

Supervising the Gatekeepers? An Alternative EU Framework for the Liability of Internet Intermediaries' for Copyright Infringement

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Abstract

This article discusses the current legislative framework for the enforcement of copyright law in the digital world. More specifically, it critically examines Article 17 of the Digital Copyright Directive (2019/790), its national implementation into the EU member states so far, and the relevant provisions of the Proposal for a Digital Services Act Regulation. Having discussed both and identified their discrepancies, an alternative framework based on co-regulation is put forward. This approach involves the creation of a supervisory authority which would oversee the operation of internet intermediaries and offer a better balance of the parties' interests.

Introduction

Introduction

Internet intermediaries² are the gatekeepers³ of the online world. They decide which information reaches the end user, thus they design the information environment of those users.⁴ At the same time, their services allow the circulation of material which infringes copyright within their networks. This has been stated by several EU policy documents that explain the rise of the unauthorized dissemination of copyright works online. For instance, in 2016 the EU Commission's *Public Consultation on the Modernization of the Enforcement Of Intellectual Property Rights* revealed that more than three-quarters of respondents

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² The term 'Internet intermediaries' encompasses the providers that offer internet access, cache providers, and providers that host content within their services.

³ The term 'gatekeeper' is explained by Lewin based on a view that organizations, families, and universities are gates and he considered the ways in which organizations exclude individuals, how families decide upon food availability in the house, and using which criteria universities reject or admit their applicants. He argued that a gatekeeper is "an individual or group ... in power for making the decision between in and out": K. Lewin, "Frontiers in Group Dynamics: II. Channels of Group Life; Social Planning and Action Research" (1947) 1 *Human Relations* 143 at 145. Developing this further, White identifies the specific steps gatekeepers take in order to control the communication channels. He gives the example of a news story about the proposed Bill for Education before the US Senate. A newspaper reporter attends the Senate hearing and records the debates. The news story is passed to the bureau chief and then to the file editors. The last gatekeeper, according to White, is the wire editor who decides which and where stories are placed in the newspaper. It is the individual who "is faced with an extremely complicated set of decisions to make regarding the limited number of stories he can use". Such decisions, however, are "highly subjective" and influenced by the "gatekeeper's own set of experiences, attitudes and expectations": see D. White, "'The Gatekeeper': A case study in the selection of News" in *People, Society, and Mass Communication* (eds.) by L.A. Dexter and D. Manning (New York: Macmillan, 1964), p. 160 at 171.

⁴ M. Thompson, "Beyond Gatekeeping: The Normative Responsibility of Internet Intermediaries" (2016) 18 *Van J Ent & Tech* 783 at 786.

suggested that new internet intermediaries have led to an increase in the rates of online piracy,⁵ while a recent report from the European Intellectual Property Office states that “Some IP owners are also considering that social media are becoming a primary channel for accessing film and television content and livestreamed events, including IP-infringing content”.⁶

Unfortunately, the current European legal landscape, which includes the Digital Copyright Directive, fails to provide a solid regulatory framework for internet intermediaries and the copyright infringements on their platforms. More specifically, Article 17 of the Digital Copyright Directive⁷ includes a set of problematic provisions that could be said to undermine not only users’ fundamental rights but also the right of internet intermediaries to operate their businesses. At the same time, the national implementations of Article 17 thus far, have adopted it verbatim (‘copy out’) and so have failed to consider any procedural mechanisms to safeguard users’ rights.⁸ While the EU Commission’s Proposal for a Digital Services Act,⁹ announced on the 15 December 2021, presents a more promising approach, its still lacks clarity in how it would be applied.

Against this background, this article explores an alternative solution to the regulatory framework for Online Content-Sharing Service Providers (OCSSP) in respect of copyright infringements. It proposes a co-regulatory approach stemming from existing legislative tools, such as the Audiovisual Media Services Directive¹⁰ and the Digital Copyright Directive itself. In addition, a co-regulatory framework is envisaged in the recent Digital Services Act proposal, which requires the creation of Digital Services Coordinators with the aim of supervising the gatekeepers. As the briefing to the EU Parliament aptly points out, “... the DSA constitutes a step away from the self-regulation approach towards more cooperative, co-regulation and regulatory mechanisms”.¹¹ At the same time, a growing number of scholars argue in favour of a co-regulatory approach with the establishment of an independent body.¹²

In this light, it will be argued that the existing legal framework on Online Content-Sharing Service Providers’ liability appears to be biased in favour of rights holders and does not safeguard internet users’ fundamental rights. It then suggests that the establishment of an ISP regulatory authority would offer a better balance between the interests of the relevant stakeholders. Accordingly, it examines the current legal

⁵ European Commission, *Public Consultation on the evaluation and modernisation of the legal framework for the enforcement of intellectual property rights: Summary of responses.* (2016), p 7-8.

⁶ European Union Intellectual Property Office, *Social media- discussion paper: New and existing trends in using social media for IP infringement activities and good practices to address them* (June 2021), pp 10-11.

⁷ Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market [2019] OJ L 130.

⁸ The implementation deadline was 7 June 2021: Directive (EU) 2019/790, art 29(1). However, most of the EU member states have yet to transpose the Directive.

⁹ European Commission, *Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act)*, COM (2020) 825 final

¹⁰ Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [2010] OJ L 95/1 (as amended, in particular, by Directive (EU) 2018/1808) .

¹¹ EU Parliament, *Briefing Legislation: Digital Services Act* (2021), p 1.

¹² M. Tessier, J. Herzog and L. Madzou, “Regulation at the Age of Online Platform-Based Economy: Accountability, User Empowerment and Responsiveness” in L. Belli and N. Zingales (eds.), *Platform Regulations: How Platforms are Regulated and How They Regulate Us Official Outcome of the UN IGF Dynamic Coalition on Platform Responsibility* (United Nations Internet Governance Forum Geneva, December 2017), p 175; Edwards suggests the appointment of “An Ombudsman able to get remedies for users”: L. Edwards, “With Great Power Comes Great Responsibility? The Rise of Platform Liability” in L. Edwards (ed.), *Law, Policy and the Internet* (Hart Publishing 2019), p. 253; K. Garstka, “Guiding the Blind Bloodhounds: How to Mitigate the Risks art. 17 of Directive 2019/790 poses to the Freedom of Expression” in P. Torremans (ed.), *Intellectual Property and Human Rights*, 4th edn, (Kluwer Law and Business 2020), p. 350; M. Vermeulen, “Online content: to regulate or not to regulate- is that the question?” (Association for Progressive Communications 2019), pp 10-11; S. Kulk, *Internet Intermediaries and Copyright Law: EU and US perspectives* (Kluwer 2019), p 305.

landscape relating to the enforcement of copyright in the digital world and, in particular, Article 17 of the Digital Copyright Directive and its implementation. This is followed by a consideration of the proposal for a Digital Services Act and how it can address online copyright infringement before the discussion concludes with a proposal for an alternative framework based on supervised co-regulation

A critical examination of the current legal framework

Article 17 of the Digital Copyright Directive: a controversial approach

The Digital Copyright Directive was finally adopted by the European Parliament on 17 April 2019.¹³ Article 17 of the Directive regulates the liability of a new type of internet intermediary, namely “online content sharing service providers”, for copyright infringement. The scope of online content sharing service providers is limited to those whose services are:

“...to store and enable users to upload and share a large amount of copyright-protected content with the purpose of obtaining profit therefrom, either directly or indirectly, by organizing it and promoting it in order to attract a larger audience, including by categorizing it and using targeted promotion within it.”¹⁴

[Examples include YouTube, Vimeo, Dailymotion, Instagram, and Facebook]

However, Article 17 has attracted criticism from civil society organizations and scholars. This is because it sets out a regime which is very complex, so much so it has been subject to multiple interpretations by scholars.¹⁵ At the same time, the EU Commission’s Guidance fails to provide a clear interpretation of the rules it set.¹⁶ In this light, the following section critically discusses the problematic features of Article 17, namely the primary infringement liability rules, the liability exemptions, and the risk of dual liability. These problems create an imbalance between the rights of copyright holders, users and online content sharing service providers.

The introduction of primary infringement liability rules

Article 17(1) provides a primary liability rules for online content sharing service providers:

“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 the

¹³ European Parliament, ‘Legislative train schedule, connected digital single market’ <<https://www.europarl.europa.eu/legislative-train/theme-connected-digital-single-market/file-jd-directive-on-copyright-in-the-digital-single-market>>.

¹⁴ Directive (EC) 2019/790/EC, recital (62).

¹⁵ S. Dusollier, “The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a Few Bad Choices and an Overall Failed Ambition” (2020) 57 C.M.L.Rev 979 at 980; J.P Quintais, G. Frosio et al., “Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive” (2019) 10 JIPITEC 277, [1]; S. Stalla-Bourdillon et al, “Open Letter to the European Commission – On the Importance of Preserving the Consistency and Integrity of the EU Acquis Relating to Content Monitoring within the Information Society”, 2016 <<https://research.cbs.dk/en/publications/open-letter-to-the-european-commission-on-the-importance-of-prese>>; C. Angelopoulos and J.P. Quintais, “Fixing copyright reform: a better solution to online infringement” (2019) 10 JIPITEC 147 at 153.

¹⁶ European Commission, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market* (2021) COM 288 final.

Directive when it gives the public access to copyright protected works or other protected subject matter uploaded by its users.”

This means that online content sharing service providers are liable for copyright infringements occur within their networks. Husovec argues that Article 17 constitutes a *sui generis* communication to the public right,¹⁷ which means that it introduces a new communication to the public right that does not have commonalities with the communication to the public right as set forth in Article 3 of the InfoSoc Directive.¹⁸ On the other hand, the Commission’s Guidance states that Article 17(1) constitutes a *lex specialis* to the communication to the public right set out in article 3:

“It does not introduce a new right in the Union’s copyright law. Rather, it fully and specifically regulates the act of ‘communication to the public’ in the limited circumstances covered by this provision ‘for the purposes of this Directive’.”

Interestingly, the attribution of a primary infringements liability to online content sharing service providers is in line with existing Court of Justice case law. Consider, for instance *Svensson*,¹⁹ which concerns a dispute between journalists and Retriever Sverige, which was a website that diverted its users via hyperlinks to articles that were published on the websites of journals. The Court examined whether hyperlinking amounts to an act of communication to the public under Article 3 of the InfoSoc Directive and concluded that a hyperlink does so when two requirements are fulfilled, namely that there is an act of communication and it is to a new public. The Court reasoned that the concept of a “new public” encompasses the public that the right holder did not include in the initial transmission of the work.²⁰

Likewise, a similar approach was adopted in *GS Media*²¹ where Sanoma, the publisher of Playboy Magazine, sued GS Media, a lifestyle website, for copyright infringement on the basis that GS Media’s website provided hyperlinks to redirect its users via hyperlinks to a website where pictures of a Dutch celebrity had been uploaded prior to their official release. The Court concluded that in order to assess whether hyperlinking constitutes an act of communication to the public,

“it is to be determined whether those links are provided without the pursuit of financial gain by a person who did not know or could not reasonably have known the illegal nature of the publication of those works on that other website or whether, on the contrary, those links are provided for such a purpose, a situation in which that knowledge must be presumed...”²²

This, if knowledge is presumed it is an act of communication to a *new* public and the internet intermediary is operating on a commercial basis.²³ Further, in *Brein v Ziggo* the requirements set out in *GS Media* were

¹⁷ M. Husovec, “How Europe wants to redefine global online copyright enforcement” in T. Synodinou (ed.), *Pluralism or Universalism in International Copyright Law* (Kluwer 2019), p. 519 at 536 where he notes that “the newly constituted exclusive right is a communication to the public right only in name.”

¹⁸ Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167.

¹⁹ *Nils Svensson v Retriever Sverige AB* (C-466/12), EU:C:2014:76; A. Ohly, “The Broad Concept of ‘Communication to the Public’ in recent CJEU judgements and the Liability of Intermediaries: Primary, Secondary or Unitary liability?” (2018) 13 J.I.P.L.P 664 at 670.

²⁰ *Svensson and Others* (C-466/12), EU:C:2014:76 at [24].

²¹ *GS Media BV v Sanoma Media Netherlands BV* (C-160/15), EU:C:2016:644.

²² *Ibid* at [55].

²³ T. Rendas, “How Playboy Photos Compromised EU Copyright Law: The GS Media Judgment” (2017) 20 Journal of Internet Law 11 at 14; E. Rosati, “GS Media and Its Implications for the Construction of the Right of Communication to the Public within EU Copyright Architecture” (2017) 54 C.M.L.Rev 1221 at 1242.

reaffirmed.²⁴ This case involved a dispute between an anti-piracy association, *Sichting Brein*, and *Ziggo*, an internet service provider with the court finding that the operators of *Pirate Bay*²⁵ might be held primarily liable since:

“by making that platform available and managing it, [they] provide their users with access to the works concerned. They can therefore be regarded as playing an essential role in making the works in question available.”²⁶

Finally, the most recent ruling which reinforces the trend towards primary infringement liability is the joined cases of *YouTube/Cyando*.²⁷ The court was asked whether YouTube and Cyando were making copyright works available to the public. After a consideration of the relevant facts, the Court of Justice concluded that an online content sharing service provider is not communicating the work to the public merely by providing this sort of service and passed this back to the national court the examination of whether there was a deliberate intervention by the service provider in relation to the communication of the infringing copyright works.²⁸

While a primary infringement liability rule has been supported through a line of cases, it seems to contradict the purpose of EU policymakers to promote innovation in the digital market. This is because EU policymakers introduced a secondary liability framework whereby host ISPs could escape from liability if they did not have knowledge of the unlawful content or removed the illicit content upon being notified.²⁹ In particular, Article 14(1) of the E-Commerce Directive defines the liability of internet intermediaries that offer hosting services in a negative way, allowing them to escape liability provided they are not aware of the illicit activity they are hosting, or that they take it down upon being notified of its existence. The concept of knowledge had, therefore, been set as a requirement for the liability of internet intermediaries. By contrast, Article 17(3) of the Digital Copyright Directive expressly excludes the application of Article 14(1) of the E-Commerce Directive, meaning that online content sharing service providers will be liable, regardless of whether they have knowledge of the copyright infringement taking place within their service. In other words, online content sharing service providers become liable once the infringements take place.

What is more, the introduction of primary infringement liability might lead to online content sharing service providers taking down material simply to avoid liability. So leading to an overzealous removal of copyright content without prior consideration of its legality, making service providers “overzealous police officers”³⁰ who reduce the content available to the public. Finally, as Dussolier notes, a primary infringement rule might lead “to an intricate system where sharing platforms will be responsible for everything that is uploaded with a risk of turning them into edited services like TV Channels or Netflix type of services, where all content needs to be cleared beforehand”.³¹ This would mean that service providers would need to review their business model and invest in additional resources for ex-ante control of their services. It might also prevent new players from entering the internal market, while others might need to shut down their businesses. As a result, innovation might be jeopardized. Moving on from primary infringement rules, the discussion now turns to the liability exemptions set out in Article 17.

²⁴ *Stichting Brein v Ziggo BV and XS4ALL Internet BV* (C-610/15), EU:C:2017:456.

²⁵ A file sharing website that allows the sharing of works without regard to intellectual property rights.

²⁶ *Ibid* at [37].

²⁷ *YouTube and Cyando* (C-682/18), EU:C:2021:503.

²⁸ *Ibid* at [78], [80] and [83].

²⁹ Known as safe harbour provisions.

³⁰ D. Rowland, U. Kohl and A. Charlesworth, *Information Technology Law*, 5th edn, (Routledge 2017), p. 86.

³¹ Dussolier, “The 2019 Directive on Copyright in the Digital Single Market” at 1013.

Liability exemptions

Further controversy arises from Article 17(4), which provides that in order to be exonerated from liability, the online content sharing service providers must undertake certain acts. Thus, providers must demonstrate they have made best efforts to obtain an authorization, and 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 rights holders have provided the service providers with the relevant and necessary information. Further, service providers have to have acted expeditiously, upon receiving a sufficiently substantiated notice from the right holders, 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. Such acts, however, have implications for the rights of internet users and online content sharing service providers.

First, what is meant by “best efforts” to gain the authorization of copyright holders in Article 17(4)(a)? Secondly, paragraph (4)(b) requires the service providers to use their best efforts to align with industry practices, so what is the level of diligence³² must be demonstrated by service providers?³³ Indeed, recent studies indicate that industry practices might be biased in favour of service providers.³⁴ This is because service providers may prioritise their business partners’ interests but undermine their users’ rights and the interests of other business players. Thirdly, demonstration that a service provider has used its best efforts to obtain authorization from rights holders will lead to a licensing system to be the main way of avoiding liability. This will mean that service providers must adapt their business model by entering into license agreements with organizations representing rights holders, leading to higher transaction costs and possibly putting the service provider’s business in peril.³⁵ Indeed, one might wonder how easy it is to license all the material that is disseminated online through these services.³⁶ Collecting societies can only license the works of their members³⁷ and there is still no pan-EU licence available for most types of work.³⁸ So even if service providers wish to conclude collective licences, in some stances it might be the case where service providers would need to enter multiple licences across jurisdictions.

³² The translation of the term ‘best effort’ might substantially differ between member states. Indeed, there is evidence that in Spain the term ‘best effort’ translates to ‘greater efforts’, in Italy it amounts to ‘greatest effort’, in Germany it is construed as ‘all efforts’, and in Greece ‘every best effort’; for more examples, see “DSM Directive Series #5: Does the DSM Directive mean the same thing in all language versions? The case of ‘best efforts’ in Article 17(4)(a)”, *IPKat blog*, 22 May 2019 <<https://ipkitten.blogspot.com/2019/05/dsm-directive-series-5-does-dsm.html>>.

³³ K. Erikson, “The EU copyright directive creates new legal uncertainties”, LSE Blog, 6 April 2019 <<https://blogs.lse.ac.uk/businessreview/2019/04/06/the-eu-copyright-directive-creates-new-legal-uncertainties/>>.

³⁴ See further in M. Perel (Filmar) and N. Elkin-Koren, “Accountability in Algorithmic Copyright Enforcement” (2016) 19 *Stan. Tech. L.R.* 473 at 495; and Z. Krokida, “Use of Filters by Online Intermediaries and the Rights of Users: Developments in the European Union, Mexico, India and China” in International Federation of Library Associations and Institutions (ed.), *A Copyright Reader for Librarians* (De Gruyter, forthcoming 2022).

³⁵ A. Bridy, “EU Copyright Reform: Grappling with the Google Effect” (2019) *Van J. Ent. & Tech* 323 at 348.

³⁶ M. Husovec, “How Europe wants to redefine global online copyright enforcement” in T. Synodinou (ed.), *Pluralism or Universalism in International Copyright Law* (Kluwer Law International 2019), p. 519; for an opposite view see M. Husovec and J. Quintais, “How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms” (2021) 70 *GRUR Int* 325; J. Reda, “The text of Article 13 and the EU Copyright Directive has just been finalised”, 13 February 2019 <<https://juliareda.eu/2019/02/eu-copyright-final-text/>>.

³⁷ JP Quintais, “The New Copyright in the Digital Single Market Directive: A Critical Look” [2019] *E.I.P.R* 28 at 40.

³⁸ M. Senftleben, “Bermuda Triangle – Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market” [2019] *E.I.P.R* 480 at 481; Also it is worth to mention that the extended collective licensing scheme has not been harmonised so far at the European level.

Interestingly, rights holders have expressed their negative experiences negotiating these sorts of collective agreements in stakeholders' meetings in October and December 2019.³⁹ They argue that collective licensing agreements are not transparent with respect to the allocation of the revenues to the authors and the technological tools that service providers use create difficulties in distinguishing between legitimate and illegitimate content.⁴⁰

The requirement in Article 17(4)(c) attracts even more controversy. It provides that the online content sharing service providers must make best efforts not only to terminate the dissemination of unlawful content, but also to prevent the emergence of these infringements in the future. In order to do so, service providers might need to deploy technological filtering tools and to mitigate the negative impact of this technology on users' fundamental rights, Article 17(7) states:

“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.”

Yet, a number of scholars have argued that these safeguards are not enough to protect internet users' right to free speech.⁴¹ This is mainly due to the peculiarities of the filtering tools.⁴² For example, a number of cases have been reported where filtering technology could not differentiate between legitimate and infringing content. A representative example can be found in YouTube's counter-claim procedure. YouTube's transparency report reveals that in the first half of 2021, there were 722,649,569 claims for copyright infringement and 60% of those claims have been resolved in favour of the uploader.⁴³ In addition, it has been found that content produced by marginalized societies has been suppressed. A telling example can be found in a YouTube video that referred to same-sex relationships. The video has been placed in a 'restricted mode', which reduced its visibility within the platform.⁴⁴

This controversy has been flamed by the recent Opinion of the Advocate-General Saudmandsgaard ØE in respect of the action by Poland to annul Article 17.⁴⁵ This is mainly because the Advocate General declared that the use of filtering tools is compatible with the right to freedom of expression protected by the EU

³⁹ EU Commission, *Press release on first meeting of the Stakeholder Dialogue on Art 17 of the Directive on Copyright in the Digital Single Market*, 15 October 2019 <<https://ec.europa.eu/digital-single-market/en/news/first-meeting-stakeholder-dialogue-art-17-directive-copyright-digital-single-market>>.

⁴⁰ GESAC: Authorsocieties.eu, 'Art 17 Stakeholders Dialogue 1st meeting' (15 October 2019, Brussels) <https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=63024>

⁴¹ M. Senftleben et al, "The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform" [2018] E.I.P.R 149 at 161.

⁴² G. Sartor and A. Loreggia, "The impact of algorithms for online content filtering or moderation: Upload filters" (Report for the JURI Committee, 2020), pp. 54-56; E. Engstrom and N. Feamster, "The limits of filtering: the look at functionality and shortcomings of content detection tools" (2017) < <https://www.engine.is/the-limits-of-filtering>>, pp. 14-15; F. Romero Moreno, "Upload filters and human rights: implementing Article 17 of the Directive on Copyright in the Digital Single Market" (2020) Int'l Rev.L.Computers & Tech 158; Z. Krokida, "Towards a wider scope for the duty of care of host internet service providers: The case of *Eva Glawischnig-Piesczek v Facebook*" [2021] E.I.P.R 313 at 315.

⁴³ YouTube, 'YouTube Copyright Transparency Report January-June 2021' <https://storage.googleapis.com/transparencyreport/report-downloads/pdf-report-22_2021-1-1_2021-6-30_en_v1.pdf>.

⁴⁴ F. Reda, 'When filters fail: These cases show we can't trust algorithms to clean up the internet' <https://felixreda.eu/2017/09/when-filters-fail/>

⁴⁵ *Republic of Poland v European Parliament* (C-401/19), EU:C:2021:613.

Charter of Fundamental Rights.⁴⁶ In particular, he pointed out that filtering tools could be a convincing option for identifying online infringements. This is because, as he noted, the high volume of content on these platforms means that human reviewers could not easily identify copyright infringing works; he went on to say:

“Therefore, I find it difficult to see by what means other than the use of an automatic recognition tool enabling them to filter the content uploaded to their services those providers would reasonably be able to ‘ensure the unavailability’ of protected works and subject matter identified by rightholders and ‘prevent their future upload’ to their services, in accordance with the objectives set out in the contested provisions.”⁴⁷

What is more, he highlighted that many online content sharing service providers have already been using filtering tools and, while these tools have different costs, their utilization does not constitute an expensive burden for these providers.⁴⁸ Such tools, however, should be subject to the principle of proportionality. Further, whereas the Advocate-General accepted that Article 17 of the Copyright Digital Directive interferes with freedom of expression,⁴⁹ he outlined why the contested provision is compatible with Article 11 of the European Charter of Fundamental Rights. He stated that any limitation on the right must be prescribed by law, respect the ‘essence’ of the right to freedom of expression, and be proportionate. In this light, he opined that the contested provisions “are sufficiently clear and precise to meet that standard...”,⁵⁰ whereas they respect the essence of the right because they impose a specific monitoring obligation (rather than a general monitoring obligation).⁵¹ Finally, it is proportionate since the limitation is necessary. This is because, as the Advocate General pointed out, the notice and take down system as set forth in Article 14 of the E-Commerce Directive and Article 17(4)(c) is not an effective measure for rights holders to contest unlawful content. Rather, the imposition of monitoring obligations seems to be an effective system.⁵² This approach has been reinforced by the recently issued judgement of the CJEU on 26 April 2022. The Court concluded that Article 17 is compatible with the freedom of expression but limits the removal of allegedly infringing content to cases where online content sharing service providers do not undertake an individual assessment of the illegal nature of the content.⁵³ To sum up, the liability exemption might place an additional burden on online content sharing service providers because it increases the transaction costs. In addition, it might jeopardize the fundamental rights of internet users and pose an obstacle to free speech. However, apart from the implications of liability exemptions for online content sharing service providers and internet users, Article 17 of the Digital Copyright Directive might create a dual liability regime. The following section explores the risk of a dual liability regime and its implications for the parties at stake.

Risk of a dual liability regime

The scope of Article 17 is also problematic⁵⁴ because online content sharing service providers are a subcategory to the internet service providers that offer hosting services. They therefore act as a *lex specialis*

⁴⁶ Charter of the Fundamental Rights of the European Union, art 11.

⁴⁷ *Republic of Poland v European Parliament* (C-401/19), EU:C:2021:613.

⁴⁸ *Ibid* at [AG68], where he states that “However, those specific cases aside, it is clear, to me, that, in all situations in which various appropriate and effective tools are available on the market and are not unreasonably expensive, sharing service providers are a priori required to put them into place in order to demonstrate that they have made ‘best efforts’ to prevent the uploading of illegal content and, therefore, to comply with the contested provisions.”

⁴⁹ *Ibid* at [AG72] where he states that “That fundamental right is undeniably relevant in the present case.”

⁵⁰ *Ibid* at [AG95].

⁵¹ *Ibid* at [AG110].

⁵² *Ibid* at [AG127].

⁵³ *Republic of Poland v European Parliament* (C-401/19) ECLI:EU:C:2022:297; (2022) at [90].

⁵⁴ Recital (62) states that their scope: “is to store and enable users to upload and share a large amount of copyright-protected content with the purpose of obtaining profit therefrom, either directly or indirectly, by organising it and promoting it in order to attract a larger audience, including by categorising it and using targeted promotion within it”.

under Article 14(1) of the E-Commerce Directive. It provides that intermediaries can escape from liability if they are not aware of the infringing content, or if they expeditiously remove the allegedly infringing content upon being notified of its presence. This means that online content sharing service providers would be subject to primary infringement liability rules, whereas host internet service providers would be treated only as accessories for infringements.

There is therefore a dual liability regime for online content sharing service providers and host providers (Article 17 of the Digital Copyright Directive and Article 14(1) of the E-Commerce Directive). This is a problem because an online content sharing service provider whose business model attracts both copyright and trade mark infringements would be subject to different rules. At the same time, rights holders face legal uncertainty by reason of their copyright works being disseminated not only through online content sharing service providers,⁵⁵ but also by activities using online marketplaces, online sessions, and cloud service providers. This means that rights holders might be unsure as to how to enforce their rights.

This is because, while online marketplaces do not fall within the definition of online content sharing service providers in Article 17, its services still might. Online marketplaces offer tangible as well as intangible goods, such as online seminars, audio files, digital pictures, or eBooks.⁵⁶ Consider, for instance that, if a trade mark owner sues an online marketplace alleging trade mark infringement, the principle of the diligent economic operator applies. Following the *L'Oreal v Ebay*,⁵⁷ the question is whether the online marketplace is “aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality in question”⁵⁸ and acted to remove or to disable access to the information. On the other hand, does the principle of diligent economic operator apply in respect of a claim against an online marketplace for copyright infringement?⁵⁹

Further, this dual liability impedes one of the main goals of the Digital Single Market, namely innovation. This is because the additional regulatory burden may discourage potential online marketplace operators to enter the market in the first place. For instance, as discussed above, in order to be protected from liability, online content sharing service providers must conclude licensing agreements with rights holders or provide evidence that it has made best efforts either to obtain the authorisation of rights holders for the copyrighted content that is disseminated on the platform, or prevent the availability of unlawful content within the platform. At the same time, under the E-Commerce Directive, the safe harbor requires a host internet service provider to expeditiously take down, upon notification, the allegedly infringing content.

Finally, this dual liability leads to a fragmented landscape which blurs the preexisting harmonised online enforcement framework in copyright law. For example, it provides contradictory burdens of proof: Article 14(1) of the E-Commerce Directive requires rights holders to provide, in its notification to the internet intermediary, evidence that copyright in their works has been infringed; on the other hand, Article 17 of the Digital Copyright Directive, obliges online content sharing service providers to demonstrate that they undertook all the necessary measures to terminate the circulation of copyright infringing works and to prevent their re-emergence in the future. Thus, rights holders do not need to prove a copyright infringement

⁵⁵ EU Commission, *EU Study on the New Rules for a New Age? Legal Analysis of a Single Market for the Information Society: 6. Liability of Online Intermediaries*, (2009), p. 12.

⁵⁶ *Nederlands Uitgeversverbond and Groep Algemene Uitgevers* (C-263/18), EU:C:2019:1111 where it has been concluded that the provision of an ebook is communication to the public; see also M. Husovec, “Compromising (on) the Digital Single Market? A Quick Look at the Estonian Presidency Proposal(s) on Art 13”, *Kluwer Copyright Blog*, 8 September 2017 <<http://copyrightblog.kluweriplaw.com/2017/09/08/compromising-digital-single-market-quick-look-estonian-presidency-proposals-art-13/>>.

⁵⁷ *L'Oreal SA V eBay Int'l AG* (C-324/09) [2011] E.C.R. I-6011.

⁵⁸ *Ibid* at [120].

⁵⁹ Angelopoulos and Quintais, “Fixing Copyright Reform: A Better Solution to Online Infringement” at 153.

in order to seek redress for the infringement on online content sharing services whereas under the provision of the E-Commerce Directive they do need to provide evidence to online marketplaces.

Overall, it can be seen Article 17 is problematic because it introduces a primary infringement liability rule, it does safeguard internet users' fundamental rights, and it creates a dual liability regime. At the same time, the much-awaited Opinion of the Advocate General on Poland's annulment action in relation to Article 17 does not assist, rather it merely accentuates the existing difficulty. The discussion now turns to the implementations of Article 17 into member states' legal systems.

The national implementation of the Digital Copyright Directive

So far, Article 17 of the Digital Copyright Directive has not been implemented in all 27 EU member states yet, despite the transposition deadline being 7 June 2021. This is not surprising as the EU Commission's Guidance on the implementation of the Directive was only published just three days before the deadline while the Polish annulment action against Article 17 of the Directive has been decided by the CJEU on 26 April 2022.⁶⁰ Interestingly, the national implementations so far have failed to address the problematic features of Article 17. Most have implemented Article 17 verbatim ('copy out') without providing any safeguards for internet users' fundamental rights. The following discussion offers an overview of the transposition of Article 17 in selected member states.

The Netherlands was the first country to transpose the Directive on the 15 May 2020, by inserting new articles into the Dutch Copyright Act⁶¹ which replicate Article 17 verbatim.⁶² It adopts its definition of online content sharing service providers⁶³ and in Article 29d.2(2) states that these providers must remove the allegedly infringing content after being notified by the creator or make the access to the allegedly infringing content impossible and make every effort to impede the access to the work in the future.⁶⁴ This means that content providers are required to prevent the reappearance of infringing content without clarifying the methods and mechanisms they need to deploy for this purpose. Such practices might be subject to technological tools, such as content identification technology or algorithmic-based tools. Interestingly, while the Dutch provision allows the imposition of further measures in the future, however the Dutch Parliament has not shown any indication to do this so far.

Likewise, France has implemented Article 17 of the Directive verbatim,⁶⁵ which is not surprising given that the French Government noted in its stakeholders' consultation that Article 17 takes into consideration the fundamental rights framework and provides benefits for users.⁶⁶ Once more, the French implementation

⁶⁰ Action brought on 24 May 2019: *Republic of Poland v European Parliament* (Case C-401/19).

⁶¹ Implemented by the Act of 16 December 2020 (Implementatiewet richtlijn auteursrecht in de digitale eengemaakte markt) (2020) Staatsblad 558.

⁶² See Dutch Copyright Act, art 29c to 29e.

⁶³ See Dutch Copyright Act, art 29c(8).

⁶⁴ The Dutch version reads "hij, na ontvangst van een voldoende onderbouwde kennisgeving van de maker of zijn rechtverkrijgende, de gemelde werken snel van zijn website heeft verwijderd of de toegang daartoe onmogelijk heeft gemaakt en hij zich naar beste vermogen heeft ingespannen om te voorkomen dat de gemelde werken in de toekomst weer worden aangeboden."

⁶⁵ Code of Intellectual Property, Art. L. 137-1 and Art. L. 137-2 (inserted by Ordonnance n° 2021-580 of 12 May 2021).

⁶⁶ *Note des autorités françaises*, 10 September 2020 <www.communia-association.org/wp-content/uploads/2020/10/201001french_consultation_response.pdf>, where the French Government responded to the Commission's stakeholders Consultation with regard to the implementation of Article 17 of the Copyright in the Digital Single Market Directive by noting that Article 17 takes into consideration the fundamental rights framework and provides safeguards for internet users.

refrains from legislating for legitimate uses of works, and thus from providing any safeguards for users' fundamental rights.

Further, Germany implemented Article 17 of the Directive on 20 May, 2021 with then passage of the Act on Copyright Liability of Online Content Sharing Service Providers.⁶⁷ Like the provision of the Digital Copyright Directive, the German Act states that Online Content Sharing Service Providers can be held liable for primary copyright infringement if they communicate the work to the public. In order to escape from liability, section 4 of the Act states that a service provider must make every effort to obtain the contractual rights for communicating the work to the public as well as reproducing it.⁶⁸

In contrast to the other member states, the German Act introduces an additional provision which offers a higher level of protection to copyright exceptions. More specifically, section 9 notes that content uploaded by users must remain online if the use falls within the scope of permitted minor use of a work or if the video entails less than half of the work or if the content is earmarked as legitimate by trusted users.⁶⁹ Such content can only be removed after the final resolution of any complaints procedure. This helps to minimise the risk of over-blocking legitimate content. However, it is worth to outline that the Act does not provide rules with regard to the moderation of content outside those two categories. For instance, consider an uploaded work that either makes a citation to the whole work of a creator or where the work exists in the public domain.⁷⁰ Since those cases do not fall within section 9, it is highly likely that online content sharing service providers will resort to technological-based systems. At the same time, section 9 does not address cases where copyright holders submit inaccurate or fabricated copyright claims. This has already happened as money has already been extorted from YouTubers; two popular YouTubers reported that their YouTube channels have been suspended under the reasoning of copyright infringement and they have been threatened to pay up to \$400 in order to remove the copyright strikes against their channels.⁷¹

In similar fashion, Austria implements Article 17 with Resolution no. 1510/2021.⁷² Following Germany's example, the transposition offers additional provisions that aim to protect users' fundamental rights. More specifically, § 89b (2) of the Austrian Copyright Act requires online content sharing service providers to provide information to users about the adopted measures to prevent unlawful content online while § 89b (3) states that works that consist of less than half of the copyright work, 15 seconds of a film, 15 seconds of a soundtrack or up to 160 characters of a text shall not be taken down.

Hungary has also completed the implementation of Article 17, but without any additional rules in order to safeguard users' rights. Rather, section 57.E(4) only reinforces that online content sharing service providers must not prevent the circulation of lawful content when they deploy measures under this section.⁷³

⁶⁷ Urheberrechts-Diensteanbieter-Gesetz (UrhDaG).

⁶⁸ UrhDaG, art 4.1: "Ein Diensteanbieter ist verpflichtet, bestmögliche Anstrengungen zu unternehmen, um die vertraglichen Nutzungsrechte für die öffentliche Wiedergabe urheberrechtlich geschützter Werke zu erwerben."

⁶⁹ See UrhDaG, art 10 and 11.

⁷⁰ T. Nobre, "The German Model to Protect User Rights when implementing Article 17", *Communia*, 26 February 2021 <<https://www.communia-association.org/category/eu-policy/dsm-implementation/page/2/>>; J. Reda, "Germany attempts to square the circle in its implementation of Article 17 CDSMD – Part 1.", *Kluwer Copyright Blog*, 2 June 2021 <<http://copyrightblog.kluweriplaw.com/2021/06/02/germany-attempts-to-square-the-circle-in-its-implementation-of-article-17-cdsmd-part-1/>>.

⁷¹ T. Gerken, "YouTube's copyright claim system abused by extorters", *BBC News*, 14 February 2019 <<https://www.bbc.co.uk/news/technology-47227937>>.

⁷² Bundesgesetz, mit dem das Urheberrechtsgesetz, das Verwertungsgesellschaftengesetz 2016 und das KommAustria-Gesetz geändert werden (Urheberrechts-Novelle 2021 – Urh-Nov 2021)

⁷³ A (2) bekezdésben meghatározott intézkedések tartalmegosztó szolgáltató általi alkalmazása nem eredményezheti a jogszerű felhasználások megakadályozását.

Interestingly, s. 57. G (1) of the Hungarian Act offers a separate provision for the creation of a complaint redress mechanism and dictates that online content sharing service providers need to provide an effective dispute resolution mechanism so as to give users the opportunity to challenge the erroneous removal of their content.

Denmark also implemented Article 17⁷⁴ verbatim with 52c. Stk. 2 transposing the definition of online content sharing service providers and, in Stk.4, it provides liability exemptions without offering additional provisions against risks for users' free speech. Malta followed with its implementation of Article 17 on 7 July, 2021.⁷⁵ It too did not provide safeguards in order to curb threats for users' fundamental rights and so in effect prioritised copyright holders' rights. Likewise, Croatia implemented the relevant provision on 14 October 2021⁷⁶ with Articles 43-46 of the Croatian Act following the rationale and the features of Article 17 and refraining from imposing safeguards on internet users' rights in order to avoid cases of censorship.

Spain implemented the Directive on 3 November 2021⁷⁷ and not only followed the rationale of Article 17, without offering any safeguards against the misuse of legitimate works, but added provision which gives further benefits to right holders. More specifically, it provides that the allegedly infringing content remains blocked until the final decision of the redress mechanism procedure. It also widens the scope of the rule to online content sharing service providers which do not solely store and give access to large amounts of copyright protected works.⁷⁸ Finally, the Spanish implementation of Article 17 gives the opportunity for monetary relief to rights holders even if service providers demonstrate that they made their best efforts to terminate or prevent the reemergence of the allegedly infringing content.

Italy implemented the relevant provision into its national legislation on 4 November, 2021⁷⁹ by inserting Article 102-septies into the Italian Copyright Act. It requires online content sharing service providers to obtain permission for the use of copyright works, either from the rights holders or collective management organizations. The operation of the complaints mechanism and appeals against its decisions will be issued and supervised by AGCOM, the Italian Communications Authority.⁸⁰

Likewise, Estonia implemented Article 17 with § 57.9 lg by amending the current Copyright Act.⁸¹ While the transposition follows the rationale of Article 17, it adds two important provisions that safeguard internet users' procedural and substantive rights. More specifically, § 57.11. provides a dispute resolution mechanism where users can submit and adjudicate complaints and § 57.14 enables the Consumer Protection and Technical Surveillance Authority to file proceedings against providers that infringe users' fundamental rights. Finally, Ireland transposed Digital Copyright Directive with S.I. No. 567 of 2021,

⁷⁴ Lov om ændring af lov om ophavsret, 3 June 2021 (L 205).

⁷⁵ Copyright and Related Rights in the Digital Single Market Regulations 2021 (LN 261 of 2021).

⁷⁶ Autorskom pravu i srodnim pravima, koji je Hrvatski sabor donio na sjednici, 1 October 2021 (Zakon NN 111/2021-1941).

⁷⁷ Real Decreto-ley 24/2021, de 2 de noviembre, de transposición de directivas de la Unión Europea en ejercicio de derechos de autor y derechos afines aplicables a determinadas transmisiones en línea y a las retransmisiones de programas de radio y televisión.

⁷⁸ M. Peguera, "Is the Spanish implementation of Art. 17 CDSM compatible with EU Law?", *Kluwer Copyright Blog*, 11 November 2021 <<http://copyrightblog.kluweriplaw.com/2021/11/11/is-the-spanish-implementation-of-art-17-cdsm-compatible-with-eu-law/>>.

⁷⁹ Convocazione del Consiglio dei Ministri n. 45.

⁸⁰ Ibid.

⁸¹ Kuulutan välja Riigikogus 8. detsembril 2021 vastu võetud 'Autoriõiguse seaduse muutmise seaduse (autoriõiguse direktiivide ülevõtmine)'.

European Union (Copyright and Related Rights in the Digital Single Market) Regulations 2021.⁸² The implementation follows the rationale of Article 17 without providing any provisions that safeguards users' rights.

However, it is not only the transposition of Article 17 to member states that fails to address the problematic features of the liability of Online Content Sharing Service Providers. Indeed, it seems that the *Guidance of the European Commission on implementation of Article 17* similarly provides no solid guidance. More specifically, in order to offer greater protection for the fundamental rights of the users, the Guidance introduced the concept of earmarking and stated:

“When providing the relevant and necessary information to the service providers, rightholders may choose to identify specific content which is protected by copyright and related rights, the unauthorised online availability of which could cause significant economic harm to them. The prior earmarking by rightholders of such content may be a factor to be taken into account when assessing whether online content-sharing service providers have made their best efforts to ensure the unavailability of this specific content and whether they have done so in compliance with the safeguards for legitimate uses under Article 17(7).”

This means that if online content sharing service providers take no notice of that information, they will be liable for copyright infringement. This is because they will not be able to demonstrate that they made best efforts to prevent the dissemination of copyright infringing content within their networks. In order to escape from liability, there are two plausible solutions. Online content sharing service providers would either have to deploy human moderators or block content via filtering tools for every upload that contains every work or portions of works or parts of a work that have been flagged as copyright protected content by rights holders.⁸³ As a corollary, users' rights to receive and impart information would be in jeopardy and even the Advocate General, in his Opinion on the annulment action of Poland, expressed his disagreement with the Guidance:

“[I]f it is to be understood as meaning that those same providers should block content ex ante simply on the basis of an assertion of a risk of significant economic harm by rightholders – since the guidance does not contain any other criterion objectively limiting the ‘earmarking’ mechanism to specific cases – even if that content is not manifestly infringing, I cannot agree with this, unless I alter all the considerations set out in this Opinion.”⁸⁴

Overall, it is clear that Article 17 and its implementation by member states fails to offer safeguards for internet users' fundamental rights or adequately protect copyright exceptions. This framework places the fundamental rights of users in peril and at the same time subordinates the rights of online content sharing service providers. To offer a full picture it is vital to turn to the *Proposal for a Digital Services Act Regulation*, which was announced by the European Commission on 15 December 2020 as part of the EU's strategy to make Europe fit for the Digital Age.

Proposal for a Digital Services Act: a blurred intersection with Article 17 of the Digital Copyright Directive

⁸² European Union (Copyright and related rights in the Digital Single Market) Regulations 2021. (S.I. No. 567 of 2021).

⁸³ J. Reda and P. Keller, “European Commission back-tracks on user rights in Article 17 Guidance.” (*Kluwer Copyright Blog*, 4 June 2021 <<http://copyrightblog.kluweriplaw.com/2021/06/04/european-commission-back-tracks-on-user-rights-in-article-17-guidance/>>).

⁸⁴ *Poland v European Parliament* (C-401/19), EU:C:2021:613 at [AG223] (footnote omitted).

Following the Commission's impact assessment,⁸⁵ it published a Proposal for a Digital Services Act on 15 December 2020.⁸⁶ Its aim:

“to ensure the best conditions for the provision of innovative digital services in the internal market, to contribute to online safety and the protection of fundamental rights, and to set a robust and durable governance structure for the effective supervision of providers of intermediary services”.⁸⁷

The Proposal has been welcomed by a great number of academic scholars and civil society organizations.⁸⁸ This is mainly due to the introduction of procedural mechanisms to safeguard users' online safety, including transparency obligations,⁸⁹ rules for the traceability of sellers,⁹⁰ a notice and action mechanisms,⁹¹ the appointment of compliance officers, and the establishment of Digital Services Coordinators.⁹² However, it is unclear how certain provisions of the proposal will apply in the copyright context and more specifically how it will align with Article 17 of the Digital Copyright Directive. This piles further uncertainty upon the existing difficulties and therefore might further subordinate the rights of users, rights holders, and providers of hosting services.

First, as stated in draft Article 1(5), the proposed Regulation complements sector-specific legislation regarding internet service providers and the circulation of illicit material online. This means that the proposed Regulation would apply as *lex specialis* in cases which are not covered by the current rules, such as the Digital Copyright Directive and the Audiovisual Media Services Directive.⁹³ This means that the proposed Regulation will not affect the issues that are already regulated by EU copyright law. Nevertheless, Recital 12 of the Proposed Regulation specifies that ‘the non-authorized use of copyright protected material’ is understood as illegal content, thus the instrument still covers copyright infringements as well.

It has been argued that the proposed Regulation requires further clarity with regard to copyright.⁹⁴ For instance, draft Article 8(1) addresses the issue of injunctive orders against providers of intermediary services in order to stop the access to, or the circulation of, illegal content, while draft Article 9 is about the requirement to provide information to internet users about the removal of their content. Should those Articles apply, two different copyright regimes will appear. This is because Article 17 of the Digital Copyright Directive only requires online content sharing service providers to demonstrate that they made their best efforts to terminate access to, or prevent the reappearance of, unauthorized content.

Secondly, the same uncertainty is to be found in draft Articles 10-18. Those provisions cover new obligations for providers of intermediary services. More specifically: Article 10 is about the establishment of points of contact; Article 12 entails the requirement for providers of intermediary services to provide

⁸⁵ European Commission, *Commission staff working document, impact assessment on a Proposal for a Regulation on a Single Market for Digital Services* (2020), p. 72.

⁸⁶ *Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act)* (2020) COM 825 final.

⁸⁷ *Ibid* at 2.

⁸⁸ EDRI, ‘Digital Services Act/Digital Markets Act: Document pool’ <<https://edri.org/our-work/digital-service-act-document-pool/>>; EFF, ‘Digital Services Act’ <https://www.eff.org/issues/eu-policy-principles>.

⁸⁹ Draft Regulation on a Single Market for Digital Services, art 24.

⁹⁰ Art. 22.

⁹¹ Art. 32.

⁹² Art. 38.

⁹³ C. Angelopoulos, “Digital Services Act and Digital Markets Act: Commission presents legislative proposals” EU Law Live 2020 (No 42), p 14.

⁹⁴ J. Quintais and S.F. Schwemer, “The Interplay between the Digital Services Act and Sector Regulation: How special is copyright?” (2022) Euro J of Risk & Reg, *forthcoming*; Angelopoulos, “Digital Services Act and Digital Markets Act”, p.14.

information of terms and conditions; Article 13 addresses the issue of transparency reports; Article 14 introduces a notice and action mechanism for providers of hosting services; Article 15 is about the statement of reasons with regard to the removal of infringing content; Article 17 addresses the internal complaints system; and Article 18 refers to the creation of out-of-court dispute mechanisms. It is questionable, however, whether these draft provisions cover the activities of online content sharing service providers.

The Explanatory Memorandum states that sector specific instruments do not cover all regulatory gaps and lack procedural rules on transparency and accountability of service providers.⁹⁵ On the other hand, if the sector-specific laws are not applicable, Quintais and Schwemer argue that detailed mechanisms would have a positive impact on legal certainty and the protection of the rights of the parties involved, namely users' fundamental rights and the platforms' rights to operate their business.⁹⁶ A telling example can be found in the removal of a video from the Black Lives Matter protests.⁹⁷ This video was removed from YouTube and Facebook on the grounds of copyright infringement because snippets of songs were played in the background of the protests. However, the uploaders were not aware of the reasons that led to the removal of their video and so they were left in doubt as to their legal rights.⁹⁸ Had an internal complaints' mechanisms existing along with a requirement to provide a statement of reasons no such certainty could have existed.

Finally, draft Article 19 is about the use of trusted flaggers⁹⁹ and Article 20 addresses measures against misuse. However, there is no reference to Article 17 of the Digital Copyright Directive. This might suggest that both provisions do not apply to online content sharing service providers. However, as Quintais and Schwemer point out, service providers would greatly benefit from the use of trusted flaggers since copyright violations within their networks will be detected.¹⁰⁰ This has already been practiced on a voluntary basis by providers of hosting services with successful outcomes,¹⁰¹ whereby Europol and INHOPE flagged material related to terrorism and child abuse respectively.¹⁰²

It might appear, therefore, that the Proposed Regulation presents a promising approach because it offers safeguards for users' fundamental rights; however, more granularity in terms of its relationship with Article 17 is still required. Against this background, this discussion will move on to explore an alternative framework for internet intermediaries' copyright liability based on a co-regulation approach.

Possible solution: supervision of gatekeepers as an alternative regulatory framework for copyright infringements online?

⁹⁵ *Explanatory Memorandum in Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) (2020) COM 825final 2.*

⁹⁶ See Quintais and Schwemer, "The Interplay between the Digital Services Act and Sector Regulation".

⁹⁷ M. Masnick, "Copyright Blocks Interview of Protesters Because Marvin Gaye's 'Let's Get It On' Was Playing In The Background", *Techdirt*, 3 June 2020 < <https://www.techdirt.com/articles/20200602/21391944634/copyright-blocks-interview-protesters-because-marvin-gayes-lets-get-it-was-playing-background.shtml> >.

⁹⁸ Center for Democracy and Technology, *Mixed Messages? The Limits of Automated Social Media Content Analysis* (November 2017) <<https://cdt.org/wp-content/uploads/2017/11/Mixed-Messages-Paper.pdf>>, p 3, 18 where it is stated that "an accuracy rate of 80% means that one out of every five people is treated "wrong" in such decision-making; depending on the process, this would have obvious consequences for civil liberties and human rights."

⁹⁹ They are individuals that have been selected in order to notify the providers of hosting services for content that violates their Community guidelines.

¹⁰⁰ *Ibid.*

¹⁰¹ European Commission, "How the Code of Conduct helped countering Illegal Hate Speech Online" (February 2019) <https://ec.europa.eu/info/sites/default/files/hatespeech_infographic3_web.pdf> .

¹⁰² EU Commission, *Recommendation on Tackling Illegal Content Online Towards an enhanced responsibility of online platforms* (2017) COM 555 final, p. 2.

A framework based on co-regulation might offer an alternative solution for the regulation of copyright infringements taking place on intermediary hosting services. This framework would involve of a regulatory authority supervising the operation of online content sharing service providers under Article 17 of the Digital Copyright Directive. The authority could be part of the Digital Services Coordinator under the Proposed Regulation.¹⁰³ The Coordinator could supervise online content sharing service providers and, in particular, resolve disputes between rights holders and service providers. Indeed, a co-regulatory approach has already been adopted in related areas as well as being proposed by scholars.

Co-regulation framework: policy, legislative, and academic trends

The Audiovisual Media Services Directive¹⁰⁴ envisages the development of regulatory bodies in each member state;¹⁰⁵ Article 28b(5) provides:

“Member States shall establish the necessary mechanisms to assess the appropriateness of the measures referred to in paragraph 3^[106] taken by video-sharing platform providers. Member States shall entrust the assessment of those measures to the national regulatory authorities or bodies.”

This means that regulatory bodies are already given supervisory duties over online intermediaries in respect of certain types of content. Examples can be found in Austria, with the Kommunikationsbehörde; in Malta, the Broadcasting Authority; and in Spain with the Comisión Nacional de los Mercados y la competencia.¹⁰⁷ What is more, the Digital Copyright Directive includes a co-regulatory framework within Article 17(9): “Member States shall also ensure that out-of-court redress mechanisms are available for the settlement of disputes”. Finally, as already mentioned, the Proposed Regulation envisages the creation of Digital Services Coordinators who will be responsible for the application and enforcement of the Regulation as well as acting as channels for cooperation between member states. These Coordinators must operate in accordance with principles of transparency and impartiality.¹⁰⁸

However, it is not only at legislative level that co-regulation seems to gain ground. Indeed, a growing number of scholars argue in favour of the establishment of a supervisory authority.¹⁰⁹ For instance, in the context of Digital Copyright Directive, Garstka notes that:

¹⁰³ Draft Regulation on a Single Market For Digital Services, arts 38-46.

¹⁰⁴ Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [2010] OJ L 95 (as amended, in particular, by Directive (EU) 2018/1808).

¹⁰⁵ European Commission. Directorate General for Communications Networks, Content and Technology., Deloitte., and SMIT., ‘Study on the Implementation of the New Provisions in the Revised Audiovisual Media Services Directive (AVMSD): Final Report, Part D.’ (Publications Office 2021), pp. 90–100.<<https://data.europa.eu/doi/10.2759/135983>>; L. Kuklis, ‘Video-Sharing Platforms In AVMSD – A New Kind Of Content Regulation’ (2019) is available at <<https://papers.ssrn.com/abstract=3527512>>.

¹⁰⁶ Paragraph 3 relates to the appropriates of the measures imposed by Article 28b to protect minors from programmes, user-generated videos and audiovisual commercial communications which may impair their physical, mental or moral development and the general public from programmes, user-generated videos and audiovisual commercial communications containing incitement to violence or hatred directed against a protected group or terrorist material, child pornography or racist material.

¹⁰⁷ List of EU Audiovisual Regulators - Audiovisual and Media Services Directive (AVMSD) is available at <https://ec.europa.eu/digital-single-market/en/list-eu-audiovisual-regulators-audiovisual-and-media-services-directive-avmsd> >.

¹⁰⁸ Draft Regulation on a Single Market For Digital Services, art 30.

¹⁰⁹ Tessier, Herzog and Madzou, “Regulation at the Age of Online Platform-Based Economy: Accountability, User Empowerment and Responsiveness”, p. 175; L. Edwards, “With Great Power Comes Great Responsibility” at 289; K.

“there were multiple signals indicating the need for a neutral, administrative body, which could help in ensuring the adequate implementation and functioning of the enforcement schemes enabled through the analysed provision of the DSMCD”.¹¹⁰

Likewise, Laidlaw recommends such a mechanism, but not without some skepticism.¹¹¹ She highlights the need to establish an independent complaints mechanism to safeguard against the manipulation of search result rankings (and argues that OFCOM in the UK is a good example of a complaint mechanism). Finally, in relation to the Proposed Regulation, Geiger and Frosio note that providers of hosting services deploy filters against illicit content that could lead to the removal of lawful content and:

“In the aftermath of the DSA [Digital Services Act], this could be monitored by an independent authority to be set up in order to secure that the obligation is feasible and does not lead to significant overlocking of legitimate content.”¹¹²

Finally, a co-regulatory framework is in place in a few member states, such as Greece¹¹³ and Italy.¹¹⁴ In Greece, a Committee on Internet Violations of Intellectual Property has been established under Article 66E of the Greek Intellectual Property Law No. 4481/2017 and operates under the auspices of the Hellenic Committee for Intellectual Property Infringements. Its main duty is to solve copyright disputes between copyright holders and online content sharing service providers through an extrajudicial mechanism. In particular, in order to seek redress, the copyright holder must have already given the service provider details of the relevant infringing content on its platform, and the service provider must either have not processed the notification or have rejected it. It must then apply to the Committee to take steps, and the Committee must issue its decision within ten days. It can order the online content sharing service provider to remove the infringing content or face a fine of up to €1000.

This expedient redress offered to copyright holders has been successful with 84 decisions being issued since its establishment in 2017.¹¹⁵

Another example of a regulatory body is AGCOM which has been introduced by the Italian Authority for Communication Industries.¹¹⁶ Its main duty is to solve disputes between online content sharing service

Garstka, “Guiding the Blind Bloodhounds: How to Mitigate the Risks art. 17 of Directive 2019/790 poses to the Freedom of Expression” in Torremans (ed.), *Intellectual Property and Human Rights*, 350-351.

¹¹⁰ K. Garstka, “Guiding the Blind Bloodhounds” at 350.

¹¹¹ E. Laidlaw, “Private Power, Public Interest: An Examination of Search Engine Accountability” (2008) 17 I.J.L.& I.T. 113 at 143 and 144.

¹¹² G. Frosio and C. Geiger, “Taking Fundamental Rights Seriously in the Digital Services Act’s Platform Liability Regime” [2022] Euro L.J., *forthcoming*.

¹¹³ General information on the Greek Committee on intellectual property violations is available at < <https://www.opi.gr/en/committee/general-information>>.

¹¹⁴ Regolamento in material di tutela del diritto d’autore sulle reti di comunicazione elettronica e procedure attuative as sensi del decreto legislativo 9 April 2003, No. 70 in English is available at < <http://www.portolano.it/wp-content/uploads/2013/12/English-translation-of-the-IT-Regulation-on-the-copyright.pdf>>.

¹¹⁵ Decisions of the Committee are available here < <https://www.opi.gr/en/committee/decisions-committee>>; Also consider the concerns that have been expressed about the Committee’s scope and legal basis, namely that the Committee lacks legitimacy as it does not satisfy the rules of Greek Administrative Law which requires such a body to be accountable to a higher administrative body in Ch. Tsigkou, “Notice and Takedown Procedure under Greek Intellectual Property Law 4481/2017” (2018) JIPITEC 201, 206; Infographique about the complaints procedure for copyright infringements online is available at < https://opi.gr/images/various/infographic_en.jpg>

¹¹⁶ Regolamento in material di tutela del diritto d’autore sulle reti di comunicazione elettronica e procedure attuative as sensi del decreto legislativo 9 April 2003, No. 70.

providers and copyright holders. AGCOM examines a request for removal either in 35 working days or in 12 working days, depending on the urgency of the matter, and then issues a decision. It can issue fines of up to €258,000 and its decisions may be appealed to the Italian Administrative Court. Unlike the Greek Committee, whose legal nature is not yet clear, AGCOM incorporates a public administrative structure.¹¹⁷

118

Overall, it appears that both administrative bodies offer fast and effective legal redress to copyright holders and they offer an example from which other supervisory authorities could be developed. The discussion will now turn to consider the normative aspects of a co-regulatory framework.

Normative considerations and challenges

The establishment of a supervisory authority with enforcement and supervision duties offers a number of benefits for rights holders and for online intermediaries' business models, and at the same time safeguards the fundamental rights of internet users.¹¹⁹ The authority would hear an appeals against the decision of internet intermediaries (and avoid the need for rights holders to go to court). By placing intermediaries under the supervision of an authority, a greater level of certainty is offered to both for internet users and rights holders and both would to retain the right to go to the courts when they consider it necessary.

A supervisory authority might offer better enforcement of rights because it would have trained staff who would become highly skilled and experienced in identifying infringing content. The European Commission has articulated the need to equip independent bodies and highlighted that “this would make the executive more effective at European level in highly specialised technical areas requiring advanced expertise and continuity, credibility and visibility of public action”.¹²⁰

The earlier *White Paper on European Governance* notes that:

The advantage of agencies is often their ability to draw on highly technical, sectoral know-how, the increased visibility they give for the sectors concerned (and sometimes the public) and the cost-savings that they offer to business. For the Commission, the creation of agencies is also a useful way of ensuring it focuses resources on core tasks.¹²¹

As this states, staff employed in the agencies would develop high levels of expertise and skills and would be able to reach decisions that take into consideration the rights of rights holders without subordinating the rights of internet users. Further, a supervisory authority would promote the rule of law (compared to self-regulation) as it would act independently, would be accountable to the public and would not be influenced by the interests of private stakeholders. Regulatory independence has already been mandated in other fields,

¹¹⁷ It is also worth to consider the concerns that have been raised for the Regulation in Italian law. For instance, it has been argued that more clarification is required in reference to the ‘webpage manager’ while the threshold that triggers either the fast or the slow procedure for solving a dispute about the dissemination of illicit content online seems unclear in Andy, “Italian ISPs Say New Copyright Amendment Infringes Human Rights”, (Torrentfreak, 27 July 2017) <<https://torrentfreak.com/italian-isps-say-new-copyright-amendment-infringes-human-rights-170728/>> ; M Tavassi, ‘Copyright and the Internet’ in M Frazosi et al (eds), *The Digital Single Market Copyright; Internet and Copyright Law in the European Perspective* (Aracne Editrice, 2016), p 188.

¹¹⁹ See further analysis in Z. Krokida, *Internet service provider liability for copyright and trade mark infringement: Towards an EU co-regulatory framework* (Hart Publishing, 2022), forthcoming.

¹²⁰ European Commission, *The operating framework for the European Regulatory Agencies* (2002) COM 718 final, p 5.

¹²¹ European Commission, *European Governance: A White Paper* (2001) COM 428 final, p. 20.

such as in Competition Law and Data Protection Law,¹²² and the European Commission has stated that regulatory agencies “should operate with a degree of independence and within a clear framework established by the legislature”.¹²³

Moreover, a co-regulatory framework would improve access to justice¹²⁴ as it could offer efficient and effective legal redress for copyright holders. It would be more efficient than the courts and, if properly resourced it could deal with a higher number of cases as it has already been pointed out “administrative agencies adjudicate massive numbers of individual disputes, far exceeding the number resolved by courts”.¹²⁵ Likewise, it is better placed to ensure due process than self-regulation as it would be supervising the implementation of its orders to remove content and could set standards as to the balance between human and automatic review of content. The authority could be required to publish regular and structured transparency reports and all these things would help ensure that the right of users to impart and receive information would be safeguarded.

Finally, a supervisory authority would be able to protect the diversity of the online content and avoid *de facto* censorship. Studies have illustrated that legitimate content, such as uses of works amounting to fair dealing or things in the public domain, are erroneously taken down. For instance, Jacques et al. demonstrates that automated filtering tools cannot properly identify parodies of songs and so remove them.¹²⁶ Erikson and Kretschmer on the other hand suggest that human reviewers lack the necessary knowledge and training to distinguish between lawful and unlawful material.¹²⁷ Penney found that internet users whose content has been removed are hesitant to upload similar content again: “responses suggested a noteworthy chilling effect with 72% of respondents either much less likely (38%) or somewhat less likely (34%) to share such content online after receiving a personalized legal notice”.¹²⁸ In this light, a supervisory authority might be in a position to monitor the practices of internet intermediaries and be better placed to keep more works available online. The creativity of users would therefore be safeguarded.

Nevertheless, the creation of a supervisory authority might not be a panacea for rights holders.¹²⁹ This is because could suffer from the complexities and discrepancies of state regulation. As a World Economic Forum White Paper states “...relying only on government legislation and incentives to ensure the right outcomes is ill advised”.¹³⁰ A cornucopia of EU Directives and Regulations have endeavored to capture and regulate technological developments (for instance, the Audiovisual Directive, the Digital Copyright Directive, the General Data Protection Regulation, the EU Directive against Terrorism, as well as the Proposal for a Digital Services Act, and the Proposal for a Digital Markets Act¹³¹), each aim to offer legal

¹²² Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1; Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data [2016] OJ L 119.

¹²³ European Commission, *European Governance: A White Paper* at p. 24.

¹²⁴ European Union Charter of Fundamental Rights, art 47.

¹²⁵ C. H. Koch, "Policymaking by the Administrative Judiciary" (2003) *J.Nat'l A.Admin.L.Judges* 49 at 49.

¹²⁶ S. Jacques, K. Garstka and others, “An Empirical Study of the Use of Automated Anti-Piracy Systems and their Consequences for Cultural Diversity” (2018) 15 *SCRIPTed* 277 at 308.

¹²⁷ K. Erickson and M. Kretschmer, ‘Empirical Approaches to Intermediary Liability’ in Giancarlo Frosio (ed.), *The Oxford Handbook of Intermediary Liability Online* (Oxford University Press, 2021), p 104.

¹²⁸ J. Penney, “Privacy and Legal Automation: The DMCA as a Case Study” (2019) 22 *Stan Tech L.R.* 412, 447.

¹²⁹ See further analysis in Z. Krokida, *Internet service provider liability for copyright and trade mark infringements.*

¹³⁰ *Values and the Fourth Industrial Revolution: Connecting the Dots Between Value, Values, Profit and Purpose* (World Economic Forum, September 2016), p. 6.

¹³¹ Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data [2016] OJ L 119; Directive (EU) 2017/541 on combating terrorism [2017] OJ L 88; *Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act)* (2020) COM 842 final (other instruments already referenced above).

responses in order to cover the latest developments in technology. Yet these risk can impeded if the duties of a supervisory authority were clearly carved out so that it operates under specific principles, namely independent operation, the issue of consistent and proportionate decisions, and accountability.

The establishment of a supervisory authority would need a careful mapping of its duties. For instance OFCOM, the UK regulator,¹³² faced criticism for its proposed a code of conduct concerning a notice and take down procedure. According to the code, internet intermediaries which offered access to internet had to send three notices to users that infringe copyright. Should the users not comply with the three notices, their identity would be disclosed to rights holders and thereby effectively meaning they could be subject to civil proceedings. The code drew severe criticism from civil society organizations on the grounds it violated the right to privacy and it would lead to the improper disclosure of internet users' personal details without a court order.¹³³ Accordingly, the duties assigned to any supervisory authority need to take into account internet users' fundamental rights and they must maintain an equilibrium between stakeholders.

An important issue would be funding of the authority as its might be very expensive to run. For instance, Data Protection Authorities in member states already have substantial budgets, in 2019, the Croatian agency had an annual budget of €890,610, the Spanish €15,000,000, the Swedish over €8,000,000; while the UK Information Commissioner had an €36,047,932 budget and the Federal Commissioner for Data Protection and Freedom of Information in Germany had €25,200,000.¹³⁴ It might be to mitigate the burden on taxpayers, any supervisory authority might be able to operate under the auspices of an existing governmental body, or be funded by contributions from online content sharing service providers themselves. For instance, the funding of the Hellenic Committee for Intellectual Property Infringements is funded from donations, members' contributions, as well as financial support from EU Institutions and International Organizations.¹³⁵ Likewise, the Italian Communications Authority's funding mainly comes from state support on an annual basis, and from fees paid by internet intermediaries that are members of the Authority.

Conclusion

This article has critically engaged with the current legal framework for Online Content-Sharing Service Providers, in particular, Article 17 of the Digital Copyright Directive. As the findings indicate, Article 17 entails problematic features that favour rights holders' interests while they place internet users' fundamental rights in peril. Likewise, the transposition of Article 17 in twelve member states so far fails to maintain an equilibrium between the interests of the parties involved. This is because the implementation follows the rationale of the Directive and therefore subordinates users' fundamental rights.

What is more, the Proposal on Digital Services Act has been critically addressed. In particular, it has been found that it is unclear how certain provisions of the proposal align with Article 17 of the Digital Copyright Directive and therefore how they could be applicable in the copyright context. This uncertainty accentuates the existing discrepancies and might undermine the rights of rights holders, internet intermediaries and users even further.

¹³² OFCOM, 'Online Infringement of Copyright and the Digital Economy Act 2010, Notice of Ofcom's proposal to make by order a code for regulating the initial obligations' (2010) 2.

¹³³ D. Mendis, "Digital Economy Act 2010: Fighting a Losing Battle? Why the 'Three Strikes' Law Is Not the Answer to Copyright Law's Latest Challenge" (2013) 27 Int'l Rev.L.Computers & Tech. 1.

¹³⁴ Report on EU Data Protection Authorities, Part 4: Resources Deloitte Privacy Services – Privacy Response is <<https://www2.deloitte.com/content/dam/Deloitte/nl/Documents/risk/deloitte-nl-risk-reports-resources.pdf>>.

¹³⁵ Ch. Tsigkou, "Notice and Takedown Procedure under Greek Intellectual Property Law 4481/2017" (2018) JIPITE C 201, 204.

Against this background, this article puts forward an alternative framework for Online Content-Sharing Service Providers in respect of copyright infringements. More specifically, it considers the development of a co-regulatory framework with the establishment of a national supervisory authority in EU member states. That authority could be part of the Digital Services Coordinator under the Proposal on Digital Services Act and would be assigned to deal with IP disputes and oversee the operation of internet intermediaries. The establishment of that authority might offer a better balance for the interests of the parties, namely benefitting rights holders and online intermediaries' business models, while at the same time safeguarding the fundamental rights of internet users to a great extent. Such benefits might be the enhancement of the rule of law, due process, transparency in the operation of online platforms and the protection of the diversity of content.