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Will article 17 of the Directive on Copyright in the Digital Single Market alter the fair balance between copyright and the freedom of expression and information?

An investigation of how the increased copyright liability for Online Content Service Providers in the EU affects relevant copyright stakeholders.

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Abbreviations

AG = Attorney General in the Court of Justice of the European Union

Article 17 = Article 17 of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC

CJEU = Court of Justice of the European Union

CFR = Charter of Fundamental Rights of the European Union

DSM-directive = Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC

EC = The European Commission

ECHR = European Convention on Human Rights

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 ('Directive on electronic commerce')

E&Ls = Exceptions and limitations (to copyright)

EP = The European Parliament

IFPI = International Federation of the Phonographic Industry

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

ISP = Internet service provider

ISS = Information society service

OCSP = Online content service provider

URL = Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk

WIPO = World Intellectual Property Organization

1. Introduction

In the spring of 2019 the Directive on Copyright in the Digital Single Market (DSM-directive) was passed in the EU parliament and by the Council of the European Union.¹ The directive contained the controversial introduction of what critics claimed was a general monitoring obligation for Online content service providers (OCSPs) in article 17 (4) of the directive.² Article 17 was therefore widely contested before it came into force. One of the main worries was that it would force OCSPs to introduce content filters in order to block copyright-protected material ex-ante (before a successful upload has occurred).³ This would in turn, critics argued, lead to “over-blocking” and prevent lawful content from being spread online, which would constitute an infringement of the fundamental human rights of freedom of expression and information.⁴

The opponents of article 17 achieved a partial victory by having several safeguards added to the final version of the directive. However, the opposition continued despite the safeguards, culminating with Poland filing an action for annulment of the contested provisions to the CJEU. In its recent ruling, the CJEU upheld the article but underlined that the introduced safeguards were key when legitimising its existence and structure.⁵

Copyright law has long been faced with the tricky task of having to accommodate several rights simultaneously. This is due to the enforcement of copyright by default entailing an infringement on other rights. One such right that can be seen as being in conflict with copyright is the freedom of expression and information. The conflict between copyright and the freedom of expression and information is particularly sensitive in the EU as it affects two of the EU’s main goals. Those are the protection of fundamental rights for EU citizens and a well-functioning internal market.⁶ Copyright is both important for the internal market and a right protected by the Charter of fundamental rights of the EU (CFR).⁷ On the other hand, the freedom of expression and information is a fundamental right in the EU and very important for the Union’s self image as a democratic frontrunner.⁸

The CJEU’s solution to the conflict of these rights has been to apply the fair balance doctrine. Its purpose is to achieve as much balance as possible between the interests of the parties participating in creating economic value and between copyright and other rights when they are

¹ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

² OCSPs are platforms where the users upload content for other users to watch, but the platform contributes by organising and promoting the content. YouTube is a classic example of an OCSP. See section 3.1 for a detailed explanation.

³ European Digital Rights Initiative (EDRI), *Censorship machine takes over EU’s Internet*.

⁴ Article 11 CFR

⁵ C-401/19 *Republic of Poland v European Parliament and Council of the European Union*.

⁶ Pila J & Torremans P, *European Intellectual Property Law*, p.87.

⁷ Article 17 (2) CFR

⁸ Article 11 CFR

not fully compatible with each other.⁹ Copyright is an area of EU law where the fair balance has been used frequently, which proves how often copyright comes into conflict with other rights.

One of the main worries voiced by academics regarding article 17 was that limitations on the freedom of expression and information caused by over-blocking would alter the balance between the two heavily in favour of copyright. The feared result of such a development was that the Internet would lose its role as a forum for free speech and exchange of ideas and opinions.¹⁰

To understand the reasoning behind article 17 it is of importance to analyse the developments leading up to the introduction of article 17 and how they affected the balance between copyright and the freedom of expression and information. To get the full picture, it is vital to investigate both legislative developments and how technological changes and developments regarding how the Internet worked and was used in relation to copyright affected the EU legislative framework regarding liability for copyright infringements online.

After the CJEU ruling in *Poland v Parliament and Council* some clarity has for the first time been given by a binding EU source of law on how to interpret the partly contradictory obligations in article 17. The conclusion were that the safeguards had to be implemented and given priority over the obligation to attempt to stop copyright infringements ex-ante.¹¹ Since the court insisted that the fair balance should be maintained despite the major reforms, the doctrine once again entered the spotlight as the solution to the conflict between copyright and the freedom of expression and information. However, in order for the safeguards to have the intended effect there is a number of issues regarding especially AI content filters and complaints mechanisms that needs to be solved.

The purpose of the thesis is to examine whether article 17 of the DSM-directive and its implementation will result in the application of the fair balance being maintained or if the application of the doctrine is likely to be altered. The answer of this question is important since it is crucial for the future development of the freedom of expression and information online and its relation to copyright enforcement. The fair balance in practice equates to not disproportionately disadvantaging any stakeholder to copyright and their enjoyment of fundamental rights.¹² Therefore the stakeholders and how they are affected are a central part of analysing the question of the thesis. For example, each solution to an implementation issue is likely to affect copyright stakeholders differently. Likewise the implementations that have so far been presented in different member states have vastly different consequences for such stakeholders. The effects and motivations of the stakeholders will therefore be discussed

⁹ See sections 1.3.2 and 1.3.3 for a detailed explanation of the fair balance and the relevant copyright stakeholder respectively.

¹⁰ Senftleben, M, *Bermuda Triangle – Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market*, p.4 ff.

¹¹ C-401/19 *Republic of Poland v European Parliament and Council of the European Union*, paras 98-99.

¹² See sections 1.3.2 and 1.3.3.

frequently throughout the thesis to show the complexity of the problem that the CJEU attempts to mediate by applying the fair balance.

1.1 Method and structure

1.1.1 Legal dogmatic part

Firstly, to ascertain a stable ground from which a theoretical discussion can proceed from, the method of legal dogmatics will be used. The legal dogmatics section is of great importance to understand how article 17 of the DSM-directive will affect the fair balance-doctrine. In order to research possible upcoming changes, one must know how the rule in question has been applied up until now. The purpose of the legal dogmatics section is therefore to establish how the fair balance-doctrine has been applied in EU-law so far. Even though the term derives from the recital to a directive it has, when it comes to cases regarding the fair balance between copyright and freedom of information and expression, mainly been applied by the CJEU in practice.¹³ The legal dogmatics part of the thesis will therefore mainly consist of CJEU case law.

How a legal dogmatic analysis should be carried out is a topic that is occasionally debated. Kleinemann argues that it should be seen as a *reconstruction of a solution to a legal issue*.¹⁴ This description fits the purpose of this thesis since the fair balance-doctrine is an attempt at a solution of the legal issue that is the conflict between copyright and other rights. Furthermore, clarification is needed regarding what value different sources are given in the legal dogmatic analysis. Whether only authoritative sources should be used or if a broader range of sources can be applied has been debated. Olsen argues for the former view and states that the use of non-authoritative sources makes the analysis increasingly sociological. If other sources are used the motives for this has to be stated.¹⁵ On the contrary, Jareborg has argued in favour of going outside the scope of applicable law in a legal dogmatic analysis. The reason is that even authoritative legal arguments often have political and/or moral arguments behind them, although that is not always apparent when reading such sources.¹⁶

The same reasoning applies when Kleinemann talks about teleological arguments. They can be used in an effort to bring an outside view on the legal situation being analysed, as long as they are based on applicable law. However, if the arguments are not founded in applicable law it would cease being a legal dogmatic analysis.¹⁷ In the context of this specific legal dogmatic analysis, it is important to highlight that its purpose is to analyse a legal solution that is highly topical. Additionally, the main authoritative source is the CJEU, which is known for using teleological arguments since one of their main purposes is to make EU-law align with the

¹³ The term can in EU-law be traced back to recital 41 of Dir 2001/29/EC, which states that the directive “strikes a balance between the interests at stake”.

¹⁴ Kleinemann, J, *Rättsdogmatisk metod*, Juridisk metodlära, p.21.

¹⁵ Olsen, L, *Rättsvetenskapliga perspektiv*, SvJT 2004 p.119.

¹⁶ Jareborg, N, *Rättsdogmatik som vetenskap*, SvJT 2004 p.10.

¹⁷ Kleinemann, J, *Rättsdogmatisk metod*, Juridisk metodlära, p.44.

political goals set up by the EU.¹⁸ Interestingly, the topic in this thesis regards two of the main EU political goals simultaneously, (1) the upholding of the fundamental rights and (2) the functioning of the internal market.¹⁹ Since the existence of political aspirations and other non-legal considerations is part of the application of the fair balance-doctrine it is relevant to use teleological arguments and to some extent go outside the scope of applicable law, as Kleinemann and Jareborg advocates for.²⁰ Furthermore, EU legal theory have tendencies to be less theoretical, partly due to it being relatively new and being more “reactive and context-dependent”.²¹ These reasons also act as motives for not exclusively using authoritative sources in this analysis, even if that makes the analysis less strictly dogmatic according to Olsen.

1.1.2 Analysis of arguments for and against article 17 and their relevancy for each stakeholder

Additionally, a theoretical discussion will unfold, attempting to view the issue from different angles in relation to the problems that lead to the introduction of article 17 as well as potential problems arising from article 17 for different stakeholders. The different stakeholders are divided into three groups regarding the DSM-directive. Those are (1) rightsholders, meaning both creators of works and owners of copyright protected works that are not creators themselves, (2) online content service providers and (3) consumers of content, which includes most Internet users. All of the three above mentioned groups are generalisations and the members of each group do not share the exact same views simply because they belong in one group. In particular, the diversity is noticeable regarding the last group, Internet users. Since a vast majority of people in the EU uses the Internet today, this group contains almost every human being in the EU. However, the generalisation focuses on the behaviours, interests and consequences for the group as a whole. The most interesting conclusions will derive from situations where the interests or consequences for the group as a whole align. Therefore, doing these generalisations can still contribute to reaching conclusions even though the groups are heterogenous to various extents.

The theoretical discussion serves the purpose of connecting the results reached by applying the other two methods. The legal dogmatic section focuses on the how the fair-balance doctrine has been applied previously, until the current situation, while the comparative section looks forward, investigating the implementation and future use of the fair-balance doctrine, in Spain, Sweden and Germany in particular. With such different methods being applied, it is useful to use this discussion part as a link between the two legal research methods.

¹⁸ Reichel, J, *EU-rättslig metod*, Juridisk metodlära, p.111.

¹⁹ Ibid.

²⁰ See section 1.3.

²¹ Walker, N, *Legal Theory and the European Union: a 25th Anniversary essay*, Oxford Journal of Legal Studies, p.583.

1.1.3 Comparative part

Lastly, a comparison will be made between the finished implementations in Germany and Spain and the Swedish implementation that will come into effect on 1 January 2023. The comparison will focus on how the implementation tackles the issues that have been discussed previously in the essay and whether each implementation is likely to strike a fair balance or not. The main reason for choosing these three countries for the comparative part is that they each implemented article 17 differently, with different emphasis on the rights of different stakeholders and varying approaches to the safeguards. The German implementation is more advantageous for users in relation to rightsholders, as it prioritises their rights to take part of content to a bigger extent than stopping all unlawful uploads to OCSPs.²² Contrary to the German approach, Spain's approach has been exemplified as somewhat of the opposite. It prioritises rightsholders by allowing content to be blocked while review of that particular content is ongoing. Sweden's implementation serves as an interesting contrast since it makes concessions to both sides, while also being rather vague compared to the other two implementations.²³

The comparative part of the thesis is important since it gives indications on how the issue with finding a fair balance between copyright and the freedom of expression and information will be dealt with going forward. Since the remainder of the thesis looks at aspects of the issue theoretically and how it has been dealt with up until now, it is very important to include the comparative part to answer the main question of the thesis. Lacking any further guidance in the form of judgements from the CJEU or other EU sources, one for now has to turn to the national level to make more detailed predictions on future developments regarding the fair balance.

1.2 Sources

The material used consists mainly of EU legal sources and academic articles on the subject. The reason for the frequent use of academic articles are due to the lack of recent doctrine on the subject. Most of the published literature regarding copyright on the EU-level only discusses the state of the law before the adoption of the DSM-directive, as well as the developments leading up to the implementation of it. Academic articles, on the other hand, generally has the advantage of being published more frequently and focusing on more specific aspects of copyright law. They can thereby provide more ongoing analysis of recent developments compared to textbooks. Therefore, they are suitable as sources regarding such a delimited and recently ongoing subject as article 17 of the DSM-directive.

Since this thesis mainly regards EU-law it is necessary to mention some important aspects of the legal norms in EU law. Already in the *Van Gend en Loos* case, the CJEU established that the EU was a “*new legal order*”, that is different from “ordinary institutional organisations”.²⁴

²² Ibid.

²³ Sweden's implementation is yet to take effect since the Swedish legislator waited for the ruling in C-401/19 before proposing the bill in parliament. However, after a recent vote in parliament, the implementation will come into force on the 1st of January 2023. See Prop 2021/22:278 on Riksdagen.se.

²⁴ C-26/62 *Van Gend en Loos*, p.2.

Most importantly for this thesis, EU legal sources can be divided into primary and secondary law. The primary law, which consists of e.g. the EU treaties and the Charter of Fundamental Rights (CFR), is superior to secondary law such as directives. Since the DSM-directive constitutes secondary law, it needs to comply with the Charter which is primary law. Concretely, article 17 therefore needs to comply with the freedom of expression and information that is guaranteed by the charter. The CJEU plays a crucial role in ensuring that the secondary law complies with the primary law. The purpose of the court has even been described as making the application of the EU law align with its political goals.²⁵ A challenge of EU secondary law before the CJEU is therefore a natural part of EU legislation and can be viewed as a safeguard for the righteous application of primary law.

Additionally, non-binding sources from the Commission and to some extent other EU institutions will be used. These sources consist of i.e. strategies, guidance's for implementation and studies conducted by EU institutions. They do not have a binding value but since EU copyright law has strong instrumentalist traits they are of great importance to understand the intents of the EU legislator.

Since the thesis partly concerns how different stakeholders are affected by article 17, some statistics and opinions from rightsholders' organisation, user rights' organisations and OCSPs will also be used. These sources are impartial since they are generally used to favour the agenda of a stakeholder. For this reason, such sources will only be used when it is necessary to highlight statistics that are only available to that stakeholder or opinions of a particular stakeholder.²⁶ Lastly, since the subject of the thesis concerns law an area of law that is closely connected to technology, some sources are used for understanding the relevant technology and how it is used.

1.3 Theory

1.3.1 An instrumentalist view on copyright

While copyright serves varying purposes in different jurisdictions, copyright law on the EU level is to a large extent an instrumentalist tool for the EU legislator. The EU started the process of harmonising copyright law in the 1990s.²⁷ It is explicitly being used to achieve both social, economic and other political goals as well as to guarantee the European values laid out in the European Convention on Human Rights (ECHR) and the CFR.²⁸ For example EU copyright law aims to increase the incentives for creating and disseminating creative works. The desired effect of this is to increase growth, innovation and foster the spread and exchange of culture, knowledge and entertainment throughout Europe, thereby increasing European integration.²⁹ Since copyright is intellectual property it is also protected through the right to property in the

²⁵ Reichel, J, *EU-rättslig metod*, Juridisk metodlära, p.111.

²⁶ For example, information regarding remunerations paid by an OCSP or similar statistics is often only made available by that OCSP, since it is not public information.

²⁷ Pila J & Torremans P, *European Intellectual Property Law*, p.221 ff

²⁸ Pila J &, Torremans P, *European Intellectual Property Law*, p.87.

²⁹ These aspirations are explicitly stated in the recital of the Infosoc directive, see Recital 4 of Dir 2001/29/EC.

ECHR and CFR.³⁰ Lastly, it is also beneficial for the internal market to harmonize such an essential area of law as copyright.³¹ Since a smooth functioning of the internal market is one of the EU's main goals as an institution this last reason should not be underestimated. Thus, the EU sees many reasons for taking legislative action in the copyright field. This arguably makes the EU one of the most instrumentalist jurisdictions when it comes to copyright.³²

The stakeholders in copyright have interests that differ substantially, as will be seen throughout this thesis. In some cases, they even have completely opposite interests. The legislator therefore does not trust that the aims mentioned above can be achieved without a guiding governmental hand. However, the aims are still mostly dependent on actions of other parties in order to be achieved. That is the main reason behind the increased cooperation between the parties being prescribed in the DSM-directive.³³ The legislator wants the stakeholders to cooperate for copyright law to be successful, but they want that cooperation to occur on their terms.

The instrumentalist view on copyright makes sense not only in relation to EU copyright law as a whole, but also in relation to article 17 of the DSM-directive in particular. As mentioned in the recital to the DSM-directive, the objectives and principles guiding “*the Union copyright framework*” has not changed.³⁴ What had changed was instead the relevant technological and market developments in relation to copyright, which made it harder to reach the framework's objectives and principles with the previous set of rules. Legislative adjustments were therefore necessary according to this instrumentalist view on copyright. Article 17 can therefore be seen as new means to achieve the already established goals.³⁵

1.3.2 The balance between interests in copyright

As mentioned, the instrumentalist view sees copyright law as a legislative tool to encourage creativity and content-creation. In order for this approach to succeed, the legislator needs to accurately weigh the interests of different stakeholders over time as it is inevitable that copyright will clash with other fundamental rights that involved stakeholders have. This is where the term *fair balance* comes into play as a compromise between the parties.³⁶ Since all stakeholders to different extents are essential in order for economic value to be created, they all have to be sufficiently appeased for the objectives of copyright to be achieved. Thus, achieving and maintaining a balance between the relevant stakeholders participating in creating value is essential. Such a balance is necessary for all involved parties since the parties participating in creating economic value are dependent on each other for such value to emerge. The term *fair balance* should not necessarily be interpreted as fair in that all stakeholders are given an equal treatment. Instead, it has developed to imply not disproportionately disadvantaging any

³⁰ Protocol 1 Article 1 ECHR and article 17 (2) CFR respectively.

³¹ Pila J & Torremans P, *European Intellectual Property Law*, p.87.

³² Ibid

³³ See section 5.2.1.2 for details.

³⁴ Recital 3 of Dir 2019/790/EU

³⁵ Rosati, E, *Five considerations for the transposition and application of Article 17 of the DSM Directive*, p.7

³⁶ Angelopoulos, C & Smet, S, *Notice-and-Fair-balance: How to reach a compromise between Fundamental rights in European intermediary liability*, p.2

stakeholder while still achieving the objectives of the EU copyright framework. Since it is inevitable that copyright will clash with other fundamental rights all involved stakeholders each have to make concessions.³⁷ To simplify, fairness in copyright means that the law should be sufficiently rewarding for all stakeholders. The advantage of the prerequisites being sufficiently rewarding for all is that they will continue to create value in the form of creative and original works. Since stakeholders have different interests a balance needs to be found to adequately accommodate all stakeholders, thereby creating a thriving market for copyright. That balance is fair if it succeeds in proportionately accommodating all relevant stakeholders.

The relevant stakeholders in this thesis serves as a great example of how they are dependent on each other for creating value related to copyright. Creators or owners of content are dependent on platforms for their content to reach a larger audience, while the platforms are dependent on the creators and owners of copyright to create or distribute content that can be shown on the platforms. Furthermore, both are dependent on users, since very little economic value would arise unless the content is consumed by users. Meanwhile, consumers of music, audio-visual content etc. would not have any content to consume if that content was not created. Consuming content would also be significantly harder without service providers having huge catalogues of content available, which was the case before the Internet when albums and movies had to be bought individually instead of being accessible online.

One additional reason for the need of an appropriate balance in copyright law is that the existence of copyright inevitably results in other fundamental rights being infringed to some extent. While most areas of law are based on compromises between different interests, fundamental rights themselves generally do not come into conflict with each other. However, when it comes to copyright, strong copyright protection can mean that the freedoms of information and expression as well as the freedom of enterprise becomes infringed. On the other hand, since copyright is a form of ownership, a weak copyright system will mean that the freedom to enjoy your own property is limited. Therefore, a balance between the interests must ensure that all relevant rights are sufficiently respected and not infringed more than necessary. It should also be underlined that while some fundamental rights are absolute, the right to intellectual property is not.³⁸

1.3.3 Suthersanens' theory on copyright and the relevant stakeholders

As society progresses and new technology or industries change the conditions for different stakeholder's copyright constantly have to be adjusted to maintain a reasonable balance between the stakeholders. As proposed by Suthersanen, the pace of such changes can vary considerably, depending on the pace of societal changes and what kind of work the copyright

³⁷ Even though only users and rightsholders are mentioned in relation to the fair balance in the recitals to the Info-soc and DSM-directives, intermediaries like OCSPs have been accommodated through the safe harbour in the E-commerce directive. This shows that one sometimes has to look at EU copyright law as a whole instead of individual provisions to see how a balance between stakeholders is complied with in EU law.

³⁸ This has been pointed out in numerous cases regarding the fair balance, i.e. C-70/10 *Scarlet Extended*, para 43 and C-401/19 *Poland vs parliament and council*, para 92.

is aimed at protecting.³⁹ A reasonable balance can endure for a longer time regarding works that are physical, e.g. physical books or paintings. On the other hand, copyright works that are produced by or distributed through modern technology are subject to changed rules more frequently due to the increasingly rapid technological development in society. Thus, technology has a cyclical effect on copyright as it upsets the balance between the stakeholders, which then has to be readjusted according to new presumptions.⁴⁰ The stakeholders contribute to the ongoing cycle, as they are part of market readjustments that both causes the legislator to act to restore the balance as well as market readjustments taking place after a legislative reform has occurred. The pace of technological and/or societal development is decisive for the length of a cycle between when the balance is disrupted until a new balance is found which at some point will also be disrupted. During the last 20 years, the swift technological development has led to a huge increase in the amount of works that are being produced and consumed digitally, which have made it necessary to readjust copyright law more frequently. The fact that parts of the Info-soc and E-commerce directives appear outdated only 20 years after coming into force is therefore not particularly controversial considering today's rapid digitalization in the EU.⁴¹ However, before the digitalization of society, the balance between stakeholders provided by copyright law was intended to endure for much longer periods of time and a law that had to be adjusted after only 20 years would likely be deemed a poor piece of legislation. Nevertheless, the fact that copyright has endured through centuries despite drastically different conditions for both creating and disseminating works shows that it is a very resilient area of law.⁴² Combined with the increased value that can be earned through copyright today, the resilience of copyright law indicates that its importance will only increase in the future.

When looking at copyright law according to Suthersanens' theory, it is of great importance to identify the relevant stakeholders. Two obvious stakeholders in most areas of copyright are creators and consumers of works. They are also relevant in relation to article 17. The consumers in this case constitutes all users of OCSPs, which is up to 98 % of Internet users.⁴³ They are a very important stakeholder since many of the voiced concerns regarding the freedoms of information and expression concerns the enjoyment of such freedoms for the general Internet user in particular. The opposition to article 17 was also widespread amongst the public with several large demonstrations taking place throughout the EU, which shows that parts of the public took their role as a stakeholder seriously. The public is otherwise the stakeholder with the least influence on copyright law, since they are a heterogenous group where many do not have copyright law as a main priority. However, it's important to underline that the more a specific user consumes copyright protected works, the more relevant that particular user is as a stakeholder.

³⁹ Suthersanen, U, *Copyright Law: A Stakeholders' Palimpsest*, p.116.

⁴⁰ Ibid, p.122.

⁴¹ At least the parts that article 17 acts as *lex specialis* to, namely article 3 (1) and (2) of Dir 2001/29/EC and article 14.1 of Dir 2000/31/EC

⁴² Suthersanen, U, *Copyright Law: A Stakeholders' Palimpsest*, p.122.

⁴³ Ceci, L, *Frequency of YouTube use in the United States as of 3rd quarter 2020*

When it comes to owners of copyright, Suthersanen categorizes them into two different categories, (1) the creators of works and (2) other owners of copyright. As mentioned in the theory section, this thesis combines creators and other rightsholders whose content are posted online into one category, referred to as rightsholders.⁴⁴ This is because they generally share interests in relation to copyright and its functions in relation to intermediaries online. It is still important to underline that actual creators of works can have a larger interest in the moral rights to their works while other owners, in particular i.e. record and movie companies and different collecting societies are more important stakeholders regarding the economic rights to works.⁴⁵ This is particularly evident when it comes to the lobbying process behind article 17, which was mainly carried out by major rightsholders and collecting societies in the music industry.⁴⁶⁴⁷ Since article 17 mainly aims at readjusting economic aspects of copyright, major rightsowners are slightly more relevant than creators as stakeholders in relation to article 17.

The last relevant stakeholder is the online content service providers (OCSPs).⁴⁸ They are a relatively new form of stakeholder, whose influence did not start to gain significant importance until 10-15 years ago. They, as well as other information society services, have replaced physical stores selling and renting movies, series and music.⁴⁹ Their emergence as a copyright stakeholder has been remarkable and is the main reason behind the introduction of article 17.⁵⁰ The OCSPs are also the only stakeholders in this thesis that does not fit into the “three primary stakeholders”, as proposed by Suthersanen and her theory.⁵¹ As the theory was introduced in 2007, when YouTube was still in its infancy and OCSPs had far less content as today, it is unsurprising that they were not considered a primary stakeholder at the time. However, in the context of article 17, I find it necessary to treat them as a primary stakeholder due to their immense relevance in this particular area of copyright law.

1.4 Delimitations

This thesis aims to investigate a relatively narrow field of EU Copyright law, albeit one that has the potential to affect many EU citizens Internet use greatly. Due to the complexity and intertwined nature of EU copyright law several delimitations have to be made.

The thesis aims to investigate the balance between copyright and the freedom of expression and information exclusively. This means that the relationship between copyright and other fundamental freedoms that are potentially affected by the article 17, e.g. the freedom of enterprise, will not be discussed.

⁴⁴ See section 1.3.1.

⁴⁵ A collecting society is a collective management organisation which collectively licenses and/or enforces copyrights on behalf of rightsholders. See LexisNexis.co.uk, definition of collecting society.

⁴⁶ Bridy, A, *The Price of Closing the Value Gap: How the Music Industry Hacked EU Copyright Reform*, p.12

⁴⁷ See section 2.1.1

⁴⁸ The definition of OCSPs as provided in the DSM-directive is analysed in section 3.1.

⁴⁹ An information society service is essentially the EU term for all websites and apps, see Article 1 (2) of Dir 98/34/EC and section 3.1 for further explanation of the term.

⁵⁰ Recital 3 and 61 of Dir 2019/790/EU

⁵¹ Suthersanen, U, *Copyright Law: A Stakeholders' Palimpsest*, p.116.

The CJEU joined cases of *YouTube and Cyando* was a significant case for platform liability in EU copyright law.⁵² The outcome of this ruling can be of great importance for platforms that do not qualify as online content service providers (OCSPs). At the time of the ruling there was still a possibility that the CJEU would dismiss article 17. If that would have been the case the rulings would have been relevant for all OCSPs. However, since article 17 was upheld as *lex specialis* they are now instead ruled by the specific rules and the precedent set in the *YouTube/Cyando* case does not apply to them. Since the purpose of this thesis is to discuss how OCSPs are affected by the new *lex specialis* aimed at them, cases such as *YouTube/Cyando*, that are not relevant for such platforms will be excluded in the legal dogmatic analysis. Since the thesis exclusively regards the balance between copyright and the freedom of expression and information, CJEU cases regarding the balance between copyright and other freedoms will not be discussed.

Another major EU reform aimed at regulating the digitalization of European society is the adaption of the Digital Service Act (DSA) and Digital Market Act (DMA). These two directives are meant to set horizontal rules regarding digital services and markets. They do therefore not replace or amend *lex specialis* legislation such as the DSM-directive.⁵³ As the purpose here is to analyse how the *lex specialis* that is article 17 affects the fair balance, they will not be discussed further. However, since the DSA will partly replace the E-commerce directive it underlines how that directive has become outdated due to the quick technological development.

One aspect that earlier was seen as an important part of the legislative process was the guidance issued by the commission in June 2021.⁵⁴ The guidance was based on stakeholder dialogues that the commission had organized. As discussed in the section regarding cooperation between stakeholders, these dialogues were not as successful as the legislator had hoped, with widespread distrust between the present stakeholders.⁵⁵ This, combined with the fact that the guidance was not binding and published just days before the implementation deadline meant that it was ignored by several member states. While the guidance does have points of interest those will not be analysed in detail. They will only be referred to if they are still relevant after the CJEU ruling in *Poland v Parliament and Council*.

Lastly, some concepts in especially copyright law e.g. *a communication to the public* is assumed to be known by the reader and therefore not explained in detail. This is due to the thesis being aimed at an audience that has an interest and certain previous knowledge of copyright law.

⁵² C-682/18 *YouTube* and C-683/18 *Cyando*.

⁵³ European Commission, *Questions and answers: Digital Services Act*.

⁵⁴ European Commission, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market*.

⁵⁵ See section 5.2.1.2.

2. Background about article 17

2.1 The Digital Single Market Strategy

The Commission launched a plan in 2015 called the Digital Single Market Strategy. The strategy included making adjustments to the Infosoc- and E-commerce directives to accommodate the rapid technological developments relating to public behaviour online.⁵⁶ The purpose of the commission's project was to improve digital services and infrastructure online, giving online businesses as well as their customers and/or users the same advantages as those provided through the EU single market for physical products.⁵⁷⁵⁸ To understand the reasoning behind creating article 17, it is important to mention that it is only one part of a directive, which in turn is just one part of several legislative measures that form the commissions´ digital single market strategy.⁵⁹ The project of creating a digital single market is part of the instrumentalist EU effort to maintain a well-functioning internal market and guarantee the fundamental rights of the Union’s citizens.⁶⁰

The DSM-directive focuses on the measures that the commission estimated were necessary regarding EU copyright law, to achieve the overall goals of the digital single market strategy. The directive contains several reforms with a total of 32 articles. However, the focus for this thesis and the one that has by far sparked the most controversy is article 17.

2.1.1 Changing Internet habits and a perceived lack of accountability for copyright infringements for YouTube and similar platforms

One of the measures the commission identified as necessary in the strategy was to improve the combating of copyright protected works being uploaded online illegally. When the commission launched its strategy in 2015 52,7 % of the asked stakeholders described measures taken against illegal content online as ineffective and lacking transparency.⁶¹ A key contributor to this problem according to these stakeholders was article 14 (1) of the E-commerce directive. This article is known as the “*safe-harbour provision*” since platforms acting as intermediaries for content between creators and consumers could avoid responsibility for illegal content being uploaded to their platforms because of this rule.⁶² According to article 14 of the E-commerce directive, platforms should only be held accountable for unlawfully uploaded works if they “*have actual knowledge*” of the unlawful works being available on the platform or if they fail to remove them when instructed to do so. The effect of the safe-harbour provision was that platforms to some extent could avoid liability by simply not obtaining knowledge regarding

⁵⁶ European Commission Communication, *A Digital Single Market Strategy for Europe*

⁵⁷ European Commission Communication, *A Digital Single Market Strategy for Europe*, p.3. For a description about the relevant stakeholders, see section 1.3.3.

⁵⁸ See section 1.3.1 regarding the instrumentalist approach to EU copyright law.

⁵⁹ See section 1.3.4 regarding delimitations,

⁶⁰ See section 1.3.1 regarding the instrumentalist approach to EU copyright law.

⁶¹ European Commission, *A Digital Single Market Strategy for Europe*, p.12.

⁶² European Parliamentary Research Service, *Reform of the EU liability regime for online intermediaries*, p.1.

unlawful works on their own platforms. Rightsholders therefore argued that it was necessary to “re-balance” the rights and obligations that OCSPs had in regard to illegal content on their own platforms.⁶³

The need to re-balance the rights and obligations had a simple explanation: major changes of how the Internet worked in the 2010s today compared to the years around 2000 when the previous legislative framework came into effect. There are many differences between the Internet today and twenty years ago, but the emergence of very powerful and influential platforms like Facebook, Twitter and YouTube is perhaps the most fundamental one. Before the rise of such tech giants, the Internet was more diverse with many smaller websites sharing the Internet users to a larger extent. To illustrate this, in one month in 2000 the most visited website (Yahoo) saw 36 % of Internet users visit them in any given month while in 2020, 62 % of Internet users visited YouTube daily and 98 % monthly.⁶⁴

The result of these new Internet habits was that OCSPs received competitive advantages due to the safe harbour. To use YouTube (the biggest OCSP) as an example, these advantages arose due to YouTube being able to receive views and clicks from people watching the large amount of copyright protected material that finds its way onto their platform. Meanwhile they only had limited responsibility for hosting infringing content. Since YouTube avoided responsibility to monitor infringing content themselves, the rights owners were to some extent forced to “police” the platforms in search of their own works being uploaded illegally if they wanted them removed. Before the DSM-directive came into effect, YouTube saw 62 % of Internet users visit them daily and up to 47 % of the total time users spent listening to on-demand music was on YouTube.⁶⁵ All these clicks and views generate enormous advertising revenues for YouTube. This was claimed to be disadvantageous for other platforms that had to pay higher fees to rightsholders for their content.⁶⁶ Additionally, the music industry in particular felt that YouTube should pay higher licensing fees since they were profiting from content being unlawfully made available on their platforms. However, rightsholders had little leverage in negotiations since YouTube could avoid liability due to the safe harbour. This became known as “*the value gap*”. The term was coined by IFPI, an interest group representing rightsholders in the music industry.⁶⁷ The purpose of the safe harbour provision had been to protect platforms that were passive online intermediaries.⁶⁸ IFPI and other rightsowners argued it was not meant to protect platforms that were actively promoting and organising uploaded content themselves, like i.e. YouTube does.⁶⁹ Since the legislator had not foreseen that the safe harbour would cause this

⁶³ European Commission, *A Digital Single Market Strategy for Europe - Analysis and Evidence*, p.56.

⁶⁴ Numbers are for users in the US due to more comprehensive statistics, but the user habits are similar for the EU. See Pastore, M, *Top 50 sites of January 2000* & Ceci, L, *Frequency of YouTube use in the United States as of 3rd quarter 2020*

⁶⁵ Numbers are from 2016 and 2018 respectively. IFPI, *State of the industry overview 2016*, p.5 and IFPI, *Music consumer insight report 2018*, p.13.

⁶⁶ Angelopoulos, C, *On Online Platforms and the Commission’s New Proposal for a Directive on Copyright in the Digital Single Market*, p.3.

⁶⁷ IFPI, *State of the industry overview 2016*, p.23.

⁶⁸ Recital 42 of Dir 2000/31/EC.

⁶⁹ IFPI, *State of the industry overview 2016*, p.23.

effect, they argued that the intended balance between copyright stakeholders had been upset and that this necessitated the need to re-balance the rights and obligations of OCSPs.⁷⁰

2.2 The value gap = A tale of successful lobbying?

Even though IFPI first coined the term “value gap”, other interest groups representing rightsholders soon followed.⁷¹ That these interest groups attempted to amend the situation through lobbying can hardly be seen as surprising. As mentioned, they had very little leverage in negotiations as long as YouTube and other OCSPs could enjoy the safe harbour in the E-commerce directive. The only remaining alternative for increasing received remunerations and decreasing infringements in the arisen situation was to lobby for legislative change. In hindsight, this is something that they did successfully.

2.2.1 What the music industry did not mention regarding their relationship with YouTube

While the discrepancy in remuneration paid by OCSPs vis-a-vis streaming services had undoubtedly become significant, it should be mentioned that the complaints regarding the value gap mainly came from biased rightsholders. For example, an aspect that the music industry rarely mentioned is how YouTube also is a major platform for discovering and promoting new talent in their industry. A list of artists that were discovered through YouTube can be made long and includes i.e. Justin Bieber, The Weeknd, Alessia Cara and Shawn Mendes.⁷² Such artists have provided huge earnings and value for the music industry. When advocating for a dissolution of the safe harbour provisions the music industry seemingly did not account for the beneficial aspects that YouTube and similar platforms provides for them. During the years when the music industry lobbied against the value gap, their revenue also rose steadily. This implies that the value gap was not causing such an economic demise for rightsholders that their lobby organisations at times projected. The value gap was hardly an existential threat to the music industry, as was occasionally predicted. Instead, it was identified by the industry as something that was limiting their potential remunerations and profits from online music streaming.⁷³

By increasing the liability for OCSPs, they could gain competitive advantages on behalf of OCSPs, while still maintaining most of the benefits that such platforms provided for them.

2.2.2 The extent of the value gap and its relevancy for EU Copyright Law

⁷⁰ See section 1.3.1 regarding the EU legislator’s objective to create a balance between stakeholders in the copyright field.

⁷¹ Examples of a global organisation advocating for the interests of rightsholders are the World Intellectual Property Organisation (WIPO). Most countries also have such organisations on the national level, for example ALIS, CopySwede and Stim in Sweden.

⁷² Briones, I, *12 major artists who got their start on YouTube*.

⁷³ Bridy, A, *The price of closing the “value gap”: How the music industry hacked EU copyright reform*, p.10.

While it is hard to determine the extent of the value gap, a comparison of three giants of the user-upload and streaming platforms respectively can give a view of the imbalance the safe harbour-rule created. In 2017, YouTube, the biggest user-upload platform, paid 1.50 dollars per 1000 streams to rightsholders. This can be compared to streaming services that do not rely on user uploads, i.e. Spotify that pays 7,50 dollars and Apple Music which pays 12 dollars to rightsholders for the same number of streams.⁷⁴ The difference in business model between YouTube and such streaming services makes it logical that the remuneration fees differ. However, such a substantial difference in remuneration is noteworthy. Furthermore, these numbers do not consider the ad revenue that YouTube could make from unlawful uploads of works that they could not be held accountable for. Despite the precise extent of the value gap being hard to define, it can with certainty be said to exist. It is also clear that it did not exist when the E-commerce directive was introduced in 2000 and only emerged in conjunction with YouTube becoming the leading OCSP. Whether its existence is an issue is another question, one that will depend on which interests one has in relation to copyright. However, for the EU legislator it becomes an issue if it disrupts the balance between the relevant stakeholders, which it in their view did.⁷⁵

Since this is a civil law matter it is important to remember that legislation is not the only option to achieve change. Changes or occurring issues in a certain market sector can also be solved by the parties themselves or by the market as a whole. However, in this case the legal framework provided by the EU legislator in the copyright sphere had contributed significantly to the differences in remunerations paid by YouTube compared to other streaming services. This arguably led to a situation where the balance between stakeholders shifted from how it was intended to be when the Info-soc and E-commerce directives were constructed. Since the legislative framework contributed to the differences in remuneration, this was unlikely to be changed by renegotiations or by the market themselves. Thereby the only way to achieve a change that rediscovered the desired balance was by changing the prerequisites through legislation. Additionally, the instrumentalist trend prevailing in EU copyright law throughout the last decades made it more likely that the legislator would choose to amend the legislative framework to achieve the objectives and rediscover the balance, instead of leaving this task to the involved stakeholders.⁷⁶

To conclude, the value gap resulted in the market for copyright protected content changing in a way that made the EU legislator act in order for their objectives with EU copyright law to be reached and secured. The main problem in their view was that the previous legal framework had not foreseen the technological and market changes that occurred.⁷⁷

⁷⁴ Liebowitz, S, *Economic analysis of safe harbor provisions*, p.29.

⁷⁵ Recital 3 of Dir 2019/790/EU

⁷⁶ See section 1.3.1 regarding the instrumentalist approach to EU copyright law.

⁷⁷ See section 1.3.3 regarding the cyclical effect of technology on copyright.

2.3 Road to legislation

As mentioned, controversy quickly arose after the commission unveiled its plan for the Digital Single Market and their legislative intentions regarding copyright in general and intermediary platforms in particular became clear. The controversy around article 17 was so significant that the DSM directive became one of the most disputed directives in EU history. The main worries of the opponents were that the “freedom of the Internet” would be set aside as article 17 would force tech-giants to introduce upload filters.⁷⁸ There was also widespread opposition amongst academics and tech companies.

Due to this opposition the legislative process was far from straightforward. It included several revisions, objections from several countries as well as a vote in the European Parliament in 2018 that denied the process to move forward to the negotiation phase. When the process at last reached the European parliament for a final vote the public opposition was significant. A change.org petition against article 17 became the biggest one in EU history with 5.3 million signatures to date.⁷⁹

While lobby organisations representing rightsholders had been successful in bringing copyright and the new liability regime for OCSPs on the commission’s legislative agenda, the opposition became significantly more vocal during the latter stages of the legislative process. Consequently, the finalised version of article 17 contained more safeguards and was arguably more watered down than what was initially proposed.⁸⁰

2.4 Poland’s challenge

Even with the final version containing more safeguards and being more diluted, the opposition to article 17 continued after the directive was approved in the EU parliament. The next obstacle came when the Republic of Poland launched an attempt to get either parts of article 17, article 17.4 (b and c), or failing that article 17 in its entirety annulled by the CJEU.⁸¹ The argument made by Poland in favour of annulment was familiar, they argued that the introduction of a provision that presupposes filtering of content is an infringement of the fundamental rights of information and expression. Those fundamental rights are guaranteed by *article 11 (1) of The Charter of Fundamental Rights of the European Union*, which according to Poland trumped the need to protect rightsovers, even though intellectual property shall also be protected according to article 17 (2) of the same charter.

In April 2022 the CJEU’s judgement finally came. Article 17 was upheld by the court, which however emphasised that the safeguards introduced in article 17 (7-9) were necessary to

⁷⁸ The Copyright Directive: *Misinformation and independent enquiry: Statement from European academics to members of the European Parliament in advance of the plenary vote on the copyright directive on 5 July 2018.*

⁷⁹ Change.org. *Stop the censorship-machinery! Save the Internet!*.

⁸⁰ The introduced safeguards and their effects are described in detail in section 3.6.

⁸¹ Case C-401/19 *Poland v Parliament and Council*.

guarantee a fair balance between the mentioned fundamental rights and the right to intellectual property, including copyright.

There had been uncertainty regarding whether article 17 would be annulled or not up until the CJEU ruling. Therefore, many member states, including Sweden, had put their implementation of the directive on hold until after the ruling. In fact, only 4 out of 27 countries had implemented it when the original deadline ran out in June 2021. A contributing factor to so many countries being late was likely that the guidance regarding article 17 from the commission was delayed and not published until just days before the deadline for implementation.⁸² With the ruling having secured the survival of the article, member states started implementing the directive at an increasing rate. More than three years after the DSM directive was passed some queries regarding article 17 are now dissipating and a discussion regarding what is ahead regarding the filtering of content by YouTube and other big platforms can be had.

3. Legal structure of article 17

As mentioned, the opposition against article 17 led to the structure of the article being revised several times.⁸³ The initial proposals were shorter, with the original draft presented in 2016 only containing three numbered paragraphs, in comparison to the ten numbered paragraphs of the final article.⁸⁴ The 2018 proposal that did not get approval to go ahead was longer, focusing more on proportionality and that exceptions and limitations to copyright should be respected.⁸⁵ The final version passed in 2019 saw additional safeguards introduced, including the statement that the application “shall not lead to any general monitoring obligation”.⁸⁶ The final structure of the article is therefore long and complex. An explanation of the structure and the most important aspects is necessary in order to understand the different projections regarding what the effect of article 17 will be.

3.1 The scope of article 17, what platforms are included?

Article 17 applies to *online content service providers (OCSPs)*, which is a term coined by the EU legislator for the purpose of article 17. Therefore, the definition provided in the directive and its recital are the starting point regarding what platforms counts as OCSPs according to the directive.⁸⁷ Firstly, all OCSPs are information society services (ISS).⁸⁸ An ISS is defined as a service provided electronically at a distance, normally for remuneration (or at least for economic gain), and at the request of the recipient.⁸⁹ This definition means that most apps and website are classified as an ISS according to EU law. Additionally, to qualify as an OCSP, an

⁸² For details about the guidance, see section 1.4 regarding delimitations.

⁸³ See section 2.3 regarding the legislative process.

⁸⁴ European Commission, *Proposal for a Directive on copyright in the Digital Single Market*, p.29.

⁸⁵ European Commission, *Proposal for a directive on copyright in the Digital Single Market – agreed negotiation mandate*, p.56.

⁸⁶ Article 7 (8) para 1 of Dir 2019/790/EU.

⁸⁷ Definition is provided in article 2 (6) and recital 62 of Dir 2019/790/EU.

⁸⁸ Which is a term originating in Dir 98/34/EC.

⁸⁹ Recital 18 of Dir 2000/31/EC

ISS needs to have as its main purpose or one of its main purposes to store and give the public access to works uploaded by its users. It also needs to organise and promote the content that users upload for profit-making purposes.⁹⁰

These requirements cause a number of adjudication issues, which will be briefly discussed here. There are many platforms whose main idea is that the users shall upload content that other users can take part of. However, the need for organising and promoting the content by the platform for profit-making purposes serves as a key additional requirement. YouTube serves as a great example of a platform whose algorithms organise and suggests to the viewer what to watch next, thereby fitting the definition. Many social media platforms, i.e. Facebook and Instagram, initially only had a profile page for each user where their uploads appeared in chronological order. That would not fit the definition due to a lack of organising and promoting the content. However, in recent years, the trend is that many social media platforms are mimicking each other with both Facebook and Instagram now having search functions where users are given suggestions on what to watch next instead of only having to find content themselves. Facebook and Instagram are thereby likely also included under the definition as an OCSP. Most platforms check the box regarding having profit-making purposes, for example all platforms displaying ads on the platform have profit incentives.⁹¹

Interestingly, the recital provides an additional requirement compared to the definition in article 2 (6) of the DSM-directive. It is stated that the definition should only include platforms that compete with streaming services, i.e. Spotify and Netflix, for the same audiences.⁹² While that certainly is the case with YouTube it puts social media platforms like Facebook and Instagram in somewhat of a grey zone as the content there does not compete with regular streaming services in the same way. They are not necessarily excluded though as songs and especially trailers to movies and series can be found widely on their platforms. As many countries implemented these requirements word for word, it will be the CJEU that gets the final say on exactly what platforms are classified as an OCSP and thereby covered by article 17.

Lastly, there are some platforms that are explicitly not included.⁹³ This applies to i.e. non-profit educational platforms and encyclopedias, open-source websites and online marketplaces. These exceptions have in common that they lack either the profit motives or have a main purpose that has little relation to copyright. For example, online marketplaces such as eBay has so little relation to copyright that it would be illogical to alter the scope of the article by including it. Many of the exceptions also serve some other important purpose.⁹⁴

⁹⁰ Article 2 (6) of Dir 2019/790/EU.

⁹¹ Recital 62 of Dir 2019/790.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ For example, encyclopedias and open-source websites both serve the purpose of spreading information and knowledge.

3.2 Lex specialis

Article 17 acts as *Lex specialis* in relation to article 3 of the Infosoc directive and article 14 of the E-commerce directive.⁹⁵ The structure of article 17 (1) of the DSM-directive is based on the already existing concept of copyright infringement through a communication to the public, found in article 3 (1) of the Infosoc-directive.⁹⁶ The difference is that an act of communication to the public is now also considered to be made by an online content service provider (OCSP) when such a platform gives the public access to their works on their platform. Apart from this situation, the concept of communication to the public remains the same throughout EU Copyright Law.⁹⁷ This means that the burden of responsibility for OCSPs is flipped. Previously such platforms could only be held liable if it could be proven that they did not act upon receiving knowledge about the infringement.⁹⁸ Article 17 flips this presumption which means that an OCSP is assumed to be liable for conducting a communication to the public if unlawful content is uploaded on their platform. However, this presumption can be disregarded if the platform has conducted best efforts in relation to two cumulative criteria, licensing the content and stopping unlicensed content from being posted.

Article 17 (1) and 17 (3) have the following wording:

17 (1) Member States shall provide that an online content-sharing service provider performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users.

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

3.3 Authorisation through licensing agreements, extending to users of a platform

It is also important to underline an aspect of article 17 that was often overlooked during the fierce debate about content filters. Apart from the changed liability regime the main change is the introduction of a legal obligation to make best efforts to obtain “an authorisation from the rightsholder”.⁹⁹ This is proposed to be done through licensing agreements which, when concluded by an OCSP, will extend to also cover all users of that OCSP.¹⁰⁰ The intention is that

⁹⁵ European Commission, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market*, p.2.

⁹⁶ The right to communicate a work to the public as a main rule exclusively belongs to the rightsholder or someone that has permission from the rightsholder.

⁹⁷ European Commission, *Targeted consultation addressed to the participants to the stakeholder dialogue on Article 17 of the Directive on Copyright in the Digital Single Market*, p.3.

⁹⁸ Article 14 (1) of Dir 2000/31/EC and C-682-683/18 *YouTube/Cyando*, para 102.

⁹⁹ Article 17 (1) para 2 and article 17 (4) (a) of Dir 2019/790/EU.

¹⁰⁰ Article 17 (1) para 2 and art 17 (2) Dir 2019/790/EU.

as many rightsholders as possible shall enter into such agreements. Apart from the OCSPs making their best efforts to conclude licensing deals the commission and member states shall contribute by organising stakeholder dialogues between OCSPs and rightsholders to facilitate cooperation between the two.¹⁰¹

However, the sheer amount of different works uploaded to some OCSPs, as an example YouTube averages 500 hours of uploaded material every single minute, makes it practically impossible for them to get authorisation from every single rightsholder.¹⁰² For this reason, the rest of the article, 17(4)-17(9), deals with the scenario that a work is considered as uploaded illegally due to a lack of authorisation. It is this latter part of the article that most of the controversy has centered on.

Article 17 (1) para 2 and 17 (2) have the following wording:

17 (1) para 2: An online content-sharing service provider shall therefore obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, for instance by concluding a licensing agreement, in order to communicate to the public or make available to the public works or other subject matter.

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

3.4 The content filter provisions, article 17 (4 and 5)

The requirement chosen by the legislator for this scenario is that the OCSPs need to conduct “best efforts” in order to avoid liability for unlawful uploads. The best effort requirement cumulatively relates to the attempt to receive authorisation and preventing protected works from being uploaded to the platform. What constitutes best efforts is up to interpretation and will ultimately be up to national legislators and courts as well as the CJEU to decide. However, critics of the article have feared that it will de facto mean that OCSPs will see no other option than to apply automatic upload filters on their platforms, in order to prove that they have made best efforts to stop unlawful works. The best effort requisite is what Poland in its challenge of article 17 argued would come into serious conflict with the fundamental rights of freedom of information and expression.¹⁰³

One thing that remains unchanged despite the introduction of article 17 is that unlawful content shall be removed swiftly once an OCSP gains knowledge about its existence. However, the alteration is that best efforts must now also be applied to make sure that content identical to the

¹⁰¹ How the new requirements in regard to licensing will affect the balance between stakeholders is discussed in section 5.2.1.1.

¹⁰² Ceci, L, Statista, *Hours of video uploaded to YouTube every minute 2007-2020*.

¹⁰³ Article 11 (1) CFR.

removed material will not be uploaded again to the same platform.¹⁰⁴ Since the best efforts requisite is used here as well, there are fears that this will also curtail the freedom of information and expression through the application of upload filters. When it comes to filtering it is important to distinguish between *ex-ante* filtering and *ex-post* filtering. The former is proactive and means that content that users want to upload shall pass through an upload filter *before* it becomes available for the public on the platform. Such an upload filter will have to be automatic since the amount of uploaded works means it is not feasible to have humans check everything. On the contrary, *ex-post* filtering is *reactive* since it investigates content that is already uploaded and available to the public.¹⁰⁵ The worry among opponents is that article 17 (4) will lead to upload filters being applied *ex-ante*. If they cannot differentiate between lawful and unlawful content, *ex-ante* upload filters can be argued to constitute a larger infringement on the freedom of information and expression since they completely stop the works from reaching the public. On the other hand, filters that are applied *ex-post* at least allows works to reach the public for some time if they do not work properly.

Article 17 (4) have the following wording:

If no authorisation is granted, online content-sharing service providers shall be liable for unauthorised acts of communication to the public, including making available to the public, of copyright-protected works and other subject matter, unless the service providers demonstrate that 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 specific works and other subject matter for which the rightsholders 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 rightsholder, to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b).

Article 17 (5) of the DSM-directive contains guidance regarding how the “best efforts” requisite shall be interpreted. The guidance is vague but essentially states that any efforts adopted by OCSPs must be in accordance with the principle of proportionality. What is proportionate depends on the size of the service, the audience and the cost of the measures etc. Due to the proportionality requirement it is likely that *best efforts* do not equal *all available efforts*.¹⁰⁶

It is also worth mentioning that necessary information has to be provided by the rightsholders in order for an OCSP to be able to conduct best efforts regarding a work.¹⁰⁷ This further shows how article 17 aims to increase the cooperation between rightsholders and the platforms, which

¹⁰⁴ Article 17 (4) (c) of Dir 2019/790/EU.

¹⁰⁵ European Parliament Study, “*Upload filters*” *The impact of algorithms for online content filtering or moderation*, p.22

¹⁰⁶ Rosati, E, *Copyright in the Digital Single Market*, p.34.

¹⁰⁷ Article 17.4 (b) of Dir 2019/790/EU.

in itself is a way of achieving the goal of a more smoothly functional copyright system for digital works.

Article 17 (5) have the following wording:

In determining whether the service provider has complied with its obligations under paragraph 4, and in light of the principle of proportionality, the following elements, among others, shall be taken into account:

(a) the type, the audience and the size of the service and the type of works or other subject matter uploaded by the users of the service; and

(b) the availability of suitable and effective means and their cost for service providers

3.5 Article 17 (6), an exception for small and new online content service providers

Article 17 (6) contains an exception for new, smaller OCSPs. Within the first 3 years of operating, a new platform does not have to make best efforts to block illegal content from their platforms, if they have an annual turnover of no more than 10 million € and less than 5 million unique visitors per month. This exception was initially not included, neither in the 2016 or the 2018 proposals, but only added in the final version of article 17. It can be seen as an attempt to appease critics, who as one of their main concerns, claimed that one of the issues with article 17 was that it would constitute a hindrance for start-ups and smaller platforms. This was mainly because they would not have the means to comply with the new obligations and would thus be unfairly affected in comparison to YouTube and other big platforms.¹⁰⁸

3.6 The safeguards

The *three main safeguards*, introduced to achieve a fair balance and counter the new obligations in article 17 (4) (b and c), are found in article 17 (7-9). The different safeguards each serve a different purpose.

The *first safeguard* aims to prevent that any measures taken by OCSPs in order to apply with article 17 (4) (b and c) results in over-blocking and that lawful content is not stopped by content filters. In particular, it is regarded as important that traditional exceptions to copyright such as *quotation, criticism and parody* etc. shall be respected. Another important aspect of this safeguard is that all the enumerated exceptions and limitations are made mandatory. In the Infosoc directive most of these exceptions were optional to implement for the member states. They are at this point only made mandatory in relation to the article 17 *lex specialis*. However, academics have recommended that these exceptions and limitations are harmonised generally to facilitate coherence in EU copyright law as a whole.¹⁰⁹ If they are made mandatory throughout the entirety of EU copyright law, it would constitute a major reform.

¹⁰⁸ Recital 67 of Dir 2019/790

¹⁰⁹ Quintais, J, et al, *Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics.*

The first safeguard is salient since if the best efforts deployed by the OCSPs results in the exceptions and limitations to copyright not being respected, the negatives might outweigh the benefits of the reforms. This was also one of the main worries amongst the critics of article 17.¹¹⁰ With today's technology, it is unlikely that upload filters would stop all exceptions to copyright. But every time an exception is not fully respected, the benefits for copyright gained by the DSM-directive are slightly more hollowed out. In article 17 (9 para 3) it is once again stated that the effect of the reforms shall not lead to any consequences regarding the use of legitimate exceptions and limitations under EU copyright law.

Article 17 (7) have the following wording:

The cooperation between online content-sharing service providers and rightholders shall not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation.

Member States shall ensure that users in each Member State are able to rely on any of the following existing exceptions or limitations when uploading and making available content generated by users on online content-sharing services:

- (a) quotation, criticism, review;*
- (b) use for the purpose of caricature, parody or pastiche.*

The **second safeguard** consists of the statement that “*the application of this article shall not lead to any general monitoring obligations*”.¹¹¹ However, it is not further clarified how this shall be achieved. A similar ban on general monitoring already exists in article 15 of the E-commerce directive and it is therefore nothing new in EU law. The prohibition on general monitoring implies that an OCSP must have technology that lives up to the best effort's requirement in article 17 (4)(b) while simultaneously not monitoring all content. How that shall be achieved in practice remains an unsolved question since none of the involved parties in Poland's challenge of the directive could provide any viable alternatives to automatic filtering tools to conduct review of uploaded content ex-ante.¹¹² This safeguard thereby creates doubts whether it is even possible to comply with the entirety of article 17 simultaneously. However, both the CJEU and the German implementation has proposed solutions for how to reconcile these contrarities.¹¹³

This safeguard was, similar to the exception for new and small platforms, not added until the final version of the DSM directive. Similar to the exclusion of new and small OCSPs this

¹¹⁰ UK Copyright and Creative Economy Centre, *The Copyright Directive: Misinformation and independent enquiry: Statement from European academics to members of the European Parliament in advance of the plenary vote on the copyright directive on 5 July 2018.*

¹¹¹ Art 17 (8 para 1) of Dir 2019/790/EU

¹¹² Case C-401/19, Poland v Parliament and Council, para 54.

¹¹³ See sections 4.5.2 regarding the CJEU's statement on the difference between best efforts and obligation of result. See also section 6.2.1 for the German implementation and its solutions to these contrarities.

safeguard can therefore be seen as having the additional motive of appeasing critics. However, it will also act as a boundary for how much monitoring can be allowed in the different national implementations of article 17.

The *third and last safeguard*, in article 17 (9 para 1), focuses on how to amend the situation if the other safeguards fail. It states that OCSPs should have routines in place to effectively handle complaints from users who have their uploaded material removed despite their upload being lawful. It is also clarified that such complaints shall be reviewed by a real person and as fast as possible. This final safeguard can be seen as a last resort when the technology used for differentiating between legal and illegal content fails. As will be seen in the comparative part, it will serve an important function if the implementations of article 17 shall manage to strike a fair balance between copyright and the freedom of information.¹¹⁴

Article 17 (9) paras 1 and 2 have the following wording:

Member States shall provide that online content-sharing service providers put in place an effective and expeditious complaint and redress mechanism that is available to users of their services in the event of disputes over the disabling of access to, or the removal of, works or other subject matter uploaded by them.

Where rightsholders request to have access to their specific works or other subject matter disabled or to have those works or other subject matter removed, they shall duly justify the reasons for their requests. Complaints submitted under the mechanism provided for in the first subparagraph shall be processed without undue delay, and decisions to disable access to or remove uploaded content shall be subject to human review. Member States shall also ensure that out-of-court redress mechanisms are available for the settlement of disputes. Such mechanisms shall enable disputes to be settled impartially and shall not deprive the user of the legal protection afforded by national law, without prejudice to the rights of users to have recourse to efficient judicial remedies. In particular, Member States shall ensure that users have access to a court or another relevant judicial authority to assert the use of an exception or limitation to copyright and related rights.

4. The evolution of the Court of Justice of the European Union case law regarding the fair balance doctrine in relation to copyright

4.1 Introduction

The fair balance doctrine has been used by the CJEU when attempting to balance copyright against other fundamental rights. Originally, it was coined in the recital to the Infosoc-directive as a motive of why it is necessary to have limitations and exceptions to copyright included in EU copyright law.¹¹⁵ The fair balance aims to achieve as much fairness as possible between the

¹¹⁴ See section 6 for comparative analysis and section 5.2.2 for discussion regarding complaints mechanisms.

¹¹⁵ Recital 31 of Dir 2001/29/EC

rights and interests of the stakeholders affected by the EU directives on copyright.¹¹⁶ Most of the cases referred to below originated in a filed injunction against either an Internet service provider (ISP) or an online content service provider (OCSP). This possibility arises from articles 8 (3) of the Infosoc directive and art 14 (3) of the E-commerce directive respectively.

The fair balance doctrine can be seen as an attempt to ease the non-avoidable conflict between rightsholders and the users of their works. The conflict is a result of the fact that copyright of some works, e.g. movies, music and literature, by default results in a limitation on the freedom of expression since those works cannot be used freely due to copyright. This has become increasingly relevant as improving technology and the Internet makes it substantially easier to produce and distribute unlawful copies of works.¹¹⁷ In this context, it is worth underlining that the phenomenon of new technology constituting a challenge to copyright is a recurring theme throughout history. The most striking example is perhaps how the printing press revolutionised the way that works could be produced and distributed on a scale similar to how the Internet provided a similar revolution around 500 years later.¹¹⁸

4.2 C-275/06 Promusicae

The first case where the CJEU used the fair balance doctrine in relation to a copyright injunction was the *Promusicae* case in 2008.¹¹⁹ The case was not about the conflict between copyright and the freedom of expression and information, but it is still relevant since the CJEU introduced the *fair balance doctrine* as a tool of mediation in this case. The issue at hand was that a Spanish ISP (Telefónica) had refused to reveal the identities of their users, whose IP addresses and details of their Internet use could be traced. The users in question had shared p2p files protected by copyright illegally on a site called KaZaA. The applicant, a non-profit organisation (Promusicae) representing rightsholders, filed an application to disclose the user's identities at a national court in Spain on behalf of the rightsholders.¹²⁰ The court chose to interpret the question in regard to Union law as a whole.¹²¹

In this case the interests of the rightsholders, whose intention was to start civil proceedings against the Internet users in question, collided with the Internet users' interest of privacy online and protection of their personal data. The conflict between the two interests was unavoidable. Promusicae argued that two of the fundamental rights in the CFR should prevail and that they should therefore gain access to the information. These rights were the right to property (article 17 CFR), in this case intellectual property, and the right to a fair trial and effective remedy (article 47 CFR).¹²² However, the CJEU held that the information stored by Telefónica meant

¹¹⁶ See section 1.3.2 regarding the purpose of the fair balance doctrine.

¹¹⁷ Pila, J & Torremans, P, *European Intellectual Property Law*, p.234.

¹¹⁸ Ibid, p.233 and section 1.3.3 regarding Suthersanens' theory on copyright.

¹¹⁹ C-275/06 *Promusicae*.

¹²⁰ Ibid, para 30.

¹²¹ The Spanish court asked for interpretation of Directives 2000/31/EC, 2001/29/EC and 2004/48/EC, although the national rules in question aimed to implement Directives 95/46/EC and 2002/58/EC.

¹²² C-275/06 *Promusicae*, para 61.

that they were processing data according to article 2 of the E-privacy directive.¹²³ Since the E-privacy directive thus became applicable, they argued that the two fundamental rights of right to privacy and the right to personal data (article 7 and 8 CFR respectively) should prevail.¹²⁴

The CJEU's solution to the incompatibility of the different fundamental rights in this case was to, for the first time in a copyright case, apply the fair balance doctrine in practice. Fair balance in this case meant that it was not compulsory to disclose personal data in order to "ensure effective protection of copyright in the context of civil proceedings".¹²⁵ On the other hand, it was stated that in the future, the fair balance must be struck in each single case when transposing directives that results in a conflict between for example copyright and other fundamental rights. This paved the way for an increased use of the fair balance doctrine during the years to come. No further guidance was given regarding which circumstances should be considered when national courts and legislators attempted to find the fair balance. However, the court insisted that the fair balance should also apply in relation to other fundamental principles of Union law, such as the principle of proportionality.¹²⁶

The introduction of the fair balance doctrine in CJEU copyright jurisprudence had the potential of being quite significant. However, the lack of guidance on how to apply the principle in practice meant that the application of the doctrine was likely to become unpredictable. Since no criterion was added it opened up the possibility of using fair balance as an argument to limit or expand the exceptions of copyright, simply by arguing that such an action is necessary in order to achieve a fair balance.¹²⁷ Since it is up to the member states to implement the rules, the likelihood of them interpreting what constitutes a fair balance differently increases when there are no clear criteria for how to implement it. That countries can implement directives differently is not a problem in itself. On the contrary, it is an important cornerstone of EU law that countries should be able to implement directives so that they fit into the national laws, as long as the main objectives are achieved. However, when countries can use the same argument, in this case the fair balance, to implement a directive in two different directions that can be damaging for the harmonisation in that particular area of EU Law. Thereby, when the CJEU decided to not formulate any criterion for what constitutes fair balance they opened up for the possibility that the harmonisation of EU Copyright law would weaken.

4.3 The Sabam cases

The next development in the CJEU came with two rulings involving the Belgian company *Sabam*, which manages different copyrights on behalf of rightsholders.¹²⁸ The first one, *Scarlet Extended*, was a more extensive ruling, mainly because similarities in the cases meant that

¹²³ Dir 2002/58/EG.

¹²⁴ Case C-275/06 *Promusicae*, para 64.

¹²⁵ *Ibid*, para 70.

¹²⁶ *Ibid*.

¹²⁷ Pila J & Torremans P, *European Intellectual Property Law*, p.242.

¹²⁸ C-70/10 *Scarlet Extended SA v SABAM* and C-360/10 *SABAM v Netlog*.

similar conclusions could be drawn in the second one, *Sabam v Netlog*, without repeating all facts and circumstances.

4.3.1 C-70/10 Scarlet Extended SA v SABAM

Sabam intended to put an end to copyright infringement of their works and their strategy for doing so was innovative. Instead of going after people that were copying or downloading the works illegally, which e.g. Promusicae had done, they attempted to stop it by going after the ISP which acted as an intermediary by providing the means for sharing P2P-files and thus making the infringements possible. In the *Scarlet extended case*, Sabam had filed a comprehensive injunction that, if approved by the court, would mean that Scarlet (the ISP in question) would have to put in place technology that would (1) filter all electronic communications (2) between all customers (3) exclusively at their own expense and (4) for an unlimited amount of time.¹²⁹ Since this was to be done regarding all communications between all customers means the intention was for the measures to be applied ex-ante as a preventive tool instead of as a reactionary tool.

Such an extensive injunction would come into conflict with several other fundamental rights, i.e. the right to personal data, the right to conduct a business for the ISP and, most important for this thesis, the right to expression and information. Regarding the latter conflict, the CJEU's main worry was that the filtering system "might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications".¹³⁰ The injunction in question would thus not strike a fair balance with the right to expression and information (article 11 CFR). As a side note, the injunction did not strike a fair balance with the other two fundamental rights in question either. A further issue was that the injunction was so extensive that it could be considered a general monitoring obligation, which is expressly prohibited according to article 15 (1) of the E-commerce directive.

There was also additional doubt whether the filtering system could discern whether works would fall under an exception to copyright or under the public domain, which would make an otherwise unlawful communication lawful. Interestingly, this concern is similar to the worries that have been raised regarding article 17 of the DSM Directive, worries that were the key reason behind the safeguards being included in the article.¹³¹ At the time of the Scarlet case a report had established that there were several technological obstacles that needed to be solved in order for an upload filter to work accurately enough to only block unlawful content. However, the report also found that "it could not be entirely ruled out" that such technology would work.¹³² Despite a decade of technological development, the doubts regarding the accuracy of upload filters have remained at the core of the issue ever since.¹³³

¹²⁹ C-70/10 *Scarlet Extended SA v SABAM* and C-360/10 *SABAM v Netlog*, para 29.

¹³⁰ C-70/10 *Scarlet Extended SA v SABAM*, para 52.

¹³¹ See section 3.6 about the safeguards being introduced to appease critics of article 17.

¹³² C-70/10 *Scarlet Extended SA v SABAM*, para 22.

¹³³ See section 5.3.1 regarding this issue.

4.3.2 C-360/10 Sabam v Netlog

The injunction in *Sabam v Netlog* was similar to the injunction in *Scarlet Extended*. The main difference was that the company the injunction was aimed at was a social media platform (Netlog).¹³⁴ Netlog's function and purpose were similar to e.g. Facebook in that each user had a profile where they could upload content in the form of texts, pictures and videos. The profile of each user was available to view for all of the other millions of users worldwide.¹³⁵ Thus, as soon as one person illegally uploaded content protected by copyright to their own profile, that content technically became available to all other users of the network. Therefore, Sabam argued that the injunction was justified. Another difference to the *Scarlet Extended* case was that this upload filter would apply to all uploaded electronic files, instead of only P2P-files as in *Scarlet Extended*.

The rights that would come into conflict with such an upload filter were the same three rights as in *Scarlet Extended*.¹³⁶ The main worry in regards to the freedom of information and expression was once again that the proposed upload filter would not be sufficiently precise regarding the differentiation between lawful and unlawful content, in particular in regards to the exceptions and limitations to copyright.¹³⁷ The risk posed by the proposed upload filter meant that a fair balance would not be struck if such an injunction was allowed.

The two Sabam cases should preferably be read and understood together. However, it is important to remember the major distinction between the cases, which was the different industries the two companies that the injunctions were aimed at was operating in.¹³⁸ This resulted in some difference regarding which technological transmissions the proposed content filters would review ahead of them being conducted. However, the arguments for a fair balance not being achieved are the same in both cases. Since the proposed injunctions can be argued to be intrusive into as many as three different fundamental rights, it was unsurprising that the CJEU concluded that they would fail to strike a fair balance. If the injunctions had been allowed, rightsholders would have received far more power to take widespread action against many forms of copyright intrusions. The result was now instead an introduced lower limit saying that general upload filters at the time could not constitute a fair balance. Two years later the CJEU would complement this ruling by explaining what kind of injunctions *could* strike a fair balance between copyright and other fundamental rights.

¹³⁴ If article 17 of the DSM-directive would have applied at the time, Netlog would likely not have been classified as an OCSP due to them not organising and promoting the content uploaded by users. However, their functions at the time were similar to Facebook and Instagram. See section 3.1 for definition of OCSP.

¹³⁵ C-360/10 *Sabam v Netlog*, para 17.

¹³⁶ The right to conduct a business, the right to personal data and the right to receive and impart information.

¹³⁷ C-360/10 *Sabam v Netlog*, para 50.

¹³⁸ *Scarlet Extended* being an ISP and Netlog being an OCSP in the form of a social media platform.

4.4 C-314/12 UPC Telekabel Wien

In the C-314/12 *Telekabel Wien* case, the issue was once again that copyright protected works were made available illegally to the public on an Internet website. This time, two production companies attempted to put an end to the infringements by getting a court ordered injunction against an Austrian ISP (UPC Telekabel) that would require the ISP to block access to the website in question. The case made its way to the CJEU, who answered two questions.¹³⁹ Firstly, the court determined that the UPC Telekabel was to be classified as an intermediary (according to article 8 (3) of the Infosoc directive), since their services were necessary in order to make the infringements possible. This meant that any measures available to be used against an intermediary according to EU-law could be used against UPC Telekabel.¹⁴⁰

Additionally, this raised the question of what measures could be taken against UPC Telekabel whilst maintaining the fair balance between copyright and other rights. Once again, the contending fundamental rights were the right to conduct a business and the right to freedom of expression and information. In contrast to the Sabam cases, the CJEU ruled that (1) an injunction against the UPC Telekabel could be allowed and (2) set out criteria for how an injunction should be constructed in order to maintain the fair balance.

Several statements were made by the court regarding what measures could be deemed appropriate in relation to the freedom of information and expression. Firstly, they had to be rigorously constructed so that they “*strictly target*” the copyright infringing use and not lawful use. The CJEU made it clear that *if* the measures do affect lawful acts in addition to the unlawful acts, they do not strike a fair balance. However, if they only affect unlawful use, they are seen as reasonable measures.¹⁴¹ Comparatively, as an example of a situation where blocking the website completely seems proportional, AG Szpunar’s opinion in *Stichting Brein* can be mentioned. In the case the AG states that The Pirate Bay, a website where over 90 % of files are available unlawfully and the operators of the site were not cooperating with rightsholders or authorities regarding the removal of unlawful content, is an example of a website where even total blocking can be seen as proportionate. On the other hand, if illegal content is less voluminous and the site operators are co-operating, the measures have to be less comprehensive in order to be proportionate and strike a fair balance.¹⁴²

Another important criterion introduced in the case, which is also the *first example of a safeguard being introduced to protect the fair balance*, is the possibility for internet users to complain to national courts if measures are too intrusive in regard to the freedom of information. This can be compared to article 17 (9 para 1) of the DSM-directive, which is also an ex-post complaint-mechanism system.¹⁴³

¹³⁹ There were four questions asked in the case, however the court did not have to answer the second and fourth questions since the answer to question one and three was in the affirmative.

¹⁴⁰ C-314/12 *UPC Telekabel Wien*, paras 23-40.

¹⁴¹ C-314/12 *UPC Telekabel Wien*, paras 42-63.

¹⁴² Opinion of AG Szpunar – C-610/15 *Stichting Brein*, paras 75-76.

¹⁴³ See section 3.6 for further elaboration of Art 17 (9 para 1) of Dir 2019/790/EU

Most importantly, the court also recognised the possibility that the reasonable measures that can be allowed might not be enough to stop all infringements. In such a situation it was underlined that it is sufficient that the measures at least make it “more difficult to achieve or seriously discourages” the Internet users accessing unlawful works from continuing to do so.¹⁴⁴ This kind of injunction, which focuses on a certain result being achieved without specifying the measures required to achieve it, is known as an *outcome injunction*. As will be seen below, outcome injunctions are something that the CJEU has found useful in cases regarding content filters as a way to stop copyright infringements.¹⁴⁵ However, it should be pointed out that when it comes to stopping unlawful content online, an outcome injunction can equate to a filtering order if there are no other options than applying upload filters to achieve the desired outcome.¹⁴⁶

This compromise means that ISPs have to contribute to the enforcement of copyright law online, while rightsowners have to accept that all infringements likely will not be stopped. It was the first time that the CJEU, in its case law regarding the fair balance recognised that neither side could both have the cake and eat it. Instead it was acknowledged that all stakeholders needed to make some concessions.

AG Cruz Villalón had a slightly contradicting approach to the case. He argued that the answer to the third question should be in the negative, which gave him the opportunity to also answer the fourth and last question. The fourth question was whether it should be seen as compatible with EU-law to require the ISP to take “*specific measures to make it more difficult to access a website containing unlawful material, if the measures does not require inconsiderable costs and can be circumvented without any special technical knowledge*”.¹⁴⁷

Such an injunction as the one proposed in the fourth question is essentially the opposite of the very far-reaching injunctions proposed in the Sabam cases. As the AG points out, this poses new problems. While the problem in the Sabam cases were that those injunctions were too far-reaching and thus would restrict several other rights, the issue with an injunction such as the one proposed in the fourth question is that it might not contribute to reaching the goal of restricting access to unlawful material at all, since it would be too easy to circumvent. Despite its flaws, the AG found such an injunction more suitable since it did not interfere with the fair balance in the same way as a general injunction acquiring an ISP to block all access to a website would do. The AG warranted this by arguing that the general injunction would not strike a fair balance since it would be an unreasonable burden for the ISP, since they do not conduct any infringements themselves and has no connection to the operators of the website in question.¹⁴⁸

An injunction such as the one in Telekabel Wien transfers much of the responsibility for the construction of the measures to the ISPs themselves. It would not be the last time that such a

¹⁴⁴ C-314/12 *UPC Telekabel Wien*, para 63.

¹⁴⁵ The CJEU also choose outcome injunctions as an option in C-401-19 *Poland v Parliament and council*.

¹⁴⁶ C-401/19 *Poland v Parliament and Council*, para 54. See also the discussion in section 4.5.2 for how the CJEU treats this issue.

¹⁴⁷ C-314/12 *UPC Telekabel Wien*, para 17 (4).

¹⁴⁸ Opinion of Mr Cruz Villalón in C-314/12 *UPC Telekabel Wien*, paras 90 and 109 respectively.

responsibility was transferred to a private actor.¹⁴⁹ Such a transfer of the responsibility for a blocking or content filtering measure poses issues for the private actor in question. While being targeted with an injunction they have to appease both rightsholders and users, with the threat of either being held liable or making their customer base upset and risk losing market shares if the opposing stakeholders are not sufficiently satisfied.¹⁵⁰ Additionally, it is no easy task to construct proportionate measures without guidance regarding what measures are considered reasonable and proportionate according to the legislator.¹⁵¹ The private actor thereby becomes an involuntary trial balloon, both putting time and effort into constructing the measures as well as taking blame for them if they are found insufficient. The task becomes even more daunting when you consider that the CJEU in the ruling states that the preferred outcome is unlikely to be achieved. Such an outcome injunction therefore seems contradictory. The review of the actual measures also has to be conducted ex-post, which is not ideal if they are found to be unreasonable.

Regardless of the issues this could bring for private actors, the CJEU and the AG had now acknowledged the difficulties facing parties attempting to navigate the fair balance between copyright and the freedom of expression and information online, which was an important step forward in the application of the doctrine.

4.5 C-401/19 Poland v European Parliament and the Council of Europe

The ominous cloud looming over article 17 for the first three years of its existence was the action for its annulment filed by Poland. In April 2022 the long-awaited verdict arrived and the CJEU upheld article 17 in its entirety in *C-401/19 Poland v Parliament and Council*.

4.5.1 Poland's claim

The initial claim made by Poland was that only article 17 (4), points b and c, *in fine* should be annulled. These two points were the ones prescribing that “best efforts” should be applied in order to stop unlawful content. The CJEU found this impossible to do since an annulment of those two points would uphold the rest of article 17 but give it a “substantially different” meaning. This would favour the online content service providers (OCSPs) more than intended, instead of increasing their liability and responsibilities.¹⁵² When reading the court's reasoning, the inadmissibility of Poland's initial claim becomes evident since the court argues that article 17 is only justified when looking at the article in its entirety, including its safeguards. Therefore, Poland's alternative claim, that article 17 should be annulled in its entirety due to the infringement on the freedom of information and expression, was instead tried by the court.

¹⁴⁹ A similar approach is partly taken in relation to article 17, see *C-401/19 Poland v Parliament and Council* para 75.

¹⁵⁰ Opinion of Mr Cruz Villalón in *C-314/12 UPC Telekabel Wien*, para 89.

¹⁵¹ Angelopoulos, C, *CJEU in UPC Telekabel Wien: A totally legal court order ...to do the impossible*, Kluwer Copyright Blog.

¹⁵² *C-401/19 Poland v Parliament and Council*, para 20.

The CJEU made several arguments, which are quite interconnected, for why article 17 viewed in its entirety “do not *disproportionately* restrict the freedom of expression and information of users” of OCSPs. The word *disproportionately* is very important in this regard, since it makes it clear that some limitations on those freedoms are necessary if copyright shall be protected online.¹⁵³¹⁵⁴ This is similar to what the court had already established in *Telekabel Wien*.¹⁵⁵ Additionally, neither of the parties could provide any alternatives to automatic recognition and filtering tools when it came to prior review of a huge number of files. The court concluded that this means that the liability regime introduced in article 17 did constitute a limitation on the freedom of expression and information.¹⁵⁶ However, the reasoning is that by restricting those rights, but not *disproportionately*, a fair balance between the rights can be struck.

4.5.2 The Courts first argument – *Allowing* lawful content vs *attempting* to stop unlawful content

The first argument is that EU law, and articles 17 (7) and 17 (9) in particular, lays out a sufficiently “clear and precise” limit of the result that the measures introduced by OCSPs relating to article 17 (4) needs to achieve. That result is that the measures in question needs to cumulatively achieve two things. The measures need to constitute a best effort to block unlawful content while simultaneously not blocking lawful content. The key point here is that the latter prescribes a specific and obligatory result that needs to be achieved, while the former only implies that a well-executed attempt has to be made while still achieving the other obligatory result.¹⁵⁷

4.5.3 The second argument - exceptions and limitations to copyright are safeguarded

Additionally, the exceptions and limitations to copyright are expressly upheld by article 17 (7 para 2). They are also made mandatory since they are considered to be a vital part of striking a fair balance between article 17 and other fundamental rights.¹⁵⁸

The court also emphasizes that the rightsholders have to provide adequate information regarding their works, which aims to increase the accuracy of the best efforts made by the OCSPs.¹⁵⁹ This connects to the argument that the introduction of a general monitoring obligation for OCSPs is expressly prohibited by article 17 (8). In the absence of such an obligation it is unlikely that all unlawful content can be stopped, especially if the rightsholders do not provide the OCSPs with adequate information regarding their works.¹⁶⁰ The stakeholder dialogues between the involved parties aims to simplify the exchange of such information and

¹⁵³ *Ibid*, para 82.

¹⁵⁴ See section 1.3.2 regarding the meaning of the fair balance.

¹⁵⁵ See section 4.4 and C-314/12 *UPC Telekabel Wien*.

¹⁵⁶ C-401/19 *Poland v Parliament and Council*, para 58.

¹⁵⁷ *Ibid*, para 85 and Opinion of Advocate General Øe in C-401/19 *Poland v Parliament and Council*, para 191.

¹⁵⁸ C-401/19 *Poland v Parliament and Council*, para 58. In the *Infosoc* directive several of the limitations and exceptions from copyright are only voluntary for the member states to use.

¹⁵⁹ C-401/19 *Poland v Parliament and Council*, para 89.

¹⁶⁰ *Ibid*, para 91.

increase the understanding of each other's practices among the involved parties.¹⁶¹ This indicates that the desirable result of article 17, according to the court, is not that all unlawful content shall be blocked. Instead, through cooperation between the parties and increased efforts by the OCSs, unlawful content shall be decreased as much as possible. This is in line with both the purpose of the fair-balance doctrine historically as well as the intentions behind article 17 expressed by the legislator, who aimed to achieve this both by more license agreements and by the new liability regime.¹⁶²

4.5.4 The third argument - ex-post safeguards can correct eventual mistakes

Furthermore, article 17 (9 paras 1 and 2) put the nail in the coffin for Poland's challenge of article 17 according to the court, by introducing *ex-post safeguards* for the quite likely event that lawful works are either unjustifiably removed or blocked. This final safeguard consists of human review of any complaint which shall be conducted promptly. The combination of obligatory aims and an ex-post safeguard with the purpose of correcting the result to align with the aim, if that aim is not achieved initially, makes the intrusion into the freedom of information and expression proportionate. However, it has to be underlined that the CJEU emphasised that it is the safeguards and legal considerations *combined* that made them arrive at the conclusion that a fair balance can be struck despite the changes provided by article 17. Due to this reasoning, it is unlikely that the court would have found the original versions of the directive compatible with the fair-balance doctrine, which implies that the added safeguards were necessary in order for the directive to be compatible with EU law.¹⁶³

Lastly, the court also provided a warning regarding the delicate task that is the implementation process. It must be carried out carefully in order for the fair balance to be maintained and no fundamental rights to be disproportionately limited.¹⁶⁴ This is certainly not an easy task and it serves as a premonition that this is likely not the last time article 17 will lead to a case in the CJEU. This statement also gives a clear indication that the CJEU is unlikely to allow verbatim implementations since they will struggle to achieve a fair balance.¹⁶⁵

5. Analysis of arguments for and against art 17 and their relevancy for each stakeholder

The relevant arguments in relation to article 17 can be divided into two categories of arguments. The first category (section 5.1) contains arguments that relates to the situation before the introduction of the article. These were the arguments that rightsholders' in particular to various extents claimed necessitated the legislative reform. The second category (sections 5.2-5.4)

¹⁶¹ Ibid, para 96.

¹⁶² Recital 61 and 66 (1) of Dir 2019/790/EU

¹⁶³ See section 2.3 regarding the initial proposal of the design of article 17.

¹⁶⁴ Recital 61, 66 (1), 98 and 99 of Dir 2019/790/EU.

¹⁶⁵ See section 6.1 regarding the Spanish implementation of article 17 for an example of the issues that arise with verbatim implementations.

consists of arguments that relates to the introduced measures in article 17 and what effects they will have for different stakeholders looking forward.

5.1 The underlying factors leading to article 17 being introduced

5.1.1 The safe harbour in art 14 (1) of the E-commerce directive becoming outdated due to the rise of online content service providers and YouTube in particular

The safe harbour provision in the E-commerce directive came into force in 2000 when the Internet was a very different place compared to the Internet of today. At the time, the thought of the Internet as a wonderful place to exchange ideas and content was still flourishing. That a single platform could have as much as 1,3 billion users and 5 billion videos watched daily would be an astonishing thought twenty years ago since that outnumbers the total amount of Internet users in 2000.¹⁶⁶ In the light of this age of digital optimism, safe harbour provisions such as the one in the E-commerce directive was seen as a tool to allow the freedom on the Internet to thrive. Since the amount of online content was so low compared to today, it was hard to imagine that they could cause significant economic damage to rightsholders.

In 2018 the music industry claimed that 38 % of all music consumption were consumed through copyright infringement.¹⁶⁷ Additionally, Universal Music Group estimated that as many as 100 000 files per day, equalling 36,5 million files per year, were infringing on their copyrights on YouTube.¹⁶⁸ It is important to underline that these figures are from biased sources since the music industry is a vital stakeholder when it comes to copyright in the online sphere.¹⁶⁹ Information about how much is paid to rightsholders by Google (the owners of YouTube) is also contested by the music industry, meaning that accurate non-partial numbers on remunerations is not available. However, due to the enormous number of music consumption online it is still clear that the amount paid to rightsholders is significantly lower than the income generated by the content. Even the unverified amount that Google claims to pay is 10 times lower than the total revenue received from advertisement on YouTube.¹⁷⁰ These figures shows that the economic opportunities for OCSPs have increased drastically. That invalidates the argument, which warranted the safe harbour for OCSPs, that such platforms only act as innocent intermediaries without sufficient self-interest in copyright law to be accounted for. On the contrary, YouTube and other OCSPs are now key stakeholders. The drastic increase in available content and the changed role of particularly YouTube in relation to copyright were key reasons for the commission to act and initiate the *lex specialis* that is article 17. However, that the safe harbour in the E-commerce directive was outdated does not mean that safe harbours as a concept is outdated. Article 17 (4) is essentially also a safe harbour since it exempts platforms

¹⁶⁶ The numbers are for YouTube. See Dusollier, S, *The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a few Bad Choices, and an Overall Failed Ambition*, p.33.

¹⁶⁷ IFPI, *State of the industry report 2018*, p.8.

¹⁶⁸ United States Copyright Office, Notice and Request for Public Comment, *Comments of Universal Music Group*, p.17-19.

¹⁶⁹ See section 2.2 regarding the partiality of the music industry regarding the value gap.

¹⁷⁰ Dusollier, S, *The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a few Bad Choices, and an Overall Failed Ambition*, p.34.

from liability if they comply with the *best efforts*' requirement. The difference is that article 17 has different obligations that have to be met in order for OCSPs to be protected by it. As will be seen in the comparative part, both Germany and Sweden have also implemented new safe harbours.¹⁷¹ Therefore, it is a fairer statement that it was the criteria for the safe harbour in the E-commerce directive that had become outdated and not safe harbours as a legislative solution in copyright law.

To reconnect to the theory regarding copyright law as a constant struggle to maintain a balance between the stakeholders, the changed perspective on the safe harbour is an example of how a rule that twenty years ago seemed to strike an appropriate balance between different interests do not strike such a balance anymore due to technological changes. The technological changes had been very advantageous for OCSPs and YouTube in particular benefited on behalf of other stakeholders. Therefore, it was necessary to recalibrate the law in order to once again find the balance, which is what article 17 strives to do. As YouTube is the stakeholder that had benefited the most from the shifting balance, it is reasonable that article 17 aims to increase their responsibility and liability. As will be seen later, article 17 might not achieve the desired effect though, as YouTube is better equipped to deal with the new rules than their competitors due to their size.¹⁷² On the contrary, rightsowners were negatively affected by the shifting balance. Even though individual creators in some cases also saw negative effects, the effects were worse for rightsowners with huge copyright portfolios, i.e. record and movie companies. The aspect of copyright that the value gap affected the most was the economic aspect, while the moral aspect was less affected. Since record and movie companies generally have more economic incentives with their copyright portfolios they were affected more by the emerging imbalance.

5.1.2 Necessary to flip the duty of enforcement, due to the large amount of copyright infringing content

One of the most fundamental changes provided by article 17 is that the duty of enforcement is flipped from being a task mainly carried out by the rightsholders themselves, to an obligation for the platforms. The safe harbour in article 14 (1) of the E-commerce directive contributed to a notice-and-takedown system, in which OCSPs only had to remove infringing content after being notified of its existence by a rightsholder.¹⁷³ The only measure required by them was then to carry out an assessment of the legality of the content and remove it if it was infringing.

As the number of copyright-protected works and the number of users online grew the task of “policing” platforms like YouTube in search of infringements of your own works became increasingly difficult, even for rightsholders with vast resources like record and movie companies. Infringing content could be uploaded at a faster rate than it could be detected by rightsholders. Combined with the fact that it takes time for the platforms to review each complaint this meant that popular works could be unlawfully available much of the time on

¹⁷¹ See 6.2.1 and 6.3.1 respectively.

¹⁷² See section 5.3.3.

¹⁷³ The term *notice and takedown* is borrowed from US copyright law, which has a similar system as the pre-article 17 system in the EU.

OCSPs. This sowed the argument from rightsholders about the increasing incongruity of the enforcement of copyright being a burden for them and not the OCSPs that were hosting infringing content and enjoying protection through the safe harbour. The task of attempting to stop infringements of your works on YouTube has even been compared to attempting to “drink from a firehose”, due to the seemingly never-ending uploads of content.¹⁷⁴

The impossibility of this task had the effect that copyright enforcement online could no longer contribute to one of the main purposes of copyright, which is the exclusive right to decide where and when works shall be communicated to the public. Therefore, altering the tactic regarding copyright enforcement did seem necessary in order to maintain the legitimacy of the copyright system online.

For new approaches to be successful, an increased duty of enforcement and cooperation from OCSPs seems necessary. A comparison can be made between the enforcement of copyright online and the enforcement of financial crimes such as money-laundering. For such crimes to be detected, the cooperation of banks and other financial institutions are often required. Many banks have tools available to detect and prevent money laundering. This does not mean that every single transaction in a bank is examined, but there are systems in place that flags transactions that for some reason is seen as suspicious. Neither does the cooperation of banks result in all money-laundering being stopped or that banks are always pleased to contribute to such enforcement. However, the punitive measures that banks in many countries can receive if they do not cooperate against money laundering results in the amount of money laundering being reduced. In the same way, cooperation from OCSPs is increasingly necessary in order to stop copyright infringement online. The question is then what incentives they should have for cooperating, what punitive measures they should get if they refuse cooperation and in what ways they should cooperate. Article 17 mainly regards the latter of those questions.

An example of a tool for enforcing copyright laws that already is in operation is the Content-ID system that YouTube started to introduce as early as 2007. Content-ID can recognise content that interferes with copyright by identifying similarities between uploads when running them through a database containing protected works.¹⁷⁵ However, it was initially only partly intended to contribute to the enforcement of copyright. While it did provide the opportunity of allowing the proceeds from infringing content go to the rightsholder of that content, the choice of doing that was made by the user and not the rightsholder. More importantly, Content-ID was also a tool that was only available to some users and rightsholders of YouTube, namely big ones and not individual creators.¹⁷⁶ This meant that while the technology for stopping infringing works existed, it was not used as extensively as rightsholders might have wished. In YouTube’s defence, Content-ID is a costly measure which means that they had economic motives for only applying it to big rightsholders.¹⁷⁷ The costs for filtering measures such as Content-ID raises

¹⁷⁴ Liebowitz, S, *Economic analysis of safe harbour provisions*, p.11.

¹⁷⁵ YouTube Help – *How Content-ID works*.

¹⁷⁶ YouTube Help – *Qualifying for Content-ID*.

¹⁷⁷ Google themselves claims to have invested more than 100 million dollars into constructing the Content-ID system. See Google Public Policy, protecting what we love about the internet: our efforts to stop online piracy.

several issues, in particular making it harder for smaller OCSPs to compete with big ones and making it less appealing to start new such platforms.¹⁷⁸

With OCSPs required to make *best efforts* to stop infringing works from being uploaded, the “delegation of enforcement” is undoubtedly flipped.¹⁷⁹ The term *best efforts* indicate that the OCSPs will have to pick the rightsholders side over the users. If copyright was the only issue at stake this would not be controversial, since active cooperation from YouTube and other OCSPs would decrease the amount of copyright infringement taking place on their platforms. This would give the rightsholders increased control of where and when their works should be communicated to the public, thereby fulfilling one of the main purposes of copyright to a larger extent. However, the risk is that this transforms copyright enforcement from being reactionary to a preventive tool.¹⁸⁰ When the interests of other stakeholders are considered the question of how to delegate the enforcement is less simple. If platforms have to cooperate with rightsholders to enforce copyright the risk increases that lawful works are unjustly blocked to a larger extent than unlawful works are unjustly made available. This is due to the platforms receiving a greater incentive for complying to a duty of enforcement, since the liability for not doing so would be heavier than the other way around. While this would be positive for rightsholders, it would infringe on the users right to freedom of expression and information.¹⁸¹ The concerns of the effects that a flip of the duty of enforcement would have due to over-blocking should therefore not be diminished. It was also these concerns that lead to the many safeguards being introduced in article 17.

5.1.3 Reasonable to treat online content service providers similarly as Internet service providers based on the reasoning in the Telekabel Wien case

Article 8 (3) of the Infosoc-directive states that injunctions can target “intermediaries whose services are used by a third party to infringe copyright”. However, the previously discussed safe harbour in article 14 (1) of the E-commerce directive made sure that this did not apply to OCSPs. In the *Telekabel Wien* case the CJEU established that an ISP should be seen as an intermediary when they provided access to websites where infringing material was stored.¹⁸² Arguably, some of the arguments put forward by the CJEU regarding ISPs could also be applied to OCSPs. As an example, the court found that since the ISP is an “inevitable actor in any transmission” that constitutes an infringement, they have to be seen as an intermediary in relation to the infringement.¹⁸³ It was not necessary for any specific relationship to exist between the ISP and the person committing the infringement in order for the ISP to become an intermediary, it was enough that the ISP was used to commit an infringement.¹⁸⁴

¹⁷⁸ For more on these competitive aspects of article 17, see section 5.3.3.

¹⁷⁹ Dusollier, S, *The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a few Bad Choices, and an Overall Failed Ambition*, p.41.

¹⁸⁰ Elkin-Koren, N *Fair use by design*, p.1093.

¹⁸¹ See section 5.3.1.

¹⁸² C-314-12 *UPC Telekabel Wien*.

¹⁸³ *Ibid*, para 32.

¹⁸⁴ C-314-12 *UPC Telekabel Wien*, paras 35 and 40.

When it comes to infringements via an OCSP such as YouTube their services are equally necessary for an infringement to take place. Without such platforms it would not be possible to commit infringements aimed at such a huge audience. They would instead have to be committed via P2P file-sharing, which was the most common method before YouTube became popular. They are therefore as much of an intermediary as an ISP, the only difference being that the OCSPs were protected by the safe harbour. If the damage from infringements that i.e. YouTube are technically an intermediary to increases so that they are greater than the damage from infringements where ISPs are the main intermediary, the arguments for not holding a platform such as YouTube liable for being an intermediary are tainted. In the *Telekabel Wien* case the CJEU also justified their choice of classifying an ISP as an intermediary by stating that it would provide a higher level of protection for copyright in the EU, which is one of the main goals of EU Copyright law.¹⁸⁵ If a high level of protection is to be continuously achieved, it was arguably a necessity that YouTube and other platforms could no longer use the safe harbour in the E-commerce directive to avoid liability for their roles as an inevitable part of infringements.

5.2 Key aspects of article 17 and their presumed effect for various stakeholders

5.2.1 Article 17's increased focus on licensing as a tool to decrease copyright infringement and on increased cooperation between the stakeholders

The “*best efforts*” requirement in article 17 (4) to filter unlawful content has been the centre of much debate regarding article 17. The equally obligatory best efforts requirement for online content service providers (OCSPs) to conduct licensing deals with rightsholders have received only secondary attention.¹⁸⁶ However, the obligation to at least attempt to enter into licensing deals serves a very important function in achieving one of the main purposes of article 17, which is to “foster the development of the licensing market”.¹⁸⁷ This feature of the article has good-minded intentions but also contains several aspects that could make it difficult to fulfil those intentions in practice.

The intent of the legislator is to increase the amount of works that are licensed beforehand, since the *best efforts* requirement to filter only applies if an authorisation has not been granted through licensing. Since no particular form of licensing is specified in article 17, the rightsholders and platforms can choose what type of licence agreement is most suitable for each individual work or for a specific collection or type of works. The different forms of licensing available are i.e. direct licensing, collective licensing and statutory licensing (which can rely on exceptions and limitations to copyright).¹⁸⁸ Collective licensing will likely be a necessity if the goal of authorisation for as many works as possible shall be reached. Such a licensing system

¹⁸⁵ Ibid, para 35

¹⁸⁶ See section 3.4 for explanation on “*best efforts*”

¹⁸⁷ Recital 61 of Dir 2019/790/EU.

¹⁸⁸ Quintais, J, et. Al, *Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics*, p.1.

originates in the Scandinavian legal tradition and has the effect that a copyright license extends to other parties than those concluding the agreement.¹⁸⁹ In such agreements, collecting societies often represent rightsholders that gives the collecting society their blessing to negotiate on their behalf.¹⁹⁰ Such extensive licenses can be advantageous since they provide more certainty to all involved stakeholders regarding what is licensed or not. An additional argument for the increased focus on licensing is that it is part of the greater scheme to get OCSPs and organisations for rightsholders to cooperate to a larger extent. Since OCSPs have to be able to prove that they at least attempted to receive authorisation for works in order to avoid liability it is likely that the amounts offered as remuneration for the use of works will increase, since too low remuneration offers cannot be seen as best efforts.¹⁹¹

5.2.1.1 Issues with the licensing requirement

However, there are several obstacles to extensive collective licensing becoming a solution that can regain a balance between rightsholders and OCSPs. Since copyright is territorial in EU-law, collective licenses cannot be reached on a pan-European level. This means that the coverage of authorisations as well as the conditions for entering collective licensing might vary considerably between different jurisdictions, which can provide uncertainty. For example, rightsholders will likely be more eager to strike deals in bigger jurisdictions due to it being more lucrative.¹⁹² The existence of collecting societies suitable for concluding such deals also differs considerably between different EU countries.¹⁹³ The daunting task of entering licensing agreements in all EU jurisdictions will also be significantly harder for smaller OCSPs which can be problematic from a competition-law perspective.¹⁹⁴ The prerequisites for entering collective licensing deals are therefore very different depending on what country and what stakeholders the agreement concerns.

Additionally, the amount of works being uploaded to especially YouTube means that licensing them all is practically impossible.¹⁹⁵ In the EU legislators defence, they did foresee this by introducing the liability mechanism that is article 17.4, which stipulates what should be done in cases where prior authorisation through licensing has not been given by rightsholders. A major obstacle to fostering a flourishing licensing market for content uploaded to OCSPs is also the difficulty of licensing content before knowing how and when it will be used and received. When YouTube and similar platforms shall negotiate authorisation for content that will extend to their users they do not know how their users are going to use that content. Neither context, motives or other circumstances regarding the uploads of works can be known since it is

¹⁸⁹ Dusollier, S, *The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a few Bad Choices, and an Overall Failed Ambition*, p.26.

¹⁹⁰ A collecting society is a collective management organisation which collectively licenses and/or enforces copyrights on behalf of rightsholders. See LexisNexis.co.uk, definition of collecting society.

¹⁹¹ Which is what is required according to article 17 (4(a)) of Dir 2019/790/EU

¹⁹² Sentfleben, M, *Bermuda Triangle – Licensing, filtering and privileging user-generated content under the new Directive on Copyright in the Digital Single Market*, p.3 f.

¹⁹³ Ibid.

¹⁹⁴ Which is also an issue from a fair competition point of view, see section 5.4

¹⁹⁵ Sentfleben, M, *Bermuda Triangle – Licensing, filtering and privileging user-generated content under the new Directive on Copyright in the Digital Single Market*, p.3 f.

impossible to ask every YouTube-user how they might use a work. Even if that was possible the problem would remain since new ideas for using a work can appear after negotiations have taken place. Furthermore, it is also impossible to know beforehand how an upload will be received by the audience on a platform. The logic behind what content goes viral or not is hardly consistent or predictable beforehand. This makes it tricky to calibrate remunerations, which could lead to them not being appropriate compared to the amount of attention the use of a certain protected work receives. If remuneration cannot be set appropriately that could in turn lead to distrust between the stakeholders, which would do the opposite of fostering the development of the licensing market.

5.2.1.2 Cooperation between stakeholders in the form of stakeholder dialogues, will it lead to increased understanding between the parties?

An important part of the effort for increased cooperation and understanding between the stakeholders were the stakeholder dialogues, organised by the commission between October 2019 and February 2020. The legislator saw them as an opportunity for themselves and the involved parties to gain an understanding of each other's practices and through that understanding carve out a way forward that would "establish best practices" and "ensure uniform application".¹⁹⁶

Unfortunately, the stakeholder dialogues were not as transparent and constructive as the legislator intended. Instead there was a lack of transparency from all the present stakeholders. Many of the already existing agreements between platforms and major rightsholders are covered by confidentiality clauses and the stakeholders were reluctant to share more information than necessary, due to distrust in relation to the other stakeholders.¹⁹⁷

During the stakeholder dialogues the discordances between different rightsholder representatives regarding the function of article 17 also became apparent. The differences essentially boiled down to what industry the rightsholders belonged to. *The music industry* insisted that the focus should be on licensing and that as much content as possible should be licensed. They held that establishing smooth mechanisms for the licensing process between the parties was crucial. On the contrary, *the audio-visual industry* insisted that focus should be on the content filters since they do not believe in broad licensing as a business strategy to the same extent. Instead they want to be more selective with the licensing of their content, which makes it more important to be able to block the content that is not licensed. As Keller argues in his article this makes the audio-visual industry seem like the villains for the stakeholders (mainly users) that are worried about upload filters. Ironically, it was the music industry that lobbied the most intensely for article 17 but with their focus on licensing the free Internet advocates now see their viewpoint as comparatively harmless compared to the audio-visual industry.¹⁹⁸

¹⁹⁶ Recital 71 of Dir 2019/790

¹⁹⁷ Keller, P, *Article 17 stakeholder dialogue: What we have learned so far – part 1*, Kluwer Copyright Blog

¹⁹⁸ Ibid.

The general lack of transparency and the dissension between stakeholders that supposedly should be on the same side and have the same interests highlights the complexity of the issues at hand. When even the stakeholders that could be assumed to have similar interests are not cooperative, it forebodes what a tricky task it is to reach compromises that all stakeholders can find reasonable and how delicate the balance between different copyright stakeholders are.

5.2.1.3 The licensing requirement in the view of the stakeholders

When the main issues with the new legislative take on licensing in analysed, no clear winner can be highlighted amongst the relevant stakeholders. With that said, there are positive aspects for especially users and the music industry. For users that mainly uploads content as a hobby without any commercial motive, everything that is licensed will be licensed on their behalf without them having to take further action. The music industry can also benefit since broad licensing aligns with their business model to a larger extent than the audio-visual industry. However, this is on the presumption that article 17 does lead to more copyright protected content being licensed and authorised for use, which is still uncertain.

For both rightsholders and platforms there are several concerns, most notably the tricky task of negotiating licenses for future unknown actions undertaken by a third party. The licensing task is especially daunting for the OCSPs since they have to attempt to receive authorisation for every copyright-protected work, in all different EU jurisdictions. This is a delicate task since the structure of collecting societies and other copyright bodies varies significantly between jurisdictions.

5.2.2 The Complaints mechanism in article 17 (9) – can it ensure a fair balance?

The complaints mechanisms stipulated in article 17 (9 para 1) can arguably be seen as the most important safeguard for two key reasons. *Firstly*, it is of course important as a toll to make sure that the law is applied as coherently and correct as possible. *Additionally*, such a mechanism can serve as an incitement for OCSPs to not apply over-filtering simply because they are afraid of being held liable for the content where ambiguity prevails regarding its lawfulness.¹⁹⁹ Since exceptions and limitations to copyright occasionally involves tricky assessments regarding what is allowed and not there will be cases where a user or a rightsholder do not agree with the assessment made by an OCSP. Since even the involved stakeholders have stated that ex ante content filters will have to be applied and those content filters have flaws there will likely be cases where users see their content unduly blocked.²⁰⁰

The EU legislator has clarified that the complaints mechanism should include human review of disputed content and that it should carried out “without undue delay”. Rightsholders must also

¹⁹⁹ See section 5.3.1.

²⁰⁰ See section 4.5.1. regarding automatic content recognition as the only alternative and section 5.3.1 regarding the flaws of such technology.

duly justify the reasons behind their requests for removal.²⁰¹ For the complaints mechanism to be well-functioning and efficient, these obligations are very important. If those requirements cannot be fulfilled the chances of such a system being fair decreases substantially, which can be seen by looking at the rules regarding counter notices in United States (US) copyright law.

In the US, users have the opportunity to file a counter notice to a takedown request if a rightsholder claim their content posted on an OCSP is infringing.²⁰² However, this possibility is seldomly used by individuals as mainly big corporations take advantage of it.²⁰³ The reasons for the reluctance of individuals to file counter notices can be boiled down to three key reasons.²⁰⁴ *Firstly*, the average user does not possess any significant knowledge of copyright law. *Secondly*, filing a counter notice against a rightsholder that comes across as a “big player” can seem daunting for an individual user, especially if that user does not possess knowledge about copyright law. *The last reason* is that the uploading of content is usually dependant on timing, as it relates to a current event or a work that is currently trending. If one has to go through a process of solving the dispute (which in the US takes 10-14 days) the relevance of the upload might have been lost which means the user do not consider the effort of taking part in the process to be worth their time. The lessons learned from the inefficiency of the US complaint mechanisms is that simply the existence of a complaint mechanism will not be enough to combat issues that arise from the application of article 17. The last point mentioned above, in particular, indicates the importance of complaints mechanisms being expeditious in order for them to be an efficient tool for setting things right. Other features that they should preferably have, to avoid them being ignored by users, is that they should be simple, user-friendly and as easy as possible to comprehend for users with no prior knowledge of copyright law.²⁰⁵

If such features can be achieved users as well as OCSPs can benefit from the complaints mechanism since they can bring clarity to what is allowed when it comes to exceptions and limitations to copyright. For some rightsholders, that have used takedown requests as somewhat of a scare tactic against individual users a well-functioning complaint’s mechanism can affect them negatively. However, that is hardly a problem for anyone else since such behaviour only serves to diminish the purpose of copyright law for their own gain.

5.3 The accuracy of content filters

The introduction of content filters was arguably the most controversial aspect of article 17, both during the legislative process and after the directive came into force. This was mainly because content filters were identified as the measure that posed the greatest threat to the freedom of

²⁰¹ Recital 70 of Dir 2019/790

²⁰² According to 17 U.S. Code § 512 (g) of the Digital Millennium Copyright Act.

²⁰³ Urban, J, et al, *Notice and Takedown in everyday practice*, p.140 ff.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

information and expression and the vision of “the free Internet”.²⁰⁶ There were mainly two aspects of automatic content filters that were seen as problematic. *The first one* was the risk of over-filtering due to the increased threat of liability for Online content service providers (OCSP) if infringing content was to slip through the filters. *The second aspect* was the issue of automatic content filters being unable to differentiate context in the way humans can, which risked leading to justified exceptions and limitations being stopped by such filters.

5.3.1 The risk of over-filtering

Article 17 (4) states that “best efforts” in accordance with “high industry standards of professional diligence” shall be applied by the OCSPs when making sure that infringing content is stopped *ex ante*. This can seem like a guarantee that content filters are constructed as expedient as possible, but uncertainties remain since the industry will have to take economic and efficiency aspects into consideration and not just aspects relating to fundamental freedom and user rights. The most well-balanced content filter is likely not the cheapest option and OCSPs will thus have to make decisions regarding what costs are proportionate in relation to the result that can be achieved.²⁰⁷

Another economic aspect is that the OCSPs could risk facing liability in the form of fines or damages if their filters are not blocking illegal content sufficiently, as that would not equate to “best efforts”. The duty to not filter lawful content is an obligation of result but the liability for over-filtering is not the same as the only clear consequence is having to unblock content if users successfully use the complaints mechanism. Increased human review could of course also be costly as it would require more employees but, as already discussed, the existence of a complaints mechanism does not guarantee that users frequently use such a system.²⁰⁸ Therefore, there is a possibility that the threat of increased liability combined with economic incentives will lead to OCSPs opting to use content filters that to some extent leads to over-filtering.

The construction of content-filters has partly been delegated to the platforms themselves.²⁰⁹ This is a potential issue since there is no clear system of oversight regarding how the content filters shall work. This is questionable since supervision seems crucial when such an important task as implementing the content filters are delegated to private parties. The complaints mechanisms will cater to individual complaints (although the number of hypothetical claims per individual is unlimited) and not to the function of the system as a whole. This means that if over-blocking occurs it can go on for some time without the scope of it being realised. Article 17 (8 para 2) does introduce a duty for OCSPs to inform rightsholders of their methods undertaken to apply with the *best efforts*’ requirement. However, since this duty is in relation

²⁰⁶ Senftleben, M, Bermuda Triangle – *Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market*, p.4

²⁰⁷ Senftleben, M, *Bermuda Triangle: Licensing, filtering and privileging user-generated content under the New Directive on Copyright in the Digital Single Market*, p.9

²⁰⁸ See section 5.2.3.

²⁰⁹ C-401/19 *Poland vs Parliament and Council*, para 75.

to the rightsholders and not the users, it could work as a further incentive to allow some over-blocking in order to not upset rightsholders.

5.3.2 Automatic content filters cannot differentiate context = catch 22

Even if all OCSPs were to apply the most well-balanced content filter available, the success of such a filter would be far from guaranteed due to one core issue, which is that automatic content filters cannot differentiate context in the same way a human can. This was pointed out by several stakeholders, both from the OCSPs but also from companies that are making these filters, during the stakeholder dialogues held in 2019-2020.

Facebook: “Our matching system is not able to take context into account; it is just seeking to identify whether or not two pieces of content match to one another.”²¹⁰

Audible Magic: “Copyright exceptions require a high degree of intellectual judgement and an understanding and appreciation of context. We do not represent that any technology can solve this problem in an automated fashion. Ultimately these types of determinations must be handled by human judgement.”²¹¹

As the quotes make clear, automatic content filters can only identify what content is similar or identical to copyright protected content or not. If copyright would have been an absolute right without any exceptions and limitations, they would therefore have been ideal. But since the exceptions and limitations is an essential part of copyright law it is a major flaw if they cannot differentiate lawful exceptions from infringing content. This becomes particularly problematic as a number of exceptions and limitations are being made mandatory by article 17 (7) of the DSM-directive.²¹²

Interestingly, despite 10 years of technological improvement, the concerns regarding whether automatic content filters would adequately be able to differentiate legitimate exceptions from unlawful uploads remain almost identical.²¹³ There is neither any signs that such filters will improve from being context-blind within the foreseeable future.

This risk is thus that the application of article 17 (4) and article 17 (7) becomes a catch 22. The only way of conducting an ex-ante review as article 17 (4) demands is to apply automatic content filters.²¹⁴ However, these filters do not possess the capacity to differentiate context and therefore cannot filter uploaded content in the way intended, since exceptions and limitations to copyright cannot be adequately distinguished as article 17 (7) dictates.

²¹⁰ Keller, P, *Article 17 stakeholder dialogue: What we have learned so far – part 1*, Kluwer Copyright Blog

²¹¹ Ibid. Audible Magic is one of the leading companies in the ACR industry.

²¹² Most exceptions and limitations are voluntary in the Infosoc directive.

²¹³ See C-360/10 *Sabam vs Netlog* para 50 and section 4.3.2.

²¹⁴ As pointed out by the stakeholders, see C-401/19 *Poland vs Parliament and Council*, para 54.

5.3.3 Over-filtering in relation to the stakeholders

To reconnect to the theory of the purpose of copyright law being to maintain a balance between the stakeholders, over-filtering would result in a situation that is the opposite of the situation prior to the introduction of article 17. The perception prior to article 17 was that some copyrights infringements were allowed to happen since content was not checked beforehand and many rightsholders had to “police” YouTube etc. if they wanted to stop infringements of their content. Copyright was thus deprioritised in relation to the free Internet and the right to upload content freely. Over-filtering results in the opposite situation with the user’s ability to upload content freely being deprioritised in relation to compliance with copyright law.

The rightsholders are the obvious winners of such a development. While over-filtering might not make much difference economically for rightsholders, it will affect the moral rights to works significantly. Since many exceptions and limitations are i.e. parodies or critique of works, the rightsholders to such works might find it liberating if such challenges to their works could not as easily reach a huge audience. With that said, many rightsholders likely also realise the cultural importance of critique and parody etc. being an essential part of the reception of cultural works.

Users will be the most negatively affected by over-filtering, since they are the ones having their freedom of information and expression online limited. This also risks decreasing the exchange of different ideas and views online, which is what the critics of article 17 feared when they called it “the end of the Internet as we know it”.²¹⁵

For the OCSPs, which is the stakeholder that is mainly to blame for the occurrence of the over-filtering, the issue can be viewed from different angles. In the short term, they can benefit from over-filtering since they thus avoid being held liable for unlawful communications to the public on their platform.

However, if over-filtering is applied for a longer time they risk losing users, which in turn will lead to a decrease of content and traffic on their platform. Interestingly, this also results in an argument against article 17 (4) leading to over-filtering. If the OCSPs loses market shares and revenue due to extensive filtering, the chances of them attempting to filter content more accurately increases. This could also lead to different OCSPs attempting to outrival each other by applying less filtering, which would be positive for users.

To conclude, the risks in relation to automatic content filters are evident and two main factors indicates that over-filtering will appear to some extent. The one stakeholder that over-filtering will harm the most, the users, could lessen the chances of it happening by actively encouraging platforms to filter as accurately as possible, and choose alternative platforms if they do not.

²¹⁵ European Digital Rights Initiative, *Censorship machine takes over EU:s Internet*.

5.4 Competitive disadvantages for smaller OCSPs, risk that YouTube's monopoly as the major OCSP is strengthened further

A common misconception about article 17 is that it was aimed solely at YouTube. While that is not correct it is understandable that such a perception arose. YouTube is the biggest OCSP and much of the debate regarding the value gap was also in regard to YouTube in particular instead of OCSPs in general.²¹⁶ Due to the design of article 17 YouTube might instead gain further competitive advantages, as there are several aspects of the article which could benefit bigger OCSPs over small or medium-sized ones.

When the idea of the Digital Single Market was set out by the commission in 2010, fair competition was also a cornerstone of the vision that was the digital single market.²¹⁷ Fair competition was seen as especially important in the digital single market since many online markets are dominated by just a few major global companies, like Google, Meta, Twitter etc. Traces of promoting fair competition online can also be seen in article 17, most notably by the exclusion of new and small OCSPs in article 17 (6).

The main competitive issue with article 17 is likely that the best efforts that OCSPs have to conduct will be resource-demanding.²¹⁸ This amounts to both technological resources and personnel. The technological resources will be needed in order to execute some kind of content filter solution whilst human resources will be needed to negotiate license agreements and staff the complaints mechanisms. The increased cost for the required measures might not be a major issue for YouTube and other major OCSPs, but they can have significant effects for smaller competitors. On the contrary, YouTube already has the relevant technology in the form of ContentID as well as staff resources that can deal with negotiations, customer support and complaints mechanisms.²¹⁹

However, one factor that might help smaller platforms is that the principle of proportionality is to be applied when assessing whether an OCSP have conducted *best efforts* according to article 17 (4).²²⁰ Major platforms will thus be expected to make greater efforts when it comes to licensing content and invest greater resources into stopping unlawful content ex-ante. However, the principle of proportionality does not apply to complaints procedures and the obligation to allow exceptions and limitations. The issue of article 17 providing competitive disadvantages therefore remains relevant.²²¹

²¹⁶ See section 2.1.1

²¹⁷ European Commission, *Europe 2020 A strategy for smart, sustainable and inclusive growth*.

²¹⁸ Bridy, A, *The Price of Closing the Value Gap: How the Music Industry Hacked EU Copyright Reform*, p.350.

²¹⁹ Google had approximately 164 000 employees in mid-2022.

²²⁰ As pointed out in the Swedish implementation proposal, see Prop 2021:22:278, p.129. See also European Commission, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market*, p.11 ff.

²²¹ Ibid

Despite the principle of proportionality, the resources needed to comply with article 17 risks resulting in higher “entry barriers” for entering the OCSP market.²²² That means that it will be harder for new competitors to enter the market, which poses a further risk to the goal of achieving fair competition for OCSPs.

Less competitiveness is a bad thing for most stakeholders, except for the major OCSPs that are already established in the market. Users will have less platforms to choose from and rightsholders will have less platforms where they can distribute their content. This is negative for both of them since that would make big platforms even more influential as a stakeholder. When it comes to rightsholders it can also be harder to negotiate beneficial deals if there is less competition on the other side of the negotiation table.

6. Comparison of three national article 17 implementations

Due to the uncertainty caused by Poland’s challenge to article 17 in the CJEU, the implementation process of the DSM-directive was delayed in many countries. While many member states implemented the directive in 2021 some countries, e.g. Sweden, have still not finalised their implementation. However, after the ruling in *Poland v Parliament and Council* all member states are now at least in the process of implementing the provisions, e.g. Sweden’s implementation is now approved by the Swedish parliament and will enter into force on 1 January 2023.²²³

The three implementations examined in this section have different approaches to the potential issues caused by article 17, which is why they have been chosen for the following analysis. The Spanish and German implementations have different approaches to in particular ex ante safeguards, liability for platforms and the availability of disputed content during a complaints process. Communia has stated that Spain has one of the worst implementations when it comes to safeguarding the freedom of information and expression while Germany received praise for having the best safeguards for those rights.²²⁴ After the ruling in *Poland v Parliament and Council*, Germany is also one of few countries whose implementation has the capacity to meet the thresholds that the CJEU aims for when it comes to safeguarding the freedom of expression.²²⁵ The contrast between the receptions of the two implementations make them ideal to use as examples of how differently article 17 can be implemented. Since the Spanish and German implementations can be viewed as opposite extremes there is also great value in analysing an implementation that finds a middle way and contains both positive and negative aspects for all stakeholders respectively. The Swedish implementation is also one that

²²² An entry barrier is a term used in competition law to describe either an obstacle that new competitors face that incumbent firms did not face when they entered the market or any obstacle for a new competitor entering the market. In this context, it refers to the first definition. See OECD, Glossary of statistical terms.

²²³ Riksdagen.se, *prop 2021/22:278*.

²²⁴ Communia is a project funded by the commission with the aim of providing discussion regarding copyright issues and the public domain in the digital environment. See Communia’s *Eurovision DSM contest*.

²²⁵ Reda, F, *CJEU upholds Article 17, but not in the form (most) Member States imagined*, Kluwer Copyright blog.

implements the safeguards more vaguely than the German implementation. This makes it an interesting contrast and valuable to add to the analysis.

To answer the main questions of the thesis, focus will be on the implementation aspects that are most relevant to the freedom of expression and information as well as the balance between users, rightsholders and OCSPs.

6.1 Spain – A rightsholders friendly approach

Spain implemented the DSM-directive in November 2021.²²⁶ The legislative method used for the new provisions was a Royal Decree, which is a legislative fast track that the government can use when a law needs to be passed urgently, for example when an implementation deadline has passed.²²⁷ Such a solution allows the government to introduce a law without any prior public discussion or referrals to relevant stakeholders etc. The adequacy of implementing a directive which is supposed to centre on cooperation and understanding between the involved parties, without any input from the parties can be questioned. As will be seen below, it has resulted in a law which at least some of the stakeholders should be dissatisfied with.

The Spanish implementation is a relatively verbatim one. This is nothing unique as several member states opted for such solutions. That many countries choose this way of implementing article 17 is unfortunate, since the generally vague wording of the article meant that more detail would have been appreciated by stakeholders. After the CJEU stated that the article 17 safeguards had to be implanted carefully to strike a fair balance the compatibility with EU law of such a verbatim implementation has to be questioned.²²⁸

6.1.1 Structure of the Spanish implementation

6.1.1.1 Scope and licensing requirements

The extension of communications to the public to cover Online content service providers is implemented but with a slightly lowered threshold for what kind of platforms are included.²²⁹ One difference is that the Spanish law only requires OCSPs to store and give access to protected content “*either in big numbers or to a large audience in Spain*”.²³⁰ Since article 17 (1) only stipulates the need to store and give access to a *large amount* of content the Spanish definition is slightly wider. Theoretically, a platform could have a limited amount of content but many viewers and therefore be included. Niche platforms that might not be included in many other countries could therefore be included under the Spanish definition.

²²⁶ The DSM-directive was implemented together with several other directives in the same act, see *Royal Decree-Law 24/2021*.

²²⁷ Article 86.1 of the Spanish Constitution of 1978

²²⁸ C-401/19 *Poland v Parliament and Council*, para 99 .

²²⁹ See section 3.1 regarding the intended scope of article 17.

²³⁰ Article 66.6 of Royal Decree law 24/2021.

When it comes to the obligation for OCSPs to attain authorisation for content, the obligation itself is the same as in article 17. However, there are some specifications when it comes to how licensing negotiations shall be conducted. Most importantly, they must be transparent and respect free competition, which results in a specific ban on exploiting dominant competitive positions.²³¹ This will affect several of the major Internet giants, since they have a significant market share and are very important players in their industries.

6.1.1.2 Best efforts might not be enough

Article 17 (4) itself has been transferred without any changes into the Spanish implementation, meaning that the “*best efforts*” requirement to attain licenses and stop infringing content are the same as in the directive.²³² However, a feature of the Spanish implementation that stands out is what happens if a platform is found to apply best efforts, but unlawful content still becomes available. While the intention of the EU legislator was that an OCSP should not be held liable as long as best efforts are made, the Spanish implementation introduces the opportunity for rightsholders to claim damages from the platform on the grounds of *unjust enrichment* in such a scenario.²³³ This has been criticised since it arguably leaves no way for OCSPs to avoid liability for unlawful content on their platforms. The Spanish implementation thus completely abolishes the safe harbour, instead of only amending the criteria for it like Sweden and Germany does.²³⁴ A potential effect of this could be that rightsholders refrains from providing information that is necessary for the platforms when they attempt to block content, but still claim damages if unlawful content is found on the platform. Even though there could be some issues for rightsholders with proving proximate cause for such claims, this extended possibility shows that this is an implementation favouring rightsholders on the behalf of OCSPs and users.

6.1.1.3 Safeguards

The aspect that has received the most criticism is the Spanish implementations of the safeguards in article 17 (7-9). While the ban on general monitoring in article 17 (8) has been transposed, there is no specific ex ante safeguards being introduced except for the statements that exceptions and limitations to copyright should not be affected.²³⁵ This is noteworthy since article 17 (7 para 2) of the DSM-directive states that the member states need to ensure that exceptions and limitations are still available to users. By not adding any safeguards, Spain simply transfers that responsibility onwards to the platforms.

²³¹ Article 73.1 of Royal Decree law 24/2021.

²³² Article 73.4 of Royal Decree law 24/2021.

²³³ Ibid.

²³⁴ See sections 6.2.1 and 6.3.1 for the German and Swedish introduction of a new safe harbour with revised requirements for OCSP:s.

²³⁵ Article 73.8-9 of Royal Decree law 24/2021. The article even states that legal use *will* be allowed, which is a confident statement when it is not stated how that shall be achieved in practice.

When it comes to the complaint's mechanism, the controversial aspect is that during the complaint's procedure (which can take up to 10 days) the contested content shall not be available to users.²³⁶

6.1.2 Reflection on the Spanish implementation

There are several parts of Spain's new provisions that are problematic from the perspective of finding a balance between copyright and the freedoms of expression and information online, since they risk leading to over-blocking of content uploaded by users. This applies both when they are viewed separately but especially when their effects are combined.

6.1.2.1 Risk of over-filtering

Firstly, platforms will constantly have the threat of damages looming over them even if they do their best to obtain licenses for content and stop unlawful content. This is due to the rightsholders possibility of applying for damages for "unjust enrichment" if, despite the best efforts, illegal content is found on the platform. This increases the incentives for the OCSPs to take a "better safe than sorry" approach and apply over-filtering. *Secondly*, such an approach becomes even more logical if there are no consequences for over-filtering. By not introducing any specific ex ante safeguards that provides incentives to adequately allow exceptions and limitations to copyright, there is no counter-weight to the incentives to apply over-blocking.

Thirdly, by extending the definition of what platforms constitute an OCSP, over-blocking potentially becomes a tempting tool for more platforms. The imbalance favouring copyright could thereby be extended to cover a larger part of the Internet as a whole.²³⁷

6.1.2.2 Issues with the complaint mechanism

With the risk of over-blocking evident, the importance of the complaint mechanism as a safeguard increases. However, the requirement that no access to contested content should be allowed during the period when a complaint is processed weakens the function as a safeguard considerably. It enables rightsholders to use the complaint mechanism as a tool for stopping access to content if it suits them, regardless of the lawfulness of such content. The rightsholders can exploit this by disabling access to relevant content when that is of importance to them, for example when new movies or albums are released. For example, a rightsholder can use such a system for their own gain by filling invalid complaints and thereby restricting access to their content temporarily. As discussed previously the reception of content, especially content that is a parody on or quoting a current event, is usually dependant on timing. Therefore, if the complaint process takes up to 10 days the purpose of the upload might be gone in today's fast

²³⁶ Article 73.10 of Royal Decree law 24/2021.

²³⁷ See section 5.3.1 for discussion regarding incentives for platforms to apply over-blocking.

paced online world, even if the complaint is found to be unjustified. There is also a risk that this discourages users from using the complaints mechanism at all.²³⁸

6.1.2.3 The implementation in relation to each stakeholder

To conclude, from the perspective of different stakeholders, rightsholders are the clear winners of the Spanish implementation. In many ways the Spanish provisions is exactly what the music industry set out to achieve when they started voicing concern about the value gap in the mid-2010s. Platforms will be forced to make serious attempts to obtain licenses for content and block unlawful content that they do not have licenses for. Additionally, there is a possibility for rightsholders to receive payment for unlawful content that users still manage to upload, since liability for unjust enrichment can arise for OCSPs in relation to such content. As the cherry on top, if a dispute arises regarding the legality of content that content will be unavailable during the complaint's procedure.

Both users and OCSPs are disadvantaged since the balance is clearly shifted in favour of copyright by this implementation. Both over-blocking and the inaccessibility of content while processing complaints risks affecting user's possibility to access and share information freely online. The user rights were supposed to be protected by specifying the safeguards but the Spanish government either implemented them verbatim or watered them down. Thereby there is insufficient counter-weight to the parts of article 17 that is infringing on user rights.

For OCSPs tough choices are ahead. They will have to decide to what extent they should risk being held liable for unjust enrichment or allow over-blocking and thereby risk upsetting users. The third option is to challenge the implementation by claiming that it is unable to strike a fair balance and attempt to get it annulled by the CJEU. After the CJEU insisted on a fair balance in *Poland vs Parliament and Council*, the chances of the third option being successful for OCSPs have increased significantly.

6.2 Germany – A user friendly approach

Germany opted to implement article 17 by introducing a new law.²³⁹ The law has received praise from Communia for being the best DSM-implementation (although not all member states had finished implementation at the time of that statement).²⁴⁰ The German law includes several provisions that aims to guarantee both copyright and user rights simultaneously to the biggest extent possible. In Poland's challenge of article 17 the CJEU argued that it was the safeguards in article 17 that justified the limitation on the right to freedom of expression and information for the users.²⁴¹ Since the German provisions have gone to great lengths to include and make

²³⁸ See section 5.2.2 for detailed explanation of this problem.

²³⁹ *The Act on the Copyright Liability of Online Content Sharing Service Providers*, or Urheberrechts-Diensteanbieter-Gesetz (UrhDaG) as is the eloquent German wording of the act.

²⁴⁰ Communia's *Eurovision DSM contest*.

²⁴¹ CJEU C-401/19 *Poland v Parliament and Council*, para 58.

use of these safeguards, this statement by the CJEU justifies the rather complicated structure of the provisions.

6.2.1 Structure of the German implementation

6.2.1.1 Scope and licensing requirements

Section (Sec.) 1 establishes that OCSPs, as a starting point, are communicating works to the public by providing access to content on their platforms.²⁴² However, if they fulfil the obligations in Sec. 4 (best efforts to license) and Sec. 7-11 (best efforts to stop unlawful content) they are exempted from such liability.

The definition of what platforms that are to be included can be found in Sec. 2-3 and it is mainly unaltered compared to the definition in article 17 of the directive. However, one important detail is that smaller OCSPs have less obligations than bigger ones, even if they are not new. The cumulative requirement that an OCSP that otherwise fits the definition have to be both new and small to be excluded is thereby not cumulative in the German implementation.

Sec. 4, which is about licensing, is the first section where there are additional regulations introduced compared to article 17. They are introduced in an attempt to clarify what constitutes best efforts regarding attempts to license content and provide a clearer guidance to OCSPs on what efforts they must make when it comes to licensing.

There are three situations where an OCSP must acquire a license for content. Those are if (1) licenses are offered to the OCSP by a rightsholder, (2) if the OCSP has knowledge of rightsholders that can conduct relevant licensing deals or (3) that authorisation can be given by a german collecting society or similar rights management organisations. Even in those three situations, Sec. 4.2 states that the obligation to apply best efforts to receive a license only applies to some content. The content needs to amount to more than a “minor quantity” of what is posted on the platform. Furthermore, it needs to cover a considerable repertoire of the works belonging to that rightsholder and the terms and conditions offered by the rightsholder have to be reasonable. Since rights offered for use needs to cover a considerable repertoire, there is incentive for rightsholders to come together and offer authorisation collectively, preferably through collecting societies.²⁴³ The German implementation thereby puts more responsibility to act on rightsholders compared to the Spanish one. If works are not included by Sec. 4.2, OCSPs will not be held liable for not receiving authorisation for those works. This means that the best efforts regarding licensing in Sec. 4 technically can be met by an OCSP despite them not having conducted a single licensing deal.

²⁴² Each provision in the translated version of the UrDaG is referred to as sections. They are here abbreviated as *Sec.* to avoid confusion with the sections of the thesis that are also frequently referred to in the footnotes.

²⁴³ Waiblinger, J & Pukas, J, *Implementation of Art. 17 DSM Directive into German National Law – the German Act on the Copyright Liability of Online Content Sharing Service Providers (UrDaG)*, Kluwer copyright blog

Sec. 4 provides a clear definition of what best efforts constitutes in practice. It also provides an example of how best efforts shall not be understood as “all available efforts”, but instead be interpreted in light of the principle of proportionality. The fact that the requirement only applies when it covers a considerable repertoire of works and under reasonable conditions are examples of the principle of proportionality being applied in practice. This interpretation of the best efforts as an autonomous notion of EU Law, instead of a literal interpretation, have also been advocated for by the commission.²⁴⁴

6.2.1.2 Blocking obligations and complaint mechanism

When it comes to the German blocking obligations, things get increasingly complicated and technical. They can be divided into two different obligations, *qualified and simple blocking obligations* in Sec. 7 and 8 respectively. As the name implies the measures taken to comply with Sec. 7 are generally held to a higher standard. This is mainly because Sec. 7 relates to the general blocking of all copyright-infringing content, which makes it more important that over-blocking does not occur. However, preventive blocking shall only be applied “as far as possible”, which is an indication by the legislator that the filtering measures should not be too draconian.²⁴⁵ Sec. 7.2 further underlines that preventive measures shall not result in lawful, non-infringing content being blocked. If content is blocked the uploading user needs to be informed about the blockage and their possibility to use the complaints mechanism. The simple blocking obligation in Sec. 8 targets specific cases where rightsholders notifies an OCSP of a copyright infringement occurring on their platform. Sec. 8 amounts to *ex-post* filtering while Sec. 7 relates to *ex-ante* filtering.

The most notable aspect of the German implementation is the part about “*uses presumably authorised by law*”, which is a new concept introduced through this implementation.²⁴⁶ This is the main measure taken in order to find an appropriate balance between the new copyright regulations and the freedoms of information and expression in Germany. Sec. 9 states that “*presumably permitted*” content shall be kept available on the platform during the complaints process. Thereby the communication that inevitably occurs during the complaint’s procedure is not grounds for liability for the OCSP. Keeping such content up during the complaint’s procedure is the complete opposite of the Spanish approach, where contested content is unavailable to users during the process of the complaint. There are also definitions regarding what content is presumed to be permitted due to it consisting of minor use of protected content in Sec. 10. The cumulative demands for minor uses are that any work shall (1) contain less than half of another work or works by made by a third party, (2) combine the parts that are from other works with other content and (3) use other protected works only to a minor extent, which means less than 15 seconds in case of videos or audio, 160 characters in case of text and 125

²⁴⁴ European Commission, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market*, p.8

²⁴⁵ Waiblinger, J & Pukas, J, *Implementation of Art. 17 DSM Directive into German National Law – the German Act on the Copyright Liability of Online Content Sharing Service Providers (UrhDaG)*, Kluwer copyright blog.

²⁴⁶ Leistner, M, *The implementation of Art. 17 DSM Directive in Germany – A primer with some comparative remarks*, p.11.

kb in case of photos or other graphics. The word minor is key here since the criteria are quite strict. For example, the full name of the DSM-directive is too long to be classified as minor use due to the 160-character limit.²⁴⁷ It should be noted that Sec. 8 acts as an exception to the main rule of disputed content being available while the legality of it is reviewed. However, the rightsholder needs to provide a “duly substantiated notice” of the unlawfulness of such content.

If the use of other works does not fulfil the criteria for being presumably permitted, Sec. 11 further provides users with the opportunity to flag their own content as “authorised by law”. This is convenient when it comes to exceptions and limitations to copyright since parodies and critique might have to include more than minor use of a work for it to become relevant and impactful. If rightsholders do not agree that an upload is “presumably permitted” or with a user’s assessment of its legality, they are of course entitled to use the complaint mechanism.

As for the complaint procedures, participation is voluntary for both rightsholders and users. However, both should be informed if a complaint is filed regarding a work that they either have uploaded or have the rights to. The process is required to be wrapped up within 7 days of the initial complaint. Additionally, rightsholders that are classified as “trustworthy” may use what is labelled as the *red button procedure*, which results in a work being removed and blocked during the complaint procedure.²⁴⁸ For the red button procedure to be allowed it is necessary that the availability of the work during the complaint process can result in economic loss for the rightsholder in question. It is not clarified what a rightsholder must do in order to become “trustworthy” in the eyes of the legislator but presumably the track record regarding the validity of previous complaints will be of relevance in such an assessment.

6.2.2 Reflections on the German implementation

The German implementation attempts to balance the colliding interests of the stakeholders in a significantly more proportionate way than the Spanish implementation. The result is a complex legal product, even more complicated than article 17 itself, with many references back and forth between different sections of the provisions. However, the result is seemingly in accordance with what the CJEU requested when they insisted on the necessity of functional safeguards in order to maintain a fair balance.²⁴⁹

6.2.2.1 Well balanced implementation of the safeguards

All of the three main safeguards in article 17 (para 7-9) have been accommodated and more importantly, a detailed set of rules for *how* they will be accommodated is introduced. Due to the general wording of the safeguards in article 17 there were concerns regarding how they

²⁴⁷ Reda, F and Keller, P, *CJEU upholds article 17, but not in the form (most) member states imagined*, Kluwer Copyright Blog.

²⁴⁸ See sec. 14.4 UrhDaG.

²⁴⁹ Leistner, M, *The implementation of Art 17 DSM Directive in Germany – A Primer with Some Comparative Remarks*, p.15.

would be able to guarantee the freedom of expression in practice.²⁵⁰ The safeguard where most concern was expressed in regard to how it would be fulfilled with the current technology was the safeguard in article 17 (7) stating that non-infringing content, in particular exceptions and limitations to copyright, should not be blocked. Those concerns originated in the inability of content filters to differentiate context with today's technology.²⁵¹ The German solution is to let users that are uploading be the ones that differentiate context instead of an AI filter. Such users are of course biased since it is their own content that they can flag as "permitted under law". On the other hand, rightsholders are equally biased and it can be argued that context filters are also biased since they cannot differentiate context and will therefore generally side with rightsholders in most cases. By giving users this opportunity, the unavoidable biasness related to this safeguard is shifted in favour of the users. Since the freedom of expression and information has been deemed as more important than copyright, this is a reasonable approach.²⁵²

The ex-ante blocking obligations comes with definitions of exact parameters describing when content should not be blocked ex-ante. This serves the purpose of drawing a limit for how extensive the content filtering should be. It also provides an instruction for how filtering systems should be designed without having to impose a general monitoring obligation. While it could still be a challenge for some rightsholders to implement the correct technical measures, the task becomes significantly easier when they only have to follow previously set parameters, instead of also having to guess what parameters the courts will find reasonable and proportionate.

As for the last safeguard the choice of, as the main rule, letting disputed content stay up during the complaint's procedure is undoubtedly beneficial for the users access to content and thereby to the freedom of expression and information. However, rightsholders also have the option of applying for an immediate removal of the content in specific cases and trusted rightsholders can initiate a "red button" procedure. These types of exceptions to the main rules is an attempt to appease all stakeholders. When it comes to the rightsholders opportunity to apply for immediate removal it is a reasonable counter-weight to make sure that users do not misuse the opportunity to flag content as legal and do it to a proportionate degree.

6.2.2.2 The implementation in relation to each stakeholder

Even if it remains to be seen how successful this attempt at finding a balance will be, one can hardly blame the German legislator for not giving it a serious attempt. The implementation contains aspects meant to propitiate every relevant stakeholder. Users will appreciate that there are clear limits to prevent over-blocking and that disputed content as a main rule will be kept available during the complaint procedure. OCSPs will benefit from the clarity provided by the definitions on what constitutes best efforts in practice when it comes to both licensing and

²⁵⁰ Dusollier, S, *The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a Few Bad Choices, and an Overall Failed Ambition*, p.37 ff

²⁵¹ See discussion in section 5.3.1.

²⁵² See for example C-401/19 *Poland v Parliament and Council*, para 92

filtering. However, for rightsholders the implementation could definitely have been more beneficial, which is evident when comparing the German implementation to the Spanish one. That does not mean that it is only negative for all rightsholders. Collective societies can for example be pleased with their elevated status in relation to the licensing obligation in Sec. 4. It is also worth mentioning that an implementation that is too negative for users and OCSPs can also affect rightsholders negatively. After all many rightsholders are dependent on their content being available online and that users consume their content there.²⁵³ While the German implementation does not go as far as some rightsholders wanted, it still abolishes the old safe harbour in the E-commerce directive which is advantageous for them. That the liability for OCSPs does not come into force until after a complaint process is finished is not ideal for rightsholders, but it is still an improvement compared to the situation before article 17 came into force.

6.3 Sweden – A “lagom” implementation, aiming for the middle ground

Of the three analysed implementation, Sweden’s is the only one that is yet to come into force. Since the DSM-directive should have been implemented in June 2021 one could be forgiven for wondering what the Swedes have been waiting for. The answer is that they have chosen a precautious approach and waited for the commission’s guidance and the CJEU ruling on whether Poland’s challenge would annul article 17 or not. However, the proposal has now been approved by the Swedish parliament and the implementation will take effect on 1 January 2023.²⁵⁴

6.3.1 Structure of the Swedish implementation

6.3.1.1 Scope

Sweden will implement article 17 by adding a new chapter, chapter 6 b, to their existing copyright law (URL). Initially, the scope of the new provision is set out by identifying which OCSPs are included. The definition is similar to the one provided in article 2 (6) of the DSM-directive, although the Swedish proposal goes a bit further and also includes parts of the recital.²⁵⁵ However, that does not affect the scope and should only be seen as a clarification.

An interesting alteration regarding which uploads are included is that live transformation and linking is not included in the Swedish implementation. This is due to a verbatim interpretation of the definition of what platforms should be included in article 2 (6) of the DSM-directive, which states that platforms need to “store and give access to” the content. The opinion of the Swedish legislator is that a live transmission cannot be seen as storing content since it is too temporary in time. Likewise, linking cannot be included either since the posting of a link is not

²⁵³ Compare with section 1.3.2.

²⁵⁴ See Prop 2021/22:278

²⁵⁵ In particular recital 62 that establishes that an OCSP have to compete with other non-user generated online platforms to be included.

an upload and no storage takes place on the platform since a link directs users to another website.²⁵⁶

6.3.1.2 A new safe harbour, if safeguards are complied with

Two features of relevance in the implementation is the introduction of a new safe harbour in 52 l § URL and the implementations of the safeguards in 52 o-q §§ URL. The new safe harbour is similar to the German approach which shows that it is not necessarily the existence of a safe harbour that is damaging for copyright, but instead under what conditions platforms can make use of such liability exemptions.²⁵⁷ To be able to enjoy the Swedish safe harbour OCSPs will have to fulfill three cumulative criteria, which essentially corresponds to the obligations stated in article 17 (4) of the DSM-directive. These criteria are to 1) intervene ex-post when informed by rightsholders of an infringement, 2) take reasonable measures to obtain authorization from rightsholders and 3) take reasonable measures to stop unlawful content which rightsholders have informed them about ex-ante. Additionally, the compliance with these three cumulative criteria are not allowed to interfere with 52 o § URL, that implements article 17 (7), safeguarding lawful content. The most noticeable aspect in this new safe harbour is that *best efforts* have been translated to “*vad som skäligen kan krävas*”, which implies measures should be reasonable instead of best efforts.²⁵⁸ However, it is of importance to remember that best efforts is an autonomous notion of EU law, that should not be interpreted literally but instead be understood in light of the aim and objectives of article 17 in its entirety.²⁵⁹ Thus, the wording is simply an interpretation that the aim and objective of article 17 is to increase the protection of copyright, but only insofar the fair balance can be maintained, which results in the criteria of reasonable measures.²⁶⁰

When it comes to the safeguards, the protection against over-blocking consists of an obligation that automatic content filters should only aim to stop content that “*with a high degree of certainty*” is infringing on copyright. Lawful content shall also not be blocked to “*any significant degree*”. There are no definitions regarding what constitutes a *high degree of certainty* or a *significant degree*. Compared to the German implementation, the OCSPs constructing the filters will therefore have less guidance regarding what a reasonable amount of filtering is.²⁶¹ Additionally, a positive right is introduced for users in 52 p § URL, the right for users to upload lawful content on to an OCSP. This right prohibits OCSPs from removing lawful content with reference to complaints from rightsholders.²⁶² Adding obligations for OCSPs in relation to rightsholders is clearly an attempt to strengthen user rights.

²⁵⁶ Prop 2021/22:278 p.112

²⁵⁷ See discussion in section 5.1.1

²⁵⁸ See Sveriges Domstolar, *svensk/engelsk ordlista*, p.115, translation for ”skälig”= reasonable

²⁵⁹ European commission, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market*, p.8

²⁶⁰ This interpretation is supported by the CJEU statements in C-401/19 *Poland v Parliament and Council*, see e.g. para 69 of that ruling.

²⁶¹ See section 6.3.1. for the criteria of the German implementation

²⁶² Prop 2021/22:278, p.265

As for the complaint's procedure, Sweden has chosen a middle-road compared to the other analysed implementations. In case of a complaint from a rightsholder, content shall only be made unavailable if the rightsholder can "*duly justify*" their request. If the complaint is not *duly justified* the content shall be immediately restored.²⁶³ The examination on whether a request is duly justified shall be carried out by human review. Thereby content can only be removed after human review but on the other hand, content that is i.e. blocked by a filter ex-ante will not be available during the complaints process either. It will require either human review determining that the block of that particular content was not duly justified or the absence of a motivation from the rightsholder for content to be restored after an unrighteous block.

6.3.2 Reflections on Swedish implementation

The Swedish implementation is by all means a serious attempt at finding the delicate fair balance that is at the essence of article 17. It has more in common with the German implementation than the Spanish one. It is not a verbatim implementation, instead the legislator has both added some criteria compared to article 17 as well as adjusted several of the provisions to the customs and vocabulary of Swedish law. However, when it comes to the implementation of the safeguards there are *four main aspects* that differ from the German implementation.

6.3.2.1 Vaguer criteria and excluded live transmissions

The first one is that the German law provides detailed criteria for what kind of content should be "presumably permitted" and therefore as a main rule should not be stopped ex-ante.²⁶⁴ The Swedish requirements is that lawful content "should not be blocked to any significant degree" and that only content that "with a high degree of certainty" can be classified as unlawful shall be stopped ex-ante.²⁶⁵ Even though they share the aim of finding the balance between stopping copyright infringing content and respecting user's rights, the German laws makes the definition of that balance more distinct. Since the OCSPs have to launch the content filters and choose the extensiveness of them themselves, the clearest possible definition of what the legislator expects is to prefer. The Swedish definition will likely be clarified eventually as the courts will have to attempt to define what "significant degree" and "high degree of certainty" means in this context. However, until that is done the Swedish implementation provides uncertainty regarding those key aspects. That is not only a problem for the OCSPs as all stakeholders share an interest in clarity regarding the extent of ex-ante blocking.

Secondly, live transmissions are not covered by the Swedish implementation which differs it from both the Spanish and German ones. Interestingly, the Swedish legislator argues that the choice of excluding live transmissions is based on the wording of the directive.²⁶⁶ Meanwhile, Germany has gone for the opposite approach and even excludes live transmissions from some

²⁶³ Duly justify = vederbörligen motivera in the swedish legislative text.

²⁶⁴ Sec. 9 UrhDaG.

²⁶⁵ Prop 2021/22:278, p.25.

²⁶⁶ Prop 2021/22:278 p.112

of its safeguards, based on the same wording.²⁶⁷ Spain also requires live transmissions to be interrupted immediately if they are of a copyright infringing nature.²⁶⁸ This aspect is disadvantageous for rightsholders in Sweden who will not be able to protect their copyright to the same extent in the case of live transmissions.

6.3.2.2 The implementation in relation to each stakeholder

For users it is worth mentioning that they receive a separate right, the right to upload content that is non-infringing. This is a good thing on paper since increased rights generally have to be considered positive for an individual. However, it remains to be seen whether this will have any effect in practice. The additional right for users can also be advantageous for OCSPs as it provides them with an argument for undertaking a more restrained application of the filtering provisions. On the other hand, the stakes can be said to increase as wrongful removal or blocking will lead to the infringement of a user right.

Furthermore, the structure of the complaint's mechanism highlights how the Swedish implementation takes a middle way. While Spain and Germany as a main rule disallows or allows, respectively, that content is kept available on the platform during the duration of the complaint's procedure, Sweden cannot be said to have such a general rule. Instead, they take a "don't change anything until the complaining party has proved their case" approach. This goes both ways which can be argued to be the most balanced solution since neither the rightsholders or the users can claim that they are being disadvantaged. However, this does not automatically mean that such a complaint mechanism will work. As the experiences from the US shows, the success of a complaint mechanism is dependent on the system being used by the users.²⁶⁹ Therefore, it remains to be seen whether the Swedish users will make use of their opportunity to oppose a takedown request from a rightsholder. If not, there is a possibility that lawful content is denied to a larger extent, although this depends on the accuracy of the ex-ante content filters.

To conclude, the Swedish legislator does take the safeguards seriously in the implementation. They propose solutions that are meant to fulfill the desired objectives for all stakeholders. By not implementing article 17 word-for-word they have already made a better effort than several other countries, for example Spain.²⁷⁰ However, the proposed provisions lack detail regarding how the law shall be interpreted. This is arguably a more careful approach than the German one which is more detailed. This has the advantage of the law not having to be changed if the CJEU in a future ruling gives more specific guidance on how e.g. the proportionality requirement in article 17 should be interpreted. While the German law will have to be changed completely if it is denounced by the CJEU the Swedish version can be interpreted differently without changing its wording due to its vagueness. The downside of this approach is that the stakeholders that has to follow the law will, especially before case-law has arisen on disputable aspects, struggle to know what is expected from them.

²⁶⁷ See section 7 (2) UrhDaG which provides an exception from Sec. 9-11 UrhDaG.

²⁶⁸ Article 73.4 of Royal Decree Law 24/2021.

²⁶⁹ See section 5.2.2 regarding the experiences from the US system of counter notices against takedown requests.

²⁷⁰ See section 6.1.2.

By doing what is necessary but relying on a case-by-case assessment of what is proportionate instead of more clear and precise instructions to relevant stakeholders, the Swedish legislator have been “lagom” ambitious with their implementation.

7. Summary and reconnaissance for the future of the fair balance

To answer the question of whether article 17 will alter the fair balance between copyright and the freedom of expression and information, the starting point needs to be what the doctrine meant in relation to online content service providers (OCSPs) before article 17 came into force. As established in the legal dogmatic part of the thesis the CJEU carved out a successively clearer definition of the initially quite obscure doctrine. In the *Sabam* cases it was established that a filtering system that might not be able to distinguish between unlawful and lawful content did not strike a fair balance between copyright and the freedom of expression and information. This set a lower limit for a filtering measure that cannot strike a fair balance.

In *Telekabel Wien* it was further clarified that measures that strictly targets unlawful use strikes a fair balance. However, this also meant that measures in accordance with such a balance could not be expected to stop all unlawful use. This case also saw the introduction of a safeguard in the form of a complaint mechanism. In *Poland v Parliament and Council*, the CJEU declared that article 17 in its entirety “do not *disproportionately* restrict the freedom of expression and information of users”. However, this only applies if member states manage to construct filtering systems that only targets unlawful use. As established, the fair balance doctrine should therefore essentially be understood as a requirement of not disproportionately disadvantaging any copyright stakeholder and their enjoyment of fundamental rights. This balance needs to be upheld in each case in the ongoing strife of reaching the objectives of the EU copyright framework.

Due to the concerns of over-blocking there was reasonable doubt whether the best efforts requirements to stop unlawful content in article 17 (4) (b and c) could be compatible with the fair balance. This was due to the risk of over-blocking affecting lawful content as a result of those best efforts. If that were to occur, it would not only be unlawful use that were targeted. The CJEU insisted that it was the introduced safeguards in article 17 (7-9) that meant that article 17 could avoid this and strike a fair balance. Such safeguards should be available both ex-ante and ex-post. Since the safeguards in article 17 only state an intended result it is the member states who in their implementations have to ensure that the safeguards maintain a fair balance between the stakeholders. When implementing the safeguards, the analysis shows how there are several obstacles that can hinder successfully retaining a fair balance.

The first obstacle is that article 17 will require some kind of AI upload filters if copyright infringing content shall be stopped ex-ante. The problem with such filters, who are great at identifying similarity between works, are their inability to distinguish context. Since exceptions and limitations to copyright should be allowed according to article 17 (7) and the lawfulness of those are generally context-dependent this is a major issue in relation to the fair balance. For

users' rights to freedom of expression and information to not be disproportionately disadvantaged it is therefore necessary that member states acknowledge the flaws of upload filters and accustoms their implementations accordingly.

Looking at the three different implementations in the comparative part, the German one has the most appropriate way of accommodating the flaws of upload filters. For example, the possibility for users to flag their own content as lawful transfers the ability to interpret context away from upload filters that do not have the ability to do that. On the contrary, verbatim implementations like the Spanish one does not do anything to remedy the issues with AI upload filters.

That measures intended to both ensure availability of lawful content as well as blocking unlawful content cannot be expected to be completely accurate was established in the *Telekabel Wien* case. Due to the flaws of such measures, the ex-post complaints' mechanism serves a very important purpose and is essential if a fair balance is to be maintained. There are several options regarding how to construct the complaints mechanism. The main obstacles when constructing such a system is to ensure that users actually use their opportunity to complain if they feel that their content have been blocked unjustly. Additionally, it is important that rightsholders do not misuse the complaints mechanism for their own gain. If disputed content is blocked during the complaints process that could give rightsholders incentive to misuse the system to get content unavailable for a time, even if that content is lawful. On the other hand, by allowing access to content during the process of a complaint users are likely to feel increasingly encouraged to take part in such a process. The structure of the German complaint mechanism is therefore more likely to ensure a fair balance since it can avoid the issues that similar systems in the US have encountered.

Since the CJEU in *Poland v Parliament and Council* made it clear that their intention is to uphold the fair balance in its previous form, despite the introduction of article 17, one can assume that the fair balance is unlikely to be altered. However, the answer is more complicated than that, mainly because many of the parties involved in the legislative process seem to lack an answer on *how* the implementation of article 17 shall strike such a balance. The commission delegated this task to the member states and many of the member states only further passed this responsibility onwards to the OCSPs by their verbatim implementations. This results in uncertainty regarding how the safeguards shall maintain the fair balance in practice. This can be exemplified by the Swedish implementation that, while having the intention of finding a reasonable balance, does not provide much detail on exactly what will constitute such a balance. That means that the courts, both national ones and the CJEU, have to decide what constitutes best efforts or reasonable efforts as is the wording in the Swedish implementation. This leaves the OCSPs with the tricky task of, before the courts get the opportunity to have a say on the matter, having to estimate themselves what measures are appropriate. The task is made even more delicate since liability can arise if those measures are either too loose or too intrusive in relation to the safeguards. In the end, it is likely that the CJEU will have to further clarify in more detail what implementations and measures in relation to article 17 can constitute a fair balance.

In relation to the stakeholders in EU copyright law, major OCSPs will therefore go from having a remarkably small role in reaching the objectives, relative to the size of YouTube in particular, to becoming a vital part of reaching those goals. Thereby, they are also the stakeholder that is affected the most by article 17. The users, whom it was feared would be severely negatively affected might not see as much of a change as would have been the case if the safeguards had not been introduced. Rightsholders could arguably be disappointed with how the concessions in the form of safeguards have made article 17 less strict. Their lobbying for the closure of the value gap initially appeared to lead to a system where copyright would get a significantly enhanced role online, at the expense of other rights such as the freedom of expression and information. However, due to the opposition the EU legislator backtracked. Even though rightsholders should be pleased with e.g. the increased focus on licensing the changes are unlikely to become as significant as they hoped. The balance between stakeholders in relation to copyright online is therefore unlikely to shift as much in their direction as rightsholders lobbied for and what initially seemed to be the case. With that said, more developments regarding the introduction of upload filters and safeguards caused by article 17 is likely to happen due to both the commission and many national legislators dodging responsibility for drafting the exact measures of the safeguards. In the end the uncertainties regarding which structure of the safeguards are the most appropriate when it comes to striking a fair balance between copyright and the freedom of expression and information will likely have to be cleared up by the CJEU. However, after the CJEU in *Poland v Parliament and Council* insisted that the fair balance shall be maintained despite article 17's introduction, the remaining question is more *how* that shall be achieved in practice, instead of *if* the fair balance will remain. This leads to the conclusion that the future does admittedly entail a more regulated Internet, but not one where the freedom of expression and information is neglected. All in all, it is therefore reasonable to say that with the current developments, the reports of the demise of the free Internet has been greatly exaggerated.

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