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# Comment of the European Copyright Society on Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market Into National Law

prepared by Axel Metzger\* and Martin Senftleben\*\*

Date: 27 April 2020

## 1. Introduction

The European Copyright Society (ECS) was founded in January 2012 with the aim of creating a platform for critical and independent scholarly thinking on European Copyright Law. Its members are renowned scholars and academics from various countries of the European Union, seeking to promote their views of the overall public interest. The Society is not funded, nor has been instructed, by any particular stakeholders. This ECS Opinion concerns the implementation of Article 17 of the Directive on Copyright in the Digital Single Market (DSM Directive or DSMD)<sup>1</sup> into national law. Article 17 DSMD is one of the most complex – and most controversial<sup>2</sup> – provisions of the new legislative package which EU Member

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<sup>1</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, *Official Journal of the European Communities* 2019 L 130, 92.

<sup>2</sup> As to the debate during the legislative process (at the time concerning Article 13 of the proposed new copyright legislation), see Martin R.F. Senftleben/Christina Angelopoulos/Giancarlo F. Frosio/Valentina Moscon/Miguel Peguera/Ole-Andreas Rognstad, “The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform”, *European Intellectual Property Review* 40 (2018), 149; Christina Angelopoulos, “On Online Platforms and the Commission’s New Proposal for a Directive on Copyright in the Digital Single Market”, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2947800](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947800); Giancarlo F. Frosio, “From Horizontal to Vertical: An Intermediary Liability Earthquake in Europe”, *Oxford Journal of Intellectual Property and Practice* 12 (2017), 565-575; Giancarlo F. Frosio, “Reforming Intermediary Liability in the Platform Economy: A European Digital Single Market Strategy”, *Northwestern University Law Review* 112 (2017), 19; R.M. Hilty/V. Moscon V. (eds.), “Modernisation of the EU Copyright Rules – Position Statement of the Max Planck Institute for Innovation and Competition”, *Max Planck Institute for Innovation and Competition Research Paper* No. 17-12, Max Planck Institute for Innovation and Competition: Munich 2017; R.M. Hilty/V. Moscon, “Contributions by the Max Planck Institute for Innovation and Competition in Response to the Questions Raised by the Authorities of Belgium, the Czech Republic, Finland, Hungary, Ireland and the Netherlands to the Council Legal Service Regarding Article 13 and Recital 38 of the Proposal for a Directive on Copyright in the Digital Single Market”, available at: <http://www.ip.mpg.de/>; CREATE et al., “Open letter to Members of the European Parliament and the Council of the European Union”, available at: <http://www.create.ac.uk/policy-responses/eu-copyright-reform/>; E. Rosati, “Why a Reform of Hosting Providers’ Safe Harbour is Unnecessary Under EU Copyright Law”, *CREATE Working Paper* 2016/11 (August 2016), available at: <https://ssrn.com/abstract=2830440>; S. Stalla-Bourdillon/E. Rosati/M.C. Kettemann et al., “Open Letter to the European Commission – On the Importance of Preserving the Consistency and Integrity of the EU Acquis Relating to Content Monitoring within the Information Society”, available at: <https://ssrn.com/abstract=2850483>.

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States must transpose into national law by 7 June 2021.<sup>3</sup> Seeking to contribute to the debate on implementation options, the following Opinion addresses several core aspects of Article 17 DSMD that may play an important role in the national implementation process.

The following section 2 deals with the concept of online content-sharing service providers (OCSSPs)<sup>4</sup> before section 3 embarks on a discussion of the licensing and content moderation duties which OCSSPs must fulfil in accordance with Article 17(1) and (4). Section 4 focuses on the copyright limitations mentioned in Article 17(7) that support the creation and dissemination of transformative user-generated content (UGC). It also discusses the appropriate configuration of complaint and redress mechanisms set forth in Article 17(9) that seek to reduce the risk of unjustified content removals. Section 5 addresses the possibility of implementing direct remuneration claims for authors and performers. Finally, section 6 includes the private international law aspect of applicable law – an impact factor that is often overlooked in the debate.

## 2. Definition of OCSSPs – Article 2(6) DSMD

### 2.1 OCSSPs covered by Article 2(6)

Article 2(6) DSMD clarifies that the OCSSP concept underlying Article 17 DSMD covers providers of an information society service “of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes.” This definition leaves room for national legislation to introduce certain nuances with regard to *de minimis* activities. The reference to “a large amount of copyright-protected works or other subject matter” indicates that not each and every online platform with certain UGC features is automatically subject to the new liability regime following from Article 17 DSMD. By contrast, Recital 63 DSMD points in the direction of a fine-grained assessment “made on a case-by-case basis” – an assessment that “should take account of a combination of elements, such as the audience of the service and the number of files of copyright-protected content uploaded by the users of the service.”

As to the breadth of *de minimis* exclusions, Recital 62 DSMD confirms that the OCSSP definition is intended to target “only online services that play an important role on the online content market by competing with other online content services, such as online audio and video streaming services, for the same audiences.” The Recital also underlines that online platforms fall outside the scope of the OCSSP concept if they have a main purpose “other than that of enabling users to upload and share a large amount of copyright-protected content with the purpose of obtaining profit from that activity.” Article 2(6) DSMD specifies in this regard that “not-for-profit online encyclopedias, not-for-profit educational and scientific repositories, open source software-developing and-sharing platforms, providers of electronic communications services as defined in Directive (EU) 2018/1972, online marketplaces, business-to-business cloud services and cloud services that allow users to upload content for their own use, are not ‘online content-sharing service providers’ within the meaning of this Directive.” In addition, Article 17(6) provides a privilege for start-up platforms which have

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<sup>3</sup> Article 29(1) DSMD.

<sup>4</sup> See the definition in Article 2(6) DSMD.

been available to the public in the Union for less than three years and which have an annual turnover below 10 million €.

While these elements of the OCSSP concept do not seem to pose particular implementation challenges, the substantive requirement of organizing and promoting copyright-protected works or other protected subject matter uploaded by its users for profit-making purposes raises the question of the requisite degree of organization and promotion activities. Is it sufficient to offer a general website infrastructure that allows users to organize content more or less independently? Is the integration of a search tool sufficient? Or does the requirement of content organization imply that an OCSSP must provide a fixed framework of categories and be actively involved in the consistent organization of protected material in accordance with its own organization principle? If the latter, stricter standard is applied, social media services may fall outside the OCSSP definition because they leave a considerable degree of organization options and duties to their users. Similar questions arise from the promotion requirement. Is it necessary to promote specific forms of content that can be found on an online platform? Or does it suffice to promote more generally interactive features of the platform that enable users to upload content? Again, the stricter standard focusing on the promotion of concrete forms of content may lead to an OCSSP concept that does not cover social media services which may advertise their social media functions without announcing specific forms of content.

## 2.2. Implementation in EU Member States

Member States implementing Article 2(6) and 17 DSMD should make clear in their legislation or in the official memorandum that online sharing services that do not organize and promote the materials uploaded by their users are not held liable for copyright infringement in accordance with Article 17(1), (4) DSMD. There are numerous simple sharing services which offer users the mere function of uploading materials for the download of specific other users, without any focus on pirated content, search function, structured streams of suitable contents etc. For those simple upload and sharing services, the DSM Directive does not require any of the proactive duties of care as now stated in Article 17 DSMD. Since the level of control and advantages taken from the uploaded contents are much less intensive for those services than for OCSSPs, Member States should continue to apply the general rules for secondary liability combined with a notice-and-take-down approach. In this regard, the safe harbour rules for hosting services as laid down in Article 14 E-Commerce Directive, the ban of general monitoring obligations in Article 15 E-Commerce Directive and the fundamental freedoms of OCSSPs must be respected without restrictions of any kind.<sup>5</sup> The CJEU will have an opportunity to develop a tailor-made regime for those services in the currently pending case *Elsevier/Cyando*.<sup>6</sup> Timely publication of legislative drafts of Member States which propose

<sup>5</sup> Cf. CJEU, 23 March 2010, case C-236/08, *Google and Google France*, para. 114-118; CJEU, 12 July 2011, case C-324/09, *L'Oréal/eBay*, para. 120-122; CJEU, 16 February 2012, case C-360/10, *Sabam/Netlog*, para. 45-51. For commentary, see S. Kulk, *Internet Intermediaries and Copyright Law – Towards a Future-Proof EU Legal Framework*, Utrecht: University of Utrecht 2018; C. Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis*, Alphen aan den Rijn: Kluwer Law International 2016; M. Husovec, *Injunctions Against Intermediaries in the European Union – Accountable But Not Liable?*, Cambridge: Cambridge University Press 2017; M.R.F. Senftleben, “Breathing Space for Cloud-Based Business Models: Exploring the Matrix of Copyright Limitations, Safe Harbours and Injunctions”, *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 4 (2013), 87-103.

<sup>6</sup> See the pending prejudicial questions in CJEU, case C-683/18.

rules along these lines for the future regime of simple sharing services could also be helpful for the CJEU.

### 3. Duties of OCSSPs – Article 17(1) and (4) DSMD

Article 17 represents an innovative concept of an exclusive right: OCSSPs perform an act of communication to the public or an act of making available to the public when they give the public access to copyright-protected works or other protected subject matter uploaded by its users. They are not merely secondarily liable for the infringements committed by their users but directly liable. However, OCSSPs may be exempted from liability if they fulfil the duties of care explicitly stated in Article 17(4). These duties of care are integrated in the scope of the exclusive right itself.<sup>7</sup> The CJEU has paved the way for such a concept of the right of communication to the public.<sup>8</sup> It is nevertheless a remarkable deviation from the traditional way of tailoring exclusive rights. The following sections explain the interplay between the exclusive right of the rightholder and the necessary efforts of the OCSSP to obtain a license (section 3.1), provides guidance on the required use of filtering technology or other efforts to ensure the unavailability of works not licensed (section 3.2) and explores the notice-and-take-down and notice-and-stay-down measures required by Article 17 (section 3.3). It closes with general advice on the implementation of Article 17 into national law (section 3.4).

#### 3.1 Efforts to obtain a license according to Article 17(1) and (4)(a) DSMD

Article 17(1)(2) seems to state the obvious. OCSSPs shall obtain an authorisation from rightholders if they want to avoid being held liable. However, the rights and duties of the rightholder and the OCSSP are more nuanced if Article 17(1) and 17(4)(a) are considered together. According to Article 17(4)(a), an OCSSP is exempted from liability if it makes best efforts to obtain an authorisation from the rightholder (and also complies with the other conditions laid down in lit. b and c). It may therefore suffice to make best efforts to obtain a license to avoid liability. This may appear as a contradiction to Article 17(1) at first glance, but seems reasonable as long as Article 17(1) and 17(4)(a) are interpreted as expressions of the same duty of the OCSSP.<sup>9</sup>

If conceptualized as expressions of the same duty of the OCSSP, Article 17(1) and 17(4)(a) may be applied as a cascade of different rules for different scenarios. The same may be said about the further nuances in Article 17(4)(b) and (c). Obviously, OCSSPs are in compliance with Article 17(1) if they have concluded a license agreement with the rightholders, which today is a common practice for all contents that are “monetized” over OCSSP platforms.

Article 17(4)(a) is applicable if the OCSSP has not (yet) concluded a license agreement. In this case it may be exempted from liability – and as a consequence keep protected materials

<sup>7</sup> For a more detailed discussion of this question, see M. Husovec/J. Quintais, “How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms,” available at: <https://ssrn.com/abstract=3463011>.

<sup>8</sup> CJEU, 8 September 2016, C-160/15, GS Media; CJEU, 26 April 2017, C-527/15, Filmpeleer; CJEU, 14 June 2017, C-610/15, The Pirate Bay.

<sup>9</sup> See Timm Pravemann, “Art. 17 der Richtlinie zum Urheberrecht im digitalen Binnenmarkt - Eine Analyse der neuen europäischen Haftungsregelung für Diensteanbieter für das Teilen von Online-Inhalten”, *Gewerblicher Rechtsschutz und Urheberrecht* 2019, 783 (786)..



on its platform without authorisation<sup>10</sup> – if and as long as it makes best efforts to obtain a license. This raises the question of what best efforts means in this regard. One extreme position would be that the OCSSP must proactively search for each and every item of protected material and its rightholder and offer adequate license conditions.<sup>11</sup> Such an interpretation would entail a general monitoring obligation for all uploaded content,<sup>12</sup> and conflicts with Article 17(8) DSMD, Article 15 E-Commerce Directive and the fundamental freedom of OCSSPs to conduct a business pursuant to Article 16 of the Charter of Fundamental Rights.<sup>13</sup> Moreover, the danger of overblocking would be serious. The other extreme position would be to oblige the rightholders always to take the first step and inform the OCSSP that protected material is available without a license (or even offer a license?).<sup>14</sup> This would lead to an interpretation of “best efforts” which would allow OCSSPs merely to react to rightholders.

Legislators and judges should avoid such extreme positions and define pragmatic approaches, which balance the interests of both stakeholders.<sup>15</sup> A possible middle ground could be that OCSSPs must contact publicly known rightholders proactively and offer negotiations on licensing terms. This would comprise collective management organisations (CMOs) but also major individual rightholders, which are known in the market for the respective rights/content (e.g. music, film, photographs, games, etc.). In respect of such publicly known rightholders, it seems bearable for OCSSPs to operate proactively. Such negotiations are already the daily business of OCSSPs. Once the OCSSP has offered serious negotiations on license agreements, it should be up to the rightholder to provide the OCSSP with the necessary information on the repertoire owned or represented by the rightholder. To arrive at an appropriate distribution of duties during the pre-contractual negotiation phase, the guidelines can serve as a reference point which the CJEU gave in *Huawei/ZTE* with regard to the FRAND requirement in standard essential patent cases.<sup>16</sup> In this regard, it should be clear that, different from the scenario in *Huawei/ZTE*, the duty to negotiate of the OCSSP under Article 17(4)(a) DSMD does not depend on a dominant position; also the right holder is under no obligation to conclude a license contract. Nevertheless, the guidelines developed in *Huawei/ZTE* for negotiations in good faith may still serve as a blueprint for negotiations under Article 17(4)(a). To offer judges a solid basis for recourse to the *Huawei/ZTE* guidelines in the context of Article 17(4)(a), it seems advisable to include a reference to those pre-contractual obligations in the legislation that transposes the DSM Directive into national law.

10 Thomas Dreier, “Die Schlacht ist geschlagen – Ein Überblick zum Ergebnis des Copyright Package der EU-Kommission”, *Gewerblicher Rechtsschutz und Urheberrecht* 2019, 771 (776).

11 See e.g. the position paper by different rightholders associations during the legislative process, „Europe’s Creators, Cultural and Creative Industries’ Call to the European Council” of 12.4.2018, available at: [https://www.ifpi.org/downloads/EU\\_Creators\\_Cultural\\_and\\_Creative\\_Industries\\_Call\\_to\\_European\\_Council.pdf](https://www.ifpi.org/downloads/EU_Creators_Cultural_and_Creative_Industries_Call_to_European_Council.pdf)

12 Franz Hofmann, “Die Plattformverantwortlichkeit nach dem neuen europäischen Urheberrecht – »Much Ado About Nothing«?”, *Zeitschrift für Urheber- und Medienrecht* 2019, 617 (621).

13 CJEU, 16 February 2017, C-360/10, Sabam/Netlog.

14 Judith Steinbrecher, “Die EU-Urheberrechtsrichtlinie aus Sicht der Digitalwirtschaft - Zeit für Augenmaß und faktenbasierte Gesetzgebung”, *Multimedia und Recht* 2019, 639 (642).

15 Compare Dreier, *supra* note 10, at 776; Opinion of the German Association for Intellectual Property and Copyright Law (GRUR) of 5.9.2019, p. 62 et seq., available at: [http://www.grur.org/uploads/tx\\_gstatement/2019-09-05-GRUR-Stellungnahme\\_zur\\_DSM-und\\_zur\\_Online\\_SatCab-RL\\_endg.pdf](http://www.grur.org/uploads/tx_gstatement/2019-09-05-GRUR-Stellungnahme_zur_DSM-und_zur_Online_SatCab-RL_endg.pdf) [GRUR Opinion].

<sup>16</sup> CJEU, 16 July 2015, case C-170/13, Huawei/ZTE, para. 63-69.

However, if the protected material and the respective rightholder are not publicly known, e.g. if the rights are held by small or medium-sized companies or by individual authors without a collective representation, “best efforts” should not require extensive monitoring and search activities. For those materials, it must suffice for the OCSSP to react immediately to a notice by the rightholder.<sup>17</sup> Before such a notice, the OCSSP can remain passive. This will incentivize smaller rightholders to seek representation by CMOs or other collective entities. Also, Article 12 DSMD may play a role in this regard. The two approaches under Article 17(4)(a) should not be applied in a schematic way as a principle – OCSSP must always be active – and an exception – rightholders must never be active unless there are exceptional circumstances – but rather on a case-by-case basis.<sup>18</sup>

To sum up, the cascade of licensing duties under Article 17(1) and 17(4)(a) should be analysed according to the following scheme:

- 1) Article 17(1): license agreement concluded, no further best efforts required under Article 17(4)(a); (see supra)
- 2) Article 17(4)(a): no license agreement concluded, obvious protected materials and publicly known rightholders → best efforts: OCSSP must actively contact these known rightholders and offer serious negotiations on licensing terms;
- 3) Article 17(4)(a): no license agreement concluded, non-obvious protected materials or rightholders → best efforts: OCSSP can remain passive until rightholders (including CMOs) give notice but must react immediately after receiving such notice.

The testing scheme should be used as a starting point of the analysis. Courts should also take into account, according to Article 17(5), “the type, the audience and the size of the service and the type of works or other subject matter uploaded by the users of the service” but also criteria like the degree of specialisation of the OCSSP in kinds of content, the collective organisation or fragmentation of rights etc.<sup>19</sup> In any case, all measures required from OCSSPs and rightholders must respect the principle of proportionality.

Member States should encourage OCSSPs and rightholders to take part in the stake holder dialogues foreseen in Article 17(10) and develop best practices on a national level which may also include framework agreements, such as agreements between OCCSPs and CMOs, on the best efforts prescribed by Article 17(4). Such practices and agreements on a national level, however, should not undermine the development of pan-European standards. By contrast, they should contribute to the identification of best practices and foster their broader application across EU Member States.

<sup>17</sup> See Rec. 66 para. 2; see also Matthias Leistner, “European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive Compared to Secondary Liability of Content Platforms in the U.S.”, forthcoming *Intellectual Property Journal* 2020, at 26, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3572040](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3572040).

<sup>18</sup> Otherwise the maxim „*exceptiones sunt strictissimae interpretationis*” would be applied with unwanted results; contra GRUR Opinion, *supra* note 15, p. 54 et seq.

<sup>19</sup> Compare Opinion of the German Society for musical performing and mechanical reproduction rights (GEMA) of 6.9.2019, p. 46 et seq., available at: [https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Stellungnahmen/2019/Downloads/090619\\_Stellungnahme\\_GEMA\\_EU-Richtlinien\\_Urheberrecht.pdf?\\_\\_blob=publicationFile&v=3](https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Stellungnahmen/2019/Downloads/090619_Stellungnahme_GEMA_EU-Richtlinien_Urheberrecht.pdf?__blob=publicationFile&v=3) [GEMA Opinion].

### 3.2 Best efforts to ensure the unavailability of works according to Article 17(4)(b) DSMD

Even though filtering technologies have been at the heart of the European debate about Article 17 and the DSMD at large, the notion of “filter”, “filtering” or “upload-filter” is not used in the text of the DSMD, neither in the regulatory part nor in the exceptionally long Recitals 61-71 on Article 17. Instead, Article 17(4)(b) uses a generic, technology-neutral language. For being exempted from liability, OCSSPs must demonstrate

*“that they have (...) (b) 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.”*

This neutral language however can hardly disguise the fact that all parties involved in the legislative process had filtering technologies in mind when the provision was drafted, most obviously the famous Content-ID technology used by Google/YouTube.<sup>20</sup> Today, it is common knowledge that the major platforms covered by Article 17 DSMD already make extensive use of such filtering technologies under the current rules. In this regard, especially in light of the user rights in Article 17(7) and 17(9), certain aspects of the provisions may even be welcomed as a juridification of a practice of some OCSSPs which have suffered an adequate regulatory framework to date – and adequate safeguards against excessive use of filtering technology.

Based on the final wording of Article 17(4)(b), member states will be well advised to implement a technology-neutral provision which may include filtering technologies as long as they represent the best efforts and high industry standard of professional diligence, but which also allows courts to oblige OCSSPs to use different technical (or other) means once they are available on the market. As the technological development stands today, it would be incompatible with Article 17(4)(b) to ban filtering technologies.<sup>21</sup> Vice versa, member states should also abstain from designating filtering technologies as the only possible way to comply with Article 17(4)(b).

The more precisely filtering technologies are capable of spotting infringing materials on OCSSPs, the less problematic they are. By contrast, the more “false positives” they produce, the more significant their impact on the fundamental rights of users and the public at large will be.<sup>22</sup> Article 17 tries to mitigate the risk of overblocking filtering technologies by different means, especially by the rules on the preservation of legally uploaded content under Article 17(7), see below at 3.1-3.4 and by the procedural safeguards for users under Article 17(9), see below at 3.5.

Moreover, filtering or other technical solutions are only required insofar as the rightholder has provided the OCSSP with the relevant and necessary information. Any filtering must be restricted to those specific content items. It can be assumed that the preservation rules and

<sup>20</sup> See <https://support.google.com/youtube/answer/2797370>.

<sup>21</sup> See also Geralt Spindler, Report commissioned by the parliamentary group of the German Greens of 14.12.2019, p. 44, available at: [https://www.gruene-bundestag.de/fileadmin/media/gruenebundestag\\_de/themen\\_az/netzpolitik/pdf/Gutachten\\_Urheberrechtsrichtlinie\\_01.pdf](https://www.gruene-bundestag.de/fileadmin/media/gruenebundestag_de/themen_az/netzpolitik/pdf/Gutachten_Urheberrechtsrichtlinie_01.pdf) [Spindler Report].

<sup>22</sup> Pravemann, *supra* note 9, at 787.



procedural safeguards of Article 17(7) and 17(9) will incentivize OCSSPs to limit the number of “false positives” as much as possible. But the significance of this effect will depend on how active users – or user’s organisations and NGOs – will use the procedural safeguards of Article 17(9) which again depends on the implementation of the harmonized legal framework into member state law.

The closer determination of “industry standards of professional diligence” and “best efforts” expected from OCSSPs will depend both on the “availability of suitable and effective means and their cost for service providers” and on the “the type, the audience and the size of the service and the type of works or other subject matter uploaded”, Article 17(5). Smaller OCSSPs with diverse forms of uploaded content should not be required to meet the same standards as bigger, specialised platforms.<sup>23</sup> Here, simple title-based filtering may suffice as a starting point, if more sophisticated ways of content identification are beyond reach in light of the volume of platform activities and diversity of materials, and if smaller OCSSPs do not have the chance of reducing costs by pooling resources and developing more sophisticated systems in collaboration with others.<sup>24</sup> As a superficial mode of identifying potentially infringing material, however, title-based filtering should be supplemented with safeguards against overblocking, such as easy access to complaint mechanisms that allow users to signal problematic content removals immediately under Article 17(9) DSMD. For derivative works a manual review may be required before blocking content.<sup>25</sup>

Also, the quality of the information provided by the rightholder will play an important role. For both parties, the principle of proportionality must be respected. If the proportionality test is applied effectively, it can also serve as a vehicle to prevent the requirements of Article 17(4)(b) from further strengthening the dominant market position of existing major platforms.<sup>26</sup> In this regard, the number of notified works and the diversity of platform content are not the only relevant parameters. In addition, the volume of uploads must be factored into the equation. An OCSSP receiving, on average, 1 million uploads every second can spread a 1 million € investment in a filtering system more broadly (1 € per upload) than an OCSSP receiving only 100.000 uploads per second (10 € per upload). However, the effectiveness of the proportionality test as a tool to level out these differences depends to a large extent on the interpretation of Article 17(4)(b) by the courts and finally the CJEU.

### 3.3 Notice-and-take-down according to Article 17(4)(c) DSMD

OCSSPs have to comply with all three obligations listed in Article 17(4)(a-c) to be exempted from liability. They must therefore – besides best efforts to obtain authorisation (a) and best efforts to ensure unavailability of certain works (b) – also (c) demonstrate that they have

*“acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works*

23 René Houareau, “Die EU-Urheberrechtsrichtlinie aus Sicht der Musikindustrie - Plattform-Haftung, Lizenzpflicht und Harmonisierung – auf dem Weg zu einem resilienten Markt”, *Multimedia und Recht* 2019, 635 (637).

24 GEMA Opinion, *supra* note 19, p. 47.

25 GEMA Opinion, *supra* note 19, p. 48.

26 Torsten J. Gerpott, “Artikel 17 der neuen EU-Urheberrechtsrichtlinie: Fluch oder Segen? - Einordnung des Streits um „Upload-Filter“ auf Online-Sharing-Plattformen”, *Multimedia und Recht* 2019, 420 (423).

*or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b).”*

Lit. c) takes up the known concept of “notice-and- take-down” and supplements it with a “notice-and-stay-down” principle.<sup>27</sup> OCSSPs must not only disable access to the specific content notified by the rightholder but they must also take measures to prevent their future uploads which again will be achieved, at least for the time being, by use of filtering technologies. In this regard, it would be reasonable for implementing member states to clarify the extent of this stay-down obligation, e.g. whether the global reference to “the notified works or other subject matter” in Article 17(4)(c) still leaves room for confining the stay-down obligation to repeated uploads by the same user of the identical material<sup>28</sup> or whether it also implies an obligation to prevent uploads by other users and perhaps even of slightly modified material. Without such a clarification, circumvention strategy by users would be unduly facilitated.<sup>29</sup> In this regard, it should be noted that the CJEU recently held in a case concerning defamatory statements on a social media platform, that Article 15 E-Commerce-Directive “does not preclude a court of a Member State from ordering a host provider to remove information which it stores, the content of which is identical to the content of information which was previously declared to be unlawful, or to block access to that information, irrespective of who requested the storage of that information.”<sup>30</sup> Such an order should also possible under Article 17(4)(c).

### 3.4 Implementation in EU Member States

Given the fact that the DSM Directive is a full harmonisation instrument, every specification of the rights and duties of the parties under Article 17(1) and (4) by the legislator is at risk of being overruled by the CJEU. Most of the terms of the Directive are subject to an autonomous interpretation by the CJEU. Member States should therefore consider carefully whether they should deviate or specify the provisions on the national level or whether they should choose a language similar to the DSM Directive<sup>31</sup> and give further explanation, such as guidance on underlying objectives and interpretative preferences, in an official explanatory memorandum or other legislative materials. Even a full harmonisation instrument leaves some room for manoeuvre for Member States which should be used for a fertile regulatory competition among different approaches, be it codified in the legislative measures of Member States or in explanatory memoranda or case law.

## 4. Use Privileges and Complaint and Redress Mechanisms – Article 17(7) and (9) DSMD

Article 17 DSMD concerns not only the new licensing and filtering duties that have been discussed in the preceding section. The provision also concerns certain measures to preserve breathing space for forms of UGC that may be qualified as “transformative” in the light of the creative input which the user added to pre-existing third-party content. Article 17(7) DSMD underlines the need to safeguard copyright limitations for creative remix activities, in

<sup>27</sup> See already CJEU, 12 July 2011, C-324/09, L’Oréal/eBay, para. 144.

<sup>28</sup> CJEU, 12 July 2011, C-324/09, L’Oréal/eBay, para. 141, pointed in this direction by referring to “further infringements of that kind by the same seller...”

<sup>29</sup> GRUR Opinion, *supra* note 15, p. 61.

<sup>30</sup> CJEU, 3 October 2019, C-18/18, Eva Glawischnig-Piesczek/Facebook Ireland, Ruling.

<sup>31</sup> See e.g. the French Projet de Loi of 5.12.2019, MICE1927829L/Bleue-1, p. 28 et seq.

particular use for the purposes of “quotation, criticism and review,” and “caricature, parody and pastiche.”<sup>32</sup> As these use privileges enhance freedom of expression and information, they are important counterbalances to the new licensing and filtering obligations (following section 4.1).<sup>33</sup> Against this background, Member States may consider the opportunity of combining the implementation of the DSM Directive, in particular Article 17(7) DSMD, with the introduction of a broader “pastiche” limitation covering a wider spectrum of UGC (section 4.2). If a broad limitation infrastructure for UGC – based on the open-ended concept of “pastiche” – is combined with the payment of equitable remuneration, Article 17(7) DSMD will also generate new revenue streams that support the general policy objective of the new EU legislation to close the so-called “value gap” (section 4.3). Even though platform providers will still have to distinguish between permissible pastiche and prohibited piracy, the introduction of new use privileges for UGC is a gateway to the development of algorithmic content identification tools that follow a different filtering logic. Instead of focusing on traces of protected third-party content that may render user uploads impermissible, a filtering system looking for quotations, parodies and pastiches focuses on creative user input that may justify the upload (section 4.4). In addition, Article 17(9) DSMD supplements the guarantee of certain use privileges in Article 17(7) DSMD with a complaint and redress mechanism that may also play an important role for creative users in the EU (section 4.5).

#### 4.1 Impact of Freedom of Expression

Article 17(7) DSMD leaves little doubt that the use of algorithmic enforcement measures must not erode areas of freedom that support the creation and dissemination of transformative amateur productions that are uploaded to platforms of OCSSPs:

*“The cooperation between online content-sharing service providers and rightholders shall not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation. Member States shall ensure that users in each Member State are able to rely on any of the following existing exceptions or limitations when uploading and making available content generated by users on online content-sharing services:*

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

Use of 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 (ISD),<sup>34</sup> these use privileges were only listed as limitation prototypes which EU

<sup>32</sup> Article 17(5) DSMD.

<sup>33</sup> P.B. Hugenholz/M.R.F. Senftleben, *Fair Use in Europe. In Search of Flexibilities*, Amsterdam: Institute for Information Law/VU Centre for Law and Governance 2011, 29-30. For a discussion of new UGC use privileges under the umbrella of EU copyright law, see J.-P. Triaille/S. Dusollier/S. Depreeuw/J.B. Hubin/F. Coppens/A. de Francquen, *Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society*, Study prepared by De Wolf & Partners in collaboration with the Centre de Recherche Information, Droit et Société (CRIDS), University of Namur, on behalf of the European Commission (DG Markt), Brussels: European Union 2013, 522-527 and 531-534 [Triaille et al.].

<sup>34</sup> Article 5(3)(d) and (k) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001, on the harmonisation of certain aspects of copyright and related rights in the information society (*OJ* 2001 L 167, 10).

Member States are free to introduce (or maintain) at the national level. The adoption of a quotation right and an exemption of caricature, parody or pastiche remained optional. Article 17(7) DSMD, however, converts these use privileges into mandatory breathing space for transformative UGC.<sup>35</sup> This metamorphosis makes copyright limitations in this category particularly robust: they “shall” survive the application of automated filtering tools. In case national legislation does not already provide for the exemption of “quotation, criticism, review” and “caricature, parody or pastiche”, the use of “shall” in Article 17(7) imposes a legal obligation on Member States to introduce these use privileges.<sup>36</sup> The reference to “existing” exceptions or limitations must not be misunderstood in the sense of pre-existing national quotation and parody rules. By contrast, it only reflects the fact that these are long-standing EU limitation prototypes that belong to the “existing” canon of permissible use privileges laid down in Article 5 ISD.<sup>37</sup> This solution also makes sense from the perspective of harmonization in the internal market. Only if all Member States provide for these use privileges in the context of UGC uploads, can filtering systems be applied across territorial borders and can OCSSPs apply the same system configuration and standard of review throughout the EU. This, in turn, ensures that EU citizens enjoy the same freedom of transformative use and a shared UGC experience regardless of territorial borders.

In implementing Article 17(7) DSMD, Member States can benefit from guidance which the CJEU has already provided with regard to the concepts of “quotation” and “parody.” In *Painer*, the CJEU underlined the need for an interpretation of the quotation right following from Article 5(3)(d) ISD that enables its effectiveness and safeguards its purpose.<sup>38</sup> The Court clarified that Article 5(3)(d) ISD was “intended to strike a fair balance between the right of freedom of expression of users of a work or other protected subject-matter and the reproduction right conferred on authors.”<sup>39</sup>

In its more recent decision in *Pelham*, the CJEU clarified that an essential characteristic of a quotation was

*“the use, by a user other than the copyright holder, of a work or, more generally, of an extract from a work for the purposes of illustrating an assertion, of defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user, since the user of a protected work wishing to rely on the quotation exception must therefore have the intention of entering into ‘dialogue’ with that work...”*<sup>40</sup>

<sup>35</sup> Cf. J. Quintais/G. Frosio/S. van Gompel/P.B. Hugenholtz/M. Husovec/B.J. Jütte/M.R.F. Senftleben, “Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics”, *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 10 (2020), 277 (278, para. 11) [Quintais et al.].

<sup>36</sup> Favoring a mandatory nature of exceptions and limitations in the form of user’s rights, in particular when justified by fundamental rights such as freedom of expression, see the previous Opinion of the European Copyright Society: C. Geiger/J. Griffiths/M. Senftleben/L. Bently/R. Xalabarder, ‘Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union, Opinion on the Judgment of the CJEU in Case C-201/13, *Deckmyn*’, *International Review of Intellectual Property and Competition Law* 46 (2015), 93 (97, para. 22).

<sup>37</sup> *Ibid.*, 279, para. 14-15.

<sup>38</sup> CJEU, 1 December 2011, case C-145/10, *Painer*, para. 132-133.

<sup>39</sup> CJEU, *ibid.*, para. 134.

<sup>40</sup> CJEU, 29 July 2019, case C-476/17, *Pelham*, para. 71. As to the background of this decision, see L. Bently/S. Dusollier/C. Geiger et al., “Sound Sampling, a Permitted Use Under EU Copyright Law? Opinion of the European Copyright Society in Relation to the Pending Reference Before the CJEU in Case C-476/17,

With regard to the parody exemption in Article 5(3)(k) ISD, the CJEU provided guidance in *Deckmyn*. As in its earlier *Painer* decision, the Court underlined the need to ensure the effectiveness of the parody exemption<sup>41</sup> as a means to balance copyright protection against freedom of expression.<sup>42</sup>

As these decisions demonstrate, the fundamental guarantee of freedom of expression plays a crucial role.<sup>43</sup> Relying on Article 11 of the Charter of Fundamental Rights of the EU (CFR) and Article 10 of the European Convention on Human Rights (ECHR), the CJEU interpreted the quotation right and the parody exemption less strictly than limitations without a comparably strong freedom of speech underpinning.<sup>44</sup> The Court emphasized the need to achieve a “fair balance” between, in particular, “the rights and interests of authors on the one hand, and the rights of users of protected subject-matter on the other.”<sup>45</sup> The Court thus referred to quotations and parodies as user “rights” rather than mere user “interests.” In *Funke Medien* and *Spiegel Online*, the Court explicitly confirmed the status of user rights by pointing out that, “although Article 5 of Directive 2001/29 is expressly entitled ‘Exceptions and limitations’, it should be noted that those exceptions or limitations do themselves confer rights on the users of works or of other subject matter.”<sup>46</sup>

The CJEU’s line of reasoning stemming from quotation and parody cases sheds light on a common denominator of the copyright limitations listed in Article 17(7): these user rights strike a balance between copyright protection and freedom of expression. This rationale is particularly relevant to transformative UGC. As long as UGC is the result of creative efforts

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Pelham GmbH v. Hütter”, *International Review of Intellectual Property and Competition Law* 2019, 467 (486-487); for a critique of the dialogue requirement, see Tanya Aplin/Lionel Bently, “Displacing the Dominance of the Three-Step Test: The Role of Global, Mandatory Fair Use”, in: Wee Loon Ng/Haochen Sun/Shyam Balganeshe (eds.), *Comparative Aspects of Limitations and Exceptions in Copyright Law*, Cambridge: Cambridge University Press 2018 (forthcoming), 6-8, available at: <https://ssrn.com/abstract=3119056>; Lionel Bently/Tanya Aplin, “Whatever Became of Global Mandatory Fair Use? A Case Study in Dysfunctional Pluralism”, in: Susy Frankel (ed.), *Is Intellectual Property Pluralism Functional?*, Cheltenham: Edward Elgar 2019, 8-36.

<sup>41</sup> CJEU, 3 September 2014, case C-201/13, *Deckmyn*, para. 22-23. For a detailed comment on this ruling, see ECS, supra note 36.

<sup>42</sup> CJEU, *ibid.*, para. 25-27.

<sup>43</sup> For a discussion of the status quo reached in balancing copyright protection against freedom of expression, see 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”, *European Intellectual Property Review* 41 (2019), 131 (133-136).

<sup>44</sup> As to the influence of freedom of speech guarantees on copyright law in the EU, see Christophe Geiger/Elena Izyumenko, “Copyright on the Human Rights’ Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression”, *International Review of Intellectual Property and Competition Law* 45 (2014), 316; Christophe Geiger, “Constitutionalising’ Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union”, *International Review of Intellectual Property and Competition Law* 37 (2006), 371; Alain Strowel/F. Tulkens/Dirk Voorhoof (eds.), *Droit d’auteur et liberté d’expression*, Brussels: Editions Larcier 2006; P. Bernt Hugenholtz, “Copyright and Freedom of Expression in Europe”, in: Niva Elkin-Koren/Neil Weinstock Netanel (eds.), *The Commodification of Information*, The Hague/London/Boston: Kluwer 2002, 239.

<sup>45</sup> CJEU, 1 December 2011, case C-145/10, *Painer*, para. 132; CJEU, 3 September 2014, case C-201/13, *Deckmyn*, para. 26; see also CJEU, 29 July 2019, case C-476/17, *Pelham*, para. 32, 37 and 59.

<sup>46</sup> CJEU, 29 July 2019, case C-516/17, *Spiegel Online*, para. 54; CJEU, 29 July 2019, case C-469/17, para. 70; for a more detailed discussion of this point, see C. Geiger/E. 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!”, *International Review of Intellectual Property and Competition Law* 51 (2020), 282 (292-298).



that add value to underlying source material,<sup>47</sup> user-generated remixes and mash-ups of third party content can be qualified as a specific form of transformative use falling under Article 11 CFR and Article 10 ECHR.<sup>48</sup>

#### 4.2 Cultivation of the Concept of “Pastiche”

Bearing this insight in mind, it can be of particular importance during the implementation process to consider not only the well-established concepts of “quotation” and “parody” but also the less developed concept of “pastiche.” In *Deckmyn* and *Pelham*, the CJEU established the rule that the meaning of limitation concepts in EU copyright law had to be determined by considering the usual meaning of those concepts in everyday language, while also taking into account the legislative context in which they occur and the purposes of the rules of which they are part.<sup>49</sup> The Merriam-Webster English Dictionary defines “pastiche” as “a literary, artistic, musical, or architectural work that imitates the style of previous work.”<sup>50</sup> It also refers to a “musical, literary, or artistic composition made up of selections from different works.”<sup>51</sup> Similarly, the Collins English Dictionary describes a “pastiche” as “a work of art that imitates the style of another artist or period” and “a work of art that mixes styles, materials, etc.”<sup>52</sup>

Evidently, the aspect of mixing pre-existing materials and using portions of different works is of particular importance to UGC. In many cases, the remix of pre-existing works in UGC leads to a new creation that “mixes styles, materials etc.” and, in fact, is “made up of selections from different works.” Hence, the usual meaning of “pastiche” encompasses forms of UGC that mix different source materials and combine selected parts of pre-existing works. Against this background, “pastiche” can be an important reference point for lawmakers seeking to offer additional freedom for creative platform users who express themselves in transformative UGC – additional room that goes beyond the long-standing concepts of “quotation” and “parody.”<sup>53</sup>

Until now, EU Member States have not made effective use of this option to regulate UGC. Implementing Article 17(7), they could take a fresh look at the concept of “pastiche” and clarify that the exemption of pastiches is intended to offer room for UGC.<sup>54</sup> In this

<sup>47</sup> OECD, 12 April 2007, “Participative Web: User-Created Content”, Doc. DSTI/ICCP/IE(2006)7/Final, available at: <https://www.oecd.org/sti/38393115.pdf>, 8.

<sup>48</sup> Florian Pötzlberger, *Kreatives Remixing: Musik im Spannungsfeld von Urheberrecht und Kunstfreiheit*, Baden-Baden: Nomos 2018.

<sup>49</sup> CJEU, 3 September 2014, case C-201/13, *Deckmyn*, para. 19; CJEU, 29 July 2019, case C-476/17, *Pelham*, para. 70.

<sup>50</sup> Merriam-Webster English Dictionary, available at: <https://www.merriam-webster.com/dictionary/pastiche>.

<sup>51</sup> Ibid.

<sup>52</sup> Collins English Dictionary, available at: <https://www.collinsdictionary.com/dictionary/english/pastiche>.

<sup>53</sup> Cf. the detailed analysis conducted by Emily Hudson, “The pastiche exception in copyright law: a case of mashed-up drafting?”, *Intellectual Property Quarterly* 2017, 346 (348-352 and 362-364), which confirms that the elastic, flexible meaning of the term “pastiche” is capable of encompassing “the utilisation or assemblage of pre-existing works in new works” (at 363); in the same sense Florian Pötzlberger, “Pastiche 2.0: Remixing im Lichte des Unionsrechts”, *Gewerblicher Rechtsschutz und Urheberrecht* 2018, 675 (681); see also João P. Quintais, *Copyright in the Age of Online Access – Alternative Compensation Systems in EU Law*, Alphen aan den Rijn: Kluwer Law International 2017, 235 [Quintais], who points out that the concept of “pastiche” can be understood to go beyond a mere imitation of style. In line with the results of the study tabled by Triaille et. al., *supra* note 33, at 534-541; Quintais, *ibid.*, 237, nonetheless expresses a preference for legislative reform.

<sup>54</sup> As to guidelines for a sufficiently flexible application of the pastiche exemption in the light of the underlying guarantee of free expression, see Hudson, *supra* note 53, at 362-364.

clarification process, Member States have several options depending on the scope of the UGC exemption which they consider appropriate:

- with regard to UGC that constitutes a “genuine” mix of styles and materials in the sense of an artistic “pastiche” that sufficiently plays with all underlying source materials, a mere clarification may suffice that the exemption of “pastiche” is intended to offer breathing space for UGC. This focus on “genuine” pastiche cases, however, may fail to cover widespread forms of UGC, such as funny animal videos with unmodified, copyrighted music in the background. As the music is not part of a transformative mix with other forms or styles of music, this limited version of a pastiche exemption may require a license and related measures under Article 17(1) and (4) DSMD. The animal video as such, however, testifies the creative efforts of the uploading user. Against this background, the regulation of this creative form of UGC on the basis of Article 17(1) and (4) DSMD may appear too harsh in the light of the described need to reconcile copyright protection with freedom of expression and information – in this case, the freedom of expression of amateur creators;
- alternatively, the concept of “pastiche” could be broadened to encompass not only uncontroversial pastiche scenarios with a “genuine” mix of styles and materials but also “non-genuine” forms of mixing pre-existing content, such as the combination of a self-created animal video with protected third-party music. As, in this scenario with a “non-genuine” form of pastiche, the music is simply added, but not mingled with other materials, it seems worth considering to introduce – with regard to this extension of the scope of the “pastiche” concept – an obligation for OCSSPs to pay equitable remuneration. In this alternative scenario, the remuneration would thus not follow from licensing deals under Article 17(1) and (4) DSMD. Instead, the remuneration would follow from statutory remuneration rules that are administered by CMOs and lead to the distribution of remuneration payments in accordance with applicable repartitioning schemes.

#### 4.3 Payment of Equitable Remuneration

As to the introduction of an appropriate remuneration mechanism in the latter scenario of “non-genuine” forms of pastiche, it is important to point out that the combination of use privileges with the payment of equitable remuneration is not an anomaly in the European copyright tradition. In a 1999 case concerning the Technical Information Library Hanover, the German Federal Supreme Court, for example, permitted the library’s practice of copying and dispatching scientific articles on request by single persons and industrial undertakings even though this practice came close to a publisher’s activities.<sup>55</sup> To ensure the payment of equitable remuneration, the Court deduced a payment obligation from the three-step test in international copyright law and permitted the continuation of the service on the condition that equitable remuneration be paid.<sup>56</sup>

Under harmonized EU copyright law, the CJEU adopted a similar approach. In *Technische Universität Darmstadt*, the Court recognized an “ancillary right”,<sup>57</sup> allowing libraries to

<sup>55</sup> German Federal Court of Justice, 25 February 1999, case I ZR 118/96, “TIB Hannover”, *Juristenzeitung* 1999, 1000.

<sup>56</sup> German Federal Court of Justice, *ibid.*, 1005-1007.

<sup>57</sup> CJEU, 11 September 2014, case C-117/13, *Technische Universität Darmstadt*, para. 48.

digitize books in their holdings for the purpose of making these digital copies available via dedicated reading terminals on the library premises. To counterbalance the creation of this broad use privilege, the Court deemed it necessary – in light of the three-step test in Article 5(5) ISD – to insist on the payment of equitable remuneration. Discussing compliance of German legislation with this requirement, the Court was satisfied that the conditions of the three-step test were met because German libraries had to pay adequate remuneration for the act of making works available on dedicated terminals after digitization.<sup>58</sup>

Hence, it is not unusual in the EU to establish an obligation to pay equitable remuneration with regard to use privileges that have a broad scope. The courts derive the obligation to pay equitable remuneration from the three-step test in international and EU copyright law.<sup>59</sup> Considering this practice, there can be little doubt that EU Member States that already provide for an exemption for pastiches (based on Article 5(3)(k) ISD), or that introduce such an exemption in implementing the DSM Directive, could supplement this user right with an obligation to pay equitable remuneration for “non-genuine” forms of pastiches, such as the aforementioned animal video with unaltered background music. In this way, it becomes possible to broaden the scope of the pastiche exemption and cover not only “genuine” but also “non-genuine” forms of mixing different source materials in UGC.<sup>60</sup> OCSSPs could use advertising revenue to finance the remuneration payments. As a result, users would remain free to create and upload creative content mash-ups and remixes, even if they contain unaltered third-party components, such as background music. OCSSPs, however, would be obliged to pay equitable remuneration for the dissemination of UGC that falls within the scope of the new, broadened category of “non-genuine” pastiche.<sup>61</sup>

A remunerated UGC privilege would have the advantage of creating a continuous revenue stream for authors and performers. While licensing and filtering agreements between

<sup>58</sup> CJEU, *ibid.*, para. 48.

<sup>59</sup> See Article 9(2) BC, Article 13 TRIPS and Article 10 WCT at the international level, and Article 5(5) ISD in EU copyright law. For a more detailed analysis in the light of the three-step test, see M.R.F. Senftleben, ‘User-Generated Content – Towards a New Use Privilege in EU Copyright Law’, in: T. Aplin (ed.), *Research Handbook on IP and Digital Technologies*, Cheltenham: Edward Elgar 2020, 136-162; C. Geiger/D. Gervais/M.R.F. Senftleben, ‘The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law’, *American University International Law Review* 29 (2014), 581-626.

<sup>60</sup> Admittedly, this solution leads to the dilemma that a creative form of use is subjected to the obligation to pay equitable remuneration. Traditionally, this has not been the case, cf. Reto M. Hilty/Martin R.F. Senftleben, ‘Rückschnitt durch Differenzierung? – Wege zur Reduktion dysfunktionaler Effekte des Urheberrechts auf Kreativ- und Angebotsmärkte’, in: T. Dreier/R.M. Hilty (eds.), *Vom Magnettonband zu Social Media – Festschrift 50 Jahre Urheberrechtsgesetz (UrhG)*, Munich: C.H. Beck 2015, 317 (328-329) [Hilty/Senftleben]. However, see the broader concept of a general use privilege for creative reuse (not limited to UGC) developed by Christophe Geiger, ‘Freedom of Artistic Creativity and Copyright Law: A Compatible Combination?’, *UC Irvine Law Review* 8 (2018), 413 (443-454); *Id.*, ‘Statutory Licenses as Enabler of Creative Uses’, in: Kung-Chung Liu/Reto M. Hilty (eds.), *Remuneration of Copyright Owners – Regulatory Challenges of New Business Models*, Berlin: Springer 2017, 305 (308-318); *Id.*, ‘Promoting Creativity through Copyright Limitations, Reflections on the Concept of Exclusivity in Copyright Law’, *Vanderbilt Journal of Entertainment and Technology Law* 12 (2010), 515 (541-544), who proposes a remunerated statutory limitation for commercial creative uses, administrated by an independent regulation authority which could solve ex post disputes between original and derivative creators on the price to be paid for the transformative use via mediation.

<sup>61</sup> Cf. Matthias Leistner, ‘Copyright law on the internet in need of reform: hyperlinks, online platforms and aggregators’, *Journal of Intellectual Property Law & Practice* 12, No. 2 (2017), 146-149; *Id.*, *supra* note 17, at 37; Matthias Leistner/Axel Metzger, ‘Wie sich das Problem illegaler Musikanutzung lösen lässt’, *Frankfurter Allgemeine Zeitung*, 4 January 2017, available at: <http://www.faz.net/aktuell/feuilleton/medien/gema-youtube-wie-sich-urheberrechts-streit-schlichten-liesse-14601949-p2.html>; Hilty/Senftleben, *supra* note 60, at 327-328.

copyright owners and OCSSPs may predominantly benefit the content industry (as to the option of introducing direct remuneration claims of authors and performers, see section 5 below), the repartitioning scheme of collecting societies receiving UGC levy payments could ensure that authors and performers obtain a substantial part of the UGC remuneration, even if they have transferred their copyright and neighbouring rights to exploiters of their works and performances.<sup>62</sup>

#### 4.4 Reverse Filtering Logic

Quite clearly, Article 17(7) DSMD does not entail a full immunity from filtering obligations. Even if an OCSSP decides to focus on permitted quotations, parodies and pastiches, it will still be necessary to introduce algorithmic enforcement measures to separate the wheat from the chaff. The platform provider will have to distinguish between permissible pastiche and prohibited piracy. Nonetheless, the robust use privileges for UGC in Article 17(7) DSMD offer important impulses for the development of content identification systems that seek to find creative input that renders the upload permissible instead of focusing on third-party content that makes the upload problematic.<sup>63</sup>

The exemption of quotations, parodies and pastiches paves the way for a markedly different approach to the assessment of content. Instead of focusing on traces of protected third-party content in UGC (and starting points for blocking content), it becomes critical to establish whether the user has added sufficient own creativity to arrive at a permissible form of UGC.

Admittedly, it remains to be seen whether (and how) this reverse filtering logic can be implemented in practice.<sup>64</sup> It is conceivable, for instance, that users could upload not only their final pastiche but also a file containing exclusively the self-created material which they have combined with protected third-party content. In the case of separable input (the funny animal video on the one hand, the added background music on the other), the user creation can be included as a separate content item in the identification system. In this way, the system could be made “aware” that UGC contains different types of creative input.<sup>65</sup> Accordingly, it could factor this “insight” into the equation when calculating the ratio of own content to third

<sup>62</sup> In the context of repartitioning schemes of collecting societies, the individual creator has a relatively strong position. As to national case law explicitly stating that a remuneration right leads to an improvement of the income situation of the individual creator (and may be preferable over an exclusive right to prohibit use for this reason), see German Federal Court of Justice, 11 July 2002, case I ZR 255/00, “Elektronischer Pressespiegel”, 14-15; for a discussion of the individual creator’s entitlement to income from the payment of equitable remuneration, see Guido Westkamp, “The ‘Three-Step Test’ and Copyright Limitations in Europe: European Copyright Law Between Approximation and National Decision Making”, *Journal of the Copyright Society of the U.S.A.* 56 (2008), 1 (55-59); Quintais, *supra* note 53, at 335-336, 340-341, 347-349 and 356-357; European Copyright Society, *Opinion on Reprobel*, available at: <https://europeancopyrightsociety.org/opinion-on-reprobel/>.

<sup>63</sup> Cf. Niva Elkin-Koren, “Fair Use by Design”, *UCLA Law Review* 64 (2017), 1082 (1093-1096).

<sup>64</sup> For critical comments on the ability of automated systems to distinguish between an infringing copy and a permissible quotation, parody or pastiche, see the contribution of Peter K. Yu; Mark A. Lemley, “Rationalizing Internet Safe Harbors”, *Journal on Telecommunications and High Technology Law* 6 (2007), 101 (110-111); Dan L. Burk/Julie E. Cohen, “Fair Use Infrastructure for Rights Management Systems”, *Harvard Journal of Law and Technology* 15 (2001), 41 (56).

<sup>65</sup> As to the creation of digital reference files in content identification systems, see Maayan Perel/Niva Elkin-Koren, “Accountability in Algorithmic Copyright Enforcement”, *Stanford Technology Law Review* 19 (2016), 473 (513-514); Lauren G. Gallo, “The (Im)possibility of “Standard Technical Measures” for UGC Websites”, *Columbia Journal of Law and the Arts* 34 (2011), 283 (296).



party content. In addition, the potential of artificial intelligence and self-learning algorithms must not be underestimated. Filtering machines may be able to learn from decisions on content permissibility taken by humans. As a result, algorithmic content screening could become more sophisticated. It may lead to content identification systems that are capable of deciding easy cases and flagging difficult cases which could then be subject to human review.<sup>66</sup>

#### 4.5 Procedural Safeguards

Article 17(9) DSMD supplements the safeguards for creative user involvement laid down in Article 17(7) DSMD by offering procedural remedies. It provides for an “effective and expeditious complaint and redress mechanism” for users who are confronted with unjustified content blocking. Complaints shall be processed “without undue delay.” The content industry must “duly justify the reasons for their requests” vis-à-vis content blocking and removal. In the light of this substantiation of the filtering request, OCSSPs will have to take a final decision on the status of the upload at issue.

For this procedural safeguard to work well in practice, a high degree of efficiency and reliability is crucial. Evidence from the application of the counternotice system in the U.S.<sup>67</sup> shows quite clearly that users are unlikely to file complaints in the first place.<sup>68</sup> If users must wait a relatively long time for a final result, it is foreseeable that the complaint and redress mechanism will be incapable of safeguarding freedom of expression. In the context of UGC, it is often crucial to react quickly to current news and film, book and music releases. If the complaint and redress mechanism finally establishes that a lawful content remix or mash-up has been blocked, the significance of an affected quotation, parody or pastiche may already have passed.<sup>69</sup>

Against this background, it is advisable to make the submission of a complaint against content filtering as simple as possible. If users must fill in a complicated form and add lengthy explanations to substantiate their request, Article 17(9) will remain a dead letter. To avoid this loss of an important safeguard against excessive algorithmic enforcement, the blocking of UGC should automatically lead to the opening of a dialogue box with a menu of standardized complaint options, such as “The content blocking is unjustified because my upload is a

<sup>66</sup> Elkin-Koren, *supra* note 63, at 1096-1098.

<sup>67</sup> As to this feature of the notice-and-takedown system in U.S. copyright law, see Miquel Peguera, “The DMCA Safe Harbour and Their European Counterparts: A Comparative Analysis of Some Common Problems”, *Columbia Journal of Law and the Arts* 32 (2009), 481.

<sup>68</sup> See the study conducted by Jennifer M. Urban/Laura Quilter, “Efficient Process or “Chilling Effects”? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act”, *Santa Clara Computer and High Technology Law Journal* 22 (2006), 621, showing, among other things, 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; however, cf. also 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 F.W. Mostert/M.B. Schwimmer, “Notice and Takedown for Trademarks”, *Trademark Reporter* 101 (2011), 249 (259-260).

<sup>69</sup> Apart from the time aspect, complaint systems may also be implemented in a way that discourages widespread use, cf. Perel/Elkin-Koren, *supra* note 65, at 507-508 and 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. Elkin-Koren, *supra* note 63, at 1092.



permissible pastiche,” “...my upload is a permissible parody,” “...is a permissible quotation” etc. The user should then be able to launch the complaint by simply clicking the box with the applicable argument supporting the review request.<sup>70</sup>

Ideally, this click should lead to the appearance of the contested content on the platform. As copyright owners will seek to minimize the period of online availability of allegedly infringing content, this appearance ensures that they avoid delays in the review process and “duly justify the reasons for their requests.” In addition, it is important to pave the way for complaint and redress mechanisms that also allow collective and concerted reactions, in particular based on initiatives taken by consumer organizations and NGOs.

Obviously, the crux of this regulatory model lies in the question of liability for the appearance of potentially infringing content until a final decision is taken on the status of the content item at issue. As Article 17(9) DSMD also gives users access to impartial out-of-court settlement mechanisms and, if this does not help, access to the courts, the period of uncertainty about the status of the content may be quite long. If OCSSPs are liable for harm flowing from content availability during this period, they will eschew the introduction of the described regulatory model. To solve this dilemma and allow the appearance of contested UGC directly after the uploading user has launched a complaint, platforms must not be exposed to liability for content which, in the end, is found to infringe copyright. Therefore, a liability shield should be available at least when an OCSSP can demonstrate that it has checked whether the user has not simply clicked one of the complaint buttons to play the system and make content available which, evidently, is mere piracy and very far from constituting a permissible quotation, parody or pastiche.<sup>71</sup>

If these checks and balances are in place, however, the contested UGC should become available on the OCSSP platform. Otherwise, the potentially lengthy procedure for clarifying the status of the UGC at issue may frustrate the goal to safeguard freedom of expression and information which, as explained above, underlies the user rights of Article 17(7) DSMD.

## 5. Direct remuneration claims

Members States should consider implementing direct remuneration claims for authors and performing artists which guarantee that the creative persons receive a fair share of the expected additional revenues obtained by rightholders under Article 17 DSMD. The Directive does not foresee such claims but tries to strengthen the position of authors and performers by contractual means under Article 18-23 DSMD. However, experiences with existing national legislation in this area show that it is doubtful whether these contractual means will suffice to redirect the revenue streams at least partly to the creative workers.<sup>72</sup>

<sup>70</sup> Cf. Quintais et al., *supra* note 35, at 280, para. 24..

<sup>71</sup> Cf. Quintais et al., *supra* note 35, at 280-281, para. 27-28.

<sup>72</sup> For instance, see M.R.F. Senftleben, ‘More Money for Creators and More Support for Copyright in Society - Fair Remuneration Rights in Germany and the Netherlands’, *Columbia Journal of Law and the Arts* 41, No. 3 (2018), 413-433.

The German Government in its Protocol Declaration on Article 17 DSMD<sup>73</sup> has declared that it will examine the possibility of such direct remuneration claims. Such a claim would fit well into the system of direct remuneration claims that already exist in the *acquis communautaire* and in national copyright legislation, especially the unwaivable right to equitable remuneration in Article 5 Rental right and lending right Directive 2006/115/EC. In this regard, it should be noted that Article 17 DSMD does not preclude such direct remuneration claims.<sup>74</sup> Rather, the provision is neutral with regard to the allocation of rights. However, to avoid individual claims raised by single authors or performers, such direct remuneration claims should be administrated by CMOs.

## 6. Applicable Law

### 5.1 Possible deviations from a territorial approach

A topic of high practical importance for OCSSPs which has hardly been addressed during the legislative process or in academic writing is private international law.<sup>75</sup> Which law applies to the different rights and duties under Article 17 DSMD? Can OCSSPs comply with one legislation implementing Article 17 DSMD or do they have to comply with 27 different national rules?

The only directly applicable European principle on this question is Article 8(1) Rome II-Regulation:

*“The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed.”*

According to the traditional interpretation of this provision, rightholders would have to plead copyright infringement against OCSSPs in each of the countries for which they seek protection.<sup>76</sup> If they claim protection for multiple countries, the laws of these multiple countries would apply (“mosaic approach”) irrespective of the fact that available content may not be substantially used in each of those countries. The effect of such a literal application of Article 8(1) Rome II would be that OCSSPs would either apply geoblocking technology to comply with the requirements of the different member states or comply with the strictest regime all over Europe. Both approaches seem detrimental for the further development of a rich and diverse European landscape of information and cultural expression and also for the internal market of the European Union.

Two possible solutions should be considered when implementing Article 17 into national law. Firstly, member states could take up academic proposals for concentration of cases of ubiquitous infringement on the Internet under one applicable law.<sup>77</sup> Such proposals have been

73 Statement by the Federal Republic of Germany on the DSMD; in particular on Article 17 of the Directive of 15.4.2019, available at: [https://www.bmjv.de/SharedDocs/Pressemitteilungen/DE/2019/041519\\_Erklärung\\_Richtlinie\\_Urheberrecht.html](https://www.bmjv.de/SharedDocs/Pressemitteilungen/DE/2019/041519_Erklärung_Richtlinie_Urheberrecht.html).

74 Contra Houareau, *supra* note 23, at 636.

75 But see Spindler Report, *supra* note 21, at 70-72.

76 See Axel Metzger, Commentary on Article 8 Rome II, in: U. Magnus/P. Mankowski (eds.), *European Commentaries on Private International Law: Rome II Regulation*, Köln: Otto Schmidt 2019, Article 8, N° 23-32.

77 See Article 3:604 CLIP-Principles.

developed with a specific focus on platforms held liable for infringements committed by the users. For those platforms, it is hardly foreseeable which battlegrounds will be chosen by the rightholder. Here, it should be possible to apply the one law to the multistate infringement, being the law with the closest connection. However, if a member state would apply such an approach, it would in the end be up to the CJEU to decide upon the issue of compatibility with Article 8(1) Rome II. Secondly, it is questionable whether all issues regulated in Article 17 DSMD are to be characterized as questions of copyright infringement in the sense of Articles 8, 15 Rome II. One may argue that at least the procedural safeguards of Article 17(9) are not covered by Articles 8, 15 Rome II which would give implementing member states more flexibility, especially to apply the country-of-origin principle of Article 3(2) E-Commerce-Directive on a voluntary basis.<sup>78</sup>

### *5.2 Implementation in EU member states*

Questions of private international law are not covered by the DSMD, which leaves some room for manoeuvre for EU member states. However, Article 8 Rome II Regulation must be taken into account. If one follows the approach suggested here, the law applicable to ubiquitous infringement of OCSSPs is arguably not dealt with in Article 8 Rome II Regulation. Therefore, member states may determine the law of the closest connection as being applicable instead of multiple laws under a territorial approach. At least for the procedural safeguards of Article 17(9), it should remain possible for member states to apply only one law. Whether the legislature or the courts apply such an approach, it will finally be up to the CJEU to decide whether this solution is compatible with the Rome II Regulation.

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<sup>78</sup> Member states are under no obligation to apply the country of origin principle to intellectual property, see Article 3(2) and Annex to the Directive.

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