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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

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How to License Article 17 of the Copyright in the Digital Single Market Directive? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms

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Article 17 of the Copyright in the Digital Single Market Directive is a major internet policy experiment of our decade. The provision fundamentally changes copyright regulation of certain digital platforms. However, the precise nature of Art. 17 is far from clear. How does it fit the existing structure of EU copyright law and doctrine? How can the Member States implement it? These are the questions at the heart of this article. To answer them, we start by examining the nature and structure of the right prescribed in Art. 17. The exact qualification brings important legal consequences. Among others, it determines the conditions imposed by EU and international law on national implementations. After reviewing different interpretation options, we conclude that Art. 17 introduces either a ‘special’ or a ‘new’ *sui generis* right, both of which allow significant margin of discretion for Member States, especially as regards licensing mechanisms and exceptions.

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I. Introduction

This is a very technical paper. Unfortunately, it is so because copyright law has become too complicated. Along with our learned colleagues, we remain prisoners of this copyright Esperanto. Article 17 of the Copyright in the Digital Single Market (CDSM) Directive¹ is the latest step in obfuscation of this body of law. To compensate for this, we try to provide a detailed explanation of our core arguments throughout the analysis, and an easy-to-follow translation of our findings from the outset and in the conclusions.

In recent years, the EU and its Member States have proposed and adopted a growing number of laws and policies to regulate online content, with a focus on enhancing the responsibility of hosting platforms for user-uploaded illegal content.² Article 17 CDSM Directive fits within this broader policy trend, which is manifest also in initiatives surrounding hate speech, terrorist content and – most impactful – the ongoing reform of the E-Commerce Directive through the Digital Services Act.³

The main legal instruments that currently regulate hosting service providers both at a general level and in the copyright sphere date from the turn of the century: the 2000 E-Commerce Directive and the 2001 Information Society Directive.⁴ The E-Commerce Directive provides only partial harmonisation in this area, namely by creating a liability exemption or safe-harbour for hosting service providers and setting forth a prohibition of general monitoring obligations.⁵ The InfoSoc Directive harmonises exclusive rights and exceptions and limitations (E&Ls) in the field of copyright and related rights.⁶ It also creates a regime for injunctions against intermediaries whose services are used by third party users to carry out infringing activities.⁷

With the technological and business development of the internet, many hosting providers evolved into multi-purpose ‘web 2.0’ platforms that enable varying degrees of structured and optimised access to content uploaded by users. Presently, online platforms provide the main point of access

¹ 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 (CDSM Directive).

² Mathias Vermeulen, ‘Online Content: To Regulate or Not to Regulate – Is That the Question?’ | Association for Progressive Communications’ (*Association for Progressive Communications*, 2019) Issue Paper <<https://www.apc.org/en/pubs/online-content-regulate-or-not-regulate-question>> accessed 25 November 2020. COM/2017/0555; Commission, ‘Recommendation of 1.3.2018 on measures to effectively tackle illegal content online’ C/2018/1177.

³ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market [2000] OJ L178/1 (E-Commerce Directive). See EP Legislative Observatory, Procedure file on preventing the dissemination of terrorist content online, 2018/0331(COD) (at time of writing this proposal is at the trilogue stage); and European Commission, ‘The Digital Services Act Package’ <<https://ec.europa.eu/digital-single-market/en/digital-services-act-package>> last accessed 25 October 2020.

⁴ 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).

⁵ See arts 14 and 15 E-Commerce Directive.

⁶ arts 2 to 5 InfoSoc Directive.

⁷ art 8(3) InfoSoc Directive.

to information and other content in the digital age, whether through search engines, social media networks, or video-sharing websites.⁸ Although these platforms bring undeniable economic and social benefits, they have also enabled the spread of illegal content, including copyright infringement.⁹ Copyright law has increasingly struggled to adjust to this shift. This is notable at the European level, with the Court of Justice of the European Union (CJEU) regularly adjusting both the scope and conditions for primary liability for communicating works to the public online, as well as intermediary liability under the hosting safe harbour and the prohibition of general monitoring.¹⁰

Article 17 CDSM Directive is nothing short of a major policy experiment. It has sparked fierce policy debate from proposal to adoption, and continues to generate controversy at the implementation stage. Its goal is to tackle what has been called the ‘value gap’, i.e. the imbalance between the value that online content-sharing service providers (OCSSPs) derive from running a platform on which their users can upload copyright-protected content and the revenue they return to rightholders. Although the value gap is used as a justification for the new legal regime there is a lack of economic evidence as to its existence. Nevertheless, the primary goal of the provision is to redistribute the profit generated by forcing OCSSPs into licensing arrangements. Only secondarily does the provision aim to prevent re-appearance of protected content in absence of such arrangements through automated tools colloquially known as ‘upload filters’.

The Member States' implementing the provision have an important role before them. The EU legislator left many issues open when drafting and designing the rules, which are both complex and ambiguous. This article explores the margin of discretion of Member States when it comes to implementing Art. 17. It explores different interpretation options and examines the nature and status of the new right set out in the provision, in order to identify permissible authorisation and licensing mechanisms, and map implementation paths.¹¹

⁸ Commission, ‘Tackling Illegal Content Online Towards an enhanced responsibility of online platforms’ COM/2017/0555, 2.

⁹ Recommendation of 1.3.2018 on measures to effectively tackle illegal content online, C/2018/1177.

¹⁰ See the discussion below at II.1. and case-law cited therein.

¹¹ There is already significant scholarship art 17. See eg Matthias Leistner, ‘European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive Compared to Secondary Liability of Content Platforms in the U.S. – Can We Make the New European System a Global Opportunity Instead of a Local Challenge?’ [2020] *Zeitschrift für Geistiges Eigentum/Intellectual Property Journal (ZGE/IPJ)* <<https://papers.ssrn.com/abstract=3572040>> accessed 17 April 2020; Axel Metzger and others, ‘Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market into National Law – Comment of the European Copyright Society’ <<https://papers.ssrn.com/abstract=3589323>> accessed 4 July 2020; Sebastian Felix Schwemer, ‘Article 17 at the Intersection of EU Copyright Law and Platform Regulation’ [2020] *Nordic Intellectual Property Law Review* <<https://papers.ssrn.com/abstract=3627446>> accessed 4 July 2020; Thomas Spoerri, ‘On Upload-Filters and Other Competitive Advantages for Big Tech Companies under Article 17 of the Directive on Copyright in the Digital Single Market’ (2019) 10 *JIPITEC* <<https://www.jipitec.eu/issues/jipitec-10-2-2019/4914>>; Giancarlo Frosio, ‘Reforming the C-DSM Reform: A User-Based Copyright Theory for Commonplace Creativity’ (2020) 51 *IIC* 709 <<https://doi.org/10.1007/s40319-020-00931-0>> accessed 4 July 2020; Maxime Lambrecht, ‘Free Speech by Design – Algorithmic Protection of Exceptions and Limitations in the Copyright DSM Directive’ (2020) 11 *JIPITEC* <<http://www.jipitec.eu/issues/jipitec-11-1-2020/5080>>; Gerald Spindler, ‘The Liability System of

As noted, it is important to set out our main findings from the beginning so as to provide signposts for the ensuing technical analysis. The main takeaways of our analysis are as follows. Article 17(1) sets out a new right of communication to the public in EU copyright *acquis*. This right exists in its own special regime, either because it is a ‘special right’ to Art. 3 InfoSoc Directive, or because it goes beyond that provision, constituting a ‘new *sui generis* right’. This means that licensing of the new right is unconstrained by the pre-existing general framework of EU copyright law, and is only limited by the *effet utile* of the CDSM Directive. The result is a broader margin of discretion than previously thought possible.

However, the practical consequences of this interpretation are limited by the unique design of the legal mechanism. In particular, limitations arise from the fact that exploitation acts by OCSSPs under Art. 17(1) presuppose an exploitation¹² act by users, covered by Arts. 2 and 3 InfoSoc Directive. At the same time, a special rule in Art. 17(2) automatically extends any (contractual or statutory) authorisation concerning the right in Art. 17(1) to users acting on a predominantly non-commercial basis. This causes the licensing of users’ exploitation acts to follow the arrangements for OCSSPs. Beyond such non-commercial situations, no licensing extension takes place, meaning that users do not benefit from the licensing arrangements for OCSSPs. To put it more simply, the obligation on OCSSPs to license their own use of protected content is a special law. This enables Member States to arrange its authorisation through a number of modalities, possibly including new E&Ls. The authorisation obtained by OCSSPs covers the acts of users automatically only if they act on a predominantly ‘non-commercial’ basis. If users act otherwise, they require a separate authorisation.

This article proceeds as follows. Part II provides a brief overview of the mechanics of Art. 17 CDSM Directive. Part III then examines the nature of the provision’s right of communication to the public under International and EU law. At international level, the analysis focuses on the 1994 TRIPS Agreement, and the 1996 WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). At the EU level, it focuses on the InfoSoc and E-Commerce Directives.¹³ Part IV explores the potential authorisation mechanisms for the right. Part V then briefly examines the recent German implementation proposal of Art. 17, which incorporates some

Art. 17 DSMD and National Implementation – Contravening Prohibition of General Monitoring Duties?’ (2020) 10 JIPITEC 334; Krzysztof Garstka, ‘Guiding the Blind Bloodhounds: How to Mitigate the Risks Art. 17 of Directive 2019/790 Poses to the Freedom of Expression’ in Paul Torremans (ed), *Intellectual Property and Human Rights* (4th edn, Kluwer Law International 2019) <<https://papers.ssrn.com/abstract=3471791>> accessed 8 April 2020; Séverine Dusollier, ‘The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a Few Bad Choices, and an Overall Failed Ambition’ (2020) 57 *Common Market Law Review* 979; Jan Bernd Nordemann and Julian Wiblinger, ‘Art. 17 DSM-RL – Spannungsverhältnis Zum Bisherigen Recht?’ [2020] GRUR 569.

¹² We use the term ‘exploitation acts’ as a synonym for ‘copyright restricted acts’.

¹³ 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); Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market [2000] OJ L178/1 (E-Commerce Directive).

of our suggested interpretation and therefore highlights its application in practice. Part VI concludes.

II. Mechanics of Art. 17: brief overview

The first step in our analysis is to set out a baseline understanding of the legal regime of Art. 17 CDSM Directive. This Part explains the complex mechanics of the provision, why licensing is such a central component of it, and how it relates to international and EU copyright law. In doing so, we lay the foundations for the subsequent analysis of the legal nature of the new right in Art. 17.

1. Definition of Online Content-Sharing Service Provider (OCSSP)

Article 17 CDSM Directive regulates online content-sharing service providers (OCSSPs). These are defined in Art. 2(6) as platforms with a profit-making purpose that store and give the public access to a large amount of works or other subject matter uploaded by their end-users, which they organise and promote.¹⁴ Recital 62 gives further guidance on how to interpret the definition, in particular the importance of a relevant service's substitution effects and of a case-by-case assessment of a provider's profit-making purposes.

The definition of OCSSP clearly includes well-known user-upload or user-generated content video-sharing platforms like YouTube. It probably also includes social networking platforms with similar functionalities (e.g. Facebook), although some authors rightly point out that certain aspects in the legal definition raise doubts on this point.¹⁵ The scope of the definition is further clarified by a *non-exhaustive* list of exclusions in Art. 2(6), which includes electronic communication services (e.g. Skype), providers of business-to-business cloud services and cloud services (e.g. Dropbox), online marketplaces (e.g. eBay), not-for profit online encyclopaedias (e.g. Wikipedia), not-for-profit educational and scientific repositories (e.g. ArXiv.org), and open source software developing and sharing platforms (e.g. GitHub). Not all the types of excluded platforms listed follow neatly from the application of the definition. Some of them are undoubtedly the result of lobbying and political expediency. However, the exclusions share one or both of the following characteristics: (a) the main activity of these services is *not* giving access to protected content; and (b) the listed services are wholly or predominantly not for-profit.¹⁶

A further definition wrinkle is noteworthy. Recital 62 contains an ambiguous reference to piracy websites that opens the door to exclude them from the definition of OCSSP. However, a closer reading suggests a different interpretation. Piracy websites can qualify as OCSSPs but are subject

¹⁴ For simplicity sake we refer in this article to copyright-protected works and other subject matter as 'content' or 'protected content'.

¹⁵ See Metzger and others (n 11) 2-4; Dusollier (n 11).

¹⁶ This aligns with recital 62 CDSM Directive, which states that that the definition 'should not include services that have a main purpose other than that of enabling users to upload and share a large amount of copyright-protected content with the purpose of obtaining profit from that activity.'

to a stricter regime, since they cannot benefit from the special liability exemption mechanism in Art. 17(4). As such, they will be strictly liable once they fulfil the definition of OCSSP.¹⁷

2. Direct liability of platforms and exclusion from hosting safe-harbour

Article 17(1) CDSM Directive states that Member States shall provide that an OCSSP ‘performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users.’ In addition, recital 64 states that when OCSSPs provide such access, ‘[it] is appropriate to clarify in this Directive that [OCSSPs] perform an act of communication to the public or of making available to the public’. Predominantly on the basis of this wording, some scholars argue that Art. 17 does not change the existing *acquis* or introduce any new right.¹⁸ In their view, Art. 17 only applies in the cases where Art. 3 InfoSoc Directive would already govern the acts of the OCSSP in question. This would be the case for the most popular user-upload video-sharing platforms, like YouTube, which would qualify as an OCSSP. According to this view, Art. 17 offers no new right to the rightholders; it is a mere clarification of the pre-existing exclusive right in Art. 3 InfoSoc Directive. Rather what Art. 17 does is merely to introduce a new type of safe harbour or liability mitigation mechanism for OCSSPs. Therefore, Art. 17 exists to the benefit of users and OCSSPs only if the acts in question qualify as communication to the public in Art. 3 of the InfoSoc Directive.

We find this reading difficult to defend. First, as we explain in detail below, it runs contrary to the clear wording of the new directive. Second, it entails a re-interpretation of previous CJEU case-law and the history of the legislative process. Prior to the new directive, user-upload platforms were predominantly qualified as hosting service providers, and were not directly liable for communicating protected content to the public. In simple terms, rightholders would usually have to find and notify infringing content, while providers had to assess their notifications and take the content down where necessary. This notice-and-takedown regime was the result of the combined application of rules on direct liability for copyright infringement (in Art. 3 InfoSoc Directive), with

¹⁷ On art 17(4), see below at II.3. Recital 62 CDSM Directive states that ‘the liability exemption mechanism provided for in this Directive should not apply’ to piracy websites.

¹⁸ Nordemann and Wiblinger (n 11) 576 make this argument. However, when it comes to implementation, they curiously propose that the German legislator explicitly implement and separate the right in the statute in its own subsection. If their argumentation is followed, the German legislator should not do anything concerning exclusive rights at all and should simply rely on pre-existing provisions on communication to the public right. See also Eleonora Rosati, ‘The Legal Nature of Article 17 of the Copyright DSM Directive, the (Lack of) Freedom of Member States, and Why the German Implementation Proposal Is Not Compatible with EU Law’ (*The IPKat*, 31 August 2020) <<http://ipkitten.blogspot.com/2020/08/the-legal-nature-of-article-17-of.html>> accessed 7 September 2020. See also IFPI, ‘IFPI and 21 Organisations from Europe’s Cultural and Creative Sectors Raise Concerns Regarding the European Commission’s Proposed Guidance on the Application of Article 17 of the DSM Directive’ <<https://www.ifpi.org/ifpi-and-21-organisations-from-europes-cultural-and-creative-sectors-raise-concerns-regarding-the-european-commissions-proposed-guidance-on-the-application-of-article-17-of-the-dsm-d/>> accessed 14 September 2020.

partially harmonised rules on a hosting liability exemption or safe-harbours for intermediaries (in Art. 14 E-Commerce Directive), with rules on injunctions against intermediaries for illegal content placed on their platforms by users (in Art. 8(3) InfoSoc Directive). Abundant CJEU case-law on each of these provisions and their interaction extended the scope of primary liability for communicating works to the public, most notably to piracy websites such as *The Pirate Bay*.¹⁹ However, this case-law never clearly extended direct liability to mainstream hosting platforms, such as those covered by the new regime as OCSSPs. This conclusion is reinforced by the multiple judgments that qualify them as hosting service providers under Art. 14 E-Commerce Directive, as well as recent preliminary references to the CJEU that inquire precisely on this point.²⁰

In this light, it was clear to observers of the legislative process of the new Directive that rightholders demanded the introduction of Art. 17 to force OCSSPs into licensing negotiations. This was despite some existing licensing deals between certain European CMOs, like GEMA and PRS, and providers like YouTube, which agreements (for the most part confidential) never established direct liability of providers for their hosting activities.²¹ For this purpose, rightholders required a more far-reaching right than previously available under Art. 3 InfoSoc Directive.

This is exactly what they obtained in the legislative bargain, in exchange for concessions to OCSSPs and users elsewhere in the provision. Unlike the early stages of the legislative process, during which the European Commission tried to embed in the new regime – through language in the recitals of the proposed directive – some criteria from the CJEU case-law on Art. 3 InfoSoc Directive and 14 E-Commerce Directive,²² the final version of CDSM Directive unambiguously changed the status quo. Article 17(1) The CDSM Directive could not be clearer on this point, as it states that Member states ‘shall provide’ that an OCSSPs ‘performs’ an act of communication to the public only ‘when’ it gives access to user-uploaded protected content.

¹⁹ See, eg Case C-160/15 *GS Media BV v Sanoma Media Netherlands BV and Others* ECLI:EU:C:2016:644 (hereafter *GS Media*), Case C-527/15 *Stichting Brein v Jack Frederik Wullems* ECLI:EU:C:2017:300 (hereinafter: *Filmspeler*), and Case C-610/15 *Stichting Brein v Ziggo BV and XS4All Internet BV* ECLI:EU:C:2017:456 (hereinafter: *The Pirate Bay*).

²⁰ On CJEU case-law on hosting service providers, see eg Case C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* ECLI:EU:C:2012:85, and *L’Oréal SA and Others v eBay International AG and Others* ECLI:EU:C:2011:474 (hereinafter: *L’Oréal*). On the recent preliminary reference mentioned, see Joined Cases C-682/18 and C-683/18 *Frank Peterson v Google / YouTube and Elsevier Inc. v Cyando* ECLI:EU:C:2020:586, Opinion of AG Øe (hereinafter: Opinion of AG Øe in *Google / YouTube*).

²¹ See eg Anita Awbi, ‘GEMA Ends Licensing Dispute with YouTube’ (*PRS for Music*, 1 November 2016) <<https://www.prsformusic.com/m-magazine/news/gema-ends-licensing-dispute-youtube/>> accessed 23 October 2020. (‘However, there are still different legal positions held by YouTube and GEMA on the issue of whether YouTube or the uploaders are responsible for the licensing of the used musical works... Despite the conclusion of this agreement, the challenge remains for the politicians to create a clear legal framework.’). See also PRS for Music, ‘What Rights Are Covered by the YouTube Licence?’ (*PRS for Music*) <<https://www.prsformusic.com/help/what-rights-are-covered-by-the-youtube-licence/>> accessed 23 October 2020.

²² See Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market COM/2016/0593 final – 2016/0280 (COD), art 13 and recitals 38-39.

Therefore, despite political declarations in CDSM Directive's recitals, Art. 17 is not a 'clarification' of existing law.²³ The provision *changes* the law in several fundamental ways.²⁴

First, it introduces a special liability exemption mechanism²⁵ directly within the structure of the exploitation right of Art. 17. That is to say, the same provision that sets the scope of the right exempts the provider from direct liability – in para. (4)(b) and (c) – when certain conditions are met. To our knowledge, there is no precedent for such a mechanism in international, EU or national copyright laws.²⁶

Second, it merges exploitation acts of users and OCSSPs in some circumstances. The authorisation obtained by OCSSP for their acts covered by the right in Art. 17(1) automatically covers the uploading acts of users, but only if they act on a predominantly 'non-commercial' basis.²⁷ If the acts of users do qualify as such, they require a separate authorisation. The extension of the authorisation obtained by OCSSPs to certain acts of end-users is both a legal innovation and *lex specialis* to the pre-existing legal framework. The same can be said of the statement in Recital 69 to the effect that authorisations obtained by users to upload protected content to OCSSPs *extend* to the platform's acts of communication to the public.

Third, Art. 17 goes beyond current case-law of the CJEU in the definition of the scope of the concept of 'communication to the public'. It does so by stating that OCSSPs carry out acts of 'communication to the public' when they give access to content uploaded by their users. In Part III

²³ Recital 64 CDSM Directive. It is important to note that the concept of 'clarification' belongs to the political – rather than the statutory – domain. Such 'clarification' is either a direct or indirect amendment. While an indirect amendment would apply to specific subject matter regulated by the newer law, the direct amendment could potentially go beyond, if it explicitly stated so. But there is no middle ground where a new law magically re-interprets previous law without touching it. A new law might provide a testimony of how legislature updates its views of economic and cultural problems – a testimony which might eventually influence the judges, but that is as far as it gets. Giving such 'clarifications; more credit puts it out of reach of a regular canon of statutory interpretation because it tries to escape temporal effects of legislative changes, in particular, general suspicion toward retroactivity.

²⁴ Agreeing, see Leistner (n 11) 12, 13, 14, 19. Leistner views art 17(1) as 'a specific form of communication to the public', which has its conditions in art 17 and art 2(6). See also Spindler (n 11) paras 15, 17, referring to it as 'independent infringement' under art 17(1); and Karina Grisse, 'After the Storm – Examining the Final Version of Article 17 of the New Directive (EU) 2019/790' (2019) 14 JIPLP 887, 890-891, stating that it 'does not create a new exclusive right', but noting that it actually changes the concept and this labeling it as '*lex specialis*'.

²⁵ The term 'liability exemption mechanism' is used in recital 62, last paragraph, to mean the mechanism in art 17(4)(b) and (c).

²⁶ In EU law, of course, art 3 InfoSoc Directive establishes direct liability for acts of communication or making to the public, whereas art 14 E-Commerce Directive provides partial (negative) harmonisation or 'secondary liability' through a safe-harbor for hosting service providers, which applies beyond copyright. In other words, the applicable liability exemption mechanism operates separately and at a different level than the rule on direct or primary liability.

²⁷ art 17(2) CDSM Directive ('not acting on a commercial basis and that their uploading activity does not generate significant revenues'). For convenience, in this article, we refer to this authorisation extension to users as applying to their 'non-commercial' acts. See also recital 69.

we analyse to what extent this new right derives or goes beyond the pre-existing international and EU legal framework.²⁸

Contrary to CJEU case-law on the right of communication to the public, the definition of OCSSPs in Art. 2(6), which delineates the scope of application of the right in Art. 17(1), makes the knowledge of third-party actions largely irrelevant to the determination of the legal status of a platform.²⁹ In the new regime, this assessment is of a more objective nature, focusing on service design and its effects on markets.³⁰ The divergence with existing case-law is likely to emerge in the future when the CJEU will be confronted also with cases on service providers that do not qualify as OCSSP, and whose activities must be assessed under the general right of communication to the public in Art. 3 InfoSoc Directive.

In fact, we can already observe it with regards the pre-existing case-law and the situation post-CDSM Directive. In particular, in the context of the pending joined preliminary references on *Frank Peterson v Google* and *YouTube and Elsevier Inc. v Cyando*, the Opinion of AG Saugmandsgaard Øe explicitly draws on the distinct assessment criteria in the pre-CDSM framework to conclude that online platform operators (e.g. YouTube and Uploaded) are not directly liable for the illegal uploading of protected works by their users.³¹ Therefore, as a result of the changes brought by Art. 17, OCSSPs will become directly liable for their users' uploads independently of their knowledge of the illegality of the act.

Another change of regime occurs in the relationship of the new rules with the E-Commerce Directive. In essence, OCSSPs are a subset of hosting service providers. The latter benefit from a liability exemption or safe harbour in Art. 14(1) E-Commerce Directive.³² This safe harbour

²⁸ art 17(1) CDSM Directive. On the complex case-law on communication to the public, see Giancarlo Frosio, 'It's All Linked: How Communication to the Public Affects Internet Architecture' (2020) 37 *Computer Law & Security Review* 105410; João Pedro Quintais, 'Untangling the Hyperlinking Web: In Search of the Online Right of Communication to the Public' (2018) 21 *The Journal of World Intellectual Property* 385; Jane C Ginsburg and Luke Budiardjo, 'Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives' (2018) 41 *Columbia Journal of Law & the Arts* 153; Miquel Peguera, 'Hyperlinking under the Lens of the Revamped Right of Communication to the Public' (2018) 34 *Computer Law & Security Review* 1099.

²⁹ Relevant CJEU cases that introduce a mental element of knowledge in the assessment of the right of communication to the public include *GS Media* (n 19), *Filmpeleer* (n 19), and *The Pirate Bay* (n 19).

³⁰ In this respect, the definition of art 2(6) is supported by recital 62, which clarifies the focus on the design of the service and its effect on markets: 'Certain information society services, as part of their normal use, are *designed* to give access to the public to copyright-protected content or other subject matter uploaded by their users. The definition of an online content-sharing service provider laid down in this Directive *should target only online services that play an important role on the online content market by competing with other online content services*, such as online audio and video streaming services, for the same audiences. The services covered by this Directive are services, *the main or one of the main purposes of which is to store and enable users to upload and share a large amount of copyright-protected content with the purpose of obtaining profit therefrom*, either directly or indirectly, by *organising it and promoting it in order to attract a larger audience*, including by categorising it and using targeted promotion within it.' (emphasis added).

³¹ See Opinion of AG Øe in *Google/YouTube* (n 20). The same point is made by Spindler (n 11) para 15. For an opposite view, see Leistner (n 11) 4.

³² art 17(3) CDSM Directive.

prevents national laws from imposing liability unless certain conditions are met. Following CJEU case-law, the application of the safe harbour depends on whether the relevant activity of the hosting service provider is predominantly ‘passive’ (as opposed to active).³³ The new directive also expressly excludes OCSSPs from the hosting safe harbour. However, one could argue that the exclusion of the hosting safe-harbour is merely declaratory, since the definition of OCSSP tries to allude to the ‘active’ character of the services provided, thereby avoiding overlaps in application of the two legal instruments.³⁴

In our view, these drafting choices result in the qualification of Art. 17 CDSM Directive as *lex specialis* to Art. 3 InfoSoc Directive and to the E-Commerce Directive.³⁵ This has important legal and practical consequences, which we explore throughout this paper.

3. Avoiding direct liability: authorisation or preventive obligations

Article 17 imposes direct liability on OCSSPs for content uploaded by their users. However, it leaves OCSSPs with two avenues to avoid direct liability. The first avenue is the legal default and consists of an OCSSP obtaining an authorisation to communicate to the public the content uploaded by users. The example provided is of (direct) licensing from the rightholder but leaves open other modalities of authorisation.³⁶ In theory, other authorisation mechanisms include different collective licensing schemes (voluntary, extended or mandatory), as well as statutory licensing – relying on remunerated or compensated E&Ls.³⁷

³³ The consideration of the ‘active’ role of an information society provider as a key role to disqualify it from the safe-harbours in arts 12 to 15 E-Commerce Directive has been a staple of the CJEU’s case-law in the area of intermediary liability since Case C-236/08 to C-238/08 *Google France SARL and Google Inc. v Louis Vuitton Malletier SA* (C-236/08), *Google France SARL v Viaticum SA and Luteciel SARL* (C-237/08) and *Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others* (C-238/08) ECLI:EU:C:2010:159, and Case C-324/09, *L’Oréal v eBay International* (n 20). For a critical assessment, see Martin Husovec, *Injunctions against Intermediaries in the European Union: Accountable but Not Liable?* (Cambridge University Press 2017) 43 ff; Christina Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis* (Kluwer Law International 2016); J van Hoboken and others, ‘Hosting Intermediary Services and Illegal Content Online: An Analysis of the Scope of Article 14 ECD in Light of Developments in the Online Service Landscape’ (*European Commission*, 2018) 31-37 <<https://dare.uva.nl/search?identifier=db3fa078-e225-4336-95ec-5d6f25731799>> accessed 23 August 2020.

³⁴ On the intersection between the CDSM and E-Commerce Directives, see Miquel Peguera, ‘The New Copyright Directive: Online Content-Sharing Service Providers Lose ECommerce Directive Immunity and Are Forced to Monitor Content Uploaded by Users (Article 17).’ (*Kluwer Copyright Blog*, 26 September 2019) <<http://copyrightblog.kluweriplaw.com/2019/09/26/the-new-copyright-directive-online-content-sharing-service-providers-lose-ecommerce-directive-immunity-and-are-forced-to-monitor-content-uploaded-by-users-article-17/>> accessed 13 April 2020.

³⁵ See below at III (on the latter point).

³⁶ art 17(1), second paragraph, CDSM Directive: ‘An [OCSSP] shall therefore obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, for instance by concluding a licensing agreement...’). N.B. art. 17(8), second paragraph, CDSM Directive, refers to ‘licensing agreements... concluded between service providers and rightholders.’.

³⁷ See below at IV (further exploring these mechanisms).

If no authorisation is obtained, OCSSPs can rely on a second avenue to avoid direct liability: they must comply with the three cumulative conditions in Art. 17(4). OCSSPs must demonstrate that they have: (a) made best efforts to obtain an authorisation; (b) made best efforts to ensure the unavailability of specific works for which the rightholders have provided them with the relevant and necessary information; and (c) acted expeditiously, subsequent to notice from rightholders, to take down infringing content and made best efforts to prevent its future upload.

The first condition is intertwined with the default obligation to obtain authorisation in Art. 17(1).³⁸ Since OCSSPs do not know what content users might upload to their services, their obligation to license is limited by a notion of ‘best efforts to obtain an authorisation’ in Art. 17(4)(a). This delimits the scope of the obligation to obtain an authorisation as a default avenue to avoid direct liability. It is also the first hurdle that must be cleared by any OCSSP that wishes to avail itself of the liability exemption mechanism in Art. 17(4)(b) and (c).

It is easy to understand that obtaining direct authorisations from all potential rightholders in the world whose content may be uploaded by a user of a platform is impossible. That would mean clearing authorisations for millions of works of different types uploaded by users. The provision therefore clarifies that ‘best efforts’ have to be ‘proportionate’, meaning that the concept should take into account the type and size of the service, the type of content it usually carries, and the costs of rights clearance given the existing licensing options on the market.³⁹

Member States implementing Art. 17 may influence what constitutes ‘best efforts to obtain authorisation’ in different ways. First, they can create or incentivise particular licensing mechanisms.⁴⁰ These might then become more affordable or wide-spread. Second, they may create standards for rights clearance, for instance by establishing registries that are to be consulted by OCSSPs when providing their services. Third, they could also provide interpretative guidelines for the relevant parties. This could mean, for example, differentiating between requiring from OCSSPs the proactive search of authorisation from well-known rightholders, while taking a more reactive notice-and-licence stance towards less known ones.⁴¹ If adopted, mechanisms or rules of this type would contribute to more clearly define the content of this ‘best efforts’ obligation in each Member State. However, unless these solutions are coordinated, it will be difficult to prevent fragmentation in the Digital Single Market.

In sum, OCSSPs will meet their obligation under Art. 17(4)(a) at least in two scenarios. First, when they seek such an authorisation and it is denied by rightholders. Second, when OCSSPs can establish that obtaining the authorisation is beyond the (as of yet undefined) ‘best efforts’ obligation. In these circumstances, OCSSPs will have cleared the hurdle in 17(4)(a) and can rely on the second avenue to avoid direct liability: the ‘liability exemption mechanism’ in Art. 17(4)(b) and (c).

³⁸ See Metzger and others (n 11) 4, calling art 17(1) and 4(a) ‘expressions of the same duty of the OCSSP’.

³⁹ art 17(5) CDSM Directive.

⁴⁰ On which, see below at IV.

⁴¹ Metzger and others (n 11).

This mechanism requires the adoption of *preventive* and *reactive* measures. Preventive measures include obligations on platforms – when provided with ‘relevant and necessary information’ by rightholders – to proactively carry out ‘best efforts to ensure the unavailability of specific works’ (lit. b) and ensure the works already taken down do not surface again on the platform (lit. c). Whereas the first obligation incentivises platforms to apply *ex ante* filtering measures, the second imposes a notice-and-stay-down regime. In the heated debate surrounding Art. 17, critics have labelled these obligations as requiring ‘upload’ and ‘re-upload’ filters. Regarding reactive measures, platforms must put in place a notice-and-takedown system, according to which they must act ‘expeditiously’ to remove or disable access to content they host upon receiving a ‘sufficiently substantiated notice from the rightholders’.⁴² This obligation is similar to that imposed on hosting platforms by Art. 14 E-Commerce Directive.

Therefore, OCSSPs are subject to a triple set of obligations: to *license* content, to *prevent* the upload of infringing content, and to *remove* infringing content already uploaded. In order to satisfy Art. 17, all these obligations must meet the ‘best efforts’ threshold, interpreted in light of the principle of proportionality and the factors described in para. (5). The burden of proof lies with the platform. Article 17(6) contains a partial exception to this regime, to the benefit of OCSSPs that are ‘new service providers with small turnover and audience’. These new providers remain covered by the regime in Art. 17 but are subject to mitigated obligations in order to benefit from the liability exemption mechanism in para. (4).⁴³ Although this exceptional regime modulates the best efforts obligations for certain platforms, it is not meant to affect the availability of remedies against them. In other words, smaller and newer OCSSPs have to comply with fewer obligations than their larger or older counterparts, but they remain subject to the same remedies as larger platforms. In particular, they are still subject to injunctions under Art. 8(3) InfoSoc Directive if their services are used by a third-party user to infringe copyright.⁴⁴

4. User rights and freedoms

⁴² art 17(4)(c) CDSM Directive.

⁴³ art 17(6) and recital 67 CDSM Directive identify two exclusion scenarios, ie cases in which OCSSPs are exempted from *some* of the preventive obligations in art 17(4)(b) and (c). In the first scenario, OCSSPs that are under three years old and have an annual turnover below EUR 10 Million are only subject to the notice-and-takedown obligation in art 17(4)(c). The second scenario applies to OCSSPs that meet the conditions of the first scenario and additionally have more than 5 million monthly unique visitors. These OCSSPs are in addition subject to the notice-and-stay-down obligations in art 17(4)(c), meaning that they are only exempt from the strictest preventive obligations in this paragraph. N.B. some of the thresholds used to define the exclusion scenarios are taken from other legislative instruments: art 16(2) Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (Text with EEA relevance) (CRM Directive); and Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (Text with EEA relevance) (notified under document number C(2003) 1422) ([2003] OJ L124/36).

⁴⁴ Recital 66, first paragraph, third sentence CDSM Directive. For a detailed analysis of the legal regime of injunctions in art 8(3) InfoSoc Directive, see Husovec (n 33).

It is possible to identify different categories of uploaded material that do not infringe copyright and related rights: (a) material in the public domain, (b) material subject to an express or implied licence, and (c) material covered by and E&Ls, either in Art. 17(7) CDSM Directive, or in Art. 5 InfoSoc Directive (if implemented).⁴⁵

Article 17(7) CDSM Directive includes a special regime for certain E&Ls. According to this, ‘Member States shall ensure that users’ of OCSSPs, when uploading or making available content, ‘are able to rely’ on the following exceptions: (a) quotation, criticism, review, and (b) use for the purpose of caricature, parody or pastiche. Previously, these were *optional* exceptions in the InfoSoc Directive.⁴⁶ Now the exceptions have become *mandatory*. This is clear from the text of the provision – ‘shall ensure’ – and from the recitals, which state that such exceptions ‘should, therefore, be made mandatory in order to ensure that users receive uniform protection across the Union.’⁴⁷

There is debate on the exact nature of the E&Ls in Art. 17(7), their relationship to para. (9), and the place of these user rights or freedoms in the normative hierarchy of Art. 17 vis-à-vis preventive obligations. This debate goes beyond the scope of our analysis. On this topic, we have provided elsewhere, together with a number of academics, analysis and recommendations aimed at safeguarding user freedoms in the implementation of these rules.⁴⁸

III. A special or new sui right of communication to the public?

The question at the heart of this paper is: what is the *nature* and *status* of the right in Art. 17 CDSM Directive? The answer is consequential for the compatibility of this provision with international and EU law, the margin of discretion of Member States in national implementations, and the possible authorisation mechanisms through which the right may be licensed. Part III examines the nature and status of the right by outlining and assessing different interpretation options in light of international and EU law.

1. The nature of the right in Art. 17: interpretation options

⁴⁵ In cases of conflict between E&Ls in the CDSM and InfoSoc Directives, the former overrides the latter due to the application of the principle *lex posterior specialis derogat legi priori generali*.

⁴⁶ arts 5(3)(d) and (k) InfoSoc Directive.

⁴⁷ Recital 70 (first subparagraph).

⁴⁸ See João Pedro Quintais and others, ‘Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics’ (2020) 10 JIPITEC <<https://www.jipitec.eu/issues/jipitec-10-3-2019/5042>> accessed 12.11.2020. On this topic, see also Lambrecht (n 11); Garstka (n 11); Felipe Romero Moreno, “‘Upload Filters’ and Human Rights: Implementing Article 17 of the Directive on Copyright in the Digital Single Market’ (2020) 34 International Review of Law, Computers & Technology 153.

There are four basic options on how to interpret or qualify the right in Art. 17 CDSM Directive and its relationship to existing international and EU law. We term these options A, B, C and D, with the following descriptive shorthands.⁴⁹

| | |
|------------------|--|
| <i>Option A:</i> | A sub-type of right of communication to the public <i>within</i> international minimum standards. |
| <i>Option B:</i> | A sub-type of right of communication to the public <i>outside</i> international minimum standards. |
| <i>Option C:</i> | A ‘special’ right of communication to the public outside international minimum standards but within the earlier EU copyright <i>acquis</i> . |
| <i>Option D:</i> | A ‘new <i>sui generis</i> ’ right of communication to the public outside international minimum standards <i>and</i> outside the earlier EU <i>acquis</i> . |

a) Option A: a sub-type of right of communication to the public within international minimum standards

The first option is to interpret the right in Art. 17 as a sub-type of communication to the public, covered by the international minimum standard set forth in Art. 8 WCT, for copyright-protected works, and Arts. 10 and 14 WPPT, for performances and phonograms. Article 8 WCT prescribes a general and broad right of communication to the public, including the making available to the public of works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

In Option A, the broad international minimum standard encompasses in its scope the EU right of communication to the public in Art. 3 InfoSoc Directive. This in turn includes as a sub-type the right in Art. 17 CDSM Directive (see Figure 1). In this Russian doll-like configuration of exploitation rights, Art. 17 is subject to the requirements stemming from its mother and grandmother rights in the InfoSoc Directive and WCT, respectively.⁵⁰

⁴⁹ To be sure, there are other constellations that are possible, eg under option A one can imagine many sub-situations, but they do not matter for the purposes of this paper.

⁵⁰ The question then becomes how to qualify the special liability exemption mechanism in art 17(4), which is an integral component of the new right.

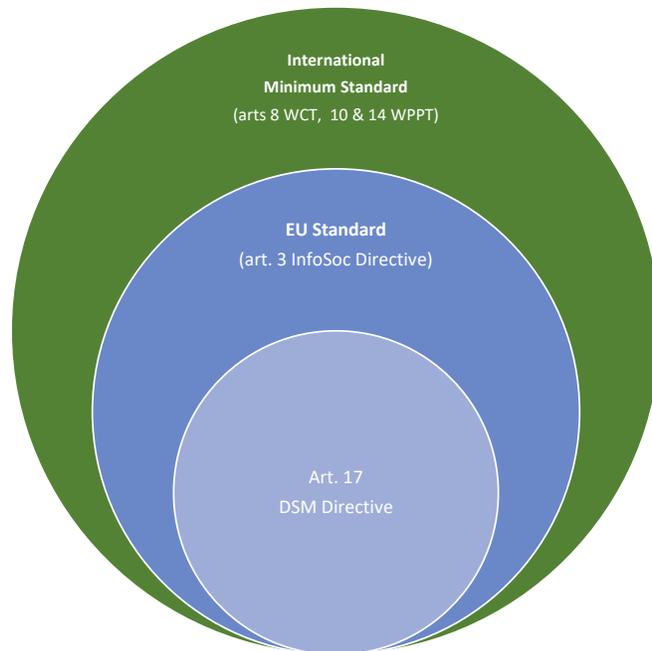


Figure 1. Option A

b) Option B: a sub-type of right of communication to the public outside international minimum standards

Option B views the right in Art. 17 as a sub-type of the EU right of communication to the public. This scenario recognises that EU law has broadened the scope of the right of communication to the public beyond the international minimum standard in the WCT/WPPT, as a result of CJEU case-law on Art. 3 InfoSoc Directive. Examples include the application of the right of communication to the public to acts of hyperlinking, to the sale of media-devices with add-ons linking to content made available online without the permission of rightholders, and to the operation of piracy websites hosting torrents and magnet links to unauthorised copies of protected content.⁵¹

In this scenario, OCSSPs would already be covered by the pre-existing right of communication to the public in the InfoSoc Directive, as extended through CJEU interpretation. The novelty of Art. 17 would be to create a sub-type of right of communication to the public for the activities of OCSSPs – including non-commercial end-user uploads – *without* isolating it from the scope of Art. 3 InfoSoc Directive. In essence, this would amount to the creation of a sub-right of making available to the public. Differently from Option A, this sub-right would be outside the scope of the international minimum standard (see Figure 2).

As noted, a variation of this argument is to say that there is simply no legal right in Art. 17 because its rules only apply if Art. 3 InfoSoc Directive and its criteria are satisfied. Therefore, Art. 17

⁵¹ See generally Pekka Savola, ‘EU Copyright Liability for Internet Linking’ (2017) 8 JIPITEC <<https://www.jipitec.eu/issues/jipitec-8-2-2017/4563>>; Peguera (n 28); Quintais (n 28).

provides nothing ‘extra’ to the rightholders, and only limits the liability following from Art. 3 InfoSoc Directive.⁵²

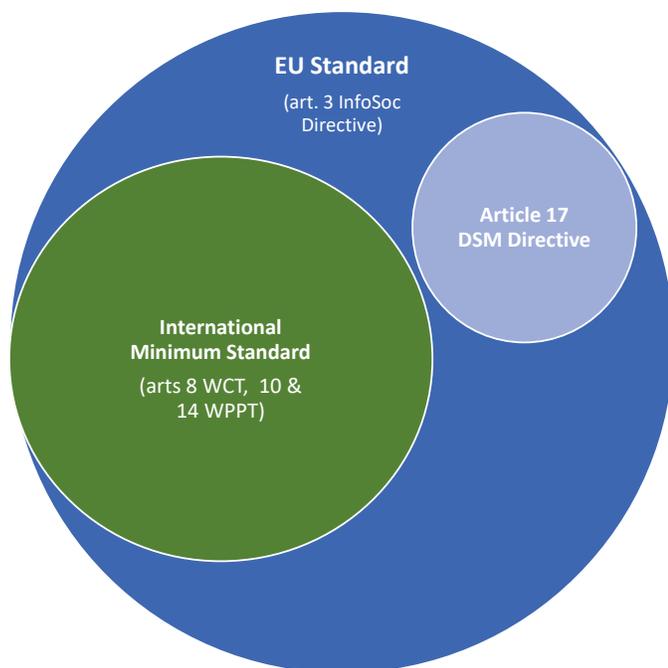


Figure 2. Option B

c) Option C: a ‘special’ right of communication to the public

Option C is a variation of the previous option. The difference is that Art. 17 CDSM Directive is isolated from Art. 3 InfoSoc Directive because it is considered *lex specialis* with respect to it. That is to say, although the acts covered by the new right would in theory comprise a sub-set of those included in the scope of Art. 3 InfoSoc Directive, Art. 17 will henceforth govern them separately through a new regime. In doing so, the new provision removes the acts of OCSSPs (but not those of their users) from the scope of the InfoSoc Directive and its regulatory scheme (see Figure 3). This marks a significant difference from Option B, as we detail below.

⁵² See above at II.2.

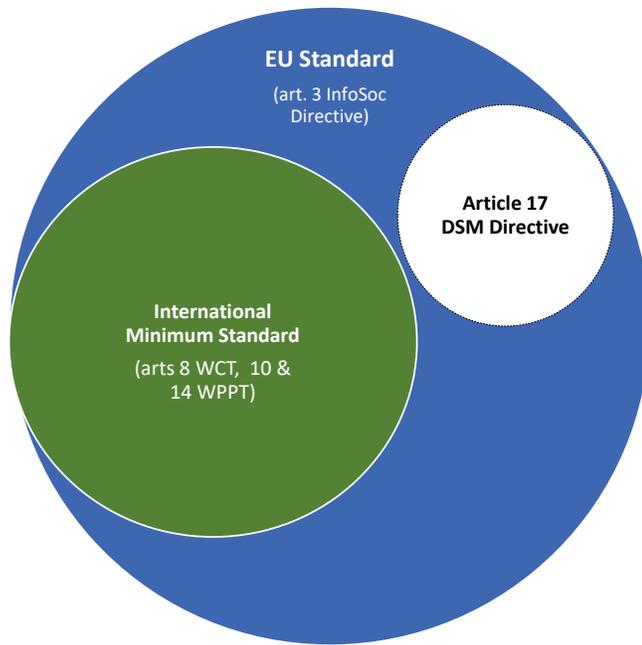


Figure 3. Option C

d) Option D: a ‘sui generis’ right of communication to the public

The last Option is D. According to this, Art. 17 should be interpreted as an extension of the scope of the right of communication to the public as compared to that of Art. 3 InfoSoc Directive. That is to say, Art. 17 is a wholly new right of communication to the public, which extends the concept beyond the already broad EU notion of the communication to the public in Art. 3 InfoSoc Directive as interpreted by the CJEU (see Figure 4). Effectively, under this option, Art. 17 shares only a name with its other cousin, much like lion does with a sea lion – otherwise they have little in common.

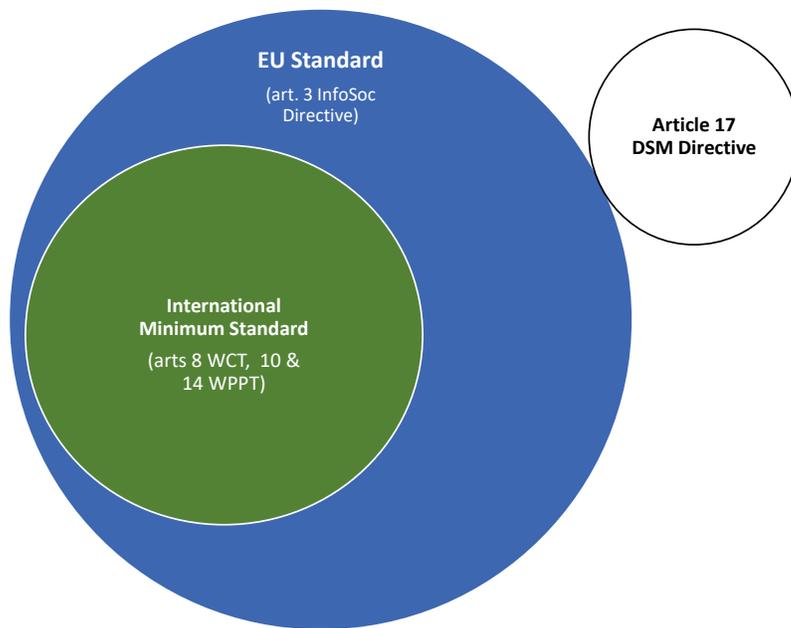


Figure 4. Option D

2. Assessing the interpretation options

After laying out the different interpretation options of Art. 17 vis-à-vis the pre-existing international and EU standards of communication to the public, we will now assess strengths, weaknesses, and their consistency with international and EU law. Each option brings different consequences for the qualification of the underlying right, its legal admissibility, the applicable authorisation mechanisms and, ultimately, its implementation into national law.

a) Rejecting options A and B

In our view, Options A and B should be rejected. Option A assumes that the right in Art. 17 falls within the scope of the international minimum standard of communication to the public. Article 8 WCT provides for a broad concept of communication to the public, encompassing acts of making available that extend to on-demand access and secondary transmissions.⁵³ Under the WCT's 'umbrella solution', contracting states were afforded significant discretion in national implementations of this prong of the exclusive right.⁵⁴

Still, it is a conceptual stretch to argue that Art. 8 WCT covers the provision of indirect access to protected content uploaded by third parties to an intermediary platform. In fact, this possibility was considered and rejected in the drafting process of the Treaty. Prior to the WIPO Diplomatic

⁵³ Ginsburg and Budiardjo (n 28) 158.

⁵⁴ See Mihály Ficsor, *The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation and Implementation* (Oxford University Press 2002) 204-210. See also Ginsburg and Budiardjo (n 28) 158-159. (noting that in choosing this approach 'the drafters opted for an approach of juridical as well as technological neutrality').

Conference, proposals were put forward to make Internet Service Providers liable for the activities of their users.⁵⁵ These proposals were rejected by the delegates to the Conference,⁵⁶ who instead adopted the Agreed Statement to Art. 8 WCT, according to which ‘the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention.’⁵⁷

To the best of our knowledge, no national law of a WCT member state extends its national implementation of Art. 8 to user-upload or user-generated content platforms in a way that results in direct liability. An observation on the development of CJEU case-law on the notion of ‘communication to the public’ reinforces this view.

Article 3 InfoSoc Directive is the EU implementation of the corresponding provisions in the WCT/WPPT.⁵⁸ But this does not mean that the resulting EU right of communication to the public – as interpreted by the CJEU – mirrors in scope the international minimum international standard it implemented. The Court arguably gave this right a distinctly ‘European’ identity, in an effort to apply it in a way that addressed the many shortcomings in the process of harmonisation, such as missing doctrines of secondary, intermediary or accessory liability at Union level.⁵⁹ This European experimentation does not per se raise the international minimum standards of the interpreted provisions, nor does it bind other countries to change their laws accordingly.

In the field of communication to the public, the Court has steadily expanded the scope of Art. 3 InfoSoc Directive to capture activities previously regulated by non-harmonised secondary liability doctrines, namely ‘mediated types’ of use like hyperlinking to content hosted on third-party websites.⁶⁰ Prior to the intervention of the Court, it was doubtful whether such activities would

⁵⁵ See Pamela Samuelson, ‘Pushing Back on Stricter Copyright ISP Liability Rules’ (2020) 26 Michigan Technology Law Review (forthcoming) <<https://papers.ssrn.com/abstract=3630700>> accessed 13 July 2020. (and sources cited therein).

⁵⁶ *ibid.*

⁵⁷ *ibid.* at 4 noting that ‘Agreed Statement to Article 8 of the WCT became the international norm regarding ISP liability for user infringements of which the ISPs were unaware and over which they had no control. ... Consistent with this statement were subsequent legislative limitations on ISP liability for infringing acts of their users about which they lacked knowledge and over which they had no control’. See also Opinion of AG Øe in *Google/YouTube* (n 20) para 80 (‘In my view, it follows that, in principle, operators such as YouTube and Cyando merely provide ‘physical facilities’, as envisaged in recital 27 of Directive 2001/29, which enable users of their platforms to carry out a ‘communication to the public’, within the meaning of Article 3(1) of that directive, of works chosen by the latter.’) and generally the analysis in paras 66-93 (on the interaction between the ‘mere provision of physical facilities’ primary vs secondary liability of online service providers such as YouTube).

⁵⁸ See recital 15 InfoSoc Directive.

⁵⁹ For an in-depth analysis of intermediary, secondary and accessory liability regimes in Europe in connection to the EU copyright *acquis*, see Angelopoulos (n 33); Jaani Riordan, *The Liability of Internet Intermediaries* (Oxford University Press 2016); Stefan Kulk, *Internet Intermediaries and Copyright Law: EU and US Perspectives* (Wolters Kluwer 2019) <<https://irus.wolterskluwer.com>> accessed 22 October 2020.

⁶⁰ João Pedro Quintais and Joost Poort, ‘The Decline of Online Piracy: How Markets – Not Enforcement – Drive Down Copyright Infringement’ (2019) 34 American University International Law Review 807, 833-841.).

even be covered by the exclusive right in the InfoSoc Directive. It took the Court a great deal of legal ‘innovation’ and the introduction of mental elements and legal presumptions in the assessment of an otherwise strict liability tort to achieve the result of extending the right to such ‘mediated types’ of use.⁶¹

None of these elements or presumptions can be found in or derived from the WCT/WPPT texts, whichever method of legal interpretation we apply.⁶² It is therefore doubtful whether the types of acts at issue are covered by the international minimum standard of communication to the public. In fact, a cursory view of national approaches implementing the same international obligations shows that the EU solution stands isolated.⁶³ The acts regulated by Art. 17 CDSM Directive are one degree further removed from the judicially extended scope of Art. 3 InfoSoc Directive. Indeed, the new right in Art. 17 appears to be an outlier in copyright laws worldwide.⁶⁴ In our opinion, this places it beyond the scope of the international standard.

To conclude otherwise would have far-reaching consequences. If Option A is correct, other WCT/WPPT member states would have had to recognise a similar level of protection for rightholders vis-à-vis OCSSPs – an exclusive right – under their national laws. In the US, for example, that would mean that YouTube and Facebook would have to obtain a licence from rightholders for all or most the protected content uploaded by their users. It would thus be difficult to reconcile the current application to these platforms of secondary liability doctrines – contributory infringement, inducement and vicarious liability⁶⁵ – and safe harbour legislation, such as Sec. 512(d) of the Digital Millennium Copyright Act (DMCA).⁶⁶ On these grounds, Option A should be dismissed.⁶⁷

The conclusion that Art. 17 lays beyond the realm of harmonised international copyright law leads us to Option B. According to this, the provision merely prescribes a new sub-right of

⁶¹ Quintais and Poort (n 60); Christina Angelopoulos and João Pedro Quintais, ‘Fixing Copyright Reform: A Better Solution to Online Infringement’ (2019) 10 JIPITEC 147; Frosio (n 28) 9-17.

⁶² It is generally accepted that arts 31 to 33 of the Vienna Convention on the Law of Treaties (1969) provide a codification of customary international law on the matters they cover, and that international treaties on copyright should be interpreted in their light. See Martin Senftleben, *Copyright, Limitations, and the Three-Step Test* (Kluwer Law International 2004) 99; Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, vol I (OUP 2006) 181-182.

⁶³ See, eg, Quintais and Poort (n 60); João Pedro Quintais, ‘Global Online Piracy Study Legal Background Report’ (*IViR* 2018) <<https://www.ivir.nl/nl/projects/global-online-piracy-study/>>. See also Samuelson (n 55).

⁶⁴ On the novelty of art 17 CDSM Directive at an international level, see, eg, House of Commons Canada, Statutory Review of the Copyright Act, Report of the Standing Committee on Industry, Science and Technology (June 2019) 20, 75-83 <<https://www.ourcommons.ca/Content/Committee/421/INDU/Reports/RP10537003/indurp16/indurp16-e.pdf>> accessed 21 August 2020. For commentary, see Carys J Craig, ‘Meanwhile, in Canada... A Surprisingly Sensible Copyright Review’ [2020] European Intellectual Property Review <<https://papers.ssrn.com/abstract=3494363>> accessed 23 August 2020.

⁶⁵ On which, see eg Ginsburg and Budiardjo (n 28) 193-201.

⁶⁶ Online Copyright Infringement Liability Limitation Act, Pub. L. No. 105-304, sec. 201-02, 112 Stat. 2877 (1998) (codified as amended at 17 U.S.C. § 512).

⁶⁷ Reaching a similar conclusion, see Leistner (n 11) 34-35.

communication to the public, subordinate to its mother provision in the InfoSoc Directive (i.e. not *lex specialis*) but outside international minimum standards. A variation of this view is to say that there is simply no legal right in Art. 17 because its rules only apply if Art. 3 InfoSoc Directive and its criteria are satisfied. Therefore, Art. 17 provides nothing ‘extra’ to the rightholders, and only limits the liability following from application of Art. 3 InfoSoc Directive. The consequences of both arguments are the same.

Option B must also be rejected. If Art. 17 introduces a mere sub-right as described, how could its idiosyncratic features not constitute a special regime to the broader right of Art. 3 InfoSoc Directive?

In our view, the right in Art. 17 is a *unitary* solution blending different core components, namely: it merges commercial exploitation acts of OCSSPs (access provision) with non-commercial exploitation acts of users (uploading); and it embeds a complex liability exemption mechanism with preventive and reactive obligations.⁶⁸

This composition makes the right unique in EU (and international) law. For example, the hosting liability exemption or safe-harbour in Art. 14 E-Commerce Directive limits (non-harmonised) secondary liability doctrines that complement the catalogue of harmonised exclusive rights in the *acquis*.⁶⁹ Article 17 is a different beast: it incorporates the liability exemption mechanism *within the fabric of the right itself*. The effect is to limit the scope of application of the right. When the liability exemption mechanism applies, the activities otherwise reserved to rightholders can be carried out by OCSSPs without the need for authorisation.

Under option B, the effect of the liability exemption mechanism in para. (4) is to restrict the exclusive right of Art. 3 InfoSoc Directive. When that mechanism applies, it exempts from authorisation all the activities that fall within the scope of Art. 17(1) CDSM Directive. Consequently, from a functional perspective, the liability exemption mechanism would operate as an E&L to the exclusive right of Art. 3 InfoSoc Directive, whether or not it is accepted that Art. 17 introduces a new right.⁷⁰ This unexpected qualification calls into question the viability of this interpretative option.

First, from a literal and systematic perspective, it is difficult to consider the liability exemption mechanism in para. (4) as an E&L. Article 17 contains in para. (7) its own set of mandatory E&Ls to the right in para. (1). These exceptions are separate and independent from those in Art. 5 InfoSoc Directive, making no explicit reference to them. In that light, it does not make sense to consider that the mechanism in Art. 17(4) contains an E&L to the exclusive right in Art. 3 InfoSoc Directive, which in Option B incorporates the right in Art. 17(1). To put it more simply, how can Art. 17(4) be an E&L to Art. 3 InfoSoc Directive (a consequence of Option B), when the same provision already deals with other E&Ls to Art. 3 InfoSoc Directive explicitly in Art. 17(7). Furthermore, such a reading makes it hard, if not impossible to explain Art. 17(2) CDSM Directive, which

⁶⁸ Leistner presents a similar view repeatedly referring to the hybrid character of the provision. See Leistner (n 11) 8, 23, 34.

⁶⁹ Opinion of AG Øe in *Google / YouTube* (n 20) paras 138-139.

⁷⁰ Leistner seems to agree, when he says that ‘Art. 17 (4) is also devised as an exception from the basic Art. 17 (1) liability principle’. See Leistner (n 11) 12.

foresees a merger of exploitation acts of two different actors (user and OCSSP) under some circumstances.

There is no indication that the liability exemption mechanism in Art. 17(4)(b) and (c) was intended as an E&L. To the best of our knowledge, no recital or preparatory document suggests this. However, if qualified as such, Options A and B become even less appealing. For Option A, it would mean that the liability exemption mechanism would have to comply with the different international variants of the three-step test;⁷¹ at least those in Arts. 10 WCT and 16 WPPT (and perhaps that in Art. 13 TRIPS).⁷² For Option B, the international three-step tests would in principle not apply since the right would go beyond minimum standards. However, the three-step test in Art. 5(5) InfoSoc Directive would still apply. The new right in Art. 17, under this reading, is only a sub-type of the right in Art. 3 InfoSoc Directive, which is not separate from the general regime. As a result, the E&L would also technically apply to the ‘mother’ exclusive right in Art. 3. Consequently, Art. 5(5) would limit concepts of Art. 17, including how the Member States can implement ‘best efforts’ and ‘proportionality’ in relation to Art. 17(4). This is not a workable solution and clearly goes against the spirit of the new Directive, which even foresees a Stakeholder Dialogue ‘to discuss best practices for cooperation between [OCSSPs] and rightholders’.⁷³

b) Why Art. 17 creates either a ‘special’ or a new ‘sui generis’ right

Legal interpretation methods are tools that lawyers use to decipher the meaning of words in statutes. The legislative process is often complex and highly contested, and the adopted legislative outcomes are not uncommonly surprising for the legislators themselves. Upon adoption, a statute becomes part of a broader family of statutes, which often have pre-existing rules and vocabulary. For that reason, legal interpretation cannot ignore the context of other statutes, and the purpose of the underlying law in general. In the modern area, scholars usually settle on four basic methods of interpretation: literal (or textual), systematic, historical and purposive (or teleological).

The literal interpretation method sets the boundaries for other methods. As repeatedly emphasised also by CJEU, ‘[a]lthough an interpretation of a provision (...) “in the light” of its legal context is

⁷¹ An analysis of the admissibility of the liability exemption mechanism vis-à-vis the international or EU three-step tests is beyond the scope of this article. However, there is reasonable doubt that the mechanism could survive the test unscathed. Despite the abundant literature on strict versus flexible interpretations of the test, the CJEU has predominantly endorsed the stricter view. This would probably impose a challenge to admissibility of the liability exemption mechanism, further complicating its already complex operation. On the three-step test in international law see, eg, Senftleben (n 63); Christophe Geiger, Daniel J Gervais and Martin Senftleben, ‘The Three-Step-Test Revisited: How to Use the Test’s Flexibility in National Copyright Law’ (2014) 29 *American University International Law Review* 581.

⁷² For TRIPS, this would require an extensive interpretation of its test to rights not covered by TRIPS or interlinked Treaties. See Panel Report, United States – s 110(5) of the US Copyright Act, para 6.80, WTO Doc WT/DS160/R (adopted 15 June 2000) (in the context of Berne-incorporated rights) the Panel states that: ‘[i]n our view, neither the express wording nor the context of Article 13 or any other provision of the TRIPS Agreement supports the interpretation that the scope of application of Article 13 is limited to the exclusive rights newly introduced under the TRIPS Agreement.’).

⁷³ art 17(10) CDSM Directive.

possible in principle to resolve a drafting ambiguity, such an interpretation cannot have the result of depriving the clear and precise wording of that provision of all effectiveness'.⁷⁴ Furthermore in EU law, as noted by Rösler, the CJEU does not always pay attention to the historical argument.⁷⁵ Interpretation of EU law by the CJEU thus predominantly follows literal, systematic and purposive interpretation. Since the interpretation of EU law is always complex due to a number of official language versions, the underlying purpose of the provisions often plays an outsized role compared to national law.

The starting point of every act of interpretation is legal fiction. Every judge must assume a *rational legislator* that adopts laws which are internally consistent; otherwise, individuals could be subject to contradictory requests from the government. The requirement of consistency is the underlying logic behind the most fundamental rules of interpretation, such as a later law amends a former law (*lex posterior derogat legi priori*), and a special law amends a general law (*lex specialis derogat legi generali*). The president of the CJEU, Koen Lenaerts, specifically highlights that this equally means that: '[a]s a token of rationality, the EU legislator must also avoid useless duplication. Accordingly, no provision of EU law should be redundant'.⁷⁶

Drawing on the basic interpretation methods used by the CJEU, we argue that the rational EU legislator construed Art. 17 either as 'special' or as a new '*sui generis*' right (Options C and D). Option C is the same as Option B, a case of a sub-right, with the difference that Art. 17(1) and (2) are *lex specialis* to Art. 3 InfoSoc Directive. Such qualification splits the regimes of communication to the public in the different directives, meaning that the new right in Art. 17 abides only by the requirements of the CDSM Directive.⁷⁷ Option D views Art. 17(1) as recognising a wholly new – *sui generis* – right of communication to the public that rightholders previously did not own. As such, the only constraints imposed on the new right would be those deriving from the CDSM Directive.

⁷⁴ Case C-220/03 *European Central Bank v Federal Republic of Germany* ECLI:EU:C:2005:748, para 31.

⁷⁵ Hannes Rösler, 'Interpretation of EU Law' in Jürgen Basedow, Klaus J Hopt and Reinhard Zimmermann (eds), *The Max Planck Encyclopedia of European Private Law* (OUP 2011) 979-982 <https://content.schweitzer-online.de/static/catalog_manager/live/media_files/representation/zd_std_orig__zd_schw_orig/001/136/708/9780199578955_content_pdf_1.pdf> accessed 12.12.2020.

⁷⁶ Koen Lenaerts and José A Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' (AEL 2013/9) (2013) *Academy of European Law (AEL) Working Paper (Distinguished Lectures of the Academy)* 14.

⁷⁷ Leistner also views art 17(1) as 'a specific form of communication to the public' which has its conditions in art 17 and art 2(6). See Leistner (n 11) 12, 13, 14 and 19. At the same time, he rejects the notion of *sui generis* right (p 4), because the reach of art 17(1) is 'in principle' consistent with existing case-law; *ibid* 4. Thus, we read his position as largely conforming with our Option C, under which art 17(1) is a special right, but not going beyond the pre-existing scope. However, Leistner doubts that this immediately means that art 17 escapes the InfoSoc Directive also with regard to E&Ls; *ibid* 39-40. Expressing similar doubts, although without a conclusive opinion on the matter, see GRUR, 'Stellungnahme des GRUR Fachausschusses für Urheber- und Verlagsrecht zum Diskussionsentwurf eines Zweiten Gesetzes zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes v. 24.6.2020' (2020) GRUR Position Statement 8 <http://www.grur.org/uploads/tx_gstatement/2020-08-27-GRUR-Stn-Diskussionsentwurf-Umsetzung-DSM-RL.pdf> accessed 12.12.2020. We address these objections below at III.4.

In essence, Options C and D *escape* the InfoSoc Directive; they are interpreted on their own terms.⁷⁸ Under both interpretations, licensing of the right in Art. 17(1) is unconstrained by the pre-existing EU copyright law framework, and is only limited by the *effet utile* of the CDSM Directive. The practical consequences of this interpretation are, however, limited by the fact that exploitation acts by OCSSPs presuppose an exploitation act by users, regulated by Arts. 2 and 3 InfoSoc Directive. At the same time, the special rule of Art. 17(2) automatically extends any authorisation concerning the new right to users acting on a predominantly non-commercial basis. This causes the licensing of users' non-commercial acts to follow the arrangements for OCSSPs.

Whether the new right falls under Option C or D will largely depend on the outcome of a number of pending preliminary references before the CJEU, which deal with the legal qualification of activities of user-upload platforms vis-à-vis the right of communication to the public in Art. 3 InfoSoc Directive.⁷⁹ In particular, in joined cases *YouTube v Google* and in the case *Puls 4 TV* the Court must in essence decide whether a video-sharing platform like YouTube qualifies as a hosting service provider that benefits from the safe-harbor in Art. 14 E-Commerce Directive or, instead, as a service provider that is directly liable for communicating to the public the user-uploaded material it hosts under Art. 3 InfoSoc Directive. If the Court decides YouTube benefits from the hosting safe-harbor, then Options A, B and C must be discarded, since the right in Art. 17 will clearly go beyond the scope of Art. 3 InfoSoc Directive. Option D becomes the only viable interpretation. Conversely, if the Court decides that YouTube is directly liable for the content it hosts, then Options A and D must be rejected and only B and C are viable. In this scenario, Option C would make the most sense since Art. 17 CDSM Directive sets out a special regime for OCSSPs (like YouTube) that would otherwise be covered by Art. 3 InfoSoc Directive. Option B would only be possible if the Court decides YouTube is covered by Art. 3 InfoSoc Directive while at the same time developing criteria that allow the new regime in Art. 17 CDSM Directive to be incorporated into the InfoSoc Directive while not being *lex specialis* to it.

Until the judgments are handed down by the CJEU, we consider that Option D is the most accurate interpretation. This is because the language of Art. 17 shifts the enquiry on whether a platform carries out a restricted communication to the public from an assessment of subjective mental elements (e.g. volition or knowledge) to an assessment of objective elements, such as the relevant service's effects.

Further support can be found for Options C and D. First, there is support for these options in the official statement by the German government following the approval of the new directive in the

⁷⁸ While other authors reject or hesitate about our *sui generis* reading, they seem to largely agree that if the *sui generis* position were to be correct, then the consequences we describe would follow. Nordemann and Wiblinger (n 11) 576; Leistner (n 11) 40; GRUR (n 77) 8.

⁷⁹ Joined Cases C-682/18 and C-683/18 *Frank Peterson v Google and others and Elsevier Inc. v Cyando* ECLI:EU:C:2020:586; and Request for a preliminary ruling from the Oberster Gerichtshof (Austria) lodged on 1 July 2019 – *Puls 4 TV GmbH & Co. KG v YouTube LLC and Google Austria GmbH* (Case C-500/19). In both cases there have been AG opinions. See Opinion of AG Øe in *Google / YouTube* (n 20), and AG Opinion in Case C-392/19 *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz* ECLI:EU:C:2020:696, Opinion of AG Szpunar.

Council. This statement assumes a broad margin of discretion for the national legislator in matters of licensing, which is only possible if the right in Art. 17 is qualified as special or *sui generis*.⁸⁰ Second, the first German implementation proposal also supports these options by qualifying the right as '*sui generis*'.⁸¹ Third, the European Commission's consultation document in the context of the stakeholder dialogues states that Art. 17 is a *lex specialis* to Art. 3 InfoSoc Directive, which is consistent with Option C.⁸² This view is also shared by Advocate General Saugmandsgaard Øe in his Opinion on *YouTube v Cyando*.⁸³

The margin of discretion for the Member States regarding national implementation largely converges in options C and D. They lead to identical outcomes. To understand how, it is crucial to examine the wording of the new directive. According to recital 64:

'It is appropriate to clarify in this Directive that online content-sharing service providers perform an act of communication to the public or of making available to the public when they give the public access to copyright-protected works or other protected subject matter uploaded by their users. Consequently, online content-sharing service providers should obtain an authorisation, including via a licensing agreement, from the relevant rightholders. This does not affect the concept of communication to the public or of making available to the public elsewhere under Union law, nor does it affect the possible application of Article 3(1) and (2) of Directive 2001/29/EC to other service providers using copyright-protected content.'

While the first sentence of the recital might suggest that 'clarification' is of declaratory nature, recital 64 immediately refutes this reading. It distinguishes the acts of OCSSPs from other exploitation acts covered by the concept of 'communication to the public' elsewhere in the *acquis*. It emphasises that Art. 17 'does not affect' pre-existing exploitation rights, and even repeats the same for Art. 3 InfoSoc Directive under its 'possible application' to 'other services providers'. Article 17(1) then provides (our emphasis):

'1. 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 *for the purposes of this Directive* when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users.

An online content-sharing service provider shall therefore obtain an *authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC*, for instance

⁸⁰ Draft Directive of the European Parliament and of the Council on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (first reading), 'Joint statement by the Netherlands, Luxembourg, Poland, Italy and Finland' (*Council of the European Union*, 15 April 2019) <<https://data.consilium.europa.eu/doc/document/ST-7986-2019-ADD-1-REV-2/en/pdf>> accessed 21 August 2020 (Draft Directive Joint Statements April 2019).

⁸¹ See below at V.

⁸² European Commission, 'Targeted consultation addressed to the participants to the stakeholder dialogue on Article 17 of the Directive on Copyright in the Digital Single Market' <https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=68591> accessed 12.12.2020.

⁸³ Opinion of AG Øe in *Google/YouTube* (n 20) para 251.

by concluding a licensing agreement, in order to communicate to the public or make available to the public works or other subject matter.’

The text clarifies that acts of ‘communication to the public’ by OCSSPs only take place for ‘the purposes of this directive’. The second sentence then elucidates that the beneficiaries of this right should be the same as beneficiaries of the right in Art. 3 InfoSoc Directive.⁸⁴ If Art. 17 was merely meant to clarify that OCSSPs perform the act of communication to the public within the meaning of Art. 3 InfoSoc Directive, there would have been no reason to include the wording ‘for the purposes of this directive’ or repeat the same set of beneficiaries. In the absence of this wording, a legal presumption would have triggered the application of Art. 3 and the rest of the InfoSoc Directive. Instead, the legislator decided to highlight the particular nature of the right in Art. 17. Moreover, the comparison with Art. 17(2) shows that in other areas the CDSM Directive explicitly subjects the acts of end-users uploading protected content to platforms to the regime of the InfoSoc Directive. The choice to not make such explicit connection in Art. 17(1) – as opposed to, for example, the press publisher’s right in Art. 15(1) of the directive⁸⁵ – must be construed as meaning that the right regulating the activities of OCSSPs is of a different nature. The literal and systematic (contextual) interpretations within the directive therefore confirm our reading.

Some argue that the CJEU is unlikely to follow this approach because the court overwhelmingly tends to interpret the same terms identically even if they are included in different acts of secondary EU law.⁸⁶ However, it has to be noted that this interpretative argument is only valid if the law in question, which uses the term, does *not* indicate a ‘different intention expressed by the European Union legislature in the specific context of that directive’.⁸⁷ The CJEU has been perfectly comfortable with interpreting identical terms differently if this is warranted by special status of the legislation and legislative purpose, as confirmed in *UsedSoft*.⁸⁸

Our conclusion is reinforced by the underlying special purpose of the legislation. The ‘special’ or ‘*sui generis*’ nature of the right in Art. 17 (options C and D) is also underlined by conditional nature of licensing,⁸⁹ which rests on criteria unknown to traditional theory of exclusive rights, including that of the right of communication to the public. This view is further supported by the list of E&Ls and safeguards in paras. (7) and (9), which apply in a regime that goes beyond the InfoSoc Directive.

The result is a curious bifurcation of legal regimes. Where the exploitation act of a user takes place in the service of an OCSSP, the provider may benefit from conditional licensing, E&Ls and the safeguards mentioned. But if the same act takes place in platform that does not qualify as an

⁸⁴ See, similarly, Spindler (n 11) para 16.

⁸⁵ art 15(1) reads: ‘Member States shall provide publishers of press publications ... with the *rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC ...*’ (emphasis added).

⁸⁶ Rosati (n 18); Leistner (n 11) 40; GRUR (n 77) 8, 10.

⁸⁷ See Case C-128/11 *UsedSoft*, ECLI:EU:C:2012:407, para 60.

⁸⁸ *UsedSoft* (n 87) para. 60; Case C-355/12 *Nintendo and Others* ECLI:EU:C:2014:25, para 23.

⁸⁹ See also Leistner (n 11) 12, 28., on duty to license as a special duty of care.

OCSSP, such E&Ls and safeguards will not apply.⁹⁰ This bifurcation suggests a different legal nature for the right in Art. 17 as compared to that of Art. 3 InfoSoc Directive.

Scholars offer different justifications for this, based on their interpretation of the pre-existing *acquis*.⁹¹ Our explanation is that Art. 17 is meant to regulate the space between (a) predominantly ‘passive’ hosting providers that do not engage in the use of protected content and (b) on-demand streaming services whose business model is predicated on the use of such content, such as Spotify or Netflix. Whereas the first (a) benefit from the safe-harbour in Art. 14 E-Commerce Directive, the latter (b) are squarely under the regime of Art. 3 InfoSoc Directive, and would not qualify as an OCSSP. Article 17 thus emerges as a regulatory regime for user-generated content platforms situated in the middle ground of the spectrum of service providers that either merely host protected content (a) or clearly engage in own use of such content (b).

3. Merging exploitation acts by OCSSPs and users

If the interpretation options C or D are accepted, then neither international copyright law nor the EU copyright *acquis* pose significant constraints on authorisation mechanisms for the new right, at least as compared to Options A and B. This would suggest the broadest possible room for the Member States when implementing the new regime. However, this interpretation is only partially correct. It should not be forgotten that Art. 17 only covers restricted/exploitation acts of a selected set of platforms (OCSSPs), and it only partly covers restricted/exploitation acts of their users. Users uploading content on platforms engage in acts of reproduction and communication to the public under Arts. 2 and 3 InfoSoc Directive. Article 17 introduces only three special rules with respect to users’ activities, namely: (a) a set of mandatory E&Ls in para. (7); (b) a conditional merger of restricted/exploitation acts of OCSSPs and non-commercial acts of users in para. (2); and (c) an extension of user’s explicit permissions from rightholders to OCSSPs according to recital 69.

This design imposes certain legal constraints. If the new right is outside the scope of the InfoSoc Directive’s framework, then the latter’s rules on E&Ls (Art. 5) do not apply. In fact, Art. 5(5) InfoSoc Directive explicitly speaks of E&Ls introduced to the rights of reproduction and communication to the public within ‘the exceptions and limitations provided for in paragraphs [of that Directive].’ Unless the reading in Option B is followed (which we have rejected), this means that E&Ls to Art. 17 are not subject to the explicit limits of the InfoSoc Directive. However, given the tango between the exploitation acts of users and OCSSPs, certain limitations applying to the uploading acts of *users* would still indirectly result from the InfoSoc Directive. Such indirect application is limited by the special regime of Art. 17(2), which effectively prevents any such limitations to non-commercial uploading acts of users. Table 1 summarises and helps disentangle the various outcomes resulting from these complex interactions of legal provisions.

⁹⁰ When a national law has implemented the relevant national E&L in art 5 InfoSoc Directive the act may still be privileged.

⁹¹ See eg Leistner (n 11) 12, arguing that art 17(4) is a stricter version of a fall back regime than art 14 E-Commerce Directive. In his view, carve-outs benefit from a more generous regime of the E-Commerce Directive).

Table 1. Exploitation Scenarios Art. 17

| OCSSP's act Art. 17(1) | User's act | Legal assessment |
|--|---|--|
| (1) IF authorised [always includes commercial use due OCSSP's definition] | (2) THEN non-commercial use = free | Art. 17(2) CDSM is <i>lex specialis</i> to Art. 3 InfoSoc = possible licensing depends on Art. 17 CDSM limits. |
| (2) THEN free of obligation of authorisation/preventive measures obligations | (1) IF covered by E&Ls ⁹² = free | Art. 17(7) CDSMD lists 6 E&Ls; other E&Ls in Art. 5 InfoSoc have to be construed as permissible under Art. 17(1) CDSM. ⁹³ |
| (2) THEN free of authorisation/preventive measures obligations | (1) IF covered by express authorisation from rightholders | Recital 69 CDSM |
| (1) IF NOT authorised = liability depends on meeting obligations in 17(4) | (2) THEN <i>non-commercial</i> use = infringement of Arts. 2 and 3 InfoSoc, unless covered by E&Ls, e.g. in Art. 17(7) CDSM | User: Art. 5 InfoSoc limits any solutions OCSSP: Art. 17 allows no-licence outcome. |
| (1) REGARDLESS of whether or not it is authorised | (2) <i>commercial</i> use is always an infringement of Arts. 2 and 3 InfoSoc, unless covered by E&Ls, e.g. in Art. 17(7) CDSM | User: Art. 5 InfoSoc limits any solutions. OCSSP: N/A |

⁹² There are two possibilities: (i) art 17(7), first sentence, refers to the E&Ls as designed by national law and as permitted by art 5 InfoSoc Directive; (ii) art 17(7), second sentence, mandates a group of E&Ls with reference/compared to those listed in art 5 InfoSoc Directive.

⁹³ See also the discussion below at III.4.b).

This breakdown of possibilities shows that national legislators have broad room for implementation in scenarios of non-commercial exploitation acts by users. By definition, an OCSSP is always assumed to act for-profit, since Art. 2(6) characterises its activities as ‘for profit-making purposes’. Otherwise, the platform does not qualify as an OCSSP and is not covered by Art. 17. The exploitation acts of OCSSPs and their users, however, are importantly connected.

According to Art. 17(2) (emphasis added):

‘Member States shall provide that, where an online content-sharing service provider obtains an authorisation, *for instance* by concluding a licensing agreement, that authorisation shall also cover acts carried out by users of the services falling within the scope of Article 3 of Directive 2001/29/EC when they are not acting on a commercial basis or where their activity does not generate significant revenues.’

Article 17(2) thus arguably merges exploitation acts of OCSSPs and users in non-commercial scenarios. Once there is an authorisation, they cannot be split. Nevertheless, there are a number of other aspects to note about this provision. First, it does not limit the authorisation mechanism to direct licensing via contractual means. The provision clearly mentions licensing as an example. The authorisation may therefore originate from other sources, e.g. the statute. Second, as noted, concerning users’ exploitation acts, Art. 17(2) directly refers back to the regime of the InfoSoc Directive. Third, the same merger is being relied on in the context of licensed users where, by virtue of the users’ permission, OCSSPs do not have to obtain a licence for their own exploitation.⁹⁴ Thus, authorisations obtained by users that are not expressed contractually, such as implied licences and statutory authorisations, will not automatically extend to the platform. To put it more simply, while contractual authorisations travel in both directions – from users to OCSSPs and from OCSSPs to users – non-contractual authorisations travel only from OCSSPs to users. Furthermore, the merger of platform and user acts has an important consequence for Member States. If the right in Art. 17 could be licensed in all possible scenarios, then Art. 17(2) would partly override Art. 5 InfoSoc Directive and, as *lex specialis*, extend such authorisations to users’ non-commercial acts of exploitation (see Table 2).

Table 2. Art. 17 CDSM versus Art. 3 InfoSoc: commercial/non-commercial scope

| User OCSSP | <i>Commercial</i> | <i>Non-commercial</i> |
|-------------------|---|--|
| <i>Commercial</i> | <i>Two separate restricted/exploitation acts:</i> | <i>Merger of acts: Art. 17(2) extension if OCSSP obtains authorisation</i> |

⁹⁴ See above Table 1, scenario III.

| | | |
|-----------------------|--|--|
| | (1) by OCSSP, and (2) by users. | |
| <i>Non-commercial</i> | <i>Impossible</i> : OCSSP must act for profit (art 2(6)) | <i>Impossible</i> : OCSSP must act for profit (art 2(6)) |

From the perspective of users, such a broad interpretation might be preferable. This is because under most other authorisation scenarios the legality of users' uploads depends on whether or not the platform has obtained an authorisation. If the platform does not obtain such an authorisation, it will be difficult for users to determine the legal status of their non-commercial uploads. This assessment will for instance depend on whether the act falls outside the scope of existing E&Ls or an implied licence. This introduces a significant degree of uncertainty for users.

One way to address this problem would be to enact a statutory licensing scheme covering all non-commercial activities *by users*, thus eliminating the risk that OCSSPs do not take – or rightholders do not give – a licence, at least in some circumstances. To be sure, this scheme would have to satisfy international obligations. In particular, the three-step test would govern its admissibility in relation to its application to user's non-commercial exploitation acts. Still, there are good arguments to support the admissibility of such a scheme.⁹⁵ Against this background, the absence in Art. 17(2) of an analogous extension of the platform's authorisation to the commercial acts of users is fully justified, even if it may lead to unexpected outcomes.⁹⁶

4. Objections against the special or *sui generis* interpretation

Scholars disagree on the qualification of the right in Art. 17 as a special or *sui generis* right. Although some agree with us,⁹⁷ in this section we focus on the most significant objections to our qualification and the margin of discretion we believe it entails for national legislators. In essence, critics object to placing the new right outside the framework of the InfoSoc Directive, thereby opening the door to its implementation as a non-exclusive right, or to the possibility of subjecting

⁹⁵ In fact, a number of scholars in the past argued for similar solutions. See Angelopoulos and Quintais (n 61); Matthias Leistner and Axel Metzger, 'The EU Copyright Package: A Way Out of the Dilemma in Two Stages' (2017) 48 IIC 381; Reto M Hilty and Andrea Bauer, 'Part G – Use of Protected Content on Online Platforms (Article 13 COM(2016) 593 Final)' in Reto M Hilty and Valentina Moscon (eds), *Modernisation of the EU Copyright Rules – Modernisation of the EU Copyright Rules – Position Statement of the Max Planck Institute for Innovation and Competition* (Max Planck Institute for Innovation and Competition 2017) 99-112 <https://pure.mpg.de/pubman/faces/ViewItemFullPage.jsp?itemId=item_2574083_3> accessed 23 August 2020.

⁹⁶ We discuss this point in Martin Husovec and João Pedro Quintais, 'Too Small to Matter?' in Tuomas Mylly and Jonathan Griffiths (eds), *Constitutional Hedges of Intellectual Property* (CUP 2021) (forthcoming).

⁹⁷ See eg Lambrecht (n 11) para 108; Martin Senftleben and Christina Angelopoulos, 'The Odyssey of the Prohibition on General Monitoring Obligations on the Way to the Digital Services Act: Between Article 15 of the E-Commerce Directive and Article 17 of the Directive on Copyright in the Digital Single Market' 26 <<https://papers.ssrn.com/abstract=3717022>> accessed 29 October 2020.

it (or parts of it) to E&Ls beyond those expressly stated in Art. 17(7) or foreseen by Art. 5 InfoSoc Directive.

a) The InfoSoc Directive should be left ‘intact’

A first objection states that our proposed qualification would materially impact the pre-existing *acquis*, in particular the rules in the InfoSoc Directive. This would be prohibited by Art. 1(2) CDSM Directive. Following this view, the new directive can only amend the underlying *acquis* in the circumstances mentioned in Art. 24, which spells out the amendments to the Database and InfoSoc Directives. Outside those cases, no amendments are possible.

However, this is difficult to accept, since Art. 17 *indirectly* but unequivocally amends the InfoSoc Directive. Consider for instance how Art. 17(2) extends the platform’s authorisation to its users’ exploitation acts. This mechanism has no parallel in the InfoSoc Directive. Without support in the CDSM Directive, a national rule of this type would violate the InfoSoc Directive. Think moreover of how the provisions on E&Ls in Art. 17(7) clearly affect and override the InfoSoc Directive vis-à-vis the user activities they cover.⁹⁸ The same can be said about virtually all other paragraphs of Art. 17; indeed, the fact that no interpretation option considered in this article leaves the InfoSoc Directive ‘intact’ is a powerful indicator of this.

If it is accepted that Art. 17 at least indirectly amends the InfoSoc Directive, then how to interpret the language in Arts. 1(2) and 24 CDSM Directive? In our view, the simplest explanation is that those provisions merely mean that the new directive should not horizontally amend the former. This view is reinforced by Art. 25 on the relationship with E&Ls in other directives. The idea is that a new directive should not drive the standards up or down, also for subject areas which are beyond its specialised focus.⁹⁹

b) Only parts of Art. 17 are *lex specialis*

A second objection is that only some parts of Art. 17 are *lex specialis*, with the result that national legislators have a much narrower margin of discretion than we suggest.¹⁰⁰ This would mean that the new right is in fact a sub-type of communication to the public (option B) or constitutes a special right (option C), but E&Ls to it remain limited by pre-existing law, as a matter of subsidiarity.¹⁰¹

⁹⁸ To the extent that certain types of previously optional E&Ls become mandatory, at least where the use at issue takes place in the context of OCSSPs.

⁹⁹ On art 25, see also below at II.4.d).

¹⁰⁰ Nordemann and Wiblinger (n 11).

¹⁰¹ Leistner (n 11). For a more open-ended approach, see GRUR (n 77) 8 ff. It is worth emphasising that any arguable subsidiarity cannot simply open availability of other InfoSoc E&L, as hoped by the European Commission. See European Commission, ‘Targeted consultation addressed to the participants to the stakeholder dialogue on Article 17 of the Directive on Copyright in the Digital Single Market’ <<https://ec.europa.eu/eusurvey/runner/4fd43123-6008-a214-f572-4ecd331b9e0e>> accessed 12.12.2020. In the European tradition, E&Ls are limited by a strict purpose, such as research, and OCSSPs can never claim to engage in such activities. By definition, their only activity is to assist their users in fulfilling such purpose.

The central problem with this reading is that divorcing the different parts of Art. 17 from each other is not possible. The right in para. (1) and the liability exemption mechanism in para. (4) do not operate independently. They are the constituent parts – scope, enforcement, exceptions – of the same complex legal provision merged into a *unitary legal regime* aimed at solving the ‘value gap’ problem.¹⁰² To this point, the best efforts obligation to obtain an authorisation in Art. 17(4)(a) effectively defines the scope of the right in Art. 17(1), and the liability mitigation mechanism is carved into the scope of the right.

In legal interpretation, although the legislator can describe its actions in various ways (such as that it only clarifies the existing law), it is always the case that a later special rule overrides an earlier general rule in relation to its particular scope of application.¹⁰³ This is true even if the later rule does not expressly state so. The policy goal of Art. 17 is to improve the negotiation position of rightholders by giving them a right that reaches the OCSSPs in exchange for acceptance of specific rules for licensing of content uploaded by third parties.

In order to strike a balance between competing interests, E&Ls are an integral part of this political bargain, as clearly results from Art. 17(7). As noted, both the Database and Computer Programs Directives are also *lex specialis* to the InfoSoc Directive and contain their own set of E&Ls. Unlike the Database Directive, Art. 17 offers no indication that the E&Ls in para. (7) to the new right are the only ones that Member States may adopt.¹⁰⁴ In this sense, the new regime is closer to that of the Computer Programs Directive, which only regulates some E&Ls (e.g. for decompilation and back-up copies), without indicating if the provisions are exhaustive. In that context, in the literature, this is interpreted to mean that for situations other than those considered in the Computer Programs Directive, which are pre-empted by EU law, national law has a room for its own solutions.¹⁰⁵ Dreier, for instance, suggests that citation and public security exceptions might be available under German copyright law and remain compatible with EU law.¹⁰⁶ In the absence of provisions prohibiting further E&Ls, we interpret Art. 17 equally as not restricting the Member States in their implementations beyond *effet utile*.¹⁰⁷

Therefore, we conclude that Art. 17 *as whole* is *lex specialis* to the InfoSoc and E-Commerce Directives. This means that it exclusively governs the entirety of the specific subject matter and circumstances it regulates, which were previously subject to earlier directives.

¹⁰² For that matter, the entire provision is a single and ad-hoc political compromise. See also Leistner (n 11) 4, 8, 9, 13.

¹⁰³ Case T-60/06 *RENV II* ECLI:EU:T:2016:233, para 81.

¹⁰⁴ Compare with art 6 Database Directive (‘Member States shall have the option of providing for limitations on the rights set out in Article 5 in the following cases’).

¹⁰⁵ Lionel Bently and Lee Yin-Harn, ‘Directive 2009/24/EC – on the Legal Protection of Computer Programs (Computer Programs Directive)’ in Thomas Dreier and P Bernt Hugenholtz, *Concise European Copyright law* (2nd edn, Wolters Kluwer 2016) 258, reinforced by Recital 19. Similarly Thomas Dreier and Gernot Schulze, *Urheberrechtsgesetz* (6th edn, CH Beck 2018) § 69d, para 3.

¹⁰⁶ Dreier and Schulze (n 105) § 69d, para 3

¹⁰⁷ This point is made from the position of interpretation of C and D. It is clear that this cannot convince authors who argue that art 17 provides no rights, as for them, only art 3 InfoSoc Directive determines and regulates the scope of the right; art 3 is clearly subject to art 5 InfoSoc Directive.

c) The *effet utile* of the new Directive requires an exclusive right

A third objection notes that certain language in the new directive favours an exclusive rights approach to Art. 17, thereby allowing only individual or voluntary forms of collective licensing.¹⁰⁸ Different textual elements in the directive support this objection. First, Art. 17(1) states that OCSSPs shall ‘obtain an authorisation from the rightholders’. Second, the references to ‘granted’ in Art. 17(4) suggest the need for an exclusive right. Third, the notion that the obligation of ‘best efforts to obtain an authorisation’ implies the possibility that rightholders refuse a licence. Finally, the references to contractual freedom in the last sentence of recital 61 also point towards exclusivity.¹⁰⁹ Building on these textual elements, critics argue that the *effet utile* of the directive requires that the new right in Art. 17(1) is exclusive. As a consequence, it cannot be implemented as a remuneration right *tout court* or be subject to E&Ls outside those expressly permitted by EU law.

This objection operates on two levels. First, it relies on the qualification of the new right as a type of communication to the public governed by Art. 3 InfoSoc Directive (options A or B). This would make any E&L to the right subject to the three-step test in Art. 5(5), thus reducing the space for implementation other than as an exclusive right.¹¹⁰ We have shown that the qualification of the new right as ‘special’ or ‘*sui generis*’ (options C and D above) sets aside the application of the international or EU three-step test. In doing so, the legal consequences associated with the three-step test disappear.

But this still leaves the second level of the objection based on the *effet utile* of the CDSM Directive. In our view, there are important counter-arguments to this point. As noted, we argue that Art. 17(1) defines who is carrying out a copyright-relevant act (OCSSPs) and who are the beneficiaries of the new right governing that act (rightholders). The provision requires an authorisation, but it does not require that the same must always be contractual and never *ex lege*. There is certainly an implied preference in Art. 17(1) and (4) for an exclusivity-based model, and an explicit preference in recital 61 for such a model. However, recitals are not dispositive and implied preferences should not forego other available and legally admissible authorisation mechanisms. This is especially so, as argued below, when in certain scenarios non-exclusive licences better achieve the *effet utile* of the legal provision.

Article 17 is a framework provision that allows a range of possible licensing mechanisms for the new right it introduces. The choice is left to the national legislatures. Given the broad scope of

¹⁰⁸ See ALAI, ‘Draft Opinion on Certain Aspects of the Implementation of Article 17 of Directive (EU) 2019/790 of 17 April 2019 on Copyright and Related Rights in the Digital Single Market’ (*ALAI – International Literary and Artistic Association*, 30 March 2020) <https://www.alai.org/en/assets/files/resolutions/200330-opinion-article-17-directive-2019_790-en.pdf> accessed 12.12.2020.

¹⁰⁹ Recital 61, last sentence: ‘However, as contractual freedom should not be affected by those provisions, rightholders should not be obliged to give an authorisation or to conclude licensing agreements’.

¹¹⁰ See, eg ALAI (n 108); Leistner (n 11).

protected content covered, the different sectors affected and the variety of possible uses at issue, it is clear that a one-size-fits-all approach to the new right is neither feasible nor desirable. In many exploitation scenarios, an exclusive right may prove suitable, especially if coupled with collective licensing. For others, it is clearly inadequate. The qualification of the right in Art. 17 as special or *sui generis* provides a degree of flexibility to Member States, as it releases them from the legal constraints of the InfoSoc Directive, e.g. on E&Ls. This flexibility enables them to adjust their national laws to different exploitation scenarios and market realities, while preserving the normative hierarchy of Art. 17, which favors authorisation and user rights over preventive measures. This much was recognised early on by the German declaration.¹¹¹

In this regard, it is important to clarify that our interpretation does not lead to any dramatic inroads on exclusivity. If the right in Art. 17(1) is implemented as a remuneration right in its entirety, rightholders would not have an exclusive right and OCSSPs would benefit from a legal authorisation to make available protected content uploaded by users. However, this legal authorisation is limited to non-commercial uploads. Any commercial exploitation acts by users would still be subject to exclusivity and require a separate authorisation. Without it, the platforms would have to remove the uploaded content and enforce a stay-down against users. The point is that the legal interdependence between the acts of users (upload) and platforms (providing access) minimises the impact on exclusivity of national implementations of Art. 17(1) as a remuneration right. The impact is limited to cases of non-commercial uploads by users. Even then, the applicable requirements of *effet utile*, the conditions of collective rights management, the market realities for different sectors, and the (legal and practical) idiosyncrasies of each Member State all impose barriers to wholesale non-exclusive approaches.

To conclude, even if it is accepted that *effet utile* of the CDSM Directive requires that Art. 17(1) prescribes an exclusive right, this does not diminish the power of the conclusion that E&Ls to certain of the acts within its scope are unrestrained by the InfoSoc Directive's rules. Beyond that, there are strong arguments why the *effet utile* of Art. 17 actually favors a flexible interpretation of the new right – including the possibility of implementing it as a remuneration right – thereby allowing Member States a wider range of options than a one-size-fits-all approach.

d) No new E&Ls to the new right

A fourth objection is levied not against the qualification of the right in Art. 17(1) as special or *sui generis* directly, but rather against a consequence of that qualification: the wider margin of discretion of Member States to impose E&Ls to the right beyond those listed in para. (7), as well as in Art. 5 InfoSoc Directive. The point is particularly relevant since the German implementation proposal includes such provision, aimed at minor uses of protected content uploaded to an OCSSP.¹¹²

¹¹¹ Draft Directive Joint Statements April 2019 (n 80).

¹¹² See below at V.

There are a number of variations to this objection: (i) new E&Ls are only possible if expressly allowed in the CDSM Directive; (ii) new E&Ls are specifically prohibited by Art. 25; (iii) at the very least new E&Ls cannot be imposed on non-commercial user uploads. Let's look at each in turn.

The first argument is that Member States are not allowed to introduce new E&Ls to the right unless the CDSM Directive explicitly says so.¹¹³ We disagree. If a directive introduces a separate exclusive right, any E&L to it not provided for explicitly is subject to applicable legal requirements. If it is accepted that the new right is special or *sui generis*, then Member States are not subject to the requirements of the InfoSoc Directive. Their margin of discretion is, however, subject to the condition that they respect the *effet utile* of the CDSM Directive. That is the very point of directives, which are meant to harmonise certain areas of law while leaving a margin of discretion for national implementation.

It could be argued that Art. 5 InfoSoc Directive is an explicit prohibition to recognition of new E&Ls to rights recognised in the subsequent CDSM Directive. In this way, new exceptions at the national level would be pre-empted. But this is only possible if we consider the new right is subject to Art. 3 InfoSoc Directive (options A and B). It is not possible if the right is considered special or *sui generis* (options C and D): you cannot have both a *lex specialis* that goes beyond the InfoSoc Directive and is simultaneously governed by the same rules.

The best analogy here is offered by the specific subject matter rules in the Computer Programs and Database Directives, that exist independently from the general rules on subject matter in the InfoSoc Directive. Both the Computer Programs and Software Directives regulate specific types of works with their own set of exclusive rights and E&Ls. In particular, those E&Ls are not superseded by the exhaustive list of E&Ls in Art. 5 InfoSoc Directive.¹¹⁴ The CJEU itself respects this *lex specialis* nature, as has been most vividly demonstrated in *UsedSoft*.¹¹⁵

Importantly, the InfoSoc Directive does not set a limit to all other directives, nor does it attempt to do so. This much is clear from the wording of its Art. 5, which delineates its scope of application. As we see it, the CDSM Directive establishes a specific regulation of OCSSPs by partly excluding them from the scope of the InfoSoc Directive's framework. The particular scope of the new *lex specialis* regime in Art. 17 is set out in Art. 2(6). As noted, Art. 17(1) remains limited by the *effet utile* of the CDSM Directive itself. But it is not limited by rules of other directives vis-à-vis its specific subject matter. It is a fundamental feature of an EU directive that the Member States have a margin of discretion in its implementation, provided they respect its own provisions and the *effet utile* of the directive.

The second argument within this objection is that new E&Ls are barred by virtue of Art. 25 CDSM Directive, which regulates the 'relationship with exceptions and limitations provided for in other

¹¹³ Nordemann and Wiblinger (n 11).

¹¹⁴ P Bernt Hugenholtz, 'Directive 96/9/EC – on the Legal Protection of Databases (Database Directive)' in Dreier and Hugenholtz (n 105) 399-400., noting that the Database Directive 'leaves Member States broad discretion to provide for exceptions to the economic rights granted under art. 5'.

¹¹⁵ *UsedSoft* (n 87) para 60.

directives'.¹¹⁶ The article provides that: 'Member States may adopt or maintain in force broader provisions, compatible with the exceptions and limitations provided for in [the Database and InfoSoc Directives], for uses or fields covered by the exceptions or limitations provided for in this Directive.' This language, critics say, means that *any* E&Ls in the CDSM Directive have to be compatible with – meaning subject to the rules of – the InfoSoc Directive. But this is unconvincing. First, the provision imposes a compatibility test only to the extent that a new or adapted E&L would apply to the scope of an exclusive right as determined in the InfoSoc Directive. As we have argued, that is not the case for the new right in Art. 17(1).

Second, looking at the legislative process, Art. 25 was drafted with reference to the new E&Ls introduced by the CDSM Directive in Title II, Arts. 3 to 6 on text and data mining, cross-border teaching and preservation of cultural heritage.¹¹⁷ Its goal was to emphasise that the new directive should not limit the possibility for Member States to 'adopt or maintain' other E&Ls covering the same uses, which are provided by the previous directives.¹¹⁸ In other words, new provisions in the CDSM Directive should not narrow down pre-existing E&Ls for research or education. After all, the CDSM Directive is *lex specialis*, isn't it? Hence the wording 'compatible' with those directives. Therefore, in our view, it is clear that Art. 25 is intended to apply to the new E&Ls in Title II. Arguing the opposite not only ignores the language of the directive but implies that *any limitation* to the CDSM Directive has to be compatible with the previous Database and InfoSoc Directives. This would have significant consequences for the margin of discretion of Member States when it comes to defining concepts such as 'best efforts', 'prevent' and 'proportionality', as in the end they all limit Art. 17. It would essentially lock in the entire provision in the form adopted by the EU legislator. This would be problematic because the CDSM Directive obviously does not even remotely consider all novel issues its application will raise. This would also be contrary to the intention of the legislator to leave the possibility for Member States to adapt some of the rules in Title IV, as is made clear from the text of the provisions and the recitals, and the very logic behind the Commission Stakeholder Dialogues mandated in Art. 17(10).

IV. Authorisation mechanisms for content-sharing platforms

1. Preliminary remarks

¹¹⁶ For a defense of this argument see Jan Bernd Nordemann and Julian Wiblinger, 'Art. 17 DSMCD: A Class of Its Own? How to Implement Art. 17 into the Existing National Copyright Acts, Including a Comment on the Recent German Discussion Draft – Part 2' (*Kluwer Copyright Blog*, 17 July 2020) <<http://copyrightblog.kluweriplaw.com/2020/07/17/art-17-dsmcd-a-class-of-its-own-how-to-implement-art-17-into-the-existing-national-copyright-acts-including-a-comment-on-the-recent-german-discussion-draft-part-2/>> accessed 11 September 2020.

¹¹⁷ During the trilogue negotiations, art 25 was discussed as art 17a only in the context of the text and data mining and teaching E&Ls. See rows 139, 145, 147, 305 and 306 of the negotiation documents released by Julia Reda back in November 2018 <https://juliareda.eu/wp-content/uploads/2018/11/Copyright-Directive_4-column-document_ARTICLES-Version-3.2-for-3rd-trilo...pdf> accessed 12.12.2020.

¹¹⁸ See also art 24 and recitals 4 and 5 CDSM Directive.

Authorisation is the first ‘avenue’ offered to OCSSPs to avoid direct liability. What types of ‘authorisation’ are covered by Art. 17? In theory, different types are possible, most of them variations on the theme of licensing. When the CDSM Directive was approved by a qualified majority Council in April 2019, six countries voted against. These countries issued a number of statements that either criticise the legislative text or lay out some interpretative guidelines for some of its controversial issues.¹¹⁹ The statement by the German Government is particularly important for our purposes, as it addressed possible authorisation mechanisms under Art. 17. As noted in that statement, ‘in the European compromise, licensing is the method chosen to achieve’ the authorisation goal under this provision.¹²⁰ It goes on to identify a number of possible legal mechanisms:

‘10. In order to resolve this issue – of how licences can, as far as possible, be concluded for all content on upload platforms – copyright law provides for many other mechanisms besides ‘traditional’ individual licensing (e.g. exceptions and limitations, possibly combined with remuneration rights; the option of converting exclusive rights into remuneration rights; the obligation to conclude contracts on reasonable terms; and the involvement of associations of creative artists such as collecting societies).

11. The Federal Government will examine all of these models. Should it appear that the implementation has led to a restriction of freedom of expression or should the guidelines set out above encounter obstacles in EU law, the Federal Government will work to ensure that the shortcomings identified in EU copyright law are corrected.’

The options laid out by the German statement offer a catalogue of potential legal mechanisms to obtain the required authorisation under Art. 17. Importantly, they include the option of turning the exclusive right into an E&L, possibly subject to remuneration, as well as the intriguing possibility of a standalone remuneration right.

The question of what types of authorisation mechanisms are possible depends on the legal qualification of the new right in Art. 17(1), examined at length above.¹²¹

On the basis of that analysis, Part IV of this article examines possible authorisation/licensing mechanisms for the right in Art. 17 CDSM Directive. Before that, however, it is important to highlight two aspects that are transversal to much of the subsequent analysis.

The first refers to the *territorial* nature of the right(s) to be authorised. Whichever authorisation mechanism is used, it shall apply on a country-by-country basis, unless it can leverage other legal provisions in the *acquis* that enable a pan-European effect. In the absence of a country-of-origin rule (as exists e.g. in the field of satellite broadcasting and ancillary online services of broadcasting organisations¹²²), only the rules on multi-territorial licensing of musical works in the CRM

¹¹⁹ Draft Directive Joint Statements April 2019 (n 80).

¹²⁰ *ibid*, Statement by Germany, para 10.

¹²¹ See above at III.

¹²² See: art 1(2)(b) Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission; and art 3 Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online

Directive would enable such cross-border licensing. However, as we explain below (at IV.3.a), their usefulness in the present context is limited.

Second, since many of the authorisation mechanisms discussed rely on collective licensing, this begs the question of whether current CMOs have mandates that cover the specific right in Art. 17(1) CDSM Directive. This is by no means clear. Article 5(7) CRM Directive states that if a rightholder authorises a CMO to manage his rights, ‘he shall give consent specifically for each right or category of rights or type of works and other subject-matter which he authorises the [CMO] to manage’, which ‘consent shall be evidenced in documentary form.’

If the right in Art. 17(1) CDSM Directive is considered to be a new *sui generis* right (option D), then most CMOs will fail to meet this requirement, as they would need to obtain fresh authorisations for such right. The situation is less clear if the right is considered under the concept of Art. 3 InfoSoc Directive, as in Options A, B and C. In that situation, if a CMO is already mandated to represent the communication/making available to the public right in Art. 3, then the existing mandate may already cover the sub-right in Art. 17(1). In this light, it remains an open question whether a CMO would be required to obtain a separate, specific consent for administration of the new right in Art. 17(1).

2. Direct licence (to OCSSPs)

The default mechanism envisioned by Art. 17 CDSM Directive is the granting of a direct licence of the exclusive right by the rightholder to the OCSSP.¹²³ However, as noted, it is also clear that the provision leaves open the possibility of national laws recognising other types of authorisation. In this sense, Art. 17(1), second subparagraph, mentions that OCSSPs must obtain the relevant authorisation ‘for instance by’ concluding a licensing agreement.

Whether we are discussing the licensing of a sub-right under Art. 3 InfoSoc Directive, or a special or a new *sui generis* right does not appear to make a difference for this authorisation mechanism. In either case, the right in question would have to be specified in the licence and – at least for authors and performers – be subject to appropriate and proportionate remuneration, pursuant to Art. 18 CDSM Directive.

OCSSPs should also be able to make available content for which *the user* has obtained authorisation to upload to the platform. This refers to a contractual or non-contractual authorisation applying to the initial user upload, which cover by extension the subsequent act of making available by OCSSP.¹²⁴ Legal basis for this requirement as regards explicit contractual authorisations is found in recital 69, according to which, ‘[w]here rightholders have *explicitly* authorised users to upload and make available works or other subject matter on an online content-sharing service, the act of communication to the public of the service provider is authorised within the scope of the

transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC.

¹²³ See the explicit references in art 17(1), (2) and (8), and the discussion above at III.4.b).

¹²⁴ See the discussion above at III.3, 4.b).

authorisation granted by the rightholder' (emphasis added). This is for example the case where: (a) the user is the rightholder, his representative or licensee with the required making available permission; or (b) when the work or subject matter is initially made available under an open access licence that allows its subsequent making available to the public online, such as a Creative Commons licence.¹²⁵

But the text of recital 69 only takes us so far. Its implementation would need to go beyond the textual requirements in order to ensure that the extension or merger of restricted/exploitation acts of users and platforms actually takes place. In these merger cases, the user authorisation extends to the act of communication to the public by the OCSSP enabling the upload. Before Art. 17, this was obvious. The platform was (in most cases) qualified as an intermediary hosting service provider that – as a matter of law – did not communicate the content uploaded by their users to the public. With Art. 17, because the OCSSP is now considered to be directly communicating user-uploaded content to the public, it is necessary to clarify that an explicit permission given to the user by a (third-party) rightholder, or a *statutory authorisation* resulting from an E&L, extends its effect to the necessary communication to the public by the platform.

As noted, the situation is less clear for cases where the user's upload is covered by E&Ls other than those listed in the second sentence of Art. 17(7). In those cases, the extension of the user's legal authorisation to OCSSPs is not explicitly stated in recital 69, and follows only indirectly from Art. 17(7), first sentence, and (9), which speak of not preventing legitimate uses or the availability of non-infringing material, including where the uses and content are covered by E&Ls.¹²⁶

3. Different shades of collective licensing

This section discusses different mechanisms of collective rights management in EU law that can be used to operationalise the authorisation or licence of the new right in Art. 17(1). These mechanisms impose increasing levels of restrictiveness on the exclusive exercise and nature of the underlying right. We examine first voluntary collective licensing, including multi-territorial licensing (a), followed by the new framework regime for collective licensing with extended effect in Art. 12 (b), and conclude with mandatory collective management (c).

a) Voluntary collective licensing, including multi-territorial licensing

In addition to direct licensing, the concept of authorisation in Art. 17 CDSM Directive surely includes voluntary forms of collective rights management. At the EU level, CMOs offering voluntary collective licences are subject to the rules of the CRM Directive. Those rules include a special regime for CMOs established in the Union managing authors' rights in musical works for online use on a multi-territorial basis. A 'multi-territorial licence' (MTL) means a licence which

¹²⁵ See Creative Commons, About the Licenses <<https://creativecommons.org/licenses/>> accessed 21 August 2020.

¹²⁶ See discussion above at III.4.b).

covers the territory of more than one Member State.¹²⁷ General rules on collective licensing can be found in Art. 16 CRM Directive. Particularly relevant is the fact that Art. 16(2) applies to licences between rightholders and start-up OCSSPs, i.e. those benefiting from the special regime in Art. 17(6) of the CDSM Directive.

It is possible to identify two main issues with voluntary collective rights management models as viable authorisation mechanisms for the uses covered by Art. 17. The first relates to their (in)ability to provide pan-European licences for such uses. The second relates to the representativeness of their catalogue, since they do not cover non-members.

There are two basic paths to obtain a pan-European voluntary collective licence. The first is by obtaining a licence from a CMO – including via subsidiaries and joint ventures or licensing hubs like ICE, MINT and ARMONIA¹²⁸ – or an ‘independent management entity’¹²⁹ for the territory of the EU and for the catalogue(s) they represent. The obvious issue here is that content uploaded by users that is outside that catalogue will remain unauthorised. The OCSSP will then be directly liable for communicating the content to the public, unless it is established that the licences it obtains are sufficient to meet the best efforts obligation in Art. 17(4)(a) CDSM Directive.¹³⁰ Outside the online music sector, it is difficult to envisage this path as a workable solution. This is because, to the best of our knowledge, most other content sectors do not have the same level of development of CMO structures across the territory of the EU, including the necessary representation agreements in place with CMOs in the EU and abroad.¹³¹

The second path is to use the MTL mechanism in the CRM Directive. The issue is that this mechanism applies only to online rights in musical works, meaning any of the rights of an author in a musical work provided for in Arts. 2 and 3 InfoSoc Directive which, prior to the CDSM Directive, are required for the provision of an online service.¹³² The mechanism does not apply otherwise, neither to the rights of related rights holders in phonograms nor to rights of any rights

¹²⁷ art 3(m) CRM Directive.

¹²⁸ On subsidiaries, see art 2(3) and recitals 17, 43 CRM Directive. On ICE, MINT and ARMONIA, see: ‘ICE Services’ (*ICE Services*) <<https://www.iceservices.com/company/about/>> accessed 7 September 2020. (joint venture between PRS, STIM and GEMA); ‘MINT – Worldwide Digital Licensing for Music Publishers and Administrators’ (*MINT*) <<https://www.mintservices.com>> accessed 7 September 2020. (joint venture between SESAC and SUISA); ‘Armonia Online – Licensing musical works for digital services’ (*Armonia Online*) <<https://www.armoniaonline.com/>> accessed 7 September 2020. (an alliance of nine European CMOs, including SACEM, SABAM and SGAE).

¹²⁹ According to art 3(b) CRM Directive an ‘independent management entity means any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which is: (i) neither owned nor controlled, directly or indirectly, wholly or in part, by rightholders; and (ii) organised on a for-profit basis.’

¹³⁰ See Metzger and others (n 11) 3. making a similar connection between collective licensing and the best efforts obligation to obtain an authorisation.

¹³¹ According to art 3(m) CRM Directive a ‘representation agreement’ means any agreement between CMOs whereby one CMO mandates another CMO to manage the rights it represents.

¹³² art 3(n) CRM Directive. In the practice of collective management, these rights are also commonly referred to as mechanical (reproduction) and performance (communication to the public) rights.

holders in other types of subject matter. It would also not apply to the right in Art. 17(1) CDSM Directive if we consider it to be a special or a new *sui generis* right, which raises the aforementioned issue of lack of mandates.¹³³ The MTL mechanism is therefore of limited use to obtain a pan-European licence in relation to Art. 17. To sum up, as noted by Martin Senftleben, ‘a Pan-European license for UGC – covering a wide variety of works that may be uploaded by users – seems beyond reach.’¹³⁴

The second main issue with voluntary collective licensing relates to its inability to cover non-members. This is problematic to an extent. Obviously, it appears impossible to obtain a licence from a CMO whose repertoire covers all content uploaded by users. There will always be uploaded content that is owned by rightholders that are not members of the licensor CMO(s). In sectors where it is possible to obtain a sufficiently representative collective licence (catalogue-wise), the same might be sufficient to meet the ‘best efforts’ requirement imposed on OCSSPs. The Member States could even create a legal fiction to this end when implementing Art. 17(4)(a). In other cases, voluntary collective licensing will not be an adequate licensing mechanism in this field.

b) Collective licensing with extended effect: the Art. 12 framework¹³⁵

One collective licensing mechanism that has received attention as a possible solution for types of use at issue here is collective licensing with an *extended effect*.¹³⁶ The CDSM Directive significantly harmonises this collective licensing scheme with an optional rule in Art. 12, ‘that applies to all kinds of works or other subject matter and all forms of use’.¹³⁷ This new rule envisages three different mechanisms that have the effect of extending the collective licence agreement or

¹³³ Following our options C or D. See above at III. On the lack of mandates, see above IV.1.

¹³⁴ Martin Senftleben, “‘Bermuda Triangle – Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market’” (2019) 41 European Intellectual Property Review 480.

¹³⁵ This section is adapted from Angelopoulos and Quintais (n 61); João Pedro Quintais, ‘The New Copyright in the Digital Single Market Directive: A Critical Look’ (2020) 42 European Intellectual Property Review 28.

¹³⁶ Quintais, ‘The New Copyright in the Digital Single Market Directive’ (n 135).

¹³⁷ Thomas Riis and Ole Andreas Rognstad, ‘Comment of the European Copyright Society on the Implementation of the Extended Collective Licensing Rules (Arts. 8 and 12) of the Directive (EU) 2019/790 on Copyright in the Digital Single Market’ (European Copyright Society 2020) European Copyright Society Opinion <<https://papers.ssrn.com/abstract=3631082>> accessed 24 August 2020. The provision is ‘optional in the sense that it leaves it to the Member States to decide whether or not, to implement it.’; *ibid* 3. Prior to the CDSM Directive, it was possible to find specific references to extended collective licensing in art 3(2)-(4) Satellite and Cable Directive, as well as in recitals 18 InfoSoc Directive, 24 Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, and 12 CRM Directive. In addition, several Member States contain provisions of this type in their national laws, especially the Nordic countries. See also Recital 44 CDSM Directive.

mandate to non-represented rightholders and their works in a certain territory: (a) extended collective licensing proper, (b) legal mandates, and (c) presumptions of representation.¹³⁸

Article 12 subjects collective licensing with an extended effect to a number of requirements: the licensing mechanism must be managed by a CMO, within well-defined areas of use, where direct licensing is too costly or impractical (but not impossible), and in a manner that ‘safeguards the legitimate interests’ of rightholders.¹³⁹ The provision further sets out a number of safeguards that must be put in place for this mechanism to be valid: the CMO must be sufficiently representative; there must be equal treatment between represented and non-represented rightholders; non-represented rightholders must be able to opt-out of the system easily and effectively at any time; and CMOs have to comply with several information obligations towards rightholders.¹⁴⁰

As argued elsewhere in relation to extended collective licensing proper, mechanisms of collective licensing with extended effect should not be qualified as E&Ls.¹⁴¹ This is especially true where specific safeguards – such as an *opt-out* – are put in place that push the mechanism towards the voluntary end of the collective licensing spectrum.¹⁴² In this line, even without taking a position on the matter, the CDSM Directive clearly demarcates the mechanisms in Art. 12 from *mandatory* collective management of rights.¹⁴³

In the context of the directive, the mechanism of Art. 12 has been viewed as a possible option to obtain the necessary authorisations for OCSSPs required by Art. 17.¹⁴⁴ In theory, it is likely that a collective licence with extended effect will meet the requirement of applying to well-defined areas of use if its scope is limited to the uses of OCSSPs as delineated by Art. 17.¹⁴⁵ The mechanism of

¹³⁸ art 12(1)(b) CDSM Directive. It is outside the scope of this paper to discuss the nuances between models implementation that focus the extended effect on the licensing agreement versus the general legal mandate. For a reference to the distinction, see Riis and Rognstad (n 137) 6.

¹³⁹ art 12(2) and Recitals 45-47, and 49 CDSM Directive. The definition of CMO is found in art. 3(a) CRM Directive.

¹⁴⁰ art 12(3) CDSM Directive.

¹⁴¹ One of us has argued elsewhere before that such a qualification should not attach to ECL with opt-out. See João Pedro Quintais, *Copyright in the Age of Online Access: Alternative Compensation Systems in EU Law* (Kluwer Law International 2017) 110-11 (and references cited therein). See also Senfleben (n 134); Johan Axhamn and Lucie Guibault, ‘Cross-Border Extended Collective Licensing: A Solution to Online Dissemination of Europe’s Cultural Heritage’ (*IViR*, 8 February 2012) <<https://papers.ssrn.com/abstract=2001347>> accessed 24 August 2020; Johan Axhamn, ‘Exceptions, Limitations and Collective Management of Rights as Vehicles for Access to Information’ in Dana Beldiman, *Access To Information And Knowledge : 21st Century Challenges in Intellectual Property and Knowledge Governance* (Edward Elgar 2013).

¹⁴² See, in this respect, Quintais (n 141).

¹⁴³ See art 12(4) and Recital 46 CDSM Directive.

¹⁴⁴ Metzger and others (n 11) 6; Riis and Rognstad (n 137) 11, 15-16; Quintais, ‘The New Copyright in the Digital Single Market Directive’ (n 135); Johan Axhamn, ‘The New Copyright Directive: Collective Licensing as a Way to Strike a Fair Balance between Creator and User Interests in Copyright Legislation (Article 12)’ (*Kluwer Copyright Blog*, 25 June 2019) <<http://copyrightblog.kluweriplaw.com/2019/06/25/the-new-copyright-directive-collective-licensing-as-a-way-to-strike-a-fair-balance-between-creator-and-user-interests-in-copyright-legislation-article-12/>> accessed 14 September 2020.

¹⁴⁵ See the considerations on the scope of the license in Riis and Rognstad (n 137) 11-12.

Article 12 is particularly promising as it addressed some of the shortcomings mentioned above in relation to voluntary collective licensing, namely the representation of non-members. However, despite its promise, there are some significant challenges associated with its application in the present context.¹⁴⁶

First, Art. 12 does not create a framework for pan-European licensing, but only for voluntary territorial collective licences.¹⁴⁷ In this sense, the same criticism set forth in the previous section applies here *mutatis mutandis*. The one possible caveat, noted by European Copyright Society, is that the ‘the cumulative effect of Member States’ application of ECL provisions to platform uses may be that repertoires are cleared for such uses throughout the EU’.¹⁴⁸ Second, Art. 12 sets out a number of requirements that will be challenging for CMOs in many Member States to meet in the short and medium-term, such as that of representativeness.¹⁴⁹ Even for the Member States where some CMOs in some fields meet the requirements (e.g. online music), other CMOs in other fields might not (e.g. visual arts). The result is the co-existence of extended collective licences in some Member States (or part thereof) with a system of individual or limited voluntary collective licensing for platforms in other Member States, leading to a fragmented EU landscape.¹⁵⁰

c) Mandatory collective management

Mandatory collective management is the strictest form of collective rights management. It prevents rights holders from directly exploiting their works, imposing by operation of law the transfer or assignment of the *exercise* of rights to a CMO, which will act on their behalf.¹⁵¹ This mechanism is distinguishable from that in Art. 12 in that it applies automatically without the need to meet a representativeness requirement and without an opt-out safeguard. In theory, mandatory collective management can apply to the regulation of exclusive rights or rights of remuneration/fair compensation. In the first and by far the most common case (also sometimes called ‘obligatory’ collective management) the mechanism will operate in tandem with a statutory licence where the rights holders have a *de facto* or *de iure* obligation to administer the right through a CMO. In the

¹⁴⁶ Quintais, ‘The New Copyright in the Digital Single Market Directive’ (n 135).

¹⁴⁷ Leistner (n 11) 35.

¹⁴⁸ Riis and Rognstad (n 137) 16.

¹⁴⁹ See however Riis and Rognstad (n 137) 1, 7-8. arguing for a flexible interpretation of the representativeness criterion that accounts for qualitative and quantitative factors, and ‘safeguards the interests of rightholders and enables effective collective licensing.’ See also recital 48 CDSM Directive listing relevant factors to assess representativeness.

¹⁵⁰ See, similarly, Angelopoulos and Quintais (n 61); Quintais, ‘The New Copyright in the Digital Single Market Directive’ (n 135).

¹⁵¹ Quintais (n 141) 113. See also Riis and Rognstad (n 137) 5. noting that in mandatory collective management the rights covered ‘are managed “by legal mandate” exclusively by CMOs.’

second and rarer case, the law requires the collective administration of exclusive rights.¹⁵² Arguably, there are examples of both cases in the *acquis*.¹⁵³

A discussion of the legal nature of this mechanism, in particular its possible qualification as an E&L, is beyond the scope of this paper.¹⁵⁴ In any case, in its *Soulier* judgment, the CJEU appears to have significantly restricted the margin of discretion of national laws to adopt this collective licensing mechanism for exclusive rights in the InfoSoc Directive.¹⁵⁵ If we consider the right in Art. 17 CDSM Directive to be placed under the umbrella of Art. 3 InfoSoc Directive – as in our options A or B – then there is little room for mandatory collective management of the right, especially in a post-*Soulier* world. In this scenario, the imposition of mandatory collective management will likely be considered as equivalent to the introduction of an E&L to the respective right of communication to the public, subject to the three-step test in the terms described above. Given the strict interpretation of E&Ls adopted by the CJEU in a significant part of its case-law, it would be unlikely that such a mechanism would pass that test.

The opposite is true if we consider Art. 17 to be a special or a new *sui generis* right, as in options C and D above. In that case, the national legislator does not appear to be constricted by the three-step test, and could theoretically enact national legislation in this direction. Because this is a collective rights management mechanism, it would be subject to the rules in the CRM Directive and (possibly) to some of the requirements and safeguards applicable to collective licensing with extended effect in Art. 12 CDSM Directive, provided these respect the structural differences between types of collective licensing mechanisms. For instance, it would make sense to apply the equal treatment and publicity obligations, but not the requirements relating to representativeness or opt-out.¹⁵⁶

Again, for comprehensiveness, it should be emphasised that if the *effet utile* of Art. 17 is understood to require some form of exclusivity,¹⁵⁷ mandatory collective management of the *entirety* of new (exclusive) rights could be precluded even under options C and D.¹⁵⁸

4. Statutory Licences and E&Ls

¹⁵² Quintais (n 141) 113.

¹⁵³ See, eg, the regimes applicable to: the exclusive right of cable retransmission (arts 9-12 Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission); the equitable remuneration right for rental (art 5 Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property); and the artists' resale right (art 6(2) Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art).

¹⁵⁴ See, on that point, Quintais (n 141) 118-124. (and references cited therein).

¹⁵⁵ Quintais (n 141) 123-124.

¹⁵⁶ See Riis and Rognstad (n 137) 5. reaching a similar conclusion on the basis that art. 12 does not apply to mandatory collective management.

¹⁵⁷ See above III.4.d).

¹⁵⁸ See in this respect our conclusion at III.4.c)-d). Compare our view with Spindler (n 11) para 123.

The concept of statutory licences refers to a legal mechanism that restricts the nature of an exclusive right by replacing it *entirely* or *partly* with a compensated or remunerated E&L.¹⁵⁹

As with mandatory collective management, however, this possibility is difficult to contemplate should the right in Art. 17 CDSM Directive be subsumed in Art. 3 InfoSoc Directive, as in Options A and B. That would require passing the three-step test, which would prove difficult. Conversely, if it is accepted that Art. 17 prescribes a special or a new *sui generis* right, then we must also accept that national lawmakers have broader freedom to implement this provision through a compensated or remunerated E&L.

If the argument concerning exclusivity implied in Art. 17 CDSM Directive were to prevail, *effet utile* could prevent only that the entire right in Art. 17(1) is turned into a remunerated E&L. Exclusivity, as such, never prevents exceptions to the right. There is no exclusive right recognised to copyright holders in EU law that does not allow for E&Ls to it. In other words, even under this strict reading of Art. 17(1), the national legislators would be allowed to carve out new remunerated E&Ls to this right. For instance, it should be possible that a statutory license covers only some or all of the ‘non-commercial’ uploading acts by *end-users* that – as a result of Art. 17(2) – are inevitably linked to the subsequent act of providing access to the public by OCSSPs. As we shall see, this is precisely what the German legislator did in its implementation proposal discussed below.¹⁶⁰

As argued elsewhere, the choice of the remuneration concept that attaches to such right or exception is not irrelevant.¹⁶¹ Three options emerge for national lawmakers that adopt this authorisation mechanism: (a) equitable remuneration, (b) fair compensation, and (c) appropriate and proportionate remuneration.

Equitable remuneration rights are commonly tied to compulsory licences for uses or forms of exploitation of works not previously covered by an exclusive right.¹⁶² In the EU *acquis*, there exists a right for an unwaivable and equitable remuneration for rental, an optional right of remuneration for public lending, and rights for a single equitable remuneration for broadcasting and communication to the public.¹⁶³ The CJEU interprets the concept of equitable remuneration as based on the ‘value of the use in trade’ and following a logic of balance between competing interests.¹⁶⁴

Since the InfoSoc Directive, the concept of equitable remuneration has mostly been replaced by that of ‘fair compensation’ when applied in relation to E&Ls. In the *acquis*, this applies to reprographic reproductions, private copying, reproductions of broadcasts by non-commercial

¹⁵⁹ We agree with Spindler that statutory licenses are functionally E&Ls. See Spindler (n 11) paras 126-127. The reason we consider them to be permissible lies in the special regime for art 17(1). See above at III.2.

¹⁶⁰ See below at V.

¹⁶¹ Quintais (n 141) 123-124.

¹⁶² Examples at the international level are the equitable remuneration rights for the broadcasting of works and for ‘secondary uses’ of phonograms. See art 11^{bis} Berne Convention and art 12 Rome Convention.

¹⁶³ arts 5, 6 and 8(2) Rental and Lending Rights Directive.

¹⁶⁴ See, on art 8(2) Rental Right Directive, Case C-245/00 *Sena* ECLI:EU:C:2003:68, paras 36-37; Case C-192/04 *Lagardère Active Broadcast* ECLI:EU:C:2005:475, para 50.

social institutions, and for use of orphan works by specific organisations.¹⁶⁵ Fair compensation is based on the concept of harm derived from recital 36 InfoSoc Directive. It is an autonomous concept of EU law, which has been subject to interpretation by the CJEU in a number of judgments.¹⁶⁶

Finally, Art. 18 of the CDSM Directive¹⁶⁷ sets out a principle of appropriate and proportionate remuneration for authors and performers that license their content.¹⁶⁸ The provision leaves the choice of mechanism when implementing the principle to Member States' discretion, subject to conformity with EU law. Because the concept applies in the context of exploitation agreements, it could at a minimum be a viable option for authorisation mechanisms under Art. 17 that rely on an exclusive right.

Whichever concept the Member States chose, two key aspects must be safeguarded. First, for this mechanism to benefit individual creators – authors and performers – it must be ensured that the underlying right of remuneration is unwaivable. Second, the calculation of such remuneration or compensation must exclude any acts covered by the mandatory E&Ls in Art. 17(7), other applicable uncompensated E&Ls (e.g. incidental inclusion in Art. 5(3)(i) InfoSoc Directive), as well as those uploads for which there is prior explicit or implicit authorisation.¹⁶⁹

Such a statutory licence would naturally have to consider other aspects, as would indeed any type of collective licence applied on a territorial basis that is meant to be mirrored in all Member States. These include the calculation of the remuneration in accordance with the remunerative concept chosen, the collection and distribution of rights revenues (under the supervision of one or several CMOs), and other practicalities.¹⁷⁰

Whichever remuneration concept is used, there is one obvious advantage for national lawmakers in choosing, at least partly, statutory licensing as an authorisation mechanism. This mechanism provides the most effective means to enable the functioning of OCSSPs and safeguarding user rights. In a statutory licensing scheme, the application of preventive measures in Art. 17(4)(b) and (c) is not possible for 'non-commercial' uses on platforms, which would be covered by the licence.

¹⁶⁵ See, respectively, arts 5(2)(a), (b) and (e) InfoSoc Directive and art 6(5) Orphan Works Directive.

¹⁶⁶ For an overview of this case-law, see eg Alexandre L Dias Pereira, 'Levies in EU Copyright Law: An Overview of the CJEU's Judgments on the Fair Compensation of Private Copying and Reprography' (2017) 12 *Journal of Intellectual Property Law & Practice* 591.

¹⁶⁷ For commentary on art 18 CDSM Directive, see Séverine Dusollier and others, 'ECS Comment on Art. 18-22 CDSM Directive Comment of the European Copyright Society Addressing Selected Aspects of the Implementation of Articles 18 to 22 of the Directive (EU) 2019/790 on Copyright in the Digital Single Market' (*European Copyright Society*, 8 June 2020) <https://europeancopyrightsocietydotorg.files.wordpress.com/2020/06/ecs_comment_art_18-22_contracts_20200611.pdf> accessed 12.12.2020; Giulia Priora, 'Catching Sight of a Glimmer of Light: Fair Remuneration and the Emerging Distributive Rationale in the Reform of EU Copyright Law' (2020) 10 *JIPITEC* <<https://www.jipitec.eu/issues/jipitec-10-3-2019/5043>> accessed 12.12.2020.

¹⁶⁸ Recital 73 CDSM Directive clarifies that a lump sum payment can constitute proportionate remuneration 'but it should not be the rule'.

¹⁶⁹ See our considerations above at III.4.

¹⁷⁰ For a consideration of these aspects in the context in the context of a statutory licensing scheme for non-commercial use in EU copyright law, see Quintais (n 141).

By limiting the availability of these measures, there is a lower risk that the application of Art. 17 leads to a violation of the prohibition on general monitoring in Art. 17(8). The result is that OCSSPs would have a lower risk of liability for providing their services, and would therefore have less of an incentive to geo-block certain Member States. In addition, they could make automation much more scalable, because the defining factor would not be a case-by-case assessment of the contextual requirements of E&L (e.g. regarding parody or pastiche), but the observable commercial and non-commercial character of use. If correctly deployed, such a mechanism could also secure a steady revenue stream for rightholders – especially authors and performers.

As explained above, there is an important limitation to a full statutory licensing scheme as an authorisation mechanism for Art. 17. Such a scheme cannot cover all the uploading acts of end-users. If the acts of users are predominantly non-commercial, they must be covered by an extended *ex lege* licence based on Art. 17. In all other cases, the flexibility described above is less useful, since users' acts that qualify as commercial are still subject to the exclusive rights regime of Arts. 2 and 3 InfoSoc Directive. Naturally, the Member States might decide to facilitate such licensing too, however, by other means confined to the InfoSoc framework (same as in Options A and B).

5. Hybrid licensing: remuneration right with an opt-out safeguard

As noted, Art. 17 provides a framework of potential implementation options for Member States to modulate their implementations to different national laws, practice and market realities. This flexibility allows in principle for a combination of exclusive and non-exclusive approaches to regulate the acts within the scope of the new right. One potential avenue for Member States that endorse our options C or D in this regard is to combine key components of the above licensing mechanisms. A particularly interesting combination, noted in the aforementioned German Government declaration¹⁷¹ is to implement the right in Art. 17(1) as a right to (appropriate and fair) remuneration, with an opt-out safeguard. Such design mitigates any exclusivity concerns.

A precedent to this mechanism already exists in Art. 8 CDSM Directive for out-of-commerce works/subject matter in the permanent collections of cultural heritage institutions on the basis of non-exclusive licences for non-commercial purposes. The provision includes a *fall-back* E&L for these institutions to make available such works/subject matter, for non-commercial purposes, subject to certain conditions and exclusions.¹⁷² In a legal innovation, rights holders are allowed to opt out – in general or in specific cases – not only from collective management but also from the E&L.¹⁷³ It is also possible to envision subject matter or sector variations, with different default legal regimes. For example, musical works and phonograms (and as a result the music industry) could be subject to a default remuneration right managed through collective licensing and with an

¹⁷¹ See above at IV.1

¹⁷² See art 8(2) CDSM Directive. The exception is a fallback since it only applies to the extent the conditions for collective management of OOC works are not met, eg because the relevant CMO is not sufficiently representative. See also art 8(3) and recital 32 CDSM Directive.

¹⁷³ art 8(4) and Recital 35 CDSM Directive.

opt-out, whereas audio-visual content – and thus the audio-visual industry – would continue to benefit from and exclusive right subject to extended collective licensing, where appropriate.

6. Summary

Table 3 below contains a simplified representation of the possibilities for the above-described authorisation mechanisms to cover the acts of OCSSPs and users regulated by Art. 17 across the interpretation options we have identified:

Table 3. Licensing Mechanisms and Interpretative Options

| Permissible licensing mechanism? | Options A and B | Options C and D |
|--|--|--|
| <i>Direct licensing</i> | OCSSP: YES | |
| <i>Voluntary collective licensing</i> | Users: YES | |
| <i>Collective licensing with extended effect</i> | OCSSP: YES, BUT subject to Art. 12 CDSM Users: YES, BUT subject to Art. 12 CDSM | |
| <i>Mandatory collective management</i> | OCSSP: PROBABLY NO due to requirements of <i>Soulier</i> , ¹⁷⁴ the CRM Directive, and Art. 12 CDSM (indirect) Users: subject to requirements of <i>Soulier</i> , the CRM Directive, and Art. 12 CDSM (indirect)) | OCSSP: YES, subject to the requirements of the CRM Directive, and Art. 12 CDSM Directive (indirect; debatable) Users: PROBABLY NO, due to requirements of <i>Soulier</i> (only commercial uses), the CRM Directive, and Art. 12 CDSM Directive (indirect) |
| Statutory licensing & E&Ls | OCSSP/Users: YES, subject to the international and EU three-step test (arts. 10 WCT, 16 WPPT, and 5(5) InfoSoc). | OCSSP: YES, but if managed by CMO (see above). Users: YES, subject to Art. 5(5) InfoSoc (but possible extension |

¹⁷⁴ Case C-301/15 *Soulier and Doke* ECLI:EU:C:2016:878.

| Permissible licensing mechanism? | Options A and B | Options C and D |
|----------------------------------|-----------------|---|
| | | of OCSSP legal authorisation), ¹⁷⁵ and WCT/WPPT (commercial and non-commercial acts) |

V. How it could work in practice? Briefly on the German 2020 proposal

Approximately eight months after the draft version of this article was originally published, in September 2020, the German Ministry of Justice introduced its discussion proposal for implementation of Art. 17 CDSM Directive.¹⁷⁶ The German Ministry's September proposal makes use of the flexibilities in the EU legal framework, which we have highlighted throughout this paper. Specifically, Secs. 6 and 7 of the German proposal include a new type of limited remunerated exception to the right in Art. 17(1), which is subsequently extended by means of Sec. 9 to accompanying exploitation acts of a non-commercial nature by end-users.

Section 6 of the German Ministry's September proposal (on 'Mechanically verifiable uses authorised by law') provides for the following new exception:

'(1) The communication to the public and the reproduction required for this purpose of copyright-protected works and parts of works for non-commercial purposes is permitted to the following extent: [1] up to 20 seconds of an individual film or motion picture, [2] up to 20 seconds of an individual audio track, [3] up to 1000 characters of an individual text and [4] an individual photograph or an individual graphic with a data volume of up to 250 kilo-bytes.

¹⁷⁵ However, art 17 CDSM Directive extends the list of possible E&Ls available to users in situations where the user's non-commercial act of upload benefits (by extension) from a (legal) authorisation obtained by the OCSSP. See discussion above at III.3.

¹⁷⁶ Federal Ministry of Justice and Consumer Protection (Germany), 'Discussion draft of the Federal Ministry of Justice and Consumer Protection – Working translation of the draft Act on the copyright liability of service providers for sharing online content (Article 3 of the discussion draft, transposing Article 17 DSM directive)'

<https://www.BMJV.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/DiskE_II_Anpassung%20Urheberrecht_digitaler_Binnenmarkt_englischeInfo.html> accessed 14 September 2020. For academic reactions to this proposal see e.g. Nordemann and Wiblinger (n 11); GRUR (n 77); Leistner (n 11); Rosati (n 18); Martin Husovec and João Pedro Quintais, 'Article 17 of the Copyright Directive: Why the German Implementation Proposal Is Compatible with EU Law – Part 1' (*Kluwer Copyright Blog*, 26 August 2020) <<http://copyrightblog.kluweriplaw.com/2020/08/26/article-17-of-the-copyright-directive-why-the-german-implementation-proposal-is-compatible-with-eu-law-part-1/>> accessed 14 September 2020; Martin Husovec and João Pedro Quintais, 'Article 17 of the Copyright Directive: Why the German Implementation Proposal Is Compatible with EU Law – Part 2' (*Kluwer Copyright Blog*, 28 August 2020) <<http://copyrightblog.kluweriplaw.com/2020/08/28/article-17-of-the-copyright-directive-why-the-german-implementation-proposal-is-compatible-with-eu-law-part-2/>> accessed 14 September 2020.

(2) Paragraph 1 shall only apply if there is no contractual right authorising uses according to paragraph 1 and it is not a use authorised by law according to § 5.’

Section 9 (on ‘Extension of authorisations’), the national implementation of Art. 17(2) CDSM Directive, then extends the licences as follows:

‘(1) If the service provider allows the communication to the public and the reproduction of a work necessary for this purpose, this permission also extends to the user, provided that the user is not acting commercially or is not generating substantial income.’

Although Sec. 6 does not articulate this expressly, it concerns the acts covered by Art. 17(1) CDSM Directive. Hence, Sec. 6 of the German proposal is an exception to the national provision implementing Art. 17(1) of the directive.¹⁷⁷ The criteria of Sec. 6 only limit the liability of users where the requirement of predominantly non-commercial use is met. Since the exploitation acts in Sec. 6 refer to users’ uploaded content, the reference to ‘non-commercial purposes’ is a reminder of this. The exception is remunerated, and applies only if there is no other exception or licence available.¹⁷⁸ Section 9, in compliance with Art. 17(2) of the directive, then extends the corresponding *ex lege* authorisation to users. This means that the construction of the exception conforms to the criteria that we outlined earlier. Therefore, in our view, this design makes the proposed German exception compatible with the requirements of the CDSM Directive. The situation might change under subsequent iterations of the German proposal.¹⁷⁹

VI. Conclusion

This article provides an in-depth examination of the legal nature and status of the new right provided in Art. 17 CDSM Directive. After reviewing different interpretative options, we conclude that it is either a ‘special’ or a ‘new’ *sui generis* right, which finds itself outside of the pre-existing framework of the InfoSoc Directive. It is a right that goes beyond the minimum standard required by international law operating in the layer of European experimentation. Whether the right in Art. 17 is seen as a carve-out from the existing European case-law (a special right), or a new right that goes beyond the interpretation of CJEU case-law (a new *sui generis* right), will probably be decided in pending preliminary references before the CJEU. Based on the existing case-law, we view the latter option as the most correct interpretation. This seemingly theoretical categorisation can have important consequences for licensing arrangements. Most importantly, our review of the constraints imposed by international and EU law concludes that the Member States have a broader margin of discretion than previously anticipated in the choice of licensing mechanisms for the new right. This may include various mechanisms of collective and statutory licensing, subject to the *effet utile* of the CDSM Directive. As a matter of legal design, Member States’ margin of discretion is limited by the fact that licensing of the right by OCSSPs will only extend automatically to their

¹⁷⁷ ie s 1 of the German proposal.

¹⁷⁸ See s 7 of the German proposal.

¹⁷⁹ In October 2020, the German Ministry of Justice updated its proposal, see <https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Gesetz_Anpassung-Urheberrecht-dig-Binnenmarkt.html> accessed 12.12.2020.

users if these act on a predominantly ‘non-commercial’ basis. If they act otherwise, a separate authorisation is required for users’ activities, which remain limited by the InfoSoc Directive.

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