

Article 17 of the CDSM Directive and the Fundamental Rights: Shaping the Future of the Internet

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Abstract

Article 17 of the Directive on Copyright in the Digital Single Market (CDSM Directive) contains filter obligations to prevent future copyright infringements for online content-sharing service providers (OCSSPs). According to the Article, user-generated content must be reviewed by OCSSPs before it can be uploaded and made available to the public to meet the requirement of '*making best efforts*' set by the Article.

However, with the new copyright Directive, the exception of the liability provided by the safe harbours of the E-Commerce Directive shall no longer apply to the OCSSPs. Combining the inevitability of upload filters with the preventive obligations introduced by this Article, there will likely be strict protection of copyright by the providers by using the '*upload filters*'. Hence, there is a crucial necessity for safeguards against the possible effects of the Article's obligations on fundamental rights.

This paper discusses the incompatibilities and shortcomings of Article 17 and the adverse outcomes of the implementation of automated content recognition systems on fundamental rights with a focus on freedom of expression. Most importantly, this paper will suggest procedural safeguards to ensure that the upload filters can be implemented in a way, which is compatible with the fundamental rights to fill the gap in the literature.

Keywords: CDSM Directive, Article 17, Upload Filters, Fundamental Rights

1. Introduction

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The Internet has expanded individuals' possibilities to exercise their fundamental rights, such as freedom of expression and free access to online information.¹ Online platforms play a key role by enabling individuals to express themselves via user-generated content (UGC) and exercise their rights and freedoms.

However, there is a delicate balance between user's and platform's fundamental rights, such as user's freedom of expression, platform's freedom to conduct a business and on the other hand, creative market's intellectual property rights; all groups are expecting legal protection in the hectic digital environment. Issuing injunctions against online platforms seems convenient since determining the identity of primary infringers is usually challenging, and as business entities, online platforms are more capable of paying the damages.

Yet, enforcing intellectual property (IP) protection through disproportionate injunctions can constitute severe interferences with the right and freedoms protected by the EU Charter of Fundamental Rights (Charter).

To comply with the growing need for reform which underlined by the Commission in various Communications² to achieve a specialised framework for the injunctions against intermediaries, European Parliament adopted one of the most heavily disputed legislative acts in EU history: the Directive on Copyright in the Digital Single Market (The CDSM Directive).³ Unfortunately, it is argued that this new Directive failed to achieve its objective of solving the problems with striking the fair balance between conflicting fundamental rights. Article 17 requires online content-sharing service providers (OCSSPs) to make their best efforts to ensure the unavailability of infringing works and prevent future infringing uploads in the absence of the authorisation for the making available of copyright content uploaded by users of their service.⁴

In order to fulfil these requirements of Article 17 realistically, OCSSPs should implement automated content recognition tools, namely upload filters. Unsurprisingly, this filtering obligation for online platforms raised numerous questions and concerns, especially regarding their compatibility with fundamental rights. The interferences of upload filters with fundamental rights and their clashes with legal mechanisms such as the fair balance

¹ Council of the European Union (2014), EU Human Rights Guidelines on Freedom of Expression Online and Offline, Foreign Affairs Council Meeting.

² European Commission, 'Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe' COM(2015) 192 final, 6 May 2015, at para 3.3; European Commission, 'Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions, Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market' 14 September 2016 COM(2016) 592 final.

³ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives (hereinafter: the CDSM Directive) 96/9/EC and 2001/29/EC OJ L 130, 17.5.2019, p. 92–125.

⁴ Article 17 of the CDSM Directive (n 3), p.120.

and proportionality pointed out in various decisions by the Court of Justice of the EU (CJEU)⁵ and a rich literature on the topic has been developed by the academics.⁶

These complex and costly filters, due to their operation, monitor all data from all customers for any future infringement of intellectual property for an unlimited time and decide on which uploads will be uploaded on the platform or not with their opaque, context-blind algorithms. This unlimited monitoring interferes with no monitoring obligations, and the erroneous decisions of the upload filters disrupt the users' freedom of expression and information. Most alarmingly, their inability to detect copyright exceptions and distinguish between lawful and unlawful content results in a severe and far-reaching impact on the users' freedom of expression and information.⁷

Therefore, to achieve a practical solution regarding these concerns, rather than merely investigating the shortcomings, one must focus on the implementation of the Article as the Member States can benefit from the flexibilities within the Directive during the implementation process. The implementation of the new rules gives the Member States a

⁵ C-324/09 *L'Oréal SA and Others v eBay International AG and Others (L'Oréal)* [2011] EU:C:2011:474;; C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) (Scarlet Extended)*, [2011] EU:C:2011:771.; C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV (Netlog)* [2012] EU:C:2012:85.; Case C-275/06, *Productores de Música de España v Telefónica de España SAU, (Promusicae)* [2008], ECLI:EU:C:2008:54.

⁶ Annemarie Bridy, 'The Price of Closing the 'Value Gap': How the Music Industry Hacked EU Copyright Reform' (2019) 22 *Vanderbilt Journal of Entertainment & Technology Law* 323; Karina Grisse, 'After the Storm—Examining the Final Version of Article 17 of the New Directive (EU) 2019/790' (2019) 14 *Journal of Intellectual Property Law & Practice* 887; Bernd Justin Jütte, 'Finding Comfort between a Rock and a Hard Place Advocate General Szpunar on Striking the Balance in Copyright Law' (*European Law Blog*, 28 February 2019) <<https://europeanlawblog.eu/2019/02/28/finding-comfort-between-a-rock-and-a-hard-place-advocate-general-szpunar-on-striking-the-balance-in-copyright-law/>> accessed 22 June 2020; Aleksandra Kuczerawy, 'EU Proposal for a Directive on Copyright in the Digital Single Market: Compatibility of Article 13 with the EU Intermediary Liability Regime' (Social Science Research Network 2018) SSRN Scholarly Paper ID 3309099 <<https://papers.ssrn.com/abstract=3309099>> accessed 29 October 2020; Eva Inés Oberfell and Alexander Thamer, '(Non-)Regulation of Online Platforms and Internet Intermediaries – The Facts: Context and Overview of the State of Play' (2017) 12 *Journal of Intellectual Property Law & Practice* 435; João 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 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 277 <<https://www.ssrn.com/abstract=3484968>> accessed 15 June 2020; 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; Martin Senftleben, 'Bermuda Triangle – Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market' [2019] SSRN Electronic Journal <<https://www.ssrn.com/abstract=3367219>> accessed 14 July 2020; Dirk JG Visser, 'Trying to Understand Article 13' (Social Science Research Network 2019) SSRN Scholarly Paper ID 3354494 <<https://papers.ssrn.com/abstract=3354494>> accessed 14 July 2020.

⁷ Cambridge Consultants, 'Use of AI in Online Content Moderation' (Ofcom 2019) <https://www.ofcom.org.uk/data/assets/pdf_file/0028/157249/cambridge-consultants-ai-content-moderation.pdf>, p. 34.

one-of-a-kind chance to tackle the long-standing issues with striking the fair balance between fundamental rights.

This paper discusses the adverse outcomes of the implementation of the automated content recognition systems and investigates the question of: What is the most fundamental rights compatible way to implement Article 17 into the national laws? This is a topic of intense discussion as the implementation process is still ongoing for most of the Member States. Thus, this paper will make recommendations and suggest a number of safeguards that guarantee the fair balance within the online copyright enforcement to achieve this desired fundamental rights-compliant implementation.

First, this paper outlines the framework regarding the injunctions against intermediaries and explains key concepts regarding online intermediary liability. Then, it critically assesses the rich case law in order to provide the necessary background information for the required understanding of the problems with the current systems.

Second, it expands the criticism regarding Article 17 and examines the compatibility of the requirements of the Article to avoid liability such as licensing and filtering. This examination of the problems regarding the upload filters includes their ineffectiveness, their interference with general monitoring, and most importantly, with fundamental rights.

It then focuses on the analysis of Article 17's compatibility with freedom of expression by taking into account the general principles of EU law such as legal certainty, proportionality, and necessity to support and clarify upload filters' adverse impacts of freedom of expression.

Lastly, the paper suggests a number of procedural safeguards to achieve balanced protection regarding the competing fundamental rights within the online enforcement in addition to the general advice to achieve a fundamental rights-compliant implementation by minimising the negative effects of the strict enforcement of intellectual property rights which required by the Article.

This paper agrees with the existing scholarship that suggests that Article 17 is problematic, especially regarding the fundamental right protection, and the direct implementation of Article 17 will cause infringements of various fundamental rights. Thus, the present contribution aims to expand the knowledge about the effects of upload filters and make recommendations to minimise their adverse impacts on the fundamental rights, especially on freedom of expression. This is in order to achieve the desired implementation of Article 17, which is compatible with fundamental rights. Most importantly, in addition to the discussion on the implementation of Article 17 of the CDSM Directive, this paper aims to contribute to the current discussion of the proposed Digital Services Act.⁸

⁸ 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.

2. Injunctions against intermediaries

Enforcement practice of injunctions has gained tremendous popularity to enforce intellectual property rights over the last few years in the EU. In various Directives⁹, European Union law prescribes its Member States to provide injunctions against intermediaries whose services are used by a third party to infringe intellectual property rights, even though these intermediaries are not liable under tort law. With the rise of the Internet, rightholders gained new tools against intermediaries whose services are used by third parties to infringe IP rights. These are de-indexing, freezing orders, and the most common ones regarding online platforms: blocking and filtering.

2.1 Legislative and regulatory basis

The regulatory base of injunctions against intermediaries within the EU law can be found in the Information Society Directive(2001/29/EC), Enforcement Directive(2004/48/EC), and E-Commerce Directive(2000/31/EC).

Article 3(1) of the InfoSoc Directive provides an essential concept regarding the intermediaries' liability - communication to the public. The right of communication to the public adopts the broad concept of Article 8 of the WIPO Copyright Treaty,¹⁰ and it gives authors the exclusive right to communicate their works to the public. Recital 23 obliges a broad interpretation of '*communication to the public*' to strengthen the protection of the authors. However, there is no definition regarding this concept in the body of the Directive.

Therefore, the CJEU tried to define the scope of this concept through a series of cases¹¹, and in time, it has developed several criteria regarding the assessment of the acts of

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 (hereinafter: The InfoSoc Directive) *OJ L 167, 22.6.2001, p. 10–19*; Directive 2004/48/EC of The European Parliament and Of The Council of 29 April 2004 on the enforcement of intellectual property rights (hereinafter: The Enforcement Directive) *OJ L 195, 2.6.2004, p. 16–25*; 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 (hereinafter: the E-Commerce Directive) *OJ L 178, 17.7.2000, p. 1–16*.

¹⁰ World Intellectual Property Organisation Copyright Treaty, 20 December 1996, WIPO Doc. CRNR/DC/94.

¹¹ Case C-306/05, *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA.* ('SGAE') [2006] ECLI:EU:C:2006:764; Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others*, ('Football Association') [2011] EU:C:2011:631; C-135/10, *Società Consortile Fonografici (SCF) v Marco Del Corso*, ('SCF') [2012] EU:C:2012:140; C-607/11 *ITV Broadcasting Ltd and Others v TVCatchUp Ltd*, ('ITV Broadcasting') [2013] EU:C:2013:147; C-348/13 *BestWater International GmbH v Michael Mebes and Stefan Potsch*, ('BestWater') [2014], EU:C:2014:2315; C-466/12 *Svensson and Others*, ('Svensson') [2014] EU:C:2014:76; C-117/15 *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische*, ('Reha Training') [2016] EU:C:2016:379; C-160/15 *GS Media BV v Sanoma Media Netherlands BV and Others*, ('GS Media') [2016] EU:C:2016:644; C-527/15, *Stichting*

communication to the public. According to the well-established case law of the CJEU, the concept of communication to the public includes two cumulative criteria besides several interdependent and not autonomous complementary criteria.¹² These two criteria in the structure of the right of communication to the public are an ‘act of communication’ and the communication of that work to a ‘public’. In addition, well-settled jurisprudence from the CJEU also suggests a number of independent complementary criteria such as the indispensable role played by the user and the deliberate nature of the intervention,¹³ a communication using different technical means from those previously used or a communication to a ‘new public’;¹⁴ and the profit-making nature of the communication.¹⁵

The shift towards a more digital world introduced new challenges for identifying the acts which would fall under the scope of the communication to the public, so the question of whether the online intermediaries’ acts would constitute communication to the public has been examined by the CJEU numerous times.¹⁶ In *Svensson*, the CJEU stated that the hyperlinking in question could be covered by the concept of communication to the public only where the following communication is towards a ‘new public’ in line with the settled case law.¹⁷ The Court explained *new public* as a public that was not taken into account by the copyright holders when they authorised the initial communication to the public.¹⁸

Yet, the CJEU assumed that rightholders were already taken into account the users of the site, which gives hyperlinks to their works, as part of the public, considering the works in question offered on a freely accessible site.¹⁹ The absence of this *new public* prevented the hyperlinking fall under the scope of communication to the public. The Court stated that the concept of communication to the public must be interpreted as precluding a Member State from extending the protection to copyright holders by including a wider range of activities and broadening the concept of ‘communication to the public’ as it would create legal uncertainty, which is the exact opposite to pursued objective of InfoSoc Directive.²⁰

However, in *GS Media*, the CJEU has adopted a practical approach that seeks to provide a high level of protection for rightholders and found the hyperlinking in question as constituting a ‘communication to the public’.²¹ For this assessment, the Court introduced ‘knowledge of the unlawful nature’ and ‘profit-making intention of link provider’ criteria and held that where hyperlinks are carried out for profit, there is the presumed knowledge

Brein v Jack Frederik Wullems, ('Filmspeler') [2017] EU:C:2017:300; C-610-15, *Stichting Brein v Ziggo BV and XS4All Internet BV, ('The Pirate Bay')* [2017] EU:C:2017:456.

¹² *Reha Training* (n 11), paras 33-35.; *Svensson* (n 11), para 16; *GS Media* (n 11), para 34.

¹³ *SCF* (n 11), para 82; *Svensson* (n 11), para 35.

¹⁴ *SGAE* (n 11), paras 40-42.; *Svensson*, (n 11), para 24. *BestWater* (n 11), para 14; *ITV Broadcasting* (n 11), para 39.

¹⁵ *Football Association* (n 11), para 204; *GS Media* (n 11), para 38.

¹⁶ *GS Media* (n 10), para 34.; *Svensson* (n 11), para 16.; *Filmspeler* (n 11); *The Pirate Bay* (n 11).

¹⁷ *Svensson* (n 11), para 24; *SGAE* (n 11), paras 40 and 42; *ITV Broadcasting* (n 11), para 39.

¹⁸ *Svensson* (n 11), para 24.

¹⁹ *Svensson* (n 11), para 24-27.

²⁰ *Svensson* (n 11), paras 33-41.

²¹ *GS Media* (n 11), para 51.

that the hyperlinker was aware of the unlawful nature of the work, meaning the act which falls within the scope of communication to the public.²²

Due to the fact that online platforms have developed and extended their services, the liability of the intermediaries regarding their users' unlawful activities within the platform has arisen and correspondingly, the concept of communication to the public has evolved. The Court made it clear that the concept of communication to the public also covers digital matters such as hyperlinking to copyright-infringing content with GS Media ruling²³ and operating a platform on which copyright infringing content is shared with The Pirate Bay ruling.²⁴ However, identifying hosting providers as '*communicating to the public*' under EU law is still seen as a challenge²⁵ as the area of the online content sharing service provider platforms, such as YouTube is still blurred.²⁶

In terms of issuing the injunctions, Article 8(3) of the Information Society Directive requires ensuring the injunctions against intermediaries for rightholders when their services are used by a third party to infringe a copyright or related right. This Directive also explains why the role of intermediaries is central to online enforcement. Recital 59 explains that injunctions are required in the digital environment to end the infringing activities of third parties, as in many cases, intermediaries are best placed to do this.

Correspondingly, the Enforcement Directive provides the same guarantee regarding the availability of injunctions for rightholders in the case of an intellectual property right infringement under the third sentence of Article 11. Article 3 of the Directive defines the limits of injunctions; they should be fair and equitable as well as effective, proportionate, and dissuasive, and should be applied '*in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.*' They should not be unnecessarily complicated, costly, or entail unreasonable time-limits and unwarranted delays.

As the most important source for intermediary injunctions, the E-Commerce Directive (ECD) starts with defining the subjects of the injunctions. Article 2(a) describes '*information society service providers*' as '*any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.*' These

²² GS Media (n 11), paras 49-51.

²³ GS Media (n 11).

²⁴ The Pirate Bay (n 11).

²⁵ Christina Angelopoulos, 'EU Copyright Reform: Outside the Safe Harbours, Intermediary Liability Capsizes into Incoherence' (*Kluwer Copyright Blog*, 6 October 2016) <<http://copyrightblog.kluweriplaw.com/2016/10/06/eu-copyright-reform-outside-safe-harbours-intermediary-liability-capsizes-incoherence/>> accessed 28 October 2020.; Giancarlo Frosio, 'It's All Linked: How Communication to the Public Affects Internet Architecture' (2020) 37 Computer Law & Security Review 105410.

²⁶ YouTube prevents its users to upload copyright-protected works on their platform by employing measures(Content ID) unlike The Pirate Bay which encourages its users to upload infringing content. See: Cedric Manara , 2018. The question is currently in front of the CJEU. See, Joined cases C-682/18 *Frank Peterson v YouTube Inc. and C-683/18 Elsevier Inc. v Cyando.*

intermediaries can take a wide variety of forms, ranging from access providers to social media platforms.

However, with specific regard to copyright, there are many discussions which concern a particular type of intermediary, i.e. hosting providers.²⁷ Hosting providers, as their classic definition pictured by Article 14 of ECD, store data that specifically selected and uploaded by a user of their service and this data is intended to be stored for an unlimited amount of time. The idea is that the recipient of the service, an independent third party, generates the content on the host's platform, and the host provides space on its server for storing the information, thus making it accessible to the public.²⁸

Therefore, for these types of platforms, it is not easy nor practical to control every upload by users even though most hosts do not approve content before it was uploaded to their server. As a result of the structure of UGC that they are hosting, Article 14 (1) of the ECD includes a separate liability regime, namely safe harbours, that establishes a liability exemption for hosting activities. Nonetheless, these exemptions are subject to certain conditions.

The first condition for the platform is not to have '*actual knowledge*' about the infringing content; they should not be aware of facts or circumstances from which the illegal activity or information is apparent or when they do not have actual knowledge of illegal activity or information.

The second condition is to act expeditiously, meaning that when the service providers fail to expeditiously remove or disable access to such information once they obtained it, the liability exemption will no longer apply.²⁹

As an additional immunity condition, notice and takedown mechanism of the US Digital Millennium Copyright Act³⁰ is implied but not directly provided under Article 14 to provide an opportunity to rightsholders to demand a remedy directly from the intermediary regarding the infringement. This notice and takedown mechanism allows rightsholders to send takedown requests to these services, which must be expeditiously acknowledged while enabling the targets of notifications to challenge those requests through a counter-notice system.

Upon receiving a request, intermediaries assess the accuracy of the complaint to decide the fate of the content. However, one should keep that in mind that this implied nature caused the implementation of different systems on national levels, and this created a lack

²⁷ Eleonora Rosati, 'Why a Reform of Hosting Providers Safe Harbour Is Unnecessary Under EU Copyright Law' [2016] SSRN Electronic Journal <<http://www.ssrn.com/abstract=2830440>> accessed 8 April 2021.

²⁸ Information Society and Media Directorate-General, 'Legal Analysis of a Single Market for the Information Society (SMART 2007/0037)' (2011) Text <<https://ec.europa.eu/digital-single-market/en/news/legal-analysis-single-market-information-society-smart-20070037>> accessed 9 September 2020.

²⁹ Recital 46 of 'E-Commerce Directive' (n 9), p 6.

³⁰ § 512 of US Digital Millennium Copyright Act (DMCA).

of harmonisation regarding notice and takedown mechanism of E-Commerce within the EU.

Traditionally, safe harbour legislation provides mere conduit, caching and hosting exemptions for intermediaries, together with the exclusion of general monitoring obligation.³¹ Monitoring refers to examining information that electronically stored or transmitted by a service provider, which usually involves ascertaining whether they are lawful or meeting other conditions.³² Article 15(1) of the ECD prevents Member State courts from imposing general obligations upon service providers to monitor the information or to investigate facts or circumstances denoting unlawful activity, such as uploading unauthorised copyright-protected material when they transmit, cache, or store information. Recital 47 compares this general monitoring obligation with monitoring obligations imposed in a '*specific case*' and paves the way for injunctions that require specific monitoring.

Moreover, Recital 48 allows the Member States to impose reasonable duties of care specified by national law on host service providers even if they are protected by the hosting safe harbour to detect and prevent illegal activity, including copyright infringements. However, these duties are limited by Article 15(1) as well as general principles of EU law such as fundamental rights protection, proportionality, legal certainty and equal treatment.

Consequently, the introduction of any monitoring, blocking or filtering technology would inevitably require necessary coordination with ECD and fundamental rights. Meaning, any measure that violates the prohibition of general monitoring obligation or these principles would not be applicable. Since the national regulations are subject to EU Charter's standards, there is no complete freedom for the Member States regarding these injunctions. European Court of Human Rights (ECtHR) and the CJEU examined these injunctions and their compatibility with EU law.

2.2 Relevant case law concerning monitoring, blocking and filtering injunctions

Both CJEU and ECtHR investigated monitoring, blocking and filtering in their early decisions such as *Ahmet Yildirim v Turkey*, *Cengiz and Others v Turkey*, *SABAM* cases and current ones such as *Big Brother Watch and others v United Kingdom*, *Glawischnig-Piesczek v Facebook* and *Engels v Russia*. Even though the recent cases did not concern copyright infringements, monitoring, blocking, and filtering were at the heart of the discussion.

2.2.1 Blocking injunctions

One of the measures that can be imposed on intermediaries is blocking injunctions, a technical measure that can include blocking access to a service, a website, or a specific content within the limits of being effective, proportionate, dissuasive fair and equitable. In

³¹ Articles of 12-15 of the E-Commerce Directive (n 9).

³² Jaani Riordan, *The Liability of Internet Intermediaries* (First edition, Oxford University Press 2016).

Yildirim v Turkey³³, ECtHR gave the guidelines on the steps to be taken to achieve a fair-balanced Internet blocking injunction. According to Judge Pinto de Albuquerque, this decision marks *'the first time the question of freedom of expression on Web 2.0 based platforms has been put to the ECtHR.'*³⁴

This decision underlined the fact that any possible interference with fundamental rights and freedoms requires an examination of whether or not that interference is justified in the light of the conditions set out in Article 52(1) of the Charter of Fundamental Rights: they must be provided by law, legitimate, necessary and proportionate. Taking Article 52(1) as the basis, in his opinion, Judge Albuquerque described the minimum criteria that need to be met by legislation concerning Internet access ban measures to be compatible with the EU law and explained the purpose of his opinion as supplementing the judgment by setting out the fundamental principles applicable to restrictions on freedom of expression online. The minimum criteria that need to be provided have been described as:

1. A definition of categories of persons and institutions likely to have their publications blocked: on this point, Judge Albuquerque underlined the importance of providing a clear definition for both content and service provider since the distinction between a service provider and a content provider is not easy to identify, and liability-wise, distinguishing them is highly essential.
2. A definition of categories of access ban orders, for instance, those aimed at blocking of entire websites, IP address, ports, network protocols, or the access ban of types of use, such as social networks;
3. A provision on the territorial field of application of the access ban order, which can have a regional, national, even worldwide coverage;
4. A limit on the duration of the blocking order since indefinite blocking orders constitute *per se* unnecessary interference with freedom of expression;
5. The indication of interests, in the sense of those which are indicated in Article 10(2) of the European Convention on Human Rights (Convention), which can justify a blocking order;
6. Compliance with the proportionality, which provides for fair balancing of the competing fundamental rights and interests while ensuring that the essence of freedom of expression is respected;
7. Compliance with the necessity principle. This principle allows an assessment to be made whether the interference with freedom of expression adequately advances the interests pursued and goes no further than is necessary to meet

³³ ECtHR, *Yildirim v Turkey*, App. No. 3111/10, Judgement of 18 December 2012

³⁴ Opinion of Judge Pinto De Albuquerque in *Ahmet Yildirim v. Turkey*, App. No. 3111/10 (ECtHR, 18 December 2012)

the said '*social need*'. On this point, it has been advised that '*less draconian measures*' should be envisaged³⁵;

8. Definition of the authorities competent to issue a reasoned blocking order;
9. A procedure to follow for the issuance of this order, including the examination by the competent authority of the file, supported by request for blocking order, and the hearing of evidence from the affected person or institution, except if this audition is impossible or clashes with the pursued '*interests*';
10. Availability of procedural safeguards such as notification of the blocking order and the grounds for it to the person or institution affected;
11. Availability of judicial appeal proceedings against the order.

With this landmark decision, ECtHR made it clear that fundamental rights have been recognised as a core value of the Internet, where individuals exercise their right to freedom of expression and information.³⁶ The Court stated that while the right to freedom of expression and information does not afford absolute protection, restrictions on this right require strict judicial investigation. Following this decision, in *Cengiz and Others v Turkey*, ECtHR examined another blocking injunction by RTUK³⁷ and found a violation of Article 10 of the Convention, namely, the right to receive and impart information.³⁸

The Court allowed internet users to challenge the blocking order by stating that preserving the right to challenge the injunction only to platforms or rightsowners in an online setting would disturb the fair balance and affect users' fundamental rights. Parallel to these decisions, most recently, in *Engels v Russia*³⁹, ECtHR stressed the importance of restrictions on freedom of expression on the Internet to comply with established international standards; according to the three-part test, these restrictions should be provided for by law and should be necessary to protect an interest which is recognised under international law.⁴⁰ The Court found that the Russian law on website blocking by Roskomnadzor⁴¹ had an excessive and arbitrary impact on freedom of expression and information as it does not provide proper safeguards to protect fundamental rights against the disproportionate blocking injunction.

Regarding the scope of the blocking injunctions, in *McFadden*, the CJEU found an injunction requires to block all infringements as contrary to no general monitoring obligation of

³⁵ Opinion of Judge Pinto De Albuquerque (n 34), footnote 14.

³⁶ *Ahmet Yildirim v. Turkey* (n 33), para 54.

³⁷ Radio and Television Supreme Council: Turkish state agency for monitoring, regulating, and sanctioning radio and television broadcasts.

³⁸ ECtHR, *Cengiz and Others v Turkey*, Applications nos. [48226/10](#) and [14027/11](#), Judgement of 1 December 2015.

³⁹ ECtHR, *Engels v Russia*, App no 61919/16, Judgement of 23 June 2020.

⁴⁰ *Engels v Russia* (n 39), para 14.

⁴¹ Russian federal executive body responsible for censorship in media and telecommunications.

Article 15(1) of ECD, although the blocking requested only for a single work.⁴² However, a recent decision, *Glawischnig-Piesczek v Facebook*,⁴³ provided contrasting outcomes on the scope of the blocking injunctions. Austrian Supreme Court referred three critical questions⁴⁴ to the CJEU, asking the possibility of worldwide application of the removal injunctions and extending the scope of the removal to ‘*equivalent*’ content.⁴⁵

The CJEU adopted an extensive blocking approach and accepted the possibility of the injunctions to block or remove ‘*identical*’, ‘*similar*’, and ‘*equivalent*’ illegal content⁴⁶ and paved the way for worldwide injunctions for the removal of the content globally by national courts,⁴⁷ even in countries where the posts would be legal or protected. An injunction of this nature constitutes a high risk for over-blocking and harming the users’ freedom of expression and information by blocking and removing the lawful uses. Unfortunately, there was no emphasis on these dangerous aftermaths of this practice as the decision did not include any remedy for erroneous removal of lawful content by the filters, and there was no clarification for the content to be filtered and removed by the injunction’s filters. These risks, with the lack of clarification within the decision, constituted a call for attention regarding the unbalanced blocking injunctions’ harmful impacts.

2.2.2 Filtering injunctions

In various decisions, both CJEU and ECtHR also examined filtering injunctions as they became a popular topic of discussion due to their nature that includes both monitoring and blocking. Filtering injunctions require online platforms to monitor, filter and block or remove specific works with the use of automated content recognition technology, namely upload filters. These filters scan data either when uploaded online or before it is published to the online platform and consequently verify it according to their criteria.⁴⁸ Application of upload filters should be in line with the general principles of the EU law and respect the limits introduced by legislative sources as also repeatedly underlined in case law. These requirements and limitations were identified as a ‘*matter for national law*’ in *L’Oréal v eBay*.⁴⁹

In this landmark case, the CJEU stated that injunctions must be designed to serve the objective pursued by the ECD; they must not restrict the freedom to provide information society services from another Member State, and they must be effective and dissuasive.⁵⁰ Most importantly, while outlining the measures for preventing future infringements, the

⁴² C-484/14 *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH* (‘McFadden’)[2016] EU:C:2016:689, para 87.

⁴³ C-18/18 *Eva Glawischnig-Piesczek v Facebook Ireland Ltd* (‘Glawischnig-Piesczek’) [2019] ECLI:EU:C:2019:821.

⁴⁴ *Glawischnig-Piesczek* (n 43), paras 12-17.

⁴⁵ *Glawischnig-Piesczek* (n 43), para 20.

⁴⁶ *Glawischnig-Piesczek* (n 43), para 46.

⁴⁷ *Glawischnig-Piesczek* (n 43), para 49-52.

⁴⁸ IONOS, ‘Upload Filters: A Danger to Free Internet Content?’ (*IONOS Digitalguide*) <<https://www.ionos.co.uk/digitalguide/websites/digital-law/upload-filters/>> accessed 8 April 2021.

⁴⁹ *L’Oréal* (n 5), para 135.

⁵⁰ *L’Oréal* (n 5), para 136.

CJEU underlined the fact that how filters that require unlimited monitoring all data from all customers for any future infringement of intellectual property for an unlimited time violate the general monitoring prohibition of Article 15(1) of ECD and disproportionately affects fundamental rights.⁵¹

In line with the L'Oréal decision, in the twin cases of SABAM v Scarlet and SABAM v Netlog, the CJEU examined the intermediary injunctions which oblige the implementation of filtering technologies to prevent copyright infringements. The question in front of the CJEU was whether an obligation to install a mechanism to filter out copyright-protected works is in line with EU acquis. The filtering obligation in SABAM cases did not meet the requirements of EU law; therefore, this filtering obligation requested by SABAM found in breach of the EU law.⁵²

The Court stated that content filtering requirements, as such in this case, undermine the expressive rights of Internet users and interferes with their right to receive or impart information safeguarded by Article 11 of the Charter.⁵³ Their effects on the freedom of expression are lethal as these automated content recognition systems are unable to distinguish between lawful and unlawful content. The Court underlined an important point regarding filtering technologies by stating that these systems cannot consider the factors that affect the legitimacy of the work, such as statutory exceptions to copyright, works fall within the public domain and free of charge works.⁵⁴

Therefore, these filters acknowledged as affecting users' freedom of expression in addition to *'affecting the possibility of internet users lawfully accessing information using the provider's services'*.⁵⁵ This prevention of the availability of lawful works constitutes an *'unjustified interference'* in the freedom of expression and information as the filters are not capable of strict targeting and often filter out the uses that covered by a copyright exception or limitation.⁵⁶ These measures fail to strike a fair balance between different rights and interests by interfering with users' freedom of expression and information while protecting the rightsholders' IP rights. For that reason, in these cases, the Court found these types of injunctions *'not respecting the fair balance requirement'*⁵⁷ and used proportionality to rule out these measures under the EU law.⁵⁸ Thus, it has been accepted

⁵¹ L'Oréal (n 5), para 139.

⁵² Scarlet Extended (n 5), para 40.

⁵³ Scarlet Extended (n 5), paras. 51-52; Netlog (n 5), paras 48-50.

⁵⁴ Scarlet Extended (n 5), para 52; Netlog (n 5), para 50.

⁵⁵ McFadden (n 42), para 93; C-314/12 UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH ('UPC Telekabel') [2014] EU:C:2014:192, para 56.

⁵⁶ McFadden (n 42), para 93.

⁵⁷ Netlog (n 5), para 51; Scarlet Extended (n 5), para 53.; McFadden (n 42), para 98.

⁵⁸ Eleonora Rosati, 'Material, Personal and Geographic Scope of Online Intermediaries' Removal Obligations beyond Glawischnig-Piesczek, C-18/18 and Defamation' (2019) 41 European Intellectual Property Review 672.

that the CJEU made it clear that the fundamental rights discourse is central to the assessment of intermediary liability causing by injunctions and appropriate remedies.⁵⁹

The importance of the fundamental rights discourse is underlined, even where the filters were placed for governmental surveillance. In *Big Brother Watch v United Kingdom*,⁶⁰ the ECtHR found the regime for obtaining communications data from communications service providers of the United Kingdom's mass surveillance regime to violate the right to respect for private life and freedom of expression and information. The Court applied a set of factors, including accessibility and proportionality, and reasoned that the regime required more robust safeguards at the filtering stage.

Another case with significance is the joined cases *Frank Peterson v YouTube Inc. and Elsevier Inc. v Cyando AG*⁶¹ which also examines the implementation of upload filters for the automatic assessment of the unlawful content. The case is pending before the CJEU, but in his recent opinion, Advocate General (AG) Saugmandsgaard Øe found the obligation to detect other files that use the work in question disproportionate as it requires the application of complex and costly upload filters.⁶² AG recognised this incapability of upload filters to detect the application of any copyright exceptions and their negative impact on fundamental rights, especially on freedom of expression and stated that the use of these technologies should not prevent users from enjoying legal uses of the work.⁶³

As can be seen from these decisions regarding the implementation of the injunctions, case law emphasises the importance of the fair balance and the protection of fundamental rights such as freedom of expression in countless scenarios. Thus, in the light of these decisions, it can be said that overprotection of the IP rights through injunctions would conflict with the general principles of EU law and harm fundamental rights. Both ECtHR and the CJEU examined the problems with monitoring, blocking and filtering and emphasised their dangerous effects on the fundamental rights' protection on the Internet.

However, while freedom of expression is at the heart of diversity, creativity and innovation on the Internet, these filtering mechanisms entail a risk to this habitat by undermining the freedom of expression's essence.⁶⁴ Unfortunately, Article 17 of the CDSM Directive imposes requirements that will force platforms to implement upload filters even where the

⁵⁹ Christina Angelopoulos, 'Are Blocking Injunctions against ISPs Allowed in Europe? Copyright Enforcement in the Post-Telekabel EU Legal Landscape' (2014) 9 *Journal of Intellectual Property Law & Practice* 812 p. 814.

⁶⁰ *Big Brother Watch and others v United Kingdom*, App nos 58170/13, 62322/14 and 24960/15 (ECtHR, 13 September 2018).

⁶¹ Joined Cases C-682/18 and C-683/18 *Frank Peterson v Google LLC, YouTube LLC, YouTube Inc., Google Germany GmbH (C-682/18) and Elsevier Inc. v Cyando AG (C-683/18)*.

⁶² Opinion of Advocate General Saugmandsgaard Øe in Joined Cases C-682/18 and C-683/18 *Frank Peterson*

v Google LLC, YouTube LLC, YouTube Inc., Google Germany GmbH (C-682/18) and Elsevier Inc. v Cyando AG (C-683/18) [2020] EU:C:2020:586, para 222.

⁶³ Opinion of Advocate General Saugmandsgaard Øe (n 62), para 222.

⁶⁴ The action brought on 24 May 2019, *C-401/19 Republic of Poland v European Parliament and Council of the European Union* [2019].

problems with this technology and their incompatibility with the EU law persistently underlined by the Courts and academics.⁶⁵

3. Compatibility of Article 17 with the right to freedom of expression

As mentioned previously, identifying hosting providers as platforms that perform acts of communication to the public has never been a clear conclusion under EU law. As the online platforms and their services got more complex, classifying their acts as communication to the public became even more challenging. Despite this, Article 17(1) of the CDSM Directive suggests that online content sharing service providers (OCSSPs) perform an act of communication to the public, and therefore, these platforms are responsible for their content, including the ones created by their users. Recital 62 of the CDSM Directive defines OCSSPs as services with the main purpose of storing and enabling users to upload and share a large amount of copyright-protected content to obtain directly or indirectly profit by organising, promoting, categorising and using targeted promotion within it.⁶⁶

To avoid liability caused by the assumption of all OCSSPs engaging in communication to the public due to their operation, service providers must demonstrate that they have made best efforts to obtain an authorisation (Article 17(4)(a)), to ensure the unavailability of specific works and other subject matter (Article 17(4)(b)). In addition to that, where they receive a sufficiently substantiated notice from the rightsholders, they must act expeditiously and disable access or remove the notified works or other subject matter from their websites in addition to prevention of future infringing uploads (Article 17(4)(c)).

Therefore, with Article 17, the imposition of direct liability for copyright infringement is combined with a three-tiered standard of care and due diligence.⁶⁷ Article 17(1) gives a broad concept of communication to the public by stating that when an OCSSP gives the public access to copyright-protected works or other protected subject matter uploaded by its users, it performs an act of communication to the public. However, under the existing regime of InfoSoc and ECD, the role played by those platforms is the role of an intermediary, so they do not carry out an act of '*communication to the public*' by providing physical facilities to their users by benefiting the safe harbour protection.⁶⁸

⁶⁵ *Scarlet Extended* (n 5), para 50; *Netlog* (n 5), para 52; Annemarie Bridy (n 6), Felipe Romero Moreno (n 6); Kris Erickson and Martin Kretschmer, 'Empirical Approaches to Intermediary Liability' in Giancarlo Frosio (ed), *The Oxford Handbook of Intermediary Liability Online* (Oxford University Press 2019).

⁶⁶ Recital 62 of the CDSM Directive (n 3) also lists the OCSSPs which excluded from the definition of OCSSP. These are providers of services such as open source software development and sharing platforms, not-for-profit scientific or educational repositories as well as not-for-profit online encyclopaedias, telecommunications networks such as internet service providers, business-to-business and private cloud services such as cyberlockers and online marketplaces.

⁶⁷ Giancarlo Frosio, 'Reforming the C-DSM Reform: A User-Based Copyright Theory for Commonplace Creativity' (2020) 51 IIC - International Review of Intellectual Property and Competition Law 709.

⁶⁸ Opinion of Advocate General Saugmandsgaard Øe (n 62), paras. 72-73.

Endorsement of the licensing agreements between platforms and rightsholders and the licencing market's development was the main aim of the CDSM Directive. As a result of this incentive, OCSSPs are assumed to perform communication to the public, and they obliged to get an authorisation for the UGC that comes to life via their platform. There are many interpretations of the definition of the *'best efforts'*, but in the context of licenses, this seen as a duty to negotiate all relevant licenses for certain repertories, in particular, to take all the necessary and available collective licenses.⁶⁹ This duty leaves the existence of UGC that contains acts of expression and information entirely depending on the extent of the licensing agreement in a situation where obtaining authorisation is troublesome, and the only way of obtaining the required authorisation is direct licensing from the copyright holder.

Even for the users' non-commercial uploads, obtaining the licenses for all third party material uploaded by the users on their platforms would not always be straightforward. The backbone of many online platforms, UGC, relies heavily on existing digitalised works such as text, images and pictures, music and music videos, films.⁷⁰ Thus, according to the Directive, OCSSPs should obtain licences for a wide spectrum of works to avoid direct liability. Although the content which users upload is unpredictable, according to the Directive, the necessary license should include the whole range of potential posts. There is an agreement within the literature that obtaining an all-embracing licensing deal that would cover all possible uploaded content is an extremely challenging task, even with recourse to voluntary or extended collective licensing.⁷¹

On this point, Senftleben drew attention to the low possibility to license for *'all kinds of mash-ups and remixes including critical statements and biting lampoons'* as there will be not many rightsholders willing to give authorisation for that kind of content.⁷² This argument is especially worthy of note since this shortcoming will affect the content diversity and, consequently, the online culture while putting the users' and creators' fundamental rights in danger. It is quite likely for the platforms that host user-generated content to focus on mainstream works since obtaining licenses that provides authorisation for the wide variety of content has many dissuasive challenges.⁷³

Therefore, the Article's licensing obligation brings the risk of a significant loss of freedom of expression and information on the Internet. As long as the licensing deals cover only a limited selection of the content, EU citizens will no longer take an active part in the creation of online content since they will not be able to enjoy the freedom of uploading criticisms, parodies, remixes and mash-ups of all kinds of pre-existing material. As a result, the

⁶⁹ Matthias Leistner, 'European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive Compared to Secondary Liability of Content Platforms in the U.S. – Can We Make the New European System a Global Opportunity Instead of a Local Challenge?' [2020] *Zeitschrift für Geistiges Eigentum/Intellectual Property Journal*, p. 26

⁷⁰ Bernd Justin Jütte, 'The Beginning of a (Happy?) Relationship: Copyright and Freedom of Expression in Europe' (2015) 38 *European Intellectual Property Review*, p. 11.

⁷¹ Christina Angelopoulos and João Pedro Quintais, 'Fixing Copyright Reform: A Better Solution to Online Infringement' (2019) 10 *JIPITEC* 147; Giancarlo Frosio (n 67); Martin Senftleben (n 6).

⁷² Martin Senftleben (n 6), p. 5.

⁷³ Martin Senftleben (n 6), p. 5.

possibility of EU citizens to express themselves for a wider audience and to learn about views and expressions of users with diverse social, cultural and ethnic backgrounds will reduce. This problem underlined by many academics,⁷⁴ especially how licensing obligations do not consider the risk of a substantial loss of freedom of expression and information. This dangerous approach described as *'license first, ask questions later.'*⁷⁵

According to Article 17(4)(b) and (c), where an umbrella license is not or could not be obtained, the OCCSPs should ensure the unavailability of the infringing content and its re-uploads by monitoring all of the files uploaded on the platform which is an option that also costly and even less respectful to the fundamental rights. Taking into account the mentioned difficulties regarding the licensing and the Directive's strict liability regime for OCCSPs, there is only a little choice but to implement 'upload filters' to prevent the availability of any potentially unauthorised content from appearing on their platform. Therefore, if a license is not concluded, the OCCSPs have no other option than filtering.

3.1 Upload filters of Article 17

The second requirement for the OCCSPs to benefit from Article 17(4) 's exemption regime is making *'best efforts to ensure the unavailability of specific works'* and other subject matter for which the rightsholder provided the service provider with the relevant and necessary information to locate the infringing works. The Directive's language suggests that OCCSPs have to filter all types of content proactively and mandates platforms to comply with these requirements by using technical measures, without specifying them.⁷⁶ Even though filtering technologies have been at the heart of the European debate about Article 17, both Article 17's wording and Recitals 61-71 do not use the term *'upload filters'*; instead, the language is generic and technology-natural.⁷⁷ However, there is an agreement in the literature that to realistically fulfil the Article's requirements, platforms should filter and block specific works using automated tools, namely upload filters.⁷⁸

⁷⁴ Giancarlo Frosio (n 67); João 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 Journal of Intellectual Property, Information Technology and Electronic Commerce Law 277. Martin Senftleben (n 6).

⁷⁵ Kristofer Erickson and Martin Kretschmer, 'Analyzing Copyright Takedown of User-Generated Content on YouTube' (2018) 9 Journal of Intellectual Property, Information Technology and E-Commerce Law 2190.

⁷⁶ David Abecassis and Alexander Gann, 'The Impact of a Content-Filtering Mandate on Online Service Providers' (2018) <<https://www.analysysmason.com/consulting-redirect/reports/the-impact-of-a-content-filtering-june2018/>> accessed 14 July 2020., p.2.

⁷⁷ Axel Metzger and others, 'Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market into National Law – Comment of the European Copyright Society' [2020] SSRN Electronic Journal <<https://www.ssrn.com/abstract=3589323>> accessed 22 June 2020, p.7.

⁷⁸ Christina Angelopoulos, 'On Online Platforms and the Commission's New Proposal for a Directive on Copyright in the Digital Single Market' (Centre for Intellectual Property and Information Law (CIPIL) 2017). SSRN Scholarly Paper ID 2947800 <<https://papers.ssrn.com/abstract=2947800>> accessed 23 September 2020; Natalia E Curto, 'EU Directive on Copyright in the Digital Single Market and ISP

There are two leading types of content recognition technologies for upload filters: 'fingerprinting' and 'watermarking.' Filtering systems work by using software that inputs the content file into an algorithm representing it as a set of numbers representing its perceptual characteristics, creating a unique 'fingerprint' for the content. These fingerprints altogether constitute a 'fingerprint database' for checking each piece of content that the end-user attempts to upload and removing or blocking access to that content in the case of any match.⁷⁹

An algorithm then compares fingerprints from its database of copyright-protected material with those of the uploaded data, and in case of an overlap, this algorithm prevents the file from being uploaded. The reverse of the fingerprinting system is 'watermarking'. This is an invisible tattooing operation that individually merged into the file, allowing the identification of imprinted and authenticated copies.⁸⁰

Thus, identical application of these content recognition technologies to both infringing and non-infringing content would require such monitoring that includes all uploaded data. Besides various purposes that these technologies can be used, on the dark side, they can also censor the uploaded content. This possibility caused intense debates about upload filters' effects on freedom of expression and information, including amongst the members of the European Parliament.⁸¹ Article 17 requires a review of the uploaded content before it can be made available to the public, which also means the exception of the liability provided by E-Commerce's safe harbours for hosting providers, and the no monitoring obligations shall no longer apply to these cases. This constitutes a significant clash with the current legislation, and the effects of this incompatibility will cause many difficulties regarding assessing the platform liability.

These problems of the upload filters brought on to the CJEU by the Republic of Poland, where they pointed out that points (b) and (c) of Article 17(4) make it necessary for the service providers to carry out prior automatic verification of content uploaded online by users, and therefore make the introduction of preventive control mechanisms to avoid liability mandatory.⁸² Given the mass volume of uploaded content, it would be impossible to carry out such a check in advance manually, and this will force platforms to carry out general filtering to avoid liability. Therefore, by taking into consideration of the cost and

Liability: What's Next at International Level?' (2019) SSRN Scholarly Paper ID 3434061 <<https://papers.ssrn.com/abstract=3434061>> accessed 14 July 2020.; Giancarlo Frosio (n 67); Policy Department for Citizens' Rights and Constitutional Affairs and Directorate-General for Internal Policies, 'The Impact of Algorithms for Online Content Filtering or Moderation 'Upload Filters' (2020) STUDY Requested by the JURI committee PE 657.101, p .33; Felipe Romero Moreno (n 6); Martin Senftleben (n 6); Thomas Spoerri, 'On Upload-Filters and Other Competitive Advantages for Big Tech Companies under Article 17 of the Directive on Copyright in the Digital Single Market' (2019) 10 Journal of Intellectual Property, Information Technology and E-Commerce Law 173.

⁷⁹ Jennifer M Urban, Joe Karaganis and Brianna Schofield, 'Notice and Takedown in Everyday Practice' (UC Berkeley 2017) UC Berkeley Public Law Research Paper ID 2755628 <<https://papers.ssrn.com/abstract=2755628>> accessed 14 July 2020.

⁸⁰ Christina Angelopoulos (n 78).

⁸¹ IONOS (n 48).

⁸² *Republic of Poland v European Parliament* (n 64).

efficiency concerns of the industry, it is likely for the Article's filtering approach to trigger over-blocking, over-removal and content censorship regardless of rejection of this outcome in Article 17(7).⁸³

3.1.1 Impact of upload filters on freedom of expression

Using upload filters to identify and remove unlawful content to meet Article 17's enforcement requirements brings many incompatibilities and shortcomings. As it constantly highlighted within EU *acquis*, one of the most crucial examination for an injunction is its compliance with the principle of proportionality and fair balance of fundamental rights.⁸⁴ When it comes to online enforcement, injunctions that limit rights guaranteed by the Charter should strike a fair balance between, on the one hand, IPR protection (Article 17(2) EU Charter) and on the other, freedom of expression (Article 11), data protection and privacy (Articles 8 and 7 respectively) freedom to conduct a business (Article 16) and the right to a fair trial (Article 47).

Therefore, according to these principles, upload filters must not upset the fair balance between the conflicting rights and must not obliterate the core of the restricted right by being disproportionate. However, all the automated systems currently available to locate potentially infringing material are subject to severe limitations with respect to their accuracy and adaptability.⁸⁵ Even though the Directive's previous version underlined this problem and explained how the '*best practices*' should avoid the automated blocking of content, the final version seems to embrace the automated content-blocking systems.⁸⁶ These filter systems are seen as '*having a significant potential of serving as a censorship machine*,'⁸⁷ which will infringe users' fundamental rights such as freedom of expression, protection of private data, freedom to conduct a business and the right to a fair trial. Although upload filters have negative impacts on all these different fundamental rights, to achieve a detailed examination, the analysis of this contribution will mainly focus on the right to freedom of expression.

OCSSPs enable users to exercise their fundamental rights, especially freedom of expression and information, and that is why it is crucial for measures regarding content moderation to be extra sensitive about being proportionate and fair balanced. However, the nature and principal characteristics of the filtering systems have a direct and considerable impact on the freedom of expression and information. As an essential issue, filtering technologies cannot realistically be expected to accurately identify all infringing content; they are at best capable of merely identifying the contents of a file.⁸⁸ That is why these filters are often

⁸³ Martin Sentleben (n 6).

⁸⁴ Article 52 (1) of the Charter, Article 3 of the Enforcement Directive, Recital 31 InfoSoc Directive,

⁸⁵ Evan Engstrom and Nick Feamster, 'The Limits of Filtering: A Look at the Functionality and Shortcomings of Content Detection Tools' (Engine 2017) <<http://www.engine.is/the-limits-of-filtering/>>. accessed 23 September 2020

⁸⁶ Giancarlo Frosio (n 67)

⁸⁷ Julia Reda (2019) 'Article 13 in conjunction with Recitals 38 and 39 of the proposed EU copyright reform/expansion', <<https://juliareda.eu/eu-copyright-reform/censorship-machines/>> accessed 23 April 2021

⁸⁸ Evan Engstrom and Nick Feamster (n 85)

filtering out not only the infringing content but also the content that is legal, which might form part of communications that are worthy of protection under the Charter. This incorrect removal of lawful content is called false positives.⁸⁹ These false positives can severely affect the freedom of expression and information of both speakers and the recipients of the information, and consequently, cause chilling effects on free speech by disrupting the receiving and imparting of information and ideas.

Drawing the line between lawful and unlawful content requires '*contextual and nuanced analysis*',⁹⁰ which automated systems are not capable of doing. More alarmingly, these false positives can seriously infringe freedom of expression and information by causing unfair discrimination⁹¹ and identifying and targeting political oppositions.⁹² They can affect lawful speech disproportionately, especially expressions of members of racial and linguistic minority groups.⁹³ For example, if the views of groups of online users are poorly or misrepresented in AI training data, AI algorithms of the filtering technologies may learn to treat them 'unfairly'.⁹⁴

This discrimination affects the freedom of speech of smaller online communities and minority groups and the diversity within cultural expression online. The CJEU also recognised these negative reflections of fallibility and subjectivity of automated filters on freedom of expression in many cases, such as *Scarlet* and *Netlog*. The Court stated that filters implicate Internet users' expressive rights as they are unable to distinguish between lawful and unlawful content.⁹⁵ In his Opinion for *Scarlet*, AG Villalón underlined how the inevitability of the false positives makes the upload filters incompatible with the requirements of Articles 11 and 52(1) of the Charter as there is no guarantee for lawful uses that benefit from public domains, Creative Commons licenses, and copyright exceptions and limitations.⁹⁶

⁸⁹ Ben Depoorter and Robert Walker, 'Copyright False Positives' (Social Science Research Network 2013) SSRN Scholarly Paper ID 2337684 <<https://papers.ssrn.com/abstract=2337684>> accessed 23 September 2020.

⁹⁰ Policy Department (n 78), p.24

⁹¹ Kittredge Cherry, 'Rejection of LGBT Christian Ads Shows Limits of Social Media' *Huffpost* (6 December 2017) <https://www.huffpost.com/entry/rejection-of-lgbt-christian-ads-social-media_b_9525612> accessed 23 September 2020.

⁹² Wael Eskandar, 'How Twitter Is Gagging Arabic Users and Acting as Morality Police' (*OpenDemocracy*, 23 October 2019) <<https://www.opendemocracy.net/en/north-africa-west-asia/how-twitter-gagging-arabic-users-and-acting-morality-police/>> accessed 23 September 2020

⁹³ Center for Democracy & Technology, 'Mixed Messages? The Limits of Automated Social Media Content Analysis' (2017) <<https://cdt.org/wp-content/uploads/2017/11/Mixed-Messages-Paper.pdf>>; Maarten Sap and others, 'The Risk of Racial Bias in Hate Speech Detection', *Proceedings of the 57th Annual Meeting of the Association for Computational Linguistics* (Association for Computational Linguistics 2019). <https://homes.cs.washington.edu/~msap/pdfs/sap2019risk.pdf>

⁹⁴ Cambridge Consultants (n 7), p.13

⁹⁵ *Scarlet Extended* (n 5), para 52.; *Netlog* (n 5), para 50.

⁹⁶ Opinion of Advocate General Cruz Villalón in *C-70/10 Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2011] EU:C:2011:255, para. 83

Regarding the fair balancing of users' rights against rightsholders, copyright exceptions and limitations have traditionally constituted a cornerstone.⁹⁷ The guarantee of the protection of these copyright exceptions and limitations is also covered by Article 17(7). The exceptions of quotation, criticism, review, caricature, parody and pastiche identified as the minimum user freedoms and their implementation made mandatory by Article 17(7), which also guarantees the implementation of the upload filters, will not prevent the availability of works that include lawful uses.

However, at the current level of technological sophistication, automated content recognition systems are often unable to correctly appreciate the nuances between unauthorised uses of copyright-protected content and uses that are permissible by reason of falling within the ambit of copyright exceptions and limitations. In practice, ensuring this protection is not easy since copyright exceptions are not likely to be programmed into an algorithm.⁹⁸ So, these algorithms cannot understand the context within which the given file was being used where automated detection of statutory copyright exceptions such as parody, quotes or criticism is highly dependent on knowledge about the circumstances of the upload. Indeed, a dataset of user-generated parody videos hosted on YouTube shows that the overall takedown rate across the whole 4-year period was 40.8% of videos, with 32.9% of all takedowns attributable to copyright requests.⁹⁹

Both civil society organisations and providers of content recognition technology repeatedly laid out the *'filtering tools cannot understand the context'* argument.¹⁰⁰ This picture is not going to change since the technologies that will develop soon also not going to be able to determine if an exception covers a use or not. Where the presence of the lawful uses and copyright exceptions and limitation depends on their enforcement, these context-blind upload filters¹⁰¹ will remain incompatible with the aim of Article 17(7) and the guarantee of the right to freedom of expression.

Therefore, while the importance of the copyright exceptions under the EU law underlined many times,¹⁰² the incapability of the automated systems to determine whether the

⁹⁷ Sebastian Felix Schwemer and Jens Schovsbo, 'What Is Left of User Rights? – Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime' (Social Science Research Network 2019) SSRN Scholarly Paper ID 3507542 <<https://papers.ssrn.com/abstract=3507542>> accessed 23 September 2020, p. 569

⁹⁸ Dan L Burk and Julie E Cohen, 'Fair Use Infrastructure for Copyright Management Systems' (2000) Georgetown Public Law Research Paper No. 239731.

⁹⁹ Kristofer Erickson and Martin Kretschmer (n 73).

¹⁰⁰ EDRI, 'Copyright Stakeholder Dialogues: Filters Can't Understand Context' (EDRI, 15 January 2020) <<https://edri.org/copyright-stakeholder-dialogues-filters-cant-understand-context/>> accessed 23 September 2020.

¹⁰¹ Julia Reda, Joschka Selinger and Michael Servatius, Article 17 of the Directive on Copyright in the Digital Single Market: A Fundamental Rights Assessment (2020). Available at SSRN: <https://ssrn.com/abstract=3732223> or <http://dx.doi.org/10.2139/ssrn.3732223>

¹⁰² The CJEU has interpreted parody and quotation of the InfoSoc Directive as autonomous concepts of EU Law in following judgements: C-145/10, *Eva-Maria Painer v Standard VerlagsGmbH and Others*, ('Painer'), [2013] EU:C:2013:138.; C-201/13, *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others* ('Deckmyn'), [2014] EU:C:2014:2132; C-467/17, *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben* ('Pelham') [2019] EU:C:2019:624.; C-489/17, *Funke*

particular use of a given file is infringing or not by taking the statutory copyright exceptions into account is not something to turn a blind eye. These filtering systems would drastically restrict the narrow copyright exception regime in the online world and infringe the freedom of expression of creators who benefit from a copyright exception, and take away the users' freedom of information, specifically in the cases of quotation and parody.

3.1.2 Notice and stay down: filtering the future

Filtering obligations of the Article is not limited to just ensuring the unavailability of the infringing work. Although the language does not expressly refer, according to the reading of the 17(4)(c), OCSSPs must adopt effective '*notice and stay down*' based on information provided by the rightsholder to prevent future uploads in addition to the '*notice and takedown*' mechanisms. Preventing the re-posting of the infringing content in addition to the removal requires actively searching for that content, contrary to the established notice and takedown mechanism. Article 17 assumes that OCSSPs have that knowledge and replaces the obligation to '*act upon knowledge*' with the implementation of upload filters. By requiring any provider hosting information to carry out such active filtering for the locating the infringing content instead of waiting for rightsholder notifications, notice and stay down mechanism invalidates safe harbours, therefore creates incompatibles with EU law.¹⁰³

Moreover, this strict obligation of preventing future works' availability is likely to encourage OCSSPs to adopt filtering systems incompatible with the no monitoring obligations since there is no other practical way for OCSSPs to meet their obligations and qualify for the Directive's 'new safe harbour'.¹⁰⁴ When the aim is to prevent future uploads, there is also no guarantee for specific monitoring to stay specific as platforms will have to implement recognition systems that would go beyond specific monitoring by investigating all the data of each of the platform's users to prevent future uploads of the notified work.¹⁰⁵ The filters will most likely keep in place for an unlimited time by the platforms to avoid liability under the Article.¹⁰⁶ This indefinite monitoring will constitute a disproportionate interference with fundamental rights and freedoms as the instances of false positives will increase and cause erroneous suppression of the legal expression and information.

Correspondingly, the restraint of the legitimate uses of the service will cause chilling effects that seriously harm the freedom of expression and information of the users.¹⁰⁷ In sum, these mechanisms would conflict with no general monitoring obligations of Article 15 of ECD, Article 17(8), the established case law and the fundamental rights protection.¹⁰⁸ In the absence of an implementation that observes Recital 47 and Recital 48 of the E-Commerce

Medien NRW GmbH v Bundesrepublik Deutschland ('Funke Medien') [2019] EU:C:2019:623; (C-516/17) *Spiegel Online GmbH v Volker Beck ('Spiegel Online')*, [2019] EU:C:2019:625

¹⁰³ Opinion of Advocate General Saugmandsgaard Øe (n 62), para 242

¹⁰⁴ Natalia Curto (n 78), p.5

¹⁰⁵ Policy Department (n 78).

¹⁰⁶ Daphne Keller, 'Facebook Filters, Fundamental Rights, and the CJEU's Glawischnig-Piesczek Ruling' (2020) 69 GRUR International 616, p. 620.

¹⁰⁷ Opinion of Advocate General Saugmandsgaard Øe (n 62), para 222.

¹⁰⁸ *Scarlet Extended* (n 5); *Netlog* (n 5); *L'Oréal* (n 5).

Directive, notice and stay down requirements would fail to be proportionate and strike a balance between fundamental rights. Therefore, their application would result in a harmful impact on fundamental rights, especially on internet users' rights to privacy and freedom of expression and information. As the case law paved the way for the broad injunctions without giving a clear insight into what kind of corrective measures would be in place in the cases of false positives¹⁰⁹, safeguarding the freedom of expression became even more critical.

3.2 Shortcomings of Article 17's safeguards

Taking these problems into account, one can say that CDSM Directive recognises and safeguards the users' rights, unfortunately, just on paper.¹¹⁰ First, by ignoring an important practical problem regarding copyright exceptions, the second paragraph of Article 17(7) states that copyright exceptions shall be respected, and OCSPPs shall not prevent the availability of non-infringing works, including the ones which covered by a copyright exception or limitation.

However, in practice, Article 17(7) is not likely to function due to upload filters' shortcoming of understanding the context; these technologies cannot determine if an exception covers a use or not as explained above and the inability of the current and near-future technologies to understand the context of the upload repeated many times by each side of the debate. Also, these algorithms' ability to learn from previous scenarios is not a fit for copyright law since it is established on the basis that context is essential, and outcomes depend on facts.

Most importantly, the Article does not clarify how the Member States shall ensure this protection, and the lack of harmonisation on the EU level regarding copyright exceptions and limitations is also not helping with these filters' effectiveness. Thus, by ignoring these practical issues, Article 17(7) does not provide effective protection for copyright exceptions from upload filters.

Decision-making by a human on a case by case basis is another safeguard in order to ensure users who are relying on copyright exceptions. To ensure this, Article 17(9) together with Recital 70 of the CDSM Directive, require effective and expeditious complaint and redress mechanisms regarding the disabling of access to or the proactive removal of the user-generated content by the upload filters irrespective of the fairness of their use subject to human review.

However, it remains to be seen on which level these mechanisms would meet the expectations of effectiveness in practice, as the volume of requests and the cost of the task will be high. Especially for the platforms which host a considerable number of user-generated content, ensuring a case by case human review would be almost impossible.

¹⁰⁹ Opinion of Advocate General Szpunar in Case C-18/18, *Eva Glawischnig-Piesczek v Facebook Ireland Limited*, [2019] ECLI:EU:C:2019:458.

¹¹⁰ Sebastian Felix Schwemer and Jens Schovsbo (n 98).

Where the ineffectiveness of this safeguard proved by the US application of the counter-notice system, the need for a high degree of efficiency and reliability for this safeguard to work should not be underestimated.¹¹¹ Studies showed that while section 512 of DMCA offers the opportunity to file counter-notices, there are many problems with these mechanisms, such as their effectiveness as the instances in which this mechanism used are rare.¹¹² Thus, it is proven that current complaint and redress mechanisms do not provide the required protection regarding fundamental rights.

Furthermore, leaving the important task of responding to complaints to OCSSPs as private companies which are not qualified to replace courts of law constitutes an *'inappropriate transfer of juridical authority to the private sector.'*¹¹³ This dependence on private companies is quite worrisome for the future of freedom of expression within the online environment. These responses to complaints directly affect the right to freedom of expression as they can lead to the removal of content from the Internet, and it is unlikely for OCSSPs as commercial entities to put their users' fundamental right protection over their platform's protection from liability.

In addition to out-of-court redress mechanisms, according to the Recital 70 of the CDSM Directive, creators can state the use of an exception or limitation in court to deal with erroneous removal. However, in-court redress constitutes a heavy burden on most creators of user-generated content as litigation will usually be too costly for those creators, and unsurprisingly most of them will choose not to use these redress mechanisms.¹¹⁴

By looking at this picture, one can say that the inefficient safeguards, together with the high-level enforcement introduced by the CDSM Directive, constitute a significant risk for fundamental rights. The improper use of algorithmic enforcement via upload filters motivated by the Directive's strict liability regime can exterminate freedom of expression and information of the users online.

4. Recommendations for the future

In previous sections, the incompatibilities and the shortcomings of Article 17 have been discussed in detail in the light of the case law analysis. It has been seen that problems with the upload filters constitute a significant portion of the issues related to Article 17. On the

¹¹¹ Axel Metzger and others (n 77), p.17.

¹¹² Jennifer M Urban and Laura Quilter (2006) 'Efficient Process or Chilling Effects - Takedown Notices under Section 512 of the Digital Millennium Copyright Act' Santa Clara High Tech. L.J. 22; Jennifer M Urban, Joe Karaganis and Brianna Schofield (n 79); United States Copyright Office, 'Section 512 Of Title 17 A Report Of The Register Of Copyrights' (2020).
<https://www.copyright.gov/policy/section512/section-512-full-report.pdf> accessed 23 September 2020

¹¹³ European Commission (2010), 'Summary of the results of the Public Consultation on the future of electronic commerce in the Internal Market and the implementation of the Directive on electronic commerce (2000/31/EC)' Available at <http://ec.europa.eu/internal_market/consultations/docs/2010/ecommerce/summary_report_en.pdf>

¹¹⁴ Giancarlo Frosio, *Reconciling Copyright with Cumulative Creativity: The Third Paradigm* (Edward Elgar Publishing 2018), p.220.

one hand, Article 17 must balance the protection of the fundamental right to intellectual property and the protection of other fundamental rights on the other.¹¹⁵ Yet, taking into account the effects of the upload filters' on the exercise of the fundamental rights examined in the previous sections, it is clear that the Article paints a disproportionate picture.

What makes this picture even worse is the problems with safeguards that guarantee the interrupted exercise of fundamental rights, such as copyright exceptions that assure freedom of expression and information. The Directive lacks effective safeguards regarding users' fundamental rights, especially those to help minimise the risks of filtering, such as over-blocking, and fails to provide counter-notices that ensure an effective remedy. There is no guidance on how the platforms prevent general monitoring and false positives regarding copyright exceptions and limitations. Even though Article 17(7) safeguards the copyright exceptions and limitations on paper, in reality, by taking into consideration the way of working of upload filters, safeguarding them is a challenge.

However, Member States can benefit from the flexibilities within the Directive during the implementation process. That means they can strengthen the current safeguards and introduce *ex-ante* and *ex-post* protections for fundamental rights. Therefore, this section will offer a number of recommendations for the fundamental rights-compliant implementation of Article 17. To implement upload filters in a way, which is compatible with the fundamental rights, the implementation in question should have the following:

Primarily, since the rules of the CDSM Directive are creating a lack of clarity due to coexistence in the union legal order of acts of secondary law, clarification of the new Directive's concepts and its relationship with the E-Commerce Directive must be provided in order to achieve legal certainty.¹¹⁶ However, Member States should keep that in mind that there is a risk of getting overruled by the CJEU for the terms of the Directive as they are subject to an autonomous interpretation.¹¹⁷

To achieve a fundamental rights-compliant implementation of the Directive, *ex-post* safeguards such as complaint and redress mechanisms should be strengthened and updated. As explained previously, the Directive fails to deliver the required level of protection for the rights and freedoms guaranteed by the law of the Union by not providing effective appeal mechanisms for the erroneous decisions of the upload filters. Instead, it suggests the outdated mechanisms whose insufficiencies have underlined many times in various studies. Even though Article 17(9) requires the implementation of '*effective and expeditious*' complaint and redress mechanisms and also suggest that upload filters' decisions should be subject to human review, in practice ticking all the boxes is almost impossible.

¹¹⁵ *Promusicae* (n 5), paras 62-68; *Netlog* (n 5) para 42.; Case C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH* [2014] ECLI:EU:C:2014:192, paras 46-47.

¹¹⁶ European Council, 'Contribution of The Legal Service- Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market (Doc.12254/16) - Legal Issues on Article 13 and Recital 38 of the Proposal' 13140/17 (2017).

¹¹⁷ Axel Metzger and others (n 77).

The reality of the current dispute mechanisms is far away from this as they fail to deliver transparent decision-making within a reasonable time, and they have low usage and success rates because of their non-user-friendly nature.¹¹⁸ Especially in the instances of false positives that block users from benefiting the copyright exceptions and limitations, restoring the legitimate upload is a matter of life or death for the right to freedom of expression and information. Unfortunately, including human review to every automated decision is not an action that platforms would want to take as it is extremely costly and requires employing large numbers of moderators. As a further obligation of the Article, *'ensuring the out-of-court redress mechanisms'* would also not help with this unbalanced picture as these procedures often very costly and troublesome in the eyes of an average user. Thus, these types of ineffective and discouraging remedies feed the imbalance between the protection over the rightsholders and users, and they are the opposite of what fair trial guarantee and proportionality principle require.

Therefore, in order to achieve the necessary level of protection for fundamental rights, Member States should implement effective dispute mechanisms that go beyond being *'largely symbolic acknowledgement of the importance of users' expressive right.'*¹¹⁹ These mechanisms should be easy to access, and they should provide timely, transparent and well-grounded decisions. Only in this way they can guarantee comprehensive protection to the users' and create an environment that they can practise their fundamental rights. However, the problems mentioned and the imbalance of the powers between the actors of the online enforcement will remain as long as users have only *ex-post* safeguards for the filters' *ex-ante* decisions.

To protect the fundamental rights from the upload filters' negative impact, measures that would minimise the risk of over-blocking and false positives have to be implemented. In other words, the objective of Article 17(7) must be assured against the context-blind enforcement systems of Article 17(4), which *'cannot assess whether the uploaded content is infringing or covered by a legitimate use.'*¹²⁰ Even though Article 17(7) identified the implementation of quotation, criticism, review, caricature, parody and pastiche exceptions as minimum user freedoms, in practice, the existence of these copyright exceptions and limitations depends on the enforcement online. Therefore, strong enforcement of copyright exceptions and limitations safeguarded in Article 17(7) has to be ensured to help protect and enhance freedom of expression and information.

By means of *ex-ante* protection, Member States should strengthen the enforcement of the current copyright exceptions and limitations by allowing users to pre-flag and declare the legitimacy of their use of the copyright-protected work. Letting the users report the authorisation (public domain, copyright exceptions, Creative Commons licenses) that they should be able to benefit at the uploading stage of the content is crucial to prevent

¹¹⁸ Jennifer M Urban, Joe Karaganis and Brianna Schofield (n 79).

¹¹⁹ Annemarie Bridy and Daphne Keller, 'U.S. Copyright Office Section 512 Study: Comments in Response to Second Notice of Inquiry' (Social Science Research Network 2017) SSRN Scholarly Paper ID 2920871 <<https://papers.ssrn.com/abstract=2920871>> accessed 23 September 2020.

¹²⁰ European Commission (2020), 'Targeted consultation addressed to the participants to the stakeholder dialogue on Article 17 of the Directive on Copyright in the Digital Single Market', p. 15.

automatic removal of the lawful content as required by Article 17(7). The user notification via pre-flagging will help to develop the accuracy of the upload filters and reduce the number of false positives. The pre-flagging tool can be an effective tool to safeguard the copyright exceptions and limitations and protect freedom of expression and information.

Member States should use the authorisation under Article 25 of the CDSM Directive and introduce new copyright exceptions and limitations such as user-generated content exception and harmonise these exceptions on the EU level. This harmonised, cohesive approach is crucial for protecting copyright exceptions and limitations within the digital environment where the user-generated content comes into existence. The non-commercial uploads of end-users constitute acts of expression and freedom of information, and the erroneous removal of these works harms online cultural diversity. Also, one should keep in mind that not every technical infringement within cultural expressions harms the rightsholders; in some situations, net benefits accrue to authors and publishers and create revenue streams.¹²¹

Therefore, as an ex-ante safeguard, UGC must be protected, and a UGC exception should be introduced with the implementation. In order to enforce this new exception, users should also be given the option to pre-flag their non-commercial uses while uploading their content to the platform. There are a number of Member States such as Germany, Austria and Finland that included ex-ante safeguards in their implementation proposal.

For example, the German proposal focuses on limiting instances of over-blocking and acknowledges the *ex-post* complain systems' insufficiency regarding the erroneous removal of the work, and therefore, introduces pre-flagging.¹²² This system allows users to flag uploads that include copyright-protected works as legitimate to stop them from getting automatically blocked or removed by the upload filters. This proposal also contains an exception for '*mechanically verifiable uses authorised by law*', and it covers the minor and non-commercial use of third-party material.

The quantitative threshold for this '*de minimis*' exception is 20 seconds of video or audio, 1000 characters of text, or individual photograph or one individual graphic up to a file size of 250 KB.¹²³ The same minor use exception shows itself in the Austrian proposal as well as the pre-flagging system that only allows users to flag copyright exceptions in Article 17(7).¹²⁴

¹²¹ Till Kreutzer, 'The EU copyright directive and its potential impact on cultural diversity on the internet – Part I' (2020, January 22) Kluwer Copyright Blog, <<http://copyrightblog.kluweriplaw.com/2020/01/22/>> accessed 11 February 2021.

¹²² § 8 'Pre-Flagging of authorized uses', Discussion draft of the Federal Ministry of Justice and Consumer Protection Second Draft Act adapting copyright law to the requirements of the Digital Single Market

¹²³ § 6 'Mechanically verifiable uses authorized by law' Discussion draft of the Federal Ministry of Justice and Consumer Protection.

¹²⁴ §89b Urheberrechts-Novelle 2021 Verantwortlichkeit von Plattformen (Art. 17)samt Verhandlungsmechanismus (Art. 13).

As these actions constitute a promising start, as they all proposals, one should keep in mind that they are subject to change. However, where the implementation of *ex-post* redress mechanisms included in Article 17 (9) seen as not enough to fulfil Article 17(7)'s obligation also the by the Commission¹²⁵, Member States should not ignore this focus of *ex-ante* users' right protections during the implementation process.

5. Conclusion

This paper pointed out the already existing problems of online copyright enforcement as well as the ones that the new CDSM Directive will bring. By examining and comparing the case law of the CJEU and ECtHR, this paper detected the shortcomings and accordingly recommended some ideas to avoid their negative impact on fundamental rights, with the focus on the freedom of expression and information.

The problems with the upload filters examined in detail above constitute a significant portion of the issues related to the compatibility of Article 17 with the protection of freedom of expression and information. Therefore, in order to recommend solutions for these problems, by applying the outcomes of the case law to the Article, this paper laid down the issues with the implementation of upload filters in a more systematic way.

This application of case law guidance to Article 17 helped understand its problems in-depth and extended the knowledge in the literature regarding the incompatibilities of the Article. This analysis also revealed its conflicting parts with being fundamental rights-compatible law and provided a basis for the recommendations. Then, to answer the research question '*what is the most fundamental rights compatible way to implement Article 17 into the national laws?*' this paper focused on the strengthening of the protection of the freedom of expression and recommended a number of *ex-post* and *ex-ante* safeguards to achieve a fundamental right respected implementation of the Article. In addition to the contributions regarding the CDSM Directive's implementation, this paper's analysis also expanded knowledge for the current discussion of the proposed Digital Services Act.

It is crucial for the Member States to pay close attention to academic advice to implement Article 17 in a way that would respect the fair balance of the fundamental rights and interests with the minimum undesired impacts on the users' rights. Moreover, as the obligations of the CDSM Directive has to consider potential future developments,¹²⁶ ensuring the protection of freedom of expression against the automated filtering systems becomes a timeless duty. The safeguard recommendations within this paper can also be applied to the implementations of future legislation that regulate online intermediaries, such as the Digital Services Act.

¹²⁵ European Commission, 'Answer to Question No E-002681/19' (*Parliamentary questions*) <https://www.europarl.europa.eu/doceo/document/E-9-2019-002681-ASW_EN.html> accessed 13 April 2021.

¹²⁶ Recital 66 of the CDSM Directive (n 3).

This paper argued that to ensure the availability of the legitimate uses of the copyrighted content, therefore ensure the protection of users' freedom of expression and information, Member States should introduce *ex-ante* safeguards with their implementations. This focus on the *ex-ante* user safeguards is essential; therefore, the topic requires further research in order to provide recommendations to influence the Member States regarding the fundamental rights-compliant implementation of the Article.