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Directive on Copyright in the Digital Single Market:

A Legislative Analysis

Diploma Thesis

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DECLARATION

„I hereby declare that the submitted diploma thesis is my original work written by myself independently. All its sources that I have used during elaboration of the thesis are properly cited and listed. Furthermore, this thesis has not been subjected to obtaining of any other or similar degree.

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PROHLÁŠENÍ

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ABSTRAKT

Diplomová práce se zaměřuje na dvě konkrétní ustanovení Směrnice (EU) 2019/790 o autorském právu na jednotném digitálním trhu. Prvním z nich je článek 15, který vytváří nové právo související s právem autorským vydavatele tiskové publikace, které chrání tiskové publikace v souvislosti s jejich online užitím poskytovateli služeb informační společnosti. Druhým z nich je článek 17, který zavádí přímou odpovědnost poskytovatelů služeb pro sdílení obsahu za porušení autorských práv způsobená obsahem nahraným jejími uživateli. Panují obavy, že by mohlo docházet k nadměrnému blokování legálního obsahu ze strany poskytovatelů, aby zabránili možným porušením. Práce popisuje stav před zavedením těchto ustanovení, od něho se odvíjející motivace zákonodárce pro jejich prosazení a legislativní proces. Ve vztahu k přijatému znění směrnice se text věnuje jejich budoucím zamýšleným i nezamýšleným dopadům na internetové prostředí a vznáší návrhy na alternativní přístupy k řešení adresovaných problémů. V neposlední řadě je důkladná pozornost věnována otázkám souladu ustanovení směrnice s judikaturou Soudního dvora. Text má za cíl zhodnotit skutečný dopad a přínos přijaté legislativy s ohledem na to co bylo zamýšleno při jeho přijetí.

Klíčová slova:

Jednotný digitální trh, Internetová regulace, Autorské právo, Evropská unie, Právo na sdělování děl veřejnosti, Odpovědnost zprostředkovatele, Poskytovatelé služeb informační společnosti, Poskytovatelé služeb pro sdílení obsahu online

ABSTRACT

The Diploma Thesis elaborates two specific provisions of the Directive (EU) 2019/790 on Copyright in the Digital Single Market. The first is the Article 15 which creates an ancillary right to copyright that benefits certain publishers in relation to its online use by Internet Service Providers. The instrument was intended to improve the position of press publishers in the digital sector. The second is Article 17 which makes online platforms that provide access to user-generated content directly liable for copyright infringements caused by their users. Concerns have been raised about possible excessive blocking of legal content by platforms to prevent possible infringement. The thesis describes the state of things before their introduction, the motivation of the legislator for their adoption and the legislative procedure behind its adoption. In relation to the adopted text of the Directive, the text discusses its future intended and unintended impacts on the internet environment and makes suggestions for alternative approaches to address the issues. Finally, careful attention is paid to issues of consistency of the Directive's provisions with the case law of the Court of Justice. The text aims to assess the actual impact and benefits of the adopted legislation in the light of what was intended when it was adopted.

Key words:

Digital Single Market, Internet regulation, Copyright infringement, European Union, Communication to the public, Intermediary liability, Internet society service provider, Online content-sharing service provider

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INTRODUCTION

"The internet is becoming the town square for the global village of tomorrow."

- Bill Gates, August 8, 2013

One of the biggest tycoons of our time who rose from the emergence of internet used these words to describe it. Villages, towns, and their squares as we know them have been with us for long and have had stable rules for centuries.

It has been only the past few decades that brought the absolutely game-changing phenomenon of internet. The undeniable consequence of its existence is an incredible acceleration of information exchange and the abstraction of values. Both have fundamental implications for intellectual property, namely copyright.

Internet, and the wealth it brings is nothing but intellectual property. However, its fundaments date back to the period long before internet existed. Importantly, internet is after almost forty years of its existence, still an ever-changing place. The reality of yesterday is out-dated today.

Any legislative efforts to tame it thus pose a significant challenge. The first and foremost expectation we usually have from legislation is that it sets out clear rules for following decades. In order to last long in the fast-changing environment, internet regulation requires highly conceptual and abstract approach.

The following text is an assessment of one such attempt to adapt the copyright rules to our new and everyday reality brought by the internet and by the actors who play the major roles in this field. Honestly speaking, the changes made by the Directive (EU) 2019/790 on copyright in the Digital Single Market are rather partial and fragmentary, they do not introduce a holistic revision of the copyright framework. And yet they brought lengthy, voluminous discussions about their impact on copyright and freedom of speech. Out of many partial changes introduced in the Directive, I focus on the two discussed the most which are Articles 15 and 17 and therefore they form the axis of the text that follows. Each of the Articles has its own, autonomous chapter. Since each provision addresses

different problems and raises different questions, each chapter has slightly different structure.

Article 15 of the CDSM Directive addresses problems of an industry particularly affected by the emergence of the internet. Ever since we started exploring the benefits of online environment, press publishers racked their brains over a steady decline in their revenues. Unlike most other industries, independent media are regarded essential for free and democratic debate across Europe, so the legislator chooses a paternalistic approach to bring revenues where he believes they should be directed – from news aggregators to the publishers.

As my further analysis shows, I personally doubt that it was an effective solution that would substantially help to secure a bright future of European independent press. My conclusions show that the outcome might be rather opposite. Excessive paternalism can result in a disincentive to seek new business opportunities. However, I do not remain only a passive critic of efforts that have been made and propose alternative solutions that could have been adopted.

The other half of the thesis elaborates Article 17 of the Directive that concerns the liability of certain online platforms for copyright infringement inflicted by user-generated content. The previously existing regime was created by legislation adopted on the verge of millennium. Internet has become a place that we used much different nowadays and circumstances called for change.

The new rule stipulates that it should now be the platforms that are directly responsible for eventual copyright infringements caused by their users. The underlying issue is that the volume of content uploaded daily is too big to be assessed manually. The Directive thus presumes use of algorithms that filter copyright infringement. Despite all the technological advancements we witness, these filters will certainly have false-positive matches and consequently will block content uploaded legally. The algorithms cannot distinguish use of legal exceptions and limitations from illegal use.

In addition to assessing these unintended consequences, I pay close attention to understanding underlying motivations for its adoption, clarifying the position of Article 17 in the existing legal framework, and analysing its ambivalent implications.

Given the uncertainty among the professional public about these questions, great attention had to be paid to clarify the underlying issues before proceeding to analysis of impacts.

This thesis is my personal contribution to the ongoing debate on the appropriateness and actual effect of measures adopted through the CDSM Directive. Its overall aim is to determine the issues that led the EU legislator to adopt these measures in the form as they are, evaluate both their intended and possible corollary effects and finally, propose alternatives that could have been chosen.

BACKGROUND OF ADOPTION OF THE DIRECTIVE ON COPYRIGHT IN THE DIGITAL SINGLE MARKET

The European Union reduces national discrepancies through its legislation, ensures the level of protection necessary to cultivate creativity itself as well as investment in it, promotes cultural diversity and secures better access for consumers and businesses to digital content and services across Europe.[1]

The ongoing technological advancement of the 21st century with every new piece of technology or epoch-making service emerging in the market is posing new challenges to the EU copyright *acquis.* Thus, the EU legislator is required to keep pace with the progress, adjust fast and keep pace with the progress by creating flexible regulation of the field.

The existing legislative framework for copyright in the digital sphere was outlined by directives adopted in early 2000 while the technologies and markets have developed rapidly since then. Therefore, the Commission brought initiative to modernize the legal framework.

1.1. Aims defined by the Digital Single Market Strategy

In May 2015, the European Commission issued its Digital Single Market Strategy. Its main goal, according to the then EC President Jean-Claude Juncker, is taking *„legislative steps towards a connected digital single market".*[2] The growing need for new legislation, according to the DSM Strategy, comes from the rapid development of the global economy, which is becoming digital, and technology is no longer only a specific sector but permeates all sectors of people's lives and nations' economies. Hence, as the world has undergone a significant change, so must the law. The Member States were struggling with the challenges posed by the global economy but could hardly cope themselves. Therefore, the EC found that an EU-wide solution was inevitable.

[1] 'The EU Copyright Legislation' <https://ec.europa.eu/digital-single-market/en/eu-copyright-legislation> accessed 4 January 2021.

[2] 'Digital Single Market Strategy' (2015) 1 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52015DC0192> accessed 4 January 2021.

The aim of the DSM Strategy was to create a Digital Single Market that ensures that EU maintains its position of a world leader by expanding its internal market allowing companies to reach all 500 million people without having any obligations to adjust their products to national standards.

To reach its goals, the DSM Strategy was built upon three pillars:

i. *"Better access for consumers and businesses to online goods and services across Europe",*

ii. *"Creating the right conditions for digital networks and services to flourish",*

iii. *"Maximising the growth potential of our European Digital Economy".*[3]

It is of vital importance to understand the broad scope of the changes outlined in the system of the EU single market. This work focuses solely on changes in copyright law, but the package of reforms vastly affects all fields related to DSM. However, for the purpose of this work, the first pillar mentioned above is the most important one and more attention will be paid to it.

Better access to online goods and services is to be provided by *"breaking down barriers to cross-border online activity including differences to contract and copyright law between Member States".* In particular, the EC announced that it would propose legislation that harmonises cross-border consumer e-commerce rules, improves affordability of cross-border parcel delivery, prevents unjustified geo-blocking of online services, and improves access to digital content.[4]

The improvement of access to digital content is the point that includes changes in the copyright framework. The EC recognizes different national regimes of copyright as a serious barrier to cross-border portability of online content. When consumers cross an internal EU border they are often prevented, on grounds of copyright, from using the content that they have acquired in their home country. Apart from other issues, it is also due to the territoriality of copyright and difficulties related to its clearing and enforcement. According to the DSM Strategy 45% companies that considered selling

[3] ibid 3–4.

[4] Isabel Espín Alba, 'Online Content Sharing Service Providers' Liability in the Directive on Copyright in the Digital Single Market' (2020) 6 UNIO – EU Law Journal 100, 102.

digital services online were limited by national copyright restrictions in providing access to their product. For example, only less than 4% of all video-on-demand content in the EU was accessible cross-border back at the time.

Furthermore, the EC identified an issue of rules applicable to activities of online intermediaries related to works protected by copyright rules. The DSM Strategy outlined a need to clarify their position, given the growing involvement of these intermediaries in content distribution. Also, measures to safeguard fair remuneration of creators needed to be implemented in order to support the future content creation.[5]

According to that the EC made legislative proposals that included measures ensuring:

i. *"portability of legally acquired content,*

ii. *(...) cross-border access to legally purchased online services (...)*

iii. *greater legal certainty for the cross-border use of content for specific purposes (e.g., research, education, text and data mining, etc.) through harmonised exceptions,*

iv. *[clarification of] the rules on the activities of intermediaries in relation to copyright-protected content (...)*

v. *[modernisation of] enforcement of intellectual property rights, focusing on commercial-scale infringements (...) as well as its cross-border applicability."* [6]

The points (iii) to (v) are subject matter of the CDSM Directive.[7]

1.2. Content of the CDSM Directive

Despite its title, the Directive on Copyright in the Digital Single Market does not introduce an all-encompassing, monolithic statutory regulation, but rather various harmonising amendments to the existing EU copyright framework.

[5] Pablo Ibáñez Colomo, Roger D Blair and D Daniel Sokol, 'Digital Single Market Strategy' (2015) 7 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52015DC0192> accessed 4 January 2021.

[6] 'Digital Single Market Strategy' (n 2) 8.

[7] Points (i) - (ii) were introduced through Portability Regulation 2017/1128 and Geoblocking Regulation 2018/302

Besides others, the CDSM Directive includes two important sets of provisions that attempt to solve two distinct problems. Both of them are embraced by a commitment to regard copyright as a tool[8] to foster availability of information and maintain plurality of voices, and by a perception that natural market operations are no longer able to secure.[9]

Press publishers who are beneficiaries of the protection under Article 15 are seen as vital to the European democracy. Despite that, they are currently struggling with challenges posed by transition from print to online to an extent to which the EU legislator is concerned with sustainability of the field. Independent authors, on the other hand, benefit from Article 17 which is supposed to enable them to obtain a fair remuneration for their works disseminated over the internet.[10]

[8] Abbe Brown and others, *Contemporary Intellectual Property: Law and Policy* (2019) chs 2. Copyright 1: history, rationale, and policy context.
[9] Peter Drahos, *A Philosophy of Intellectual Property*, vol 8 (1998).
[10] Lionel Bently and others, 'Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive' 11–12 <https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU%282017%29596810>.

ARTICLE 15 – PROTECTION OF PRESS PUBLICATIONS CONCERNING ONLINE USES

1.3. The situation before the CDSM Directive - news snippets

The emergence of internet has caused significant changes in the work of news publishers. The shift to the online world has had two major interconnected effects on them. Firstly, monetization of their product is more complicated as consumers are not willing to pay for online content. Secondly, constantly decreasing price of online advertisement. As a consequence, the revenues of news publishers have been persistently declining.[11]

For example, in the USA the revenues from newspaper advertisement have decreased from around $50 billion in 2000 to less than $20 billion in 2017 and share of advertisement in total revenues has declined from 82% to only 65%. Moreover, "*the average number of journalists per newspaper decreased sharply from 39 in 2001 to 23.5 in 2015*."[12] These trends can be observed globally. Also, the publishers' work has changed as they have to optimize their articles and headlines for search engines, social media, and aggregators.

Therefore, news outlets started to call for a regulatory intervention to improve their position. The issue was seen in existence of online news aggregators such as Yahoo! or Google News that do not produce content themselves but only algorithmically curate content created by others. Together with the link to the original article, aggregator usually provides a headline, a photo, and a short snippet of the original article.

Allegedly, this usage brings revenue to the aggregators on the expense of content creators. As the front page of a news aggregator looks similar to the front pages of news outlets, it can therefore substitute them. Consumers then do not click through to the original article

[11] Robert G Picard, 'Cash Cows or Entrecôte: Publishing Companies and Disruptive Technologies' (2010) 11 Trends in Communication 127.

[12] Charles Angelucci and Julia Cagé, 'Newspapers in Times of Low Advertising Revenues' (2018) 11 American Economic Journal: Microeconomics 319.

but read the snippet only. Thus, it is only the news aggregator that monetizes the content created by the publisher (although indirectly). 13

Publishers might become disintermediated, commoditized, unable to differentiate their product (and its quality) from others and thus might lose incentives to maintain their reputation. Consumers on the other hand, might be even less willing to pay for such subscription.

However, the role of news aggregators is rather dual. Besides substituting the news outlets by reducing the user's need to click through to the website of origin, they also play a complementary role. It is likely that aggregators do cause decline in publishers' front-page views but on the other hand they link readers directly to the landing page (the particular article) and thus cause increase in visits there. Furthermore, they generally reduce search efforts and costs and thus make it easier for users to facilitate multiple news resources. By dint of that they also maintain diversity in the news market as the users have better access to various resources.[14]

Efforts to solve the outlined situation were made in Germany and in Spain in 2013 and 2014 respectively (see 1.7). Both countries introduced legislation similar to that later introduced EU-wide in CDSM Directive. The countries adopted reforms of copyright law that allowed publishers to charge aggregators for linking to their news snippets. The law in Germany allowed newspapers to provide the aggregators with a free license. The main German newspaper association made use of this provision and provided Google News with it. However, Google News were the only to receive a free licence, the other German aggregators discontinued their services.[15]

The Spanish law did not provide for a free license. Google News and other news aggregators then decided to shut their services down. Studies that examined impacts of this policy found that the removal of Google News reduced overall news consumption of online news by about 20% (including aggregators' websites), while visits to news

[13] Doh-Shin Jeon, 'Economics of News Aggregators' (2018) 3–4.

[14] Susan Athey, Markus Mobius and Jeno Pal, 'The Impact of Aggregators on Internet News Consumption' (2017) 17 Stanford University Graduate School of Business Research Paper 1 <https://search.ebscohost.com/login.aspx?direct=true&db=bth&AN=122147494&site=ehost-live&scope=site>.

[15] Jeon (n 13) 9–10; Joan Calzada and Ricard Gil, 'What Do News Aggregators Do? Evidence From Google News in Spain and Germany' (2020) 39 Marketing Science 134.

publishers declined by about 10%. Additionally, this decrease was concentrated around smaller publishers, while large news outlets did not see significant decline in overall figures.[16]

After the shut-down the users' browsing habits have significantly changed. Generally, they were able to replace the service, but they were not able to reach all types of news they previously read. Post-shutdown readers read less breaking news and news that usually were not covered by their favourite publishers. In other words, they visited a less diverse set of outlets, basically only those that could be accessed directly without help of an intermediary.[17]

1.4. Legislator's intention

The policymaker identified as a problem that: "*The shift from print to digital has enlarged the audience of press publications but made the exploitation and enforcement of the rights in publications increasingly difficult. In addition, publishers face difficulties as regards compensation for uses under exceptions.*"[18] The technology has changed the industry in the way that sustainable, self-standing and independent press is endangered because the protection it is granted with is not enforceable or only with disproportionate costs.

Even though print publishers have long been able to claim copyright indirectly from the contributions of their journalists, monetization of copyright has never been an essential part of their business model.[19] Now, the publishing field is in the middle of a shift from print to digital. Daily newspapers issues have been constantly declining for years. In the period 2010-2014 by 17 % in 8 EU Member States.[20] As a result of that, press publishers struggle to recoup their investments and costs incurred. Even though the overall consumption of their products grows, its monetization stagnates or declines. In the same period as mentioned, news publishers' print revenues decreased by €13.45 billion whereas

[16] Athey, Mobius and Pal (n 14) 3.
[17] ibid 16.
[18] European Commission, 'Impact Assessment on the Modernisation of EU Copyright Rules' (2016) 155.
[19] Dr Richard Danbury, 'Evaluating the Proposal That Copyright Should Be Used to Assist the Commercial News Industry.' (2015) <https://www.cipil.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.cipil.law.cam.ac.uk/documents/copyright_and_news/second_report.pdf> accessed 16 February 2021 Paper 2: Is Intervention Appropriate?'.
[20] European Commission (n 18) Annex 13A.

digital revenues rose only by €3.98 billion which indicates a net revenue loss of €9.47 billion (-13 %). The natural outcome of such shortages must be layoffs or even closing of unprofitable branches, particularly in case of small and regional newsrooms.[21]

The EC regards news publishers as a subject that plays a role more important than only the economic one. News publishers are regarded as vital to democracy since they fundamentally contribute to the public debate and good functioning of a civic society.[22] However, they are currently suffering under fast technological change to such an extent that policymakers are concerned with their sustainability. Thus, the EC committed to the point of view that copyright might serve as an effective tool to foster the sustainability, availability and plurality of voices and improve publishers' economic situation in the emerging digital market.[23]

In the recitals 54 to 57 of the CDSM Directive, the EC refers to two goals: securing a sustainable press and making it easier for publishers to conclude licences and enforce their rights. It states that: "*organisational and financial contribution of publishers in producing press publications needs to be recognised and further encouraged to ensure the sustainability of the publishing industry and thereby foster the availability of reliable information*."[24]

Due to hardship of publishers to maintain control over the content they create online intermediary services such as news aggregators or URL extractors have been indicated as being partly responsible for news publishers' decline. The research executed by the EC found that 57 % percent of EU online users read press news through online intermediaries (i.e., social media, news aggregators, search engines) and that 47 % of them do not click through links to open the source article on newspaper's webpage. For this reason, advertising revenues from the newspaper website are eroding, leaving press publishers in economic loss. Therefore, the public intervention against the market failure that is embodied in the CDSM Directive was directed towards the intermediaries.

[21] ibid 156.
[22] Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market Recital 54.
[23] Lionel Bently and others (n 10) 11–12.
[24] Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market Recital 55.

For that reason, the EC proposed a provision that granted the publishers with the reproduction right and the right of communication to the public as defined by the InfoSoc Directive in order to improve their position at the expense of information society service providers.

Conversely, the EC did consider the option of reaching the objectives by introducing a related right covering all publishers in all sectors (e. g. books, scientific works etc.) but this solution was discarded as it would not be a proportionate way to address the problems faced by the publishing industry only. This option was discarded because the issue described above does not affect other publishers to the same extent due to different nature of products and their business models. Book publishers, for instance, generally do not make their content largely accessible online for free so news aggregators and social media do not play a role as distributors of their content. 25

1.5. The ancillary right defined by the Article 15

The provision of Article 15 is designed to allow the press publishers to receive a share of earnings received by information aggregators and social media for the content produced by the press publishers. Article 15 stipulates that publishers of press publications shall be provided with the reproduction right and the right of communication to the public (as defined by the Art. 2 and 3(2) of the InfoSoc Directive) for the online use of their press publications by information society service providers.[26] Once implemented into national legislation, publishers have the exclusive right of reproduction, communication to the public and making available to the public regarding the online use of press publication. Thus, services such as news aggregators must obtain licences prior to using the content.

The protection applies on any journalistic publications, published in any media in the context of an economic activity. Conversely, the protection does not cover websites (e.g., blogs) that make available information as part of an activity which is not carried out under the initiative, editorial responsibility, and control of a news publisher.

The wording of the Article 15 has undergone significant changes during the legislative procedure. Originally, as drafted in the Article 11 of the proposed directive, its scope

[25] European Commission (n 18) 163.
[26] Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market Article 15(1).

would have been much broader. Importantly, it was intended to apply not only to online but to all digital usage, i. e. any electronic technology that generates, stores, and processes data, both offline and online. However, it is deemed to have been only a mistake caused by a confusion of terms.

Additionally, the final text of the CDSM Directive provided certain exclusions. The protection under the final wording does not apply *"in respect of the use of individual words or very short extracts of a press publication*". However, neither the CDSM Directive, nor any other related piece of legislation defines what "*very short*" is. 27

The final text also excluded protection over private and non-commercial uses by individual users and over hyperlinking. This exclusion was apparently intended to apply to "pure" hyperlinks only, any snippets of the source text are probably not excluded unless falling within the definition of a "*very short extract*". 28

The protection was originally meant to last for twenty years but was shortened to two years in course of the legislative procedure with reference to fast development in the field and the day-to-day nature of protected content.[29]

Importantly, it does not affect in any terms the existing copyright protection in the relevant press publication.[30] In other words, the CDSM Directive only adds another right to the existing set of copyright protection, thus this type of content will possess a dual protection.

Only EU-based press publishers benefit from the new right. Publishers established outside the EU are not entitled to protection under this Article (including the United Kingdom which did not join transposition of the CDSM Directive before leaving the Union).[31]

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[27] ibid Article 15(1) subparagraph 4.
[28] Proposal for a Directive on copyright in the Digital Single Market COM/2016/0593 2016 Article 11.
[29] ibid Article 11(4); Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market Article 15(4) subparagraph 3,4.
[30] Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market Article 1(2).
[31] Eleonora Rosati, 'The EU Copyright Directive: The Press Publishers' Right ' (9 April 2019) <https://mediawrites.law/the-eu-dsm-directive-the-press-publishers-right/> accessed 13 March 2021; 'Copyright and Brexit' <https://afterbrexit.tech/digital-single-market/copyright-directive/> accessed 13 March 2021.

The definition of press publication encompasses not only literary works, but videos and pictures as well. By way of contrast, it does not include scientific journals and blogs, nor does it extend to the sole facts covered by the relevant press publication.[32]

Recipients of this right will be able to license the online use of their press publications to information society service providers, which implies that the press publishers' right is a business-to-business right. Therefore, it is not enforceable against individual users in connection to non-commercial uses of press publications such as users' content sharing on the social media.

1.6. Positions of stakeholders

Unsurprisingly, the information society service providers opposed enactment of the new right as it directly affects the way how they render services such as Google News, Bing News but also social media like Facebook or Twitter and various URL extractors. After the first transposition of the CDSM Directive in France, Alphabet Inc. announced that it would adjust its services in order to avoid paying any remuneration to publishers.

The reform was primarily advocated by big news outlets as the publishers were concerned for being disintermediated and commoditized by becoming mere subsidiaries for a news aggregator which distributes the final product. Another argument concerned decreasing ability to differentiate their product that consequently causes loss of incentives to maintain their reputation for quality on one hand and decreasing willingness of consumers to pay subscription for their product on the other hand.

However, small and medium enterprises expressed their concern over possible adversarial effects of the regulation. According to data gathered in Spain, the publishers' neighbouring right has a negative effect on small business in the field (see 1.7.2). In Spain, Google News, the biggest news aggregators have discontinued its services altogether. That caused a decline in daily visits to news outlets by 14% but mostly to small publishers, while large publishers did not see significant changes in their overall traffic as users' traffic was directed straight to their websites (to put it simply, users typed in command line the website they knew by heart).[33]

[32] Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market Recital 56.
[33] Athey, Mobius and Pal (n 14) 3.

Thus, smaller publishers rather opposed the proposal as they worried that adverse effects would go to their detriment. In various joint letters, small and medium publishers expressed concerns that the neighbouring right will make it harder for small and medium sized publishers to reach their audience and will raise the barrier of entry, and that it will dismantle digital business models and stifle media pluralism.[34] Consequently, it will become harder to be discovered and accessed by readers online.[35] Instead, small publishers called for granting effective tools to enforce their existing rights rather than adding new.

The authors generally believed that the publishing industry's bargaining position with online service providers should improve, but expressed some concern about the potential negative impact of the new law on the ability of publishers to enforce their rights.

Consumer organisations have expressed reservations about the possible introduction of a related right and concerns that it could make it more difficult for consumers to access existing print content online.

Various groups of scholars in the intellectual property field warned against unintended impacts that the provision might have in the future and questioned whether the new rights are able to improve publishers' situation at all. The scholars mainly criticised poor quality of the draft and apparent lack of in-depth analysis both of the causes of publishers' decline, and of possible negative effects of the intervention.

Some pointed out in their letters that the EC overlooked many important aspects of the introduced measures. The documentation enclosed to the draft did not consider the necessity for a new right. Neither did it explain why the current scope of protection was not sufficient, nor did it explain how precisely this intervention will be helpful. The EC presented the right as a simplifying measure but did not explain how it was supposed to simplify the copyright law framework. On the other hand, the new right brings a certain

[34] The European Innovation Media Publishers, 'Open Letter on the Introduction of a New Neighboring Right under Art. 11 of the Copyright Directive' <http://mediapublishers.eu/2017/09/25/open-letter-to-members-of-the-european-parliament-and-the-council-of-the-european-union-on-the-introduction-of-a-new-neighboring-right-under-art-11-of-the-copyright-directive/> accessed 16 February 2021.

[35] Alliance of independent publishers, 'Statement on the Digital Single Market Strategy' (2015) <https://clabe.org/pdf/151204_Statement_on_Digital_Single_Market_FINAL.pdf> accessed 16 February 2021.

amount of administrative burden for publishers and related costs. Unfortunately, the burdens fall also on rightholders who have no interest in the right but fall within the definition of a press publisher. Additionally, the original definitions in the draft indicated an unthorough legislator's research – the definition of 'press publication' included very wide range of publications most likely unintentionally due to imprecise consideration of its effects.

Furthermore, it is reportedly not certain whether the new right will have any positive impact on publishers' ability to recoup investments. The publishers already possess sufficient scope of rights stemming from contracts and assignments with journalists or *sui generis* database right (see 1.10.2). A direct benefit in creating a new, additional right is unclear. The new right does not introduce any ground shaking change that would change the market significantly.[36]

Finally, similar initiatives in Spain and Germany (see 1.7) have demonstrably proven ineffective but the legislator did not thoroughly examine and explain why promoting of the right EU-wide should be helpful. The documentation to the CDSM Directive only mentions that introducing the right for the whole EU will give the publishers greater bargaining power. However, the reasons why German and Spanish attempts failed were probably different.[37]

In conclusion, this legislative action is regarded by some as a non-conceptual step that penetrates and shatters the copyright framework with an unclear vision of possible benefit that might eventually stem from it.

1.7. German and Spanish initiatives

Before adoption of the EU-wide CDSM Directive, two Member States made attempts to introduce similar regulation into their national legal frameworks. Their examples may show what kind of effect the CDSM Directive could possibly have.

[36] Marco Ricolfi, Raquel Xalabarder and Mireille van Eechoud, 'Academics against Press Publishers' Right: 169 European Academics Warn against It' 15.

[37] Lionel Bently and others, 'Call for Views: Modernising the European Copyright Framework' (2016); Ricolfi, Xalabarder and Eechoud (n 36).

1.7.1. Germany

Germany was the first European country to move on with the debate and pass the ancillary right to support press. The law came into force on August 1, 2013 and allowed newspapers to provide the news aggregators with a free license (Sec 87h).

The situation in Germany developed as follows. Main publishers jointly mandated their rights to a collecting society VG Media and set a fee of 6% of aggregators' gross revenues. However, Google, as it announced in advance, became 'opt-in' on the very first day when the new provisions of the Copyright Act entered into force. That means that only the websites that requested to be included in Google News would be indexed. That removed Google's obligation to license and pay royalties to rightholders.[38]

Most publishers granted their permission to Google for free as traffic on their websites went down. Shortly after, VG Media members also licensed Google for free. Nonetheless, VG Media and the press publishers sued Google for anti-competitive conduct and for abuse of its dominant position in the market.

Both the German Competition Authority and the Regional Court in Berlin dismissed their claim. The German Competition Authority refused to open proceedings against Google and based its decision on the grounds that Google's opt-in policy towards publishers was justifiable as it effectively excluded its liability, due to legal uncertainty regarding the linking activity. Also, the deal offered by Google was beneficial for both parties as it increased access to newspapers websites. Finally, it stated that the payment for a licence would shatter this balance.[39] Following the CJEU's preliminary judgment[40], the Regional Court in Berlin decided that the national neighbouring right in favour of press publishers was unenforceable for formal reasons.[41] All in all, adoption of the ancillary right has had a minimum effect on functioning of the market in the end.

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[38] Eleonora Rosati, 'Neighbouring Rights for Publishers: Are National and (Possible) EU Initiatives Lawful?' 573.

[39] Lionel Bently and others (n 10) 33; 'Bundeskartellamt - Homepage - Bundeskartellamt Takes Decision in Ancillary Copyright Dispute' <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/09_09_2015_VG_Media_Google.html%3Fnn%3D3591568> accessed 18 February 2021.

[40] *C-299/17 VG Media Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen mbH v Google LLC*.

[41] 'VG Media/Google: German Press Publishers' Right Declared Unenforceable by the CJEU for Formal Reasons – but It Will Soon Be Re-Born - Kluwer Copyright Blog'

1.7.2. Spain

Spain enacted similar 'link tax' shortly after Germany. In October 2014, the Spanish Congress approved a reform of Intellectual Property Law introducing a copyright fee for showing short excerpts of content created by news publishers. The entitlement to remuneration does not come from a new right, but from the reformed wording of 'quotation exception' that introduced a right to 'equitable remuneration'. Unlike Germany, Spain did not provide in its national law for a free licence. The right cannot be waived. The immediate impact was that most news aggregators discontinued their services, including Google News[42].

Various studies measured the impact of the reform and attempted to evaluate it by comparing internet traffic data before and after the 'link tax' came into force. One study showed that aggregators not only had a negative effect on the industry by marginalising the publishers but also deprived them of profits. On the contrary, they affected the Spanish online news market in a certain positive way as well. The data has shown that aggregators have been directing traffic to smaller news outlets and simultaneously have been improving the ability of consumers to access higher diversity of resources. The aggregators also influenced the kind of articles the consumers read. Post-shutdown readers read less breaking news and also news and topics that are not covered by the biggest outlets.

Most importantly, the shutdown caused a decrease of 20% in overall news consumption among Google News users in the period after the search engine made the decision to discontinue its website. The study found that this decline was concentrated around small businesses while large publishers did not experience significant changes in overall traffic. as a result of the shutdown.[43]

<http://copyrightblog.kluweriplaw.com/2019/11/11/vg-media-google-german-press-publishers-right-declared-unenforceable-by-the-cjeu-for-formal-reasons-but-it-will-soon-be-re-born/> accessed 18 February 2021.

[42] 'Google Europe Blog: An Update on Google News in Spain' <https://europe.googleblog.com/2014/12/an-update-on-google-news-in-spain.html> accessed 18 February 2021.

[43] Athey, Mobius and Pal (n 14) 3, 15, 16, 36.

1.7.3. Lawfulness of national initiatives

An analysis executed by Prof Rosati draws attention to legal issues that the national initiatives might struggle with if challenged before the CJEU. [44] However, no stakeholder made effort to bring the question before courts, so the following remains only a pure academic debate.

Both national regulations are potentially in breach of the relevant *acquis* and its interpretation by the European courts. Notably with the InfoSoc Directive and the Rental and Lending Rights Directive and with CJEU cases *Reprobel*[45] and *Svensson*[46]. From a combined reading of these resources, it follows that publishers are not entitled to obtain any rights under the InfoSoc Directive.

The aim of the InfoSoc Directive was close approximation of national laws to avoid legal uncertainties and re-fragmentation of the internal market. Thus, the CJEU case law made it apparent that (amongst the other articles) the Art. 3(1) providing the *"authors with the exclusive right to authorise or prohibit any communication to the public of their works"* of the InfoSoc Directive should be interpreted as leaving only a very limited space for independent national initiatives. In *Svensson,* the CJEU concluded that Recitals 1, 6 and 7 of the InfoSoc Directive represent the will of the EU to remove legislative differences and legal uncertainty in the copyright protection.[47]

Therefore, granting wider protection to copyright holders "*by laying down that the concept of communication to the public also includes activities other than those referred to in Article 3(1) would have the effect of creating legislative differences and thus, for third parties, legal uncertainty."*[48]

A breach of the *acquis* could also potentially be seen in the creation of a new category of rightholders who are not included in the InfoSoc Directive, i.e., news publishers, as follows from *Reprobel.*[49]

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[44] Rosati, 'Neighbouring Rights for Publishers: Are National and (Possible) EU Initiatives Lawful?' (n 38).
[45] *C-572/13, Hewlett-Packard Belgium SPRL v Reprobel SCRL, EU:C:2015:750*.
[46] *C-466/12, Nils Svensson and Others v Retriever Sverige AB, EU:C:2014:76*.
[47] Rosati, 'Neighbouring Rights for Publishers: Are National and (Possible) EU Initiatives Lawful?' (n 38) 577.
[48] *C-466/12, Nils Svensson and Others v. Retriever Sverige AB, EU:C:2014:76* (n 46).
[49] *C-572/13, Hewlett-Packard Belgium SPRL v. Reprobel SCRL, EU:C:2015:750* (n 45).

1.8. Unanswered questions about Article 15

1.8.1. Is the right waivable?

The Article 15 of CDSM Directive directly builds upon the German and Spanish examples. Its Impact Assessment admits that these national initiatives were not successful because they caused fragmentation in the single market and did not develop sufficient leverage against the internet service providers. It says that: *"This incomplete protection in the EU causes legal uncertainty, notably as regards exploitation of press publications through B2B licences and makes enforcement complex and sometimes inefficient. (...) The gap in the current EU rules further weakens the bargaining power of publishers in relation to large online service providers and contributes to aggravate the problems faced by press publishers as regards the online exploitation of, and enforcement of rights in, their content."*[50]

Despite these words that prove that the EU legislator realises the importance of scaling the right up to the EU-wide level, the CDSM Directive does not tackle the issue of waivability of the publishers' right under Art. 15 at all. It is left to the member states whether they make the right waivable or not. Leaving the issue up to the Member States, the EU contradicts the sense of introducing the right to the whole DSM.

That raises issues regarding enforceability of the new right. The Member States might opt for different ways to transpose the Art. 15 into their national legal frameworks. Either intentional lobbying or simple different wording in each language might lead to diverging meanings of the right. Ultimately, the consequence might be that the right is waivable in certain Member States whereas unwaivable in others.[51]

It will remain to the CJEU to unify the European practice which will take at least a few years for the transposition to be challenged before it. Its previous decisions might give us a hint how it could decide.

[50] European Commission (n 18) 159–160.

[51] Eleonora Rosati, 'DSM Directive Series #2: Is the Press Publishers' Right Waivable? - The IPKat' <https://ipkitten.blogspot.com/2019/04/dsm-directive-series-2-is-press.html> accessed 21 February 2021.

Both in *Svensson*[52] and in *C More*[53] the CJEU explicitly excluded the possibility of Member States to alter the scope of rights harmonized by the Art. 3 of the InfoSoc Directive. However, if the CDSM Directive lacks harmonisation regarding waivability of the publishers' right, it might be difficult for the CJEU to demand it from those Member States that make the right waivable.

1.8.2. What is a "very short extract"?

Until recently, before the beginning of the digital era, the reproduction of very short excerpts of a literary work was generally allowed because it was not considered capable of dissuading potential readers from reading the complete text. On the contrary, it was rather regarded as a useful bait that attracted readers. Perhaps, that was a reason why press publishers started to share their content online for free in the first place – to attract potential readers to buy the printed version.

As the way how the consumers use the internet has changed, the short extracts have become a commodity themselves. Ghidini and Banterle point out that we found ourselves in sort of a fast-food information environment. As mentioned in Chapter 1.4, 47 % of users read only the headlines on the intermediary's website without clicking through to the link to read the full article (and as a result of that they do not increase traffic on publisher's website and do not generate income from advertisements). Nowadays, short excerpts of the source text represent a sufficient, self-standing product and therefore a valuable economic asset as well.[54]

The exclusion of minimal uses is apparently only a traditional feature that has been part of the copyright framework for a long time but does not constitute an essential backbone of it.[55] The CDSM Directive is changing this traditional feature by allowing sharing of only *"very short extracts of a press publication"*.[56] Recital 58 explains that: "*the use of*

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[52] *C-466/12, Nils Svensson and Others v. Retriever Sverige AB, EU:C:2014:76* (n 46).
[53] *C-279/13, C More Entertainment AB v Linus Sandberg, ECLI:EU:C:2015:199*.
[54] Gustavo Ghidini and Francesco Banterle, 'Copyright, News, and "Information Products" under the New DSM Copyright Directive' 4 <https://www.researchgate.net/profile/Francesco_Banterle2/publication/342707640_Copyright_news_and_information_products_under_the_new_DSM_Copyright_Directive/links/5f02c63fa6fdcc4ca44e9586/Copyright-news-and-information-products-under-the-new-DSM-Copyright-Directive.pdf> accessed 22 February 2021.
[55] Potential breach of Article 10 of the Berne Convention is discussed in Chapter 1.9
[56] Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market Article 15 (1) in fine.

individual words or very short extracts of press publications by information society service providers may not undermine the investments made by publishers of press publications in the production of content. Therefore, it is appropriate to provide that the use of individual words or very short extracts of press publications should not fall within the scope of the rights provided for in this Directive."[57]

However, neither the CDSM Directive, nor any other piece of legislation defines how long a "*very short extract"* is. Its interpretation remains unclear, and it is up to Member States to define it in their national laws which will certainly cause further fragmentation in the single market. It will be eventually up to the CJEU to harmonise the issue.

The interpretation will be rather restrictive taking into account wording of Recital 58 which says that: "*the exclusion of very short extracts be interpreted in such a way as not to affect the effectiveness of the rights provided for in this Directive."* This guideline is still somewhat unambiguous, and it is not of a big help to practising lawyers who face the problem of implementing the rules. It seems to suggest, that only such extracts that evidently lack an autonomous value (carrying the information) will be free to share.[58] That subsequently raises a question why they should be allowed at all.[59]

The simplest way of dealing with this intention of the CDSM Directive is to set an exact number of words or symbols that are considered to be "*very short".* Yet, such a rigid, numerical criterion does not reflect the value of information encompassed in those words or symbols. Ideally, the assessment of informative value of a snippet should be ideally based on a substantial recognition of its content. The costs of enforcement would nonetheless be disproportionate.

1.8.3. Does the new right replace the former protection?

The content of the Article 15 of the CDSM Directive does not adjust or amend the existing rights existing under the European copyright framework. It does not repeal existing protection while replacing it with a new system. The publishers' ancillary right is to be added to the existing range of rights that the publishers and authors benefit from. This

[57] ibid Recital 58.
[58] Gustavo Ghidini and Francesco Banterle (n 54) 6, 7.
[59] I am partially answering this question in Chapter 1.9.2.

sole fact has been widely criticised for being an unsystematic intervention in the copyright system.

Adding an unsystematic right into the system might have several undesired outcomes. Firstly, such multi-layering of rights might endanger the consistency of the EU copyright *acquis*. The framework already is fragmented and needs a comprehensive, holistic reform, not another and even deeper fragmentation.

Secondly, such favouritism of one class of stakeholders, i.e. news publishers, in this case, might have a snowball effect on other groups who eventually might feel to be disadvantaged in the market. Such groups might now feel encouraged to demand additional rights for themselves as long as they see that being granted new rights is feasible. As a result, any investment in content might be used to justify the calls for protection in the future.[60]

It might be publishers who were excluded from this reform, i.e., publishers of scientific, technical or medical journals. The first group mentioned was expressly excluded from the CDSM Directive protection scope by argument that: "*Scientific publishers generate revenues either through subscription licences with universities and similar establishments or, when they make available their content online under the open access model, by charging authors for the publication."*[61] However, the scientific publishers might feel discriminated by this attitude and they also might start calling for additional protection and fair remuneration and so can other excluded groups..[62] In the end, the publishers' right was introduced as a result of publishers' calls for the same level of special protection that other creators have already been granted with, e.g., broadcasters, music and film producers.[63] This right is an outcome of the snowball effect itself.

Thirdly, the overlap of rights will unavoidably cause enforcement issues. The rights can produce different results when applied to a single link. The rightholders who decide to enforce their rights over a press publication have several options of enforcement to choose from. They can either base their claim on the right of communication to the public,

[60] Ula Furgal, 'Ancillary Right for Press Publishers: An Alternative Answer to the Linking Conundrum?' (2018) 13 Journal of Intellectual Property Law and Practice 700, 709.
[61] European Commission (n 18) 158.
[62] STM Association, 'STM Response to Directive on Copyright in the Digital Single Market' (2016).
[63] Furgal (n 60) 709.

provided they meet a number of additional complementary criteria, or they can rely on the new ancillary right that has no threshold of protection. Most likely, the rightholders will select the second option because it is easier to apply and the result provides greater certainty.[64] Naturally, this certainly must have been the intention of the EU legislator as he witnessed unenforceability of the previously existing rights. Obviously, the question why these malfunctioning, unenforceable rights were left intact, only supplemented by the new unsystematic right, arises.

1.8.4. What is the personal and material scope of the Article 15?

The CDSM Directive operates with very broad concepts of a press publisher and a press publication. Press publication, as defined by the of the CDSM Directive means "*a collection composed mainly of literary works of a journalistic nature, but which can also include other works or other subject matter"* which cumulatively (1) constitutes an individual item within a periodical under a single title; (2) provides general public with information; (3) is publisher under initiative, editorial responsibility and control of a service provider.[65] A press publisher was not defined neither by the CDSM Directive nor by other piece of legislation but it unfolds from the definition of a press publication.

Taken from the other end, it is very difficult to define who or what a press publisher is. As Furgal lists in her work, the EC received a number of answers to the public consultation that have shown that the term 'press publisher' is not as intuitively understandable as it might seem.[66] Thus, if the right that is encompassed in the Article 15 of the CDSM Directive is being referred to as a 'press publisher right', it is not a clear description and creates an impression that the right is directed to one, easily delineated group of beneficiaries.

This impression is especially supported by the underlying argument for adoption of that right, i.e., the need to foster the financial position of press publishers who have moved from print to the digital environment in the past decades.

Even though the term 'press publisher' occupies central position in the debate, the press segment is not the only beneficiary of the right. The rightholder of the ancillary right is

[64] ibid 9–11.
[65] Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market Article 2(4).
[66] Furgal (n 60) 9.

anyone who publishes relevant content that is covered by the aforementioned definition of a press publication.

When one thinks the definition of a press publication through, he comes to a wide variety of content types that fulfil the criteria. Thus, the concept of publishing as outlined by the CDSM Directive does not reflect the current online reality.

Once again, a press publication according to the CDSM Directive is a periodically issued item that includes information for general public prepared under initiative and control of a service provider. This definition does aim to cover traditional newsrooms but encompasses other beneficiaries as well.

Even though the definition does omit the element of entertainment which excludes a wide range of content (but excludes entertaining content on the news publishers' websites from protection at the same time), it remains broad since neither publisher nor news have a precisely defined meaning. The only requirement remains the informative character.

1.8.5. Will the effect of the reform be certainly positive?

The overall positive impact of the new right is at least questionable. Should such market intervention take place at all? In the end, it was the press publishers who built their business models on disclosing their content on the internet to be viewed for free. In reaction to their strategy, intermediaries occurred in the market and contributed by developing necessary online infrastructure which connected the publishers with their consumers. Thus, the intervention that was passed by the EU in the CDSM Directive can be regarded as unwanted interference of legislator into affairs of the free market. I personally lean towards this point of view.

The legislator identified declining revenues of press publishers as a problem that needs to be solved in the public interest, denoted the online intermediaries as a cause of the problem and determined that for the future the news publishers should make profit at their expense. However, the legislator did not tackle with the question whether the online intermediaries are in fact the reason of the publishers' declining revenues.

Studies show that it is not clear if intermediaries steal traffic from news publishers (i.e., substitute them) or if they increase traffic on their websites (i.e., complement). The example of the Spanish intervention has shown that if the news aggregators discontinued

their services, there was a sharp drop in overall online news consumption[67] (see Chapter 1.7.2) which proves at least a partial complementary role of the aggregators.

Since their role in the market is ambivalent, it seems unfair to make them bear the costs of the declining press sector. Conversely, press should be motivated to adapt to the technological development and search for alternative sources of income instead of obtaining unfair, unsystematic support from the public bodies to the detriment of other economic subjects. Importantly, motivating the publishers to find new business models and become profitable again on their own is a considerably more sustainable solution (see Chapter 1.10 for possible alternatives).

For those reasons, the rules laid down cannot significantly improve position of the press in a long-term. Moreover, the ancillary right is tightly connected to the existence of news aggregators, and especially the biggest one – Google News. Not in vain was the German law nicknamed "*lex Google"* back in the times when it was passed.[68] Any unpredicted future development might potentially bypass the rules that were set out to solve the current situation. The law should regulate the situations in a broader, more general way.

Conversely, the existence of the publishers' right might cause detrimental adversarial effects to the press publishing sector. If some news aggregators eventually decide to end their activities, it will have a negative effect on small publishers who rely on intermediaries to bring traffic to their websites. Importantly, the small publishers are often newly emerged subjects that found innovative approach to their business and adapted to the digital era, whereas big publishers are rather the traditional companies that struggle to change the way of doing business.[69] Ironically, the EU might unintentionally cause inhibition of innovation in the field that it wants to support.

In addition to that, discouragement of investments will certainly occur on the other side of the barricade as well. Sharing news articles has never been an important or direct source of income for the intermediaries.[70] News aggregators usually generate profit only

[67] Athey, Mobius and Pal (n 14); Calzada and Gil (n 15).
[68] Andrea Montanari, '«Lex Google»: Copyright Law and Internet Providers, Future Enemies or Allies?' [2013] EUROPEAN INTELLECTUAL PROPERTY REVIEW 433 <https://pure.unipa.it/en/publications/lex-google-copyright-law-and-internet-providers-future-enemies-or-3> accessed 22 February 2021.
[69] Athey, Mobius and Pal (n 14) 27.
[70] 'Google Europe Blog: An Update on Google News in Spain' (n 42).

indirectly as being part of a wide range of products. Their operators will not have much motivation to invest in further development and advancement in this field of their business and new services will face bigger difficulties upon entry into the market.

1.9. Compatibility with CJEU case law and with international treaties

1.9.1. Berne Convention

Besides other issues that the CDSM Directive is coping, a question was raised if the publishers' ancillary right is compatible with international obligations that the EU and its Member States are bound with. Namely with the Article 10 of the Berne Convention for the Protection of Literary and Artistic Works.

The European Union itself is not a signatory of the Berne Convention. However, it is a direct party to the WIPO Copyright Treaty which requires in its Article 1(4) compliance with the Articles 1 - 21 and Appendix of the Berne Convention. Therefore, these articles are binding even for the EU as a whole body, not only for its Member States. The WIPO Copyright Treaty was implemented into the European *acquis* by the InfoSoc Directive.

The Article 10(1) of the Berne Convention explicitly stipulates that making quotations from newspaper articles and periodicals that have already been lawfully made available to the public shall be permissible provided that their extent does not exceed the justified purpose of their use.

WIPO itself characterized this article as permitting use "*without the authorization of the owner of copyright, and without payment of compensation"*[71] It is important to point out that especially news publishers are heavy beneficiaries of this exception since they often use excerpts of texts in their articles created by other authors.

Moreover, Article 2(8) of the Berne Convention says that the protection under it *"shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information."* In general, works that consist of pure facts have always been treated with caution considering that they play rather informative than creative role.

[71] 'Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)' <https://www.wipo.int/treaties/en/ip/berne/summary_berne.html> accessed 24 February 2021.

The provision of Article 2(8) of the Berne Convention is a mandatory provision followed by all its signatories. Thus, the ancillary publishers' right goes against the basic principles of copyright. The system of copyright lies open the idea of idea-expression dichotomy, in context of press publication better expressed as fact-expression dichotomy. In other words, copyright protects the expression of ideas, not the ideas and facts themselves.[72]

1.9.2. CJEU case law

The CDSM Directive, as it was proposed, was challenged for compliance with earlier decisions made by the CJEU. Even though the draft was slightly adjusted according to this criticism, some issues prevail.

In *Svensson,* the CJEU clarified that linking to freely available content online does not constitute an 'act of communication to the public' and therefore does not fall under copyright protection. Right of communication to the public in the Article 3(1) of the InfoSoc Directive (mirrors Article 8 WCT) covers the authorisation and prohibition of any "*communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them."*

In the case of *Svensson,* the CJEU gave a preliminary ruling on question whether: "*If anyone other than the holder of copyright in a certain work supplies a clickable link to the work on his website, does that constitute communication to the public"*[73] within the meaning of the Article 3(1) of the InfoSoc Directive. If the answer was 'yes', such communication may not be made without authorisation of the copyright holder.

The court interpreted that the fulfilment of the term 'communication to the public' requires both 'an act of communication and a 'public'. In relation to hyperlinks, the court ruled that the provision of hyperlinks to copyright protected works does constitute such act of communication because the links must be regarded as making the works accessible and importantly, that the website was aimed at an indeterminate large number of people that satisfied the requirement of a 'public'. The court noted that such a communication

[72] Furgal (n 60) 706.
[73] *C-466/12, Nils Svensson and Others v. Retriever Sverige AB, EU:C:2014:76* (n 46).

must be *"directed at a 'new public', that is to say, at a public not taken into account by the copyright holders when they authorised the initial communication to the public."*[74]

Thus, if the communication targets all users of the internet which any website that offers its content for free does, the links that direct traffic to it consequently do not make articles available to a new public and therefore there is no requirement to obtain the consent of the rightholder.

Hyperlinking itself was allowed in the final text of the CDSM Directive. A hyperlink can be accompanied with a "*very short extract of text"* (see Chapter 1.8.2) which will probably be required not to include a substantial piece of information from the article. The interpretation is unclear, and the issue is yet to be addressed by the CJEU. However, readers need to know where a link will take them before they clicked on it. That has always been the principle of a snippet. Any limitation on snippets is therefore a limitation on linking.

For further assessment of compliance of the previous national initiatives with the European *acquis*, see Chapter 1.7.3.

1.10. Alternative solutions

This work has so far presented a rather critical view on the implication of the publishers' ancillary right enacted by the CDSM Directive. This chapter suggests several alternative approaches that may have been taken into account by the EC at the time of drafting the Proposal of the Directive.

Basically, the reason why the press publishers called for a reform was not a lack of rights but rather legal instruments for their enforcement. If that is a factual problem, it could be solved easily and more effectively by granting publishers with such instruments without adding a new right.

The essence of the enforcement problem was that if an infringer scraped and copied a whole publishers' website with thousands of articles, the publisher would have to prove its legal entitlement in every single item for which he was seeking protection, i.e., articles, photos, graphics. Thus, the whole enforcement process became immensely complex and

[74] ibid.

expensive. However, this problem is not specific only for publishers but affects other rightholders as well, namely collecting societies that manage and enforce the rights of their members.

1.10.1. Presumption of ownership

With this issue in mind, the creation of a presumption of ownership for the press publishers might be considered. Such instrument facilitates the burden of prove by presuming that the publisher is entitled to enforce rights in every copyright protected work in his possession.[75] Hence, the publisher does not have to prove his entitlement but contrarily anyone who alleges that the publisher is not entitled must prove his statement. The legal effect is that the general rule concerning the onus of proof is reversed.[76]

Similar mechanism is already included in the Enforcement Directive in its Article 5 to facilitate the burden of proof for initial rights holders such as authors. It reads:

"For the purposes of applying the measures, procedures and remedies provided for in this Directive,

a) *for the author of a literary or artistic work, in the absence of proof to the contrary, to be regarded as such, and consequently to be entitled to institute infringement proceedings, it shall be sufficient for his/her name to appear on the work in the usual manner;*

b) *the provision under (a) shall apply mutatis mutandis to the holders of rights related to copyright with regard to their protected subject matter."*[77]

The Recital 19 of the Enforcement Directive explained the rule saying:

"Since copyright exists from the creation of a work and does not require formal registration, it is appropriate to adopt the rule laid down in Article 15 of the Berne Convention, which establishes the presumption whereby the author of a literary or artistic work is regarded as such if his/her name appears on the work. A similar presumption

[75] Bently and others (n 37) 2.
[76] Till Kreutzer, 'How to Solve the Only Specific Problem of Press Publishers with Copyright without an Ancillary Copyright | IGEL' (23 November 2016) <https://ancillarycopyright.eu/news/2016-11-23/how-solve-only-specific-problem-press-publishers-copyright-without-ancillary-copyright> accessed 1 March 2021.
[77] Directive 2004/48/EC on the enforcement of intellectual property rights 2004 Article 5.

should be applied to the owners of related rights since it is often the holder of a related right, such as a phonogram producer, who will seek to defend rights and engage in fighting acts of piracy."[78]

Disregarding the enacted CDSM Directive, the press publishers would not have their own neighbouring right and this Article would not apply to them. However, only a tiny modification was needed to achieve the same effect in the cards of the press publishers. The publishers would be granted with the presumption of ownership if the Enforcement Directive were amended as follows:

b) "*the provision under (a) shall apply mutatis mutandis to the holders of rights related to copyright with regard to their protected subject matter and press publishers with regard to their licensed works or other subject matter."*[79]

Creating the presumption of ownership seems to be a simple but effective solution to the problem but the EC did not consider it as an option in the Impact Assessment of the Proposal at all.[80]

1.10.2. Existence of database right

Furthermore, it seems that the EC overlooked the existence of the database right that the press publishers directly benefit from. It is essential to point out that the new ancillary right does not grant protection to any new subject. All that the ancillary right encompasses was already protected under existing legal framework by copyright and *sui generis* database right.

The definition of a database in the EU law is broad enough to cover all types of newspapers and magazines either print or online. Importantly, not only it gives the publisher the right to prevent copying a whole database, but also to prevent systematic extraction of its parts, even if insubstantial. Finally, the publishers' ancillary is not subject to a requirement of investment while the existing protection under the database right is. Such requirement seems to be reasonable as it effectively distinguishes the rightful beneficiaries of protection.

[78] ibid Recital 19.
[79] Till Kreutzer (n 76).
[80] European Commission (n 18) 161–173.

1.10.3. No intervention

Finally, an option would be leaving the problem to the market development *à la laissez faire* approach. This option would mean that the online use of press publications would remain governed by the rules that apply to the rights transferred to press publishers by the authors of their articles.

Even though this option might at the first sight appear as leaving free, independent press to diminution, it is not as simple. The switch from print to online is very challenging for the traditional press publishers who struggle to find new, effective and profitable business models. However, there are newly emerged publishers who developed their business models purely in the online environment and found ways how to make profit (as Athey and Mobius point out in their study; further elaborated in Chapters 1.7.2 and 1.8.5).[81]

The European Union is built upon the idea of free market and the freedom to conduct a business.[82] Thus, any market intervention should be weighted carefully so that it does not have negative adversarial effects, such as inhibition of innovations or increase of costs of entry into the industry.

The EC did consider the 'no intervention' option in the legislative procedure but it was rejected for several reasons. According to its arguments, a market failure consisted in the differential bargaining power of various stakeholders which complicated reliance on natural market development. Thus, stakeholders' efforts to reach voluntary agreements to collaborate and find mutually profitable solutions of online dissemination of content were not regarded as an option.

Moreover, if the EU remained passive, more Member States would eventually decide to introduce their own national initiatives to improve the positions of press publishers which would likely be ineffective and would only increase fragmentation in the single market.[83]

[81] Athey, Mobius and Pal (n 14).
[82] Charter of Fundamental Rights and Freedoms of the European Union - OJ C 326 2012 Article 16.
[83] European Commission (n 18) 161.

ARTICLE 17 – USE OF PROTECTED CONTENT BY ONLINE CONTENT-SHARING SERVICE PROVIDERS

2.1. Legislator's motivation to interfere

The development in the online environment has caused a rapid and growing shift from ownership to access-based model of using the copyright-protected content over the past two decades. Nowadays, the content is no longer delivered directly to end users by content creator.[84] Instead, a multi-step process with several parties involved has developed. At the end of this structure, the end-user only gets temporary access to online content while copyright holders do not always manage to keep control over the way their creations are distributed over the web.

Between the user and the rightholder stands an intermediary (i.e., an "online content-sharing service provider", OCSSP) which not only gathers the copyright -protected works but also provides functionalities such as the ability to share content, categorize it or further recommend related works.[85] Examples of such intermediaries are platforms such as YouTube, Twitter or Facebook.

Importantly, the copyright-protected works play vital role in the intermediaries' business models as they attract users, help to retain them on the website and thus increase the value of intermediary's service and consequently bring revenues from advertisement. Access to copyright-protected content in general is free of charge for the end users but serves to generate income indirectly from advertisement and from user data trading.[86]

Over the years, some of the online content-sharing service providers have become major distributors of online content, have a significant number of users and high market valuations. Yet rights holders struggle to get adequate remuneration for their works and cannot even walk away in case the online content-sharing service providers either refuse

[84] Catalin Mihail Barbu and others, 'From Ownership to Access: How the Sharing Economy Is Changing the Consumer Behavior' (2018) 20 Amfiteatru Economic 373, 3, 11.

[85] Karine Perset, 'The Economic and Social Role of Internet Intermediaries | READ Online' (2010) <https://read.oecd-ilibrary.org/science-and-technology/the-economic-and-social-role-of-internet-intermediaries_5kmh79zzs8vb-en#page1> accessed 13 March 2021.

[86] ibid 17–22.

to negotiate any licensing agreement due to the strong position of the platforms in the market. Their position in negotiations is therefore weakened.

Infringers are able to commit acts of infringement anonymously without undergoing risk of being revealed. Eventual investigation into their identity and subsequent prosecution are laborious, expensive, and time-consuming.

Consequently, the rightholders are confronted with broad, illegal use of their works on the websites of the intermediary networks but have no or only very limited control over their use and struggle to obtain fair remuneration for their exploitation.[87]

The legislator thus concluded that it was reasonable to consider imposing obligations upon the OCSSPs who provide the infringers with infrastructure and make the copyright violations possible in the first place.[88]

2.2. The situation before the CDSM Directive - intermediary liability

The centre of the legal framework that sets out the intermediary liability lies in the E-Commerce Directive that was adopted at the beginning of the millennium (ages ago considering the rapid pace of internet development). In its Section 4 the EU legislator sets out so called ‘safe harbours‘, a collection of exemptions from liability in the internet environment for internet intermediaries.[89]

These provisions were extremely important at a time when the internet environment itself was taking shape. They were enacted to foster its development, to give incentives to businesses. In essence, they provide intermediaries with immunity from claims for damages for any liability arising from the provision of certain services and provide them with mere conduit[90], caching[91] and hosting exemptions.[92]

[87] European Commission (n 18) 137–143.
[88] Jan Bernd Nordemann, ‘Liability for Copyright Infringements on the Internet : Host Providers (Content Providers) - the German Approach’ (2011) 2 Jipitec 37, 1.
[89] Giancarlo F Frosio, ‘Reforming Intermediary Liability in the Platform Economy : A European Digital Single Market Strategy’ (2017) 112 19, 2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2912272>.
[90] Directive 2000/31/EC on certain legal aspects of information society services in the Internal Market (e-Commerce Directive) Article 12.
[91] ibid Article 13.
[92] ibid Article 14.

The intermediary's safe harbour is defined in the Article 14 of the E-Commerce Directive. This Article extends the protection to the providers of ISSPs[93] that consists of *„the storage of information provided by a recipient of the service".*[94] The hosting provider then enjoys the protection if he:

a) *"does not have actual knowledge of the illegality of that content and as regards claims for damages, awareness of facts or circumstances from which the illegality is apparent.*

b) *upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information."*[95]

According to this provision and the ruling of the CJEU in *L'Oréal v eBay*[96], the copyright rules on the internet rely upon the concept of "notice and take-down" until the adoption of this new legislation.[97] The CJEU has further ruled in relation to copyright that internet service providers must effectively prevent access to infringing material where such content has been identified. (*Telekabel*[98]*).*

Furthermore, the E-Commerce Directive prohibits Member States from imposing general obligations to monitor the information which they provide and from imposing general obligations to actively seek facts or circumstances indicating illegal activity (as interpreted by the CJEU in *SABAM v Netlog*[99]). This is especially important for the content of newly adopted CDSM Directive, and it will be elaborated bellow.

2.3. Changes made to the proposal during the legislative procedure

The draft Article 13 (i.e., Article 17 of the final version) was the most contested one during the legislative procedure and thus it underwent significant changes. While the

[93] Information Society Service Provider, see Abbreviations for definition
[94] Directive 2000/31/EC on certain legal aspects of information society services in the Internal Market (e-Commerce Directive) Article 14.
[95] ibid Article 14.
[96] *C-324/09, L'Oréal SA and Others v eBay International AG and Others*.
[97] Dr Christina Angelopoulos, 'On Online Platforms and the Commission's New Proposal for a Directive on Copyright in the Digital Single Market' 9 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947800>.
[98] *C-314/12 UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH.*
[99] *C-360/10, Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV*.

wording of draft Article 13 was relatively simple, three-section long, the final Article 17 changed into a complex multi-layered provision.[100]

The original provision stipulated three rather simple obligations:

i. OCSSPs shall implement measures such as content recognition technologies,

ii. complaints and redress mechanisms shall be put in place in case of disputes over deleted content,

iii. Member States shall facilitate stakeholder dialogue to define best practices.

The Proposal as drafted by the EC aimed to modify the existing safe harbour principle as provided by the E-Commerce Directive and explicitly demanded the ISSPs to either enter into agreements with rightholder or to prevent availability of the protected content through implementation of content recognition algorithmic technologies.[101]

However, there was only little consideration regarding non-infringing user-generated works that would be marked false-positive and thus prevented from being uploaded. Only complaint and redress mechanisms were proposed.[102] The final text has changed significantly. It constitutes a sub-category of ISSPs, the Online content-sharing service providers (or OCSSPs) that are directly liable for acts of communication to the public of works uploaded by their users. The liability burden is twisted compared to the previous state of things.

The draft expressly imposed a general obligation to monitor traffic saying that the internet platforms shall: "*take measures to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter or to prevent the availability"* adding that: *"the use of effective content recognition technologies"*[103] as one option of fulfilling that obligation.

[100] Ula Furgal, Martin Kretschmer and Amy Thomas, 'Memes and Parasites: A Discourse Analysis of the Copyright in the Digital Single Market Directive' (2020) 12 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3712007>.
[101] Proposal for a Directive on copyright in the Digital Single Market COM/2016/0593.
[102] Furgal, Kretschmer and Thomas (n 100) 13.
[103] Proposal for a Directive on copyright in the Digital Single Market COM/2016/0593 Article 13.

However, such obligation would stand against the CJEU case law, namely the cases *Scarlet*[104] and *Sabam v Netlog*[105] in which the CJEU decided whether a hosting service provider could be required to introduce a general filtering requirement for an indefinite period of time to prevent infringement of intellectual property rights by its users. The court found that an obligation to monitor all traffic passing through the platform would conflict with the right to conduct business, as such monitoring would present burdensome technological problems and be disproportionately costly. In addition, such a system would require the provider to analyse all its users' data, which would be contrary to users' data protection rights. Finally, a monitoring system could violate freedom of information and expression by allowing the provider to assess and decide which information is protected and which is not.

Therefore, the obligation to put in place upload filtering technologies was changed in the course of the legislative procedure to the obligation to make best efforts to obtain authorisation from the rightholders (while suggesting licensing as one option but leaving the other ways open). Letting out the explicit formulation seems as a more technology-neutral long-lasting solution.

Also, a new provision was added that explicitly prohibits imposition of a general monitoring obligation (but the question remains how should the OCSSPs fulfil the obligations without filtering technologies). I personally regard this change as only cosmetic that has been made only in order to avoid conflict with *Sabam v Netlog*. The effect remains the same. The legislator implicitly anticipates implementation of filtering technologies. There is simply no other way around how OCSSPs could possibly meet the requirements.

On the grounds of this change, a complex liability mechanism has been built up. According to the final text of the Directive, OCSSP is obliged to obtain an authorisation from the rightholder in order to communicate or make the work available to the public[106] and shall be held liable if fails to do so. However, this obligation is not ironclad as the

[104] *C-70/10, Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*.
[105] *C-360/10, Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* (n 99).
[106] Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market Article 17(1) subparagraph 2.

provisions further provide exclusions from liability if the OCSSP does not manage to obtain an authorisation despite making best efforts to obtain it (further elaborated in Chapter 2.6).

Further off, it was added during the legislative procedure that user-generated content that is non-infringing under existing exceptions or limitations (i.e., quotation, criticism, review; and caricature, parody, or pastiche) shall not be prevented from being available online[107] which should be ensured by an 'expeditious complaint and redress mechanism executed under human review.[108]

Also, the final CDSM Directive created separate definition for service provider emplaced in Article 2(6). This definition provides detailed specification of an OCSSP and thus excludes certain providers that would have fallen under scope of the Draft. The exclusion depends on their function, i.e., not-for-profit encyclopaedias or open-source software sharing platforms.[109]

Importantly, new and small platforms "*which have been available to the public in the Union for less than three years and which have an annual turnover below EUR 10 million"*[110] shall be excluded from certain obligations under Article 17. A sort of intermediate stage is set for providers that fall under this definition but have exceeded 5 million unique visitors monthly.[111]

However, after all substantial changes during the legislative procedure, the core of the reform remains the same. An OCSSP must either enter into an agreement with rightholders or find a way how to recognize infringing content and make it unavailable.

2.4. Use of protected content by online content-sharing service providers as defined by Article 17

The Article 17 of the CDSM Directive provides that: *"an online content-sharing service provider performs an act of communication to the public or an act of making available*

[107] ibid Article 17(7).
[108] ibid Article 17(9).
[109] ibid Article 2(6); Tatiana Eleni Synodinou and others, *EU Internet Law in the Digital Era: Regulation and Enforcement* (Springer International Publishing 2020) 5–6.
[110] Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market Article 17(6).
[111] ibid Article 17(6) subparagraph 2.

to the public (...) when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users."[112] In order to be allowed to communicate or make the work available to the public, it must obtain an authorisation from rightholders for instance by concluding a licensing agreement (but other ways remain open as well).

The Directive further stipulates that if the OCSSP is not granted with authorisation for the use of the copyright protected works, they should be held liable for eventual infringements unless they have:

a) *"made best efforts to obtain an authorisation, and*

b) *made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of [...] subject matter for which the rightholders have provided the service providers with the relevant and necessary information; and in any event*

c) *acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, [...] subject matter, and made best efforts to prevent their future uploads in accordance with point (b)".*[113]

These are the two ways how the intermediaries can avoid direct liability for the infringing content uploaded by their users. The CDSM Directive clearly favours the first mentioned.

This provision is partially reversing the 'safe harbour' rule (described in Chapter 2) that the online content-sharing service providers could benefit from on the basis of Article 14 of the E-Commerce Directive. The CDSM Directive introduced a new category of information society service providers (ISSPs) – the 'online content-sharing service providers' (OCSSPs, see Chapter 2.4.1) who will be held liable for copyright infringement committed by their users. However, the so-called 'notice and takedown' regime will continue to apply to hosting service providers that do not fall within the scope of the definition of OCSSP and cases when content is not covered by the agreements concluded with the rightholders.[114]

[112] ibid Article 17(1).
[113] ibid Article 17 (4).
[114] European Commission (n 18) 147.

The adopted wording of the Article 17 further stipulates that (i) subject matter uploaded by users which does not infringe copyright (including legitimate use covered by an exception or limitation, i.e., parody, caricature, quotation, criticism, review etc.) shall not be prevented from being available on the websites[115] and that (ii) the application of these rules shall not lead to any general monitoring obligation.[116]

These two requirements seem problematic as they contradict the aim of the new legislation. The Directive itself implicitly presumes the use of algorithmic programs (such as Google ContentID[117]) that compare large amounts of content uploaded in its databases, i.e., executing general monitoring over all uploaded content (contradicting Article 15 E-Commerce Directive and *SABAM v Netlog[118], see Chapter 2.3*).[119]

Finally, Article 17 contains exemptions for certain online content-sharing service providers that are small or new to the market, or whose purpose is either non-commercial or allows access to open-source content.[120]

In general, the rules set out in the provision of Article 17 are unique as they blend various core components. Article 17 merges commercial exploitation acts of OCSSPs (i.e., provision of access to users) with non-commercial exploitation acts of users (i.e., content upload). Also, it embeds a complex liability mechanism[121] and exemptions from it[122] as well as obligations imposed upon the OCSSPs regarding prevention and reaction to copyright (non-)infringement.[123,124]

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[115] Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market Article 17(7).
[116] ibid Article 17(8).
[117] 'Using Content ID - YouTube Help' <https://support.google.com/youtube/answer/3244015?hl=en> accessed 3 March 2021.
[118] *C-360/10, Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* (n 99).
[119] Synodinou and others (n 109) 16.
[120] Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market Article 17(6), Recital 62.
[121] ibid Article 17(4).
[122] ibid Article 17(5)(6).
[123] ibid Article 17(9).
[124] Martin Husovec and Joao Pedro Quintas, *How to License Article 17 of the Copyright in the Digital Single Market Directive ? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms* (2021) 22.

2.4.1. Online content-sharing service providers (OCSSP)

The CDSM Directive introduces a new sub-category of 'information society service providers' (ISSPs) as defined by the Article 1(1a) of the InfoSoc Directive.[125] The CDSM Directive operates with the concept of 'online content-sharing service provider' (OCSSP) defined in its Article 2(6). The main purpose or one of the main purposes of an OCSSP "*is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes."*[126] The definition is constructed in rather broad terms to leave Member States room to introduce certain variations with regard to *de minimis* activities (see Chapter 2.9).

This definition includes several important criteria worth examining into further detail. Essential attributes of an OCSSP are:

a) Material uploaded by users

The works uploaded to the network must be a subject matter uploaded by the users of particular OCSSP. Therefore, it cannot be its own content (excludes streaming services such as Netflix, Spotify etc.)

b) Store and give access to the public

The notion of 'storage' has in this context related to the Article 2 of the InfoSoc Directive and has the meaning of an act of reproduction in its scope. The phrase "give the public access" has a connection to all types of communication under Article 3(1) of the InfoSoc Directive. An OCSSP must fulfil both criteria simultaneously (thus services that only store data are excluded from the scope, e.g., cloud storage services).

c) Large amount of copyright-protected works

This criterion is rather an unclear one. Certainly not all platforms with certain user-generated content (UGC) features are automatically OCSSPs and thus subject to the new liability regime. Recital 63 explains that the assessment should be "*made on a case-by-case basis and should take account of a combination of elements, such as the*

[125] Directive (EU) 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services 2015 Article 1.
[126] Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market Article 2(6).

audience of the service and the number of files of copyright-protected content uploaded by the users of the service"[127] while Recital 62 specifies that the definition is intended to aim only on *"online services that play an important role on the online content market by competing with other online content services"*[128]

d) One of the main purposes

A platform falls within the scope of the OCSSP definition only if its main purpose (or one of them) are above mentioned activities. Recital 62 specifies that the requirement of the main purpose is intended to exclude those services that have a different main purpose. This element must be evaluated qualitatively on the basis of business model of each platform.[129]

e) Organisation of content

While the other specifications of OCSSPs do not seem problematic for implementation, the substantive element of "organizing and promoting for profit-making purposes" does. This should be done with the aim of attracting a larger audience.[130] The question is to what extent the OCSSP is outside this specification. Is the condition fulfilled if the network has an integrated search tool or only if it is actively involved in categorization of the copyright-protected material?[131] That remains to be seen.

f) Profit-making purpose

An OCSSP must give access and promote the relevant material for profit-making purposes. Recital 62 states that promotion is done *"directly or indirectly, by organising it and promoting it in order to attract a larger audience, including by categorising it and using targeted promotion within it."*[132] Thus, an OCSSP is a

[127] ibid Recital 63.
[128] ibid Recital 62.
[129] Jan Bernd Nordemann and Julian Waiblinger, 'Art. 17 DSMCD a Class of Its Own?' 23, 9.
[130] ibid 10.
[131] Axel Metzger and others, 'Comment of the European Copyright Society: Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market into National Law' (2020) 11 Journal of Intellectual Property, Information Technology and E-Commerce Law 115, 117 <https://www.jipitec.eu/issues/jipitec-11-2-2020/5104>.
[132] Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market Recital 62.

provider that proactively offers content uploaded by users, e.g., by making suggestions as to what content might the user view.

The Article 2(6) further states that platforms whose primary purpose is not to make a profit from copyright-protected user-generated content such as not-for-profit encyclopaedias (notably Wikipedia), educational and scientific repositories, open-source sharing platform (GitHub) etc. fall outside of the scope of the OCSSP definition [133]

Finally, the OCSSPs whose main purpose is to engage in or facilitate copyright piracy are not covered by the possibility of exculpation provided by Article 17(4).[134]

Even though the listed criteria do define an OCSSP relatively strictly, they still encompass some platforms that provide users with the possibility to share large amount of protected content as their essential feature and fulfil other criteria as well, but actual copyright infringement is rare on those services. Thus, services such as dating apps (e.g., Tinder, Badoo), link aggregators (e.g., Reddit) or cooking recipe platforms might eventually fall into the scope of Article 17 as well.[135]

2.5. Application of the Article 17

The Article 17 provides for three eventual scenarios of how can the OCSSPs avoid liability for copyright infringement by the content uploaded by their users. Each option will be further examined bellow.

i. Conclude a license agreement with the rightholder. This option leaves no further duties to comply with.[136]

ii. Make best efforts to obtain a licensing agreement with the rightholder. Assessing fulfilment of the "best effort" requirement should be based on the obviousness of the protectability of particular material and on publicity of its rightholder. If both

[133] ibid Article 2(6); Synodinou and others (n 109) 8.
[134] Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market Recital 62, subparagraph 2, second sentence.
[135] Julia Reda, 'In Copyright Reform, Germany Wants to Avoid over-Blocking, Not Rule out Upload Filters – Part 2' (*Kluwer Copyright Blog*, 2020) <http://copyrightblog.kluweriplaw.com/2020/07/10/in-copyright-reform-germany-wants-to-avoid-over-blocking-not-rule-out-upload-filters-part-2/> accessed 11 March 2021.
[136] Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market Article 17(1).

are obvious, OCSSP should be obliged to contact the rightholder actively to offer negotiations on terms of a license.[137]

iii. Only if neither of the previous scenarios could be carried out, the OCSSP can remain passive and keep the material accessible until receiving notice. Upon its eventual receipt, the OCSSP must react immediately, i.e., either take the content down or enter into licensing agreement.[138]

The first option based on Article 17 (1) seems to state the obvious. The OCSSP will be held liable unless it obtains the rightholder's authorisation. However, the thing gets more complicated if considered together with Article 17(4) which includes the exemptions. According to its point (a) making 'best efforts' to obtain an authorisation from the rightsholder exempts an OCSSP from liability as well.

At the first glance, that may seem contradictory to the primary duty to obtain an authorisation. However, compliance with the Article 17(1) is fulfilled only if the OCSSP has concluded an agreement with the rightholder which is generally common practice for monetized content shared over OCSSP platforms.

On the contrary, the rule set out in Article 17(4)(a) applies to the situations when the OCSSP has not yet concluded an agreement with the rightholder. The OCSSP can benefit from this liability only if, and as long as it makes its best efforts to obtain an authorisation.

The question is how to assess the 'best efforts' in this regard. Should the OCSSPs proactively search for individual rightholder of every single piece of (possibly copyright-protected) content to offer him/her terms of a licensing agreement? Not only such an option seems to entail immense costs for the OCSSP, but it is not permissible from the legal point of view either as it would implicitly involve imposing a general monitoring obligation upon the OCSSP. Such obligation is not compatible with the CJEU case law[139] and would pose disproportionate risk of over-blocking non-infringing content.

The opposite approach to the assessment of 'best efforts' requirement might be only to demand users to give an affidavit informing the OCSSP that the material that they are

[137] ibid Article 17(4)(a).
[138] ibid Article 17(4b,c) .
[139] *C-360/10, Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* (n 99).

uploading is either their own creation or that it is available without license. Naturally, such interpretation would hardly improve the position of the actual rightholders.

Thus, a possible middle ground needs to be found. As suggested by the European Copyright Society, such middle ground might be an obligation of OCSSPs to make a public contact with known rightholders who are publicly known, including collective management organisations etc. and offer negotiations on terms. Such level of proactivity might be reasonable as similar negotiations have been part of the OCSSPs business models even in the past.[140]

Finally, there is the third option according to Article 17(4b, c) that gives the OCSSP room to preserve the accessibility of the work under certain conditions. If the rightholder of the subject-matter is not publicly known and has not been identified despite 'best efforts' made, then the OCSSP is allowed to keep it accessible. However, if the OCSSP eventually identifies the rightholder or receives a notice by them, it must disable access or remove it expeditiously and prevent it from being re-uploaded. The effect of this provision might be incentivization of smaller rightholders to seek representation by collective management organisations.[141]

This is the known concept of notice-and-take-down supplemented by notice-and-stay-down principle set out by Article 14 E-Commerce Directive[142] and relevant case law of the CJEU.[143] Only the notion of 'best efforts' is new.[144]

[140] Metzger and others (n 132) 4–5.
[141] ibid 6.
[142] Directive 2000/31/EC on certain legal aspects of information society services in the Internal Market (e-Commerce Directive), Article 14.
[143] *C-324/09, L'Oréal SA and Others v eBay International AG and Others.* (n 96).
[144] Synodinou and others (n 109) 7.

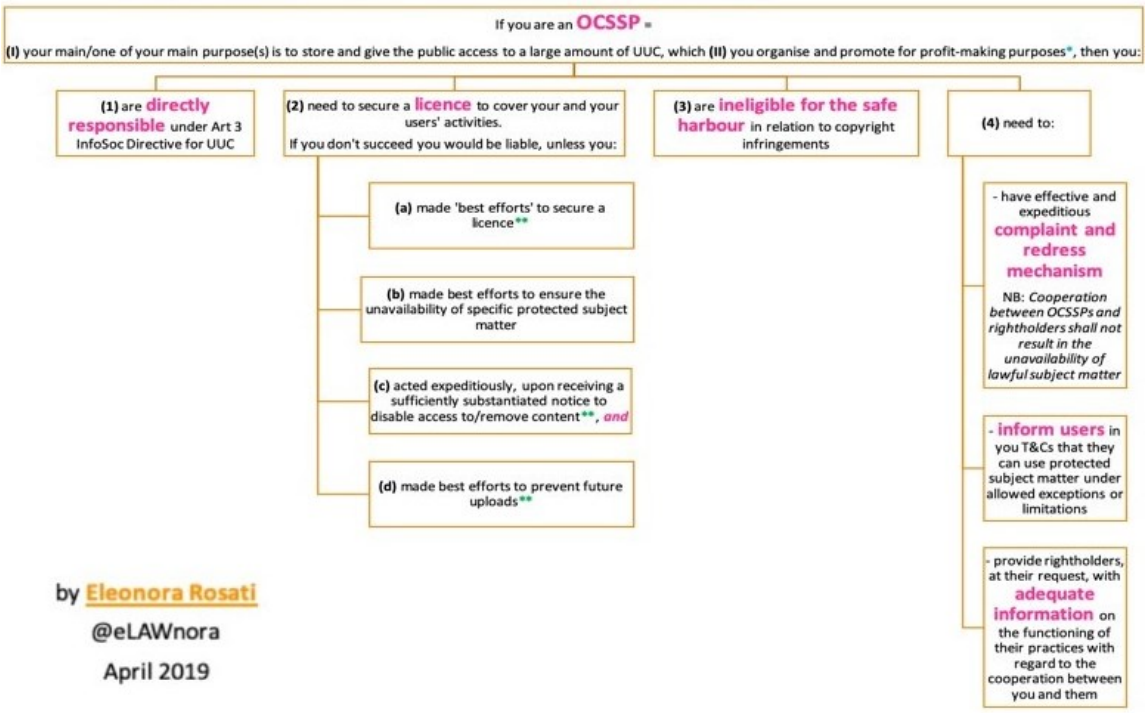

Figure 1: Chart explaining obligations stemming from Article 17 CDSM Directive for OCSSPs by Eleonora Rosati (note: edited excerpt).[145]

The language of Article 17 is highly prescriptive and leaves very little space for Member States to introduce variations in the transposition phase of implementation regarding exceptions and limitations. Member States are required to introduce the exceptions and limitations under Article 17 (i.e., quotation, criticism, review; caricature, parody, pastiche) without having option to introduce exceptions or limitations beyond what it stated. Furthermore, these concepts must be interpreted uniformly in accordance with the CJEU case law which leaves no possibility for Member States to alter its the scope.[146]

Even though the Article 17 does not expressly prohibit the Member States to introduce their own exceptions and limitations, the argument *a contrario* cannot be endorsed as such interpretation would contradict the principle of EU pre-emption, the sole rationale

[145] Eleonora Rosati, 'DSM Directive Series #4: Article 17 Obligations ... in a Chart ' <https://ipkitten.blogspot.com/2019/04/dsm-directive-series-4-article-17.html> accessed 13 March 2021.

[146] Eleonora Rosati, 'The Legal Nature of Article 17 of the Copyright DSM Directive, the (Lack of) Freedom of Member States, and Why the German Implementation Proposal Is Not Compatible with EU Law - The IPKat' <https://ipkitten.blogspot.com/2020/08/the-legal-nature-of-article-17-of.html> accessed 5 March 2021.

of the harmonisation and notably to settled CJEU case law, e.g., *Spiegel Online*[147] and *Funke Medien.*[148]

Contrarily, the Article 17 leaves significant margin of discretion for transposition in Article 17(9) for implementation of procedural safeguards into national law.

2.6. Making 'best efforts' to ensure unavailability of copyright-infringing subject matter

Content-filtering technologies have been at the centre of the debate on the CDSM Directive at large since the very beginning. The original draft text of the provision directly referred to these technologies as an option stating that: "*measures, such as the use of effective content recognition technologies, shall be appropriate and proportionate*"[149] (further in Chapter 2.3). However, the notion of "*recognition technologies*", nor "*filtering*" or "*upload-filter*" is not used in the final version of the CDSM Directive.

Instead, to avoid liability for copyright-infringement, the OCSSPs must demonstrate that they have: "*made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works* (…)." Despite avoiding the explicit formulation using a technology-neutral formulation, it can hardly conceal that the legislator had filtering technologies in mind.[150] There is only a limited scope of means that can technically achieve the aim of this provision.

As mentioned above (see Chapter 2.3), the question of application of filtering technology was elaborated in the CJEU's case *Sabam v Netlog.*[151] The court did not conclude that such content filtering technologies could be considered permissible under the EU legal framework, namely the Charter.[152] Even though the court did recognize the right to intellectual property as fundamental under Article 17(2) of the Charter, it pointed out that it must be in balance with protection of other fundamental rights and freedoms.[153] Particularly with the right to conduct a business of the provider under Article 16 on one

147 *C-516/17 - Spiegel Online*.
148 *C-469/17 - Funke Medien NRW*.
149 Proposal for a Directive on copyright in the Digital Single Market COM/2016/0593 Article 13.
150 Metzger and others (n 132) 6 paragraph 26.
151 *C-360/10, Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* (n 99).
152 ibid paragraphs 26, 36-37.
153 ibid paragraphs 41-44.

hand and the right to privacy and data protection and the right to receive or impart information of the user under Articles 8 and 11 respectively on the other hand.

It thus seems that the legislator made an attempt to hide the true meaning of the regulation in the light of *Sabam v Netlog* to escape the accusation of infringement of fundamental rights by establishing an obligation to monitor traffic on OCSSPs networks. The Article 17(8) of the CDSM Directive confirms that a general monitoring obligation is not intended but it is hard to imagine how the obligations under previous articles should be otherwise achieved. Therefore, even though the general monitoring obligation is expressly mentioned as unwanted, the OCSSPs will be left with no other option than implementing it to effectively comply with the "*best efforts*" requirement.[154] In the end, this consideration was behind Poland's claim before the CJEU for annulment of the Article 17(4)(b) and (c) (see Chapter 2.8).

The fundamental problem with the content-filtering algorithms is that the currently available AI that runs these programs is not capable of distinguishing legitimate and illegitimate use of copyright protected works (e.g., it is not able to distinguish whether the uploaded video is a pirate copy of a film trailer or a review legitimately using its fragments).[155]

It is common knowledge that some OCSSP platforms such as YouTube have been using such technologies for years.[156] Thus, the Article 17 might be welcomed as a legitimisation of their practise which has been under scrutiny for possible violation of the *Sabam v Netlog* outcomes.[157]

Now that it is clear that the filtering technologies will be implemented, the question is how it will be exploited in practise.[158] Essentially, the more precisely it is capable of spotting the infringement, the less problematic it is and vice versa, the more "false

[154] Martin Senftleben, 'Bermuda Triangle – Licensing , Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market " The Bermuda Triangle , Also Known as the Devil ' s Triangle or Hurricane Alley , Is a Loosely- Defined Regi' 1, 7 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3367219>.

[155] Daphne Keller, 'Problems with Filters in the European Commission's Platforms Proposal | Center for Internet and Society' (2017) <https://cyberlaw.stanford.edu/blog/2017/10/problems-filters-european-commissions-platforms-proposal> accessed 26 March 2022.

[156] 'Using Content ID - YouTube Help' (n 117).

[157] Metzger and others (n 132) 7.

[158] Unfortunately, at the time of finalising this text, it is not yet possible to assess the actual impact one year after the implementation deadline, as many Member States have not yet transposed the Directive.

positives" it identifies, the more significant is the impact on fundamental rights of the public.[159]

Article 17 seeks to mitigate the risk of over-blocking, but the final impact depends on more factors. It can be presumed that Articles 17(7) and 17(9) will motivate the OCSSPs to minimize the number of false positives as much as they can but the actual effectiveness of these provision will depend upon the proactivity of users themselves.

The users will be able to use *"an effective and expeditious complaint and redress mechanism (...) in the event of disputes over the disabling of access to, or the removal of, works or other subject matter uploaded by them"* under Article 17(9).

However, by giving an unclear, elastic timeframe by saying "*expeditious"*, it may appear unattractive to users as it may take a while for their complaint to be settled. In addition to it, the OCSSPs will not have a natural incentive to make the redress mechanism truly fast and effective. It is rather in their interest not to motivate users to file complaints as it brings additional costs. The faster the mechanism is, the more users will use it. Conversely, if the user has to wait relatively long for a final result, it is likely that the mechanism is incapable of safeguarding his freedom of expression.[160]

Thus, the provisions of Article 17 raise concerns about the unnecessary expansion of copyright protection threatening the freedom of expression.[161] It is being marked as the basis for content censorship in the online world instead of fostering content creation and its dissemination and thus degenerating copyright law into a censoring instrument.[162] This provision essentially changes the default position of copyright-infringement presumption. Whereas formerly copyright materials were available unless recognised to be infringing, now all material that is detected by an algorithm is removed unless expressly re-authorised again by the rightholder.[163]

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[159] Metzger and others (n 132) 7.
[160] Senftleben (n 155) 9–10.
[161] 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 and Technology 153.
[162] Senftleben (n 155) 5.
[163] Niva Elkin-koren, 'Fair Use by Design' (2017) 1082 UCLA Law Review 1082, 1093 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3217839>.

2.7. Relationship to the existing legal framework

2.7.1. Art. 17 CDSM versus Art. 3 InfoSoc and Art. 14 E-Commerce

The Article 17 CDSM Directive brings novelties into the EU copyright *acquis*. A question has been raised in the academic circles as to the relationship between the Article 17 and the pre-existing- legislation in place, namely the Article 3 of the InfoSoc Directive which defines the right of communication to the public by stating that: "*Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works (...) including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them."*[164]

The core question was whether the content of Article 17 CDSM should be interpreted as a sub-right in respect to Article 3 InfoSoc (advocated by Nordemann/Waiblinger[165] and Rosati[166]) or as a distinct, right isolated from the previous legislation creating its own self-standing regime (as Husovec/Quintas[167] think).

Both the Article 3 InfoSoc and the Article 17 CDSM lay down similar provisions and even bear the same name. Both provisions form basis for imputation of liability upon information service providers (OCSSPs, respectively) with regard to unauthorised acts of communication or making available to the public of copyright-protected works.

However, two elements make the provisions different. Firstly, the CDSM works with a narrower definition of addressees defined by Article 2(6) as OCSSPs (see Chapter 2.4.1) compared to the InfoSoc Directive which applies on broader category of addressees. Secondly, the CDSM sets out a stricter liability regime[168] applicable to OCSSPs and

[164] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society Article 3.
[165] Nordemann and Waiblinger (n 130).
[166] Rosati, 'The Legal Nature of Article 17 of the Copyright DSM Directive, the (Lack of) Freedom of Member States, and Why the German Implementation Proposal Is Not Compatible with EU Law - The IPKat' (n 147).
[167] Husovec and Quintas (n 125); Martin Husovec and Joao Pedro Quintas, 'Article 17 of the Copyright Directive: Why the German Implementation Proposal Is Compatible with EU Law - Part 1 - Kluwer Copyright Blog' (26 August 2020) <http://copyrightblog.kluweriplaw.com/2020/08/26/article-17-of-the-copyright-directive-why-the-german-implementation-proposal-is-compatible-with-eu-law-part-1/#comments> accessed 10 March 2021.
[168] Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market Article 17(1)(4).

exceptions for certain service provider from it (new, small companies – start-ups and alike).[169]

Nonetheless, the CDSM Directive does not set out any novelty regarding exploitation of rights in economic sense. In that respect, Article 17 CDSM does not have any distinct meaning compared to Article 3 InfoSoc, on the contrary it adopts definition of communication and making available to the public from InfoSoc Directive.[170]

According to Husovec/Quintas[171] even though the Article 1(2) CDSM Directive states that "*this Directive shall leave intact and shall in no way affect existing rules laid down in the directives currently in force in this area,"* including the InfoSoc Directive, it actually does directly amend the rules laid down in other pieces of legislation, InfoSoc Directive too. Articles 17(2) and 17(7) do introduce explicit changes and (3)-(6) indirectly amend the provisions of InfoSoc as well. According to them, the notion in Article 1(2) only means that the CDSM Directive shall not amend the InfoSoc Directive horizontally.

On that ground, they regard the provisions of Article 17 as a *lex specialis* with respect to the Article 3 of the InfoSoc Directive. The implication would then be that even though the acts covered by the Article 17 CDSM would be governed separately through a new regime with its own rules. The CDSM Directive as a whole should be regarded as a *lex specialis* towards the InfoSoc Directive and subsequently Article 17 as providing a right *sui generis* that does not fall under the definition of communication to the public as laid down in Article 3 of the InfoSoc Directive. That is to say, the provisions of the Article 17 constitute an extension (compared to InfoSoc) of the right of communication to the public by creating a wholly new right.

Under such interpretation, the Article 17 would have significant consequences. Firstly, it is not bound by exceptions and limitations set out in Article 5 of the InfoSoc Directive (which would contradict Article 25 CDSM), and (secondly) exceeds the minimum standards set out in international copyright treaties, namely World Copyright Convention and its Article 8 on exploitation right of communication to the public and Article 10 laying

[169] ibid Article 17(6).
[170] ibid Article 17(1) subparagraph 2.
[171] Martin Husovec and Joao Pedro Quintas (n 168).

down the three-step-test.[172] For example, the German transposition applied this model (see Chapter 2.9.1).

On the contrary, Nordemann/Waiblinger regarded the Article 17 CDSM as a sub-right to the Article 3 InfoSoc and refused explanation of their relationship as *sui generis* right which takes precedence over Article 3 InfoSoc as *lex specialis* since Article 1(2) CDSM (and Recital 64) explicitly state the opposite.[173] They developed the idea that the two provisions are built upon two levels, the exploitation and liability level.

Regarding the exploitation level, CDSM and InfoSoc are, according to them, applicable alongside one another.[174] The Article 17 CDSM relies on the application of Article 3 InfoSoc with regard to communication and making available to the public as it is stated in Article 17(1) that an OCSSP must obtain authorisation under Article 3(1)(2) InfoSoc. Article 17 is thus applicable only in connection with Article 3 InfoSoc and must be considered in the light of criteria set out by international copyright law as well (namely Article 8, 9, 10 WCT). Consequently, the provision of Article 5 InfoSoc laying down optional exceptions and limitations shall remain relevant for interpretation as follows from Article 25 CDSM.[175]

On the liability level, according to Nordemann/Waiblinger, the Article 17 CDSM replaces Article 3 InfoSoc.[176] It puts in place a different legal regime when it stipulates in paragraph (4) that an OCSSP is liable for unauthorised acts of communication to the public unless it demonstrates that it has complied with conditions under (a)-(c) (see Chapter 2.5) and clarifies in paragraph (3) that safe harbour under Article 14(1) does not apply to the cases under Article 17 CDSM.

On the contrary, the CJEU found in *The Pirate Bay*[177] that Article 3 InfoSoc includes a liability level as well which is apparently different to that set out in CDSM Directive. Thus, classification of Article 17 CDSM as a *sui generis* right would be incorrect considered ISSPs that fall under the definition in Article 2(6) CDSM are at the same time

[172] Husovec and Quintas (n 125) 10,11.
[173] Nordemann and Waiblinger (n 130) 21.
[174] ibid 13.
[175] ibid 19.
[176] ibid 15.
[177] *C-610/15, Stichting Brein v Ziggo BV and XS4All Internet BV (The Pirate Bay)*.

actually infringing Article 3 InfoSoc but subject to a different liability regime laid down in the CDSM Directive.[178]

The discussion was more or less clarified by the Commission's guidance on interpretation of Article 17 which states the first interpretation mentioned should be the prevalent one.[179] It clearly states that Article 17 CDSM is a *lex specialis* to Article 3 InfoSoc and Article 14 E-Commerce. Even though the form of communication is not binding, it plays an important role in judicial interpretation.

The consequence of the dispute was anything but purely academic. The result directly affects the margin of discretion left to the Member States in their national transpositions, and their compatibility with EU law respectively. This can be seen in the German transposition law (see Chapter 2.9.1) that operates with the interpretation that CDSM Directive is a *lex specialis* in relation to the InfoSoc Directive and that Article 17 is a right *sui generis* and thus lays down additional exclusions and limitations for minor use of copyright-protected works. 180

2.7.2. Art. 3 InfoSoc versus Art. 14 E-Commerce

Above that, the relationship between Article 3 of the InfoSoc Directive and Article 14 of the E-Commerce Directive has been unclear until very recently. One of the questions that has been referred to the CJEU in preliminary ruling proceedings in joined *YouTube and Cyando*[181] refers to their relationship.

The core issue between the two articles is the question of liability of online platforms for copyright-infringing content uploaded by their users. The Court essentially had to decide if a platform like YouTube qualifies as a hosting service provider that benefits from Article 14 E-Commerce safe-harbour or if it is directly liable for communicating user uploaded content to the public under Article 3 InfoSoc.

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[178] Nordemann and Waiblinger (n 130) 21.

[179] European Commission, 'Communication from the Commission 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' 3 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52015DC0192>.

[180] Rosati, 'The Legal Nature of Article 17 of the Copyright DSM Directive, the (Lack of) Freedom of Member States, and Why the German Implementation Proposal Is Not Compatible with EU Law - The IPKat' (n 147).

[181] *Joined Cases C-682/18 YouTube and C-683/18 Cyando*.

It is important to point out straightforward that the CJEU was careful to note that this judgment did not concern interpretation of Article 17 CDSM.[182] The judgment concerned legislative situation before its introduction. The effect on Article 17 is only indirect as the legal regimes split depending on whether a platform qualifies as an OCSSP and therefore subject to the rules of Article 17. However, the situation would be much different if the CJEU eventually repeals Article 17 CDSM in the proceedings brought by Poland. However, that scenario does not seem likely to occur (see Chapter 2.8).

The CJEU gave a negative answer to the preliminary question of the Federal court of Justice whether an operator of a video-sharing platform carries out an act of communication to the public within the meaning of Article 3(1) InfoSoc when it enables users to upload copyright protected content without a consent of rightholders.[183] Further the court confirmed that such a platform still benefits from the safe harbour provided by Article 14 E-Commerce.

2.8. Compatibility with the Charter as interpreted by the CJEU

The Article 17 of the Directive met especially strong opposition from Poland into that extent that it was challenged before the CJEU. Even though the final judgment was not issued at the time of completion of this text, I can draw certain conclusions from opinion of Advocate General Saugmandsgaard Øe delivered 15 July 2021.

Poland brought action against Article 17(4) (b) and (c) shortly after the CDSM Directive has been enacted. At the heart of the plea lies the possibility for ICSSPs to escape their liability for copyright infringement if they make "*in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter"* that is illegal and make "*best efforts to prevent their future uploads.*" In other words, it is the implied order to implement technology that preventively screens all uploaded content and filters out those works that infringe copyright.[184]

[182] ibid, para 59.
[183] ibid, para 39.
[184] *Action brought on 24 May 2019 — Republic of Poland v European Parliament and Council of the European Union (Case C-401/19)*.

According to Poland, algorithmic content-filtering is in breach with Article 11 of the Charter that among other freedoms includes the freedom to receive and impart information.[185] Importantly, previous case law of the ECHR has already shown that uploading content even of an illegal nature is covered by the Article 11 of the Charter.[186]

The problem does seem to lie in the obligation itself but in its implications. There is no doubt and no discussion that automated AI algorithms will be employed to distinguish between what is legal and what is not. However, as studies show, the algorithms are not able to distinguish the content according to values of legality and illegality that people attribute to it. It can only detect a match with its input data.[187]

The result would be a collateral damage caused by attempts to remove unlawful content. Poland suggests that the CDSM Directive creates environment in which OCSSPs are pushed to rather block legal content, and thus limit the freedom of speech, than risking that some infringing content sneaks through. While the Directive sets out severe penalties for copyright infringement, limitations of freedom of speech remain intact.[188] As the OCSSPs are not facing any comparable risk when they limit user rights by blocking access to legal content, strong incentives for over-blocking are created.[189]

Article 17 makes "*it necessary for the service providers (...) to carry out [filtering] of content uploaded online by users, and therefore make it necessary to introduce preventive control mechanisms. Such mechanisms undermine the essence of the right to freedom of expression and information and do not comply with the requirement that limitations imposed on that right be proportional and necessary.*"[190]

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[185] Charter of Fundamental Rights and Freedoms of the European Union - OJ C 326 Article 11.

[186] *Neij and Sunde Kolmisoppi v Sweden, European Court of Human Rights, no 40397/12*.

[187] Daphne Keller (n 156).

[188] 'Regulating Freedom of Expression on Online Platforms? Poland's Action to Annul Article 17 of the Directive on Copyright in the Digital Single Market Directive – European Law Blog' <https://europeanlawblog.eu/2021/02/03/regulating-freedom-of-expression-on-online-platforms-polands-action-to-annul-article-17-of-the-directive-on-copyright-in-the-digital-single-market-directive/> accessed 26 March 2022.

[189] Paul Keller, 'CJEU Hearing in the Polish Challenge to Article 17: Not Even the Supporters of the Provision Agree on How It Should Work - Kluwer Copyright Blog' (11 November 2020) <http://copyrightblog.kluweriplaw.com/2020/11/11/cjeu-hearing-in-the-polish-challenge-to-article-17-not-even-the-supporters-of-the-provision-agree-on-how-it-should-work/> accessed 26 March 2022.

[190] *Action brought on 24 May 2019 — Republic of Poland v European Parliament and Council of the European Union (Case C-401/19)* (n 185).

In his Opinion, AG Øe disagreed with Polish argumentation and advised the CJEU to dismiss the claim.[191] The conclusions drawn from this opinion in many ways overlap with his previous opinion given in case of *YouTube/Cyando.*[192] AG Øe agreed into some extent with the Polish argument that Article 17 CDSM Directive does interfere with Article 11 of the Charter. However, assessed them as justifiable with notion to Article 52 of the Charter.[193] Limitation according to this provision must be established by law, respect the essence of the rights and freedoms of the Charter; and be in accordance with the principle of proportionality.[194] The AG considered that Article 17 was compliant with these conditions.

Put shortly, imposed obligations to monitor content and compare it to the content that has been brought to the provider's attention would not amount to a general monitoring obligation, as long as sufficient safeguards are put in place which they supposedly are.[195]

Regarding proportionality, the new liability settings in Article 17 do pose a risk of proportionality. However, the AG was of the view that safeguards provided by Article 17 (7-9) do prevent exaggerated and arbitrary blocking of permitted content. Legitimate use is thus sufficiently protected *ex ante* by the OCSSPs.[196]

Even though AG's opinion is not binding on the CJEU, it usually guides its final decision. It is therefore likely that the CJEU will dismiss Poland's claim as unsubstantiated.

2.9. Member States and the Article 17

The provisions of Article 17 are a complex set of rules that require a high level of cooperation between Member States to achieve effective harmonisation. The EC thus announced that it would prepare an implementation guidance that would further help national legislators to draft laws that work together.

[191] *Opinion of Advocate General Saugmandsgaard Øe delivered on 15 July 2021 (C-401/19)*.
[192] *Joined Cases C-682/18 YouTube and C-683/18 Cyando* (n 182).
[193] *Opinion of Advocate General Saugmandsgaard Øe delivered on 15 July 2021 (C-401/19)* (n 192), para 88 et seq.
[194] Charter of Fundamental Rights and Freedoms of the European Union - OJ C 326, Article 52.
[195] *Opinion of Advocate General Saugmandsgaard Øe delivered on 15 July 2021 (C-401/19)* (n 192), para 111-115.
[196] ibid para 170 et seq.

However, less than half a year before the transposition period deadline, the guidance was still not issued (partly due to challenges posed by the pandemic). The increasing delay of the EC guidelines has led some Member States either to draft diverging proposal or to halt their work on the transposition. It is thus not clear whether the Directive will be implemented in time in the whole EU.

2.9.1. Germany

Unlike other Member States, Germany got on a track of creating a new separate act that implements Article 17 solely and is determined by the attempt to balance the conflict of obligations contained in this provision. Moreover, the German legislators do not limit themselves on merely transposing the directive into national law but include a number of provisions aimed at protecting users from over-blocking to ensure that individual creators can directly benefit from the new provision of Article 17.[197]

The German transposition conceives the provision of Article 17 as a *sui generis* regime or at least as *lex specialis* in relation to the InfoSoc Directive[198] (see Chapter 2.7). On these grounds it introduced new "minor use" exceptions that make legal certain uses of third party works on OCSSP platforms.[199]

The law creates an exemption for 20 seconds of video or audio content, 1000 characters of text or one graphic or photographic work of up to 250 kB. The exemption is subject to a requirement of remuneration to be paid not by a user but by the OCSSP via collective management organisations and applies in case if the OCSSP was not able to obtain authorisation from rightholders to cover those uses.[200] This provision should limit the negative impact of the upload-filtering technologies put in place on freedom of information and freedom of expression.[201]

This aim should be also reached by "pre-flagging" provision that requires OCSSPs to allow its users to pre-flag the legal inclusion of third-party at the moment of its upload.[202]

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[197] Federal Ministry of Justice and Consumer Protection, Discussion draft Act adapting copyright law to the requirements of the Digital Single Market; §6, § 51a.
[198] Nordemann and Waiblinger (n 130).
[199] Federal Ministry of Justice and Consumer Protection Discussion draft Act adapting copyright law to the requirements of the Digital Single Market (n 198).
[200] ibid § 6.
[201] Reda (n 136).
[202] Federal Ministry of Justice and Consumer Protection Discussion draft Act adapting copyright law to the requirements of the Digital Single Market (n 198) § 8.

Such pre-flagged content must not be blocked by the filtering algorithm automatically and in such case OCSSPs will not be held liable for those uploads for as long as the dispute resolution over its legality is pending.[203]

However, the law includes a problematic exception to the pre-flag rule for cases of "obviously incorrect" pre-flagging made by users. In such situation the content must be blocked despite having been flagged as legal.[204] This provision is apparently intended to mitigate the chance of possible misuse by users but brings a considerable uncertainty regarding exercise of the mechanism.[205]

2.9.2. France

France has been criticised for choosing rather a selective approach to provisions stipulated in the CDSM Directive.[206] The French implementation does overlook substantive safeguards provided by the CDSM Directive and clearly gives priority to the interests of rightholders whilst neglecting negative implications on user freedoms. There are a number of issues that are worth further elaboration.

Firstly, the CDSM draws the definition of an OCSSP (see Chapter 2.4.1) in rather vague terms leaving a lot of space for subsequent implementation (presumably to the interpretation of the courts), namely in terms such as "*large amounts of copyright-protected works."*[207] Despite expectations that Article 17 is aimed at huge social media platforms such as YouTube or Facebook, the French law extends the obligations to much larger scope of addressees. Its definition is as vague as the definition under Article 2(6) of the CDSM Directive which makes it apparent that no effort has been made to narrow down the uncertainty stemming from the Directive.

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[203] ibid § 16.
[204] ibid § 12.
[205] Reda (n 136).
[206] 1] Communia Association, 'Article 17: Both French and Dutch Implementation Proposals Lack Key User Rights Safeguards – International Communia Association' <https://www.communia-association.org/2020/01/10/article-17-implementation-french-dutch-implementation-proposals-lack-key-user-rights-safeguards/> accessed 13 March 2021 ; 2) Communia Association, 'France Once More Fails to Demonstrate Support for Its Interpretation of Article 17 – International Communia Association' <https://www.communia-association.org/2021/02/04/france-once-more-fails-to-demonstrate-support-for-its-interpretation-of-article-17/> accessed 13 March 2021 ; 3] Paul Keller, 'Article 17: (Mis)Understanding the Intent of the Legislator - Kluwer Copyright Blog' (28 January 2021] <http://copyrightblog.kluweriplaw.com/2021/01/28/article-17-misunderstanding-the-intent-of-the-legislator/> accessed 13 March 2021.
[207] Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market Article 2(6).

Moreover, the transposition does not reflect clarification from Recital 62 that the definition should "*target only online services that play an important role on the online content market by competing with other online content services"* and *"services that have a main purpose other than that of enabling users to upload and share a large amount of copyright-protected content with the purpose of obtaining profit from that activity."*[208] Consequently, the definition under Article 16 of the proposal implicitly includes broad set of providers including Tinder, or various cooking recipe sharing apps etc.[209]

Secondly, Article 17(7) CDSM Directive provides a safeguard stating that cooperation between OCSSPs and rightholders "*shall not result in the prevention of the availability of works (...) which do not infringe copyright."* However, this provision did not make it to the French implementation law. Such essential safeguard is missing altogether. Thus, the OCSSPs are not required to ensure that non-infringing works are not blocked by upload-filtering algorithms.

Moreover, the implementation law does not include a provision based on the second part of Article 17(7) providing that shall be able to rely on existing exceptions and limitations when uploading content, i.e., quotation, criticism, review; caricature, parody, or pastiche.[210]

Regarding provisions of Article 17(9) CDSM that constitutes the users' right for a redress and complaint mechanism in the event of disputes over removal of subject matter uploaded by them, the proposal is only mechanically transferring the provision into national law.[211] The copyright exceptions as they have been part of the French law remain unchanged despite new requirements under CDSM Directive. They are not able to cover situations that may arise on online platforms, e.g., quoting from a video.[212] The essential part of the Article 17(9) that states that OCSSPs must allow users to actually benefit from

[208] ibid Recital 62.

[209] LOI n° 2020-1508 du 3 décembre 2020 portant diverses dispositions d'adaptation au droit de l'Union européenne en matière économique et financière (1) - Légifrance 2020 Article 16; Julia Reda, 'France Proposes Upload Filter Law, "Forgets" User Rights' (2019) <https://juliareda.eu/2019/12/french_uploadfilter_law/> accessed 13 March 2021.

[210] Communia Association, 'Article 17: Both French and Dutch Implementation Proposals Lack Key User Rights Safeguards – International Communia Association' (n 207).

[211] LOI n° 2020-1508 du 3 décembre 2020 portant diverses dispositions d'adaptation au droit de l'Union européenne en matière économique et financière (1) - Légifrance Article 17, Section 4.

[212] Reda (n 210).

these exceptions and that their legally uploaded content must not be blocked are not included in the French transposition law.

In response to the criticism, the French Ministry of Culture has issued a report on the use of content-filtering technologies by the OCSSPs.[213] The central argument of the report is that algorithmic technologies filtering uploaded content have been playing a significant role on OCSSP platforms for a relatively long time (e.g., YouTube ContentID[214]), and thus does not bear a risk of extensive blockage of legal content. The report further promises that the implementation of Article 17(9) provides sufficient protection of fundamental rights through a complaints and redress mechanism and conversely that temporary limitation on freedom of expression is considered acceptable to achieve stronger protection of intellectual property rights.[215]

Unfortunately, as the transposition of the French law was delayed due to the pandemic situation, the French government abandoned the intention to implement Article 17 via standard legislative procedure (note: e.g., Article 15 has already been implemented in 2019[216]). Instead, the government has been granted in the situation of emergency with authorisation to implement the legislation by decree under so-called "*DDADUE loi*".[217] Thus, the implementation was not subject to parliamentary scrutiny in the end.[218]

2.9.3. Czech Republic

The Czech transposition is another one in a row of transposition which partially outbounds from the terms of the Directive.

Although the transposition law does include additional exceptions from the definition for cloud-services and the like as outlined by Recital 62, the general definition of an OCSSP

[213] Conseil superieur de la propriete litteraire et artistique centre national du cinema et de l'image animee, 'Rapport de Mission Les Outils de Reconnaissance Des Contenus Sur Les Plateformes Numeriques de Partage : Propositions Pour La Mise En Œuvre de l'Article 17 de La Directive Europeenne Sur Le Droit d'auteur' <https://www.culture.gouv.fr/Sites-thematiques/Propriete-litteraire-et-artistique/Conseil-superieur-de-la-propriete-litteraire-et-artistique/Travaux/Missions/Mission-du-CSPLA-sur-les-outils-de-reconnaissance-des-contenus-et-des-oeuvres-sur-les-plateformes->.

[214] 'Using Content ID - YouTube Help' (n 117).

[215] Conseil superieur de la propriete litteraire et artistique centre national du cinema et de l'image animee (n 214) 7, 32–34, 64–65.

[216] LOI n° 2019-775 du 24 juillet 2019 tendant à créer un droit voisin au profit des agences de presse et des éditeurs de presse - Dossiers législatifs - Légifrance 2019.

[217] LOI n° 2020-1508 du 3 décembre 2020 portant diverses dispositions d'adaptation au droit de l'Union européenne en matière économique et financière (1) - Légifrance.

[218] 'Implementation Update: French Parliament Gives Carte Blanche, While the Netherlands Correct Course | Infojustice' <https://infojustice.org/archives/42690> accessed 12 March 2021.

encompasses broader range of addressees. The transposition does not reflect other guidelines included in Recital 62, i.e., instruction that the regulation should target only on OCSSPs that play an important role in the market by competing with other OCSSPs.

Neither does the Czech definition[219] adopt the second part of Article 17(2) that specifies that when OCSSPs obtain an authorisation, it "*shall also cover acts carried out by users of the services (...) when they are not acting on a commercial basis or where their activity does not generate significant revenues.*" Thus, the authorisations of OCSSPs apply to any kind of usage no matter if commercial or non-commercial.

Most importantly though, the transposition into the Czech legal framework has significant negative impacts on users' safeguards. While some safeguards have been curtailed, other have been made too complex to be helpful and some are missing altogether.

First of all, prohibition of general monitoring obligation[220] is not included in any provision at all. Secondly, prohibition of provision of the availability of non-infringing works[221] and a complaint and redress mechanism[222] remain vague with very little specification in comparison to the general guideline set by the CDSM Directive and thus very little benefit for beneficiaries of these provisions, i.e., users of the OCSSPs.

The transposition simply takes over the wording of the Article 17(9) as it stands and makes it a part of the national law.[223] However, the provision is not self-executing and needs additional clarification at least regarding deadlines for complaint handling. Importantly, the transposition let out the essential feature provided by CDSM Directive[224] that complaints submitted under such mechanism shall be subject to human review. The transposition only says that the mechanisms "*shall not be exclusively automated"* which significantly changes the meaning of the provision.

[219] Návrh zákona, kterým se mění zákon č. 121/2000 Sb., o právu autorském, o právech souvisejících s právem autorským a o změně některých zákonů (autorský zákon); PID: KORNBV4HKCRN 2020, § 18 odst./par. 3.
[220] Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market, Article 17(8).
[221] ibid Article 17(7).
[222] ibid Article 17(9).
[223] Návrh zákona, kterým se mění zákon č. 121/2000 Sb., o právu autorském, o právech souvisejících s právem autorským a o změně některých zákonů (autorský zákon); PID: KORNBV4HKCRN § 51.
[224] Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market Article 17(9).

Furthermore, the transposition sets out a rigid and complex out-of-court redress mechanism for the settlement of disputes that will hardly be able to fulfil its role in practise.

In order to trigger the out-of-court mechanism, the complainant and the OCSSP must agree on an intermediary who then acts as a judge in their case and deliver a written request for mediation. The intermediary is a natural person who has fulfilled certain conditions and is registered in a list of intermediaries published by the Ministry of Culture. In case that the user and the OCSSP do not agree on an intermediary, the Ministry appoints one. This scenario is very likely to happen as the OCSSPs will have little motivation to participate on the redress mechanism and thus are likely to obstruct it. Therefore, initiation of the mechanism seems complicated by itself.

Moreover, the mechanism is not free of charge. The parties of the redress mechanism have to agree not only on the person of the intermediary but on his reward as well. If they do not find a compromise, he/she *"shall be entitled to reward in the amount of the average wage."*[225] The meaning of this provision is unclear. According to literal meaning of the provision, the intermediary should receive the amount of the average wage for each dispute resolution. According to the Czech Statistical Office, the average wage in the Czech Republic in 2020 was 38.525 CZK[226], nearly 1.500 EUR.

This procedure is immensely complex and time-consuming and costly. In order to be effective, such mechanisms must be fast and as informal as possible. It is very unlikely that users would seek such protection.

On these grounds, the transposition clearly favours the interests of OCSSPs. It mitigates possible negative impacts on their businesses while stifling the protection of users. The users under the Czech law will be left with only little chance to reverse deletion of legally uploaded content.

[225] Návrh zákona, kterým se mění zákon č. 121/2000 Sb., o právu autorském, o právech souvisejících s právem autorským a o změně některých zákonů (autorský zákon); PID: KORNBV4HKCRN § 57; author's translation.

[226] 'Wages and Labour | CZSO' <https://www.czso.cz/csu/czso/labour_and_earnings_ekon> accessed 15 March 2021.

CONCLUSIONS

The thesis was divided in two autonomous sections, each of them elaborating the most influential provisions of the CDSM Directive and affecting the copyright framework in a different context.

In the opening, I analyse the legislative situation before the adoption of the ancillary right for press publishers in the CDSM Directive. I found reasonable indicators that showed a loophole in the copyright laws exists that diverts income from the legitimate beneficiaries towards entities that profit from the state of things but do not create the values themselves.

The legislator's intention was well substantiated and backed up by a thorough analysis of the market situation. However, I gradually began to doubt the way the problem was addressed. Since Europe has had any experience with addressing this very issue, I turned my attention to the countries that introduced changes to their copyright laws. Germany and Spain have adopted similar ancillary rights for press publishers in the last decade, but research showed that neither of them substantially improved the position of press publishers in the online environment. I put aside the fact that they may have been in breach with the acquis. In both cases the changes did not lead the news aggregators to pay any remuneration to the publishers.

In case of Spain, the biggest aggregators pulled out from the market, causing worse access to information in overall terms. In the case of Germany, most press publishers who found themselves under pressure provided the aggregators with free licences as allowed by the law and at the end of the day did not receive any remuneration either, but had another administrative burden placed on their shoulders. I further asked myself why, after such a proven experience would the European Union want to expand an unsuccessful policy to the whole internal market apart from certain advantages of scaling the right up to the EU-wide level.

In addition to that, the right as it was passed through the legislative procedure raised many questions about its interpretation. It turned out that despite the need for uniform application of the provision in the whole Union, it is left to the discretion of the Member States whether they allow the publishers to waive the right. In that form, the rule

subsequently misses its effect as proven in the case of Germany. I identified this problem as a major loophole that might be unworkable to the entire scheme. I further analyse the question of position of this provision in the existing legal context. I concluded that this right does not repeal any existing forms of copyright protection but only ads on another layer of protection. I regard it as an unconceptual interference in the system and as a certain expression of favouritism towards certain group of stakeholders. I also found troublesome the way the definition of a press publication is constructed, leaving out some types of publications that should not be neglected, while at the same time including other publications that probably should not have been addressed.

Finally, I elaborate the notion of a "*very short extract"* that is to be still allowed to be shared. It is not yet entirely clear how long or short such extract is or how it should be determined. I found out that this limitation might actually be in conflict with the Article 10 of the Berne Convention that clearly states that making quotations from newspaper articles shall be permissible. Even though the EU itself is not its signatory, all its Member States are and the WIPO Copyright Treaty of which the EU is a party requires compliance with the Berne Convention. WIPO interprets this Article in a way that such quotations should be free of charge and should not be subject to consent.

Based on these observations, I conclude that a different and more suitable approach could have been chosen. I believe that the problem is not the lack of rights but difficulties in their enforcement. I am therefore inclined to think that a presumption of ownership of press publishers to works they disseminate would significantly improve their position in enforcement of the rights they already possess.

On the basis of these findings, I conclude that another appropriate approach could have been taken. I believe that the problem is not the lack of rights, but the difficulty in enforcing them. I am therefore inclined to think that a presumption of ownership by press publishers of the works they disseminate would greatly improve their position in enforcing the rights they already have.

I do not entirely reject the idea of taking no steps at all, either. The EU praises the values of free, liberal market. Giving the press industry excessive paternalistic care when it

struggles to adapt to the new technology is not a solution that secures its prosperity in the long term. It rather dissuades from finding way to succeed in the new environment.

The second chapter of this thesis concerned the effects of Article 17 CDSM Directive that overturns the existing liability for copyright infringements of certain online platforms. The regime designed by the E-Commerce and InfoSoc directives from the brink of the millennium convenient for online platforms did no longer properly address the reality of the current widespread access-based model of copyright-protected works dissemination. Enforcement of copyright in such context became too laborious and costly, not worth the efforts for the rightholders.

The existing liability regime is relatively complex itself and the CDSM Directive does not repeal it but only amend in certain circumstances. It was therefore necessary to pay close attention to the genesis of Article 17, its interpretation, its relationship to related provisions of other directives and its meaning in light of existing case law.

There was uncertainty for a long time regarding the use of Article 17 CDSM besides the E-Commerce and InfoSoc directives. It was unclear whether it was meant to be a sub-right subordinate to the regime of the previous instruments or a distinct, *les specialis* provision. After summarizing the arguments for both assumptions, I leaned towards the second option.

There is still a debate to this date over the requirement for the platforms concerned to 'make best efforts in accordance with high industry standards to ensure unavailability of copyright-protected content.' I asked myself how rigorously that will be assessed. It was an open secret from the very beginning that the high industry standards will only be met by sophisticated algorithms that automatically scan all uploaded content for a match with protected works. I prove that there is no other way around to meet the obligations set out in the Directive despite the fact that the literal text of the provision tries to state the opposite.

I draw attention to the previous case law of the CJEU which calls content-filtering technologies and general monitoring obligation incompatible with the Charter, namely the right to conduct a business, the right to privacy and data protection and finally the

right to receive or impart information. I believe that the legislator tried to avoid this conflict.

That is in the end the subject of the proceedings brought up by Poland before the CJEU. Although the Court of Justice of the EU has not delivered a judgment as of the date of completion of this work, I could draw some conclusions from the AG's opinion that was available. If the CJEU follows his opinion, the Article 17 will not be found to be in breach with the Charter. AG suggests that these limitations to rights guaranteed by the Charter are justifiable.

However, the concerns about over-blocking of content by the filtering algorithms prevail. There is still a debate about the reliability of the technology. The issue is that the software can only identify a match with a sample stored in its database. It cannot, however, determine whether it is legal or not. Legal use of copyright-protected works might thus be threatened or limited. Besides that, the platforms are motivated to keep the filters rather strict to avoid the consequences of the liability for infringement and do not have much interest in investing resources to an effective redress mechanism since it brings only costs but no income.

Unfortunately, we cannot yet see the full impact of the CDSM Directive because many states did not meet the transposition deadline. Beyond that, a thorough investigation will be possible rather later, when the changes have settled down. That can be a subject to further research.

ABBREVIATIONS

AI	Artificial intelligence
AG	Advocate general
Berne Convention	Berne Convention for the Protection of Literary and Artistic Works, 1886
CDSM Directive	Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC
Charter	Charter of Fundamental Rights of the European Union 2012/C 326/02
CJEU	Court of Justice of the European Union
DSM	Digital Single Market
DSM Strategy	Communication from the Commission 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/2015/0192 final */
EC	European Commission
ECHR	European Court of Human Rights
ECJ	European Court of Justice
E-Commerce Directive	Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market
Enforcement Directive	Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights

Information society service providers; ISSP	Service within the meaning of point (b) of Article 1(1) of Directive 2015/1535 (respectively Article 2(5) of Directive 2019/790, i.e., *„service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.“*
InfoSoc Directive	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
IP	Intellectual property
Member States	The 27 countries that are members of the European Union
Online content-sharing service provider; OCSSP	Online content-sharing service provider within the meaning of Article 2(6) of Directive 2019/790, i.e., *„provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes.“*
Proposal	Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market COM/2016/0593 final - 2016/0280 (COD)
Rental and Landing Rights Directive	Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property
WCT	WIPO Copyright Treaty (adopted in Geneva on December 20, 1996)
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

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