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HOW THE EUROPEAN UNION OUTSOURCES THE TASK OF HUMAN RIGHTS PROTECTION TO PLATFORMS AND USERS: THE CASE OF USER-GENERATED CONTENT MONETIZATION

Martin Senftleben,[†] João Pedro Quintais^{††} & Arlette Meiring^{†††}

ABSTRACT

With the shift from the traditional safe harbor for hosting to statutory content filtering and licensing obligations, the 2019 E.U. Directive on Copyright in the Digital Single Market (CDSMD) has substantially curtailed the freedom of users to upload and share their content creations online. Seeking to avoid overbroad inroads into freedom of expression, E.U. law obliges online platforms and the creative industry to consider human rights when coordinating their content filtering actions. Platforms must also establish complaint and redress procedures for users. Organizing stakeholder dialogues, the European Commission will seek to identify best practices. These “safety valves” in the legislative package, however, are mere fig leaves. Instead of safeguarding human rights, the E.U. legislature outsources human rights obligations to the platform industry. At the same time, the burden of policing content moderation systems is imposed on users who are unlikely to bring complaints in each individual case. The new legislative design in the European Union is likely to “conceal” human rights violations instead of bringing them to light. Nonetheless, the Digital Services Act (DSA) rests on the same problematic approach.

Against this background, we discuss the weakening—and potential loss—of fundamental freedoms because of the departure from the traditional notice-and-takedown approach in the European Union and the reliance on platform and user action to prevent human rights violations. Our analysis adds a new element to the ongoing debate on content licensing and filtering. Namely, we focus on how E.U. law has largely left the private power of platforms untouched to determine the “house rules” that govern the (algorithmic) monetization of detected matches between protected works and content uploads. Addressing the “legal vacuum” in the field of content monetization, we explore outsourcing and concealment risks in this unregulated space. Focusing on large-scale platforms for user-generated content, such as YouTube, Instagram and TikTok, two normative problems come to the fore: (1) the fact that rightholders, when opting for monetization, de facto monetize not only their own works

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but also the creative input of users; and (2) the fact that user creativity remains unremunerated as long as the monetization option is only available to rightholders. As a result of this configuration, the monetization mechanism disregards users' right to (intellectual) property and discriminates against user creativity. In this light, we discuss whether the DSA provisions that seek to ensure transparency of content moderation actions and terms and conditions offer useful sources of information that could empower users. We further raise the question whether the detailed regulation of platform actions in the DSA may resolve the described human rights dilemmas to some extent.

TABLE OF CONTENTS

I.	INTRODUCTION	935
II.	THE NEW CONSTITUTIONALISM DILEMMA: OUTSOURCING AND CONCEALING	943
A.	OUTSOURCING OF HUMAN RIGHTS OBLIGATIONS IN THE EUROPEAN UNION: REGULATION OF CONTENT MODERATION	943
1.	<i>Interplay of Licensing and Filtering Obligations in Article 17 of CDSMD</i>	945
2.	<i>Reliance on Industry Cooperation to Safeguard Fundamental Rights</i>	950
3.	<i>Diligence and Proportionality Viewed Through the Prism of Cost and Efficiency Considerations</i>	953
4.	<i>Considerable Risk of Encroachments Upon Fundamental Rights</i>	955
B.	CONCEALING HUMAN RIGHTS DEFICITS CAUSED BY RELIANCE ON INDUSTRY COOPERATION.....	956
1.	<i>Reliance on User Complaints as Part of a Concealment Strategy</i>	958
2.	<i>Confirmation of the Outsourcing and Concealment Strategy in CJEU Jurisprudence</i>	960
3.	<i>Member State Legislation Seeking to Safeguard Transformative UGC</i>	966
4.	<i>European Commission Taking Action on the Basis of Audit Reports</i>	970
C.	OUTSOURCING AND CONCEALMENT STRATEGY PUTTING HUMAN RIGHTS AT RISK.....	973
III.	CASE STUDY: ALGORITHMIC MONETIZATION OF USER-GENERATED CONTENT	974
A.	UGC MONETIZATION BETWEEN E.U. COPYRIGHT LAW AND THE DSA.....	975
1.	<i>Monetization as Content Moderation</i>	975
2.	<i>E.U. Copyright Law and Monetization</i>	978
3.	<i>Digital Services Act and Monetization</i>	981
B.	THE PRACTICE OF UGC MONETIZATION.....	984
1.	<i>YouTube</i>	984
2.	<i>Meta's Facebook and Instagram</i>	991
3.	<i>TikTok</i>	994

4.	<i>Third-Party Providers of Content Recognition Tools</i>	996
C.	HUMAN RIGHTS DEFICITS.....	998
1.	<i>Misappropriation of Freedom of Expression Spaces</i>	1000
2.	<i>Encroachment Upon the Fundamental Right to Copyright of UGC Creators</i>	1003
3.	<i>Unequal Treatment and Discrimination of UGC Creators</i>	1006
IV.	CONCLUSION	1009

I. INTRODUCTION

User-generated content (UGC)¹ is a core element of many internet platforms. With the opportunity to upload photos, films, music and texts, formerly passive users have become active contributors to (audio-)visual content portals, wikis, online marketplaces, discussion and news fora, social networking sites, virtual worlds, and academic paper repositories. Internet users upload a myriad of literary and artistic works every day.² A delicate question arising from this user involvement concerns copyright infringement. UGC may consist of self-created works and public domain material. However, it may also include unauthorized takings of third-party material that enjoys copyright protection. As UGC has become a mass phenomenon and a key factor in the evolution of the modern, participative web,³ this problem raises complex issues and requires the reconciliation of human rights⁴ ranging from the right to property,⁵ to freedom of expression and information,⁶ and freedom

1. For a definition and description of central UGC features, see SACHA WUNSCH-VINCENT & GRAHAM VICKERY, *WORKING PARTICIPATIVE WEB: USER-CREATED CONTENT* 8–12 (2007), <https://www.oecd.org/sti/38393115.pdf>.

2. For example, statistics relating to the online platform YouTube report over one billion users uploading 300 hours of video content every minute. *Cf. About Youtube*, YOUTUBE, <https://www.youtube.com/intl/en-GB/yt/about/press/> (last visited Sept. 6, 2023); *Youtube Company Statistics*, STATISTIC BRAIN RSCH. INST., <https://www.statisticbrain.com/youtube-statistics/> (last visited Sept. 6, 2023).

3. WUNSCH-VINCENT & VICKERY, *supra* note 1, 8–22.

4. In this Article, the terms human rights and fundamental rights are used interchangeably.

5. In the EU, the fundamental right to property enshrined in Article 17 of the Charter of Fundamental Rights of the European Union (2000/C 364/01) (CFR) explicitly refers to intellectual property in paragraph 2.

6. Article 11 CFR; Article 10 EUR. CONV. ON H.R. *Cf. Martin Senftleben, User-Generated Content – Towards a New Use Privilege in EU Copyright Law*, in *RESEARCH HANDBOOK ON IP AND DIGITAL TECHNOLOGIES* 136, 148–52 (Tanya Aplyn ed., 2020), <https://papers.ssrn.com/abstract=3325017>.

to conduct a business.⁷ Users, platform providers, and copyright holders are central stakeholders.⁸

In line with the approach taken in the U.S. Digital Millennium Copyright Act (DMCA),⁹ E.U. legislation in the field of ecommerce traditionally shielded UGC platforms from liability for copyright infringement by offering a liability exemption or “safe harbor” for hosting services. To qualify for the safe harbor, a hosting platform, provided that it was not actively involved in the posting of content, was only obliged to take immediate action and remove content when a rightholder informed the platform provider in a sufficiently precise and substantiated manner about infringing content.¹⁰ The safe harbor system was

7. Article 16 CFR. *Cf.* CJEU, 16 February 2012, case C-360/10, Sabam/Netlog, ¶ 51. *Cf.* Christophe Geiger & 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*, 70 GRUR INT'L 517 (2021); Martin Senfleben & 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* 16–20 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3717022.

8. As to the debate on user-generated content and the need for the reconciliation of divergent interests in this area, see Martin Senfleben, *Breathing Space for Cloud-Based Business Models – Exploring the Matrix of Copyright Limitations, Safe Harbours and Injunctions*, 4 J. INTELL. PROP., INFO. TECH. & E-COMMERCE L. 87, 87–90 (2013); Steven D. Jamar, *Crafting Copyright Law to Encourage and Protect User-Generated Content in the Internet Social Networking Context*, 19 WIDENER L.J. 843 (2010); Natali Helberger, Lucie Guibault, E.H. Janssen, N.A.N.M. van Ejjik, Christina Angelopoulos & Joris van Hoboken, *Legal Aspects of User Created Content*, 19 WIDENER L.J. 843 (2020); Mary W. S. Wong, “Transformative” User-Generated Content in Copyright Law: *Infringing Derivative Works or Fair Use?*, 11 VAND. J. ENT. & TECH. L. 1075 (2021); Edward Lee, *Warming Up to User-Generated Content*, 5 U. ILL. L. REV. 1459 (2008); Branwen Buckley, *SueTube: Web 2.0 and Copyright Infringement*, 31 COLUM. J.L. & ARTS 235 (2008); Tom W. Bell, *The Specter of Copyism v. Blockheaded Authors: How User-Generated Content Affects Copyright Policy*, 10 VAND. J. ENT. & TECH. L. 841 (2008); Steven Hechter, *User-Generated Content and the Future of Copyright: Part One – Investiture of Ownership*, 10 VAND. J. ENT. & TECH. L. 863 (2008); Greg Lastowka, *User-Generated Content and Virtual Worlds*, 10 VAND. J. ENT. & TECH. L. 893 (2008).

9. *Cf.* Miquel Peguera, *The DMCA Safe Harbour and Their European Counterparts: A Comparative Analysis of Some Common Problems*, 32 COLUM. J.L. & ARTS 481 (2009). More recently, see Folkert Wilman, *The EU’s System of Knowledge-Based Liability for Hosting Service Providers in Respect Of Illegal User Content – Between The E-Commerce Directive and the Digital Services Act*, 12 J. INTELL. PROP. INFO. TECH. & ELEC. COM. L. (2021), <http://www.jipitec.eu/issues/jipitec-12-3-2021/5343>.

10. Article 6(1) of Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), *Official Journal of the European Union* 2022 L 277, 1, and, previously, Article 14(1) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), *Official Journal of the European Communities* 2000 L 178, 1. *Cf.* CJEU, 23 March 2010, case C-236/08, Google and Google France, ¶¶ 114–18; CJEU, 12 July 2011, case C-324/09, L’Oréal v. eBay, ¶¶ 120–22. For commentary, see S. Kulk, *Internet Intermediaries and Copyright Law – Towards a*

based on the assumption that a general monitoring obligation would be too heavy a burden for platform providers and undesirable as a matter of public policy.¹¹ Without a safe harbor, the liability risk would thwart the creation of internet platforms depending on third-party content and frustrate the development of ecommerce.¹²

However, in preparing an update of E.U. copyright legislation and a departure from the notice-and-takedown consensus, the European Commission stated that the hosting safe harbor allowed UGC platforms to generate income without sharing the profits with producers of creative content.¹³ In line with this “value gap” argument, the Commission’s proposal for new copyright legislation—the template for Article 17 of the E.U. Directive on Copyright in the Digital Single Market (CDSMD, or “CDSM Directive”)¹⁴—sought to render the liability shield inapplicable to copyrighted works.¹⁵ Article 17 has been described as the “monster provision” of the

Future-Proof EU Legal Framework, Utrecht: University of Utrecht 2018; Martin Senftleben, *Breathing Space for Cloud-Based Business Models: Exploring the Matrix of Copyright Limitations, Safe Harbours and Injunctions*, 4 J INTEL. PROP. INFO. TECH. & ELEC. COM. L. 87, 87–103 (2013); Peguera, *supra* note 9; CHRISTINA ANGELOPOULOS, EUROPEAN INTERMEDIARY LIABILITY IN COPYRIGHT: A TORT-BASED ANALYSIS (2016); MARTIN HUSOVEC, INJUNCTIONS AGAINST INTERMEDIARIES IN THE EUROPEAN UNION: ACCOUNTABLE BUT NOT LIABLE? (2017).

11. See SENFLEBEN & ANGELOPOULOS, *supra* note 7, at 16–20.

12. Article 15(1) of Directive 2000/31/EC of 8 June 2000 (E-Commerce Directive).

13. See European Commission, 9 December 2015, *Towards A Modern, More European Copyright Framework*, Doc. COM (2015) 626 final, at 9–10.

14. 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, *Official Journal of the European Communities* 2019 L 130, 92 (CDSM Directive or CDSMD).

15. European Commission, *Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market*, Art. 13, COM (2016) 593 final (Sept. 14, 2016). Prior to this formal proposal of copyright legislation seeking to neutralize the safe harbour for hosting, the French High Council for Literary and Artistic Property had published a research paper prepared by Professor Pierre Sirinelli, Josée-Anne Benazeraf and Alexandra Bensamoun on November 3, 2015. The researchers had been asked to propose changes to current E.U. legislation “enabling the effective enforcement of copyright and related rights in the digital environment, particularly on platforms which disseminate protected content.” They arrived at the conclusion that a provision should be added to current E.U. copyright legislation making it clear that “information society service providers that give access to the public to copyright works and/or subject-matter, including through the use of automated tools, do not benefit from the limitation set out [in the safe harbour for hosting of the E-Commerce Directive 2000/31/EC].” See High Council for Literary and Artistic Property of the French Ministry of Culture and Communication, 3 November 2015, *Mission to Link Directives 2000/31 and 2001/29 – Report and Proposals*, p. 11.

CDSM Directive, “both by its size and hazardousness.”¹⁶ Despite its relatively young age, it has already triggered abundant commentary.¹⁷ The provision has also been subject to an interpretative Guidance by the European Commission (“Commission Guidance” or “Guidance”),¹⁸ and survived an action for annulment with the Court of Justice of the European Union (CJEU).¹⁹

The regulatory strategy underlying Article 17 of the CDSMD is simple: deprived of the safe harbor for hosting and exposed to direct liability for infringing user uploads, platform providers will have to embark on UGC licensing and filtering.²⁰ In the final text of the Directive, the E.U. legislature applied this approach to a specific type of online platforms: online content-

16. Séverine Dusollier, *The 2019 Directive on Copyright In The Digital Single Market: Some Progress, A Few Bad Choices, And An Overall Failed Ambition*, 57 COMMON MKT. L. REV. 979 (2020).

17. See, e.g., Martin Senftleben, *Bermuda Triangle – Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market*, 41 EUR. INTELL. PROP. REV. 480 (2019); Martin Husovec & 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*, 70 GRUR INT’L 325 (2021); 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?*, 2 ZEITSCHRIFT FÜR GEISTIGES EIGENTUM/INTELL. PROP. J. 123 (2020); Christophe Geiger & 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*, 43 EUR. INTELL. PROP. REV. 625 (2021); Axel Metzger & Martin Senftleben, *Understanding Article 17 of the EU Directive on Copyright in the Digital Single Market - Central Features of the New Regulatory Approach to Online Content-Sharing Platforms*, 67 J. COPYRIGHT SOC’Y U.S.A. 279 (2020).

18. See 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 [hereinafter Guidance Art. 17 CDSMD].

19. Case C-401/19, Republic of Poland v European Parliament and Council of the European Union, 26.04.2022, ECLI:EU:C:2022:297. For commentary, see 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 (2022), <https://verfassungsblog.de/filters-poland/>; Martin Husovec, *Mandatory Filtering Does Not Always Violate Freedom of Expression: Important Lessons From Poland v. Council and European Parliament*, 60 COMMON MKT. L. REV. 173 (2023); Bernd Justin Jutte & 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 (July 20, 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/>.

20. 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 (CDSMD), O.J. (L 130), art. 17(3).

sharing service providers (OCSSPs).²¹ OCSSPs are providers of an information society service. Furthermore, their main purpose is to store and give the public access to a large amount of protected content by its users, which they organize and promote for profit-making purposes. In assessing whether a platform qualifies as an OCSSP, it is important to examine a relevant service's substitution effects and to make a case-by-case assessment of their profit orientation.²² Recital 62 of the CDSMD clarifies that the definition is intended to confine the application of Article 17 to online services that play an important role on the online content market "by competing with other online content services, such as online audio and video streaming services, for the same audiences."²³

The scope of the OCSSP concept is further delineated by a non-exhaustive list of exclusions, i.e., electronic communication services (e.g., Skype), providers of cloud services (e.g., Dropbox), online marketplaces (e.g., eBay), not-for-profit online encyclopedias (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).²⁴ Nonetheless, legal uncertainty remains. While it is safe to assume that certain large-scale platforms, especially platforms with video-sharing features (e.g., YouTube, Facebook, Instagram), are covered, others do not so easily fit the concept. The definition includes several open-ended concepts ("main purpose," "large amount," "profit-making purpose") that ultimately require a case-by-case assessment of what providers qualify as OCSSPs.²⁵

In practice, the adoption of Article 17 of the CDSMD means that OCSSPs seeking to avoid liability must enter into agreements with copyright holders. The initial Commission proposal already contemplated that this regulatory approach would bring content filtering obligations, then referred to as "effective content recognition technologies."²⁶ If a platform provider does not manage to conclude sufficiently broad licensing agreements with rightholders, Article 17(4)(b) of the CDSMD offers the prospect of a reduction of the

21. For the definition of this type of online platforms, see *id.* art. 2(6) and the further guidance provided in Recitals 62 and 63.

22. *Id.* recitals 62 and 63. *Cf.* Metzger & Senftleben, *supra* note 17.

23. CDSMD recital 62, 2019 O.J. (L 130).

24. *Id.* art. 2(6).

25. See Guidance Art. 17 CDSMD, *supra* note 18, at n. 18, 4–5. For analysis and criticism, see JOÃO PEDRO QUINTAIS, PÉTER MEZEI, ISTVÁN HARKAI, JOÃO C. MAGALHÃES, CHRISTIAN KATZENBACH, SEBASTIAN FELIX SCHWEMER & THOMAS RIIS, COPYRIGHT CONTENT MODERATION IN THE EU: AN INTERDISCIPLINARY MAPPING ANALYSIS (2022).

26. See *Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market*, COM (2016) 593 final (Sept. 14, 2016), art. 13(1).

liability risk in exchange for content filtering and other preventive measures. If the platform—despite best efforts²⁷—has not received a license, it can avoid liability for unauthorized acts of communication to the public or making available to the public when it manages to demonstrate that it:

made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information
.....²⁸

Despite the neutral wording, it is clear that “unavailability of specific works and other subject matter” requires the use of algorithmic filtering tools.²⁹ In the legislative process leading to this remarkable paradigm shift in the European Union, the human rights impact of the departure from the traditional notice-and-takedown model has not gone unnoticed.

Algorithmic content moderation—including the use of automated filtering tools to detect infringing content before it appears online—has a deep impact on the freedom of users to upload and share information. When an algorithmic content recognition system identifies protected source material matching a platform’s reference files in a user upload, the system can be used to prevent content from appearing in the first place. Instead of presuming that UGC is lawful until proven infringing, the default position of automated filtering systems is that every upload is suspicious and that copyright owners are entitled to ex ante control over the sharing of information online.

The wording of Article 17 of the CDSMD itself shows that the new legislative design has given rise to concerns about overbroad inroads into human rights. Article 17(10) of the CDSMD stipulates that, in stakeholder dialogues seeking to identify best practices for the application of content moderation measures, “special account shall be taken, among other things, of the need to balance fundamental rights and of the use of exceptions and limitations.”³⁰ After the adoption of the Directive, the preparation of the Digital Services Act (DSA)³¹ offered further opportunities for the E.U. legislature to refine and stabilize its strategy for safeguarding human rights that

27. CDSMD art. 17(4)(a), 2019 O.J. (L 130).

28. *Id.*

29. CJEU, 26 April 2022, case C-401/19, *Poland v Parliament and Council*, where this assumption has been confirmed.

30. CDSMD art. 17(10), 2019 O.J. (L 130).

31. Regulation 2022/2065 of the European Parliament and of the Council of 19 Oct. 2022, on a Single Market for Digital Services and Amending Directive 2000/31/EC (Digital Services Act), O.J. (L 277) 1 (EU).

may be affected by algorithmic content filtering tools. Article 14 of the DSA—regulating terms and conditions of intermediary services ranging from mere conduit and caching to hosting services³²—reflects central features of the E.U. strategy.³³ Article 14(1) of the DSA requires that providers of hosting services—the category covering UGC platforms—inform users about:

any policies, procedures, measures and tools used for the purpose of content moderation, including algorithmic decision-making and human review, as well as the rules of procedure of their internal complaint handling system.³⁴

This information duty indicates that users are expected to play an active role in the preservation of their freedom of expression and information. Article 14(4) of the DSA complements this transparency measure with a fundamental rule that goes far beyond sufficiently clear and accessible information in the terms and conditions. Providers of intermediary services, including UGC platforms:³⁵

shall act in a diligent, objective and proportionate manner in applying and enforcing the restrictions [that they impose in relation to the use of their service in respect of information provided by the recipients of the service], with due regard to the rights and legitimate interests of all parties involved, including the fundamental rights of the recipients of the service, such as the freedom of expression, freedom and pluralism of the media, and other fundamental rights and freedoms as enshrined in the Charter.³⁶

In other words: in the case of upload- and content-sharing restrictions following from the employment of content moderation tools, the UGC platform is bound to some (imprecise) extent³⁷ to safeguard the fundamental rights of users, including the freedom of expression and information. As a guiding principle, Article 14(4) of the DSA refers to the principle of

32. See Digital Services Act art. 3(g), 2022 O.J. (L 277) (defining “intermediary services”).

33. For a detailed analysis of Article 14 DSA, see João Pedro Quintais, Naomi Appelman & Ronan Fahy, *Using Terms and Conditions to Apply Fundamental Rights to Content Moderation*, 24 GERMAN L.J. 881 (2023).

34. Digital Services Act art. 14(1), 2022 O.J. (L 277).

35. These providers are covered by the concept of “online platforms” in Article 3(i) DSA. *Id.* art. 3(i).

36. *Id.* art.14(4).

37. There is a complex discussion concerning the extent to which fundamental rights can have (indirect) horizontal effect, i.e., as between private parties (here: platform and user), and how Article 14 of the DSA changes pre-existing E.U. law in this respect. See Quintais, Appelman & Fahy, *supra* note 33.

proportionality³⁸ that plays a central role in the reconciliation of competing fundamental rights under Article 52(1) of the E.U. Charter of Fundamental Rights (“Charter” or CFR).³⁹

At first glance, it seems plausible to impose on platforms the obligation to safeguard fundamental rights of users, since they are closest to users and arguably best equipped to deal quickly with complex issues arising from infringement on a case-by-case basis.⁴⁰ The crux of the approach chosen in Article 14(4) of the DSA, however, clearly comes to the fore when raising the question whether the possibility of imposing human rights obligations on internet service providers exempts the state power itself from the noble task of ensuring the observance of fundamental rights. Can the legislature legitimately “outsource” the obligation to safeguard fundamental rights, such as freedom of expression and information, to private parties? And can the legislature, when passing on that responsibility, confidently leave the task of defending the public interest in this sensitive area in the hands of companies belonging to the platform and creative industry and to the users who may not lodge complaints in each individual case?

We will discuss these outsourcing questions—and the risk of platforms and public authorities hiding behind a low number of user complaints—in Part II. We will then turn to human rights risks in a detailed case study focusing on UGC monetization in Part III. While largely underexplored, UGC monetization is highly relevant in practice. On platforms, it constitutes a much more popular moderation action than blocking. In addition, it is very significant from a human rights perspective. In the absence of appropriate regulation, the monetization practices of platforms and large-scale rightholders may make inroads into human rights. Part IV provides an overview of our findings and recommendations.

38. Digital Services Act art. 14(4), 2022 O.J. (L 277) (referring to “proportionate manner”).

39. Charter of Fundamental Rights of the European Union, Official Journal of the European Communities 2000 C 364, 1. Article 52(1) CFR reads as follows: “Any limitation on the exercise of the rights and freedoms recognized [sic] by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized [sic] by the Union or the need to protect the rights and freedoms of others.”

40. For earlier case law already pointing in this direction, see CJEU, 27 March 2014, case C-314/12, *UPC Telekabel Wien*, ¶¶ 55–56, where the Court stated that internet service providers had to safeguard the fundamental rights of users; *see also* Christophe Geiger & Elena Izyumenko, *The Role of Human Rights in Copyright Enforcement Online: Elaborating a Legal Framework for Website Blocking*, 32 AM. U. INT’L L. REV. 43 (2016).

II. THE NEW CONSTITUTIONALISM DILEMMA: OUTSOURCING AND CONCEALING

Legislation that applies outsourcing strategies refrains from providing concrete solutions for human rights tensions in the law itself. Instead, the legislature imposes the burden on private entities to safeguard human rights that may be affected by the legislative measure at issue, such as the content filtering obligation in Article 17(4) of the CDSMD. In the case of UGC, the addressees of this type of outsourcing legislation are online platforms—OCSSPs—that offer users a forum for uploading and sharing their creations. The decision to outsource the burden of human rights balancing can be seen as the result of the legislature’s inability to keep pace with rapid technological developments. In the absence of sufficient expertise and insight to devise concrete rules for the reconciliation of competing human rights positions, the legislature resorts to general guidelines—in the European Union, typically inspired by the principle of proportionality—which private entities must observe when fulfilling their obligation to implement the legislative measure in a way that preserves the human rights at stake. In the following sections, we discuss the corrosive effect of this outsourcing strategy (in Section II.A) and focus on the inadequacy of complaint and redress mechanisms for users as tools to bring human rights deficits to light (in Section II.B). Instead, we argue, reliance on users will amplify the risk of human rights violations when low reported numbers of complaints are used strategically to declare automated content filtering unproblematic (in Section II.C).

A. OUTSOURCING OF HUMAN RIGHTS OBLIGATIONS IN THE EUROPEAN UNION: REGULATION OF CONTENT MODERATION

Discussing the increasing tendency to take refuge in human rights outsourcing, Tuomas Mylly has observed that “gradually, intermediaries and other key private entities become more independent regulators.”⁴¹ He describes central characteristics of this process as follows:

Courts are starting to rely increasingly on private entities to balance and adjust rights on technological domains but seek to secure formal appeal rights for users. Similarly, when legislatures shift decision-making power to intermediaries, they try to maintain some of the safeguards of traditional law and write wish-lists for private regulators. The executive pushes private regulation further to compensate for its policy failures and enters—at the request of the

41. Tuomas Mylly, *The New Constitutional Architecture of Intellectual Property*, in GLOBAL INTELLECTUAL PROPERTY PROTECTION AND NEW CONSTITUTIONALISM – HEDGING EXCLUSIVE RIGHTS 50, 71 (Jonathan Griffiths & Tuomas Mylly eds., 2021).

legislature—into regulatory conversations with private regulators to issue “guidance” in the spirit of co-regulation, thus establishing an enduring link to private regulators.⁴²

Arguably, Article 17 of the CDSMD and Article 14 of the DSA offer prime examples of provisions that outsource human rights obligations to private entities with the features Mylly describes. As explained above, Article 14(4) of the DSA places an obligation on intermediaries to apply their terms and conditions to content moderation restrictions in “a diligent, objective and proportionate manner.”⁴³ In addition to this reference to the principle of proportionality, the provision emphasizes that online platforms are bound to carry out such restrictions (which would include content filtering) with due regard to the fundamental rights of users, such as freedom of expression.⁴⁴

As to copyright limitations that support the freedom of expression, more specific rules follow from Article 17(7) of the CDSMD: the cooperation between OCSSPs and the creative industry in content moderation⁴⁵ must not result in the blocking of non-infringing UGC, including situations where UGC falls within the scope of a copyright limitation. Confirming Mylly’s prediction that the executive power will enter regulatory conversations with private entities to establish best practices and guiding principles, Article 17(10) of the CDSMD adds that the European Commission shall organize stakeholder dialogues to discuss best practices for the content filtering cooperation:

The Commission shall, in consultation with online content-sharing service providers, rightholders, users’ organisations and other relevant stakeholders, and taking into account the results of the stakeholder dialogues, issue guidance on the application of this Article, in particular regarding the [content moderation] cooperation referred to in paragraph 4.⁴⁶

In the quest for best practices, Article 17(10) of the CDSMD specifically requires that stakeholder dialogues take “special account”⁴⁷ of the need to balance fundamental rights. As in Article 14(4) of the DSA, reference is thus made to human rights tensions, although in a different context. The private entities involved in Article 17(10) of the CDSMD—copyright holders and

42. *Id.*

43. Digital Services Act art. 14(4), 2022 O.J. (L 277). *Id.* art. 14(1) explicitly refers to content moderation measures.

44. *Id.* art. 14(4).

45. *See* the interplay of creative industry notifications and filtering measures applied by the platform industry that results from CDSMD art. 17(4)(b)(c), 2019 O.J. (L 130).

46. *Id.* art. 17(10).

47. *Id.*

OCSSPs—are expected to resolve these tensions in the light of the guidance evolving from the co-regulatory efforts of the European Commission. Evidently, industry “cooperation” is the kingpin of this outsourcing scheme. To shed light on the human rights implications of this regulatory approach, we inspect the interplay of licensing and filtering obligations in Article 17 of the CDSMD more closely (in Section II.A.1). On this basis, it is possible to assess the industry cooperation resulting from this content moderation scheme (as discussed in Section II.A.2) and address the tension between abstract diligence and proportionality obligations on the one hand, and concrete cost and efficiency considerations on the other (as discussed in Section II.A.3). Considering the practical impact of the outsourcing approach underlying Article 17 of the CDSMD, the conclusion seems inescapable that, despite all references to diligence and proportionality, there is a serious risk of encroachments upon fundamental rights (as discussed in Section II.A.4).

1. *Interplay of Licensing and Filtering Obligations in Article 17 of CDSMD*

At the root of the obligation to filter UGC—and industry cooperation in this area—lies the grant of a specific exclusive right in Article 17(1) of the CDSMD that leads to strict, primary liability of OCSSPs for infringing content that is uploaded by users:

Member States shall provide that an online content sharing service provider performs an act of communication to the public or an act of making available to the public when it gives the public access to copyright protected works or other protected subject matter uploaded by its users.⁴⁸

By clarifying that the activities of platform providers amount to communication or making available to the public, this provision collapses the traditional distinction between primary liability of users who upload infringing content, and secondary liability of online platforms that encourage or contribute to infringing activities. It no longer matters whether the provider of a platform had knowledge of infringement, encouraged infringing uploads, or failed to promptly remove infringing content after receiving a notification. Instead, the platform provider is *directly* and *primarily* liable for infringing content that arrives at the platform. To reduce the liability risk, the platform provider will have to obtain a license from the rightholder for UGC uploads.

The Commission Guidance on “best efforts”⁴⁹ to obtain an authorization in the sense of Article 17(4)(a) of the CDSMD suggests in this context that

48. *Id.* art.17(1).

49. All obligations of “best efforts” must be interpreted in accordance with the principle of proportionality and the factors described in Article 17(5) CDSMD: the type, the audience

platforms should make a case-by-case analysis of licensing options.⁵⁰ At a minimum, OCSSPs should proactively engage with easily identifiable and locatable rightholders, especially collecting societies.⁵¹ The proportions of this obligation may differ according to the type of platform. For instance, smaller platforms may only need to engage with a limited number of easily identifiable rightholders. The Guidance also suggests that unreasonable rightholder refusals to license should release platforms from their obligation to seek authorization.⁵² However, platforms must be able to provide evidence for this, which could be challenging in practice. In cases where a certain type of content is not prevalent on a platform, platforms may be exempted from the task of seeking licenses proactively. Nonetheless, platforms should engage with rightholders who offer them.⁵³

While these guidelines may help OCSSPs operationalize licensing, the focus on easily identifiable rightholders confirms that, in practice, licensing will hardly ever cover all conceivable UGC that may arrive at a platform. As the Guidance notes, collecting societies have an established position in the European Union.⁵⁴ With broad mandates to administer the rights of copyright owners, especially authors,⁵⁵ they seem natural partners to OCSSPs in the development of umbrella licensing solutions. However, they would have to offer an all-embracing licensing deal covering protected content of both members and non-members. Otherwise, the licensing exercise would make little sense, as it would fail to cover all types of conceivable user uploads.

Considering experiences with licensing packages offered by collecting societies in the past, it seems safe to assume that an umbrella solution with these proportions is currently unavailable in many E.U. Member States. It remains to be seen whether harmonized rules on extended collective licensing⁵⁶

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, Article 17(6) CDSMD creates a mitigated regime for platforms that are “new service providers with small turnover and audience.” See Guidance Art. 17 CDSMD, *supra* note 18, at n. 18, 16–17.

50. Guidance Art. 17 CDSMD, *supra* note 18, at n. 18, 8–10.

51. *Id.* See Metzger & Senftleben, *supra* note 17, at 287–91.

52. As to this point, see *id.* at 289 (drawing a line with the FRAND requirement in standard essential patent cases, in particular CJEU, 16 July 2015, case C-170/13, Huawei v ZTE, ¶¶ 63–69).

53. Guidance Art. 17 CDSMD, *supra* note 18, at n. 18, 8–10.

54. *Id.* at 6.

55. *Id.*

56. Article 12 CDSMD. For a more detailed discussion of this licensing approach in the context of Article 17 CDSMD, see Husovec & Quintais, *supra* note 17. As to the discussion of extended licensing solutions in the area of orphan works, see Stef van Gompel, *Unlocking the Potential of Pre-Existing Content: How to Address the Issue of Orphan Works in Europe?*, 38 INT'L REV. INTELL. PROP. & COMP. L. 669 (2007).

will finally pave the way for broader and more flexible licensing solutions. However, even if an OCSSP finds a collecting society willing to enter a UGC agreement with an umbrella effect, a core problem of European licenses remains: the collecting society landscape is highly fragmented. The UGC license available in one Member State may remain limited to the territory of that Member State. Pan-European licenses are the exception, not the rule. If a collecting society offers Pan-European licenses for digital use, these licenses will be confined to specific repertoire, in respect of which the collecting society has a cross-border entitlement.⁵⁷

Problems also arise in the field of initiatives to obtain licenses directly from rightholders. In the music industry, the willingness to grant licenses covering a broad spectrum of musical works may be relatively high.⁵⁸ Existing services, such as Spotify, demonstrate the availability of far-reaching licenses that encompass recent music releases. In the film industry, however, the situation is markedly different.⁵⁹ Film studios use diverse strategies and distribution outlets that do not include UGC platforms. They are unlikely to sacrifice profitable exploitation avenues by permitting users to share audio-visual material on UGC platforms from day one of the theatrical release (or availability on paid streaming platforms). This would enable UGC platforms to enter direct competition with the primary exploitation strategy pursued by the film studio itself. If there is willingness to conclude UGC licensing agreements despite these concerns, film studios will only accept agreements with limited use permissions that do not jeopardize their own opportunities to exploit the film in several stages and uphold their current windowing system.

Hence, creative users seeking to contribute to the online marketplace of ideas are at the mercy of copyright holders. Without contractual permission covering their content uploads, they cannot exercise their freedom of expression. Inevitably, the licensing imperative chosen in Articles 17(1) and 17(4)(a) of the CDSMD culminates in the introduction of filtering tools. As copyright holders and collecting societies are unlikely to offer all-embracing umbrella licenses, OCSSPs must rely on algorithmic tools to ensure that

57. For a detailed analysis of current E.U. rights clearance challenges in the digital environment, see SEBASTIAN FELIX SCHWEMER, *LICENSING AND ACCESS TO CONTENT IN THE EUROPEAN UNION: REGULATION BETWEEN COPYRIGHT AND COMPETITION LAW* (2019). For a comprehensive overview of the collective rights management situation in Europe, see Oleksandr Bulayenko, Stef Van Gompel, Christian Handke, Roel Peeters, Joost Poort, João Pedro Quintais & David Regeczi, *Study on Emerging Issues on Collective Licensing Practices in the Digital Environment* (2021), <https://papers.ssrn.com/abstract=3970490>.

58. See Bulayenko et al., *supra* note 57.

59. Guidance Art. 17 CDSMD, *supra* note 18, at n 18, 6. (“Collective licensing . . . is little used in the film sector where direct licensing by film producers is more usual.”).

content uploads do not overstep the limits of the use permissions they managed to obtain.⁶⁰ In *Poland v. Parliament and Council*, the CJEU explicitly confirmed that Article 17(4)(b) of the CDSMD mandates UGC platforms to carry out a preventive review of user uploads in circumstances where rightholders have provided “relevant and necessary information”⁶¹ for the detection of protected works.⁶² Depending on the scale of the task, the review of user uploads requires the employment of automatic recognition and filtering tools. The court noted that no party to the *Poland* case had been able to designate possible alternatives to automated filtering tools. Therefore, at least for the largest platforms (e.g., YouTube, Facebook, and Instagram), automated content filtering is necessary to comply with the best efforts filtering obligations arising from Article 17(4)(b) of the CDSMD.⁶³

From the perspectives of freedom of expression and freedom of information, the amalgam of licensing and filtering obligations in Article 17(4) of the CDSMD is highly problematic.⁶⁴ In accordance with the contours of the licensing deals which UGC platforms managed to obtain, algorithmic enforcement measures will curtail the freedom of users to participate actively in the creation of online content. The fundamental rights tension caused by this regulatory approach is evident. In decisions rendered prior to the adoption of Article 17, the CJEU has stated explicitly that in transposing E.U. directives and implementing transposing measures:

Member States must . . . take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order.⁶⁵

Interestingly, the application of filtering technology to a social media platform already occupied centre stage in *Sabam v. Netlog*. The case concerned Netlog’s social networking platform, which offered every subscriber the opportunity to acquire a globally available “profile” space that could be filled with photos, texts, video clips etc.⁶⁶ Claiming that users made unauthorized use of music and films belonging to its repertoire, the collecting society Sabam sought to obtain an injunction obliging Netlog to install a system for filtering the

60. CJEU, 26 April 2022, case C-401/19, *Poland v. Parliament and Council*.

61. *Id.* ¶ 53.

62. *Id.*

63. *Id.*

64. For a more candid statement, see Senftleben, *supra* note 33, at 339–40.

65. CJEU, case C-275/06, *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, ¶ 68.

66. CJEU, 16 February 2012, case C-360/10, *Sabam v. Netlog*, ¶¶ 16–18.

information uploaded to Netlog's servers. As a preventive measure and at Netlog's expense, this system would apply indiscriminately to all users for an unlimited period and would be capable of identifying electronic files containing music and films from the Sabam repertoire. In case of a match, the system would prevent relevant files from being made available to the public.⁶⁷ The *Sabam v. Netlog* case offered the CJEU the chance to provide guidance on a filtering system such as those that are envisaged in Article 17(4)(b) of the CDSMD.⁶⁸

However, in *Sabam v. Netlog*, the CJEU did not arrive at the conclusion that such a filtering system was permissible. Instead, the court saw a serious infringement of fundamental rights. The court took the explicit recognition of intellectual property as a fundamental right in Article 17(2) of the CFR as a starting point. At the same time, the court recognized that intellectual property must be balanced against the protection of other fundamental rights and freedoms.⁶⁹ Weighing the right to intellectual property asserted by Sabam against Netlog's freedom to conduct a business,⁷⁰ the court observed that the filtering system would involve monitoring all or most of the information on Netlog's servers in the interests of copyright holders, would have no limitation in time, would be directed at all future infringements, and would be intended to protect not only existing but also future works.⁷¹ Against this background, the CJEU concluded that the filtering system would encroach upon Netlog's freedom to conduct a business.⁷²

The CJEU also found that the filtering system would violate the fundamental rights of Netlog's users. These fundamental rights included their right to the protection of their personal data and their freedom to receive or impart information, as safeguarded by Articles 8 and 11 of the CFR respectively.⁷³ The court recalled that the use of protected material in online communications may be lawful under statutory limitations of copyright in the Member States, and that some works may have already entered the public domain, or been made available for free by the authors concerned.⁷⁴ Filtering systems, however, may block communications using these lawful resources. Given this corrosive effect, the court concluded:

67. *Id.* ¶¶ 26, 36–37.

68. As to the different levels of content monitoring that can be derived from CJEU jurisprudence, see SENFTLEBEN & ANGELOPOULOS, *supra* note 7, at 7–16.

69. CJEU, 16 February 2012, case C-360/10, *Sabam v. Netlog*, ¶¶ 41–44.

70. EU Charter of Fundamental Rights art. 16 - Freedom to conduct a business.

71. CJEU, 16 February 2012, case C-360/10, *Sabam v. Netlog*, ¶ 45.

72. *Id.* ¶¶ 46–47.

73. *Id.* ¶¶ 48–50.

74. *Id.* ¶¶ 50.

Consequently, it must be held that, in adopting the injunction requiring the hosting service provider to install the contested filtering system, the national court concerned would not be respecting the requirement that a fair balance be struck between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other (see, by analogy, *Scarlet Extended*, paragraph 53).⁷⁵

This case law confirms that the filtering obligations arising from Article 17(4) of the CDSMD are highly problematic. As a way out of the dilemma, the E.U. legislature walks the fine line of distinguishing between monitoring all UGC in search of a whole repertoire of works,⁷⁶ and monitoring all UGC in search of specific, pre-identified works.⁷⁷ *Sabam v. Netlog* concerned a filtering obligation targeting all types of UGC containing traces of works falling under the Sabam rights portfolio.⁷⁸ It seems that the drafters of Article 17(4)(b) of the CDSMD tried to avoid this prohibited general monitoring obligation, and thus escape the verdict of a violation of fundamental rights, by establishing the obligation to filter “specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information.”⁷⁹

2. *Reliance on Industry Cooperation to Safeguard Fundamental Rights*

At this point, the above-described element of industry “cooperation” enters the picture. Rightly understood, the content filtering system established in Article 17(4)(b) of the CDSMD relies on a joint effort of the creative industry and the online platform industry. To set the filtering machinery in motion, copyright holders must first provide OCSSPs with “relevant and necessary information”⁸⁰ with regard to those works which they want to ban from user uploads. The Commission Guidance states that information can be deemed “relevant” if it is, at a minimum, “accurate about the rights ownership of the particular work or subject matter in question.”⁸¹ Determining whether said information is “necessary” will depend on the technical measures

75. *Id.* ¶ 51.

76. *Id.* ¶¶ 26, 36–37.

77. *Cf.* SENFILEBEN & ANGELOPOULOS, *supra* note 7, at 8–9.

78. CJEU, 16 February 2012, case C-360/10, *Sabam v. Netlog*, ¶ 26.

79. CDSMD art. 17(4)(b), 2019 O.J. (L 130). The intention to obviate the impression of a prohibited general monitoring obligation also lies at the core of Article 17(8) CDSMD. This provision declares that UGC licensing and filtering “shall not lead to any general monitoring obligation.”

80. *Id.* art. 17(4)(b).

81. Guidance Art. 17 CDSMD, *supra* note 18, at n. 18, 14.

employed by platforms: the information provided by rightholders must enable the effective implementation of the platforms' solutions.⁸²

Once relevant and necessary information on protected works is received, the OCSSP is obliged to include the information in the content moderation process and ensure the filtering—"unavailability"⁸³—of content uploads that contain traces of the protected works. According to Article 17(7) of the CDSMD, it is this cooperation which must not result in the prevention of non-infringing UGC, including situations where UGC is covered by a copyright limitation. This cooperation is also the central item on the agenda of stakeholder dialogues which the Commission is expected to organize under Article 17(10) of the CDSMD to identify best practices.⁸⁴

The fundamental problem of the whole cooperation concept, however, is the fact that, unlike public bodies and the judiciary, the central players in the cooperation scheme—the creative industry and the online platform industry—are private entities that are not intrinsically motivated to safeguard the public interest in the exercise and furtherance of fundamental rights and freedoms. Despite all invocations of diligence and proportionality⁸⁵—"high industry standards of professional diligence" in Article 17(4)(b) of the CDSMD; "diligent, objective and proportionate" application in Article 14(4) of the DSA—the decision-making in the context of content filtering is likely more simple. Namely, the moment the balancing of competing human rights positions is left to industry cooperation, economic cost and efficiency considerations are likely to occupy center stage. Arguably, these considerations will often prevail over more abstract societal objectives, such as flourishing freedom of expression and information.

A closer look at the different stages of industry cooperation resulting from the regulatory model of Article 17 of the CDSMD confirms that concerns about human rights deficits are not unfounded. As explained, the first step in the content moderation process is the notification of relevant and necessary information relating to "specific works and other subject matter"⁸⁶ by copyright holders. In the light of case law precedents, in particular *Sabam v.*

82. Guidance Art. 17 CDSMD, *supra* note 18, at n. 18, 14 (providing examples related with "fingerprinting" and "metadata-based solutions").

83. CDSMD art. 17(4)(b), 2019 O.J. (L 130).

84. *Id.* art. 17(10) (stating that the Commission will issue guidance on the application of Article 17, "in particular regarding the cooperation referred to in paragraph 4").

85. See the references to "high industry standards of professional diligence" in CDSMD art. 17(4)(b), 2019 O.J. (L 130); "diligent, objective and proportionate" application in Article 14(4) DSA.

86. CDSMD art. 17(4)(b), 2019 O.J. (L 130).

Netlog,⁸⁷ use of the word “specific” can be understood to reflect the legislator’s hope that copyright holders will only notify individually selected works. For instance, copyright holders could limit use of the notification system to those works that constitute cornerstones of their current exploitation strategy. The principle of proportionality and high standards of professional diligence also point in the direction of a cautious approach that confines work notifications to those repertoire elements that are “specific” in the sense that they generate a copyright holder’s lion’s share of revenue.⁸⁸ In line with this approach, other elements of the work catalogue could be kept available for creative remix activities of users. This, in turn, would reduce the risk of overbroad inroads into freedom of expression and information.

In practice, however, rightholders are highly unlikely to adopt this cautious approach. The legal basis for requiring a focus on individually selected works lies in the legislator’s use of the expression “best efforts to ensure the unavailability of *specific* works and other subject matter”⁸⁹ in Article 17(4)(b) of the CDSMD. Proportionality and diligence considerations only form the broader context in which this specificity requirement is embedded. Strictly speaking, however, the reference to “best efforts to ensure the unavailability”⁹⁰ shows that the requirement of “high industry standards of professional diligence”⁹¹ concerns the filtering step taken by a platform to ensure the unavailability of notified works, not the primary notification sent by copyright holders.

Just like the requirement of “high industry standards of professional diligence,” the imperative of “diligent, objective and proportionate” application and enforcement of content restrictions in Article 14(4) of the DSA relates to platform content moderation measures that restrict user freedoms, not the rightholder notification system that sets the filtering process in motion. The success of the risk-reduction strategy surrounding the word “specific” in Article 17(4)(b) of the CDSMD and the words “diligent, objective and proportionate” in Article 14(4) of the DSA is thus doubtful. In the cooperation with OCSSPs, nothing seems to prevent the creative industry

87. CJEU, 16 February 2012, case C-360/10, *Sabam v. Netlog*, ¶ 51.

88. See Martin Senftleben, *How to Overcome the Normal Exploitation Obstacle: Opt-Out Formalities, Embargo Periods, and the International Three-Step Test*, 1 BERKELEY TECH. L.J. 1 (2014); see also Christophe Geiger, Daniel J. Gervais & Martin Senftleben, *The Three-Step-Test Revisited: How to Use the Test’s Flexibility in National Copyright Law*, 29 AM. U. INT’L L. REV. 581 (2014); Daniel Gervais, *Towards a New Core International Copyright Norm: The Reverse Three-Step Test*, 9 MARQ. INTELL. PROP. L. REV. 1 (2005).

89. CDSMD art. 17(4)(b), 2019 O.J. (L 130) (emphasis added).

90. *Id.*

91. *Id.*

from sending copyright notifications that cover every element of long and impressive work catalogues. Platforms may thus receive long lists of all works which copyright holders have in their repertoire. Adding up all “specific works and other subject matter” included in these notifications, it could well be that Article 17(4)(b) of the CDSMD culminates in a filtering obligation that is very similar to the filtering measures which the CJEU prohibited in *Sabam v. Netlog*.⁹² The risk of encroachments upon human rights is evident.

3. *Diligence and Proportionality Viewed Through the Prism of Cost and Efficiency Considerations*

Turning to the second step in the content moderation process—the act of filtering carried out by OCSSPs to prevent the availability of notified works on UGC platforms—it is noteworthy that proportionality and diligence obligations are directly applicable. As explained, the requirements of “high industry standards of professional diligence”⁹³ and “diligent, objective and proportionate”⁹⁴ application only form the broader context surrounding the notification of specific works by rightholders. When it comes to the content moderation process as such, however, these rules impact the activities of OCSSPs directly: the UGC filtering process must be implemented in a way that complies with these diligence and proportionality requirements.

The Commission Guidance clarifies in this respect that compliance with “high industry standards of professional diligence” must be evaluated against “available industry practices on the market,”⁹⁵ including technological solutions. Platforms have discretion only in selecting from existing solutions on the market.⁹⁶ In discussing prevailing market practices, the Guidance highlights content recognition based on fingerprinting⁹⁷ as the primary example, whilst acknowledging that this is not the norm for smaller

92. Senftleben, *supra* note 17, at 483–84.

93. Article 17(4)(b) CDSMD.

94. Article 14(4) DSA.

95. Guidance Art. 17 CDSMD, *supra* note 18, at n. 21, 12.

96. *Id.*

97. A fingerprint is a digital representation of media content, and contains all visual and/or audio information of the content. For a technical description, see, e.g., EUROPEAN UNION INTELLECTUAL PROPERTY OFFICE, AUTOMATED CONTENT RECOGNITION: DISCUSSION PAPER. PHASE 1, EXISTING TECHNOLOGIES AND THEIR IMPACT ON IP (2020), <https://data.europa.eu/doi/10.2814/52085> (last visited Sept. 4, 2021); JEAN-PHILIPPE MOCHON & SYLVAIN HUMBERT, CSPLA, A mission on the tools for the recognition of content protected by online sharing platforms: state of the art and proposals (2020), <https://www.culture.gouv.fr/en/Sites-thematiques/Propriete-litteraire-et-artistique/Conseil-superieur-de-la-propriete-litteraire-et-artistique/Travaux/Missions/Mission-du-CSPLA-sur-les-outils-de-reconnaissance-des-contenus-protoges-par-les-plateformes-de-partage-en-ligne-etat-de-l-art-et-propositions>.

platforms.⁹⁸ Other technologies include hashing, watermarking, the use of metadata, and keyword search.⁹⁹ These solutions may be developed in-house, as in the case of YouTube’s Content ID and Meta’s Rights Manager. OCSSPs may also procure them from third-party providers, such as Audible Magic or Pex.

As to the practical outcome of UGC filtering in the light of these diligence and proportionality requirements, however, it is to be recalled that OCSSPs will likely align the concrete implementation of content moderation systems with cost and efficiency considerations. Abstract commandments, such as the instruction to act in accordance with “high standards of professional diligence”¹⁰⁰ and in a “proportionate manner in applying and enforcing [UGC upload] restrictions”¹⁰¹ can hardly be deemed capable of superseding concrete commercial cost and efficiency necessities. Tuomas Mylly accurately characterizes litanies of diligence and proportionality requirements as “wish-lists for private regulators.”¹⁰² On its merits, the legislature whitewashes statutory content filtering obligations by adding a diligence and proportionality gloss to reassure itself that the drastic measure will be implemented with sufficient care and caution to avoid the erosion of human rights. The success of this ingredient of the outsourcing recipe is doubtful. In reality, the subordination of industry decisions to diligence and proportionality imperatives—the acceptance of more costs and less profits to reduce the corrosive effect on freedom of expression and information—would come as a surprise. Instead, OCSSPs can be expected to be rational in the sense that they seek to achieve content filtering at minimal costs.¹⁰³

Hence, there is no guarantee that industry cooperation in the field of UGC will lead to the adoption of the most sophisticated filtering systems with the highest potential to avoid unjustified removals of content mash-ups and remixes. A test of proportionality is unlikely to occupy centre stage unless the least intrusive measure also constitutes the least costly measure. A test of professional diligence is unlikely to lead to the adoption of a more costly and less intrusive content moderation system unless additional revenues accruing from enhanced popularity among users offsets the extra financial investment.

In addition, the E.U. legislation sends mixed signals. Article 17(5) of the CDSMD provides guidelines for the assessment of the proportionality of

98. Guidance Art. 17 CDSMD, *supra* note 18, at n. 18, 12.

99. *Id.* at n. 18, 12–13.

100. CDSMD art. 17(4)(b), 2019 O.J. (L 130).

101. Digital Services Act art. 14(4), 2022 O.J. (L 277).

102. Mylly, *supra* note 41, at 71.

103. Senfleben, *supra* note 17, at 484.

filtering obligations. The relevant factors listed in the provision, however, focus on “the type, the audience and the size of the service,” “the type of works or other subject matter,” and “the availability of suitable and effective means and their cost for service providers.”¹⁰⁴ Hence, cost and efficiency factors have made their way into the proportionality assessment scheme. Paradoxically, it is conceivable that these factors encourage the adoption of cheap and unsophisticated filtering tools that lead to excessive content blocking. An assessment of liability risks also confirms that excessive filtering risks must be taken seriously. A UGC platform seeking to minimize the risk of liability is likely to succumb to the temptation of overblocking.¹⁰⁵ Filtering more than necessary is less risky than filtering only clear-cut cases of infringement. After all, the described primary, direct liability for infringing user uploads which follows from Article 17(1) of the CDSMD is hanging above the head of OCSSPs like the sword of Damocles.

The second step of the industry cooperation concept underlying Article 17 of the CDSMD is therefore at least as problematic as comprehensive notifications of entire work catalogues. The OCSSP obligation to embark on content filtering to police the borders of use permissions and prevent content availability in the absence of licenses raises serious concerns about interferences with human rights, particularly the freedom of expression and information.

4. *Considerable Risk of Encroachments Upon Fundamental Rights*

Surveying the described human rights risks that arise from the industry cooperation scheme in Article 17 of the CDSMD, the conclusion is inescapable that, despite all invocations of diligence and proportionality as mitigating factors, the outsourcing strategy underlying the E.U. regulation of content moderation in the CDSM Directive and the DSA is highly

104. CDSMD art. 17(5), 2019 O.J. (L 130).

105. See Maayan Perel (Filmar) & Niva Elkin-Koren, *Accountability in Algorithmic Copyright Enforcement*, 19 STANFORD TECH. L. REV. 473, 490–91 (2016). For empirical studies pointing towards overblocking, see Sharon Bar-Ziv & Niva Elkin-Koren, *Behind the Scenes of Online Copyright Enforcement: Empirical Evidence on Notice & Takedown*, 50 CONN. L. REV. 37 (2017) (“Overall, the N&TD regime has become fertile ground for illegitimate censorship and removal of potentially legitimate materials.”); Jennifer M. Urban, Joe Karaganis & Brianna Schofield, *Notice and Takedown: Online Service Provider And Rightsholder Accounts Of Everyday Practicenote and Takedown In Everyday Practice*, 64 J. COPYRIGHT SOC’Y 371, 372 (2017) (“About 30% of takedown requests were potentially problematic. In one in twenty-five cases, targeted content did not match the identified infringed work, suggesting that 4.5 million requests in the entire six-month data set were fundamentally flawed. Another 19% of the requests raised questions about whether they had sufficiently identified the allegedly infringed work or the allegedly infringing material”).

problematic. Instead of safeguarding human rights, the regulatory approach is likely to culminate in human rights violations. Against this background, it is important to analyse mechanisms that could bring human rights deficits to light and remedy shortcomings. Complaint and redress mechanisms for users may play an important role in this respect. We turn to these tools in the following section.

B. CONCEALING HUMAN RIGHTS DEFICITS CAUSED BY RELIANCE ON INDUSTRY COOPERATION

As explained above, UGC platforms are obliged by the DSA to make information on content moderation “policies, procedures, measures and tools” available to users.¹⁰⁶ This must be done in “clear, plain, intelligible, user-friendly and unambiguous language.”¹⁰⁷ Moreover, the information must be publicly available in an easily accessible and machine-readable format.¹⁰⁸ These information and transparency obligations can be regarded as exponents of a broader human rights preservation strategy.¹⁰⁹ The broader pattern comes to the fore when the information flow generated in Article 14(1) of the DSA is placed in the context of the complaint and redress mechanism for unjustified content filtering that forms a building block of Article 17 of the CDSMD. Article 17(9) of the CDSMD requires that OCSSPs put in place:

an effective and expeditious complaint and redress 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.¹¹⁰

To connect the dots between Article 14(1) of the DSA and Article 17(9) of the CDSMD, it is particularly important to recognize that the OCSSP liability regime established in Article 17 of the CDSMD constitutes a specific subsystem of platform regulation which *complements* the platform regimes in the DSA. According to Article 2(4)(b) of the DSA, the DSA rules are without prejudice to the rules laid down by “Union law on copyright and related rights.”¹¹¹ The Explanatory Memorandum accompanying the initial DSA

106. Digital Services Act art. 14(1), 2022 O.J. (L 277). Further information and transparency obligations are listed elsewhere in Article 14, namely in paras (2), (3), (5), and (6).

107. *Id.* art. 14(1).

108. *Id.*

109. Examples can be found in the GDPR and Terrorist Content Regulation.

110. CDSMD art. 17(9), 2019 O.J. (L 130).

111. Digital Services Act art. 2(4)(b), 2022 O.J. (L 277). For an extensive analysis on this topic, see Alexander Peukert, Martin Husovec, Martin Kretschmer, Péter Mezei & João Pedro Quintais, *European Copyright Society – Comment on Copyright and the Digital Services Act Proposal*, 53 IIC-INTERNATIONAL REV. OF INTELL. PROP. & COMPETITION L. 358 (2022); João Pedro

Proposal explained the interplay between the DSA and more specific regimes, such as E.U. copyright law, as follows:

The proposed Regulation complements existing sector-specific legislation and does not affect the application of existing EU laws regulating certain aspects of the provision of information society services, which apply as *lex specialis*.¹¹²

In this vein, Recital 11 of the DSA states that the OCSSP liability regime in Article 17 of the CDSMD establishes specific rules and procedures that should remain unaffected by DSA rules. Insofar as the CDSM Directive does not contain specific rules, however, the DSA rules are fully applicable. The two sets of legislation—the CDSMD and the DSA—thus complement each other.¹¹³

Regarding the role of users in the human rights arena, this complementary character yields important insights: the legislature has confidently left the identification and correction of excessive content blocking to users. A relatively low number of user complaints, however, may be misinterpreted as an indication that content filtering hardly ever encroaches upon freedom of expression and information even though limited user activism may be due to overly slow and cumbersome procedures (as discussed in Section II.B.1). Instead of addressing this problematic concealment mechanism, the CJEU has confirmed the validity of the content moderation rules laid down in Article 17 of the CDSMD.¹¹⁴ The court even qualified elements of the problematic outsourcing and concealment strategy as valid safeguards against the erosion of freedom of expression and information.¹¹⁵ Instead of uncovering human rights risks, the court preferred to condone and stabilize the system (as discussed in Section II.B.2). Under these circumstances, only legislative countermeasures taken by E.U. Member States (as discussed in Section II.B.3) and content moderation assessments in audit reports (as discussed in Section II.B.4) give some hope that violations of human rights may finally be prevented despite the corrosive outsourcing and concealment scheme

Quintais & Sebastian Felix Schwemer, *The Interplay between the Digital Services Act and Sector Regulation: How Special Is Copyright?*, 13 EUR. J. RISK REGULATION 191 (2022).

112. European Commission, 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, Explanatory Memorandum, 4.

113. Quintais & Schwemer, *supra* note 111. *See infra* Section III.A contrasting the legal regimes applicable to OCSSPs and non-OCSSPs.

114. *See infra* Section II.B.2.

115. *Id.*

underlying the regulation of content moderation in the European Union (as discussed in Section III.B.5).

1. *Reliance on User Complaints as Part of a Concealment Strategy*

Article 17(9) of the CDSMD and Article 14(1) of the DSA both identify users as the primary addressees of information about content moderation systems and potential countermeasures.¹¹⁶ This regulatory model is not new. In *UPC Telekabel Wien*, the CJEU sought to ensure that, in the case of website blocking measures, the national courts in E.U. Member States would be able to carry out a judicial review. This, however, was only conceivable if a challenge was brought against the blocking measure implemented by an internet service provider:

Accordingly, in order to prevent the fundamental rights recognised by EU law from precluding the adoption of an injunction such as that at issue in the main proceedings, the national procedural rules must provide a possibility for internet users to assert their rights before the court once the implementing measures taken by the internet service provider are known.¹¹⁷

Therefore, the rights assertion option for users served the ultimate purpose of paving the way for judicial review. In Article 17(9) of the CDSMD, this pattern reappears. Users can avail themselves of the option to instigate complaint and redress procedures at platform level and, ultimately, go to court.¹¹⁸ The DSA also contains specific user complaint and redress rights. Complementing Article 17(9) of the CDSMD,¹¹⁹ Article 20 of the DSA sets forth detailed rules for internal complaint handling on online platforms. Article 54 of the DSA confirms with regard to DSA obligations that users are entitled to compensation for any damage or loss they suffered due to an infringement of DSA obligations. As noted, one of these obligations follows from Article 14(4) of the DSA. This provision obliges platforms to apply content moderation measures in a proportionate manner—with due regard to freedom of expression and information. In addition, Article 86(1) of the DSA affords users the opportunity to mandate a non-profit body, organization, or

116. Regarding Article 14(1) DSA, see *supra* Section II.A.

117. CJEU, 27 March 2014, case C-314/12, *UPC Telekabel Wien*, ¶ 57.

118. CDSMD art. 17(9), 2019 O.J. (L 130). (“[W]ithout prejudice to the rights of users to have recourse to efficient judicial remedies. In particular, Member States shall ensure that users have access to a court or another relevant judicial authority to assert the use of an exception or limitation to copyright and related rights.”).

119. As to the complementary character of Article 20 DSA, see Article 2(4)(b) and Recital 11 DSA. For an extensive analysis of the combined application of CDSMD and DSA provisions, see Quintais & Schwemer, *supra* note 111; Peukert et al., *supra* note 111.

association to exercise their complaint, redress, and compensation rights on their behalf.¹²⁰

However, the broad reliance placed on user activism is surprising. Evidence from the application of the DMCA counter-notice system in the United States¹²¹ shows clearly that users are unlikely to file complaints in the first place.¹²² This is confirmed by data from recent transparency reports from the largest platforms.¹²³ If users must wait relatively long for a result, it is foreseeable that a complaint-and-redress mechanism that depends on user initiatives is incapable of safeguarding freedom of expression and information. Moreover, an overly cumbersome complaint-and-redress mechanism may thwart user initiatives from the outset. While it cannot be ruled out that some users will exhaust the full arsenal of complaint, redress, and compensation options, it seems unrealistic to assume that user-complaint mechanisms have the potential of revealing the full spectrum and impact of free expression restrictions that result from automated content moderation systems. User complaints are unlikely to provide a complete picture.

In the context of UGC, it must also be considered that it is often crucial to react quickly to current news and film, book, and music releases. If the complaint and redress mechanism finally yields the insight that a lawful content remix or mash-up had been unjustifiably blocked, the window of relevance for the affected quotation or parody may already have passed.¹²⁴ From this perspective, the elastic timeframe for complaint handling—“shall be processed

120. The provision requires that according to their statutes, these non-profit institutions must have a legitimate interest in safeguarding DSA rights and obligations.

121. As to this feature of the notice-and-takedown system in U.S. copyright law, see Peguera, *supra* note 9, at 481.

122. See Jennifer M. Urban & Laura Quilter, *Efficient Process or “Chilling Effects”? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUT. & HIGH TECH. L.J. 621 (2006) (showing that 30% of DMCA takedown notices were legally dubious, and that 57% of DMCA notices were filed against competitors). While the DMCA offers the opportunity to file counter-notices and rebut unjustified takedown requests, Urban and Quilter find that instances in which this mechanism is used are relatively rare. *Cf.* the critical comments on the methodology used for the study and a potential self-selection bias arising from the way in which the analyzed notices have been collected by Frederick W. Mostert and Martin B. Schwimmer, *Notice and Takedown for Trademarks*, 101 TRADEMARK REP. 249, 259–60 (2011).

123. See *infra* Section III.B.1.

124. Apart from the time aspect, complaint systems may also be implemented in a way that discourages widespread use. *Cf.* Perel & Elkin-Koren, *supra* note 105, at 507–8, 514. In addition, the question arises whether users filing complaints are exposed to copyright infringement claims in case the user-generated quotation, parody or pastiche at issue (which the user believes to be legitimate) finally proves to amount to copyright infringement. *Cf.* Niva Elkin-Koren, *Fair Use by Design*, 64 UCLA L. REV. 1092 (2017).

without undue delay”¹²⁵—gives rise to concerns. This standard differs markedly from an obligation to let blocked content reappear promptly. As Article 17(9) of the CDSMD also requires human review, it could delay a final decision on the infringing nature of content. Considering these features, the complaint-and-redress option may appear unattractive to users.¹²⁶

Instead of adequately addressing concerns about human rights deficits, reliance on user complaints, thus, adds another risk factor. The complaint-and-redress mechanism may allow authorities to hide behind a lack of user activism, even if this is caused by the cumbersome or slow nature of the process. Relatively few user complaints may be misinterpreted as evidence that no overblocking occurs, keeping human rights deficits under the radar. The oversimplified equation “no user complaint = no human rights problem” offers the opportunity to dress up an overly restrictive content moderation system as a success, and to disguise encroachments upon freedom of expression and information.

The outsourcing problem described in the preceding section—inappropriate reliance on OCSSPs and copyright holders as human rights guardians—is thus aggravated by overreliance on complaint and redress mechanisms that users are unlikely to embrace in the first place. By leaving the responsibility to safeguard freedom of expression to users, the legislator cultivates a culture of “concealing” human rights deficits. Even if users lodge a complaint, it must be considered that any redress remains an *ex post* measure. That is to say, a remedy that reinstates freedom of expression and information only after harm is done, namely harm in the form of unjustified content blocking and UGC impoverishment. The E.U. approach is thus deficient for at least two reasons: the outsourcing of the obligation to safeguard human rights to online platforms and the reliance on user activism to bring human rights violations to light.

2. *Confirmation of the Outsourcing and Concealment Strategy in CJEU Jurisprudence*

This outcome of the risk assessment raises the additional question whether other institutions in the platform governance arena could fulfil the role of human rights guardians more reliably. The judiciary seems the logical candidate. Interestingly, the CJEU already had the opportunity to discuss violations of freedom of expression and information that may arise from content moderation under Article 17 of the CDSMD. In *Poland v. Parliament and Council*, the Republic of Poland had brought an annulment action arguing

125. CDSMD art. 17(9), 2019 O.J. (L 130).

126. *Cf.* Senftleben, *supra* note 17, at 484.

that OCSSPs were bound under Articles 17(4)(b) and (c) of the CDSMD to carry out preventive—ex ante—monitoring of all user uploads.¹²⁷ To fulfil this Herculean task, they had to employ automatic filtering tools. In Poland’s view, E.U. legislation imposed this preventive monitoring obligation on OCSSPs “without providing safeguards to ensure that the right to freedom of expression and information is respected.”¹²⁸ The contested provisions thus constituted a limitation on the exercise of the fundamental right to freedom of expression and information, which respected neither the essence of that right nor the principle of proportionality. Hence, the filtering obligations arising from Article 17 of the CDSMD could not be regarded as justified under Article 52(1) of the CFR.¹²⁹

Discussing these annulment arguments, the CJEU pointed out that prior review and filtering of user uploads creates the risk of limiting a central avenue for the online dissemination of UGC. The filtering regime in Articles 17(4)(b) and (c) of the CDSMD imposes a restriction on the ability of users to exercise their right to freedom of expression and information which is guaranteed by Article 11 of the CFR and Article 10 of the European Convention on Human Rights (ECHR).¹³⁰ However, the court considered that such a limitation meets the requirements set forth in Article 52(1) of the CFR—mandating that any limitation on the exercise of the right to freedom of expression and information is legally established and preserves the essence of those freedoms.¹³¹ The court was satisfied that the limitation arising from the filtering obligations in Article 17 of the CDSMD can be deemed justified in the light of the legitimate objective to ensure a high level of copyright protection to safeguard the right to intellectual property enshrined in Article 17(2) of the CFR.¹³²

More specifically, the court identified no less than six freedom of expression safeguards in the regulatory design of Article 17 of the CDSMD which, in the court’s view, give sufficient reassurance that freedom of expression and information will not be unduly curtailed. A key aspect in this assessment is the first point. The court assumed that the introduction of automated content filtering tools would not prevent users from uploading

127. CJEU, 26 April 2022, case C-401/19, *Poland v. Parliament and Council*, ¶ 24. For a more detailed discussion of the decision, see Martin Husovec, *Mandatory Filtering Does Not Always Violate Freedom of Expression: Important Lessons from Poland V. Council and European Parliament*, 60 COMMON MKT. L. REV. 173 (2023).

128. CJEU, 26 April 2022, case C-401/19, *Poland v. Parliament and Council*, ¶ 24.

129. *Id.* ¶ 24.

130. *Id.* ¶¶ 55, 58, 82.

131. *Id.* ¶ 63 (referring to the principle of proportionality).

132. *Id.* ¶ 69.

lawful content, including UGC containing traces of protected third-party material that was permissible under statutory exceptions to copyright.¹³³ In this context, the court recalled its earlier ruling in *Sabam v. Netlog* from which it followed that:

a filtering system which might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications, would be incompatible with the right to freedom of expression and information, guaranteed in Article 11 of the Charter, and would not respect the fair balance between that right and the right to intellectual property.¹³⁴

Hence, the court was confident that, in the light of its case law, OCSSPs would refrain from introducing content filtering measures unless these systems could reliably distinguish between lawful parody and infringing verbatim copying; in other words, unless they could leave lawful uploads unaffected.¹³⁵

The court's second point addresses statutory exceptions to copyright more directly. In line with earlier decisions, the CJEU confirmed that copyright limitations supporting freedom of expression, such as the right of quotation and the exemption of parody, constitute "user rights."¹³⁶ To avoid the dismantling of these free expression strongholds, E.U. Member States have to ensure that automated filtering measures do not deprive users of their freedom to upload content created for the purposes of quotation, criticism, review, caricature, parody, or pastiche.¹³⁷ On this point the judgment endorsed, by

133. *Id.* ¶ 86.

134. *Id.* ¶ 86. *Cf.* CJEU, 16 February 2012, case C-360/10, *Sabam v. Netlog*, ¶¶ 50–51.

135. CJEU, 26 April 2022, case C-401/19, *Poland v. Parliament and Council*, ¶ 86.

136. *Id.* ¶¶ 87–88; CJEU, 29 July 2019, case C-516/17, *Spiegel Online*, ¶¶ 50–54; CJEU, 29 July 2019, case C-469/17, *Funke Medien NRW*, ¶ 65–70; *see* Christophe Geiger & Elena Izyumenko, *The Constitutionalization of Intellectual Property Law in the EU and the Funke Medien, Pelham and Spiegel Online Decisions of the CJEU: Progress, but Still Some Way to Go*, 51 IIC – INT'L REV. INTEL. PROP. & COMPETITION L. 282, 292–98 (2020); TANYA APLIN & LIONEL BENTLY, *GLOBAL MANDATORY FAIR USE: THE NATURE AND SCOPE OF THE RIGHT TO QUOTE COPYRIGHT WORKS* 75–84 (2020). For a recent discussion, *see* also Tito Rendas, *Are Copyright-Permitted Uses 'Exceptions', 'Limitations' or 'User Rights'? the Special Case of Article 17 CDSM Directive*, 17 J. INTEL. PROP. L. & PRAC. 54 (2022).

137. CJEU, 26 April 2022, case C-401/19, *Poland v. Parliament and Council*, ¶ 87. With regard to the particular importance of the inclusion of the open-ended concept of "pastiche," *see* Martin Senfleben, *Institutionalized Algorithmic Enforcement—The Pros and Cons of the EU Approach to UGC Platform Liability*, 14 FIU L. REV. 299, 320–27 (2020); JOÃO PEDRO QUINTAIS, *COPYRIGHT IN THE AGE OF ONLINE ACCESS: ALTERNATIVE COMPENSATION SYSTEMS IN EU LAW* 235–37 (2017); Senfleben, *supra* note 8, at 145–62; Emily Hudson, *The Pastiche Exception in Copyright Law: A Case of Mashed-Up Drafting?*, 4 INTEL. PROP. Q. 346, 348–

reference, the Advocate General Opinion stating 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.”¹³⁸

As a third aspect that mitigates the corrosive effect of Articles 17(4)(b) and (c) of the CDSMD on freedom of expression and information, the court pointed out that the filtering machinery was only set in motion on the condition that rightholders provide platforms with the “relevant and necessary information”¹³⁹ concerning protected works that should not become available on the UGC platform. In the absence of such information, OCSSPs would not be led to make content unavailable.¹⁴⁰

The fourth point highlighted by the court was the clarification in Article 17(8) of the CDSMD that no general monitoring obligation was intended.¹⁴¹ The fifth point was the complaint-and-redress mechanism allowing users to bring unjustified content blocking to the attention of the platform provider.¹⁴² Finally, the court recalled that Article 17(10) of the CDSMD tasks the European Commission with organizing stakeholder dialogues to ensure a uniform mode of OCSSP/rightholder-cooperation across Member States and establish best filtering practices in the light of industry standards of professional diligence.¹⁴³

Qualifying all six aspects as valid safeguards against an erosion of freedom of expression and information, the court concluded that the design of Article 17 of the CDSMD includes appropriate countermeasures to survive the

52, 362–64; Florian Pötzlberger, *Pastiche 2.0: Remixing im Lichte des Unionsrechts*, GEWERBLICHER RECHTSSCHUTZ & URHEBERRECHT 675, 681 (2018).

138. Opinion of Advocate General Saugmandsgaard Øe, 15 July 2021, case C-401/19, Poland v. Parliament and Council, ¶ 193.

139. CDSMD art. 17(4)(b), 2019 O.J. (L 130).

140. CJEU, 26 April 2022, case C-401/19, Poland v. Parliament and Council, ¶ 89.

141. *Id.* ¶ 90; see CDSMD art. 17(8), 2019 O.J. (L 130); Digital Services Act recital 30, Art. 8, 2022 O.J. (L 277). *Cf.* SENFILEBEN & ANGELOPOULOS, *supra* note 7.

142. CJEU, 26 April 2022, case C-401/19, Poland v. Parliament and Council, ¶ 94; see CDSMD art. 17(9), 2019 O.J. (L 130).

143. CJEU, 26 April 2022, case C-401/19, Poland v. Parliament and Council, ¶¶ 96–97. As to existing best practices guidelines, see Guidance Art. 17 CDSMD, *supra* note 18, at n. 21. For an early analysis of the Guidance Art. 17 CDSM Directive, see 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 (2022), <https://verfassungsblog.de/filters-poland/>; Bernd Justin Jutte & 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 (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/>.

annulment action brought by the Republic of Poland.¹⁴⁴ Still, the court cautioned E.U. Member States, as well as their authorities and courts, that when transposing and applying Article 17 of the CDSMD, they have to do so in a fundamental rights-compliant manner.¹⁴⁵

Undoubtedly, the *Poland* decision is a milestone that contains several important clarifications. In particular, the court stated unequivocally that for an automated content filtering system to be deemed permissible, it must be capable of distinguishing lawful from unlawful content.¹⁴⁶ The court pointed out that OCSSPs cannot be required to prevent the uploading and making available of content which, in order to be found unlawful, requires an independent copyright assessment, including on the scope of statutory exceptions.¹⁴⁷ Hence, it could not be ruled out that, in cases raising complex copyright questions, rightholders can only avoid the availability of unauthorized content by sending a robustly substantiated notification—providing “sufficient information to enable the [OCSSP] to satisfy itself, without a detailed legal examination, that the communication of the content at issue is illegal and that removing that content is compatible with freedom of expression and information.”¹⁴⁸ In light of previous case law and the current market and technological reality, the *Poland* decision can be understood to establish that only content that is “obviously” or “manifestly” infringing (and content that is “equivalent” to these evident risk categories) may be subject to content filtering measures with an effect *ex ante*—in the sense of preventing the appearance on the online platform from the outset.¹⁴⁹

However, in light of the above-described human rights risks arising from the outsourcing and concealment strategy underlying Article 17 of the CDSMD, the *Poland* ruling is disappointing. A critical assessment of the regulatory scheme is missing. The court did not unmask the human rights risks that, as explained in the preceding section, are inherent in the heavy reliance on industry cooperation. The court also refrained from reflecting on human rights risks that could arise from the ineffectiveness of complaint and redress mechanisms for users. Instead of exposing the outsourcing and concealment strategy and addressing human rights deficits, the court rubberstamped both the broader regulatory design and its individual elements. By singling out no

144. CJEU, 26 April 2022, case C-401/19, *Poland v. Parliament and Council*, ¶ 98.

145. *Id.* ¶ 99.

146. *Id.* ¶ 86.

147. *Id.* ¶ 90. *Cf.* CJEU, 3 October 2019, case C-18/18, *Glawischnig-Piesczek*, ¶¶ 41–46.

148. CJEU, 26 April 2022, case C-401/19, *Poland v. Parliament and Council*, ¶ 92; CJEU, 22 June 2021, *YouTube and Cyando*, C-682/18 and C-683/18, ¶ 116.

149. Concluding similarly, see *QUINTAIS ET AL.*, *supra* note 25.

less than six aspects of Article 17 of the CDSMD and declaring them valid safeguards against violations of freedom of expression and information, the court readily accepted several aspects of the Article 17 scheme that create the outsourcing and concealment risks discussed above.

This central problem of uncritical rubberstamping in the *Poland* decision clearly comes to the fore when the six free expression safeguards are re-evaluated in the light of the above-described outsourcing and concealment risks. Regarding the necessity of distinguishing between lawful and unlawful content uploads,¹⁵⁰ a platform reality check is sought in vain in the judgment. From a legal-theoretical perspective, the CJEU's assumption that filtering systems must not be applied if they cannot reliably distinguish permitted transformative uses from infringing verbatim copying may be correct. But this view does not account for the lack of incentives for platforms to refrain from the employment of unsophisticated overblocking systems in practice. The court does not even reflect on the fact that, instead of discouraging the use of excessive filtering machines, the direct liability risk evolving from Article 17(1) of the CDSMD provides a strong impulse to implement automated filtering systems, regardless of their capacity to distinguish between lawful and unlawful content.

Overblocking allows platforms to escape direct liability and avoid lengthy and costly lawsuits. The only risk from excessive filtering is that platforms must deal with user complaints which are unlikely to come in large numbers. Practically speaking, the implementation of an underblocking approach to safeguard freedom of expression is unlikely. In its pure universe of legal-theoretical assumptions, the court may assume that content filtering will only occur when automated systems can separate the wheat from the chaff. To whitewash the Article 17 approach based on such unrealistic assumptions, however, creates a human rights risk of its own.

The inclusion of rightholder notifications in the list of effective free expression safeguards, the third safeguard recognized by the court, also creates a human rights risk. As noted above, nothing prevents copyright owners from notifying long lists—entire catalogues—of protected works as reference files. Adding up all repertoire notifications, it seems naïve to assume that the notification mechanism in Article 17(4)(b) will not lead to a filtering volume that is comparable with the general filtering obligation which the court prohibited in *Sabam v. Netlog*.¹⁵¹ From this perspective, the ban on general filtering obligations in Article 17(8) (the fourth safeguard identified by the

150. CJEU, 26 April 2022, case C-401/19, *Poland v. Parliament and Council*, ¶ 86.

151. *Id.* ¶ 86; CJEU, 16 February 2012, case C-360/10, *Sabam v. Netlog*, ¶¶ 50–51.

court) can also be unmasked as mere cosmetics. The fifth safeguard which the court accepted is the complaint-and-redress mechanism that causes the corrosive concealment risk described above. The sixth and final safeguard—stakeholder dialogues seeking to establish best practices—is a toothless tiger. Article 17(10) is silent on measures which the Commission could take to enforce the best practices guidelines following from meetings with stakeholders. It remains unclear why the court is willing to accept this as a valid free expression safeguard.

On balance, the court has missed an important opportunity to reveal and address human rights risks that arise from outsourcing and concealment elements of Article 17 of the CDSMD. As a reference point for its assessment of human rights risks, the court has chosen the most favorable interpretation of Article 17 features. It has assumed that platforms would only employ moderation systems capable of adequately distinguishing between lawful and unlawful content. The court qualified the rightholder obligation to provide information on protected works as a limiting factor that could reduce the impact of the content filtering machinery, etc. Adopting this approach, the court refused to consider the practical reality of industry cooperation. It also overlooked the impact of the overblocking incentive resulting from the risk of direct liability for infringing UGC. As a result, the court has made itself an accomplice in the outsourcing and concealment strategy that puts freedom of expression and information at risk.

3. *Member State Legislation Seeking to Safeguard Transformative UGC*

The foregoing critique of the six free expression safeguards which the CJEU identified in its *Poland* decision did not address the second point made by the court: the obligation placed on E.U. Member States to ensure that transformative UGC—consisting of quotations, parodies, pastiches, etc.—survives the blocking by automated content filtering systems.¹⁵² The reason for this omission is simple: in contrast to other aspects which the court discussed, this element appears as a valid safety valve that could effectively safeguard freedom of expression and information in practice. This insight, however, does not change the critical assessment of the *Poland* judgment. With regards to outsourcing and concealment, the decision remains a missed opportunity to address and minimize human rights risks.

As to the valid second point in the *Poland* phalanx of free expression safeguards—the obligation to preserve copyright limitations for creative remix

152. *Id.* ¶¶ 87–88.

activities—Article 17(7) of the CDSMD plays a central role.¹⁵³ The provision leaves no doubt that E.U. Member States are expected to ensure that automated content filtering does not submerge areas of freedom that support the creation and dissemination of transformative user productions that are uploaded to UGC platforms. The second paragraph of Article 17(7) reads as follows:

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:

- (a) quotation, criticism, review;
- (b) use for the purpose of caricature, parody or pastiche.¹⁵⁴

The formulation “shall not result in the prevention” and “shall ensure that users . . . are able” give copyright limitations for “quotation, criticism, review” and “caricature, parody or pastiche” an elevated status. In Article 5(3)(d) and (k) of the Information Society Directive 2001/29/EC (“InfoSoc Directive”),¹⁵⁵ these use privileges were only listed as limitation prototypes which E.U. Member States are free to introduce (or maintain) at the national level. The adoption of a quotation right¹⁵⁶ and an exemption of caricature, parody, or pastiche¹⁵⁷ remained optional. Article 17(7) of the CDSMD, however, transforms these use privileges into mandatory breathing space for transformative UGC, at least in the specific context of OCSSP content moderation.¹⁵⁸

153. See Senftleben, *supra* note 17, at 485–90; P. BERNT HUGENHOLTZ & MARTIN SENFTLEBEN, FAIR USE IN EUROPE: IN SEARCH OF FLEXIBILITIES 29–30 (2011).

154. CDSMD art. 17(7), 2019 O.J. (L 130).

155. 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 (*Official Journal of the European Communities* 2001 L 167, 10).

156. 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 (InfoSoc Directive), 2001 O.J. (L 167), art. 5(3)(d).

157. *Id.* art. 5(3)(k).

158. CJEU, 26 April 2022, case C-401/19, Poland v. Parliament and Council, ¶ 87. Cf. João Pedro Quintais, Giancarlo Frosio, Stef van Gompel, P. Bernt Hugenholtz, Martin Husovec, Bernd Justin Jütte & Martin Senftleben, *Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics*, 10 J. INTELL. PROP. INFO. TECH. & E-COMMERCE L., 278–279 (2020). As to the influence of freedom of speech guarantees on copyright law in the EU, see CJEU, 1 December 2011, case C-145/10, Painer, ¶ 132; CJEU, 3 September 2014, case C-201/13, Deckmyn, ¶ 26 see also CJEU, 29 July 2019, case C-476/17, Pelham, ¶ 32, 37 and 59. Cf. MARTIN SENFTLEBEN, THE COPYRIGHT / TRADEMARK INTERFACE: HOW THE EXPANSION OF TRADEMARK

Under Article 17(7) of the CDSMD, E.U. Member States are the guardians of these user rights. This regulatory decision comes as a welcome surprise. In contrast to the prevailing preference for solutions based on outsourcing (passing on human rights responsibilities to private entities) and concealment (relying on user complaints to remedy human rights deficits), Article 17(7) entrusts the Member States with the important task of guaranteeing (“shall ensure”) that, despite content filtering on platforms, users can share creations made for the purposes of “quotation, criticism, review” and “caricature, parody or pastiche.”

In this regard, the *Poland* decision adds an important nuance. Namely, the CJEU qualified the complaint and redress mechanisms mandated by Article 17(9) of the CDSMD as *additional* safeguards against content overblocking:

the first and second subparagraphs of Article 17(9) of Directive 2019/790 introduce several procedural safeguards, which are additional to those provided for in Article 17(7) and (8) of that directive, and which protect the right to freedom of expression and information of users of online content-sharing services in cases where, notwithstanding the safeguards laid down in those latter provisions, the providers of those services nonetheless erroneously or unjustifiably block lawful content.¹⁵⁹

Hence, user complaint mechanisms evolving from Article 17(9) only constitute additional ex post measures. As they allow corrections of wrong filtering decisions only after the harm has occurred, they can hardly be considered sufficient per se. First and foremost, it is necessary to have ex ante mechanisms in place that allow permissible content uploads—quotations, parodies, pastiches, etc.—to survive automated content scrutiny. This is an important guideline for E.U. Member States. Implementing Article 17, they must ensure that UGC containing quotations, criticism, review, caricatures, parodies, or pastiches¹⁶⁰ appear directly on the platform.

In addition to limiting the scope of permissible filtering to “manifestly infringing” or “equivalent” content (discussed above), this goal can be achieved in practice by introducing mandatory flagging options for users. To ensure ex ante content availability—without exposure to filtering—domestic legislation in E.U. Member States can enable users to mark quotations,

PROTECTION IS STIFLING CULTURAL CREATIVITY 26–47, 280–83, 357–73 (2020); Christophe Geiger & Elena Izyumenko, *Freedom of Expression as an External Limitation to Copyright Law in the EU: The Advocate General of the CJEU Shows the Way*, 41 EUR. INTELL. PROP. REV. 131, 133–36 (2019).

159. *Id.* ¶ 93.

160. CDSMD art. 17(7), 2019 O.J. (L 130).

parodies, pastiches, etc. as permissible content uploads and oblige OCSSPs to make these uploads directly available on their platforms. An example of national legislation following this approach can be found in Germany.¹⁶¹ Seeking to avoid disproportionate UGC blocking, Section 9(1) of the German Act on the Copyright Liability of Online Content Sharing Service Providers imposes a “must-carry” obligation on OCSSPs regarding “uses presumably authorised by law.”¹⁶² In practice, this means that the platform provider must communicate UGC in this category to the public until a potential complaint procedure establishes that the content infringes copyright. Under Section 11(1) of the German legislation, the OCSSP is also bound to “enable the user to flag the use as authorised by law pursuant to section 5.”¹⁶³ Section 5(1) clarifies in this context that quotations, caricatures, parodies, pastiches, etc. are forms of use that are authorized by law. Finally, Section 9(2) stipulates that UGC is rebuttably presumed to fall within the privileged must-carry category when it:

- (1) contains less than half of a work or several works by third parties,
- (2) combines the part or parts of a work referred to in no. 1 with other content, and
- (3) uses the works of third parties only to a minor extent (section 10) or is flagged as legally authorised (section 11)¹⁶⁴

Section 9(2) also clarifies that images may be used in this context in their entirety in accordance with Sections 10 and 11 of the German legislation.

As already indicated, Member State legislation of this kind is of particular importance. It provides an essential counterbalance to the predominant outsourcing and concealment logic underlying Article 17 of the CDSMD. As it puts the responsibility back into the hands of the State, the “shall” obligation in Article 17(7) can be qualified as the most promising safeguard against inroads into freedom of expression and information. The Member State responsibility following from this obligation constitutes the only “real” human rights safeguard binding state power directly instead of shifting the responsibility to a private party.

Alarming, however, the central importance of the State responsibility arising from Article 17(7) seems to have escaped the attention of most E.U.

161. See §§ 11(1), no. 1 and 3, 9(1) and (2), and 5(1) of the German Act on the Copyright Liability of Online Content Sharing Service Providers, https://www.gesetze-im-internet.de/englisch_urhdag/index.html (providing an English translation).

162. *Id.* § 9(1).

163. *Id.* § 11(1).

164. *Id.* § 9(2).

Member States. The German implementation model has not become widespread. Instead, many Member States opted for a national transposition that does not offer users specific legal tools, such as statutory flagging options, to benefit from the exemption of quotations, parodies, pastiches, etc.¹⁶⁵ The Netherlands, for instance, gave preference to a literal implementation of Article 17. Effective *ex ante* mechanisms—capable of placing quotations, parodies, pastiches, etc. beyond the reach of content filtering systems from the outset—are sought in vain. Instead, the Dutch legislator places reliance on complaint and redress mechanisms even though this legal instrument only allows users to take measures *ex post*: after quotations, parodies, pastiches, etc. have been filtered out and the UGC spectrum has been impoverished.¹⁶⁶ Considering the *Poland* decision, it is doubtful that this implementation approach is adequate. As explained, the CJEU characterized *ex post* complaint and redress mechanisms as additional safeguards that supplement—but cannot replace—*ex ante* safeguards, such as the statutory flagging options in Germany and legislation that sets clear limits to the scope of permissible filtering.¹⁶⁷

4. *European Commission Taking Action on the Basis of Audit Reports*

As many E.U. Member States seem reluctant to translate their human rights responsibility under Article 17(7) of the CDSMD into statutory *ex ante* mechanisms that immunize quotations, parodies, pastiches, etc. from content filtering measures, it is important to look beyond the rules in the CDSM Directive. As noted, it is possible to factor DSA provisions into the equation when the CDSM Directive does not contain more specific rules.¹⁶⁸ A legal tool in the DSA that does not appear in the CDSM Directive is the possibility for the executive power to exercise control over content moderation systems based on audit reports. This alternative redress avenue for public authorities seeking to fulfil a watchdog function *ex officio* has been developed in Article 37 of the DSA.

165. For studies of national implementations of Article 17, see QUINTAIS ET AL., *supra* note 25; CHRISTINA ANGELOPOULOS, ARTICLES 15 & 17 OF THE DIRECTIVE ON COPYRIGHT IN THE DIGITAL SINGLE MARKET COMPARATIVE NATIONAL IMPLEMENTATION REPORT (2022).

166. Article 29c(7) of the Dutch Copyright Act (*Auteurswet*), <https://wetten.overheid.nl/BWBR0001886/2022-10-01>.

167. CJEU, 26 April 2022, case C-401/19, *Poland v. Parliament and Council*, ¶ 93. As to the German legislation, see the description above and German Act on the Copyright Liability of Online Content Sharing Service Providers, §§ 11(1), no. 1 and 3, 9(1) and (2), 5(1).

168. Digital Services Act recital 11, art. 2(4)(b) 2022 O.J. (L 277).

With respect to very large online platforms (VLOPs)¹⁶⁹ and very large online search engines (VLOSEs),¹⁷⁰ Article 37(1) of the DSA orders annual audits to assess compliance, among other things, with the due diligence obligations set forth in Chapter III of the DSA.¹⁷¹ Interestingly, one of the obligations laid down therein concerns the “diligent, objective and proportionate”¹⁷² application of content moderation systems in line with Article 14(4) of the DSA. Supplementing the complaint and redress system of Article 17(9) of the CDSMD that depends on user initiatives, Article 37 of the DSA may thus offer an important alternative basis that allows the executive power to prevent human rights violations.

Article 37(3) of the DSA ensures that organizations establishing the audit report are independent from the VLOPs and VLOSEs under examination. In particular, it prevents organizations from performing an audit when they have a conflict of interest with the VLOP or VLOSE concerned, or with a legal person connected to that service provider. The audit report must contain an opinion—in the categories “positive,” “positive with comments,” and “negative”—on whether the VLOP or VLOSE has complied with the obligations and commitments under Chapter III of the DSA, including the above-described human rights and proportionality obligations laid down in Article 14(1) and (4) of the DSA.¹⁷³ If the audit opinion is not “positive,” auditors are bound to include operational recommendations and specify the measures necessary to achieve compliance. They must also recommend a timeframe for achieving compliance.¹⁷⁴ In such a case, the VLOP or VLOSE concerned must adopt, within one month from receiving the recommendations, an audit implementation report. If the provider does not intend to implement the operational recommendations, it must give reasons

169. In accordance with Article 33(1) DSA, an online platform is qualified as a VLOP when it has a number of average monthly active service recipients in the European Union that is equal to, or higher than, 45 million, and has been designated as a VLOP by the European Commission pursuant to Article 33(4) DSA.

170. In accordance with Article 33(1) DSA, a search engine is qualified as a VLOSE when it has a number of average monthly active service recipients in the European Union that is equal to, or higher than, 45 million, and has been designated as a VLOSE by the European Commission pursuant to Article 33(4) DSA.

171. See *Digital Services Act: Commission Designates First Set of Very Large Online Platforms and Search Engines*, EUR. COMM’N (Apr. 25, 2023), https://ec.europa.eu/commission/presscorner/detail/en/IP_23_2413 (listing the first set of VLOPs and VLOSEs designated by the Commission).

172. Digital Services Act art. 14(4), 2022 O.J. (L 277).

173. *Id.* art. 37(4)(g).

174. *Id.* art. 37(4)(h).

for not doing so and set out alternative measures that it has taken to address the instances of non-compliance identified in the audit report.¹⁷⁵

As to the role of the European Commission, Article 42(4) of the DSA is of particular importance. This provision obliges VLOPs and VLOSEs to transmit audit reports and audit implementation reports to the Commission without undue delay. If, based on this information, the Commission suspects a VLOP or VLOSE of infringing Article 14 of the DSA, it can initiate proceedings pursuant to Article 66(1) of the DSA. It may request further information, conduct interviews, and inspect premises to learn more about the suspected infringement.¹⁷⁶ In case of a “risk of serious damage for the recipients of the service,” Article 70(1) of the DSA entitles the Commission to order interim measures on the basis of a *prima facie* finding of infringement. If the Commission finally establishes non-compliance with “the relevant provisions of this Regulation”—including the human rights safeguards in Article 14(4) of the DSA—in a decision pursuant to Article 73(1) of the DSA, it may impose fines of up to six percent of the VLOP’s or VLOSE’s total worldwide annual turnover in the preceding financial year.¹⁷⁷ For the imposition of fines, Article 74(1) of the DSA requires a finding that the service provider under examination has infringed Article 14(4) of the DSA intentionally or negligently.

Considering this cascade of possible Commission actions, the potential of the audit mechanism in Article 37 of the DSA must not be underestimated. The audit system may be an important addition to the canon of norms in the CDSM Directive and, in particular, a promising counterbalance to outsourcing/concealment risks arising from the regulatory design of Article 17 of the CDSMD. Like the Member State legislation discussed in the preceding section, Commission interventions evolving from the problem analysis in an audit report are welcome departures from the strategy to pass on human rights responsibilities to platforms or users. Namely, the state power itself—in this case the Commission as the executive body of an international intergovernmental organization—remains directly responsible for detecting and remedying human rights deficits.

A potential blind spot of the described audit cascade leading to investigations, however, is this: in order to offer sufficient starting points for Commission action, audit reports addressing content moderation systems must go beyond a general problem analysis. The audit opinion must convincingly discuss a platform’s failure to satisfy human rights obligations

175. *Id.* art. 37(6).

176. *Id.* arts. 67–69.

177. *Id.* art. 74(1).

evolving from Article 14(4) of the DSA. It must contain a concrete assessment of the risk of human rights violations and a sufficient substantiation of that risk. Hence, the Commission must ensure sufficient focus on the detailed examination of human rights deficits. It should adopt a delegated act based on Article 37(7) of the DSA that creates clarity about the necessity to devote particular attention to human rights questions in audit reports and seek all information necessary for a proper assessment of human rights risks.¹⁷⁸

C. OUTSOURCING AND CONCEALMENT STRATEGY PUTTING HUMAN RIGHTS AT RISK

On balance, the closer inspection of content moderation rules in the CDSM Directive and the DSA confirms a worrying tendency of reliance on industry cooperation and user activism to safeguard human rights. Both exceptions to the rule of outsourcing to private entities—the transformative use safeguard in Article 17(7) of the CDSMD and the audit system evolving from Article 37 of the DSA—are currently underdeveloped. E.U. Member States have not consistently taken specific legislative action to protect transformative UGC from content filtering measures. The success of the DSA cascade of interventions—from audit reports to non-compliance decisions and fines¹⁷⁹—is unclear. Therefore, it would be premature to sound the all-clear based on these opportunities to engage state power itself in initiatives to uphold human rights.

While this outcome of the foregoing analysis already darkens the horizon, the discussion of human rights risks arising from outsourcing and concealment strategies would be incomplete without shedding light on how these strategies work out in practice. When content moderation systems detect traces of protected third-party material in UGC, the most common rightholder reaction is not the blocking of the content at issue. Instead, rightholders often opt for “monetization”—the opportunity to garner advertising revenue that accrues from the continued online availability of UGC. Surprisingly, the monetization mechanism largely remains uncharted territory in both the CDSM Directive and the DSA. Hence, the question arises whether human rights risks emerging from inappropriate outsourcing and concealment schemes are particularly strong in this area. We turn to this issue in the following chapter.

178. At time of writing, the Commission has presented its Delegated Regulation on Independent Audits for public feedback. See *Digital Services Act: Delegated Regulation on Independent Audits Now Available for Public Feedback*, EUR. COMM'N (May 5, 2023), <https://digital-strategy.ec.europa.eu/en/news/digital-services-act-delegated-regulation-independent-audits-now-available-public-feedback>.

179. Digital Services Act arts. 66–74, 2022 O.J. (L 277).

III. CASE STUDY: ALGORITHMIC MONETIZATION OF USER-GENERATED CONTENT

UGC monetization is a largely underexplored but a highly relevant copyright content moderation action in practice.¹⁸⁰ Although not initially obvious, monetization has important human rights dimensions, and therefore offers a good case study of regulatory outsourcing and concealment tendencies. Transparency reports from the largest platforms suggest that monetization is a popular—perhaps the most popular—moderation action taken by rightholders that have access to platforms' content recognition tools. Despite this, the CDSM Directive largely ignores the topic, and the DSA only tackles it at a superficial level, mostly by outsourcing its regulation to private parties (as discussed in Section III.A). This regulatory design has enabled the emergence of copyright management systems and practices that allow platforms and the largest rightholders to dictate the terms of this crucial form of exploitation of copyrighted content. The workings of these systems are mostly concealed behind complex terms and conditions and opaque algorithmic systems.

Our analysis of the visible parts of these mechanisms, however, suggests that they work in ways that are partly contrary to E.U. copyright law, and mostly to the detriment of individual UGC creators (as discussed in Section III.B). The combination of a lax regulatory framework and the resulting monetization practices leads to a host of problems, including the lack of a proper legal basis for monetization of transformative UGC by third-party rightholders, the lack of remuneration for user creativity, and the misappropriation of monetary rewards by larger copyright holders. These problems translate into three human rights deficits: (1) the appropriation and exploitation of transformative UGC based on the exclusive rights of third parties while failing to notice copyright limitations that support freedom of expression; (2) the violation of copyright of UGC creators even though this copyright, just like the copyright of larger rightholders, falls under the fundamental right to property; and (3) the discriminatory treatment of these creators as compared to larger rightholders (as discussed in Section III.C).

180. A notable exception in scholarship is Henning Grosse Ruse-Khan, *Automated Copyright Enforcement Online: From Blocking to Monetization of User-Generated Content*, UNIV. OF CAMBRIDGE FACULTY OF L. RSCH. PAPER NO. 8/2020 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3565071.

A. UGC MONETIZATION BETWEEN E.U. COPYRIGHT LAW AND THE DSA

This Section highlights how monetization of UGC by platforms, despite its economic significance, remains a relatively unregulated space in E.U. copyright law. We start by conceptualizing monetization as a type of content moderation action from a legal perspective (in Section III.A.1). We then explain how the E.U. copyright *acquis* does not directly regulate UGC monetization in the CDSM Directive, leaving the matter mostly to private ordering of platforms and their users (as discussed in Section III.A.2). Finally, after clarifying how the DSA applies to copyright hosting platforms (OCSSPs or not), we explore whether the DSA places any constraints on this private ordering (as discussed in Section III.A.3). Our conclusion is that both the CDSMD and the DSA mostly outsource the regulation of UGC monetization to private parties. Section III.B then examines this outsourcing exercise in practice. The last analysis, in Section III.C, discusses the human rights deficits it creates for users and the public.

1. *Monetization as Content Moderation*

To understand how the monetization of UGC enjoying copyright protection (“copyrighted UGC”) is regulated in E.U. law, it is helpful to place that action within the broader context of “content moderation.” The concept of content moderation is for the most part not clearly defined in literature and is used to describe a wide spectrum of platform activities. Some authors view content moderation as a broad set of governance mechanisms that facilitate cooperation and prevent abuse,¹⁸¹ while others describe it as the organized practice of screening UGC to determine its appropriateness to a particular context or set of constraints.¹⁸² The term has also been defined as the set of practices that online platforms use to screen, rank, filter, and block UGC,¹⁸³ or as the detection, assessment, and intervention taken on content or behavior deemed unacceptable by platforms or other information intermediaries.¹⁸⁴

181. James Grimmelman, *The Virtues of Moderation*, 17 YALE J.L. & TECH. 42 (2015); see also Giovanni De Gregorio, *Democratizing Online Content Moderation: A Constitutional Framework*, 36 COMPUT. L. & SEC. REV. 105374, 2 (2020) (building on Grimmelman’s definition).

182. SARAH T. ROBERTS, CONTENT MODERATION (2017), <https://escholarship.org/uc/item/7371c1hf>. Cf. Sarah Myers West, *Censored, suspended, shadowbanned: User interpretations of content moderation on social media platforms*, 20 NEW MEDIA & SOC’Y 4366 (2018); ROBYN CAPLAN, CONTENT OR CONTEXT MODERATION? (2018), <https://datasociety.net/library/content-or-context-moderation/>.

183. Hannah Bloch-Wehba, *Automation in Moderation*, 53 CORNELL INT’L L.J. 41 (2020).

184. Tarleton Gillespie, Patricia Aufderheide, Elinor Carmi, Ysabel Gerrard, Robert Gorwa, Ariadna Matamoros-Fernández, Sarah T. Roberts, Aram Sinnreich & Sarah Myers

Some authors offer narrower definitions linked to the technical action taken by a service provider, viewing content moderation systems as those that classify UGC using either matching or prediction, resulting in a decision and subsequent governance outcome, such as content removal, geo-blocking, or account takedown.¹⁸⁵ Finally, some authors define content moderation from the perspective of the remedies associated with it, including those against individual content items or against an online account, those consisting of visibility restrictions, and those imposing financial consequences, among others.¹⁸⁶

Existing scholarly analysis of content moderation has been carried out in the absence of legal definitions of the concept in both U.S. and E.U. law. In a significant legal innovation, the DSA now advances a legal definition of “content moderation” as

the activities, whether automated or not, undertaken by providers of intermediary services, that are 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 that affect the ability of the recipients of the service to provide that information, such as the termination or suspension of a recipient’s account.¹⁸⁷

The definition covers, firstly, activities by various types of intermediaries across the technology “stack”; not only online platforms, but also providers of other types of “intermediary services,” such as “mere conduit” and “caching,”¹⁸⁸ as well as—in theory—“online search engines.”¹⁸⁹ Secondly, content moderation involves actions taken with the specific purpose of

West, *Expanding the Debate About Content Moderation: Scholarly Research Agendas for the Coming Policy Debates*, 9 INTERNET POL’Y REV. 1 (2020).

185. Robert Gorwa, Reuben Binns & Christian Katzenbach, *Algorithmic Content Moderation: Technical and Political Challenges in the Automation of Platform Governance*, 7 BIG DATA & SOC’Y 1 (2020). This definition would exclude recommender systems, norms, design decisions, and architectures.

186. Eric Goldman, *Content Moderation Remedies*, 28 MICH. TECH. L. REV. 1 (2021).

187. Digital Services Act art. 3(t), 2022 O.J. (L 277).

188. Defined in Article 3(g) DSA. In the engineering community, networks often are described in layers, which each relate to a separate functional level of the network. *Cf.*, e.g., *OSI Model*, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=OSI_model&oldid=1072600519 (describing the Open Systems Interconnection model).

189. We say in theory because although the definition of “intermediary services” in Article 3(g) DSA does not list “online search engines,” the definition of the latter in Digital Services Act art 3(j), 2022 O.J. (L 277) does mention that they are a type of intermediary service.

detecting, identifying, and addressing “illegal content”¹⁹⁰ or information that is incompatible with the terms and conditions of intermediary service providers. Such content (or part of it) is sometimes referred to as “harmful” or “lawful but awful.”¹⁹¹ Thirdly, the content in question must be provided by the “recipients of the service,” i.e., originate from the user rather than the provider itself.¹⁹² “Online platforms”¹⁹³—the type of intermediary we are interested in—mainly involve content uploaded by users that we here refer to as UGC.

The DSA’s definition is not exhaustive. It encompasses a general clause and various types of examples. The general clause states that content moderation encompasses measures that impact the availability, visibility, and accessibility of illegal content or information. Subsequently, two sets of examples of such measures are provided. The first set of measures pertains to *content or information*, such as the demotion, demonetization, disabling access, and removal thereof. Whereas content-level measures of disabling access and removal are restrictions on availability or accessibility, measures such as demotion and demonetization are closer to restrictions on visibility and therefore closer to what has been referred to in scholarship and practice as “shadow banning.”¹⁹⁴ The second set exemplifies measures that pertain to the *user or account*, such as the termination or suspension of the user’s account, i.e., temporary or permanent “de-platforming.”¹⁹⁵ The following figure provides a schematic overview of the definition.

190. Defined in Digital Services Act art. 3(h), 2022 O.J. (L 277).

191. See, e.g., Eric Goldman & Jess Miers, *Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 J. FREE SPEECH L. 191, 194 (2021).

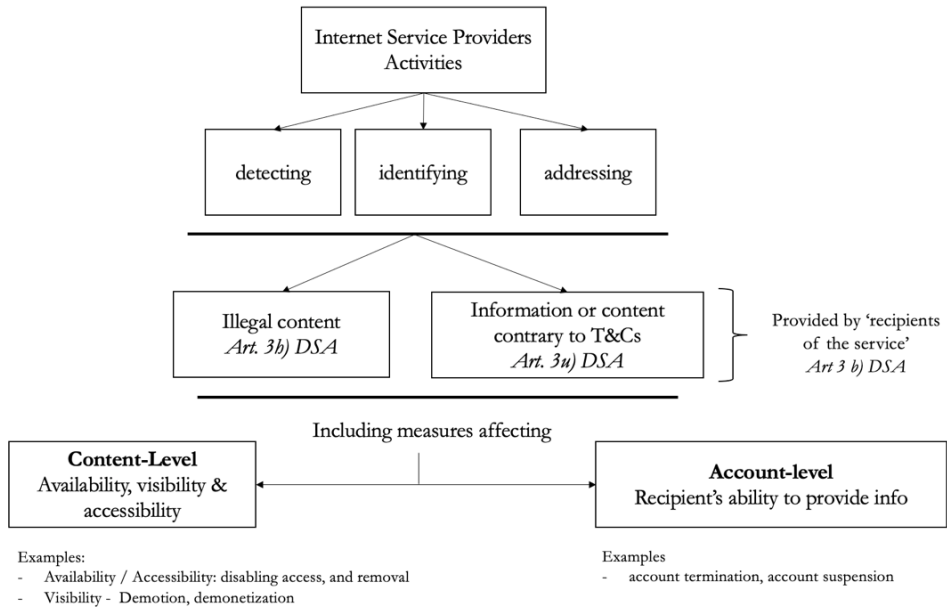
192. Defined in Digital Services Act art. 3(b), 2022 O.J. (L 277); see also Article 3(p), (q) (defining, respectively, “active recipient of an online platform” and “active recipient of an online search engine”).

193. Defined in *id.* art. 3(i), 2022 O.J. (L 277).

194. West, *supra* note 182; Kelley Cotter, “*Shadowbanning is Not A Thing*”: *Black Box Gaslighting and the Power to Independently Know and Credibly Critique Algorithms*, INFO., COMM’CN & SOC’Y 1 (2021); Laura Savolainen, *The Shadow Banning Controversy: Perceived Governance and Algorithmic Folklore*, 44 MEDIA, CULTURE & SOC’Y 1091 (2022); Paddy Leerssen, *An End to Shadow Banning? Transparency Rights in the Digital Services Act Between Content Moderation and Curation*, 48 COMPUT. L. & SEC. REV. 105790 (2023). The DSA describes visibility restrictions in Recital 55 as those that “may consist in demotion in ranking or in recommender systems, as well as in limiting accessibility by one or more recipients of the service or blocking the user from an online community without the user being aware (‘shadow banning’).”

195. On the concept of “de-platforming,” see Shagun Jhaver, Christian Boylston, Diyi Yang & Amy Bruckman, *Evaluating the Effectiveness of Deplatforming as a Moderation Strategy on Twitter*, 5 PROC. ACM HUM.-COMPUT. INTERACT. 381 (2021); Richard Rogers, *Deplatforming: Following Extreme Internet Celebrities to Telegram and Alternative Social Media*, 35 EUR. J. COMM’CN 213 (2020); Helen Innes & Martin Innes, *De-Platforming Disinformation: Conspiracy Theories and Their Control*, INFO., COMM’CN & SOC’Y 1 (2021).

Figure 1. Content Moderation DSA Definition Diagram



The conceptual framework provided by this definition is useful to examine the regulation of copyrighted UGC. With some degree of certainty, it helps to map out what types of content moderation actions are currently regulated in E.U. copyright law, what actions are in a legal grey area, and what actions are wholly unregulated. As we shall see, this determination is also crucial to identify which parts of the more general complementary DSA framework may apply to copyright content moderation actions by platforms in addition to the specific rules of the copyright *acquis*. Our main argument in the following analysis is that monetization of copyrighted UGC on online platforms is largely unregulated by E.U. copyright law. Considering the content moderation concept underlying the DSA, however, it can be said that it falls within the scope of the DSA's content moderation rules.

2. E.U. Copyright Law and Monetization

We have discussed *supra* the basic workings of Article 17 of the CDSMD, as well as related issues of outsourcing (in Section II.A) and concealment (in Section II.B), which lead to human rights deficits. Here, we merely wish to point out that from a copyright content moderation perspective, Article 17 mainly regulates filtering, blocking and takedown actions for UGC in relation to which copyright owners have provided “relevant and necessary

information” or a “sufficiently substantiated notice.”¹⁹⁶ It does not contain specific rules on other types of content moderation actions, such as restrictions on visibility of content or monetization of UGC that is not covered by licensing deals.¹⁹⁷

Then, the question that arises is whether *other* provisions in the CDSM Directive could apply to the monetization of UGC. In this respect, two provisions—on fair remuneration and transparency¹⁹⁸—can theoretically be considered, although neither is a particularly good fit for UGC monetization.

The first provision is Article 18 of the CDSMD, which establishes the principle that creators (authors and performers) who license their works or subject matter must receive appropriate and proportionate remuneration.¹⁹⁹ In the context of OCSSPs, one could imagine that this principle could protect UGC creators against abusive remuneration practices by platforms.²⁰⁰ However, whereas such a principle clearly applies to remuneration paid to creators in the context of licensing deals evolving from Article 17(1) of the CDSMD, it is harder to see how it can be operationalized vis-à-vis unlicensed content that is subsequently monetized through advertisement on the platform. This type of use and remuneration was not envisioned in the preparatory works of the Directive or, to the best of our knowledge, discussed during the legislative process. Before Article 17 was adopted, this practice also largely occurred in the shadow of the hosting safe harbor, in a context where platforms that complied with a notice-and-takedown regime were not directly liable for the UGC they hosted.

196. CDSMD art. 17(4)(b),(c), 2019 O.J. (L 130).

197. See QUINTAIS ET AL., *supra* note 25 (reaching a similar conclusion).

198. CDSMD arts. 18, 19, 2019 O.J. (L 130). These provisions may apply in the context of UGC since users-creators enter into non-exclusive license agreements with platforms to exploit uploaded content on their services, including for monetization purposes. See João Pedro Quintais, Giovanni De Gregorio & João C. Magalhães, *How Platforms Govern Users' Copyright-Protected Content: Exploring the Power of Private Ordering and its Implications*, 48 COMPUT. L. & SEC. REV. 105792 (2023).

199. Member States have discretion on the mechanism to adopt when implementing this principle, as long as it complies with E.U. law. See CDSMD recital 73 2019 O.J. (L 130) (a lump sum payment may amount to proportionate remuneration “but it should not be the rule”).

200. The application of Art. 18 CDSMD to OCSSPs has been confirmed by Commissioner Thierry Breton in response to a parliamentary question by a MEP. See *Appropriate and Proportionate Remuneration for All Online Services*, EUROPEAN PARLIAMENT (Dec. 5, 2021), https://www.europarl.europa.eu/doceo/document/E-9-2021-002618_EN.html; *Answer given by Mr. Breton on behalf of the European Commission*, EUROPEAN PARLIAMENT (Sept. 9, 2021), https://www.europarl.europa.eu/doceo/document/E-9-2021-002618-ASW_EN.html.

The second provision is Article 19 of the CDSMD, which imposes a transparency obligation on licensees or transferees of works or performances to provide creators with detailed information on the exploitation of their creations, including modes of exploitation, revenues generated, and remuneration due.²⁰¹ The obligation must account for the specificities of each sector and must be fulfilled on a regular basis. It is unclear whether and to what extent this transparency obligation applies to the context of UGC monetization (outside traditional licensing deals) and, if it does, whether current information practices of OCSSPs conform with this requirement.²⁰²

In conclusion, just like Article 17, the rules in Articles 18 and 19 of the CDSMD only minimally restrict the autonomy of platforms to establish their own internal governance policies in relation to UGC monetization. The principle of appropriate and proportionate remuneration is too broadly defined to effectively constrain a platform's remuneration and monetization policies towards users. Additionally, it is uncertain whether the requirement for transparency has a significant impact on a platform's current reporting practices to individual creators. In other words, when it comes to moderation actions related to monetization of (unlicensed) content, E.U. copyright law affords platforms a broad autonomy space. Given the significant power imbalance between platforms and users,²⁰³ the question arises whether outside the copyright *acquis*, it is possible to find relevant provisions that constrain the monetization of copyrighted UGC, particularly in the DSA. To answer this question, we first clarify the DSA's application to copyright platforms and then examine its specific rules on monetization restrictions.

201. See Séverine Dusollier, *The 2019 Directive on Copyright in the Digital Single Market: Some Progress, A Few Bad Choices, and an Overall Failed Ambition*, COMMON MKT. L. REV., 979, 1023–24 (2020).

202. YouTube does seem to provide creators who participate in the YouTube Partner Program with information on the modes of exploitation of their videos, the revenues generated by their videos, and the remuneration due via creators' respective YouTube Studio accounts. In this account, creators can select 'Analytics' to see revenue reports related to their earnings. The percentage of the gross revenue generated with the videos that is paid to the creator (revenue share) is outlined in the creator's partner agreement with YouTube. The revenue share depends on the terms of the 'module' selected by the creator (e.g., 'Watch Page Monetization Module' and 'Shorts Monetization Module.' See *Check your YouTube revenue*, YOUTUBE, <https://support.google.com/youtube/answer/9314488>; *YouTube partner earnings overview*, YOUTUBE, https://support.google.com/youtube/answer/72902?hl=en&ref_topic=9257988#zippy=%2Cwhere-can-i-see-my-earnings (last visited Mar. 28, 2023).

203. Quintais, Appelman, & Fahy, *supra* note 37; Quintais, De Gregorio, & Magalhães, *supra* note 198.

3. *Digital Services Act and Monetization*

The DSA applies to online platforms that host copyrighted content. But it applies differently depending on whether a platform qualifies as an OCSSP or not.²⁰⁴ Whereas some large-scale platforms, especially those with video-sharing features such as YouTube, Facebook, and Instagram, clearly qualify as OCSSPs, others are explicitly excluded from that category due to the carve-outs in Article 2(6) of the CDSMD.²⁰⁵ But a grey area subsists, caused by the fact that the legal definition of OCSSPs relies on open-ended concepts, such as “main purpose,” “large amount,” and “profit-making purpose,” necessitating a case-by-case assessment of whether providers meet these requirements.²⁰⁶ In addition, the extent to which a platform is covered by the definition may remain unclear. This is because a provider may offer multiple services; thus, a service-by-service analysis is necessary to determine whether a provider qualifies as an OCSSP.²⁰⁷ Consequently, as regards copyright liability for the content it hosts, the same provider may be subject to Article 17 of the CDSMD for certain services and the more general copyright liability regime, following from acts of communication to the public in the sense of Article 3 of the InfoSoc Directive, for others.

Regarding copyright liability falling outside the scope of Article 17 CDSMD, the general safe harbor system in the DSA remains applicable, including the safe harbor for hosting in Article 6 of the DSA (more on this distinction below). Considering there are numerous platforms that host copyrighted content, as well as other types of content, while providing different services, it is a complex task to determine liability regimes and respective content moderation obligations.²⁰⁸ In addition to the liability rules, whether a copyright-hosting platform qualifies as an OCSSP or not, it will be subject to the DSA’s due diligence obligations for online platforms or VLOPs, albeit to different degrees.²⁰⁹ Consequently, it is important to explore which rules, if any, the DSA might contain that supplement E.U. copyright law concerning monetization.

The DSA’s definition of content moderation explicitly refers to demonetization as a content-level restriction by intermediaries.²¹⁰ Monetization is conceptualized as an action of obtaining monetary payment or

204. See Quintais & Schwemer, *supra* note 111.

205. See *supra* Part I.

206. Guidance Art. 17 CDSMD, *supra* note 18, at n. 18, 3–5.

207. *Id.* at n. 18, 5.

208. QUINTAIS ET AL., *supra* note 25.

209. See Quintais & Schwemer, *supra* note 111; Peukert et al., *supra* note 111.

210. See *supra* Figure 1.

revenue through advertisement of “information” (in our case, copyrighted UGC) provided by the user. This activity can be restricted by suspending or terminating the monetary payment or revenue associated to that information.²¹¹ The question then is what types of obligations are imposed on UGC platforms relating to demonetization.²¹²

First, Article 17 of the DSA obliges providers of hosting services to accompany each content moderation action affecting individual recipients of the service with statements of reasons. Following Article 17(1)(b) of the DSA, such statements of reasons are also required for decisions involving the “suspension, termination or other restriction of monetary payments,” i.e., demonetization actions, on the ground that the information provided by the user is illegal content (here: copyright-infringing UGC) or incompatible with the provider’s terms and conditions.²¹³ A statement of reasons must contain detailed information on the action taken²¹⁴ and fulfil two core functions: (1) to *notify* users of any sanctions relating to their content, and (2) to *explain* why they were imposed.²¹⁵ This is especially important considering research that shows how demonetization actions are challenging to observe in practice.²¹⁶

Second, Article 20 of the DSA requires online platform service providers to provide recipients of their services with access to an effective internal complaint-handling system that enables them to lodge complaints against decisions taken by the provider of the online platform, including against “decisions whether or not to suspend, terminate or otherwise restrict the ability to monetize information provided by the recipient.”²¹⁷ As noted, for OCSSPs it is unclear to what extent this provision would apply to conventional moderation actions, such as blocking or removal of content, which are already regulated in Article 17(4) of the CDSMD. However, Article 20 of the DSA should clearly apply to OCSSPs and non-OCSSPs alike in respect of *complaints against demonetization decisions*. In fact, Article 20 offers a promising array of tools. Access to complaint-handling systems should be available for at least six months. Complaints should be easy to submit and supported with sufficient

211. Digital Services Act recital 55, 2022 O.J. (L 277).

212. As it was sufficiently discussed above, we will not further address here the DSA’s cornerstone provision on terms and conditions (Article 14), which applies also to demonetization as a type of content moderation restriction.

213. Digital Services Act art. 17(2)(b), 2022 O.J. (L 277).

214. *Id.* art. 17(3).

215. Leerssen, *supra* note 194, at 7.

216. Robyn Caplan & Tarleton Gillespie, *Tiered Governance and Demonetization: The Shifting Terms of Labor and Compensation in the Platform Economy*, April-June SOCIAL MEDIA + SOC’Y 1 (2020); see also Leerssen, *supra* note 194 (noting the “importance of notice policies for unobservable remedies such as demonetization”).

217. Digital Services Act art. 20(1)(c), 2022 O.J. (L 277).

evidence. Complaints must be handled promptly, fairly, and diligently. Platforms should reverse decisions without undue delay if the complaint sufficiently establishes that the reported information is not illegal or incompatible with the platforms' terms and conditions. Complainants should be promptly informed of decisions, given options for out-of-court resolution, and provided with other avenues for redress. Qualified staff should oversee complaint decisions, avoiding sole reliance on automated decision making.

Article 21 of the DSA then allows users affected by a platform's decision to select any certified out-of-court dispute settlement body to resolve disputes relating to those decisions. Without going into detail on the certification process, it is noteworthy that platforms must bear all the fees charged by the out-of-court dispute settlement body if a user prevails in the dispute. Conversely, should the platform prevail, the user does not have to reimburse any of the platforms' fees or expenses, unless the user manifestly acted in bad faith.²¹⁸

To be sure, these are helpful provisions. Clear and specific information about the reasons why monetary payments related to UGC have been restricted and information about redress possibilities theoretically offer users the opportunity to effectively take action against demonetization. Likewise, greater clarity and detail regarding in-platform and out-of-court dispute settlement regarding demonetization are positive, especially when accompanied by favorable rules on costs. However, the outsourcing and concealment criticism developed above regarding complaint and redress mechanisms applies with equal force here. As we show in Section III.B, most monetization claims by rightholders, e.g., in YouTube's Content ID tool, are not contested by users despite the availability of complaint and redress mechanisms. Even if Article 17 of the DSA improves the *quality* of information surrounding a monetization restriction for the affected user, it does not change the ex post nature of the mechanism. Similar arguments can be made for Articles 20 and 21 of the DSA. What remains to be seen is whether these provisions will have any meaningful impact on the behavior of affected users, absent more fundamental regulation of copyright monetization. One possible approach could be to impose ex ante restrictions on the ability of rightholders with access to content recognition tools to claim monetization in the first place.

In short, the DSA's approach to monetization operates at the level of transparency and ex post safeguards. These features mirror to a large extent what we have called a human rights "outsourcing" approach in our analysis

218. *Id.* art. 21(5).

above. The practice of UGC monetization, discussed below, suggests that this approach is problematic and leads to the concealment of human rights deficits.

B. THE PRACTICE OF UGC MONETIZATION

This Section explores the systems and tools developed by platforms for the moderation of copyrighted content through three case studies of large-scale platforms that qualify as OCSSPs: YouTube, Meta's Facebook and Instagram, and TikTok. We identify, describe, and examine the functionality of the systems and tools that these platforms make available to rightholders, including options to track usage, block, and monetize protected content. Our data is drawn from publicly available information pages on the platforms' websites, the platforms' own copyright transparency reports covering the first half of 2022, recordings of the 2019–2020 Commission Stakeholder Dialogue, and existing literature. Our analysis highlights the relative importance of monetization as a content moderation action, the way in which existing moderation rules and systems favor monetization by legacy enterprise rightholders, and three significant human rights deficits arising therefrom.

1. *YouTube*

Launched in 2005 and soon thereafter acquired by Google, the online video-sharing website YouTube is one of the longest running and most popular online platforms among creators and internet users worldwide.²¹⁹ As part of its free service, YouTube allows users to upload, watch, like and share videos. To upload content, users simply sign in into their account, upload a video file, enter the necessary details (e.g., title, description, licensing information) and add special elements such as subtitles. With every upload, YouTube's content recognition tools screen and check the file for copyrighted third-party materials and, if the user participates in the YouTube Partner program (see below), a check is made also for advertising suitability, after which the user can choose settings for monetization.²²⁰

YouTube offers various tools to rightholders to “protect and manage”²²¹ copyrighted content on the platform. The platform's Copyright Management

219. In the European Union alone, YouTube counts 401.7 million monthly active users. See GOOGLE, INFORMATION ABOUT MONTHLY ACTIVE RECIPIENTS UNDER THE DIGITAL SERVICES ACT (EU) (2022), https://storage.googleapis.com/transparencyreport/report-downloads/pdf-report-24_2022-7-1_2022-12-31_en_v1.pdf.

220. See *Upload YouTube Videos*, YOUTUBE, <https://support.google.com/youtube/answer/57407?hl=en&co=GENIE.Platform%3DDesktop&oco=0#zippy=%2Cdetails%2Cmonetization%2Cad-suitability%2Cvideo-elements%2Cchecks> (last visited Mar. 2, 2023).

221. *Overview of Copyright Management Tools*, YOUTUBE, <https://support.google.com/youtube/answer/9245819?hl=en#zippy=%2Ccopyright-takedown-webform%2Ccontent-id%2Ccopyright-match-tool> (last visited Mar. 2, 2023).

Suite consists of three main products: the Webform, the Copyright Match Tool and the Content ID system.²²² Each product targets different types of rightholders, depending on both the *scale* of the rightholders' content management needs and the rightholders' *capabilities* (i.e., knowledge, resources) to manage copyright.²²³

Webform is a simple tool through which any user holding copyright can manually request the removal of their copyrighted content²²⁴ from the platform. Its functionality is therefore that of a traditional notice-and-takedown system. The Webform is specifically meant to accommodate “those with infrequent [copyright protection] needs”²²⁵ and is open to everyone, i.e., more than 2 billion channels worldwide.²²⁶

The Copyright Match Tool is a more sophisticated product based on Content ID matching technology (see below). The tool automatically scans new user uploads for matches with existing protected content on the platform. Contrary to Webform, Copyright Match is not open to everyone. Those eligible for the use of this tool are, primarily, channels and other creators that are enrolled in the YouTube Partner Program (a program through which selected creators get access to resources to monetize their content)²²⁷ and channels that have filled out YouTube's copyright management tools application form and thereby shown a need for an advanced rights management tool.²²⁸ Since October 2021, the tool has also become available to YouTube users who submitted valid/approved Webform removal requests and indicated in the Webform that they would like YouTube to prevent the future upload of (any copies of) the reported video.²²⁹ In that capacity, the Copyright Match Tool has the affordance of a notice-and-staydown (NSD)

222. YOUTUBE, COPYRIGHT TRANSPARENCY REPORT (2022), https://services.google.com/fh/files/misc/hytw_copyright_transparency_report.pdf?hl=en.

223. *Id.* at 1, 4; *see also* YouTube Presentation, European Commission, Recording of the Third Meeting of the Stakeholder Dialogue on Article 17 of the Directive on Copyright in the Digital Single Market (Nov. 25, 2019) (including a presentation by YouTube) [hereinafter Article 17 Dialogue Recording, YouTube Presentation].

224. While YouTube's business model is built around audiovisual content, Webform can also be used to remove other copyright-protected works from the platform, including audiobooks, ebooks and still images. Article 17 Dialogue Recording, YouTube Presentation, *supra* note 223.

225. YOUTUBE, COPYRIGHT TRANSPARENCY REPORT, *supra* note 222, at 4.

226. *Id.*

227. *How to Make Money on YouTube*, YOUTUBE, <https://www.youtube.com/creators/how-things-work/video-monetization/> (last visited Oct. 17, 2023).

228. YOUTUBE, COPYRIGHT TRANSPARENCY REPORT, *supra* note 222, at 1–2.

229. *Id.*

system. Taken together, more than two million channels have access to Copyright Match.²³⁰

When the scanning tool finds a match, it provides the rightholder with information on the total views of the user upload, the channel it was uploaded to, the percentage of protected content that was used as well as some screenshots of the video. The system also indicates whether the user upload has different video but the same audio, and whether there is only a partial match, such as in the case of sampling. In this interface, rightholders are given three options: (1) do nothing and leave the video up; (2) file a removal request and ask YouTube to automatically prevent the upload of copies in the future; or (3) contact the uploader.²³¹ Like the Webform, the Copyright Match tool does not afford rightholders the option to monetize the matched content.

The last and most powerful tool within the Copyright Management Suite in terms of automation and available copyright enforcement actions, is Content ID. Since 2007, this system has enabled copyright holders to identify new user uploads that include materials they own, and to automatically initiate action based on self- and pre-specified rules dictating how to handle matched content. Content ID is specifically aimed at rightholders “with the most complex rights management needs, such as movie studios, record labels, and collecting societies.”²³² To be approved for Content ID, rightholders must demonstrate a “need for [a] scaled tool,” an “understanding of copyright” as well as the “resources to manage the complex automated matching system.”²³³ Smaller, independent creators may only indirectly access (features of) the system via intermediary service providers that manage rights through the system on behalf of others.²³⁴ In the first half of 2022, approximately 9,000 (enterprise) partners had access to Content ID.²³⁵

To set up for Content ID, eligible rightholders must provide YouTube with extensive information. This includes: (1) reference files (e.g., audio, visual

230. *Id.*

231. *Id.* at 3 (“From this interface, users can choose to archive the match and leave the video up, file a takedown request (with the option to ask YouTube to automatically prevent copies), or contact the uploader”).

232. *Id.*

233. *Id.* at 1.

234. *Id.* at 3. Such service providers may include multi-channel networks and other organizations. *See, e.g., Services Directory*, YOUTUBE, <https://servicesdirectory.withyoutube.com/directory/#?services=content-id-management> (providing a list of service providers) (last visited Mar. 2, 2023).

235. YOUTUBE, COPYRIGHT TRANSPARENCY REPORT, *supra* note 222, at 1, 4.

or audiovisual)²³⁶ that meet the content eligibility criteria;²³⁷ (2) ownership information, e.g., on the territories in which the content is owned and how much of the content is owned; (3) metadata that describe the content, e.g., titles and industry identification numbers; and (4) the preferred copyright moderation or enforcement actions to be carried out in the event of a match detection between a user upload and the reference content (“match policies”).²³⁸ In our view, these information requirements are sufficient to meet the threshold of “relevant and necessary information” set out in Articles 17(4)(b) and (c) of the CDSMD.²³⁹ As explained, the provision of such information triggers YouTube’s best efforts obligations to deploy preventive measures to ensure the unavailability of the notified works on the platform and, where appropriate, to prevent the future upload of works for which rightholders in the past provided a valid notice for removal (i.e., the “stay-down” part of Article 17(4)(c) of the CDSMD).

After the upload of reference files and the specification of match policies, Content ID starts checking new uploads to the platform against such files. Matching videos are automatically claimed on behalf of the rightholder, upon which the preferred match policies are applied. There are three types of actions

236. *Using Content ID*, YOUTUBE, <https://support.google.com/youtube/answer/3244015?hl=en> (last visited Oct. 17, 2023).

237. For example, the rightholder must hold exclusive rights over the reference content for the territories ownership is claimed, the content must be sufficiently distinct (e.g., no remasters) and each piece of intellectual property must have an individual reference (e.g., complications, mashups and full albums cannot be filed as a reference), see *Content eligible for Content ID*, YOUTUBE, <https://support.google.com/youtube/answer/2605065#zippy=%2Cexclusive-rights%2Cdistinct-reference-content%2Cindividual-references-for-each-piece-of-intellectual-property%2Coriginal-video-game-soundtrack-guidelines%2Ccontent-that-is-sold-or-licensed-at-scale-for-incorporation-into-other-works%2Casset-metadata-for-reference-content%2Cfingerprint-only-reference-content> (last visited Mar. 2, 2023). The media files are translated by YouTube into unique digital ‘fingerprints.’ In exceptional cases, YouTube allows rightholders to fingerprint the media file on their own devices and provide YouTube the fingerprint instead of the original media file. *See* Article 17 Dialogue Recording, YouTube Presentation, *supra* note 223.

238. YOUTUBE, COPYRIGHT TRANSPARENCY REPORT, *supra* note 222, at 3; *see also* Article 17 Dialogue Recording, YouTube Presentation, *supra* note 223.

239. The second part of Article 17(4)(c) CDSM (i.e., the ‘notice-and-staydown’ part) refers back to Article 17(4)(b) and thus to the provision of “relevant and necessary information” about specific works, which is needed to prevent future uploads; *see also* Guidance on Article 17 CDSMD (n. 21) (“When implementing Article 17(4)(c), the Member States need to clearly differentiate the type of information rightholders provide in a ‘sufficiently substantiated notice’ for the removal of content (the ‘take down’ part of (c)) from the ‘relevant and necessary information’ they provide for the purposes of preventing future uploads of notified works (the ‘stay-down’ part of (c), which refers back to (b))”).

that can be applied to a Content ID claim. Rightholders can instruct the system to:

- (1) *track* the matching content's viewership statistics (“leave-up-and-track”);
- (2) *block* the content from being viewed (“takedown-staydown”);²⁴⁰ or
- (3) *monetize* the content by displaying advertisements with it (“leave-up-and-get-paid”).²⁴¹

Match policies may also include directions from the rightholder on when Content ID should claim a video before anything else. Rightholders can set certain parameters, telling the system to automatically claim videos based on for instance geography (“when the UGC is uploaded from a certain country”), moment of upload (“when the UGC is uploaded during a specific time window”), match type (“when the UGC matches audio only, video only, or both”), or match amount (“when the UGC contains more than X minutes or Y percent of the reference file”).²⁴² The fact that YouTube seemingly allows rightholders to set the threshold for the length or percentage of the uploaded video that must match the reference file to activate a Content ID claim is problematic. This is because rightholders are afforded the opportunity to set the threshold for a pre-defined blocking action *below* the legal standard of “manifestly infringing” content—i.e., “identical or equivalent” content—which in our view can only be associated with a high matching percentage across different parameters.²⁴³ In our view, this is inconsistent with the CJEU’s judgment in the *Poland* case discussed above.²⁴⁴

Monetization of matching UGC via Content ID occurs by placing advertisements against the matched content. In principle, the rightholder

240. See GOOGLE, SECTION 512 STUDY: REQUEST FOR ADDITIONAL COMMENTS 3 (Feb. 21, 2017), <https://www.regulations.gov/comment/COLC-2015-0013-92487>.

241. *Id.*

242. *Upload and Match Policies*, YOUTUBE <https://support.google.com/youtube/answer/107129> (last visited Oct. 17, 2023); see also Article 17 Dialogue Recording, YouTube Presentation, *supra* note 223.

243. Admittedly, European copyright law does not provide a fixed number for the percentage or length of a video that has to match the reference file to be considered “manifestly infringing.” Some Member States, however, have independently introduced numeric thresholds in their national implementation laws, for instance to indicate which uses are presumed to be authorized by law (e.g., presumed to be a quotation, parody, pastiche, etc.). For instance, Section 9(2)(1) of the German Act on the Copyright Liability of Online Content Sharing Service Providers provides that UGC that contains *less than half* of a work or several works by third parties is presumably authorized by law. Moreover, according to Section 9(2)(3) jo. Section 10(1)–(2) of the same Act, uses *up to 15 seconds* of a cinematographic work or an audio track are deemed to be “minor and are therefore presumably authorized by law.”

244. See *supra* Section II.B.2.

receives all advertising revenue²⁴⁵ produced by the claimed video that the uploader or creator of that video would have obtained absent the claim. This does not rule out, however, the possibility for rightholders to voluntarily share advertising revenues with uploaders, for instance when the upload is a cover song video and a music publisher wants to encourage fans to make such cover songs.²⁴⁶ If a video is monetized, but the uploader decides to dispute the Content ID claim, YouTube will temporarily hold the advertising revenue from the video. Once the dispute is resolved, the platform will release the revenue to the appropriate party.²⁴⁷ It is important to note, however, that nearly all Content ID claims go undisputed. For instance, in the first half of 2022, only 0.5% of the 750 million Content ID claims were disputed by the user-uploader. This is largely consistent with existing studies that have reported a relatively low usage of counternotice mechanisms, confirming the above-described lack of effectiveness of ex post complaint-and-redress mechanisms as a means to safeguard users' rights.²⁴⁸

According to YouTube's own statistics, more than 98.9% of all copyright actions taken on YouTube arise from Content ID users. Of those actions, monetization is clearly the most popular policy applied to claims: in the first half of 2022, over 90% of all Content ID claims were reportedly monetized, which resulted in the payment of \$7.5 billion to rightholders in advertising revenue.²⁴⁹ What is remarkable about these numbers is that while monetization is the preferred moderation action via Content ID, discussion on the topic and

245. It is not entirely clear from public information whether the rightholder, when the monetization policy is applied, *at all times* receives the *entire* advertising revenue, or that this may vary depending on, for example, whether the rightholder has the rights to both the video and audio or to the audio or video only; whether the rightholder merely owns the rights in a specific territory; whether there is co-authorship; etc. Based on publicly available information, however, we assume that rightholders receive the entire ad advertising revenue, but this is to be confirmed in interviews.

246. *Monetizing Eligible Cover Videos*, YOUTUBE <https://support.google.com/youtube/answer/3301938?hl=en> (last visited Oct. 17, 2023).

247. *Monetization During Content ID Disputes*, YOUTUBE <https://support.google.com/youtube/answer/7000961> (last visited Oct. 17, 2023).

248. Urban, Karaganis & Schofield, *supra* note 105; Bar-Ziv & Elkin-Koren, *supra* note 105. Article 17(9) mandates *ex post* complaint and redress mechanisms, which should however be complementary to *ex ante* safeguards, such as restrictions on the scope of permissible filtering. See *supra* Section III.B; 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 (June 1, 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/>.

249. YOUTUBE, COPYRIGHT TRANSPARENCY REPORT, *supra* note 222, at 1, 3–4.

its regulation was largely absent during the entire legislative process leading to the adoption of Article 17 of the CDSMD, as well as the subsequent Commission Stakeholder Dialogue and Guidance (where it is not even mentioned) and national implementation processes. This is all the more impressive since YouTube was the poster child for the “value gap” narrative that supported legislative intervention.²⁵⁰

Table 1 provides a summary of the functionality and affordances of tools in YouTube’s Copyright Management Suite.

Table 1. Affordances of YouTube’s Copyright Management Suite tools

	Webform	Copyright Match	Content ID
Functionality	Notice-and-takedown	<i>Ex ante</i> filtering + notice-and-staydown	<i>Ex ante</i> filtering + notice-and-staydown + monetization
Beneficiaries	Rightholders with infrequent needs or only a few copyright-protected works on the platform	Rightholders who experience a higher amount of reposting of their copyright-protected content	Rightholders with the most complex copyright management needs (enterprises)
Eligibility and number of users/uses	Open to everyone; <i>more than two billion channels</i>	Open to participants in the YouTube Partner Program and rightholders who demonstrated a short history of takedowns; <i>more than two million channels</i>	Open to a select group of partners (large, knowledgeable and resourceful players); <i>more than nine thousand partners</i>
Automation level	Low	Medium	High
Available copyright management actions	Content removal	Archive match (leave video up); File removal request; or Contact uploader	Track (leave video up); Block; or Monetize

250. Annemarie Bridy, *The Price of Closing the “Value Gap”: How the Music Industry Hacked EU Copyright Reform*, 22 VAND. J. ENT. & TECH. L. 323, 323–58 (2020).

2. *Meta's Facebook and Instagram*

Facebook and Instagram, two of the biggest social media platforms around the globe owned by Meta,²⁵¹ pivot on the sharing of photos and videos (Instagram) and all types of media (Facebook) between families and friends. Both platforms offer to rightholders an internally developed copyright management and protection tool called Rights Manager.²⁵² At the core of Rights Manager is technology that allows for the matching of video, audio, and image materials,²⁵³ on the basis of which rightholders can identify potentially infringing content and take actions accordingly.

To be approved for Rights Manager, users must submit an application. The exact acceptance criteria are not public, but users are reportedly evaluated based on, *inter alia*, historical behavior (they must not have posted content without permission from the valid copyright holder in the past); catalogue size (there should be a substantial body of work that requires a scaled tool); content eligibility;²⁵⁴ the likelihood of a mass audience and of infringing user uploads; and historical use of the existing notice-and-takedown system to such a volume that this is demonstrably insufficient for the scale of matching.²⁵⁵ According to Meta, smaller-sized users are generally not accepted to Rights Manager, as their needs are deemed to be met by the publicly accessible Copyright Report Form, a notice-and-takedown system.²⁵⁶ Once access to Rights Manager is granted, rightholders must provide Meta with information like that required by YouTube for Content ID. This includes (1) reference files (video, audio, or

251. By the end of 2022, the platforms had respectively 255 and 250 million average monthly active users in the European Union only. *See* META, DIGITAL SERVICES ACT – INFORMATION ON AVERAGE MONTHLY ACTIVE RECIPIENTS IN THE EUROPEAN UNION (2023), <https://transparency.fb.com/sr/dsa-report-feb2023/>.

252. *See* *Introducing Rights Manager*, META (Apr. 12, 2016), <https://www.facebook.com/formedia/blog/introducing-rights-manager> (since 2016).

253. *Rights Manager*, META, <https://rightsmanager.fb.com/> (last visited Mar. 3, 2023).

254. The user must have exclusive rights to the content, the reference content must be sufficiently distinct from other reference files (e.g., no screenshots from videos) and each piece of intellectual property must have an individual reference (e.g., compilations, mashups, countdown lists and reaction videos cannot be filed as a reference but must be separated into individual components). *See* *Content Eligible for Reference Files*, META, <https://www.facebook.com/business/help/389834765475043> (last visited Mar. 3, 2023).

255. *Rights Manager Eligibility*, META (Aug. 16, 2023), <https://www.facebook.com/business/help/705604373650775?id=237023724106807>; *see also* Meta (then Facebook) Presentation, European Commission, Recording of the Fourth Meeting of the Stakeholder Dialogue on Article 17 of the Directive on Copyright in the Digital Single Market (Dec. 16, 2019) [hereinafter Article 17 Dialogue Recording, Meta Presentation].

256. Article 17 Dialogue Recording, Meta Presentation, *supra* note 255.

images),²⁵⁷ (2) ownership information, including information about accounts that are authorized to publish the content (“white-listing”), (3) match rules (i.e., rightholders can determine what constitutes a match by setting parameters for the matching threshold, for instance in terms of temporal or percentual overlap)²⁵⁸ and (4) the preferred actions to be taken in the event of a match (“match actions”). As noted for YouTube’s Content ID, the fact that rightholders can set a low threshold for the overlap to trigger a match action seems problematic from a E.U. law perspective, at least when the match action is set to the ex ante blocking of uploads.

There are six match actions that can be attached to a match rule. Of the six, rightholders can instruct the system to automatically:

- (1) *monitor* matching content for insights;
- (2) *apply an ownership link* (i.e., place a banner on the matching content which links to a destination the rightholder designates, thereby using the UGC as a promotional opportunity);
- (3) *collect advertising revenue* (only when the content is eligible for monetization); or
- (4) *block* matching content from being viewed;

Moreover, rightholders can choose to manually:

- (5) *review* matches and decide what to do at a later time; or
- (6) *submit a copyright takedown report* from within the Rights Manager interface (“Copyright Report Form”).²⁵⁹

Similar to Content ID, monetization of UGC via Rights Manager can be realized by placing in-stream advertisements in a video. Importantly, the “Collect ad earnings” option is not always available since the matching content itself must be eligible for monetization in the first place. This means that the content must have been uploaded by pages (not profiles) that comply with Facebook’s or Instagram’s Partner Monetization Policies and Brand Safety Controls; be at least 1 minute in length; and be published from a page enabled for in-stream ads (on Facebook) or from an account enabled for monetization

257. Most rightholders upload ‘playable content’ to Rights Manager, which is then fingerprinted by the tool. Meta provides the option to ingest fingerprinted or hashed content into the tool to only the “most trusted rightholders.” See Article 17 Dialogue Recording, Meta Presentation, *supra* note 255.

258. *Match Rules in Rights Manager*, META <https://m.facebook.com/help/711479543236965> (last visited Oct. 17, 2023).

259. *Rights Manager*, META, <https://rightsmanager.fb.com/> (last visited Oct. 17, 2023); see also *Copyright Report Form*, FACEBOOK, <https://www.facebook.com/help/contact/1758255661104383> (last visited Oct. 17, 2023).

with in-stream video ads (on Instagram). Matches that do not qualify for the monetization action are automatically set to the “monitor” match action.²⁶⁰

The amount of advertising revenue rightholders can earn via Rights Manager depends on the allocation of copyright ownership in the content item at issue. According to Meta, if rightholders exclusively own both the rights to the video and audio of audiovisual works, they are eligible to collect the *entire* ad earnings that the uploader would have received.²⁶¹ However, if rightholders merely own the rights to the video or audio, but not to both, they may only collect *half* of the ad earnings. If rightholders own rights in a specific geographic territory, they can collect the ad earnings generated by *views in that territory*. Lastly, if multiple rightholders share the rights to a work, the earnings should be *divided* among them.²⁶²

According to Meta, the monetization option within Rights Manager serves as an “authorization system,” through which rightholders can “authorize the content on the platform and receive compensation for it.”²⁶³ In other words, it works like a license for the platform to use the copyrighted content in exchange for the collection of the advertisement revenue that accrues from it.

To the best of our knowledge, there are no publicly available data on copyright enforcement actions executed via Rights Manager. During the Commission Stakeholder Dialogue meeting of 16 December 2019, Meta (then Facebook) noted that “over 99% of the matches . . . are allowed to remain on the platform,”²⁶⁴ which implies that claimed content is largely monitored, ownership-linked or monetized. However, the relative popularity of monetization via Rights Manager is unknown.²⁶⁵

If a user-uploader believes a match action applied by the rightholder is invalid, they can submit a dispute with the respective platform. When a user-uploader and rightholder continue to disagree on the lawfulness of the upload and match action, even after multiple phases of review and appeal, and the rightholder still wishes to uphold the claim, the internal dispute process within Rights Manager ends, and the rightholder must either release the claim or submit a takedown request via the Copyright Report Form.²⁶⁶ Table 2 provides

260. *Content Eligible for Collect Ad Earnings Match Action*, META, <https://www.facebook.com/business/help/985332875266274?id=237023724106807> (last visited Oct. 17, 2023).

261. *Collect ad Earnings in Rights Manager*, META, <https://www.facebook.com/business/help/891090414760198?id=237023724106807> (last visited Oct. 17, 2023).

262. *Id.*

263. Article 17 Dialogue Recording, Meta Presentation, *supra* note 255.

264. *Id.*

265. *See infra* Section III.A.

266. *Rights Manager*, META, <https://rightsmanager.fb.com/> (last visited Oct. 17, 2023).

a summary of the functionality and affordances of Facebook and Instagram’s copyrighted content moderation tools.

Table 2. Affordances of Facebook and Instagram’s Rights Manager tool and Copyright Report Form

	Rights Manager	Copyright Report Form
Functionality	<i>Ex ante</i> filtering + notice-and-staydown + monetization	Notice-and-takedown
Beneficiaries	Trusted rightholders with a substantial body of protected content on the platform	Any copyright holder
Eligibility and number of users/uses	Open to rightholders who can prove good historical behavior, own a large body of protected content that is likely to be used in new upload, and have a demonstrated need for a scaled tool (based on history of takedowns); <i>number of users unknown.</i>	Open to everyone; in the first half of 2022, more than 1.2 million copyright reports were submitted on Facebook and 450,000 reports were filed on Instagram ²⁶⁷
Automation level	High	Low
Available copyright management actions	Monitor (automatically) Apply ownership link (automatically) Monetization (automatically) Block (automatically) Review match (manually) File takedown-report (manually)	Content removal

3. TikTok

Within only a few years, the short-form video-sharing platform TikTok (2016) owned by ByteDance has become a true social media sensation.²⁶⁸ Via an app, users can create, share, and discover short video clips (of up to 10 minutes), varying from the well-known “TikTok dance” videos to videos that revolve around food, lip-syncing and social media challenges.

267. *Intellectual Property Transparency Report H1 2022*, META, <https://transparency.fb.com/data/intellectual-property/notice-and-takedown/facebook/> (last visited Oct. 17, 2023).

268. On February 16, 2023, TikTok reported it has over 150 million active monthly users in the EU. *See Investing for our 150m strong community in Europe*, TIKTOK (Feb. 16, 2023), <https://newsroom.tiktok.com/en-eu/investing-for-our-150-m-strong-community-in-europe>.

Contrary to YouTube and Facebook/Instagram, TikTok does not seem to offer rightholders a sophisticated in-house copyright management tool. According to the platform's Intellectual Property Policy, rightholders who want to act against the upload of copies of their works can file Copyright Infringement Reports to request the removal of allegedly infringing content.²⁶⁹ Additionally, they can manually fill out a form through which they can provide "relevant and necessary information"²⁷⁰ about themselves and their copyrighted works, upon receipt of which TikTok "will do its best to ensure that [the] copyright work is made unavailable on TikTok in the EU."²⁷¹

Thus, TikTok's current IP policy does not mention the possibility for rightholders to monetize allegedly infringing UGC by claiming uploaders' advertising revenue. This is not surprising, as the monetization of videos through advertising in itself is a relatively new phenomenon on the platform. Only in May 2022, TikTok introduced 'Pulse,' the platform's first advertising revenue sharing program through which highly popular individual creators, public figures and media publishers with over 100,000 followers can receive part of the revenue earned from advertisements run on their content.²⁷² Several creators have indicated, however, that the ad revenue sharing initiative has not exactly proven financially attractive to them, with pay-outs often not exceeding ten dollars.²⁷³ In May 2023, TikTok launched an extension to the program named "Pulse Premiere," allowing "premium publishing partners" in "lifestyle & education, sports, and entertainment categories" to monetize their content on TikTok through "a revenue-sharing model"²⁷⁴ and reportedly offering the

269. *Intellectual Property Policy*, TIKTOK (June 7, 2021), <https://www.tiktok.com/legal/page/global/copyright-policy/en>. Uploaders, in turn, can file counter-notifications via a Counter Notification Form.

270. *Id.*

271. *Id.*

272. *TikTok Pulse: Bringing Brands Closer to Community and Entertainment*, TIKTOK (May 4, 2022), <https://newsroom.tiktok.com/en-us/tiktok-pulse-is-bringing-brands-closer-to-community-and-entertainment>.

273. *See, e.g.*, Dan Whateley, Tanya Chen & Marta Biino, *How Much Tiktok Has Paid 8 Creators For Views Through its New Ad-Revenue Sharing Program Pulse*, INSIDER (Dec. 15, 2022), <https://www.businessinsider.com/tiktok-pulse-ad-revenue-share-payments-creators-2022-11?international=true&r=US&IR=T>; *see also* Alexandra Sternlicht, *Creators Report Extremely Low Earnings from TikTok's Ad Revenue Sharing Initiative*, FORTUNE (Jan. 24, 2023), <https://fortune.com/2023/01/23/creators-report-extremely-low-earnings-from-tiktoks-ad-revenue-sharing-initiative/>.

274. *Pulse Premiere: Connecting Brands with Premium Publisher Content*, TIKTOK (May 3, 2023), <https://newsroom.tiktok.com/en-us/pulse-premiere>.

publishers a 50% split.²⁷⁵ While the monetization of creators' *own* content through advertising is slowly gaining ground on TikTok, it remains to be seen whether the platform will start offering copyright holders the option to monetize allegedly infringing UGC on the platform as well.

Table 3 provides a summary of the functionality and affordances of TikTok's copyrighted content moderation tools, excluding the content monetization option, for which no verifiable public data are available.

Table 3. Affordances of TikTok's copyright management tools

	Copyright Infringement Report	Filtering system (ensuring unavailability of content on TikTok European Union)
Functionality	Notice-and-takedown	filtering + notice-and-staydown
Beneficiaries	Any copyright holder	Any copyright holder
Eligibility and number of users/uses	Open to everyone; in the first half of 2022, 94,427 copyright removal reports were submitted ²⁷⁶	No eligibility requirements but request <i>Ex ante</i> is reviewed for "accuracy, validity, and completeness" <i>number of users unknown.</i>
Automation	Low	Low
Available copyright management actions	Content removal	Blocking (automatically)

4. *Third-Party Providers of Content Recognition Tools*

Importantly, OCSSPs sometimes deploy—in addition to their in-house solutions—content recognition technologies provided by third-party vendors or service providers. Examples of entities offering such services are Audible Magic (audio and video) and Pex (audio and video). An essential difference with the in-house tools is that rightholders register their content directly with the third-party provider and not with the platforms. Depending on the platforms that implement the respective third-party technology—and thereby bear the costs of the service—the registered reference files are continuously

275. Alexandra Bruell, *TikTok Is Launching Ad Product for Publishers and Giving Them 50% Cut*, WALL ST. J. (May 3, 2023), <https://www.wsj.com/articles/tiktok-is-launching-an-ad-product-for-publishers-and-giving-them-a-50-cut-cff0c9a0>.

276. *Intellectual Property Removal Requests Report January 1, 2022 – June 30, 2022*, TIKTOK (Nov. 29, 2022), <https://www.tiktok.com/transparency/en/intellectual-property-removal-requests-2022-1/>.

checked against new content uploaded by the users of these platforms. In that sense, the third-party providers function as intermediaries between rightholders and platforms.

Audible Magic offers a fingerprinting-based content identification tool for audio and video files, which has been implemented by various OCSSPs such as Tumblr, Twitch, and Vimeo.²⁷⁷ Until recently, Facebook/Meta also used the company's technology to match audio files in tandem with its proprietary Rights Manager.²⁷⁸ However, this partnership appears to have been terminated in 2022.²⁷⁹ Rightholders can register their media assets in Audible's Authoritative Registry, which contains millions of digital fingerprints. During the registration process, rightholders provide the service with digital or physical copies of their works, basic information about the work (song titles, artist names, record labels, show titles, season and episode numbers), and designated business rules, i.e., the preferred actions to be taken in the event of a match. The business rules are equivalent to the match policies and match rules/actions in Content ID and Rights Manager respectively,²⁸⁰ and may differ for each platform. Hence, the same copyrighted work could be blocked at one platform and allowed or monetized at others.²⁸¹ Platforms that license Audible's database and recognition technology continuously translate newly uploaded UGC into machine-readable data which are forwarded to Audible Magic in the form of identification requests. Audible Magic processes these identification requests and returns the match results and business rules associated with the matched works back to the platforms. Notably, Audible Magic merely communicates the business rules to platforms. Their application—i.e., the actual blocking or monetization of content—is carried out by the platforms.²⁸²

Another fingerprinting-based solution available on the market is the “Attribution Engine” developed by technology company Pex. Its workings are

277. *Customers and Partners*, AUDIBLE MAGIC, <https://www.audiblemagic.com/customers-partners/> (last visited Mar. 9, 2023).

278. QUINTAIS ET AL., *supra* note 25, at 260–61, 265.

279. Facebook is not included in the list of customers and partners on the Audible Magic website. *See Customers and Partners*, *supra* note 277.

280. Audible Presentation, European Commission, Recording of the Fourth Meeting of the Stakeholder Dialogue on Article 17 of the Directive on Copyright in the Digital Single Market (Dec. 16, 2019) [hereinafter Article 17 Dialogue Recording, Audible Presentation]; *see also What are business rules?*, AUDIBLE MAGIC, <https://support.audiblemagic.com/hc/en-us/articles/7576145385619-What-are-business-rules-> (last visited Oct. 17, 2023).

281. Audible's slogan is, notably, “Accelerating the distribution *and monetization* of content through the digital media ecosystem.” AUDIBLE MAGIC, <https://www.audiblemagic.com/> (emphasis added).

282. *Id.*

similar to Audible Magic's system. Rightholders register their content (videos and sound recordings) in the Asset Registry and set their preferred licensing policies: monetize, block, apply a customized license, or apply a free license. Fingerprints of UGC uploaded to platforms are transmitted to the Attribution Engine. In the event of a match, the platform is informed of the rightholder and reference file in question as well as the pre-defined policy for that content.²⁸³ Unlike Audible Magic, Pex also offers a dispute resolution service to platforms, which is incorporated in the Attribution Engine. When uploaders do not agree with the applied policy, they can raise a dispute. The platform, in turn, can register the dispute via an application programming interface (API) with the Attribution Engine, which will then verify the dispute and inform the rightholder. If the rightholder decides to stick to the claim and the uploader still disagrees with it, parties have the option to request neutral copyright experts appointed by the World Intellectual Property Organization (WIPO) Arbitration and Mediation Center to review the case. Platforms complying with the WIPO panel's decision are indemnified by Pex from any legal risk. When the dispute resolution process is exhausted, parties are free to resort to other legal remedies.²⁸⁴

In sum, by identifying allegedly infringing UGC and communicating rightholders' preferred copyright enforcement actions to OCSSPs, third-party content recognition tools complement in-house tools and enable rightholders to moderate their content and enforce their rights on online platforms. It must be emphasized, however, that third-party providers do *not* apply the pre-defined match policies in practice. This remains at the discretion of the OCSSPs and rightholders.

C. HUMAN RIGHTS DEFICITS

The case studies above indicate that UGC monetization is a common practice among copyright holders, and at least the most popular on YouTube.²⁸⁵ However, there are still significant gaps in what is known about monetization on OCSSPs.

Of the four platforms discussed above, YouTube has arguably made the most information available about its systems and tools. But even in this case,

283. *Attribution Engine*, PEX, <https://pex.com/products/attribution-engine/> (last visited Oct. 17, 2023).

284. *Id.*; see also *Pex Partners with World Intellectual Property Organization Arbitration and Mediation Center Providing First Neutral Copyright Dispute Resolution Procedure*, PEX (Sept. 30, 2021), <https://pex.com/blog/pex-partners-with-world-intellectual-property-organization-arbitration-and-mediation-center-providing-first-neutral-copyright-dispute-resolution-procedure/>.

285. See *supra* Section II.B; Grosse Ruse-Khan, *supra* note 180.

much remains unclear. First, the data published by YouTube on UGC monetization via Content ID is aggregated globally; the lack of country-by-country data makes legal and empirical analysis of this phenomenon challenging given the territorial nature of copyright. Second, there is no detailed information on how rightholders can set thresholds for matching content. In the European Union at least, this is crucial for the fundamental rights assessment of such systems. Third, beyond the option of setting thresholds for matching content, there is little to no information on how these systems account for the individual context surrounding uses that are permitted by law, such as use for the purposes of parody, caricature, and pastiche protected under Article 17(7) of the CDSMD.

As regards Meta's Rights Manager, little information is available on the use of the tool in practice. Meta's 2022 Transparency Report on Intellectual Property²⁸⁶ addresses only its notice-and-takedown system ("Copyright Report Form") but lacks data on Rights Manager. It is therefore unclear how many rightholders are currently using the tool, how often rightholders on Facebook and Instagram (in the European Union and worldwide) opt for monetization, how often disputes are raised, and so on. It is also not clear from publicly available information what happens to the ad earnings during an ongoing dispute.

Equally remarkable is TikTok's general lack of information on the workings of its *ex ante* copyright filtering system and its new monetization program, which could potentially form the basis for UGC monetization by rightholders in addition to the platform's core business of UGC licensing agreements with rightholders.²⁸⁷

Considering the above, one important conclusion of our analysis is the need for heightened transparency and increased access to content moderation data held by platforms. This is crucial not only for researchers to study the activity of platforms in a relatively unregulated content moderation space (here: monetization of UGC), but also to enable evidence-based policy making in this area.²⁸⁸ In this respect at least, the rules in the DSA on statement of

286. *Intellectual Property*, META (Aug. 16, 2023), <https://transparency.fb.com/data/intellectual-property/> (providing data from the first half of 2022).

287. Grosse Ruse-Khan, *supra* note 180 (noting the focus of TikTok on the licensing approach).

288. See SEBASTIAN FELIX SCHWEMER, CHRISTIAN KATZENBACH, DARIA DERGACHEVA, THOMAS RIIS & JOÃO PEDRO QUINTAIS, *IMPACT OF CONTENT MODERATION PRACTICES AND TECHNOLOGIES ON ACCESS AND DIVERSITY* 67 (2023) (reaching a similar conclusion on the basis of legal and empirical research).

reasons should provide much needed data on the workings of monetization systems.²⁸⁹

Based on the information that *is* publicly available, however, we can identify at least three human rights issues that arise from UGC monetization as currently implemented by platforms and rightholders: (1) the misappropriation of transformative UGC by third-party rightholders even though that content falls within the scope of copyright limitations that support freedom of expression (as discussed in Section III.C.1); (2) the encroachment upon UGC creator copyright which falls under the fundamental right to property in line with Article 17(2) of the CFR (as discussed in Section III.C.2); and the discriminatory treatment of UGC creators (as discussed in Section III.C.3).

1. *Misappropriation of Freedom of Expression Spaces*

The first issue concerns freedom of expression. As explained in Section II.B.2, the CJEU confirmed in the *Poland* decision that copyright limitations supporting freedom of expression, such as the right of quotation and the exemption of parody, constitute “user rights.”²⁹⁰ Despite our criticism of the judgment, this aspect is a positive development (as explained in Section II.B.3). Article 17(7) of the CDSMD confirms the elevated status of copyright limitations serving quotations, parodies, pastiches, etc. Article 17(7), second paragraph, even imposes an obligation on E.U. Member States to immunize these areas of freedom from filtering measures that could prevent the online publication and sharing of transformative UGC (as explained in Section II.B.3). Placing these developments in the context of the broader discussion on public domain preservation,²⁹¹ it can be said that the CJEU and the E.U. legislature have created robust areas of freedom by taking steps to keep these forms of transformative use outside the scope of copyright exclusivity. Relying on Yochai Benkler’s public domain concept that includes sufficiently clear, “easy” cases of permitted use, it can be added that the court and the E.U. legislature have made these user rights part of “the range of uses of

289. *See supra* Section III.A.3.b.

290. CJEU, 26 April 2022, case C-401/19, *Poland v. Parliament and Council*, ¶¶ 87–88; CJEU, 29 July 2019, case C-516/17, *Spiegel Online*, ¶¶ 50–54; CJEU, 29 July 2019, case C-469/17, *Funke Medien NRW*, ¶¶ 65–70.

291. For an overview and core arguments, see SENFILEBEN, *supra* note 158, at 26–47, 280–283, 357–373.

information that any person is privileged to make absent individualized facts that make a particular use by a particular person unprivileged.”²⁹²

Against this background, the corrosive effect of UGC monetization in this freedom of expression space clearly comes to light. Considering the “user right”-status in CJEU jurisprudence and the confirmation of the crucial importance of this habitat for freedom of expression in Article 17(7) of the CDSMD, European Union and Member State authorities are expected to preserve this part of the public domain. Leaving the further regulation of this freedom of expression space to online platforms and rightholders in the creative industry, the State outsources a central aspect of the obligation to safeguard human rights. The result is as problematic as it is predictable: without any clear legal basis for the appropriation and exploitation of transformative UGC, existing moderation systems allow copyright holders with access to these systems to monetize transformative UGC and usurp this freedom of expression space.

Under Articles 5(3)(d) and (k) of the InfoSoc Directive and Article 17(7) of the CDSMD, quotations for criticism or review, as well as parodies, caricatures, and pastiches, require neither the authorization of the copyright holder nor the payment of remuneration. In *VG Wort*, the CJEU clarified that any authorization which a rightholder may give in such a case “is devoid of legal effects”²⁹³ because the statutory exemption places the use beyond the reach of any license or authorization. Hence, the fact that rightholders opting for monetization tolerate the use does not justify the channeling of advertising revenue to the creative industry. This is a negative consequence of the reliance on industry cooperation that is a central characteristic of the outsourcing tendency discussed *supra* Section II.A.2.

As an author of this Article, Martin Senftleben, has argued elsewhere, national legislation in the European Union may maximize the freedom of expression space called into existence by Articles 5(3)(d) and (k) of the InfoSoc Directive and Article 17(7) of the CDSMD by giving the open-ended concept of “pastiche” a broad meaning and bringing a wide variety of UGC, including the whole spectrum of memes and mash-ups, within its scope.²⁹⁴ In such a case, it would make sense to combine the broadening of the freedom of expression space with the payment of fair compensation to collecting societies

292. Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 NYU L. REV. 354, 362–63 (1999). For a more detailed discussion of this public domain concept, see SENFLEBEN, *supra* note 158, at 282–88.

293. CJEU, 27 June 2013, joined cases C-457/11 to C-460/11, *VG Wort*, ¶ 37.

294. Senftleben, *supra* note 137, at 316–23.

for the incorporation of protected third-party materials.²⁹⁵ In this vein, Section 5(2) of the German Act on the Copyright Liability of Online Content Sharing Service Providers creates a non-waivable right of authors to “appropriate remuneration” that can only be assigned in advance to a collecting society.²⁹⁶ Evidently, this solution aims at the creation of an additional revenue stream that flows directly to individual creators and not to exploiters of their works in the creative industry.²⁹⁷

The UGC monetization mechanism on online platforms is markedly different. First, it is unlikely to maximize the freedom of expression space on the basis of a flexible, broad interpretation of the pastiche exemption. To the contrary, the direct liability risk arising from Article 17(1) of the CDSMD will most probably lead to a restrictive interpretation of user rights and overblocking (see *supra* Section II.A.3). This only maximizes monetization options for larger rightholders participating in the system. Second, the advertising revenue is not paid to collecting societies. Hence, individual creators of third-party material woven into UGC cannot directly benefit from the additional source of income, either because they are not eligible to access the monetization system or because the rights revenue may not flow downstream to them from the enterprise rightholders that claim it.²⁹⁸ In a nutshell: as currently designed and implemented, UGC monetization via online platforms fails to preserve the freedom of expression space for quotations, parodies, pastiches, etc. Instead, it constitutes a problematic exponent of the outsourcing of human rights obligations to online platforms and large rightholders.

From a human rights perspective, the main deficit caused in this scenario is that moderation systems of the biggest platforms allow large rightholders (eligible to access such systems) to appropriate and exploit as their own transformative UGC that E.U. law explicitly exempts from their permission on freedom of expression grounds. Once again: Article 17(7) of the CDSMD requires national laws and competent authorities to ensure that user rights prevail on platforms over a number of notice-and action measures, especially *ex ante* filtering. In practice, however, by outsourcing this human rights

295. Senftleben, *supra* note 8, at 154–62.

296. See Section 5(2) of the German Act on the Copyright Liability of Online Content Sharing Service Providers of 31 May 2021 (Federal Law Gazette I, 1204 (1215)), https://www.gesetze-im-internet.de/englisch_urhdag/index.html.

297. As to this important aspect of remuneration via collecting societies, see Senftleben, *supra* note 17, at 487.

298. This could be the case, *e.g.*, if a music producer claims monetization on the use of a musical composition and sound recording used in UGC but does not share the rights revenue with the composer and/or performer.

responsibility to platforms and copyright holders, the E.U. (and national) legislators allow the development of complex and opaque moderation systems. Such systems bundle together moderation options covered by the E.U. copyright regulatory framework—such as to block and remove UGC—with options that are largely unregulated, like monetization. In doing so, they hide behind the veil of complexity and opaqueness workings of the systems that potentially violate human rights.

In this case, the inability of content recognition tools to identify contextual exceptions (parody, quotation, pastiche, etc.), enables that vast amounts of UGC are checked for non-contextual matches with reference files, empowering rightholders to claim that content as their own. Depending on how the thresholds are set in platforms' match policies, rules, or actions, rightholders will automatically have the option to monetize that content. Since monetization is a popular moderation option, it is likely that UGC protected by user rights is unlawfully monetized on a regular basis. This provides yet another argument to limit the permissibility of preventive filtering to narrowly defined instances of “manifestly infringing” content (as discussed in Section II.B.2).

UGC monetization also has a subtle side effect that can be placed in the context of the above-described concealment strategies (as discussed in Section II.B.1). If rightholders do not opt to block or remove content, the illusion is created that no freedom of expression harm occurs. After all, the content remains publicly available. However, by monetizing such content, rightholders de facto claim ownership and exclusivity over transformative content permitted by law and therefore remove it from the freedom of expression zone that enables follow-on creation. If monetization goes unchallenged, as it often does, the UGC in question is then considered for all practical purposes as exclusively owned and commercially exploited by the rightholder who claims it, irrespective of its legal qualification as a permitted free use belonging to the public domain. This human rights deficit, in turn, leads to another, as it thwarts the ability of users to potentially exercise their own copyright over the UGC they created.

2. Encroachment Upon the Fundamental Right to Copyright of UGC Creators

A second and closely related problem is that of unremunerated user creativity and misappropriation of monetary rewards by copyright holders that have access to platforms' content recognition tools. This problem leads to a

human rights deficit because it encroaches on the remunerative dimension of the user's fundamental right to property—in this case intellectual property.²⁹⁹

UGC may consist of self-created material, public domain material, authorized and unauthorized takings of copyrighted material, or a combination of the previous. Oftentimes, UGC is the product of a certain amount of *creative effort*, whether in creating the content from scratch or in adapting existing works to create a new one. Unlike in U.S. law, there is no harmonized concept of “derivative work” in E.U. law; there is also no harmonized right of adaptation but rather a broadly interpreted right of reproduction.³⁰⁰ This means that although exceptions or limitations for transformative uses—which may qualify as defenses or user rights³⁰¹—are to some extent harmonized in Article 17(7) of the CDSMD, national laws diverge in how they deal with different types of transformative works. Naturally, the general EU standard of originality that requires a work to be the “author's own intellectual creation”³⁰² applies to transformative or derivative works.³⁰³ Thus, considering the low threshold for originality in E.U. law, it is likely that UGC will often qualify as copyrighted content, meaning that the user-uploader should be entitled to monetize it, or at least part thereof.

If the UGC in question does qualify as copyrighted content, two main scenarios arise in relation to content where traces of a third-party reference file are matched in platforms' moderation systems. In both scenarios, as we shall see, the fact that the law outsources the regulation of monetization to platforms and larger rightholders, and the opaque practices of these players in

299. In the EU, copyright as a type of intellectual property right is protected in Article 17(2) CFR. For an analysis of this provision and its interpretation by the CJEU, see Jonathan Griffiths & Luke McDonagh, *Fundamental Rights and European Intellectual Property Law - The Case of Art 17(2) of the EU Charter* (2011), <https://papers.ssrn.com/abstract=1904507>; Peter Oliver & Christopher Stothers, *Intellectual Property Under the Charter: Are the Court's Scales Properly Calibrated?*, 54 COMMON MKT. L. REV. 517 (2017), <https://papers.ssrn.com/abstract=3042530>.

300. Generally on this topic, see HUGENHOLTZ & SENFTLEBEN, *supra* note 153. See Martin Senftleben, *Flexibility Grave – Partial Reproduction Focus and Closed System Fetishism in CJEU, Pelham*, 51 INT'L REV. INTELL. PROP. & COMP. L. 751, 758–60 (2020) (discussing the “backdoor” harmonization strategy developed by the CJEU).

301. See Rendas, *supra* note 136.

302. See, e.g., P. Bernt Hugenholtz & João Pedro Quintais, *Copyright and Artificial Creation: Does EU Copyright Law Protect AI-Assisted Output?*, 52 INT'L REV. INTELL. PROP. & COMP. L. 1190 (2021) (discussing the modern application of this standard).

303. National laws may contain rules on whether the use of a pre-existing work without permission in a transformative work constitutes copyright infringement. This topic is not harmonized under E.U. law. However, this aspect should not influence the qualification of the transformative work as a copyrighted “work,” provided it meets the originality standard in E.U. law.

this regard, leads to an encroachment upon UGC creators' fundamental right to property, including copyright as a form of intellectual property.³⁰⁴ This interference with the right to property deprives UGC creators of legitimate rights revenue relating to their own creative contributions.

In the first scenario, third-party material incorporated in the transformative UGC and identified via a platform's content recognition tools is *not* covered by a transformative use exception, like parody, caricature, or pastiche. In this case, application of the legal rules would leave the rightholder of the pre-existing work with two options: (1) accept to share the revenue with the user-uploader or (2) request the content's takedown on the grounds of unauthorized reproduction of the original work in part and its making available online. However, current practices and systems of platforms enable the rightholder to appropriate the entirety of the monetization revenue if they decide to leave the content up.

In the second scenario, the third-party material incorporated in the transformative work *is* covered by an exception or limitation, thus enabling the use of the third-party material in the UGC. However, the content moderation system—which is incapable of determining the contextual lawful use—nevertheless allows rightholders to monetize exclusively. In this case, subject to specific national rules (e.g., statutory licensing regimes for these uses), it follows from our analysis of E.U. law that user-uploaders should receive the entirety of the available monetization revenue for what is effectively a commercial exploitation of their works.

To the best of our knowledge, in neither scenario the content moderation systems we examined contemplate monetization for the UGC creator as default options in their matching options, rules or procedures. Rather, existing systems are designed to empower legacy enterprise rightholders, leaving follow-on users-creators only with the option to complain *ex post*. Systems like Content ID and Rights Manager enable (mostly large) rightholders to immediately apply a monetization action when segments of UGC match with reference files, without requiring the rightholders to prove copyright infringement. The burden to argue for the applicability of an exception falls on users-creators, who must file disputes and counter-notices and therefore “fight” for the monetization of their content, assuming they are eligible for monetization in the first place under the platforms' policies.³⁰⁵ As the data examined above suggests, these counterclaims rarely occur.

304. E.U. Charter of Fundamental Rights art. 17(2).

305. *See* Quintais, De Gregorio & Magalhães, *supra* note 198.

In our view, it is doubtful whether the new rules in the CDSM Directive and the DSA will improve this. Rather, they appear to create a particular challenging landscape for users, due to the potential for obfuscation of the complaint procedure offered by the overlapping application of legal regimes that outsource these procedures to platforms. As noted, monetization restrictions may be appealed—both via in-platform procedures and certified out-of-court dispute settlement bodies—under Articles 20 and 21 of the DSA (as discussed in Section III.A.3.b). However, this means that for the same item of UGC in one platform, part of the complaint and redress mechanism is regulated by Article 17(9) of the CDSMD (for UGC that is blocked or removed), whereas the other part is governed by Article 20 of the DSA (for UGC that is monetized).

The result, then, is that through the strategies of outsourcing and concealing, the fundamental right of UGC creators to be remunerated for their works through monetization is mostly eliminated or reduced to a potentially ineffective right of complaint.

3. *Unequal Treatment and Discrimination of UGC Creators*

As Martin Husovec and João Pedro Quintais argue, the way the design of Article 17 of the CDSMD favors large-scale or enterprise rightholders gives rise to the question of whether it violates the principle of equal treatment in Article 20 of the Charter.³⁰⁶ Although not regularly applied in the context of intellectual property rights, the principle of equal treatment is no stranger to E.U. copyright law and to the remuneration interests of authors. In the area of collective licensing and fair compensation, for instance, the CJEU has clarified that Member States cannot impose fair compensation rules that would unjustifiably “discriminate between the different categories of economic operators marketing comparable goods covered by the private copying exception or between the different categories of users of protected subject matter.”³⁰⁷

Other judgements regarding private copying, such as *VG Wort* and *Microsoft Mobile Sales International*, have further detailed the interpretation of equal treatment.³⁰⁸ These cases suggest that the principle of equal treatment

306. Martin Husovec & João Quintais, *Too Small to Matter? On the Copyright Directive’s Bias in Favour of Big Right-Holders*, in GLOBAL INTELLECTUAL PROPERTY PROTECTION AND NEW CONSTITUTIONALISM: HEDGING EXCLUSIVE RIGHTS (Tuomas Mylly & Jonathan Griffiths eds., 2021).

307. *Copydan Båndkopi v. Nokia Danmark A/S* [2015] ECLI:EU:C:2015:144, ¶ 33.

308. *Verviwertungsgesellschaft Wort (VG Wort) v. Kyocera and Others* and *Canon Deutschland GmbH and Fujitsu Technology Solutions GmbH and Hewlett-Packard GmbH v. Verviwertungsgesellschaft Wort (VG Wort)* [2013] ECLI:EU:C:2013:426, especially ¶¶ 73–79; *Microsoft Mobile Sales International*

may require lawmakers to establish “objective and transparent criteria where private ordering (based on existing rules) cannot guarantee this.”³⁰⁹

How does this translate to Article 17 of the CDSMD? The argument of unequal treatment is not easy to make, since in this instance the risk of discriminatory treatment is buried “under layers of technicalities of E.U. copyright law.”³¹⁰

The departure point for this argument is that the default liability and licensing obligation dimension of Article 17 of the CDSMD—including the best efforts obligation to license—provides an advantage to large rightholders. To avoid liability, OCSSPs must proactively approach rightholders to obtain an authorization. To save time and resources, OCSSPs are likely to focus on easily identifiable and locatable rightholders (as discussed in Section II.A.1). In contrast, small rightholders and individual creators are disadvantaged as they must find and contact OCSSPs themselves, monitor the market, review use of their works by third parties, and approach each platform separately.³¹¹

Moreover, the liability exemption mechanism in Articles 17(4)(b) and (c) of the CDSMD places individual UGC creators, who rely on transformative use exceptions, at a disadvantage in relation to larger rightholders. Through the outsourcing and concealment strategies we have described, the design and control of UGC moderation systems are left to the private ordering of platforms and larger rightholders. The way these systems and practices have developed enables rightholders to appropriate UGC via monetization tools, despite it not being regulated in Article 17. Individual creators, which in theory benefit from freedom to engage in transformative uses and are entitled to copyright protection for their creative contributions to UGC, are in practice left with ineffective ex post complaint and redress tools.

As recognized by the court in *Poland*, the justification for tolerating the encroachment of Article 17(4) of the CDSMD upon freedom of expression is the objective of ensuring a high level of protection for copyright holders under Article 17(2) of the Charter. The court relied specifically on the appropriateness and effectiveness of the liability exemption mechanism to achieve this aim.³¹² However, this is only the case if the mechanism is

Oy and Others v. Ministero per i beni e le attività culturali (MiBAC) and Others [2016] ECLI:EU:C:2016:717, especially ¶¶ 44–50.

309. Husovec & Quintais, *supra* note 306.

310. *Id.*

311. See *supra* Section II.A.1; see also Guidance Art. 17 CDSMD, *supra* note 18, at n 21); QUINTAIS ET AL., *supra* note 25.

312. CJEU *Poland*, ¶¶ 69, 84.

implemented and interpreted in light of fundamental rights, especially the freedom of expression and other fundamental rights of users.

What appears to have eluded the court is how inroads into the freedom of expression and the right to copyright of UGC creators may lead to their unequal treatment as compared to large-scale rightholders. Following the case law cited above, it is difficult to see how this different treatment between categories of rightholders is non-discriminatory, objectively justified, or socially just.

Importantly, the different pre-existing resources of large rightholders compared to individual UGC creators do not justify the uneven situation described above. In our view, the advantageous position of the first does not arise solely because they are better positioned financially and infrastructurally to internalize and benefit from the complex regime of Article 17 of the CDSMD. Rather, the unequal treatment of creators is a result of the uneven allocation of liability and obligations in the legal regime, and how they are implemented—or taken advantage of—by powerful actors. Naturally, as the court recognized in *Microsoft Mobile Sales International*, Member States cannot rely on market players implementing the provisions to correct discriminatory treatment,³¹³ especially where these might not be aligned with their corporate interests.

In its non-copyright case law, the court has stated that the “legislature’s exercise of its discretion must not produce results that are manifestly less appropriate than those that would be produced by other measures that were also suitable for those objectives.”³¹⁴ It follows that when implementing and interpreting Article 17 of the CDSMD, national legislators should consider measures to ameliorate or solve the unequal treatment described above.³¹⁵ Our analysis already points towards some solutions in this respect: clarification of the scope of matching as applying only to “manifestly infringing” UGC, which should have downstream positive effects in reducing abuses of the “monetization” option (in the sense that less matches will lead to less monetization claims and UGC appropriation); additional transparency as regards monetization actions on platforms; consideration of collective licensing schemes with non-waivable remuneration rights for individual creators; better recognition of the legal position of UGC creators; and design

313. *Microsoft Mobile Sales International*, *supra* note 308, at ¶ 49. As the court notes, ignorance of a problem with private contracts provides “no guarantee” that two groups in comparable situations will eventually be treated equally.

314. CJEU, 16 December 2008, case C-127/07, *Arcelor Atlantique and Lorraine and Others*, ¶ 59.

315. *See Husovec & Quintais*, *supra* note 306.

changes to platforms' systems to enable them to effectively monetize their own creative contributions to transformative UGC.

IV. CONCLUSION

A closer inspection of content moderation rules in the CDSM Directive and the DSA confirms a worrying tendency of reliance on industry cooperation and user activism to safeguard human rights. Instead of putting responsibility for detecting and remedying human rights deficits in the hands of the state, the E.U. legislature prefers to outsource this responsibility to private entities, such as OCSSPs, and conceal potential violations by leaving countermeasures to users. The risk of human rights encroachments is compounded by the fact that, instead of exposing and discussing the corrosive effect of human rights outsourcing in Article 17 of the CDSMD, the CJEU has rubberstamped this regulatory approach in its *Poland* decision.

As a welcome departure from the court-approved outsourcing and concealment scheme, Article 17(7) of the CDSMD obliges Member States to ensure that transformative UGC, containing quotations, parodies, pastiches, etc., survives content filtering and can be uploaded to online platforms. In addition, audit reports evolving from Article 37 of the DSA can offer important information for the European Commission to identify and eliminate human rights violations. Both exceptions to the rule of outsourcing to private entities, however, are currently underdeveloped. E.U. Member States have not consistently taken specific legislative action to shield transformative UGC from content filtering measures. The success of the DSA cascade of interventions—from audit reports to non-compliance decisions and fines—is unclear.

A case study shedding light on the largely uncharted territory of UGC monetization—the most common rightholder reaction to the detection of traces of protected third-party material in UGC—confirms that outsourcing and concealment strategies put human rights at risk. E.U. law gives platforms far-reaching autonomy to establish their own governance policies in relation to UGC monetization. The DSA only provides certain ex post mechanisms, such as transparency obligations and complaint systems. In this unregulated space, much remains unclear. The lack of country-by-country data makes a legal and empirical analysis of monetization practices challenging. In particular, there is no detailed information on how rightholders can set thresholds for matching content. In the European Union, this is crucial information for the fundamental rights assessment of such systems. Finally, beyond the option of setting thresholds for matching content, there is little information on how these systems account for the individual context surrounding uses that are

permitted by law, such as use for the purposes of parody, caricature, and pastiche protected under Article 17(7) of the CDSMD.

From a human rights perspective, the main deficit caused in this opaque environment is that content moderation systems established by the biggest platforms allow larger rightholders to appropriate and exploit as their own transformative UGC that, under E.U. law, is explicitly exempt from their permission on freedom of expression grounds. Outsourcing the human rights responsibility to platforms and copyright holders, the E.U. (and national) legislators allow the development of complex moderation systems with monetization options that disregard freedom of expression spaces. The current regime further leads to an encroachment on UGC creators' fundamental right to (intellectual) property, as it deprives them of the opportunity to benefit from revenues generated by their transformative content. Finally, we argue that the existing framework leads to the unequal treatment of UGC creators. This results from the uneven allocation of liability and obligations, and their practical implementation by powerful platforms and large rightholders.

To minimize the corrosive effect of monetization systems on the fundamental rights of creative users, it is important to reduce the impact of content filtering mechanisms—and related monetization options for rightholders—from the outset. Considering the outcome of the *Poland* decision, a first step in this direction is the confinement of content filtering to “manifestly infringing” UGC.³¹⁶ Going beyond the *Poland* ruling, however, it should also be considered to introduce collective licensing schemes with non-waivable remuneration rights for individual UGC creators. In addition, it is important to redesign monetization systems and make them inclusive, in the sense of offering creative users monetization opportunities that are equivalent to those available to large rightholders.

316. Cf. CJEU, 26 April 2022, case C-401/19, *Poland v. Parliament and Council*, ¶¶ 84–86; *QUINTAIS ET AL.*, *supra* note 25.