist of affirmative submissions by rights holders or are the other channels through which Facebook is acquiring content for this database?24. Could you give us some information about the size of the database (number of video/image reference files, number of requests)?25. Can you please explain, in general terms, what variables are taken into account by Rights Manager algorithms during the process of reading, matching and eventually taking down a piece of content?

25. Could you give us some information about the size of the database (number of video/image reference files, number of requests)?

26. Can you please explain, in general terms, what variables are taken into account by Rights Manager algorithms during the process of reading, matching and eventually taking down a piece of content

27. What is the relative importance of these variables?
28. How does the Right Manager specify whether a given second of a video is an overlapping second of a reference file? Example: Imagine a video with a length of 20 seconds and a match rule of ≥ 20 seconds' overlap. If a copyright infringer now speeds this video up to 15 seconds, the content is 100% overlapping but not 20 seconds.
29. What are the thresholds for the similarity between two files and how robust is it to modifications (which may be not human perceivable)? Example: imagine two videos but one video has one pixel difference/slightly different colour/different resolution

Matching process

30. What are the match rules for images?
31. How does the location (country) of the user who uploaded infringing content is taken into account by the Rights Manager during the process of reading, matching and eventually taking down a piece of content?
32. What is the accuracy of matches that are generated within the Rights Manager for images and videos?
33. Does Facebook employ artificial intelligence in the matching process? If yes, in which ways?

Monetisation

34. What is the criteria used to define who can access the "collect ad earnings" action? Or can all Rights Manager users access this form of monetisation?
35. What is the share of ad earnings that Facebook pays to copyright owners via Rights Manager?
36. Is the share of ad earnings the same for all Rights Manager users? If different shares apply to different users, which criteria does Facebook use to define who gets a larger / smaller share?
37. What sort of data about the monetised content or linked ad does the copyright owner have access to?
38. Can the rights owner blacklist or somehow choose advertisers associated with their content?
39. Are the data on which monetisation is based validated / checked by any third-party, external actor (e.g., a consultancy firm)?

Disputes

40. Does Facebook get somehow involved in a non-DMCA dispute to a Rights Manager match? E.g., by making a decision on the validity of an appeal.
41. If Facebook does get involved in a non-DMCA dispute, could you please detail how this involvement occurs? E.g., which criteria Facebook uses to define the validity of an appeal.

42. If Facebook does not get involved in a non-DMCA dispute, why is that so?
43. What criteria (*beyond* the completeness of the required documentation) does Facebook consider when making a decision on whether a DMCA counter-notification regarding a Right Manager match is valid?
44. In which way are copyright exceptions, and in particular fair use, taken into consideration by Facebook when deciding on whether a DMCA counter-notification regarding a Right Manager match is valid?
45. Is this decision on the validity of a DMCA counter-notification regarding a Right Manager match made exclusively by human actors or does it involve some form of algorithmic system?
46. If this decision on the validity of a DMCA counter-notification regarding a Rights Manager match involves humans, which people participate, and who are they (e.g., are they Facebook employees, contractors etc.)?
47. If this decision on the validity of a DMCA counter-notification regarding a Rights Manager match involves humans, do the people involved in it have formal legal training, typically?
48. If this decision on the validity of a DMCA counter-notification regarding a Rights Manager match involves humans, and these people *do not* have typically formal legal training, does Facebook provide them with any form of training? If so, can you please explain what this training consists in?
49. If this decision on the validity of a DMCA counter-notification regarding a Rights Manager match is semi-automated (meaning, if it involves both people and algorithms), can you please explain what exactly is done by who in the process – e.g., which steps are performed by humans, which steps are performed by algorithms?
50. If this decision on the validity of a DMCA counter-notification regarding a Rights Manager match is partly or fully algorithmic, what kind of algorithms are used?
51. (*If applicable*) If this decision on the validity of a DMCA counter-notification regarding a Rights Manager match is partly or fully algorithmic, what datasets are used to train the algorithms?
52. If this decision on the validity of a DMCA counter-notification regarding a Rights Manager match is partly or fully algorithmic, what parameters are used in the design of the algorithms?
53. If this decision on the validity of a DMCA counter-notification regarding a Rights Manager match is partly or fully algorithmic, does Facebook automate (or have tried to automate) the characterization of copyright exceptions, such as fair use?
54. If Facebook does (or have tried to) automate the characterization of copyright exceptions, such as fair use, how this automation is done or was attempted – what kinds of algorithms, parameters, and datasets are/were used, for instance?

55. If the DMCA counter-notification regarding a Rights Manager match is successful and no lawsuit is filed, is the reinstatement of the content automatic? Or are there instances in which Facebook unilaterally decides not to reinstate a piece of content?

56. (If applicable) What reasons might lead Facebook to not reinstate a piece of content, regardless of a successful DMCA counter-notification regarding a Rights Manager match and no lawsuit?

57. What happens after a second publisher disputes the rejection of a dispute for conflicts in a reference file upload?⁵⁰ In the Help Center it is said that, when a dispute over a piece of content uploaded to Rights Manager is rejected, the user can “contact us” [Facebook]. What happens then? Is this a formal process of appeal? If so, what does this appeal encompass -- which necessary documentation is required, what are the steps of the process, etc.?

58. Can a user without access to the Rights Manager dispute an action taken by Facebook in the context of the Rights Manager?

59. After the rejection of a dispute by a reference file owner, what options does a content creator have?

60. Does Facebook use data associated with any dispute processes and decisions in the context of Rights Manager to train its own algorithmic systems? If so, how so? Which systems are trained?

Audible Magic

61. In which ways, exactly, does Facebook use Audible Magic technology in its attempt to protect copyrights?⁵⁵ What is the relationship between Audible Magic’s technology and Rights Manager?

ANNEX IV. RIGHTS MANAGER'S APPLICATION FORM.

[Application Form Fields]

Which Page(s) do you want to protect? Users can choose from their managed non-private pages.

Primary rights holder

Name of person, company, brand who owns the rights to the content

Contact Email

What type of rights owner are you?

For video content, select from: Media company, Individual creator, Content aggregator, Legal representative of a content owner, Other

For image content, select from: Media company, Individual creator, Viral content aggregator, Image distributor, Legal representative of a content owner, Other

No additional description is necessary if “Other” is selected.

Which best describes your content? Select all that apply.

For video content, select all that apply from: Advertising/Marketing, Art, Education, Entertainment, Gaming, Music, News, Sports, Other

For image content, select all that apply from: Photographer, Illustrator/Visual Artist, Stock Site, News, Publisher, Entertainment, Image Archive, Artist Agency, E-Commerce, Public Figure, Sports League, Sports Team

How often do you publish content?

Select from: Daily, A few times a week, Weekly, Monthly, Less than once a month

For Image only: **Do you use a third-party agency?**

Yes/No

Have you issued a copyright report on Facebook before?

Yes/No

Where else does your Page have an online presence? (Optional)

Fields available for Instagram, YouTube, Website, Other

Do you have an example of the content you want to protect? (Optional)

Field for an URL.



The ReCreating Europe project aims at bringing a ground-breaking contribution to the understanding and management of copyright in the DSM, and at advancing the discussion on how IPRs can be best regulated to facilitate access to, consumption of and generation of cultural and creative products. The focus of such an exercise is on, *inter alia*, users' access to culture, barriers to accessibility, lending practices, content filtering performed by intermediaries, old and new business models in creative industries of different sizes, sectors and locations, experiences, perceptions and income developments of creators and performers, who are the beating heart of the EU cultural and copyright industries, and the emerging role of artificial intelligence (AI) in the creative process.



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