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Directive on Copyright in the Digital Single Market and Freedom of Expression: EU's Online Dilemma

Sevra Guler Guzel¹

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Abstract This paper focuses on one of the most heavily disputed legislative acts in EU history; Directive on Copyright in the Digital Single Market. When it comes to the online enforcement of the IP rights, it is essential to strike the fair balance between fundamental rights in the Charter of Fundamental Rights of the European Union, in particular, the freedom of expression, and the right to property, including intellectual property. Thus, this will paper will investigate the negative outcomes of Article 17 by examining the incompatibilities of content recognition and filtering technologies with the freedom of expression under Article 10 of Charter. Also, it will critically examine the safeguards introduced by the CDSM Directive against Article 17's obligations and suggest a number of necessary safeguards. This paper will be based on the in-depth analysis of primary sources like EU legislation: Article 17 of CDSM Directive with its Recitals 61 and 70; Article 15 E-Commerce Directive with its Recitals 47 and 48, Recital 59 and Articles 8 and 15 of The InfoSoc; Article 11 and Article 52 of the EU Charter of Fundamental rights; Art.10 European Convention on Human Rights (ECHR) and relevant case law of CJEU and ECtHR along with recent academic sources.

S.G. Guzel

Attorney at Law & PhD Candidate, University of Hertfordshire, UK

e-mail: s.g.guzel@herts.ac.uk

Introduction

Enforcement practice of injunctions has gained popularity in recent years to enforce intellectual property rights both in the EU and the UK.² However, there is a delicate balance between user's and platform's fundamental rights, like user's freedom of expression, platform's freedom to conduct a business and on the other hand, creative market's intellectual property rights. The Internet and digital technologies have expanded the possibilities of individuals and media to exercise the right to freedom of expression and free access to online information.³ Freedom of expression and copyright become a new way of interaction between cultures and promote creativity. Every minute, Snapchat shares 527,760 photos, users watch 4,146,600 YouTube videos, 456,000 tweets are sent on Twitter, and Instagram users post 46,740 photos. These platforms of the online world play a key role in the freedom of expression and communication of people worldwide.

As a matter of course, both groups are expecting legal protection in the hectic digital environment. Using injunctions against intermediaries for online enforcement of the rightholders' intellectual property rights seems convenient since determining the identity of primary infringers is usually challenging and as a business entity, intermediaries are more capable of paying the damages. However, this focus on the non-wrongdoer intermediaries is open to upset the fair balance by disrespecting various fundamental rights.⁴ Especially, where a trend towards ever-stronger IP protection has been rising in the EU, the adverse outcomes of the property protection of copyright for the balancing exercise with freedom of expression claims should not be underestimated.⁵ The disproportionate injunctions against intermediaries cause a violation of freedoms under the Charter while enforcing or protecting IP rights, and

² Husovec (2017), Roy and Althaf (2016).

³ Council of the European Union, EU Human Rights Guidelines on Freedom of Expression Online and Offline, Foreign Affairs Council meeting (2014)

⁴ Riordan, (2016).

⁵ Communication from The Commission to The European Parliament, *'Towards a renewed consensus on the enforcement of Intellectual Property Rights: An EU Action Plan'* COM/2014/0392 final.

this can strip citizens of their fundamental rights. Both the InfoSoc⁶ and the E-Commerce⁷ directives, as well as their interpretation by the Courts, are failing to give a clear guideline for finding the liability of online content-sharing service providers (OCSSPs) for online IP rights infringement.

Therefore, the legal framework does not provide for the checks and balances necessary to achieve a proper balance of all fundamental rights and freedoms involved. This ambiguous framework affects the balancing exercises. The different applications of the principles to balance the fundamental rights fail to set the desired fair balance between IP protection and the freedoms; subsequently, this non-homogenous practice caused more legal uncertainty. The fact that some gaps cannot fill with the harmonisation at the EU level made the new specialised framework on the issue a crucial need.

To achieve that specialised framework and comply with the growing need of reform the framework for the injunctions against intermediaries, European Parliament adopted one of the most heavily disputed legislative acts in EU history; Proposal for a Directive on Copyright in the Digital Single Market on 26th March 2019. Unfortunately, this new Directive failed to achieve the objective of solving the problems with striking the fair balance between conflicting fundamental rights. This Directive's notorious Article 13 (which in the final text became Article 17) regulates the use of the copyrighted content by the service providers and lays down filter obligations for them which are intended to prevent future copyright infringements.

According to the Article, content must be reviewed by online content providers before it can be uploaded by the users and made available to the public which means the exception of the liability provided by the safe harbours for hosting providers shall no longer apply to these cases. Also, when the large volume of uploaded content considered, it would be challenging to apply Article 17 in practice without using the upload filters since a content review on that scale would be only possible with those filters. However, the use of filter systems will lead to over-blocking of legitimate use as upload filter systems are not yet capable of detecting the important

⁶ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society ('The InfoSoc directive'), OJ L 167

⁷ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') ('The E-Commerce Directive'), OJ L 178

copyright exceptions like memes, GIFs, parody or pastiche and not capable of distinguishing between lawful and unlawful content in this context.⁸

This incapability will naturally constitute a restriction of the freedom of expression by violating Article 10 European Convention on Human Rights (ECHR) and Article 11 Charter of Fundamental Rights of the European Union (EU Charter), which is one of the biggest concerns about Article 17. In addition to this critical incompatibility, the implementation of the “upload filters” by the online platforms to comply with the obligations of Article 17 will lead to general monitoring which causes a serious clash with other EU Directives as well as with the General principles of European Union law as it stated in many decisions by the Court of Justice of the European Union (CJEU) and European Court of Human Rights (ECtHR).⁹ This situation leaves the online platforms with the obligation of meeting the conflicting requirements; on the one hand, the prevention of future infringements; protection of IP and related rights and on the other, the prohibition of general monitoring obligations for hosting providers; protection of freedom of expression, privacy and related rights. Ultimately, these undesirable results are raising the importance of the safeguards on a critical level to protect the fundamental rights in the online environment.

Literature Review

The European Union law prescribes its Member States to provide injunctions against intermediaries in respect of infringements of the intellectual property rights,¹⁰ even if the intermediaries themselves are not liable so, the plaintiffs can apply for injunctions against Internet access providers who are not liable regarding tort law.¹¹

As a matter of course, subject matter injunctions against intermediaries must comply with a number of legislative sources and principles.¹² While applying these injunctions, as the

⁸ Cambridge Consultants (2019), pp. 34.

⁹ Art 15 of E Commerce Directive, CJEU, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, C-70/10; CJEU, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog*, C-360/10. ; *L'Oréal SA and Others v eBay International AG and Others*, C-324/09.

¹⁰ Recital 59 and Article 8(3) of The InfoSoc directive; Article 11(III) of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights(‘The Enforcement Directive’), OJ L 157

¹¹ Husovec, (2014), pp. 631–634.

¹² Rosati (2017), p. 340.

primary source for the EU law, The EU Charter¹³ should expressly be recognised. Because of this status of Charter, the CJEU has developed various tools to ease the tension between intellectual property rights and the principles of the Charter.¹⁴ In its continuous struggle for moderating private IP disputes via human rights,¹⁵ the CJEU has already examined the conflicts between the protection of intellectual property (Article 17) and the other fundamental rights: the rights to private and family life (Article 7)¹⁶ secrecy of communications (Article 7)¹⁷, personal data (Article 8)¹⁸, freedom to conduct a business (Article 16)¹⁹ and right to property (Article 17)²⁰ and most importantly; freedom of expression and information (Article 11)²¹. In addition to CJEU, European Court of Human Rights also examined the conflict between fundamental rights in many cases and applied the principle of proportionality of the EU copyright to the lightly regulated areas like online copyright enforcement procedures.²² In the landmark case of *Ashby Donald and others v. France*²³, ECtHR clarified, for the first time in a judgment, that a conviction which restricts freedom of expression based on copyright law must be relevantly motivated as being necessary in a democratic society, in addition to being prescribed by law and pursuing a legitimate aim.²⁴ Correspondingly, the Council of the European Union issued new guidelines on freedom of expression in 2014 underlining that the principles of obligations to respect human rights’ apply equally in the online and offline environments by stating “Any

¹³ Charter of Fundamental Rights of the European Union OJ C 326, (hereinafter: ‘Charter’).

¹⁴ Strowel and. Kim (2012), pp. 121-142.

¹⁵ Husovec, (2017)

¹⁶ CJEU, *Promusicae v Telefónica de España (Promusicae)*, Case C-275/06, Judgement of 29 January 2008 ; CJEU, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) (Scarlet Extended)*, Case C-70/10 Judgement of 24 November 2011, Opinion of AG Villalon, par. 71.

¹⁷ *Scarlet Extended*, Opinion of AG Villalon, para 71.

¹⁸ CJEU, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV (Netlog)*, Case C-360/10, Judgement of 16 February 2012, par. 49; *Scarlet Extended*, para 50; *Scarlet*, Opinion of AG Villalon, par. 71.

¹⁹ *Scarlet Extended*, par. 46; *Netlog*, para. 44; CJEU, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*, Case C-314/12 Judgement of 27 March 2014, par. 47; *UPC Telekabel*, Opinion of AG Villalon, par. 83.

²⁰ *Scarlet Extended*, Opinion of AG Villalon, par. 71.

²¹ *Scarlet Extended*, Opinion of AG Villalon, par. 71.; *Netlog*, par. 50; *UPC Telekabel* , Opinion of Advocate General Cruz Villalón, par. 86.

²² Teunissen (2018), pp. 583.

²³ ECtHR, *Ashby Donald and others v. France*, App. no. 36769/08, 10 January 2013.

²⁴ Jasserand and Spitz. (2013).

restriction that prevents the flow of information offline or online must be in line with permissible limitations as set out in international human rights law.”

Any restraints on the rights of others must be appropriate²⁵, necessary and proportionate²⁶ and must not conflict with civil liberties and human rights.²⁷ Also, the injunctions must be effective, dissuasive, equitable, proportionate and safeguarded to ensure a fair balance between protection of the intellectual property rights and the other relevant fundamental rights.²⁸ Hence, the Member States are not entirely at liberty to design the injunctions at their own discretion.²⁹

To achieve the fair balance between conflicting fundamental rights, the remedies against internet intermediaries also should be subject to safeguards and fair processes.³⁰ To ensure the desired level of efficiency on the Internet, legislators prescribed the limitation of the liability of the intermediaries in the cases of infringements as a safeguard and regarding users, these appropriate safeguards adopted for the protection of the non-wrongdoing subscribers’ fundamental rights.³¹ However, as it can be seen from the case law, the safe harbour provisions were neither effective nor efficient.³² It is not surprising that those provisions did not meet the needs of intermediaries, proprietors and internet users since safeguard policies drafted around the turn of the millennium, at the time when social media and the auctions on the Internet were just an inexperienced sensation, and electronic commerce was observed as “embryonic and fragile.”³³ The current case law is also failing to

²⁵ *Promusicae*, para. 49; *Promusicae*, Opinion of AG Kokott, para. 54; *Telekabel Wien*, Opinion of AG Villalón, paras. 94-103.

²⁶ Article 52(1) of Charter; Recital 58 and Article 8 of The InfoSoc directive; Article 3(2) of The Enforcement Directive.

²⁷ Riordan (2016).

²⁸ Article 3(2) of The Enforcement Directive; CJEU, *L’Oréal SA and Others v eBay International AG and Others*, C-324/09, Judgment of 12 July 2011, paras. 138 -141.; CJEU, *Tommy Hilfiger Licensing LLC and Others v DELTA CENTER a.s.*, C-494/15, Judgment of 7 July 2016, para 34.

²⁹ *UPC Telekabel*, Opinion of Advocate General Cruz Villalón para 73.

³⁰ Riordan, (2016).

³¹ *ibid.*

³² Friedmann, (2013), pp 148.

³³ Wyckoff and Colecchia, (1999) pp, 12.

illuminate the place that fair balance lies and the balancing scales for the case by case weighing of the fundamental rights are missing.³⁴

This lack of guidance related to the notion of “fair balance” between fundamental rights with the injunctions against intermediaries which clashes in different ways with legal mechanisms like the fair balance fed the need for comprehensive legislative reform in the scope of the EU. To fulfil this need, after the two-year-long process, The European Parliament adopted one of the Directive on Copyright in the Digital Single Market (The CDSM Directive).³⁵ Following a debate, 348 MEPs voted in favour of the Directive, while 274 voted against it and 36 abstained. With 86 Recitals and 32 articles, the CDSM Directive is one of the longest in the copyright *acquis*. Even though this Directive announced as a significant step towards a modern, more European copyright framework by the European Commission³⁶, some academics described it just a rebranding the same old approach.³⁷ The Directive has become notorious in time. Mainly because of its Article 17, which regulates the use of the copyrighted content by the service providers. This Article is part of a wide-ranging policy push in the EU towards increased responsibility of OCSSPs.

The definition of the OCSSPs can be found in Article 2(6) of the Directive as platforms with main (or one of the main) purposes of 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 organises and promotes this works and uploaded content for profit-making.³⁸ Unfortunately, this policy push comes at the expense of the individuals’ online freedom of expression. The incompatibility of the preventive obligations of the CDSM Directive with the Charter of Fundamental Rights of the EU underlined by many academics during the legislative process.³⁹ Article 17 tried to rule out some criticism that it received during its proposal stage with introducing the following requirements in its final version for the hosting services’ liability for the filtering obligations:

³⁴ Angelopoulos (2015), pp 72-96.

³⁵ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market (“CDSM Directive”) and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, p. 92–125.

³⁶ European Commission, (2015).

³⁷ Farrand, (2019).

³⁸ Angelopoulos and Quintais, (2019).

³⁹ Stalla-Bourdillon, Rosati and Turk (2016), Angelopoulos (2017)

If the subject matter service has been available in the EU for less than three years and has an annual turnover below 10 million Euro, then as an OCSSPs only need to:

- 1) Make the best efforts to secure a licence
- 2) Act expeditiously upon receiving a sufficiently sustained notice to disable access to or remove content.

However, if the average number of monthly unique visitors exceeds 5 million, then OCSSPs also need to make the best effort to prevent future uploads.⁴⁰

Nevertheless, these exemptions are responses to concerns about the business and competitive harms associated with the requirements of the Article, namely licensing and implementation of technical measures, are not enough and not practical. The exceptions for new businesses in the Article are quite limited and unquestionably not enough to eliminate the risk of disruption of the EU start-ups against leading actors of the Internet like Facebook and YouTube. Thus, the effect of these exemptions on the concerns about freedom of expression will be none or little.

The topic of this paper and the most concerning point about the Article 17 is how it upsets the balance between IP protection and other fundamental rights, especially, freedom of expression with its requirements for the IP enforcement.

Licensing

While the question of “whether an online video sharing platform, such as YouTube, performs an act of communication to the public within the meaning of Article 3 InfoSoc Directive when its users upload copyright-infringing content to its platform” is still in front of CJEU⁴¹, Article 17(1) of the CDSM Directive changed the existing law instead of clarifying it by separating the act of communication to the public from act of making available. With the recent case law⁴², CJEU made it clear that the right of communication to the public also covers digital matters like hyperlinking to infringing content with *GS Media* ruling and

⁴⁰ Art 17(6) of CDSM Directive

⁴¹ In the pending cases of *Youtube*, C-682/18 and *Elsevier*, C-683/18

⁴² CJEU, *SGAE*, Case C-306/05, Judgement of 7 December 2006, paras. 33 and 34, and CJEU, *Football Association Premier League and Others*, Case C-403/08 and C-429/08, Judgement of 4 October 2011, paras. 184 and 185.

operating a platform on which copyright infringing content is shared with *The Pirate Bay* ruling.⁴³ However, the area of the online content sharing service provider platforms like YouTube is still blurred, since they do not have an intention of providing their platform to infringers of third parties' copyright while Pirate Bay encourages its users to upload infringing content. On the contrary, YouTube prohibits its users from uploading videos that infringe copyright with their technical precautions like Content ID.

Article 17(1) states that when an OCSSP gives the public access to copyright-protected works or other protected subject-matter uploaded by its users, it performs an act of communication to the public. As a result, OCSSPs should get an authorisation to communicate the user-generated content that fills their platform and the Internet with life. User-generated content (UGC) relies heavily on existing digitalised works like text, images and pictures, music and music videos, films etc.⁴⁴ Thus, according to Directive, to avoid direct liability, OCSSPs should obtain licences for a wide spectrum of works. In connection with this requirement, Directive also highlights its goal of promoting the growth of the licencing market between OCSSPs and rightholders in its Recital.⁴⁵ However, keeping these licensing agreements fair and reasonably balanced between both parties, as stated in the Directive is a real challenge.⁴⁶

Even though the content which users upload is unpredictable, the required license should include the whole range of potential posts. Undoubtedly, obtaining an all-embracing licensing deal which would cover the entire possible uploaded content is a challenging task to accomplish even with recourse to voluntary or extended collective licensing.⁴⁷ This kind of “umbrella licences” would be costly and disproportionate for many platforms.⁴⁸ Also, one should keep that in mind that collective rights management is not well established for types of content other than online music, which forms only a section of the user-generated content. Moreover, the provision gives only one example on how to obtain the required authorisation, which is direct licensing from the copyright holder. If this is not the case, the OCSSPs should licence per amount of infringing content that is available on the platform which requires monitoring all of the files uploaded on the platform.

⁴³ CJEU, *GS Media*, Case C-160/15, Judgement of 8 September 2016 ; CJEU, *The Pirate Bay*, Case C-610/15, Judgement of 14 June 2017.

⁴⁴ Jütte (2016), pp. 11.

⁴⁵ Recital 61 of the CDSM Directive.

⁴⁶ *ibid.*

⁴⁷ Angelopoulos and Quintais, (2019), pp. 38.

⁴⁸ For mid-sized streaming companies, Audible Magic is quoting on average USD 30,000 to 60,000 per month of licensing fees. Masnik, (2019).

Hence, this licensing obligation of the Article brings the risk of a significant loss of freedom of expression and information. As long as the licensing deals cover only a limited selection of the content, EU citizens will no longer take an active part in the creation of online content since they will not be able to enjoy the freedom of uploading remixes and mash-ups of all kinds of pre-existing material. It is hard to imagine for rightholders to grant licenses for all kinds of user-generated mash-ups and remixes, including biting parodies and critical statements.

Another related problem under this licensing obligation is the impoverishment of user-generated content. It is quite likely for the platforms that hosts of the user-generated content to focus on mainstream works and the most significant language groups since obtaining licenses that would make providing access to the wide variety of content is difficult, as mentioned above.⁴⁹ As a result, this will reduce the possibility of EU citizens to express themselves for a wider audience and to learn about views and expressions of users with diverse social, cultural and ethnical backgrounds.

And where these licencing agreements are absent, filtering becomes the norm.⁵⁰

Filtering Technologies

The language of the Directive suggests that OCSSPs have to filter all types of content proactively, and mandates platforms to comply with these requirements by using technical measures, without specifying them.⁵¹ The highly debated Article 17 requires a review of the uploaded content before it can be made available to the public which means the exception of the liability provided by the safe harbours for hosting providers shall no longer apply to these cases.

According to Article 17, OCSSPs required to actively attempt to locate as many illegal content as possible instead of waiting for the report of the unlawful content.⁵² This change is turning the established notice-and-takedown principle on its head.⁵³ Article mandates Member States to provide that online content-sharing service providers make ‘best efforts’ to ensure the unavailability of copyright-protected works⁵⁴ and lays down filter obligations for

⁴⁹ Senftleben, (2019), pp. 5.

⁵⁰ Frosio, (2019).

⁵¹ Gann and Abecassis (2018).

⁵² Angelopoulos and Brody and Hins et al (2016), pp. 9.

⁵³ Engeler, (2019)

⁵⁴ Art. 17 para. 4b of CDSM Directive

hosting providers which are intended to prevent future copyright infringements in order to meet the ‘best efforts’ obligation.⁵⁵ Even though Article 17 avoids mentioning upload filters or technical measures, this ‘best efforts’ obligation constructively requires OCSSPs to implement automatic content recognition systems capable of blocking any claimed content where a rightsholder declines to license.⁵⁶ This argument recently brought on to CJEU by the Republic of Poland where they pointed out that the imposition of point (b) of Article 17(4) and point (c) of Article 17(4) make it necessary for the service providers to carry out prior automatic verification of content uploaded online by users, and therefore make it necessary to introduce preventive control mechanisms to avoid liability.⁵⁷ This conclusion has also been conceded by some EU officials and national governments like France and Germany. France’s Minister for Culture, Franck Riester, gave a speech in which he admits that Article 17 requires upload filters. Similarly, German government stated that algorithmic measures would have to be taken in connection with large volumes of data for practical reasons and they suggest that upload filters can only be prevented “as far as possible.”⁵⁸ This concern also pointed out by the Poland government in their recent action: “The risks of being held liable will push platforms to carry out prior automatic verification (filtering) of content uploaded online by users, and therefore make it necessary to introduce preventive control mechanisms.”⁵⁹

Moreover, as an initial challenge, the Directive does not define the concept of ‘best efforts’ even though it is the key concept for assessing the liability. There are already different versions of the concept of best efforts in the translations of different Member States for the concept like ‘greater efforts’, ‘all efforts’ and ‘greatest efforts.’⁶⁰ This lack of clear definition will likely result in challenges at different levels, like compliance, judicial interpretation and application of resulting national provisions.⁶¹

Thus, Article 17 leaves vagueness and the negative outcomes of the unpreventable upload filters behind.

⁵⁵ Art. 17 para. 4c of CDSM Directive

⁵⁶ Bridy, (2019).

⁵⁷ CJEU, *Republic of Poland v European Parliament and Council of the European Union*, Case C-401/19

⁵⁸ Even though Steffen Seibert said that the new Directive doesn't require upload filters, Konstantin Kuhle, provoked the following answer by state secretary (in the Federal Ministry of Justice) Christian Lange (SPD): "*In the federal government's view it appears likely that algorithmic measures will have to be taken in connection with large volumes of data for practical reasons alone.*"

⁵⁹ *Republic of Poland v European Parliament and Council of the European Union*, C-401/19

⁶⁰ Rosati, (2019).

⁶¹ *ibid*

Challenges with Filtering Technologies

There are many problems and shortcomings with the required filtering systems as enforcement mechanisms for the identification and removal of online content. As mentioned before, at the current level of technological sophistication, automated content recognition systems are often unable to correctly appreciate the nuances between unauthorised uses of copyright-protected content and uses that are permissible by reason of falling within the ambit of copyright exceptions and limitations.⁶²

All the automated systems currently available to locate potentially infringing material are subject to severe limitations with respect to their accuracy and adaptability.⁶³ Even though, self-regulated and privatised enforcement tools by online intermediaries considered as a solution, these tools are historically faulty and often lead “false positives” and over-enforcement.⁶⁴ False positives occurs where the content has been erroneously identified as an infringing material and get removed, which causes over-enforcement.⁶⁵ Also, removal of the content which is not infringing or universally agreed not to be harmful can result in undermining users’ freedom of expression like in the Facebook example, where the platform removed the iconic photograph of a young girl fleeing a napalm bombing during the Vietnam War.⁶⁶

Software used in upload filters is limited to the type of material it is designed to detect and unfortunately there is currently no upload filter which can recognise both ‘specific works and other subject matter’, such as software code, 3D printing files or written text.⁶⁷ Article 17 CDSM requires the application of the upload filters to any “copyright-protected works or other protected subject-matter uploaded by its users”, by ignoring the fact that most of the current upload filters are narrowly designed for a certain type of copyrighted works such as audio or audio-visual which constitute only a small subsection of the many types of copyrighted content available online.⁶⁸ Even for this certain type of copyrighted works, they are not able of determining whether or not the actual use of the work constitutes an infringement. Regarding this shortcoming, Romero underlined the fact that there is a need of deploying multiple upload filters to individually detect every kinds of uploaded work.⁶⁹

⁶² Giancarlo Frosio, (2011).

⁶³ Engstrom and Feamster (2017).

⁶⁴ Sefidari Huici, (2018), pp. 181.

⁶⁵ Erickson and Kretschmer, (2019).

⁶⁶ Facebook removed the photo as it breached their Community Standards stating that “while we recognise that this photo is iconic, it’s difficult to create a distinction between allowing a photograph of a nude child in one instance and not others” Cambridge Consultants (2019), pp. 39.

⁶⁷ (Gann and Abecassis 2018, 4, 7, 8, 9)

⁶⁸ Spoerri, (2019).

⁶⁹ Which makes these systems even more costly and burdensome on the shoulders of the platforms. Felipe

The CJEU recognised issues cause from upload filters' limited technological nature in many cases like *Scarlet* and *Netlog*. The Court stated that content filtering requirements implicate the expressive rights of Internet users because automated content recognition systems are unable to distinguish between lawful and unlawful content.⁷⁰ In spite of this, the second paragraph of Article 17(7) states that copyright exceptions shall be respected by offering the cooperation between rightholders and OCSSPs shall not result in the prevention of the availability of non-infringing works including the ones which covered by a copyright exception or limitation.⁷¹ Yet, Article does not make clear how the Member States shall ensure this. Moreover, the lack of harmonisation on the EU level regarding copyright exceptions and limitations is not helping these filters' effectiveness. While EU policymakers see the addition of this "new UGC exception" as safeguarding a balance between the relevant fundamental rights in the Charter of Fundamental Rights of the EU, namely freedom of expression and information, freedom of arts, and right to property, the question of "how this safeguard will function in practice" still constitutes a big problem.

Unfortunately, in practice, this provision is not likely to function. Copyright exceptions like fair use are not likely to be programmed into an algorithm,⁷² and automated detection of statutory copyright exceptions like parody, quotes or criticism is highly dependent on knowledge about the circumstances of the upload.⁷³ In the *Painer*⁷⁴ and the *Deckmyn*⁷⁵, the CJEU once again underlined the necessity of "fair balance" between the rights and interests of authors on the one hand, and the rights of users of protected subject-matter on the other and referred to quotations and parodies as user "rights" rather than mere user "interests."⁷⁶

Notwithstanding, a dataset of user-generated parody videos hosted on YouTube shows that the overall takedown rate across the whole 4- year period was 40.8% of videos, with 32.9% of all takedowns attributable to copyright requests.⁷⁷ Therefore, while the importance of the copyright exceptions under the EU law underlined many times by the Court in various

⁷⁰ CJEU, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, C-70/10, para 52. ; CJEU, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog*, C-360/10, para 50. ; *L'Oréal SA and Others v eBay International AG and Others*, C-324/09.

⁷¹ Art 17(7) of CDSM Directive

⁷² Burk and Cohen (2000)

⁷³ Engeler (2019).

⁷⁴ CJEU, *Eva-Maria Painer v Standard VerlagsGmbH and Others*, Case C-145/10, Judgment of 1 December 2011 par. 132.

⁷⁵ CJEU, *Johan Deckmyn v Helena Vandersteen and Others*, Case C-201/13, Judgment of 3 September 2014, par. 35.

⁷⁶ *Johan Deckmyn v Helena Vandersteen and Others* par. 28.

⁷⁷ Erickson and Kretschmer (2018).

cases,⁷⁸ the high risk of failure of the automated systems to determine whether the particular use of a given file is infringing or not (taking into account the context within which the given file was being used) where the use of that copyrighted content is permitted by the statutory copyright exceptions is not something to turn a blind eye. These filtering systems would drastically restrict the narrow copyright exception regime in the online world and infringe the fundamental rights of creators who benefit from a copyright exception and take away the users' freedom of expression that follows from statutory copyright exceptions, specifically the quotation right and the right to parody.⁷⁹

Another related problem is the industry reliance; by referring to “high industry standards of professional diligence”⁸⁰ in Article 17, CDSM Directive relies on industry cooperation to prevent excessive content censorship which is quite concerning taking into consideration the high risk of a direct effect on the right to freedom of expression. Furthermore, the guidance provided by Article 17(5) focuses on the cost and efficiency factors.⁸¹ Thus, the adoption of filtering tools that lead to excessive content blocking seems the reasonable option for UGC platforms which seek to avoid the liability.⁸² So, there is no doubt that OCSSPs will have clear incentives to implement rather extensive filtering mechanisms to fulfil Article 17's obligations. These obligations will tempt OCSSPs to over-block since filtering the uploaded content too much is safer than filtering too little in this situation and this will create a “shoot-first-ask-questions-later” atmosphere online.⁸³ Thus, requiring private entities to implement automatic recognition technologies to determine what unauthorised use is an infringement will likely harm the freedom of expression in the online environment. This transfer of the regulation and adjudication of internet rights to private actors will cause restrictions on the access to information and chilling effects and ultimately threaten freedom of information, freedom of expression and many other fundamental rights.

Even more worrying, in the qualitative study of Urban, Karaganis and Schofield where they interviewed 29 OCSSPs, some OCSSPs admitted that the fear of liability might lead them to over-enforce.⁸⁴ Rightholders are also unconcerned about the limits of these technologies

⁷⁸ The CJEU has already interpreted the concepts of “parody” and “quotation” in the InfoSoc Directive as autonomous concepts of EU Law in a number of judgements: *Painer* (C-145/10), *Deckmyn* (C-201/13), *Funke Medien* (C-469/17), *Pelham* (C-467/17) and *Spiegel Online* (C-516/17).

⁷⁹ Art. 5(3)(k) of Information Society Directive.

⁸⁰ Article 17(4)(b) of CDSM Directive

⁸¹ Article 17(5) CDSM Directive

⁸² Bar-Ziv and Elkin-Koren, (2017).

⁸³ Spoerri, (2019).

⁸⁴ Urban and Karaganis and Schofield, (2017).

when it comes to analysing exceptions and limitations because over-claiming is revenue-positive for them.⁸⁵ Therefore, it is predictable that the results favour commercial interests, and fail to take account of the public interest, freedom of expression and free flow of information.⁸⁶

An additional problem related to the implementation of the filtering technologies obligation is the inefficient safeguards introduced by the CDSM Directive. As the algorithms become smarter, the reliance on human decision replaced by the adaptability of the algorithms. However, this ability to learn from previous scenarios is not a fit for copyright law since it is established on the basis that context is essential, and outcomes depend on facts. As a result of this nature of Copyright Law, infringement must be determined on a case-by-case basis. Thus, in order to ensure users who are relying on copyright exceptions and limitations, a decision by a human on a case by case basis is needed as a safeguard. In order to deliver this decision, Recital 70 of the CDSM Directive states that “Online content-sharing service providers should also put in place effective and expeditious complaint and redress mechanisms allowing users to complain about the steps taken with regard to their uploads, in particular where they could benefit from an exception or limitation to copyright in relation to an upload to which access has been disabled, or that has been removed”. It remains to be seen on which level these mechanisms would meet the expectations of effectiveness in practice, as the volume of requests will be high in addition to the cost of the task since the appeals under Article 17 require human review.⁸⁷ Also, leaving the important task of responding to complaints to OCSSPs as private companies which are not qualified to replace courts of law constitutes an “inappropriate transfer of juridical authority to the private sector.”⁸⁸ This dependence on the private companies is quite concerning for the future of freedom of expression on the online environment since responses to complaints have a direct effect on the right to freedom of expression as they can lead to the removal of content from the Internet.

Far worse, there is a great possibility of these proactive monitoring and filtering mechanisms to result in general monitoring which would conflict with Article 15 of the E-Commerce

⁸⁵ Bridy, (2019).

⁸⁶ Jacques and Garstka and Hviid and Street, (2018), pp. 25.

⁸⁷ Recital 70 of CDSM Directive: “Any complaint filed...should be processed without undue delay and be subject to human review.”

⁸⁸ European Commission, (2010).

Directive and CJEU case law.⁸⁹ The strict obligation of preventing the availability of works is likely to encourage OCSSPs to adopt filtering systems incompatible with the E-Commerce Directive's no monitoring obligations since there is no other practical way for OCSSPs to meet their obligations and qualify for the Directive's "new safe harbour" without engaging in general monitoring.⁹⁰

Article 17 is neither limited in scope, nor in time nor in the specific type of uploaders to be profiled.⁹¹ Any obligation to monitor all content uploaded by users for the purpose of identifying specific works would constitute a general monitoring obligation. The CJEU has defined this classification in the cases *Scarlet*, *Netlog* and *L'Oréal* and made it clear that active monitoring of all data uploaded by users in order to prevent any future infringements would be precluded by EU law.⁹² On the other hand, a duty extending to information with equivalent content did not identify as general monitoring obligation by CJEU in the *Eva Glawischnig-Piesczek v Facebook*⁹³ case. However, the countless potential problems the possibility of "removing or blocking the access to 'identical' and 'equivalent' content even worldwide" would bring already pointed out by many academics.⁹⁴ It is clear that the removal of the 'equivalent' content would cause more false positives and harm the online freedom of expression. In addition to that, the international application of the removal orders seems problematic, especially from a policy standpoint since they based on unharmonised national rights.⁹⁵

Concerning hosting providers, in *Netlog*, CJEU held that EU law should be interpreted as precluding an injunction made against a hosting service provider which requires it to install a system for filtering: (1) information which is stored on its servers by its service users; (2) which applies indiscriminately to all of those users; (3) as a preventative measure; (4) exclusively at its expense; (5) for an unlimited period; and, (6) which is capable of

⁸⁹ *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, C-70/10; *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog*, C-360/10; *L'Oréal SA and Others v eBay International AG and Others*, C-324/09.

⁹⁰ Article 15 of the InfoSoc; The ECD is supplemented by Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L167/10.

⁹¹ Romero Moreno (2019), pp 17.

⁹² *L'Oréal SA and Others v eBay International AG and Others*, C-324/09, para. 139.

⁹³ CJEU, C-18/18, *Eva Glawischnig-Piesczek v Facebook Ireland Limited*, Judgment of 3 October 2019

⁹⁴ Rosati (2019), Romero-Moreno (2019), Doble (2019), Moore (2019).

⁹⁵ Rosati, (2019), pp. 673.

identifying electronic files containing musical, cinematographic or audio-visual works.⁹⁶ Thus, in order to distinguish general from specific monitoring obligations, both the scope and the number of infringements that can be rationally expected to be identified must be sufficiently narrow, it must be clear which materials constitute an infringement, and most importantly, specific monitoring obligations must be interpreted narrowly.⁹⁷ However, the description of ‘works or other subject-matter identified by rightholders’ of the Article would make the line between a monitoring obligation of ‘general nature’ and one of ‘specific nature’ quite blurred.⁹⁸

Without a doubt, under the E-Commerce Directive, Member States can impose duties of care on hosting providers ‘to detect and prevent certain types of illegal activities.’⁹⁹ However, according to the CJEU’s established case law, the result can never be a general monitoring obligation.¹⁰⁰ Unfortunately, in practical terms, Article 17 implicitly requires general monitoring of the content by requiring OCSSPs to make their ‘best efforts’ to ensure the unavailability of specific unauthorised content over services provided by them.¹⁰¹ When the required high-level duty of care taken into account, it is natural to assume that many OCSSPs would engage in general monitoring as a safeguard against costly copyright infringement suits.¹⁰²

In sum, filtering technologies cannot realistically be expected to accurately identify all infringing content or otherwise eliminate online copyright infringement; they are at best capable of merely identifying the contents of a file.¹⁰³ As examined above, it is clear that Article 17(4)(b) de facto culminates in a comprehensive filtering obligation that corresponds with the filtering measures which conflict with the main principles of EU law.¹⁰⁴

⁹⁶ *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog*, C-360/10, para 26, 52.

⁹⁷ Patrick Van Eecke, (2011), pp. 1486.

⁹⁸ Lilla Montagnani and Yordanova Trapova (2018), pp. 303.

⁹⁹ Recital 47 of E-Commerce Directive

¹⁰⁰ *Netlog*, C-360/10; *Scarlet Extended*, C-70/10.

¹⁰¹ Giancarlo Frosio and Sunimal Mendis, (2019), pp. 24.

¹⁰² *ibid*, pp. 25

¹⁰³ Engstrom and Feamster, (2017).

¹⁰⁴ Senftleben, (2019).

Adverse Effects of Filtering Technologies on Freedom of Expression

In this day and age most of the creative communications take place over platforms that host user-generated content owned by private companies, and as a result of the global nature of the Internet, anyone can express themselves online by sharing numerous other types of content with the world.¹⁰⁵ As a result of this nature of the Internet, freedom of expression is potentially affected by every copyright enforcement. Most of the time, the injunctions against OCSSPs cause filtering not only the infringing content but also the content that is legal, and that legal content might form part of communications that are worthy of protection under Art.10 ECHR or Art.11 of the Charter.¹⁰⁶

Introduction of the automated content recognition systems is the outcome of voluntary private initiatives. These technologies built upon agreements between rightholders and intermediaries, which increase the rightholder's control over works that shared online by third parties and often disturb the balance between freedom of expression and information of the users and the IP protection of rightholders.¹⁰⁷ Hence, as private initiatives, these technologies have often been characterised as going beyond what is prescribed under the regulatory framework as mentioned above.¹⁰⁸ The increased use of these systems that involve filtering for the purpose of monitoring the content uploaded to their services by the OCSSPs raise concerns relating to the protection of users' freedom of expression and information. The lack of transparency in the design, implementation and use of filtering technologies intensified these concerns that user-generated content platforms fail to respect fundamental rights compared to other cases where the judiciary, or other accountable public authority, would be involved in the decision-making process.¹⁰⁹

From the early rulings like *Promusicae*, *Scarlet* and *Netlog* to more recent ones like *UPC Telekabel*¹¹⁰, *McFadden*¹¹¹, CJEU stressed the importance of the fundamental rights and the principle of proportionality. In the twin judgements *Scarlet* and *Netlog*, the question was whether an intermediary could be ordered to install a filtering system that would monitor all data relating to customers in order to prevent copyright infringements. By following *L'Oréal*

¹⁰⁵ Frosio, (2018).

¹⁰⁶ Jütte (2016), pp. 10.

¹⁰⁷ Bridy, (2016).

¹⁰⁸ Jacques and Garstka and Hviid and Street, (2018), pp.3.

¹⁰⁹ *ibid.*

¹¹⁰ CJEU, C-314/12, *UPC Telekabel*, Judgement of 27 March 2014, pp. 63.

¹¹¹ CJEU, *McFadden*, Judgement of pp. 100.

v eBay, CJEU stated that “the contested filtering system may also infringe the fundamental rights of that ISP’s customers, namely their right to protection of their personal data and their freedom to receive or impart information, which are rights safeguarded by Articles 8 and 11 of the Charter respectively.”¹¹² Following that, CJEU conducted an assessment in light of fundamental rights and proportionality in *UPC Telekabel* and noted that for blocking injunctions to be compatible with EU law, a fair balance to be struck between the copyright protection (Art.17(2)) and freedom of expression and information (Art.11).¹¹³ In addition to the CJEU, ECtHR also addressed these problems with balancing the fundamental rights online. In the landmark decision of *Yildirim v Turkey*, Court stated that “...any preliminary restriction to the expression on the Internet is related to a heavy presumption of incompatibility with the Convention” and while Article 10 does not afford absolute protection, restrictions on freedom of expression do require strict judicial investigation.¹¹⁴ At a time when governments around the world progressively pursue control on the Internet, this decision was seen as a victory for online freedoms.¹¹⁵

The fundamental right of freedom of expression and freedom of speech play a crucial role in a democratic society, and many societies hold freedom of expression and freedom of speech to be the core cultural value. This way, they are making the creativity a fundamental matter to the community. However, to achieve that digital creativity, there should not be solid boundaries between users and creators.¹¹⁶ While freedom of expression is at the heart of diversity within cultural expression, creativity and innovation, such mechanisms undermine the essence of this right and entail a risk to the core of the Internet.¹¹⁷ Nonetheless, the way the filtering technologies work is not so parallel to this core. For example, if the views of groups of online users are poorly or misrepresented in AI training data, AI algorithms of the filtering technologies may learn to treat them ‘unfairly’, and this could potentially affect the freedom of speech of smaller online communities and minority groups.¹¹⁸

As previously mentioned, in the absence of a robust independent control mechanism, these filtering obligations are likely to lead to excessive content blocking since they are raising a spectre of content censorship following the maxims of cost and efficiency considerations of

¹¹² CJEU, *Scarlet Extended*, pp. 50; *Netlog*, pp. 40 and 48.

¹¹³ Rosati (2019), pp. 674.

¹¹⁴ ECtHR, *Yildirim v Turkey*, 3111/10, Judgement of 18 December 2012.

¹¹⁵ Global Freedom of Expression, (2014).

¹¹⁶ Frosio, (2019) pp. 23.

¹¹⁷ CJEU, *Republic of Poland v European Parliament and Council of the European Union*, C-401/19

¹¹⁸ Cambridge Consultants, (2019), pp. 43.

the content and platform industry.¹¹⁹ Article 17's filtering regime would pose grave dangers to the viability of the internet ecosystem in exchange for minimal effects on online infringement. The enforcing of these filtering technologies are infringing the users' right to freedom of expression, including the freedom to receive and impart information protected by the Charter of Fundamental Rights of the European Union.¹²⁰

One of the adverse effects of filtering technologies on freedom of expression is generating from their abusable nature.¹²¹ Malicious actors could use the copyright claims to remove content they find politically disagreeable, or for other arbitrary reasons unrelated to copyright.¹²² These technologies are open to abuse by parties who wish to repress unpopular and dissenting speech, by using the copyright infringement claim as an excuse to force intermediaries to remove the content that they want to be put down because of personal motives.¹²³ This fitness to the misuse leads the disproportionate fundamental rights limitations. As a recent example of this abuse, on one of the biggest online platforms, companies with 'striking teams' has been accused of attacking the small creators and some creators started to abuse those privatised enforcement systems by making false claims to use them for 'taking revenge.'¹²⁴

Like in all those scenarios explained above, technological enforcement repeatedly harms fundamental guarantees since these technologies are known to limit fair uses of content online and silence speech according to the mainstream ethical discourse.¹²⁵ Even though Article 17 contains provisions intended to address the freedom of expression related challenges associated with automated enforcement,¹²⁶ the implementation of required complaint and redress mechanisms for false positives is not easy in practice. The facts that the existing filtering technology is not advanced enough and human moderation is practically impossible are making the CDSM Directive's ideals to exist only on the paper. On top of these, the lack of safeguards against those adverse effects of filtering technologies on freedom of expression for users creates a big concern.

¹¹⁹ Senftleben, (2019)

¹²⁰ Article 11 of Charter of Fundamental Rights of the European Union

¹²¹ Angelopoulos, (2015), pp. 86.

¹²² Erickson and Kretschmer, (2019).

¹²³ Miller, (2010). ; Erickson and Kretschmer, (2018).

¹²⁴ Newsweek, (2018); Tubefilter.com, (2019).

¹²⁵ Frosio (2018) pp. 32

¹²⁶ Art 17(9) of CDSM Directive

Thus, it is clear that Directive has failed to follow even its own Recital by lacking fair balance between the fundamental rights of the Charter¹²⁷ and despite the safeguard obligation for the “fair balance of rights and interests”,¹²⁸ it has strengthened rightholders’ exclusive rights and freedom of contract, and multiplied the occasions of possible misuses of copyright, without providing suitable tools to prevent them and to counterbalance the opposing rights and interests.¹²⁹ Internet users and amateur creators do not seem like that they are the winners under the new regime of Article 17 since it is subjecting their creative production to stiff and pervasive algorithmic enforcement.¹³⁰ These outcomes of the CDSM Directive cause a bad scenario where we should consider both freedom of expression and copyright complementary rather than in conflict.¹³¹

Future is now: Content ID as A Current Example

The problems of YouTube’s Content ID constitute a present example of the possible problems with the Art 17’s implementation obligations and the upload filters. One of the most sophisticated¹³² automated content recognition systems (ACRs) is Content ID, which put into effect in 2007 is the result of US\$100 million of investment.¹³³ This system is using the fingerprinting algorithm to detect any part of audio or video by crosschecking all content during their uploading process rather than waiting until the content has gone live with its database of copyright-protected works that have been submitted by content owners. In order to make the system efficient, the reference files keep parts of the content. However, while this technology helps the Content ID being fast and efficient, it disturbs the fair balance that struck by legislators between the protection granted to rightholders to control uses of their works and the freedoms of the individuals and creators uploading content. As a result of its inability to take account of the lawful uses of the protected, like other ACRs, Content ID is not able to respect the copyright exceptions and only way to undeniably determine the permission of the uploaded content is to wait to be sued by the rightholder for infringement and to run the copyright exception defence before the court. There are many infamous

¹²⁷Rendas (2017), pp. 45.

¹²⁸ Recital 10 of Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights, OJL 157, p 17.

¹²⁹Ghidini (2013)

¹³⁰ Bridy, (2019).

¹³¹ Gervais, (2008) pp, 21; Torremans, (2015), pp. 224.

¹³² “. . .in view of the significant number of YouTube users, the massive amount of content uploaded to the platform, and YouTube’s efforts and investments in its filter, there are many reasons to believe, “Content ID” may well be the most sophisticated upload-filter.” (Spoerri, (2019))

¹³³ Manara, (2018).

examples of these false positives and over-blocking where the Content ID blocked public domain recordings of copyright-free music pieces and even of a ten-hour video of white noise.¹³⁴

Thus, despite being one of the most advanced filtering technologies on the market, Content ID's manner in which it operates is heavily criticised as it is not providing any effective means for users to exercise their freedom of expression in the event of a dispute.¹³⁵ When the system finds a match, an automated notification is sent to the relevant rightholders. They are given the options of doing nothing, adding advertising and collecting the revenue, monitoring its viewing statistics, blocking its content; and lastly, issuing a manual takedown request. The automated system is deciding what is and what is not legitimate use without human oversight and the usage policy chosen by the claimant is automatically applied without any consideration of lawfulness which is placing all control in the hands of rightholders.¹³⁶ However, these options are not available for all rightholders: To be eligible and benefit from the Content ID's protection, users "must own exclusive rights to a substantial body of original material that is frequently uploaded by the YouTube user community."¹³⁷ This limitation makes Content ID work only for the needs of major audio-visual and media groups, not for individual creators or small rightholders.

Content ID's suitability of nurturing creativity is also a big question when it comes to examining its effects on the freedom of expression and information. Within the Content ID system, just like other automated content recognition systems, over-blocking and false positives are the most significant threats against creativity and ultimately against freedom of expression as explained above. Even though, Google suggests freedom of expression is allowed to flourish while permitting rightholders' to accumulate a fair share of any revenue which results from the use of a protected work,¹³⁸ the way the algorithms work helps to strengthen the market power of the rightholders and to create a chilling effect on creativity and innovation and presents challenges for the protection of freedom of expression and relatedly, the promotion of culture.¹³⁹

¹³⁴ Bode (2018).

¹³⁵ Jacques and Garstka and Hviid and Street, (2018).

¹³⁶ Boroughf, (2015), pp. 109.

¹³⁷ Google mentions its "partners" enjoys this status in the post where they explain how Content ID works: <https://support.google.com/youtube/answer/2797370>.

¹³⁸ Oyama, (2016).

¹³⁹ Jacques, Garstka, Hviid and Street, (2018), pp. 24

Conclusion

By looking at the situation, it is clear that EU responded the reform call of the Digital Single Market with the wrong answer and there is no doubt about Directive will mark a significant shift from the currently dominant copyright policy and significantly impact the way the Internet works within the EU and beyond. Instead of changing the law so that it is legal and more accessible for users “to do something commonplace”, legislators have engineered the law towards giving many incentives to OCSSPs to prevent, block and filter the content proactively which harmfully affects the commonplace digital creativity.¹⁴⁰ Rather than redistributing resources to creators, Article 17 is imposing enhanced liability on UGC platforms with its obligation of automated filtering implementation and monitoring which will inherently cripple users’ fundamental rights and incentivise proactive censorship. Lastly, instead of highlighting users’ rights, Article 17 of the CDSM Directive emphasises rightholders’ “value gap” by focusing on fairness and personality theories. As an outcome, Article 17 harms smaller OCSSPs and creates a bigger market for third-party filtering technology services which is the complete opposite what the EU Commission promised with this reform.

That is why in discussing the future of the copyright in the light of the CDSM Directive, it is crucial to stress the need to strike a fair balance between protection and freedoms.¹⁴¹ This Directive does not seem to help with this endless challenge of striking the fair balance since the application of the filtering exercise would possibly encourage a rigorous “safety first” culture at the expense of internet freedom and the Directive does not strike the right balance between the protection of rights holders and the interests of EU citizens. The Article fails to reach the fair balance by not leaving any practical solution other than harmful upload filters which already acknowledged as ‘not a good idea’ even by the many Member States too.¹⁴² All these problems are making the cost of expansion of copyright claims is a heavy one; the trend of ACRs pushed the freedom of expression on the backseat even though every individual’s right to impart, receive and seek information and ideas freely depends heavily on that right.

¹⁴⁰ Frosio, 2019, pp. 23

¹⁴¹ Geiger, (2010). pp.12

¹⁴² In the Joint statement by the Netherlands, Luxembourg, Poland, Italy and Finland, these Member States stated that “the final text of the Directive fails to deliver adequately on the good functioning of the internal market and to stimulate innovation, creativity, investment and production of new content, also in the digital environment. We believe that the Directive in its current form is a step back for the Digital Single Market rather than a step forward.”

Even though the CDSM Directive presents new challenges for the protection of freedom of expression and the promotion of culture by failing to provide the necessary incentives and remedies to hold stakeholders despite the promise of promoting and protecting creativity and culture, the ultimate impact depends on how specific the final version of the legislation and how literally they will be applied. This dependence makes the implementation of Article 17 even more critical.¹⁴³ Member States are at liberty to implement more detailed versions of the procedural conditions in Union Law, which means that there is a freedom to reform the existing framework to get rid of its criticised parts and this burden on the legislator to specify further requirements and tools underlined by both the CJEU and the ECtHR. Thus, it is highly important to find the most appropriate way to implement Article 17 by finding ways of making them sufficient for reaching the fair balance with the necessary safeguards and most importantly, to protect and promote the freedom of expression in the online environment.

¹⁴³ *Eleonora Rosati, a lawyer and copyright expert at the University of Southampton, said the ultimate impact depends on how specific the final version of the legislation is and how it's interpreted. (Kottasová, 2018)*