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

The Directive on Copyright in the Digital Single Market (CDSM Directive) introduced a change of paradigm with regard to the liability of some platforms in the European Union. Under the safe harbour rules of the Directive on electronic commerce (E-Commerce Directive), intermediaries in the EU were shielded from liability for acts of their users committed through their services, provided they had no knowledge of it. Although platform operators could be required to help enforce copyright infringements online by taking down infringing content, the E-commerce Directive also drew a very clear line that intermediaries could not be obliged to monitor all communications of their users and install general filtering mechanisms for this purpose. The Court of Justice of the European Union confirmed this in a series of cases, amongst other reasons because filtering would restrict the fundamental rights of platform operators and users of intermediary services. Twenty years later, the regime for online intermediaries in the EU has fundamentally shifted with the adoption of Art. 17 CDSM Directive, the most controversial and hotly debated provision of this piece of legislation. For a specific class of online intermediaries known as ‘online content-sharing providers’ (OCSSPs), uploads of infringing works by their users now result in direct liability and they are required undertake ‘best efforts’ to obtain authorization for such uploads. With this new responsibility come further obligations which oblige OCSSPs to make best efforts to ensure that works for which they have not obtained authorization are not available on their services. How exactly OCSSPs can comply with this obligation is still unclear. However, it seems unavoidable that compliance will require them to install measures such as automated filtering (so-called ‘upload filters’) using algorithms to prevent users from uploading unlawful content. Given the scale of the obligation, there is a real danger that measures taken by OCSSPs in fulfilment of their obligation will amount to expressly prohibited general monitoring. What seems certain, however, is that the automated filtering, whether general or specific in nature, cannot distinguish appropriately between illegitimate and legitimate use of content (e.g. because it would be covered by a copyright limitation). Hence, there is a serious risk of overblocking certain uses that benefit from strong fundamental rights justifications such as the freedom of expression and information or freedom of artistic creativity. This article first outlines the relevant fundamental rights as guaranteed under the EU Charter of Fundamental Rights and the European Convention of Human Rights that are affected by an obligation to monitor and filter for copyright infringing content. Second, it examines the impact on fundamental rights of the obligations OCSSPs incur under Art. 17, which are analysed and tested also with regard to their compatibility with general principles of EU law such as proportionality and legal certainty. These are, on the one hand, obligations to prevent the upload of works for which they have not obtained authorization and, on the other, an obligation to remove infringing content upon notification and prevent the renewed upload in relation to these works and protected subject matter (so-called ‘stay-down’ obligations). Third, the article assesses the mechanisms to safeguard the right of users of online content-sharing services under Art. 17. The analysis demonstrates that the balance between the different fundamental rights in the normative framework of Art. 17 CDSM Directive is a very difficult one to strike and that overly strict and broad enforcement mechanisms will most likely constitute an unjustified and disproportionate infringement of the fundamental rights of platform operators as well as of users of such platforms. Moreover, Art. 17 is the result of hard-fought compromises during the elaboration of the Directive, which led to the adoption of a long provision with complicated wording and full of internal contradictions. As a consequence, it does not determine with sufficient precision the balance between the multiple fundamental rights affected, nor does it provide for effective harmonization. These conclusions are of crucial importance for the development of the regulatory framework for the liability of platforms in the EU since the CJEU will have to rule on the compatibility of Art. 17 with fundamental rights in the near future, as a result of an action for annulment filed by the Polish government. In fact, if certain features of the article are considered incompatible with the constitutional framework of the EU, this should lead to the erasing of certain paragraphs and, possibly, even of the entire provision from the text of the CDSM Directive.

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

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

I. Introduction

After a long political and public debate, the European legislator adopted the Directive on Copyright in the Digital Single Market (CDSM Directive)¹ in April 2019.² One of its core provisions redefines the liability regime for specific online platforms by creating new obligations for large content-hosting platforms, so-called online content-sharing service providers (OCSSPs).³ According to the Directive, this change of paradigm in the liability system is meant to reflect the changing realities of how works and other subject matter protected by copyright are accessed online.⁴ Because of their special position, OCSSPs are from now on considered to perform copyright relevant acts when their users upload content.⁵ In turn, Art. 17 CDSM Directive establishes an extremely complicated system of conditions under which OCSSPs can avoid liability.

Article 17 has come under heavy criticism,⁶ notably for the effects it is likely to have on various fundamental rights.⁷ The effects of the basic intermediary liability

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

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

At the core of this discussion lies the question of the circumstances under which and the way in which intermediaries are obliged to take measures to ensure that copyright and related rights are not infringed via their services. While the regime of the ECD provided for relatively broad ‘safe harbours’, i.e. liability exclusions for

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 and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92-125 (CDSM Directive).

² Providing a general overview of the Directive: João Pedro Quintais, ‘The New Copyright in the Digital Single Market Directive: A Critical Look’ (2020) 42 EIPR 28-41 and Séverine Dusollier, ‘The 2019 Directive on Copyright in the Digital Single Market: Some progress, a few bad choices, and an overall failed ambition’ (2020) 57 CMLRev 979-1030.

³ These service providers are defined in art 2(6) and Recital 62 CDSM Directive, see below III. 1.

⁴ Recital 61 CDSM Directive.

⁵ art 17(1) CDSM Directive.

⁶ See for example 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 153-182 and Christina Angelopoulos and João Pedro Quintais, ‘Fixing Copyright Reform: A Better Solution to Online Infringement’ (2019) 10 JIPITEC 147-172.

⁷ A number of extensive studies have been published on the various aspects on art 17, including its effects on fundamental rights, 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?’ [2020/2] Zeitschrift für Geistiges Eigentum/Intellectual Property Journal (ZGE/IPJ) 123-214 (1-78) <<https://ssrn.com/abstract=3572040>> accessed 25 January 2021; Julia Reda, Joschka Selinger and Michael Servatius, ‘Article 17 of the Directive on Copyright in the Digital Single Market: a Fundamental Rights Assessment’ (Study for Gesellschaft für Freiheitsrechte, December 2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3732223> accessed 25 January 2021; 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’ (22 October 2020) <<https://ssrn.com/abstract=3717022>> accessed 25 January 2021; Gerald Spindler, ‘Art. 17 DSM-RL und dessen Vereinbarkeit mit primärem Europarecht. Zugleich ein Beitrag zu Umsetzungsmöglichkeiten’ [2020] GRUR 253-261; Gerald Spindler, ‘Upload-Filter: Umsetzungsoptionen zu Art. 17 DSM-RL’ [2020] CR 50-59. Further suggestions and commentaries have been made by a wider range of relevant organizations and groups of scholars, also on plans for national implementation, see for example: The European Copyright Society, ‘Comment of the European Copyright Society. Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market into National Law’ (2020) 11 JIPITEC 115-131; ALAI, ‘DRAFT OPINION on certain aspects of the implementation of Article 17 of Directive (EU) 2019/790 of 17 April 2019 on copyright and related rights in the digital single market’ (ALAI, 30 March 2020) <<https://www.alai.org/en/assets/files/resolutions/200330-opinion-article-17-directive-2019-790-en.pdf>> accessed 25 January 2021; Reto M Hilty and others, ‘Gesetz über die urheberrechtliche Verantwortlichkeit von Diensteanbietern für das Teilen von Online-Inhalten (Urheberrechts-Diensteanbieter-Gesetz – UrhDaG) Stellungnahme zum Referententwurf vom 2. September 2020’ <http://www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/Stellungnahme_UrhDaG_Referententwurf_MPI.pdf> accessed 25 January 2021;

Sebastian Felix Schwemer, ‘Article 17 at the Intersection of EU Copyright Law and Platform Regulation’ [2020/3] Nordic Intellectual Property Law Review 400-435 (1-31) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3627446> accessed 13 March 2021.

⁸ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’) [2020] OJ L178/1-16 (e-Commerce Directive).

⁹ 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 [2001] OJ L167/10-19 (InfoSoc Directive). This directive does not foresee a specific liability standard, but simply refers to the liability regime established by the e-Commerce directive (Recital 16).

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

¹¹ See Stefan Kulk and Frederik Zuiderveen Borgesius, ‘Filtering for copyright enforcement in Europe after the Sabam cases’ (2012) 34 EIPR 791-795; Christina Angelopoulos, ‘Are blocking injunctions against ISPs allowed in Europe? Copyright enforcement in the post-Telekabel EU legal landscape’ (2014) 9 JIPLP 812-821; see for further references Stefan Kulk, *Internet Intermediaries and Copyright Law, Towards a Future-proof EU Legal Framework* (Ridderprint 2018); Aleksandra Kuczerawy, *Intermediary Liability and Freedom of Expression in the EU: From Concepts to Safeguards* (Intersentia 2018); for a comparative perspective: Folkert Wilman, *The Responsibility of Online Intermediaries for Illegal User Content in the EU and the US* (Edward Elgar 2020).

¹² See eg The European Copyright Society (n 7) and 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’ (2019) 10 JIPITEC 277-282.

¹³ Case C-401/19 *Republic of Poland v European Parliament and Council of the European Union*; according to the pleas in law and main arguments, ‘the Republic of Poland seeks the annulment of Article 17(4)(b) and Article 17(4)(c), *in fine*’ (...), or, ‘should the Court find that the contested provisions cannot be deleted from Article 17 of Directive (EU) 2019/790 without substantively changing the rules contained in the remaining provisions of that article, the Republic of Poland claims that the Court should annul Article 17 of Directive (EU) 2019/790 in its entirety’.

intermediaries,¹⁴ the new sectoral regime under Art. 17 CDSM Directive redesigned liability exemptions for OCSSPs as a specific class of intermediaries.¹⁵

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

The statutory language of Art. 17 is relatively vague and merely requires that OCSSPs ‘ensure the unavailability of specific works’.²⁰ Although the text of the Directive avoids references to monitoring or filtering, it is widely agreed among commentators that some sort of automated content control will be necessary to fulfil the obligations arising under Art. 17(4) CDSM.²¹ This potentially stands

in contradiction to the interpretation of Art. 16 EU Charter as interpreted in *SABAM v Netlog* and the express prohibition of general filtering and monitoring obligations for intermediaries²² and specifically for OCSSPs.²³

The new Art. 17 regime expressly overrides the existing safe harbour provision of the ECD and the InfoSoc Directive²⁴ and foreshadows broader obligations for online intermediaries in the EU’s Digital Services Act currently under discussion.²⁵ Under the ECD regime, intermediaries incurred an obligation to remove content upon notification. Art. 17 establishes a system based on cooperation between rightholders and users that includes elements of the ECD regime. Pursuant to Art. 17(1) OCSSPs perform relevant acts of communication to the public in relation to content uploaded by their users. For these acts, OCSSPs must make ‘best efforts’ to obtain authorization from the relevant rightholders.²⁶ Failure to obtain authorization triggers an obligation to ensure that works or other subject matter for which authorization could not be obtained are made unavailable on a hosting platform with the help of information provided by rightholders.²⁷ To achieve this outcome, OCSSPs must undertake ‘best efforts’, a standard of care that also applies to a secondary obligation which, in its formulation, resembles, but is not identical to, the liability exemption of Art. 14 ECD.²⁸ Article 17(4)(c) states that OCSSPs must ‘in any event’ expeditiously remove infringing content after notification and ensure its future unavailability, thus establishing what has been called a ‘notice and stay down’

¹⁴ arts 12-15 ECD exempt information society service providers from liability if they comply with the respective conditions. Particularly relevant for hosting providers is art 14 ECD, which provides that information society service providers who offer a service which ‘consists of the storage of information provided by a recipient of the service’ are not liable for such information if ‘(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.’ art 15 provides further that services that fall under arts 12-14 shall not be required to generally monitor or filter information or to actively seek information that could indicate illegal activities; see for a detailed analysis and further references: Mark D Cole, Christina Etteldorf and Carsten Ullrich, *Cross-Border Dissemination of Online Content* (Nomos 2020) 188-200; see for a good summary Giancarlo Frosio and Christophe Geiger, ‘Taking Fundamental Rights Seriously in the Digital Service Act’s Platform Liability Regime’ 1-44, 8 <[https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3747756](https://ssrn.com/abstract=https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3747756)> accessed 25 January 2021, and Annemarie Bridy, ‘The Price of Closing the “Value Gap”: How the Music Industry Hacked EU Copyright Reform’ (2020) 22 *Vanderbilt Journal of Entertainment and Technology Law* 323-358. See in general with many further inspiring contributions the comprehensive volume edited by Giancarlo Frosio, *The Oxford Handbook of Online Intermediary Liability* (OUP 2020).

¹⁵ See eg for a comprehensive summary Quintais (n 2).

¹⁶ *SABAM v Netlog* (n 10); see also *Scarlet Extended* (n 10) for an almost identical judgment on the obligations of internet access providers.

¹⁷ *SABAM v Netlog* (n 10) paras 39-50.

¹⁸ *SABAM v Netlog* (n 10) para 46; see further for a more nuanced assessment of the impact of art 17 on the right of platform operators to conduct a business, Julia Reda and Joschka Selinger, ‘Article 17’s impact on freedom to conduct a business – Part 1’ (*Kluwer Copyright Blog*, 18 January 2021) <<http://copyrightblog.kluweriplaw.com/2021/01/18/article-17s-impact-on-freedom-to-conduct-a-business-part-1/>> accessed 25 January 2021, and ‘Part 2’ <<http://copyrightblog.kluweriplaw.com/2021/01/19/article-17s-impact-on-freedom-to-conduct-a-business-part-2/>> accessed 25 January 2021.

¹⁹ *SABAM v Netlog* (n 10) paras 47-50.

²⁰ art 17(4)(b) CDSM Directive.

²¹ See eg Karina Grisse, ‘After the storm – examining the final version of Article 17 of the new Directive (EU) 2019/790’ (2019) 14 *JIPPL* 887-899,

894; Spindler, ‘Art. 17 DSM-RL’ (n 7) 259; Giancarlo Frosio and Sunimal Mendis, ‘Monitoring and Filtering: European Reform or Global Trend’ in Frosio (n 14) 561 ff; Sebastian Schwemer and Jens Schovsbo, ‘What is Left of User Rights? – Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime’ in Paul Torremans (ed), *Intellectual Property Law and Human Rights*, (Kluwer Law International 2020) 574: ‘Given the practical infeasibility of handling a large number of user uploads, the difficulty in identifying previously blocked content without technical means (...), the use of such algorithmic solutions is likely, akin to a de facto imposition’.

²² art 15(1) ECD.

²³ art 17(8) CDSM Directive.

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

²⁵ European Commission, Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM(2020) 825 final, Brussels, European Commission, 15 December 2020; on fundamental rights and intermediary liability under the Digital Services Act see the recent study by Frosio and Geiger (n 14) and Christina Angelopoulos, ‘Intermediary Liability, Fundamental Rights and the Digital Services Act’ (*EU Law Live*, Weekend Edition No 42) <<https://eulawlive.com/weekend-edition/weekend-edition-no42/>> accessed 25 January 2021.

²⁶ art 17(4)(a) CDSM Directive.

²⁷ art 17(4)(b) CDSM Directive.

²⁸ Contrary to the liability exemption of art 14 ECD, the ‘best efforts’ obligations arising under art 17 CDSM Directive do not require knowledge to incur liability.

mechanism.²⁹ The requirement to make content unavailable, i.e. to block and to filter user uploads, clashes with the guarantees provided in Art. 17(7), pursuant to which users of hosting platforms shall not be prevented from uploading lawful content and, in particular, from exercising certain exceptions and limitations specifically provided for in Art. 17(7)(a) and (b).³⁰ Against this background, it is appropriate and necessary to review the rifts created by monitoring and filtering obligations in the fundamental rights landscape of the EU.³¹

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

This study proceeds as follows: First, we will briefly outline the general European framework of fundamental rights protection, (II.1.) and the principle of proportionality which serves as the mechanism to reconcile conflicts between those rights and between rights and other interests (II.2.) as it applies to copyright law. Subsequently, we outline the scope of protection of the relevant fundamental rights (II.3.) and the general principles of market harmonization and legal certainty (II.4). Second, we will provide a brief overview of the mechanisms of Art. 17 CDSM (III.1.) and of the technological aspects of automated filtering and monitoring and its limitations (III.2.). Third, we will in detail examine the effects of automated filtering mechanisms and notice and stay-down obligations on the various fundamental rights with particular reference to Art. 17 CDSM (III.5.). Fourth, we review suggested solutions on how to implement Art. 17 in compliance with fundamental rights (III.6.) before briefly summarizing our findings (IV.).

II. Fundamental rights implications of platform liability

Mass-scale online copyright enforcement and fundamental rights are difficult to reconcile. In fact, given the extremely large amount of content uploaded on platforms every day, in order to identify and control potentially infringing content, monitoring and filtering information seems unavoidable at least to some extent.³² This in turn potentially affects the rights of users and the general public to impart information and restricts access to information made available on online platforms. Furthermore, in order to be able to cope with obligations to identify and monitor copyright infringement, platform operators are

obliged to install costly mechanisms involving technical and human resources, which can have severe implications on their business in particular (but not only) for small or medium-sized companies.³³

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

1. The systemic role of fundamental rights in the EU legal order

Fundamental rights are an integral element in the EU’s constitutional order. Prior to their codification in the EU Charter of Fundamental Rights (EUCFR),³⁷ the CJEU developed fundamental rights as general principles from the common constitutional traditions of the Member States.³⁸ Fundamental rights therefore sit at the top of the EU’s hierarchy of norms along with the Treaties³⁹ and the general principles of EU law.⁴⁰ All fundamental rights of the EUCFR are of equal value and no hierarchy exists between them,⁴¹ their scope

³³ See in this sense, Evan Engstrom and Nick Feamster, ‘The Limits of Filtering: A Look at the Functionality & Shortcomings of Content Detection Tools’ (*Engine*, March 2017) 21 ff <<https://www.engine.is/the-limits-of-filtering>> accessed 25 January 2021 (according to which ‘filtering tools are prohibitively expensive for many small OSPs’ and giving examples of the costs of filtering systems).

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

³⁵ cf Leistner (n 7) 123-214 (17).

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

³⁷ Case C-617/10 *Åkerberg Fransson* EU:C:2013:105, para 29.

³⁸ Case 4/73 *Nold* EU:C:1974:51, para 13; see in relation to copyright: Case C-479/04 *Laserdisken II* EU:C:2006:549, para 61.

³⁹ Consolidated Version of the Treaty on European Union [2012] OJ C326/13-45 (TEU); Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47-390 (TFEU).

⁴⁰ Paul Craig and Gráinne de Búrca, *EU Law. Text, Cases and Materials* (OUP 2020) 142-144.

⁴¹ For a diverging view see Alexander Peukert, ‘The fundamental right to (intellectual) property and the discretion of the legislature’ in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property*, (Edward Elgar 2015) 132-148, who argues that the right to property should not be considered at the same level as, for

²⁹ See eg Aleksandra Kuczerawy, ‘From “Notice and Takedown” to “Notice and Stay Down”: Risks and Safeguards for Freedom of Expression’ in Frosio (n 14).

³⁰ For further discussion, see eg Schwemer and Schovsbo in Torremans (n 21) 569 ff.

³¹ See on this issue Reda, Selinger and Servatius (n 7); Senftleben and Angelopoulos (n 7) 17 ff; for a horizontal approach on automated enforcement, platform liability and fundamental rights, see also Frosio and Geiger (n 14) 12 ff.

³² This position is implicit in the CJEU’s arguments in *Scarlet Extended* (n 10) and *SABAM v Netlog* (n 10). By prohibiting general filtering, the Court acknowledges that one way to enforce copyright is to install filtering and monitoring mechanisms.

corresponds to that of the respective rights provided for by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).⁴² This relationship is also illustrated by regular references by the CJEU to judgments by the European Court of Human Rights (ECtHR).⁴³

a) The Court's standard of review

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

b) Addressees of EU fundamental rights

According to Art. 51 EUCFR '[t]he provisions of [the] Charter are addressed to the institutions, bodies, offices and agencies of the Union (...) and to the Member States only when they are implementing Union law.'⁴⁶ This means that the provisions of the Charter bind the European legislature in all its activities and EU legislation must comply with fundamental rights. Member States are only bound by the Charter when implementing EU law.⁴⁷ The CJEU has also underlined that the courts of the Member States must have regard to EU fundamental rights when applying national law which serves to implement obligations under EU law.⁴⁸ In situations that are not fully governed by EU law, Member States remain free to apply national fundamental rights standards as long as their application does not compromise the primacy, unity and effectiveness of EU law.⁴⁹

example, the right to freedom of expression due to the 'unique structure' of property rights and their existence and scope 'as "creatures" of the legislature'.

⁴² art 52(3) EUCFR.

⁴³ See for example Case C-476/17 *Pelham and others* EU:C:2019:624, para 34.

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

⁴⁵ See for example, *Scarlet Extended* (n 10) paras 41-54 and *Mc Fadden* (n 10) paras 80-101; see also Herke Kranenborg, 'Article 8' in Steve Peers and others, *The EU Charter of Fundamental Rights. A Commentary* (OUP 2014) para 08.42.

⁴⁶ art 51(1) EUCFR.

⁴⁷ For example, Member States must transpose secondary legislation (ie directives) into their national law in full compliance with the fundamental rights of the EU Charter. Therefore, national legislatures must ensure that their transposition of secondary legislation relies on an interpretation that ensures that a fair balance is struck between the various fundamental rights protected under EU law. See eg *Promusicae* (n 19) para 70; Case C-149/17 *Bastei Lübbe* EU:C:2018:841, para 45; see also Case C-580/13 *Coty Germany* EU:C:2015:485, para 34. More generally see Craig and de Búrca (n 40) 430-431.

⁴⁸ *Scarlet Extended* (n 10); *SABAM v Netlog* (n 10), but also *Mc Fadden* (n 10).

⁴⁹ Case C-469/17 *Funke Medien NRW* EU:C:2019:623, para 32.

c) Challenging fundamental rights incompatibilities

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

Individuals can challenge a legislative measure or any act of the institutions for that purpose indirectly via the preliminary reference procedure. Article 267 gives the CJEU competence to rule on 'the validity (...) of acts of the institutions (...) of the Union.'⁵⁴

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

Likewise, Member States, by failing to properly implement a directive, can be found to be in violation of the Charter. A failure to implement can include a failure to transpose a directive or a part thereof. However, Member States can also be sanctioned for failure to implement a legislative measure in compliance with EU fundamental rights. This would assume that the act itself complies with fundamental rights, but the exercise of discretion left to the Member States in its transposition has been exercised to the effect that the implementing law does not fully respect fundamental rights. This can be challenged, ordinarily by the Commission (and exceptionally by another Member State),⁵⁷ before the CJEU, which can find a

⁵⁰ For example by imposing a measure that in itself does not respect fundamental rights or, which in its particular formulation does not strike a fair balance between the various interests involved.

⁵¹ See eg the challenge brought by Poland against parts of art 17(4) CDSM, in which it alleges that the obligation to filter content to prevent copyright infringements infringes the rights of users to receive and impart information, *Poland v Parliament and Council* (n 13); see on this issue Bernd Justin Jütte, 'Finding the Balance in Copyright Law: Internal and External Control Through Fundamental Rights' in Torremans (n 21) 481-482.

⁵² Under art 263 challenges by individuals are nearly impossible, especially in relation to generally applicable legislation. An individual application would have to demonstrate direct and individual concern in order to challenge a directive, see Craig and de Búrca (n 40) 546 ff.

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

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

⁵⁵ art 6(2) TEU.

⁵⁶ Case C-311/18 *Facebook Ireland and Schrems* EU:C:2020:559, para 175.

⁵⁷ However, other Member States would first have to bring the matter before the Commission. Only if the Commission fails to act by delivering

Member State in violation of its obligation under the EU Treaties. Such a challenge would still be possible, even if the Polish challenge were to be unsuccessful, to ‘correct’ national implementations and enable the CJEU to intervene (again) at a later point. Given the largely diverging approaches to implementing the CDSM Directive, such a (further) challenge is certainly not to be excluded.⁵⁸

However, not every restriction of fundamental rights automatically constitutes a failure to fulfil an obligation under the Treaties or other higher-ranking EU law. In principle, fundamental rights can be limited as long as their essence is respected.⁵⁹ Furthermore, any limitation of a fundamental right must respect the principle of proportionality.⁶⁰

2. Proportionality: the CJEU’s balancing methodology

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

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

an opinion within three months can a Member State bring proceedings against another Member State before the CJEU (see art 259 TFEU).

⁵⁸ As Oreste Pollicino, Giovanni Maria Riccio and Marco Bassini, *Copyright and Fundamental Rights in the Digital Age, A Comparative Analysis in Search of a Common Constitutional Ground* (Edward Elgar Publishing 2020) note in the introduction of their timely edited collection: ‘The challenges that Member States will have to face in the implementation process of the DSM Directive largely derive from the strained relationship between copyright and other competing rights such as freedom of speech, data protection and freedom to conduct business’. For an overview of the status of implementation in the various Member States see <<https://www.create.ac.uk/cdsm-implementation-resource-page/>> 25 January 2021.

⁵⁹ art 52(1) EUCFR; see also to that effect Case C-476/17 *Pelham and Others* EU:C:2018:1002, Opinion of AG Szpunar, para 98 and Case C-149/17 *Bastei Lübbe* EU:C:2018:400, Opinion of AG Szpunar, para 38 and *Coty Germany* (n 47) para 35. See also on this issue: Martin Husovec, ‘The Essence of Intellectual Property Rights Under Article 17(2) of the EU Charter’ [2019] German Law Journal 840-863, with further references.

⁶⁰ See further on the influence of this principle on EU copyright law, Orit Fischman Afori, ‘Proportionality – A New Mega Standard in European Copyright Law’ (2014) 45 International Review of Intellectual Property and Competition 889-915.

⁶¹ In this function proportionality has also served to determine the scope of individual fundamental rights, see Jonas Christofferson, ‘Human Rights and balancing: The principle of proportionality’ in Geiger (n 41) 19.

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

⁶³ This prong of the proportionality test is interpreted broadly; only measures which are manifestly inappropriate will usually found to be illegal, see Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (CUP 2019) 387-388.

⁶⁴ art 17 creates an interesting constellation: the ‘necessity’ prong will not only have to be considered in relation to the effects it has on users and arguably rightholders, but also on OCSPs, whose obligation to implement enforcement measures has significant effects on their business models.

The nature of the test is complex⁶⁵ and its application by either court does not perfectly reflect its formulation. The test reveals its more flexible nature particularly in multipolar relationships of competing rights.⁶⁶ In the practice of the ECtHR, the test leaves Member States a margin of discretion while ensuring a basic protection of fundamental rights.⁶⁷ In any case, at EU level, proportionality is a general principle of EU law and therefore must guide the institutions⁶⁸ and the Member States in implementing EU law. Accordingly, acts of the institutions and the Member States are subject to judicial review in the light of the principle of proportionality.⁶⁹

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

⁶⁵ Jonas Christofferson, ‘Human Rights and balancing: The principle of proportionality’ in Geiger (n 41) 19.

⁶⁶ cf *ibid* 24.

⁶⁷ cf *ibid* 21, this is evidenced by the flexible interpretation of the second step, which takes a liberal approach to the concept of ‘least onerous means’. The ECtHR leaves member states a large margin of discretion to exercise their legislative and regulatory powers while merely considering the second step within the context of the other two to ascertain whether the means chosen to achieve a legitimate aim are not unreasonable.

⁶⁸ The formal requirements to be followed by the institution in applying the principle of proportionality are set out in the Consolidated version of the Treaty on the Functioning of the European Union - PROTOCOLS - Protocol (No 2) on the application of the principles of subsidiarity and proportionality [2008] OJ C115/206-209. The CJEU is, however, not always consistent in its application of the test and often folds the third stage into one of the first two stages or omits it completely if the test already failed at an earlier stage, see Craig and de Búrca (n 40) 583.

⁶⁹ cf Takis Tridimas, *The General Principles of EU Law* (OUP 2007) 655. The principle was introduced as a ground for judicial review in Case 11-70 *Internationale Handelsgesellschaft* EU:C:1970:114, and since 2009 it has been expressly recognized in art 5(4) TFEU and serves to justify possible limitations to the fundamental rights of the Charter (art 52(1) EUCFR). At the institutional level, art 5 of the Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality obliges the legislator to demonstrate that a legislative proposal complies with the principles of subsidiarity and proportionality. See, for example, the impact assessment for the CDSM Directive: European Commission, Commission Staff Working Document. Impact Assessment on the modernisation of EU copyright rules. Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market and Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, SWD(2016) 301 final, 14 September 2016, at 119, 155, 195-195; it is worth noting that in this document the impact of the proposed legislative acts on fundamental rights is examined separately from proportionality assessments.

⁷⁰ cf Peter Teunissen, ‘The balance puzzle: the ECJ’s method of proportionality review for copyright injunctions’ (2018) 40 EIPR 579-593, 581, Christofferson (n 65) 35, and Peter Oliver and Christopher Stothers, ‘Intellectual Property under the Charter: are the Court’s scales properly calibrated?’ (2017) 54 CMLRev 517-565, 546, all with references to *Sky Österreich* (n 44) paras 50-68.

⁷¹ Fischman Afori describes the role of proportionality as an external standard that enables ‘a constitutional balance to be struck within the copyright-private law sphere.’ She also projects a more prominent role with far reaching consequences for substantive copyright law. Although she seems to suggest that proportionality would rather take the form of an open norm that would guide the judicial development of substantive copyright law, (Fischman Afori (n 60) 900, see also Christophe Geiger and Elena Izyumenko, ‘Towards a European “Fair Use” Grounded in Freedom of Expression’ (2019) 35 American University International Law Review 1-52) there is no reason to limit this role to the judiciary (Fischman Afori (n 60) 899). Nevertheless, the role of proportionality in EU copyright law is best traced with reference to the jurisprudence of the CJEU, see for a comprehensive summary Teunissen (n 70). For an interesting critical approach see also Tuomas Mylly, ‘Regulating with rights

The CJEU regularly interprets the European copyright *acquis* with reference to proportionality.⁷² Due to the nature of harmonization (i.e. mainly by means of directives) the Court uses proportionality to explore the internal balance of copyright law and to help national courts shape appropriate remedies to fight copyright infringements.⁷³ It is also worth noting that it often describes the functional steps of the principle of proportionality, without expressly referring to it, and instead stresses the necessity to ‘strike a fair balance’.⁷⁴

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

proportionality? Copyright, fundamental rights and internet in the case law of the Court of Justice of the European Union’ in Pollicino, Riccio and Bassini (n 58) 54.

⁷² Christophe Geiger, ‘The Role of the Court of Justice of the European Union: Harmonizing, Creating and sometimes Disrupting Copyright Law in the European Union’ in Irini Stamatoudi (ed), *New Developments in EU and International Copyright Law* (Kluwer Law International 2016) 435–446. Likewise, the ECtHR makes regular reference to proportionality in the context of intellectual property law, eg when assessing the appropriateness of criminal sanctions for large scale copyright infringements, for example, when it found that a prison sentence and the award of damages was not disproportionate to sanction large-scale online copyright infringements, ECtHR (5th section) *Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v Sweden* App no 40397/12 (ECtHR, 19 February 2013) under D.; see for example Bernd Justin Jütte, ‘The Beginning of a (Happy?) Relationship: Copyright and Freedom of Expression in Europe’ (2016) 38 EIPR 11–22, 15. More generally on the use of the proportionality principle by the ECtHR in copyright cases, see Christophe Geiger and Elena Izyumenko, ‘Shaping Intellectual Property Rights through Human Rights Adjudication: The Example of the European Court of Human Rights’ (2020) 46 Mitchell Hamline Law Review 527–612; Oleg Soldatov, ‘Copyright and fundamental rights in European Court of Human Rights case law’ in Pollicino, Riccio, and Bassini (n 58) 99. In another case, the Strasbourg Court considered the obligations of an online news portal to moderate and filter harmful speech. It found a moderate financial fine to be proportionate for failure to expeditiously remove harmful and offensive speech (*Delfi AS v Estonia* (n 34) paras 140–161). The ECtHR stressed that the extreme nature of the speech, in other words the intensity of the violation of the right to private life (art 8 ECHR), was a decisive factor in coming to this conclusion. However, it also stressed that the relatively low fine imposed by the national court, as well as the nature of the applicant, a professional operator of a large online news portal, were relevant considerations (*Delfi AS v Estonia* (n 34) para 160).

⁷³ See for example *Promusicae* (n 10); *Scarlet Extended* (n 10); *SABAM v Netlog* (n 10); *UPC Telekabel Wien* (n 10); *Mc Fadden* (n 10); *Bastei Lübbe* (n 47), but also reference to proportionality pre-Lisbon in *Laserdisken II* (n 38) para 64; see for overviews of the balancing case-law Ole-Andreas Rognstad, *Property Aspects of Intellectual Property* (CUP 2018) 184–189, Martin Husovec, ‘Intellectual Property Rights and Integration by Conflict: The Past, Present and Future’ (2016) 18 Cambridge Yearbook of European Legal Studies 239–269 and Teunissen (n 70). However, the methodological approaches chosen by the Court have been criticized. While it permanently highlights the importance and centrality of proportionality, the Court fails to provide guidance on how this important role should be exercised, see eg Rognstad (this note) 192; Teunissen (n 70) 593; see, however, the more structured analysis, for example, by AG Cruz Villalón in *UPC Telekabel*, in which he neatly outlines the appropriateness, necessity and proportionality of a blocking order: Case C-314/12, *UPC Telekabel Wien* EU:C:2013:781, Opinion of AG Cruz Villalón.

⁷⁴ See for example *Scarlet Extended* (n 10) paras 45–46.

3. The relevant fundamental rights with regard to platform liability

The competing fundamental rights in copyright law, in particular in relation to online enforcement, have most recently been summarized by AG Saugmandsgaard Øe in the *YouTube* case:⁷⁵

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

a) Freedom of expression and information, freedom of the arts

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

The right to freedom of expressions covers opinions, information and ideas, and in general all types of information that can be communicated. Article 11 EUCFR also protects information that offends, shocks or disturbs others.⁷⁸ The importance of the right to freedom of expression for a democratic society and an

⁷⁵ *YouTube* (AG) (n 10) paras 240–244 (references omitted); see also Teunissen (n 70) 581; and with regard to platform liability, Frosio and Geiger (n 14) 14 ff.

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

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

⁷⁸ ECtHR (Plenary) *Handyside v the United Kingdom* App no 5493/72 (ECtHR, 7 December 1976), para 49, ECtHR (Chamber) *Müller and Other v Switzerland* App no 10737/84 (ECtHR, 24 May 1988), para 33; Case C-159/90 *Society for the Protection of Unborn Children Ireland v*

individual's participation in the public exchange of cultural, political and social information and ideas of all kinds has been persistently underlined by both courts.⁷⁹ The ECtHR has acknowledged the protection of Art. 10 ECHR for fashion photography⁸⁰ and internet peer-to-peer filesharing,⁸¹ but recognized justified restrictions to the right to freedom of expression in order to protect the right to (intellectual) property. Such restrictions are permitted if they are prescribed by law and if they are necessary in a democratic society.⁸² Both courts have also repeatedly highlighted the importance of the right to freedom of expression on the internet and, conversely, the importance of the internet and the various services offered through the internet for the exercise of the rights protected by Art. 10 ECHR and Art. 11 EUCFR.⁸³ In *Scarlet Extended*, the CJEU stressed the importance of the internet to receive information, in other words the ability of members of the public to receive and gather information including storing such information.⁸⁴ The right to receive information is not merely limited to the passive reception of information but also includes active research by individuals.⁸⁵

The CJEU has found the right to freedom of expression to be an obstacle to the free movement of goods and services, which can, however, be justified. In discussing whether a public demonstration constituted an obstacle to the free movement of goods in *Schmidberger*, the CJEU pointed out that the right to freedom of expression is not

absolute 'but must be viewed in relation to its social purpose.' Accordingly, limitations to Art. 11 EUCFR are possible as long as they are proportionate and leave the essence of the fundamental right intact. In making this assessment, Member States enjoy a wide margin of discretion.⁸⁶ The extent of this margin depends, among other factors, on the type of information that is subject to the exercise of the right to freedom of expression.⁸⁷

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

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

Grogan and Others EU:C:1991:378, para 30; see more recently *Pelham and others* (n 43) para 34.

⁷⁹ See, for example, Christophe Geiger and Elena Izyumenko, 'Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression' (2014) 42 International Review of Intellectual Property and Competition 316-342; Christophe Geiger and Elena Izyumenko, 'Intellectual Property before the European Court of Human Rights' in Christophe Geiger, Craig Allen Nard and Xavier Seuba (eds), *Intellectual Property and the Judiciary* (Edward Elgar 2018) 36 ff; see also Jütte (n 72).

⁸⁰ ECtHR (5th section) *Ashby Donald and other v France* App no 36769/08 (ECtHR, 10 January 2013).

⁸¹ *Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v Sweden* (n 72).

⁸² art 10(2) ECHR; when the right to freedom of expression comes into conflict with the right to property, including copyright, this requires a balancing between two fundamental rights under a proportionality assessment, leading in effect to some sort of enhanced proportionality analysis. See for a detailed analysis Geiger and Izyumenko, 'Copyright on the Human Rights' Trial' (n 79) 316. More generally on the balancing exercise by the ECtHR of intellectual property with other fundamental rights see Geiger and Izyumenko (n 72).

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

⁸⁴ *Scarlet Extended* (n 10) para 50.

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

⁸⁶ cf Case C-112/00 *Schmidberger* EU:C:2003:333, paras 78-80; this wide margin of discretion afforded to the Member States has a long tradition in the jurisprudence of the ECtHR, see as examples *Handyside v the United Kingdom* (n 78) paras 48-49, *Ashby Donald and other v France* (n 80) para 39 and *Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v Sweden* (n 70) under D.

⁸⁷ In *Neij and Sunde Kolmisoppi (The Pirate Bay) v Sweden*, the ECtHR stated, for example, that the protection under art 10 ECHR granted to the information, mainly unlawful copies of music and films, disseminated via the service operated by the applicants could not enjoy the same level of protection as political expression and debate, *Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v Sweden* (n 70) under D; see also *Ashby Donald and other v France*, (n 80) para 39.

⁸⁸ *Mc Fadden* (n 10) para 92.

⁸⁹ *ibid* para 93; see also *UPC Telekabel Wien* (n 10) para 56.

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

⁹¹ Debbie Sayers, 'Article 13' in Peers and others (n 45) para 13.48.

unduly on the author's freedom of expression [...].⁹² The distribution or exhibition of artistic creation online is therefore also protected and there is an obligation on the legislator not to restrict it unduly with copyright law.⁹³ Member States enjoy a certain margin of discretion and the Strasbourg Court usually focuses on whether the interference was necessary and pursued a pressing social need.⁹⁴

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

Aside from the incentive provided by the grant of an exclusive right for intellectual creations, the use of existing works in the creation of new works is of fundamental importance. Although the CJEU has recently rejected an external restriction of copyright by the right to free artistic expression,⁹⁶ copyright includes mechanisms that enable derived creativity.⁹⁷ The Court specifically referred, on the basis of the InfoSoc Directive, to the exclusive rights of Art. 2-4, the exceptions and limitations contained in Art. 5(1)-(4) and the three-step test of Art. 5(5). In his *YouTube* Opinion, AG Saugmandsgaard Øe also warned that a general monitoring and filtering obligation would not only be contrary to Art. 11 EUCFR, since it would restrict access to information, but would also 'introduce a risk of undermining online creativity' and 'that maximum protection of certain forms of intellectual creativity is to the detriment of other forms of creativity which are also positive for society'.⁹⁸ In this regard the importance of the way art is communicated must be highlighted. In particular, modern forms of creative digital expression are predominantly disseminated to an audience via online platforms, such as those subject to regulation under Art. 17 CDSM Directive.⁹⁹ The regulation of dissemination channels can therefore constitute a

restriction on the right to artistic freedom, which requires justification.¹⁰⁰

b) Freedom to conduct a business

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

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

The Court of Justice has been largely supportive of commercial intermediaries and shielded them from excessive obligations. In *Sabam v Netlog* it argued that a 'a complicated, costly, permanent computer system' solely at the expense of the intermediary constitutes a significant infringement of the fundamental rights of a hosting provider. The imposition of such a system would not strike a fair balance between the property interests of rightholders and the business interest of a hosting provider.¹⁰⁵ The ramifications of large-scale filtering on the economic viability of platform services was appreciated by AG Saugmandsgaard Øe in *YouTube*. Especially smaller platforms would encounter financial difficulties when fulfilling a broad obligation to keep infringing material off their services.¹⁰⁶

In other situations, the CJEU has been more lenient and allowed restrictions of the freedom to conduct a business. In *Sky Österreich*, the CJEU examined a provision of the Audiovisual Media Services Directive 2010/13 (AVMSD) which obliged Member States to foresee in their national laws a rule under which broadcasters can gain access to broadcasts transmitted on an exclusive basis on a fair, reasonable and non-discriminatory manner

⁹² ECtHR (Second Section) *Alimak v Turkey* App no 40287/98 (ECtHR, 29 March 2005), para 42.

⁹³ See more generally on this topic, Christophe Geiger, 'Freedom of Artistic Creativity and Copyright Law: A Compatible Combination' (2018) 8 UC Irvine Law Review 413-458; Christophe Geiger, 'Copyright and the Freedom to Create – A Fragile Balance' (2007) 38 International Review of Intellectual Property and Competition 707-722; Christophe Geiger, 'When Freedom of Artistic Expression allows Creative Appropriations and Opens up Statutory Copyright Limitations' in Shyamkrishna Balganes, Ng-Loy Wee Loo and Haochen Sun (eds), *The Cambridge Handbook of Copyright Limitations and Exceptions* (CUP 2021) 174.

⁹⁴ *Müller and Other v Switzerland* (n 78) para 32.

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

⁹⁶ See *Pelham and others* (n 43) paras 34-39.

⁹⁷ More generally the CJEU has argued with reference not only to artistic creation that copyright, as harmonized at EU level, represent a fair balance between the various rights and interest affected, see *Pelham and others* (n 43) paras 59-62, Case C-516/17 *Spiegel Online* EU:C:2019:625, paras 43-46 and *Funke Medien NRW* (n 49) paras 57-61. On these decisions see Christophe Geiger and Elena Izyumenko, 'The Constitutionalization of Intellectual Property Law in the EU and the Funke Medien, Pelham and Spiegel Online Decisions of the CJEU: Progress, but Still Some Way to Go!' (2020) 51 International Review of Intellectual Property and Competition 282-306.

⁹⁸ *YouTube* (AG) (n 10) para 243.

⁹⁹ Martin Senftleben, 'Bermuda Triangle – Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market' (22 April 2019) <<https://ssrn.com/abstract=3367219>> accessed 25 January 2021.

¹⁰⁰ cf Henrike Maier, *Remixe auf Hosting-Plattformen: Eine urheberrechtliche Untersuchung filmischer Remixe zwischen grundrechtsrelevanten Schranken und Inhaltefiltern* (Mohr Siebeck 2018) 175; see also Hans D Jarass, *Charta der Grundrechte der Europäischen Union*, (CH Beck 2020) art 13, para 11.

¹⁰¹ See art 119(1) TFEU.

¹⁰² *UPC Telekabel Wien* (n 10) para 49. On this relatively recent fundamental right and its relation to IP, see Gustavo Ghidini and Andea Stazi, 'Freedom to conduct a business, competition and intellectual property' in Geiger (n 41) 410-420.

¹⁰³ Case C-426/11 *Alemo-Herron and Others* EU:C:2013:521, para 32 and *Sky Österreich* (n 44) paras 42-43.

¹⁰⁴ cf *Sky Österreich* (n 44) paras 46-68; here the CJEU examined whether the measure was proportionate after it had established that the essence of the freedom to conduct a business has not been affected.

¹⁰⁵ *SABAM v Netlog* (n 10) paras 44-47; see also *Scarlet Extended* (n 10) paras 46-49.

¹⁰⁶ *YouTube* (AG) (n 10) para 242.

in order to report on events of high interest to the public in the context of short news reports.¹⁰⁷ In balancing Art. 16 with Art. 17 EUCFR, the Court found that the interference with the freedom to conduct a business that resulted from the obligation for broadcasters to make their exclusive broadcasts accessible was proportionate. The Court highlighted that the conditions under which access to exclusive broadcasts could be gained by other broadcasters were clearly determined and Art. 15 AVMSD did not prevent rightholders from charging fees for such access,¹⁰⁸ thereby cushioning the effects of the restriction to the freedom to conduct a business. In this case, however the restrictions were clearly set out in the harmonizing legislation and the restrictions were relatively light.

In two cases relating to access providers, the CJEU further determined the parameters for interferences with the freedom to conduct a business in the context of monitoring and blocking information. In *Mc Fadden*, it clarified that a requirement which obliged an access provider to marginally adjust the technical options available to him would not go as far as to encroach upon the very essence of the freedom to conduct a business.¹⁰⁹ But in this case the measure requested seemed absolutely necessary to protect the essence of another fundamental right, which in turn justified a moderate restriction of the Art. 16 right;¹¹⁰ however, an obligation to monitor internet traffic was clearly rejected in this case. In *UPC Telekabel*, the Court determined that a court injunction that ordered an access provider to block access to a specific website did not infringe the very substance of the fundamental right. Although the measure might represent a significant cost for the access provider, the fact that the choice of which measure to implement to achieve a particular outcome was left to the service provider, taking into account its capacities, weighed in favour of an appropriate balance.¹¹¹ However, the Court also stressed that the access provider must be able to demonstrate before a court, in order to avoid liability, that it has taken all reasonable measures. This would safeguard compliance with the principle of legal certainty and give the access provider the opportunity to ensure full compliance with the injunction.¹¹² In his Opinion in *Mc Fadden*, AG Szpunar argued that an injunction that leaves the choice of measures to be taken entirely to the intermediary could constitute a source of legal uncertainty, even if the appropriateness of such measures would be reviewable by the courts. An injunction formulated in general and vague terms would, therefore, not always succeed in striking a fair balance between the rights and interests involved.¹¹³

Intermediaries must therefore be able to rely on sufficiently defined laws that clearly set out what actions have to be taken to avoid liability. Similarly, overly cost-

intensive measures are more likely to restrict Art. 16 EUCFR to an extent that cannot be justified with reference to competing fundamental rights. The CJEU has permitted significant restrictions to the freedom to conduct a business only when strictly necessary and provided that the economic impact on the service provider is not disproportionate. This reflects a trend in the case-law of the CJEU that does not seem to support a position that would oblige platform operators to function as general private copyright enforcers. Also, with regard to the criteria set by the Court in *UPC Telekabel*, a provision setting obligations that would leave the intermediaries no other choice but to implement automated filtering systems to be effective would also likely be considered a disproportionate restriction to the freedom to conduct business.

c) Data protection, privacy and family life

The right to private life and the right to data protection are protected by Art. 7 and 8 EUCFR respectively. Both Charter rights are based on Art. 8 of the ECHR, which protects the right to respect for private and family life.¹¹⁴ The right to data protection has further been given expression in secondary legislation by Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.¹¹⁵ Article 7 in particular also protects the right to respect for communications, which includes private and commercial communications.¹¹⁶

The right to data protection can potentially enter into conflict with several other fundamental rights, especially within the context of secondary EU legislation.¹¹⁷ In relation to copyright, the conflicts with the right to property and the right to an effective remedy are most pronounced. While the CJEU tends to avoid giving substantive guidance,¹¹⁸ the legislation itself is indicative of the balance between Art. 7 and 8 EUCFR and Art. 17(2) and Art. 47.¹¹⁹ The large-scale analysis of information uploaded onto a hosting service has been ruled to be incompatible with Art. 15(1) ECD, which prohibits Member States from obliging service providers to monitor information transmitted via, or stored on their service.¹²⁰ To that effect, the CJEU underlined in *Scarlet Extended* that a general obligation to filter for infringing content would infringe the right to protection of personal data.¹²¹ This is because the automated filtering of information and its use to identify infringers would inevitably lead to the

¹⁰⁷ See art 15(1) and (6) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services [2010] OJ L95/1-24 (Audiovisual Media Services Directive).

¹⁰⁸ *Sky Österreich* (n 103) para 63-64.

¹⁰⁹ *Mc Fadden* (n 10) para 91.

¹¹⁰ *ibid* paras 97-99.

¹¹¹ *UPC Telekabel Wien* (n 10) para 52.

¹¹² *ibid* para 54.

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

¹¹⁴ Jens Vedsted-Hansen, 'Article 7' in Peers and others (n 45) para 07.03A.

¹¹⁵ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1-88 (GDPR), which replaced Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31-50).

¹¹⁶ Vedsted-Hansen (n 114) para 07.22A.

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

¹¹⁸ See, however, *Promusicae* (n 10) paras 63-70.

¹¹⁹ *Kranenborg* (n 45) para 08.42.

¹²⁰ *SABAM v Netlog* (n 10).

¹²¹ *Scarlet Extended* (n 10) paras 50-51.

processing of personal data and would enable the identification of individual users.¹²²

The CJEU allows Member States a certain flexibility in designing their national laws to strike the balance between the right to property and the right to data protection. An illustration of the flexibility the Court affords to Member States are the *Promusicae*¹²³ and *Bonnier Audio*¹²⁴ rulings of the CJEU. While in the former, the Court held that EU law did not require that access providers must provide user data in civil proceedings, it considered national legislation that required the disclosure of user data in civil proceedings ‘likely, in principle’ to strike a fair balance between the fundamental rights concerned.¹²⁵ In *L’Oréal v eBay*, the Court added that in order to identify infringers on an online marketplace it must be possible to clearly identify infringers operating in the course of trade.¹²⁶ However, in either situation, the interpretation and application of national law must ensure that a fair balance is struck and, in particular, the right to privacy is respected.¹²⁷

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

The Courts positioning of the right to privacy and related fundamental rights display a high degree of

restraint. A careful reading of the judicial practice indicates that the rights under Art. 7 and 8 EUCFR can only be limited to enable the enforcement of copyright under strict conditions, and often only when a restriction is necessary to preserve the essence of the right to property.¹³² This leaves room for the assumption that the processing of the data of individuals, and certainly its disclosure, constitutes restrictions to Arts. 7 and 8 EUCFR that are very difficult to justify.

d) The right to property and its social function

The right to property is guaranteed by Art. 1, First Protocol to the ECHR and Art. 17(2) EUCFR. Whereas the former does not expressly mention intellectual property but guarantees the ‘peaceful enjoyment of (...) possessions’,¹³³ the latter simply states that ‘[i]ntellectual property shall be protected’.¹³⁴ However, under both fundamental rights regimes, the right to property can be limited. The ECHR foresees that ‘[n]o one shall be deprived of his possessions except in the public interest’ and any interference with the right to property must be provided for by law.¹³⁵ Furthermore, states cannot be prevented from enforcing laws that control the use of property in the public interest. In more general terms, Art. 51 EUCFR states that ‘[a]ny limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms.’

Accordingly, the right to property is not an absolute right and can be subject to restrictions.¹³⁶ In *YouTube*, AG Saugmandsgaard Øe stated that the exclusive right of communication to the public of Art. 3(1) InfoSoc Directive ‘does not necessarily have to be interpreted in a manner which ensures *maximum protection* for rightholders.’¹³⁷ In a similar vein, the CJEU limited the scope

¹²² cf *SABAM v Netlog* (n 10) para 49, see also Frosio and Geiger (n 14) 24.

¹²³ *Promusicae* (n 10).

¹²⁴ Case C-461/10 *Bonnier Audio and Others* EU:C:2012:219.

¹²⁵ *ibid* paras 57–60.

¹²⁶ Case C-324/09 *L’Oréal and Others* EU:C:2011:474, para 142.

¹²⁷ *Promusicae* (n 10) para 68; See also Husovec (n 73) 249.

¹²⁸ *Mc Fadden* (n 10) para 85.

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

¹³⁰ *Bastei Lübbe* (n 47) paras 48–53.

¹³¹ Case C-264/19 *Constantin Film Verleih* EU:C:2020:542.

¹³² See further Geiger and Izyumenko, ‘IP before the ECtHR’ (n 79) 62, discussing decisions of the ECtHR where the right to privacy was invoked as a defence against copyright enforcement measures.

¹³³ The inclusion of intellectual property in the scope of art 1 of the First Protocol to the ECHR has been confirmed, among others, in *Delfi AS v Estonia* (n 34), *Ashby Donald and other v France* (n 80) and ECtHR (Grand Chamber) *Anheuser-Busch Inc. v. Portugal* App no 73049/01 (ECtHR, 11 January 2007).

¹³⁴ For a comment on this unclear provision see Christophe Geiger, ‘Intellectual Property shall be protected? Article 17(2) of the Charter of Fundamental Rights of the European Union: a mysterious provision with an unclear scope’ (2009) 31 EIPR 113–117, 116 and Jonathan Griffiths and Luke McDonagh, ‘Fundamental rights and European IP law: the case of Art 17(2) of the EU Charter’ in Christopher Geiger (ed), *Constructing European Intellectual Property: Achievements and New Perspectives* (Edward Elgar 2013) 75–93; Alain Strowel, ‘Copyright strengthened by the Court of Justice interpretation of Article 17(2) of the EU Charter of Fundamental Rights’ in Pollicino, Riccio, and Bassini (n 58) 28.

¹³⁵ art 1(1), First Protocol to the ECHR.

¹³⁶ See eg *Pelham and others* (n 43) para 33; *Funke Medien NRW* (n 49) para 72; *Spiegel Online* (n 97) para 56; *Mc Fadden* (n 10) para 90; *GS Media* (n 83) para 45; Case C-201/13 *Deckmyn* EU:C:2014:2132, para 26; *UPC Telekabel Wien* (n 10) paras 46–47; *SABAM v Netlog* (n 10) paras 41–42; *Scarlet Extended* (n 10) para 44; CJEU, C-275/06 *Promusicae* (n 10) para 65.

¹³⁷ *YouTube* (AG) (n 10) paras 238–239. In a footnote (n 221) the AG suggests that in the absence of full and maximum protection, which seems to suggest that rightholders must expect to be exposed to certain infringements, it can be expected that they undertake their own efforts to help remedying infringements, including collaboration with platform operators. A similar approach was taken by the CJEU in the factually very different case *FAPL/Murphy* when it stated that ‘the specific subject-matter of intellectual property does not guarantee the right holders concerned the opportunity to demand the highest possible remuneration.’, Joined Cases C-403/08 and C-429/08 *FAPL/Murphy* EU:C:2011:631,

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

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

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

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

e) The right to an effective remedy and to a fair trial

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

Users of platforms must be able to rely on their fundamental right to freedom of expression and freedom of the arts to perform certain acts online. Automated enforcement by way of monitoring and filtering cannot only limit these rights, but a failure to make effective complaints mechanisms available can also restrict the right to an effective remedy. Therefore, as a first step, limitations to these rights, even if effected by private parties such as OCSSPs, must be subject to appropriate review.¹⁴⁹ Appropriate in this context should mean review by a competent court¹⁵⁰ as opposed to quasi adjudication by private operators.¹⁵¹

In substance, the right to an effective remedy requires that users can rely on a dispute settlement mechanism that provides them with an impartial forum which deals with their complaint efficiently and expeditiously.¹⁵² Just as preventive blocking of content restricts the right to freedom of expression, a delay in reinstating lawful content is equally harmful. This suggests that proceedings before national courts might not be the best option to effectively and expeditiously handle user complaints.¹⁵³ However, such complaints should not necessarily be handled by OCSSPs, which will have their own, reasonably

para 108; the AG had argued on the principle of legal certainty that rightholders cannot object to the importation of foreign TV decoders in order to maintain different pricing models for live football subscriptions across the EU Member States, partially because the relevant legal provisions did not state this expressly, see Joined Cases C-403/08 and C-429/08 *FAPL/Murphy* EU:C:2011:43, Opinion of AG Kokott, para 56.

¹³⁸ *Pelham* and *others* (n 43) para 31.

¹³⁹ cf *Bastei Lübbe* (n 47) para 46. See however Husovec (n 59), who argues convincingly that art 17(2) of the Charter 'is void of any inviolable core understood as a red line which cannot be bridged by any considerations of proportionality' and that 'any reference to essence in the case-law of the CJEU only points towards a higher level of scrutiny, but not towards an untouchable core of rights that may not be abolished by the legislator' (855).

¹⁴⁰ Case 78/70 *Deutsche Grammophon* EU:C:1971:59, paras 12-13.

¹⁴¹ *ibid* para 11.

¹⁴² *Mc Fadden* (n 10) para 95 and *UPC Telekabel Wien* (n 10) para 62.

¹⁴³ See reference in *Luksan* (n 44) para 68.

¹⁴⁴ Christophe Geiger, 'The Social Function of Intellectual Property Rights, Or how Ethics can Influence the Shape and Use of IP law' in Graeme B Dinwoodie (ed), *Methods and Perspectives in Intellectual Property* (Edward Elgar 2013) 153-176. See also Caterina Sganga and Silvia Scalzini, 'From abuse of right to European copyright misuse: a new doctrine for EU copyright law' (2016) 48 *International Review of Intellectual Property and Competition* 405-435, 426; the authors distil from the terminology used in EU legislation the indication that absolute protection is not granted to rightholders, but that the definition of the scope of the rights, and even the granting of exclusive rights themselves serves social and cultural functions; see further Caterina Sganga, *Propertizing European Copyright* (Edward Elgar 2018) 227 ff.

¹⁴⁵ On the right to a fair trial in the context of IP enforcement measures, see Jonathan Griffiths, 'Enforcement of intellectual property and the right to a fair trial' in Geiger (n 41) 438-454; Geiger and Izyumenko, 'IP before the ECtHR' (n 79); Geiger and Izyumenko (n 32) 70 ff.

¹⁴⁶ Angela Ward, 'Article 47' in Peers and others (n 45) para 47.01.

¹⁴⁷ Herwig Hofmann, 'Article 47' in Peers and others (n 45) para 47.72.

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

¹⁴⁹ cf Frederick Mostert, 'Digital due process': a need for online justice' (2020) 15 *JIPLP* 378-389 (388); the author proposes eight principles that should govern the review provided for users and notifiers, including the right to have a 'fair and public review by an independent and impartial panel or competent court' (footnote omitted).

¹⁵⁰ As recalled by Geiger and Izyumenko, 'IP before the ECtHR' (n 79) 71, access to the courts is one core element of a fair trial and effective judicial protection guarantee in the context of IP enforcement cases decided by the ECtHR.

¹⁵¹ cf Giancarlo Frosio, 'Algorithmic Enforcement Online' in Torremans (n 21) 729, with reference to Maayan Perel and Niva Elkin-Koren, 'Accountability in Algorithmic Copyright Enforcement' (2016) 19 *Stanford Technology Law Review* 473-433; the author describes the paradigmatic shift from public law enforcement institutions to private law enforcement and adjudication powers exercised by a few privately operated platforms.

¹⁵² Impartiality and independence of the court is another important feature of the right to fair trial (see; Geiger and Izyumenko, 'Copyright on the Human Rights' Trial' (n 79); Geiger and Izyumenko, 'IP before the ECtHR' (n 79) 77).

¹⁵³ cf Frosio and Geiger (n 14) 27.

justified interests in designing automated enforcement as efficiently as possible. Users must have access to an impartial forum that provides them with a quick and impartial procedure.¹⁵⁴ The CDSM Directive mandates out-of-court dispute settlement mechanism for user redress and complaints.¹⁵⁵ Indeed, a properly designed alternative dispute resolution (ADR) infrastructure would be best placed to ensure user's right to an effective remedy.¹⁵⁶

Member States are under an obligation to provide remedies to protect natural and legal persons against 'any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness' of EU law.¹⁵⁷ Accordingly, in *Mc Fadden*, the Court ruled that rightholders must have access to a remedy to enforce their rights against potential infringers, but also by way of injunction to order an intermediary to terminate and prevent future infringements.¹⁵⁸ This was further stressed in *Bastei Lübbe*, when the Court argued that the right to private life cannot be used to shield a family member from liability for copyright infringement if the rightholder would be left without an effective remedy, thereby depriving the right to property of its very essence.¹⁵⁹ In a balance between various fundamental rights, the right to an effective remedy cannot be entirely ignored. On the contrary, if necessary, other fundamental rights can be limited in order to ensure the proper enforcement of rights granted under EU law. As demonstrated above, the right to an effective remedy is not absolute and the cases in which the Court argued in its favour were based on very specific factual constellations.¹⁶⁰

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

4. Legal Certainty and market harmonization

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

Legal certainty 'requires that legal rules be clear and precise and aims to ensure that situations and legal

relationships governed by Community law remain foreseeable'¹⁶¹ and 'that Community rules enable those concerned to know precisely the extent of the obligations which are imposed on them'.¹⁶² The aim to establish an internal market is set out in Arts. 3(3) TEU and 26 TFEU and given effect in the competence norm of Art. 114 TFEU.

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

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

5. Interim conclusions

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

¹⁵⁴ *ibid* 29.

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

¹⁵⁶ See also the more extensive study by Frosio and Geiger (n 14), who stress further that algorithmic enforcement itself must be designed to ensure respect for the right to an effective remedy and a fair trial. More specifically, and in addition to what is discussed in this section, a fair and balanced automated enforcement regime must be transparent and accountable, meaning that users have access to information why and based on what criteria their uploads have been filtered out (28).

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

¹⁵⁸ *Mc Fadden* (n 10).

¹⁵⁹ *Bastei Lübbe* (n 47) para 52; see also *Coty Germany* (n 47) para 51 and *Husovec* (n 73) 257.

¹⁶⁰ See above II. 3. c).

¹⁶¹ Case C-199/03 *Ireland v Commission* EU:C:2005:548, para 69.

¹⁶² Case C-158/06 *ROM-projecten* EU:C:2007:370, para 25.

¹⁶³ *Pelham and others* (n 43) para 63; see also Case C-466/12, *Svensson and Others* EU:C:2014:76, paras 34-35.

¹⁶⁴ *UPC Telekabel Wien* (n 10) para 54.

¹⁶⁵ *ibid* para 52.

¹⁶⁶ See in this sense also Frosio and Geiger (n 14).

than users and platform operators. Therefore, any liability regime for platforms must be designed in a fundamental rights-compliant manner and safeguards must be included to make fundamental rights a reality in its practical implementation.

III. Examining Art. 17 CDSM in the light of fundamental rights

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

1. The new liability regime established by Art. 17 CDSM – an overview

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

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

cover acts of communication to the public performed by the users of OCSSPs.¹⁷⁰ Accordingly, Art. 17 derogates from the hosting safe harbour under Art. 14(1) ECD with regard to OCSSPs.¹⁷¹

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

If OCSSPs do not, or are not able to, obtain the required authorization for content uploaded by their users, they are directly liable for unauthorized acts of communication to the public, including the making available to the public.¹⁷³ However, OCSSPs can escape liability under two cumulative conditions: first, an OCSSP must demonstrate that it has undertaken ‘best efforts’¹⁷⁴ to obtain authorization,¹⁷⁵ second, it must have made ‘in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information’.¹⁷⁶ In any case, upon receiving sufficient substantiated notice from the rightholder, an OCSSP must act expeditiously ‘to disable access to, or to remove from their websites, the notified works or other subject matter, and [make] best efforts to prevent their future uploads’.¹⁷⁷ These new obligations constitute a fundamental shift in the EU’s approach to intermediary liability from ‘notice and take down’ to ‘notice and stay-down’.¹⁷⁸ However, Art. 17(8) makes it very clear that these new obligations should not lead to a duty for OCSSPs to install general filtering systems that would monitor all uploads in a general manner.¹⁷⁹

To determine whether OCSSPs comply with their obligations under Art. 17(4), certain factors must be taken into consideration and assessed in the light of the principle of proportionality. The relevant factors are ‘the type, the audience and the size of the service and the type of

¹⁶⁷ Recital 66 CDSM Directive, see also *YouTube* (AG) (n 10) para 252.
¹⁶⁸ art 2(6) CDSM Directive. Recital 62 adds the qualification that the ‘Directive should target only online services that play an important role on the online content market by competing with other online content services, such as online audio and video streaming services, for the same audiences.’

¹⁶⁹ The nature of this norm is still unclear – whether it establishes a *sui generis* right of communication to the public, or whether it merely constitutes a clarification of the CJEU’s case law on art 3(1) InfoSoc Directive (see on the CJEU’s extensive interpretation of art 3 and its implications for hosting platforms: Bianca Hanuz, ‘Direct Copyright Liability As Regulation Of Hosting Platforms For The Copyright-Infringing Content Uploaded By Their Users: Quo Vadis?’ (2020) 11 JIPITEC 315-339); art 17(1), second sentence merely refers to art 3(1) and (2) InfoSoc Directive to indicate which specific rights and rightholders are affected and does not establish that these two provisions are congruent in their scope. Recital 64, however, states that ‘[i]t is appropriate to clarify in this Directive that online content-sharing service providers perform an act of communication to the public or of making available to the public when they give the public access to copyright-protected works or other protected subject matter uploaded by their users.’ Husovec and Quintais argue that art 17(1) establishes a new right, with far-reaching implications also for the application of exceptions and limitations (Martin Husovec and João Pedro Quintais, ‘How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms’ (11 February 2021) 14-28 <<https://ssrn.com/abstract=3463011>> accessed 15 February 2021); see to the contrary: Jan Bernd Nordemann and Julian Waiblinger, ‘Art. 17 DSMCD: a class of its own? How to implement Art. 17 into the existing national copyright acts, including a comment on the recent German Discussion Draft – Part 1’ (*Kluwer Copyright Blog*, 16 July 2020) <http://copyrightblog.kluweriplaw.com/2020/07/16/art-17-dsmcd-a-class-of-its-own-how-to-implement-art-17-into-the-existing-national-copyright-acts-including-a-comment-on-the-recent-german-discussion-draft-part-1/?doing_wp_cron=1597142146.3135290145874023437500> accessed 25 January 2021, and Jan Bernd Nordemann and Julian Waiblinger, ‘Art. 17 DSMCD: a class of its own? How to implement Art. 17 into the existing national copyright acts, including a comment on the recent German Discussion Draft – Part 2’ (*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/?doing_wp_cron=1597144877.2035028934478759765625> accessed 25 January 2021. See in this regard *YouTube* (AG) (n 10), in which the AG seems to suggest that art 17(1) defines by way of non-retroactive extension the right of communication to the public sector-specifically.

¹⁷⁰ art 17(2) CDSM Directive.

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

¹⁷² Leistner (n 7) 12.

¹⁷³ art 17(4), first sentence CDSM Directive.

¹⁷⁴ Differences in the translation of the ‘best efforts’ standards have been highlighted by Eleonora Rosati, ‘DSM Directive Series #5: Does the DSM Directive mean the same thing in all language versions? The case of ‘best efforts’ in Article 17(4)(a)’ (*The IPKat*, 22 May 2019) <<https://ipkitten.blogspot.com/2019/05/dsm-directive-series-5-does-dsm.html>> accessed 25 January 2021; for a comprehensive study on the linguistic variations of Article 17(4)(a) see Aline Larroyed, ‘When Translations Shape Legal Systems: How Misguided Translations Impact Users and Lead to Inaccurate Transposition – The Case of ‘Best Efforts’ Under Article 17 DCDSM’ (30 November 2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3740066> accessed 25 January 2021, who warns that differences in national translations can seriously jeopardize the purpose of achieving harmonization.

¹⁷⁵ art 17(4)(a) CDSM Directive.

¹⁷⁶ art 17(4)(b) CDSM Directive.

¹⁷⁷ art 17(4)(c) CDSM Directive.

¹⁷⁸ Reda, Selinger and Servatius (n 7) 8; Schwemer and Schovsbo in Torremans (n 21) 586; Kuczerawy (n 29); see in general Niva Elkin-Koren, ‘Fair Use by Design’ (2017) 64 UCLA Law Review 1082-1100, 1093, who addressed the phenomenon that a shift to algorithmic enforcement has led to a shift in the balance in copyright.

¹⁷⁹ art 17(8) CDSM Directive.

works or other subject matter uploaded by the users of the service¹⁸⁰ and ‘the availability of suitable and effective means and their cost for service providers.’¹⁸¹ In addition, specific new OCSSPs do not incur all obligations under Art. 17(4).¹⁸²

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

The obligation for OCSSPs arising under Art. 17(4) and the right of users expressed in Art. 17(7) create an internal conflict within the systematic structure of Art. 17.¹⁸⁵ The resolution of practical conflicts between these two provisions is anticipated in Art. 17(9), which requires Member States to provide that OCSSPs put in place effective and expeditious complaint and redress mechanisms which users can avail themselves of in the event that access to works uploaded by them is disabled or when they have been removed.¹⁸⁶ OCSSPs must process user requests without undue delay and a decision to disable access or remove content must be subject to human review. Out-of-court redress mechanisms must also be made available, without depriving users of access to effective judicial remedies.¹⁸⁷ Article 17(9) reiterates that the

Directive should in no way affect legitimate uses, including uses falling under exceptions and limitations, and that personal data shall only be processed in accordance with Directive 2002/58/EC¹⁸⁸ and Regulation (EU) 2016/679 (GDPR).

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

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

2. Article 17, Automated filtering and fundamental rights

Article 17 foresees that OCSSPs ensure the unavailability of certain works on their platforms without, however, indicating how this should be achieved. When fulfilling their obligation, OCSSPs must be careful not to restrict their users in lawfully sharing and accessing information. At the same time, platform operators should not be obliged to explore the limits of the economic viability of their business models to ensure that the rights of rightholders are effectively enforced. The balance between the different fundamental rights that are reflected in these interests is thus largely dependent on the technological solutions that OCSSPs will employ to discharge their obligations.

a) Automated filtering as a necessary consequence of Art. 17

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

¹⁸⁰ art 17(5)(a) CDSM Directive.

¹⁸¹ art 17(5)(b) CDSM Directive.

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

¹⁸³ See very clearly in this sense, with references to the protection of the fundamental rights of users, Recital 70 of the CDSM Directive.

¹⁸⁴ See Recital 70 of the CDSM Directive, stating that ‘those exceptions and limitations should (...) be made mandatory in order to ensure that users receive uniform protection across the Union’. On this issue see Quintais and others (n 12) 278-279; Krzysztof Garstka, ‘Guiding the Blind Bloodhounds: How to Mitigate the Risks Article 17 of Directive 2019/970 Poses to the Freedom of Expression’ in Torremans (n 21) 327-352, 335. Under the central norm that harmonised exceptions and limitation to the exclusive rights of copyright in the EU, all but one exception or limitation are optional, see art 5(2) and (3) InfoSoc Directive.

¹⁸⁵ See eg Pamela Samuelson, ‘Pushing Back on Stricter Copyright ISP Liability Rules’ (13 July 2020) 14 <<https://ssrn.com/abstract=3630700>> accessed 25 January 2021; the obligation to ensure that users can perform lawful uses is extremely difficult to realize considering the obligation to ensure that unlawful uploads must be prevented. The differentiation between lawful and unlawful uses, especially in cases of context-contingent uses under copyright exceptions, is impossible to make with automated means. See in this sense Christophe Geiger, ‘The artificial intelligence and data-led revolution of copyright and its wider implications, Digital Encounters, Final report’ 5, underlining the ‘unsolvable conflict’ between art 17(4) and art 17(8) CDSM <https://www.fide.fundacion.es/docs/GlobalDigitalEncounters/Encounter_8_Report_Final.pdf> accessed 25 January 2021.

¹⁸⁶ According to Garstka, these procedures were put in place by the drafters of the Directive ‘to mitigate the damage to freedom of expression’ created by art 17 CDSM Directive: Garstka (n 184) 335.

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

¹⁸⁸ Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, [1991] OJ L122/42-46 (Software Directive).

¹⁸⁹ This seems to establish a hierarchy between art 17(7) and 17(4), which was confirmed by the European Commission during the hearing before the CJEU in the context of the Polish challenge of art 17 (see Paul Keller, ‘CJEU hearing in the Polish challenge to Article 17: Not even the supporters of the provision agree on how it should work’ (*Kluwer Copyright Blog*, 11 November 2020) <<http://copyrightblog.kluweripaw.com/2020/11/11/cjeu-hearing-in-the-polish-challenge-to-article-17-not-even-the-supporters-of-the-provision-agree-on-how-it-should-work/>> accessed 25 January 2021).

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

obligation to ensure unavailability of the works concerned.¹⁹¹

To some extent, either preventively or as a reaction to prior infringements, OCSSPs will have to monitor and filter specific works automatically. Senftleben and Angelopoulos argue that Art. 17 does not require OCSSPs to engage in automated monitoring of all content notified by rightholders.¹⁹² More targeted options, such as take-down models including suspension of user accounts could be considered, among other things.¹⁹³ The automated filtering of at least some content seems to be unavoidable for OCSSPs, even if in combination with other non-automated mechanisms.

b) Does automated filtering qualify as general monitoring? (Art. 17(8))

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

In *L’Oréal v eBay*, the CJEU stated that an intermediary cannot be expected to engage in ‘active monitoring of all the data of each of its customers in order to prevent any future infringement’. Such an obligation would be in violation of Art. 15(1) ECD.¹⁹⁸ Moreover, Art. 3 of

Directive on the enforcement of intellectual property rights (‘IPRED’)¹⁹⁹ provides that ‘measures, procedures and remedies shall be fair and equitable and shall not be unnecessarily complicated or costly’. This in itself is an expression of a balance that is informed by proportionality.

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

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

¹⁹¹ The most likely scenario is that if rightholders, for various reasons, do not grant authorization for specific works or types of works, OCSSPs would be provided with long lists of works and their respective data, see eg Gerald Spindler, ‘The Liability system of Art. 17 DSMD and national implementation – contravening prohibition of general monitoring duties?’ (2019) 10 JIPITEC Law 344-374, 356, and Reda, Selinger and Servatius (n 7) 15. In relation to these works OCSSPs would then have to ensure that any upload will be unsuccessful in order to comply with the conditions of art 17(4)(b) and (c). It should be qualified that the condition of art 17(4)(c) only applies in cases in which content has been uploaded before and has been notified by the rightholder (cf Senftleben and Angelopoulos (n 7) 31). However, as we have seen, subpara (c) not only requires a takedown upon notification but also imposes an obligation on the OCSSP to ensure the future unavailability (so-called ‘stay-down’) of the notified content in accordance with the mechanisms of subpara (b).

¹⁹² The authors recall three interpretations of what constitutes ‘general monitoring’: (1) a basic interpretation which defines general monitoring as a situation in which all content of a platform is monitored, even if only in relation to specific works; (2) a situation in which monitoring of all content is permitted in relation to specific infringements pursuant to a court order, and (3) a situation in which monitoring of all content is permitted in relation to specific infringements pursuant to a court order notification by, for example, the rightholder; Senftleben and Angelopoulos (n 7) 8-9.

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

¹⁹⁴ art 17(8) CDSM Directive.

¹⁹⁵ *Scarlet Extended* (n 10).

¹⁹⁶ *SABAM v Netlog* (n 10).

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

¹⁹⁸ art 17(3) exempts the application of art 14(1) ECD within the scope of art 17 CDSM, which means that the category of intermediaries that

qualify as OCSSPs cannot rely on the liability exemption of the ECD. By reference to art 14, art 15 of the ECD also becomes inapplicable to OCSSPs; however, art 17(8) CDSM echoes the general monitoring prohibition of art 15. And although art 15(1) ECD is not applicable to OCSSPs because art 17 CDSM constitutes a *lex specialis* regime for this specific type of intermediary, by virtue of art 17(8) such general obligation to monitor should not arise. There is nothing in the text of the Directive that suggests that art 17(8) should be interpreted differently than art 15(1) ECD, cf Senftleben and Angelopoulos (n 7) 26-27; cf Leistner (n 7) 15, who also stresses that the notion of ‘general obligation to monitor’ is a technical term which has to be interpreted in the light of the CJEU’s case-law.

¹⁹⁹ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L195/16-25 (IP Enforcement Directive).

²⁰⁰ *Mc Fadden* (n 10) para 91.

²⁰¹ *ibid* para 87.

²⁰² *Mc Fadden* (AG) (n 113) para 132; in this context the AG makes reference to the preparatory work for the ECD: see Case C-324/09, *L’Oréal and Others* EU:C:2010:757, Opinion of AG Jääskinen, para 182; the AG referred to a requirement of ‘double identity’, which requires that the infringer and the infringed subject matter be the same, which would require an intermediary to terminate or prevent infringements by the same user of a specific protected subject matter (eg a specific trademark). The AG considered the termination of a user account an appropriate means to achieve this result.

²⁰³ Senftleben and Angelopoulos (n 7) 2; this double-specificity requirement would arguably limit the effectiveness of the injunction as further infringements by other users, or the same user via different accounts, would not come within the scope of the specific monitoring obligation.

²⁰⁴ cf Senftleben and Angelopoulos (n 7) 24.

²⁰⁵ Leistner (n 7) 15-16.

²⁰⁶ Case C-18/18 *Glawischnig-Piesczek* EU:C:2019:821.

Court considered staydown obligations in relation to *specific* legal violations compatible with Art. 15(1) ECD.²⁰⁷

Following Leistner's interpretation, the monitoring of specific infringements, albeit in relation to all uploaded content, would not constitute a general monitoring obligation. However, Art. 17(4)(b) and (c) read in combination with Art. 17(4)(a) suggest that OCSSPs would be required to monitor uploads in relation to all works and other subject matter for which no authorization could be obtained by way of agreement with the relevant rightholders. This does not mean, however, that all uploads in relation to content for which information is provided by rightholders constitute infringements. Copyright infringement can be just as nuanced as context-specific defamatory statements, which were at dispute in *Glawischnig-Piesczek*.²⁰⁸ Or the upload can constitute a fully legitimate use, because it is covered by an exception and limitation to copyright, an assessment that can in itself be a very complex one. Moreover, the constellation of actors and rights in relation to injuries to personality rights and copyright infringements cannot be considered to be equivalent.²⁰⁹ Therefore, in any constellation, it is imperative to reconsider OCSSP obligations in the light of fundamental rights.

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

3. A closer look at filtering: technological background

Filtering technology, as described in the literature,²¹² is not so sophisticated as to enable it to make complex decisions on the lawfulness or unlawfulness of uploads in an

automated way.²¹³ Automated filters bear the risk of creating 'false positives',²¹⁴ i.e. identifying content as infringing although it is lawful.

a) Limits of automated filtering technology (false positives)

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

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

aa) Infringement threshold

Qualitatively, automated tools that are only able to recognize full or partial matches between two or several files will not be able to assess whether a particular match, i.e. the full or partial identity between two files, amounts to a reproduction of either an authorial work or a related right. For original works, the originality threshold is impossible to determine by merely finding certain similarities. Instead, the similarities must occur in relation to original parts of the underlying work, i.e. the parts copied must be part of an author's own intellectual creation.²¹⁷ For related rights, although the CJEU has established a relatively low threshold, a pure quantitative assessment is not sufficient to determine whether a particular file infringes a related right.²¹⁸

²⁰⁷ Leistner (n 7) 16; See also Spindler, 'Art. 17 DSM-RL' (n 7) 258, and Daphne Keller, 'Facebook Filters, Fundamental Rights, and the CJEU's *Glawischnig-Piesczek* Ruling' (2020) 69 GRUR International 616-623.

²⁰⁸ cf Aleksandra Kuczerawy and Clara Rauegger, 'Injunctions to remove illegal online content under the eCommerce Directive: *Glawischnig-Piesczek*' (2020) 57 CMLRev 1495-1526, 1517; even a defamatory statement can be considered lawful if it is included by way of quotation in another news item which critically reports on the context in which the defamatory statement was made.

²⁰⁹ Cautioning against an analogy between defamation and copyright infringements based on *Glawischnig-Piesczek*, Senftleben and Angelopoulos (n 7) 14-15 and 29-30.

²¹⁰ Spindler, 'Art. 17 DSM-RL' (n 7) 259.

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

²¹² For a detailed overview of the various filtering technologies see Giovanni Sartor and Andrea Loreggia, 'The Impact of algorithms for online content – Upload Filters' (*European Parliament Think Tank*, 15 September 2020) 35 ff <[https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2020\)657101](https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2020)657101)> accessed 25 January 2021.

²¹³ cf Senftleben and Angelopoulos (n 7) 13. For one of the most cited works in contemporary copyright literature that describes available filtering technologies see Engstrom and Feamster (n 33); see further Reda, Selinger and Servatius (n 7) 27; Leistner (n 7) 5; Dusollier (n 2) 1018.

²¹⁴ Ben Depoorter and Robert Kirk Walker, 'Copyright False Positives' (2013) 89 Notre Dame Law Review 319-359.

²¹⁵ 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) 1 JIPITEC 173-186, 182; see also a study conducted in 2018 which stresses that YouTube's ContentID cannot distinguish between unlawful uses and uses that do not require authorization: Sabine Jacques and others, 'An Empirical Study of the Use of Automated Anti-Piracy Systems and Their Consequences for Cultural Diversity' (2018) 15 SCRIPTed 277-312, 287; reiterating this point Zoi Krokida, 'AG's opinion on Peterson/YouTube: Clarifying the liability of online intermediaries for the violation of copyright-protected works?' (*Kluwer Copyright Blog*, 6 January 2021) <<http://copyrightblog.kluweriplaw.com/2021/01/06/ags-opinion-on-peterson-youtube-clarifying-the-liability-of-online-intermediaries-for-the-violation-of-copyright-protected-works/>> accessed 25 January 2021.

²¹⁶ Engstrom and Feamster (n 33) 64. See also in this sense, but in the context of the German implementation of the Directive, Albrecht Conrad and Georg Nolte, 'Die Schrankenbestimmungen im Anwendungsbereich des UrhDaG – Zu viele Rollen der Diensteanbieter beim urheberrechtlichen Interessenausgleich?' [2021] ZUM (forthcoming).

²¹⁷ See as examples Case C-5/08 *Infopaq I* EU:C:2009:465 and Case C-145/10 *Painer* EU:C:2011:798.

²¹⁸ Pelham and others (n 43); see the standard developed by the court, which requires whether a sample taken is 'unrecognisable to the ear' (para 31).

bb) Contextual differentiation

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

4. Intermission: effects of automated filtering on fundamental rights

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

First, fulfilling the ‘best efforts’ obligation can significantly restrict the freedom to conduct a business. The specific impact will differ between OCSSPs, and their relative economic capacities must be considered in relation to the harm caused to rightholders on the respective platform.²²³ Second, users of platforms will be affected when they try to upload content which is filtered and blocked by automated mechanisms; users who access content via online sharing platforms will be restricted in their right to receive information. Third, the restriction of the right to receive and impart information must be balanced against the rights of authors and other rightholders who have a vested interest in enforcing their intellectual property rights. Without some form of enforcement, they could find themselves deprived of the essence of their rights.²²⁴ However, overenforcement, which would result in

collateral overblocking of lawful uses, would in many cases be disproportionate to the protection provided to rightholders through automated filtering technologies necessitated by Art. 17 CDSM. As we have already demonstrated, they will have detrimental effects on free speech and the exercise of user rights.²²⁵ Whether these concerns can be mitigated with effective countermeasures will be decisive in assessing whether Art. 17 unduly restricts the fundamental rights concerned.

5. Addressing fundamental rights in the mechanisms of Art. 17 – a proper balance?

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

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

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

a) Best efforts to obtain authorization (Art. 17(4)(a))

The obligation to obtain authorization consists of two components: to assess whether contents on their services require licences, and to obtain authorization for the use of that content.²²⁸ Leistner argues that the systematic structure of Art. 17(4) suggests that OCSSPs incur an

²¹⁹ *Deckmyn* (n 136) para 20.

²²⁰ *Pelham and others* (n 43) paras 71–73.

²²¹ See, for example, the case of sampling, for which the CJEU in principle left room for an application of the quotation exception if the sample is used in a dialogic manner (*Pelham and others* (n 43) para 72); see also Bernd Justin Jütte, ‘CJEU permits sampling of phonograms under a de minimis rule and the quotation exception’ (2019) 14 JIPLP 827–829, 828. Other forms of art borrow from protected works and have been considered as lawful because they fall under the protection of freedom of artistic creativity (See Christophe Geiger (n 93) 174.

²²² See above III. 3. a) bb); see also Keller (n 207) 618.

²²³ For example, it will surely be problematic for smaller OCSSPs, which would have to acquire filtering software that complies with ‘high industry standards’, the cost of which could jeopardize the economic viability of their business models. See in general on the difficulty of smaller OCSSPs to gain access to sophisticated filtering technology, Spoerri (n 215) 184–185; see in this sense Engstrom and Feamster (n 33) 22–23, who conclude that ‘for smaller OSPs, the cost of these systems would make it significantly harder to attract investors and compete with dominant incumbents. In a survey of investors in the U.S. and the EU, a majority of respondents said they would be ‘uncomfortable investing in businesses that would be required by law to run a technological filter on user-uploaded content.’

²²⁴ *Mc Fadden* (n 10) paras 98–99.

²²⁵ See also Depoorter and Walker (n 214) 322. It must be highlighted here that, due to the technological limitations of filtering technologies, which will most likely be employed due to the relative expensiveness of other mechanisms (eg human review) or their lack of effectiveness (eg flagging), automated enforcement carries the risk of creating disproportionately many ‘false positives’, ie takedowns of content which does not infringe or which is covered by an exception or imitation. The sheer amount of likely false positives constitutes non-negligible restrictions to the right to freedom of expression and the right to artistic freedom in particular when online platforms are used to disseminate musical and audiovisual artistic creativity (cf *YouTube* (AG) (n 10) para 241).

²²⁶ cf Senteleben and Angelopoulos (n 7) 7.

²²⁷ See, for example, Paul Keller, ‘Divergence instead of guidance: the Article 17 implementation discussion in 2020 – Part 1’ (*Kluwer Copyright Blog*, 21 January 2021) <<http://copyrightblog.kluweriplaw.com/2021/01/21/divergence-instead-of-guidance-the-article-17-implementation-discussion-in-2020-part-1/>> accessed 25 January 2021, and Paul Keller ‘Divergence instead of guidance: the Article 17 implementation discussion in 2020 – Part 2’ (*Kluwer Copyright Blog*, 22 January 2021) <<http://copyrightblog.kluweriplaw.com/2021/01/22/divergence-instead-of-guidance-the-article-17-implementation-discussion-in-2020-part-2/>> accessed 25 January 2021.

²²⁸ Spindler, ‘Art. 17 DSM-RL’ (n 7) 255.

obligation to actively investigate infringing content and undertake best efforts to obtain licences for the relevant works and subject matter.²²⁹ In any case, OCSSPs cannot remain passive and refrain from actively engaging with rightholders to obtain the required authorizations.²³⁰ Considering that the efforts that must be undertaken have to be proportionate, Leistner argues further that OCSSPs cannot be expected to enter into licensing agreements with all rightholders, including smaller artists.²³¹ An obligation to identify all infringing works, even if, as Spindler argues, the systematic structure of Art. 17 seems to suggest this, would place a disproportionately high burden on platform operators.²³² Moreover, the *European Copyright Society* argues that this requirement would effectively amount to a general monitoring obligation.²³³

Once an OCSSP has entered into negotiations with a rightholder or, more likely, with a group of rightholders or their representative (e.g. a collecting society), the platform operator cannot be expected to accept every offer.²³⁴ The amount due for a licence to use specific works and subject matter must be proportionate in relation to the size of the platform and the number of its users.²³⁵ In this sense, the notion of ‘best efforts’ has a very concrete financial dimension. It must be possible for an OCSSP to reject an unreasonable licence offer²³⁶ while still complying with the requirement under Art. 17(4)(a). An obligation to contract at a price determined by rightholders would significantly restrict the freedom to conduct a business by limiting the economic choices of platform operators.²³⁷ Effectively, an obligation to contract cannot be derived from Art. 17(4).²³⁸ However, OCSSPs can be

expected to enter into genuine negotiations in good faith in order to enable the lawful use of *relevant* works or other subject matter.²³⁹

b) Targeted and tailored filtering obligations

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

Therefore, any obligation to remove or block access to content must be strictly targeted and tailored. The CJEU has recently ruled in *Glawischnig-Piesczek* that a hosting platform cannot be burdened with excessive obligations, more specifically it hosting platforms cannot be expected to actively seek information on infringing or generally illegal activity, or conduct an independent assessment of the illegality of acts.²⁴¹ In *UPC Telekabel*, the Court argued that an intermediary can be required to take certain measures that necessitate the use of economic resources. However, the intermediary must only take reasonable measures and not make ‘unbearable sacrifices’.²⁴² Moreover the intermediary must be able to anticipate and, if necessary, verify, in the light of the principle of legal certainty, whether the measures taken are sufficient to comply with the requirements of Art. 17(4)(b) and (c).²⁴³

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

Therefore, any measure that OCSSPs take to fulfil the conditions under Art. 17(4)(b) must not go beyond what is necessary to achieve the purpose of that condition, which is to protect the economic rights of rightholders. Several elements must be considered in order to define the

²²⁹ cf Leistner (n 7) 23.

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

²³¹ Leistner (n 7) 24, the information and transactions cost arising from such an obligation would be immense and would require OCSSPs to invest significantly in their licensing efforts. Leistner argues that it would suffice if platform operators enter into agreements with major rightholders and collecting societies. See to that effect also art 12 CDSM Directive, which enables extended collective licensing. This, admittedly, would be problematic as smaller artists, who are most of the time the most in need of better licensing revenues, would be discriminated against. Spindler on the contrary proposes that smaller rightholders could instead be offered the possibility of monetizing their rights. He argues that although OCSSPs cannot be required to conclude licences with all rightholder, a positive obligation exists for platform operators to identify rightholders whose works are infringed on their platforms. He argues further that even proportionality would not limit this obligation to make random checks for infringing content, (Spindler, ‘Art. 17 DSM-RL’ (n 7) 255). Given the sheer amount of potentially infringing content on larger platforms, but also the economic means required to conduct such searches, this interpretation might be difficult to put into practice. A proactive search and verification obligation in relation to potentially all uploads would pose significant problems with respect to art 16 EUCFR as it would amount to a general monitoring. In any case, the practical difficulties in concluding licences with rightholders of content uploaded by others cannot lead to discrimination to the detriment of smaller rightholders.

²³² Spindler, ‘Art. 17 DSM-RL’ (n 7) 255.

²³³ The European Copyright Society (n 7) 119; the drafters of the opinion argue further that OCSSPs can be expected to proactively contact larger rightholders and would only act reactively upon notification by smaller and independent rightholders.

²³⁴ See Leistner (n 7) 24, who argues convincingly that at least all available collective licences should be obtained.

²³⁵ See to this effect Spindler, ‘Art. 17 DSM-RL’ (n 7) 255: if the fees demanded by the rightholders are unreasonably high, an OCSSP cannot be expected to enter into an agreement.

²³⁶ Spindler (n 191) 348–349.

²³⁷ Spindler, ‘Art. 17 DSM-RL’ (n 7) 255. Similarly, an operator of a hosting platform must also be permitted to refuse to conclude a licence in the first place. The obligation to demonstrate best efforts cannot result in

an obligation to contract. This would effectively enable rightholders to set the financial conditions under which OCSSPs have to operate.

²³⁸ cf Spindler, ‘Art. 17 DSM-RL’ (n 7) 255.

²³⁹ cf The European Copyright Society (n 7) 119.

²⁴⁰ See above III. 2.

²⁴¹ *Glawischnig-Piesczek* (n 206) para 46.

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

²⁴³ cf *UPC Telekabel Wien* (n 10) para 54.

²⁴⁴ cf Reda, Selinger and Servatius (n 7) 28.

scope of these obligation. First, Art. 17(4)(b) refers to ‘specific works and other subject matter’. These are the types of content in relation to which OCSSPs incur an obligation to, secondly, ‘ensure [their] unavailability’. Thirdly, OCSSPs are only required to ensure the unavailability of the specific works or subject matter if rightholders have provided them with ‘relevant and necessary information’.

aa) Prevent access to specific works and subject matter (Art. 17(4)(b))

It is necessary to distinguish the obligations arising under Art. 17(4)(b) and (c). Whereas under subparagraph (c), obligations similar but not identical to those in *L’Oréal v eBay* arise (i.e. the removal of notified content), obligations under subparagraph (b) are different and go further. This can be explained from the systematic structure of Art. 17(4).²⁴⁵

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

The two extremes of filtering are illustrated by *SABAM v Netlog* (for hosting providers in relation to copyright) and by *Glawischnig-Piesczek* (for hosting providers in relation to personality rights). While in *SABAM v Netlog*, the CJEU found an obligation to filter indiscriminately not to be in compliance with the obligations arising under the ECD,²⁴⁸ it found in *Glawischnig-Piesczek* that an injunction that targets specific content uploaded by specific users would not constitute a general filtering obligation.²⁴⁹ The AG in the latter case even extended the personal scope of such an obligation to all users of a service, as long as the specificity of the subject matter limits the scope of an

injunction.²⁵⁰ And here lies the main distinction that justifies a relatively broad filtering obligation, because the subject matter that must be monitored and filtered is not only specifically defined, but it is also determined by a court which issues an injunction before a platform operator commences with monitoring and filtering.²⁵¹

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

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

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

²⁵¹ The relevant passage reads: ‘(...) it is important that the equivalent information referred to in paragraph 41 above contains specific elements which are properly identified in the injunction, such as the name of the person concerned by the infringement determined previously, the circumstances in which that infringement was determined and equivalent content to that which was declared to be illegal. Differences in the wording of that equivalent content, compared with the content which was declared to be illegal, must not, in any event, be such as to require the host provider concerned to carry out an independent assessment of that content.’ *Glawischnig-Piesczek* (n 206) para 45. However, even a complete congruence of an upload with a protected work can still be lawful if it falls within the scope of an exception. Most such matches would require an independent assessment, but per *Glawischnig-Piesczek* this assessment cannot be imposed on online platforms.

²⁵² eg child pornography and terrorist content, cf European Parliament, European Parliament resolution of 20 October 2020 on the Digital Services Act and fundamental right issues posed (2020/2022(INI)), P9_TA(2020)0274, EP, 20 October 2020, paras 11–13; at para 13 the European Parliament stresses that in relation to illegal content online, intermediaries should not be obliged to install automated tools to moderate content.

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

²⁵⁴ See eg Frosio and Geiger (n 14) 37; see also Maxime Lambrecht, ‘Free Speech by Design. Algorithmic protection of exceptions and limitations in the Copyright DSM directive’ (2020) 11 JIPITEC 68–94, 89; Lambrecht relates such a criterion to the *Glawischnig-Piesczek* standard, which would oblige OCSSPs to prevent imminent harms, ie uploads which are only imminent harms, and should not extend to potentially harmful uploads, the verification of which would require OCSSPs to conduct further investigations (89–90); the author further explains that rightholders would not be left without protection but could resort to the ‘traditional’ mechanisms of takedown requests or court injunctions, see further Quintais and others (n 12); see also a letter sent to Commissioner Breton on 14 September 2020 by 27 civil society and users’ organizations <https://www.euractiv.com/wp-content/uploads/sites/2/2020/09/Civil_society_Letter_Art17_consultation.pdf> accessed 25 January 2021.

²⁵⁵ Reda, Selinger and Servatius (n 7) 25.

²⁵⁶ *ibid* 26; see also European Parliament (n 252) para 12.

²⁵⁷ The collateral effect of employing filtering technology is that the rights of users will be significantly restricted, which can lead to a chilling effect. As a result of overblocking and user frustration through repeated unsuccessful upload, albeit of lawful content, users can be incentivized to switch platforms or cease using them altogether. Highlighting the risk of overblocking – ‘that is removing access to more than one wishes to, or more than the law requires’, see Garstka (n 184) 332.

²⁴⁵ cf Senftleben and Angelopoulos (n 7) 31.

²⁴⁶ The relevant part of art 17(7) reads: ‘The cooperation between on-line content-sharing service providers and shall not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation.’

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

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

²⁴⁹ *Glawischnig-Piesczek* (n 206) para 35; see Kuczerawy and Rauegger (n 208) 1499; the authors criticize that the CJEU did not consider sufficiently the impact of such an injunction on the rights of users, who will be affected even by a specific filtering mechanism (1524).

to ensure legal certainty and to preserve some of the very essence of the right to intellectual property of rightholders whose works and subject matter are shared on online platforms, merely relying on user self-declaration²⁵⁸ would be insufficient.²⁵⁹

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

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

bb) Disable access upon notification

The requirement to disable access upon notification pursuant to Art. 17(4)(c) seems unproblematic at first sight. In accordance with the wording of the provisions, OCSSPs can only be expected to remove infringing content if the rightholders provide ‘sufficiently substantiated notice’. All major user-generated content platforms already foresee mechanisms by which content can be flagged for copyright infringement.²⁶²

The requirement to provide ‘sufficiently substantiated notice’ reflects fundamental rights concerns over excessive content flagging. OCSSPs should only be required to remove content if it is likely that the uploaded material indeed infringes copyright.²⁶³ The obligation to remove

content becomes problematic, from a fundamental rights perspective, when it is combined with the obligation to prevent future uploads of works or other subject matter that have been removed after an OCSSP has been notified.

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

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

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

The obligations for OCSSPs can therefore not extend to an obligation that would require such platforms to take measures that would effectively have the same impact on the exercise of fundamental rights as a general filtering obligation. As automated filters cannot assess copyright infringements beyond the first step, i.e. to determine whether a *prima facie* infringement has occurred,²⁶⁵ OCSSPs must employ other means to distinguish infringing uploads from uploads that are lawful. A contextual analysis, and more importantly an expeditious analysis of uploads that cannot be assessed automatically, will require the investment of significant resources initially, but also at the stage of user complaints.

It is important here to restate the complex implications of moderating user complaints that OCSSPs would have to navigate that would, it is argued here, result in significant restrictions of freedom of expression and also create disproportionate burdens for platforms. First the lack of substantive harmonization of copyright exceptions and limitations creates very high information costs.²⁶⁶ As a

²⁵⁸ Also suggested as an intermediary step, see Quintais and others (n 12) 280.

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

²⁶⁰ Senftleben and Angelopoulos suggest other, albeit not equally effective options that could be installed *in lieu* of filtering technology. Such alternatives could include the co-option of users to flag infringing content, pop-up banners that inform users that uploading infringing content is prohibited and contractual regulation and information through terms and conditions, Senftleben and Angelopoulos (n 7) 23; the authors make reference to the original draft of what became art 17 CDSM Directive, which expressly referred to content recognition technologies as measures to fulfil the preventive obligation under art 17(4)(b). Whether this omission in the final version means the principled exclusion of such technological tools while the provision refers to ‘high industry standards of professional diligence’ (see also recital 66) or merely tries to hide the fact that some sort of technological filtering is necessary cannot be determined with certainty. However, recital 66 also states that in assessing whether the high industry standards of professional diligence have been complied with, it is necessary to consider, also in the light of the principle of proportionality, ‘the evolving state of the art as regards existing means, including potential future developments, to avoid the availability of different types of content and the cost of such means for the services.’

²⁶¹ cf Spoerri (n 215) 183.

²⁶² This approach is expressly foreseen in art 14 ECD.

²⁶³ See above III. 5. b) aa), ie that the content is identical or manifestly infringing. However, in relation to notifications for takedowns, in order to ensure the rights of users, the takedown and subsequent staydown should only be effected after a procedure that safeguards the right to an effective remedy, including users’ right to be heard.

²⁶⁴ cf Senftleben and Angelopoulos (n 7) 3.

²⁶⁵ Even *prima facie* infringements are difficult to determine with certainty, due to the qualitative nature of the originality requirement; see in general Reda, Selinger and Servatius (n 7) 27. Particularly in relation to related rights, where the CJEU has introduced a subjective element into the infringement test, automated filters that are fine-tuned to identify marginal similarities will create a large number of false positives.

²⁶⁶ See in general Lucie MCR Guibault, ‘Why Cherry-Picking Never Leads to Harmonisation: The Case of the Limitations on Copyright under Directive 2001/29/EC’ (2010) 1 JIPITEC 55-66; Christophe Geiger and Franciska Schönherr, ‘Defining the Scope of Protection of Copyright in the EU: The Need to Reconsider the Acquis regarding Limitations and Exceptions’ in Tatiana-Eleni Synodinou (ed), *Codification of European Copyright Law. Challenges and Perspectives* (Kluwer Law International 2012) 133-167. See further recital 5 CDSM Directive. See also in this sense, Christophe Geiger and Franciska Schönherr, ‘Frequently Asked Questions (FAQ) of Consumers in relation to Copyright, Summary

result, the same uploaded content can be infringing in one Member State, while fully lawful in another. Another problem in this constellation is that these decisions that potentially restrict freedom of expression would have to be made by private actors charged with safeguarding the rights of users and rightholders, which are themselves difficult to reconcile.²⁶⁷ Instead, the decisions to maintain or to remove notified content must be made by a neutral intermediary which is not biased by its own economic preferences.²⁶⁸

dd) Proportionality as a horizontal requirement (Art. 17(5))

Article 17(5) makes express reference to the proportionality principle. In assessing whether an OCSSP has complied with its obligations arising under paragraph 4, the specific characteristics of the service provider have to be taken into consideration (a) as well as the availability of suitable and effective means and their cost for the service provider (b). Also, the type of works and other subject matter uploaded by the user needs to be considered, which if interpreted in a manner that complies with freedom of expression and information might lead to a differentiation between uploads of works that carry important societal information of a political, scientific or artistic nature and other uploads. The former will need to be appreciated with specific care. The appreciation of compliance with Art. 17(4) will be made on a case-by-case basis, as the list of elements to be taken into account is not exhaustive.²⁶⁹

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

c) Safeguarding fundamental user rights (Art. 17(7))

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

aa) The primary obligation to guarantee lawful uses

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

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

A requirement for national courts to consider the effects of a blocking order is not contained in Art. 17, because the decision to block or filter is made by OCSSPs

Report’ (EUIPO 2017) <<https://euipo.europa.eu/ohimportal/web/observatory/observatory-publications>> accessed 25 January 2021 (listing exceptions and limitations to copyright as one of the areas of major divergence in national copyright law).

²⁶⁷ In assessing whether an OCSSP has complied with the ‘best efforts’ standard it is not only necessary to consider the economic impact of such an obligation on the individual OCSSP, but also, and probably more importantly, the effects on the availability of lawful content. In the end, OCSSPs should not be able to demonstrate best efforts that result in users being significantly hindered in their exercise of their art 11 and 16 rights.
²⁶⁸ See more detailed below III. 6.

²⁶⁹ This is confirmed by the wording of art 17(5), which specifies that ‘the following elements, *among others*, shall be taken into account’ (emphasis added) when assessing whether the obligations of art 17(4) are met.

²⁷⁰ In this regard recital 66 CDSM Directive considers art 17(4)(c) as an expression of proportionality.

²⁷¹ The provision refers expressly to non-infringing uses, including uses covered by an exception or limitation. See for an extensive study of safeguards in the jurisprudence in the CJEU and the ECtHR: Martin Husovec, ‘Over-Blocking: When is the EU Legislator Responsible?’ (11 February 2021) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3784149> accessed 15 February 2021.

²⁷² Emphasis added.

²⁷³ Uploaded works, the rights in which are not owned by the uploader, can be non-infringing either because the uploader has obtained authorization, or because they fall within the scope of one of the exceptions provided for by one of the various copyright directives, most notably arts 5(2) and (3) InfoSoc Directive.

²⁷⁴ *Yildirim v Turkey* (n 83) para 62.

²⁷⁵ *ibid* para 64.

²⁷⁶ *ibid* para 66.

based on their cooperation with rightholders. Moreover, Art. 17 refers to proportionality only in relation to the extent of the ‘best efforts’ standard in Art. 17(5). A framework with clear and precise rules that governs preventive restrictions of the right to freedom of expression, or the right to artistic freedom for that purpose is missing in Art. 17.

As a result, the formulation of Art. 17(7) suggests that monitoring and filtering as measures to ensure the unavailability of works or other subject matter is not permitted because this would prevent the availability of non-infringing content and thereby constitute an unjustified restriction to Arts. 11 and 13 EUCFR.²⁷⁷ Assigning priority to the interest of users to exercise lawful uses underlines a hierarchy between Art. 17(4) and 17(7) which does not become immediately apparent from the overall structure of Art. 17. Nevertheless, contrary to what the governments of France and Spain have argued in the hearing on the annulment action in Case C-401/19, the wording of Art. 17(7) read in the light of fundamental rights mandates that uploads are not initially filtered and reinstated after the user appeals through a complaint mechanism.²⁷⁸ Instead, the default position is that uploads should initially be available and rightholders can then flag them to the OCSSP which, in the absence of any further indication in the text of the CDSM Directive, has to assess the veracity of the claim. This was also the position taken by the European Commission and the European Parliament during the hearing on the Polish challenge to Art. 17.²⁷⁹ The procedural safeguards should not work to the detriment of the user but still enable rightholders to indicate infringing content. Against take-downs, subsequent to reasoned and reasonable complaints, users would then still have the opportunity to complain and demand redress, possibly, as is argued below, through ADR mechanisms offered by an independent institution.²⁸⁰ Article 17(9) requires that out-of-

court mechanisms are made available to users so as to ‘not deprive the user of the legal protection afforded by national law’. The disputes before such bodies should be settled impartially.

bb) The imperatives of exceptions and limitations

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

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

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

²⁷⁷ For an argument to that effect see eg Reda, Selinger and Servatius (n 7) 8; Romero Moreno (n 6); also in that sense Spindler, ‘Art. 17 DSM-RL’ (n 7) 259. See for empirical support a study by the Electronic Frontier Foundation (EFF), which concludes that automated filtering mechanisms (in this case Google’s ContentID software) harms creators and culture as a whole: Katherine Trendacosta, ‘Unfiltered: How YouTube’s Content ID Discourages Fair Use and Dictates What We See Online’ (*Electronic Frontier Foundation*, 10 December 2020) <<https://www.eff.org/wp/unfiltered-how-youtubes-content-id-discourages-fair-use-and-dictates-what-we-see-online>> accessed 25 January 2021.

²⁷⁸ Paul Keller, ‘Article 17: (Mis)understanding the intent of the legislator’ (*Kluwer Copyright Blog*, 28 January 2021) <<http://copyrightblog.kluweriplaw.com/2021/01/28/article-17-misunderstanding-the-intent-of-the-legislator/>> accessed 28 January 2021, criticizing a report on ‘Content Recognition tools on Digital Sharing Platforms: Proposals for the Implementation of Article 17 of the EU Copyright Directive’ published on 19 January 2021 and commissioned by the French High Council for literary and artistic property – CSPLA <<https://www.culture.gouv.fr/Sites-thematiques/Propriete-litteraire-et-artistique/Conseil-superieur-de-la-propriete-litteraire-et-artistique/Travaux/Missions/Mission-du-CSPLA-sur-les-outils-de-reconnaissance-des-contenus-et-des-oeuvres-sur-les-pla-teformes-de-partage-en-ligne-II>> accessed 28 January 2021. According to the report, the availability of infringing content can cause significant economic harm for rightholders, which justifies the ‘rare, limited and proportional infringement of freedom of expression’ resulting from the application of automated filtering. Keller however notes that this reading of art 17, which validates automated filtering and gives preference to ex-post redress mechanisms to safeguard user’s rights, is not backed by the legislative history of the provision, as ‘the true intent of the EU legislator has been to add strong independent user rights safeguards in an effort to get Article 17 past the finish line’.

²⁷⁹ Keller (n 189).

²⁸⁰ See below III. 6.; see, for example, the Finnish proposal for implementing art 17 as described by Paul Keller, ‘Finnish Article 17

implementation proposal prohibits the use of automated upload filters’ (*Kluwer Copyright Blog*, 23 December 2020) <<http://copyrightblog.kluweriplaw.com/2020/12/23/finnish-article-17-implementation-proposal-prohibits-the-use-of-automated-upload-filters/>> accessed 25 January 2021.

²⁸¹ See arts 5(3)(d) and (k) InfoSoc Directive.

²⁸² See, for example, Bernd Justin Jütte (n 51) 473, see also Pelham and Others (AG) (n 59) para 77.

²⁸³ Underlining this is recital 70 CDSM Directive, which states that ‘[t]he steps taken by online content-sharing service providers in cooperation with rightholders should be without prejudice to the application of exceptions or limitations to copyright, including, in particular, those which guarantee the freedom of expression of users.’ See further Quintais and others (n 12) 278–279, the authors argue that the scope of the exceptions and limitations for quotation, criticism, review, and the use for the purpose of caricature, parody or pastiche mentioned in art 17(7) are the same as in art 5(3) InfoSoc Directive.

²⁸⁴ cf *Ashby Donald and other v France* (n 80) para 32.

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

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

cc) Procedural safeguards

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

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

Nor can the design of complaint and redress mechanisms be decoupled from considerations on the design of Art. 17(4) obligations. The amount of and the way in which content is filtered will determine the volume of complaints platforms will have to handle and how much resources they have to expend on establishing complaint and redress mechanisms.²⁸⁹ This correlation has direct implications on OCSSPs' freedom to conduct a business under Art. 16 EUCFR, especially because decisions to remove content pursuant to Art. 17(4)(b) must be subject to human review.

While these obligations to ensure proper (human) review of likely automated takedowns and staydowns and removal requests serve to ensure the rights of users, the burden imposed on OCSSPs is not insignificant. Moreover, the proportionality considerations under Art. 17(5) relate expressly only to obligations arising under Art. 17(4). Placing this obligation on OCSSPs would neither respect the right to an effective remedy and a fair

trial, nor the freedom to conduct the business of an OCSSP. Instead, this mandated element of human review must be located elsewhere, preferable in the out-of-court mechanisms expressly referred to in Art. 17(9).

6. Resolving fundamental rights conflicts through an institutional mediator

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

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

A possible solution to this triangular dilemma would be to introduce an institutional intermediary.²⁹¹ The legislative seed from which such a regulatory institution can be

²⁸⁶ art 17(9) CDSM Directive.

²⁸⁷ *Glawischnig-Piesczek* (AG) (n 250) para 65, cf Kuczerawy and Rauegger (n 208) 1516.

²⁸⁸ See to that effect Senftleben (n 99) 9.

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

²⁹⁰ See in general on the difficulty of providing legislative guidance for the operation of upload filters: Sartor and Loreggia (n 212) 64.

²⁹¹ As suggested in similar form by Frosio and Geiger (n 14) 42-44, proposing the creation of a 'Digital Single Market and Ethics EU Observatory' to monitor and regulate *inter alia* the new platform liability regimes implemented by the CDSM Directive and the new proposed Digital Services Act; see also Garstka (n 184) 350-351, proposing to introduce a dedicated EU-wide neutral, administrative body which could help in ensuring the adequate implementation and functioning of the enforcement schemes introduced by art 17 CDSM; Kulk (n 11) 302 ff, proposing to move from private ordering to co-regulation through the active involvement of a governmental body to ensure transparency and 'that the rights and interests of users are sufficiently considered and protected'. As Kulk convincingly argues, 'co-regulation can help to protect basic principles, such as the protection of fundamental rights, the need for transparency, and a fair consideration of the rights and interests of all affected parties. Specifically regarding copyright law, co-regulation enables governments to prevent that stronger stakeholders – intermediaries and copyright owners – make agreements to undermine the copyright balance' (303). See more generally Perel and Elkin-Koren (n 151) 531, who advocate increasing the competence of regulators to supervise and secure the transparency of copyright enforcing algorithms.

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

First, such an ‘intermediary institution’ could determine the standards that apply to targeted filtering obligations. Targeted filtering is undoubtedly necessary to create a proper balance within Art. 17 and is not excluded by Art. 17(8). Therefore, the task to define what uploads constitute ‘manifestly infringing’ material which can then be subject to advance filtering should be delegated to a neutral independent third party, ideally an EU oversight institution that would *inter alia* have the task of guaranteeing a fundamental rights compliant implementation of Art. 17 at least in this respect. Substantively, it is certainly not sufficient to rely on standards such as identity or significant quantitative congruencies. The standard of what constitutes ‘manifestly infringing’²⁹⁶ should be

developed and constantly reviewed by this institution, which would be vested with judicial or quasi-judicial powers.

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

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

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

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

IV. Conclusions

The problem with Art. 17 is its incompatibility with the Treaties of the EU and the fundamental basic principles of EU law. First, the contradictions and vague concepts which we have exposed above turn the transposition of Art. 17 into an extremely complicated exercise for national legislators. It is at the national level where important normative decisions will have to be made, which impact on the fundamental rights of users, rightholders and platform operators. However, after the *Schrems II* ruling it is clear that such normative determinations under EU law must be made by the EU legislator and cannot be left to national parliaments. Second, the difficult task left to national legislators under the current formulation of

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

²⁹³ art 17(9) CDSM Directive; the authors of another study suggest external alternative dispute resolution bodies to ensure the fundamental rights of users, see Alexandre de Stree and Martin Husovec, ‘The e-commerce Directive as the cornerstone of the Internal Market. Assessment and options for reform’ (2008) Study requested by the IMCO Committee 48.

²⁹⁴ See also Sartor and Loreggia (n 212) 65; the authors suggest more generally applicable to platforms that the Commission draws up guidelines which can then be implemented by existing national regulatory media or communication authorities. However, the authors also ponder the possibility of establishing of a new European authority to regulate online platforms.

²⁹⁵ Sketching the design of such an authority would obviously go beyond the scope of this paper. It has to be noted that some OCSSP are conscious about the necessity of introducing some sort of independence in the review process and have recently established their own separate content moderation body such as the ‘Facebook oversight board’ set up in 2020. However, this private adjudication system has been facing criticism from a constitutional perspective for not reflecting sufficiently the traditional safeguards guaranteed by constitutional principles like the rule of law, due process and equality of arms and for representing ‘a form of self-regulation and marginalisation of the role of public actors in ensuring the enforcement of fundamental rights online’ and ‘a transformative challenge for the role of courts in the information society’, see Oreste Pollicino and Giovanni De Gregorio, ‘Shedding Light on the Darkness of Content Moderation. The First Decisions of the Facebook Oversight Board’ (*Verfassungsblog*, 5 February 2021) <<https://verfassungsblog.de/fob-constitutionalism/>> accessed 8 February 2021; But other scholars have been making more positive assessments: Valérie Ndior, ‘Les premières décisions du Conseil de surveillance de Facebook’ (*Droit et numérique*, 8 February 2021) <<https://enetter.fr/les-premieres-decisions-du-conseil-de-surveillance-de-facebook/>> accessed 8 February 2021, welcoming that the first decisions of the Board have stressed their commitment to review the moderation decision of Facebook applying international human rights rules and standards.

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

²⁹⁷ For such a proposal see Frosio and Geiger (n 14) 42 ff; the institution could also be tasked with providing for redress and appeals mechanisms required under art 17(9).

²⁹⁸ Already proposing an independent regulation authority or an EU copyright council, tasked among other things to secure freedom of expression in the context of disputes around creative re-uses and copyright limitations, see Geiger, ‘Freedom of Artistic Creativity’ (n 93)). More generally, the idea of a copyright council in the EU was developed by Franciska Schönherr in her Ph.D. thesis under the direction of Christophe Geiger defended at the University of Strasbourg on 3 October 2017. See Franciska Schönherr, ‘The Construction of an EU Copyright Law, Towards a Balanced Institutional and Legal Framework’ (PhD thesis, University of Strasbourg 2017).

Art. 17 will very likely not lead to a level of harmonization that would have justified the use of Art. 114 TFEU as the legal basis for internal market harmonization.²⁹⁹ Draft implementation bills of the Directive in several Member States are already showing that Art. 17 will be implemented in various diverging ways, which will augment the confusion already created by a provision with unclear wording and conflicting aims to the detriment of the creation of a true Digital Single Market.³⁰⁰

Article 17 creates a complicated construct of rights and obligations that seems to be based on the assumption that a balance can be maintained and adjusted by technological means. ‘The answer to the machine is in the machine’, to quote a famous article of the 1990s,³⁰¹ at a time when rightholders and subsequently policymakers placed all their hopes in technology – namely technical protection measures – to solve the difficulties in enforcing copyright in the digital environment.³⁰² Despite huge efforts in the EU and worldwide, we know that technical protection has not solved the issue of mass infringements of copyright law. Twenty years later, it seems that the same mistakes are being made.

Filtering technology has not reached the level of sophistication that would avoid most collateral effects. As a result, the balance between the fundamental rights must be struck by private parties through a system of cooperation between rightholders and OCSSPs and quasi-adjudication of user complaints. In the formulation of Art. 17, an external arbiter which would ensure compliance with fundamental rights is missing. ‘The answer to the machine should not be in the machine’, or in short: what is acceptable online or what is not needs to be decided collectively

and not by a few, and via independent mechanisms that duly safeguard fundamental rights.³⁰³

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

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

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

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

Therefore, the use of filtering technology should be carefully monitored not by OCSSPs themselves, but by an external institution which serves as a supervisory authority on the subject matter that platforms can filter. The introduction of an independent institution would serve to recognize that the platform landscape has ‘drastically changed’³⁰⁴ since the adoption of the ECD and that other

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

³⁰⁰ See Keller ‘Part 1’ (n 227). See also Agnès Lucas-Schloetter, ‘L’article 17 de la directive 2019/790 sur la responsabilité des plateformes de partage de contenu culturels: clarification des règles préexistantes ou nouveau régime sui generis ?’ [2021] *Propriétés Intellectuelles* 6: ‘Sa version finale, longue de dix alinéas et dont le moins qu’on puisse dire est qu’elle ne brille pas par sa clarté, est le fruit des âpres négociations et marchandages de dernière minute qui ont été nécessaires pour que le texte puisse être adopté’. See also a recent study on the liability of online platforms across sectors, stressing the need for legal certainty: Andrea Bertolini, Francesca Episcopo and Nicoleta-Angela Cherciu, ‘Liability of Online Platforms’ (Study prepared for the Panel for the Future of Science and Technology (STOA), European Parliament, February 2021 <[https://www.europarl.europa.eu/RegData/etudes/STUD/2021/656318/EPRS_STU\(2021\)656318_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/656318/EPRS_STU(2021)656318_EN.pdf)> accessed 25 January 2021).

³⁰¹ Charles Clark, ‘The Answer to the Machine is in the Machine’ in P Bernt Hugenholtz (ed), *The Future of Copyright in a Digital Environment*, (Kluwer Law International 1996) 139.

³⁰² See the WIPO Copyright Treaties of 1996 and the InfoSoc Directive of 2001, art 6.

³⁰³ Christophe Geiger, ‘The answer to the machine should not be the machine: safeguarding the private copy exception in the digital environment’ (2008) 30 European Intellectual Property Review 121-129, arguing that the answer to the machine should not be in the machine and one could think of replacing Clark’s sentence by ‘The answer to copyrights’ problems is to be found within copyright’.

³⁰⁴ European Parliament (n 252) point B.

mechanisms are required to ensure the rights of all interested parties.

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

The annulment of this unworkable provision would then give the European legislator a great opportunity to

elaborate a balanced liability regime for platforms and to implement it in a manner compliant with fundamental rights. This could be done without difficulty in the context of the ongoing discussion of the proposed Digital Service Act,³⁰⁵ whose main purpose is in fact to regulate the activities and responsibilities of platforms³⁰⁶ and which faces similar challenges with regard to the protection of fundamental rights.³⁰⁷ The proposed regulation would then be able to create a unified, horizontal and clearer approach to dealing with illegal content online, coupled with an appropriate independent EU institutional monitoring and control mechanism. Indeed, an exciting perspective for the creation of a performing, competitive but at the same time ethical digital single market in the EU.

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³⁰⁵ Proposal for a regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, 15 December 2020, COM (2020) 825 final.

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

³⁰⁷ See more detailed Frosio and Geiger (n 14).