

A disproportionate duty of care for online content-sharing service providers?

An analysis of the doctrinal change effected by Article 17 of the DSM Directive, and the extent to which the goals sought have been proportionately balanced against the risks posed by its implementation.

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1 INTRODUCTION

A great deal of academic research centres on how to regulate and enforce copyright law in the digital environment. Debate in this field has become more complex in recent years due to the evolving methods¹ by which individuals communicate,² such evolution requiring legislators to take a stance as to where liability should be attributed for copyright infringements occurring via the internet.

It is true in many systems of law that a party whose actions can be linked via causation to another's harm shall be attributed liability for such damage.³ On the internet, this general rule of thumb is complicated by the fact that multiple parties are involved in communication online. Not only is there the individual who clicks 'upload', but there are several other actors who facilitate (to varying degrees) an individual's ability to commit an infringement by providing the means through which persons communicate online. The liability of such facilitators – generally referred to as 'intermediaries' – is a thorny issue. This is the case because they perform 'at once'⁴ several different roles, with varying degrees of control over the activities of their users. Legal systems do not generally require private parties to 'prevent a third party from harming another' – liability for such harm not usually being imposed unless there is a duty to act.⁵ Rightsholders have nevertheless gone to great lengths to convince courts and legislators

¹ For example, the rise in popularity of platforms such as Facebook, YouTube and Instagram

² An example of this is the emergence of what has been defined as 'Web 2.0' – a loose term used by scholars to refer to 'interconnectivity and interactivity of web-delivered content' involving 'interaction and collaboration between users': see N Kawashima, 'The rise of 'user creativity' – Web 2.0 and a new challenge for copyright law and cultural policy' (2010) *International Journal of Cultural Policy*, page 338

³ For example, in Scotland (the jurisdiction with which I am most familiar) see: J Thomson, 'Delictual Liability', 5th Edition (Bloomsbury Professional Ltd 2014), page 143

⁴ B Fitzgerald & J Gilchrist, 'Copyright Perspectives: Past, Present and Prospect' (Springer International Publishing Switzerland 2015), page vii

⁵ K Pappalardo, 'Duty and Control in Intermediary Copyright Liability: An Australian Perspective' in B Fitzgerald & J Gilchrist, 'Copyright Perspectives: Past, Present and Prospect', page 247

that such intermediaries are complicit in those infringements which occur using the means that they have provided, such as to justify liability being imposed upon such parties. Indeed, there has been a large push by rightsholders to expand the liability of intermediaries and ‘change the rhetoric of enforcement’,⁶ using liability as a motivator⁷ to compel intermediaries to police their platforms for copyright infringement. Such efforts have met varying degrees of success, although internationally it has become obvious that there is an ‘emerging shift toward increased responsibilities for intermediaries’.⁸

Discussion in Europe as to the liability of intermediaries has only increased⁹ as a result of the recent EU Directive on copyright and related rights in the Digital Single Market (the DSM Directive or ‘the Directive’),¹⁰ which has now been adopted by the European Parliament and the Council of the European Union and thus passes into the next phase of its legislative process – transposition into domestic law by implementing national legislatures by the 7th of June 2021.¹¹

Notably, Article 17 of the DSM Directive takes a vertical approach¹² by clarifying certain matters of EU copyright law, whilst introducing certain obligations on Member States to make provision in their domestic law, regarding the civil liability for copyright infringement of a

⁶ Suzor, Choi & Pappalardo, ‘*Moments of Flux in Intermediary Liability for Copyright Infringement in Australia*’ in M Perry, ‘*Global Governance of Intellectual Property in the 21st Century – Reflecting Policy Through Change*’ (Springer International Publishing Switzerland 2016), page 131

⁷ *Ibid.*

⁸ *Ibid.* page 130

⁹ M Kivisto, ‘*The DSM Directive: a package (too) full of policies*’ in T Pihlajarinne, J Vesala and O Honkkila, ‘*Online Distribution of Content in the EU*’ (Edward Elgar Publishing 2019), page 5

¹⁰ 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 (DSM Directive)

¹¹ *Ibid.* Article 29(1)

¹² GF Frosio, ‘*From horizontal to vertical: an intermediary liability earthquake in Europe*’ (2016) *Journal of Intellectual Property Law & Practice* Volume 12 No 7, page 575

certain subcategory of intermediaries the Directive refers to as ‘online content-sharing service providers’¹³ (OCSSPs). Such OCSSPs are recognized as having become ‘a main source of access to content online’.¹⁴ It is thus possible to argue that the imposition of liability on such intermediaries for copyright infringing communications taking place on their platform is the ‘only effective and scalable way to regulate the actions of large numbers of people on the internet’, given such intermediaries are ‘the institutions that facilitate communication’.¹⁵ Indeed, it has been recognised by the EU legislator that ‘(i)n many cases... intermediaries are best placed to bring... infringing activities to an end’.¹⁶ Nevertheless OCSSPs also perform a key role by ‘ordering’¹⁷ the internet, and provide the means by which many individuals exercise their fundamental rights. It is therefore important to scrutinise the DSM Directive and its impact on OCSSP liability, given the potential for ‘bad law’¹⁸ to produce negative consequences.

This paper aims to scrutinise the Article 17 provision, breaking down such analysis into three areas of discussion – each allocated a chapter. Chapter one shall examine the doctrinal change Article 17 effects from the pre-existing regulation of OCSSP liability in the EU copyright *acquis communautaire* (*acquis*). Chapter two shall then analyse the extent to which the policy objectives pursued by Article 17 are likely to be successfully and proportionally achieved.

¹³ DSM Directive, Article 17

¹⁴ *Ibid.* recital 61

¹⁵ Suzor, Choi & Pappalardo, ‘*Moments of Flux in Intermediary Liability for Copyright Infringement in Australia*’, page 130

¹⁶ 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 (InfoSoc Directive), recital 59

¹⁷ J van Hoboken, ‘*Legal space for innovative ordering: on the need to update selection intermediary liability in the EU*’ (Winter 2009) *International Journal of Communications Law and Policy* Issue 13, pages 50 and 66

¹⁸ Suzor, Choi & Pappalardo, ‘*Moments of Flux in Intermediary Liability for Copyright Infringement in Australia*’, page 144

Finally, chapter three shall investigate what flexibility the DSM Directive offers for national legislatures to mitigate any risks posed by Article 17.

2 **CHAPTER ONE – A doctrinal analysis of the extent to which Article 17 effects
a departure from the pre-existing EU copyright *acquis***

The concern of this chapter is to identify how the DSM Directive doctrinally affects the law of intermediary liability in the EU, and thus to what extent implementing national legislatures shall have to alter their domestic law in order to comply with their obligations under the Directive. To accomplish this task, the matters which Article 17 specifically regulates shall be compared with the pre-existing EU copyright *acquis*.

It is necessary for this chapter to begin with some examination of the definition of an OCSSP given in the Directive – this delineating which intermediaries shall be subject to the Article 17 system of copyright liability. Following such analysis, this chapter shall examine two key areas of EU copyright law which the DSM Directive makes provision for in relation to OCSSPs: the test developed by the Court of Justice of the European Union (CJEU) to determine where an infringement of a rightholder’s exclusive right to authorise/prohibit the communication of their works has occurred; and the conditions for exemption from liability for such infringements. The goal of such investigation is to delineate what doctrinal change shall be produced in these areas as a result of the DSM Directive. Finally, this chapter shall question what effect the Article 17 ‘specific liability mechanism’ shall have on OCSSP methods of compliance – particularly whether this shall run afoul of the prohibition of a general monitoring obligation under EU law.¹⁹

¹⁹ 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 (E-Commerce Directive), Article 15

2.1 The OCSSP definition and its relation to intermediary liability theory

Member States are not required to comply with their obligations under the DSM Directive until the 7th of June 2021,²⁰ and therefore the courts have not yet had to apply its provisions. Based on the above, the first chapter of this paper shall be forced to apply the provisions under investigation hypothetically to the definition of an OCSSP given in the DSM Directive. This paper does not have the space to speculate as to the practical satisfaction of this definition by individual intermediaries. Nevertheless, it is useful to begin with some examination of the definition and its relation to the general debate surrounding intermediary liability.

It is therefore noted, firstly, that Article 17 of the DSM Directive seeks only to regulate the copyright liability of those intermediaries meeting the provided definition of an OCSSP. It is made clear that the DSM Directive does not affect the application of the general system of copyright liability provided for in EU law.²¹ It can therefore be concluded, given the assumption that Article 17 introduces some doctrinal change, that the system of copyright liability which OCSSPs will be subject to shall be unique (*sui generis*). To this extent the EU legislator should be praised for its move towards a more nuanced system of copyright liability, treating distinguishable classes of intermediary in different manners. It shall become clear in chapter one of this paper that one criticism of the EU copyright *acquis* has been that a ‘unitary liability’²² standard of infringement has been produced, which fails to differentiate between facilitators and infringers. This can be critiqued on the basis that an ‘autonomous’²³ standard may not account for the diversity amongst intermediaries. Therefore, focusing on an individual

²⁰ DSM Directive, Article 29(1)

²¹ *Ibid.* recitals 64 and 65

²² A Ohly, ‘The broad concept of “communication to the public” in recent CJEU judgments and the liability of intermediaries: primary, secondary or unitary liability?’, *Journal of Intellectual Property Law & Practice* 2018 Vol 13 No 8, page 675

²³ *Ibid.* page 670

category of intermediaries could be an appropriate step by the EU legislator. Whether this group shall be regulated appropriately, however, is a separate matter which this paper shall seek to determine.

For an intermediary to be classified as an OCSSP it must be a provider of ‘services, the main or one of the main purposes of which 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’.²⁴

The reaction by the EU legislator to provide for a *sui generis* system of intermediary liability for OCSSPs is unsurprising, given it has been stated that there exists a diverse spectrum of intermediaries which are active in the modern digital environment. It is due to the great diversity amongst the various intermediaries (particularly regarding the control they have over their users) that legislators, courts and commentators have sought to further distinguish between this group when debating the appropriate extent of their liability.

Some identify the two extreme forms of intermediaries as, firstly, those who ‘can be compared to roads’ and, secondly, those which are akin to ‘pirates’.²⁵ Intermediaries who provide the roadwork by which individuals traverse the internet perform a valuable role given ‘the Web needs ordering to be useful’.²⁶ However, the difficulty for copyright law is that ‘there is no clear

²⁴ DSM Directive, recital 62

²⁵ A Ohly, ‘*The broad concept of “communication to the public” in recent CJEU judgments and the liability of intermediaries: primary, secondary or unitary liability?*’, page 664-665

²⁶ J van Hoboken, ‘*Legal space for innovative ordering: on the need to update selection intermediary liability in the EU*’, pages 50 and 66

and bright line between “roads” and “pirates””.²⁷ The DSM Directive OCSSP definition is a clear example of this, given such intermediaries are defined as those which by definition organise and promote content, but only do so on the basis of their objective of obtaining profit from the uploading of copyright-protected content.²⁸ Ohly considers YouTube – an intermediary that may well satisfy the OCSSP definition given in the DSM Directive – ‘the prime example of a platform on which users can upload innocuous videos, but also clips which infringe copyright’.²⁹ YouTube may have as its objective the organisation and promotion of legitimately rightholder authorised uploads of (generally user-created) content, with the purpose of obtaining profit therefrom.³⁰ However, it is probable that through the provision and maintenance of their platform, they shall engage in the organisation and promotion of non-rightholder authorised uploads of copyright-protected content and earn revenue from such availability. In this sense the intermediary would provide the roadwork whilst also profiting from infringing activities – the line being blurred between these two extremes.

Others favour a distinction between those intermediaries who are ‘passive’ and those who are ‘active’. Indeed this distinction has been utilised by the EU legislator, as will be seen later in chapter one of this paper. ‘Passive’ intermediaries have typically been seen as those intermediaries who ‘have not actively helped users to infringe copyright but which face liability because they have not acted to *stop* the infringement’.³¹ The EU legislator has found

²⁷ A Ohly, ‘*The broad concept of “communication to the public” in recent CJEU judgments and the liability of intermediaries: primary, secondary or unitary liability?*’, page 665

²⁸ DSM Directive, recital 62

²⁹ A Ohly, ‘*The broad concept of “communication to the public” in recent CJEU judgments and the liability of intermediaries: primary, secondary or unitary liability?*’, page 664

³⁰ DSM Directive, recital 62

³¹ K Pappalardo, ‘*Duty and Control in Intermediary Copyright Liability: An Australian Perspective*’, page 241

intermediaries, in order to be considered passive/neutral³² must confine themselves to activities of a ‘mere technical, automatic and passive nature’ – such as to imply that the intermediary ‘has neither knowledge of nor control over the information which is transmitted or stored’.³³ Meanwhile, intermediaries who are deemed to be ‘active’ are those intermediaries whose activities go beyond this ‘mere technical, automatic and passive’ standard, such as to give the intermediary ‘knowledge of, or control over’ the data transmitted or stored.³⁴ Again, the OCSSP definition would seem to display elements of both passivity (one of their main purposes must be to store and enable users to upload copyright-protected content) and activity (their tactics in pursuit of this objective shall involve organising and promoting the shared content).

The point being emphasised at this stage is that intermediaries falling under the OCSSP definition shall often blur the line between those who should be protected in the performance of a valuable task and those who should be rigorously regulated in order to prevent harm to rightholders. On this basis, a nuanced approach – sensitive to the issues at stake – is required to deal with OCSSPs. This paper now turns to identifying what stance has been adopted by the EU legislator in Article 17 of the DSM Directive in relation to OCSSPs.

2.2 **The criteria for infringement of the EU communication to the public right**

The communication to the public right is one of the exclusive rights afforded to authors for their works which attract copyright protection,³⁵ the EU having sought to harmonise this right amongst Member States’ domestic laws in the InfoSoc Directive. The InfoSoc Directive

³² Case C-324/09 *L’Oreal SA and Others v eBay International AG and Others* (2011) ECLI:EU:C:2011:474 (*L’Oreal*), paragraph 113

³³ E-Commerce Directive, recital 42

³⁴ *L’Oreal*, paragraph 113

³⁵ For the requirements for a work to attract copyright protection, see J Pila & P Torremans, ‘*European Intellectual Property*’ (Oxford 2016), Chapter 11

requires Member States to ‘provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them’.³⁶ It should be noted that ‘the act of making available is a subset of the communication to the public right’,³⁷ it in fact being the ‘making available’ subset which is of concern when discussing the sharing of works online (‘making available’ covering ‘all kinds of online interactive offerings’).³⁸

Given that the communication to the public right covers the sharing of works online,³⁹ this right is of especial importance in the digital environment given the ease with which works can be shared by individuals using this medium without rightholder authorisation – especially on OCSSP platforms (such platforms having become ‘a main source of access to content online’).⁴⁰ Communications in this way pose an alternative method for users to access copyright-protected works when compared with (often more expensive) rightholder authorised methods of accessing the work.

Despite this importance, the jurisprudence dealing with the extent of this right and the requirements for its infringement have been dubbed ‘perhaps the most controversial aspect of

³⁶ InfoSoc Directive, Article 3(1)

³⁷ J Koo, ‘*Away we Ziggo: the latest chapter in the EU communication to the public story*’ (2018) *Journal of Intellectual Property Law & Practice* Vol 13 No 7, page 543

³⁸ N Helberger ‘*Legal aspects of User Created Content*’ (2009), available at <https://ssrn.com/abstract=1499333>, page 11

³⁹ *Ibid.*

⁴⁰ DSM Directive, recital 61

EU law’.⁴¹ The CJEU has produced an extensive body of jurisprudence on the matter,⁴² the result being a complex test which is used to determine which acts constitute an infringement of this right – some criticizing the increasing complexity as ‘a deepening of the already existing cracks in the law’.⁴³ Several elements of this test have been ‘creations of the court’,⁴⁴ this being a natural result where the InfoSoc Directive provision does not provide an explicit definition⁴⁵ of the notion of a ‘communication to the public’, but where an “‘autonomous and uniform interpretation” throughout the EU’ is nevertheless sought.⁴⁶

The following paragraphs shall first seek to delineate the test for infringement of the communication to the public right under the pre-DSM Directive EU copyright *acquis*, and then apply this hypothetically to the OCSSP definition to assess the extent to which OCSSPs were previously liable for copyright infringements occurring on their platform. This shall then be compared with the DSM Directive’s provision regarding the communication to the public right and OCSSPs in order to establish the extent to which Article 17 effects a doctrinal change in this area of the law.

⁴¹ JP Quintais, ‘*Untangling the hyperlinking web: In search of the online right of communication to the public*’, *The Journal of World Intellectual Property* Vol 21 Issue 5-6, page 386

⁴² Case C-306/05 *SGAE v Rafael Hoteles SA*; Case C-403/08 *Football Association Premier League Ltd and Others v QC Leisure and Others*; Case C-283/10 *Circul Globus Bucuresti v Uniunea Compozitorilor si Muzicologilor din Romania – Asociatia pentru Drepturi de Autor*; Case C-607/11 *ITV Broadcasting Ltd and Others v TVCatchup Ltd*; Case C-466/12 *Svensson v Retriever Sverige AB*; Case C-348/13 *BestWater International GmbH v Michael Mebes and Stefan Potsch*; Case C-279/13 *C More Entertainment AB v Linus Sandberg*; Case C-325/14 *SBS Belgium v SABAM*; Case C-160/15 *GS Media BV v Sanoma Media Netherlands BV*; Case C-527/15 *Stichting Brein v Filmspelers*; Case C-610/15 *Stichting Brein v Ziggo BV*; Case C-161/17 *Land Nordrhein-Westfalen v Dirk Renckhoff*; Case C-753/18 *Stim and SAMI v Fleetmanager Sweden AB and Nordisk Biluthyrning AB* (2020)

⁴³ J Koo, ‘*Away we Ziggo: the latest chapter in the EU communication to the public story*’, page 543

⁴⁴ JP Quintais, ‘*Untangling the hyperlinking web: In search of the online right of communication to the public*’, page 391

⁴⁵ C Angelopoulos, ‘*Communication to the Public and Accessory Copyright Infringement*’ (2017) *The Cambridge Law Journal* Volume 76 Issue 3, page 496

⁴⁶ Case C-306/05 *SGAE v Rafael Hoteles SA* ECLI:EU:C:2006:764, paragraph 31

2.2.1 OCSSPs and the communication to the public jurisprudence

The foundation of the EU communication to the public right – Article 3 of the InfoSoc Directive – has been outlined above. As mentioned, this gives no explicit definition as to what amounts to a ‘communication to the public’, and thus it is largely the courts that have been left to grapple with what should/should not constitute such an act. It should be borne in mind that the InfoSoc Directive was adopted in 2001, and that methods of communication online have evolved since the drafting of that Directive – particularly through the growth of large platforms which permit the large-scale sharing and accessing of user-uploaded content.⁴⁷ The courts have therefore been required to adapt the law to modern methods of communication, thereby ensuring that rightholders’ interests are not damaged through copyright law becoming out-dated.⁴⁸ Whilst doing so, it has been necessary for the courts to protect other values such as the functioning of the internet.⁴⁹ As a result the test for infringement of the communication to the public right has become ever more complex as the CJEU has sought to deal with the situation of online intermediaries. Indeed, it has been noted by other commentators that ‘the CJEU has been the engine of harmonization in the area of secondary liability’.⁵⁰ On this basis, legislative intervention should be welcomed – it being a natural progression that the legislature should step in when required to clarify where the balance should be struck between different stakeholders’ interests.

⁴⁷ Indeed YouTube, Facebook and Instagram – examples of platforms which may meet the OCSSP definition – had not yet been created in 2001

⁴⁸ Case C-161/17 *Land Nordrhein-Westfalen v Dirk Renckhoff* 2018 ECLI:EU:C:2018:634 (*Renckhoff*), paragraph 33

⁴⁹ Case C-160/15 *GS Media BV v Sanoma Media Netherlands BV* (2016) ECLI:EU:C:2016:644 (*GS Media*), paragraph 45

⁵⁰ A Ohly, ‘*The broad concept of “communication to the public” in recent CJEU judgments and the liability of intermediaries: primary, secondary or unitary liability?*’, page 674

This section thus seeks to investigate the test for infringement of an author’s exclusive right of communication to the public, and how it applies to OCSSPs. The first step is to outline what the courts have determined to be the test for a communication to the public. The CJEU jurisprudence demonstrates that this test can be boiled down to three key requirements. Firstly there are the ‘two cumulative criteria’,⁵¹ these being: that there has been an ‘act of communication’ of a work,⁵² and that the work has been communicated to a ‘public’.⁵³ Additionally, it is ‘settled case-law’ that communication must be made ‘using specific technical means, different from those previously used or, failing that, to a ‘new public’’.⁵⁴ These criteria shall be explored in turn below, each being hypothetically applied to the definition of an OCSSP.

Firstly then, this paper turns to the requirement that there has been an ‘act of communication’. The CJEU has consistently held – for there to have been such an act – that a copyright-protected work must be ‘made available to a public in such a way that the persons forming that public may access it, irrespective of whether or not they avail themselves of that opportunity’,⁵⁵ this being termed an ‘access approach’.⁵⁶ In the online context, such an access test requires that the infringing party gives users of the website ‘the opportunity to access’ the copyright-protected work ‘on that website’.⁵⁷ Such a requirement would appear to be met by an OCSSP, given such intermediaries are explicitly defined as those who provide on their platform ‘access to a large

⁵¹ Case C-753/18 *Stim and SAMI v Fleetmanager Sweden AB and Nordisk Biluthyrning AB*, paragraph 30

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Renckhoff*, paragraph 24

⁵⁵ *Ibid.* paragraph 20

⁵⁶ For criticism of such an approach, see J Koo, ‘*Away we Ziggo: the latest chapter in the EU communication to the public story*’, page 544

⁵⁷ *Renckhoff*, paragraph 21

amount of copyright-protected content uploaded by their users'.⁵⁸ Furthermore, an allegedly infringing party must have played an 'indispensable role' in the communication.⁵⁹ It seems apparent that an OCSSP satisfies this requirement, given an OCSSP is defined as an intermediary whose role is to 'enable users to upload and share'.⁶⁰ Such an 'indispensable role' must also constitute a 'deliberate intervention' by the allegedly infringing party⁶¹ – this being apparent in the case of an OCSSP, given such enabling of users to upload and share must be one of their main purposes.⁶²

The InfoSoc Directive does, however, exclude the 'mere provision' of physical facilities for enabling or making a communication from constituting an act of communication to the public.⁶³ It is possible to envision an OCSSP's actions would not amount to an infringement on this basis. However, it has been held the 'making available and management of an online sharing platform... must be considered to be an act of communication for the purposes of Article 3(1) of Directive 2001/29'.⁶⁴ Given the DSM Directive defines OCSSPs as those who organise and promote large amounts of copyright-protected content (including by categorising it and using targeted promotion within it),⁶⁵ this would seem to constitute the provision of and maintaining of an online platform – preventing an OCSSP from relying on this provision.

It can thus be concluded that an OCSSP performs an 'act of communication' where copyright-protected content is available on their platform.

⁵⁸ DSM Directive, recital 61

⁵⁹ Case C-610/15 *Stichting Brein v Ziggo BV* ECLI:EU:C:2017:456 (*Ziggo*), paragraph 26

⁶⁰ DSM Directive, recital 62

⁶¹ Case C-527/15 *Stichting Brein v Filmspelers* (2017), paragraph 49

⁶² DSM Directive, recital 62

⁶³ InfoSoc Directive, recital 27

⁶⁴ *Ziggo*, paragraph 39

⁶⁵ DSM Directive, recital 62

The second condition of the CJEU's three-step test requires that communication of a work is made to a 'public'. Such a public has been held by the CJEU to require communication 'to an indeterminate number of potential recipients and implies, moreover, a fairly large number of persons',⁶⁶ this therefore constituting a 'quantitative' test.⁶⁷ It is questionable what should constitute the relevant 'public' where communication takes place online. The CJEU has held, however, that this shall be 'all potential users of the website'⁶⁸ (taking into account any restrictions placed upon access). The relevant 'public' for an OCSSP shall undoubtedly therefore include a large number of users, given OCSSPs are recognized by the DSM Directive as constituting 'a main source of access to content online'.⁶⁹ It can therefore be concluded that this condition shall be fulfilled where an OCSSP is concerned.

The final condition of the three-step test that the CJEU applies requires that communication is either made 'using specific technical means, different from those previously used or, failing that, to a 'new public''.⁷⁰ This step in the test for infringement has been a creation of the court,⁷¹ and is the only criterion to be discussed which is not discernible from the text of the InfoSoc Directive.

Application of this final criterion in the OCSSP context depends firstly on whether the rightholder has previously authorised communication of the relevant work online. It is only

⁶⁶ *Renckhoff*, paragraph 22

⁶⁷ Case C-161/17, Opinion of Advocate General Campos Sanchez-Bordona (2018) ECLI:EU:C:2018:279, paragraph 91

⁶⁸ *Renckhoff*, paragraph 23

⁶⁹ DSM Directive, recital 61

⁷⁰ *Renckhoff*, paragraph 24

⁷¹ JP Quintais, '*Untangling the hyperlinking web: In search of the online right of communication to the public*', page 391

where a rightholder has previously authorised communication of their copyright-protected work elsewhere online that an OCSSP may hope to avoid satisfaction of the ‘specific technical means, different from those previously used’ test. This conclusion can be reached on the basis that it has been accepted that only where communication has already been authorised and taken place on another website shall a communication of the work on a OCSSP’s platform constitute communication using ‘the same technical means’.⁷² In such a scenario, the application of the ‘new public’ test shall then become the determining factor as to whether an OCSSP has infringed the rightholder’s exclusive right to authorise/prohibit the communication of their copyright-protected work.

The ‘new public’ test⁷³ requires that communication has been made to ‘a public that was not already taken into account by the copyright holders when they authorised the initial communication to the public of their work’.⁷⁴ The CJEU has recently (in its *Renckhoff* judgment) taken a firm stance that this shall be met even if the rightholder has authorised the making available of their copyright-protected work on another website. This has been reconciled with the ‘new public’ terminology by constructing the initial public taken into account by the rightholder as ‘composed solely of users of that site and not of users of the website on which the work was subsequently published without the consent of the rightholder’.⁷⁵ This would appear to impose a system of strict liability, given knowledge does not seem to have been deemed relevant by the CJEU in its *Renckhoff* judgment.⁷⁶

⁷² *Renckhoff*, paragraph 25

⁷³ For a criticism of the ‘new public’ requirement, see PB Hugenholtz & S van Velze, ‘*Communication to a New Public? Three Reasons why EU Copyright Law Can Do Without a “New Public”*’ (2016) *International Review of Intellectual Property and Competition Law* Volume 47 Issue 7

⁷⁴ *Renckhoff*, paragraph 24

⁷⁵ *Ibid.* paragraph 35

⁷⁶ Although the Advocate General’s opinion on this case suggests there should be a subjective element to the test: Case C-161/17, Opinion of Advocate General Campos Sanchez-Bordona, paragraph 78

At this point it is worth reiterating that certain commentators have argued that the EU copyright *acquis* contains only one harmonised form of copyright liability, this being an ‘autonomous’⁷⁷ system of ‘unitary liability’.⁷⁸ It is suggested this is a result of the CJEU not distinguishing ‘between infringers who use the protected work themselves, and intermediaries’.⁷⁹ Such a ‘unitary’ form of liability would seem to combine the two forms of copyright liability – primary liability (reserved for the individual infringer who performs acts reserved exclusively for the copyright holder to authorise) and accessory/intermediary liability (‘for enabling others to infringe’)⁸⁰ – which are typically distinguished between in systems of copyright law. It has been claimed that the CJEU has read certain provisions as ‘broad enough’ to cover both intermediary and primary liability⁸¹ to avoid a situation in which the liability of intermediaries would be left to national concepts of accessory liability⁸² (undesirable from a EU harmonisation project standpoint).⁸³

This paper proposes, however, that certain differences can be identified between the CJEU’s treatment of those engaging in traditionally *primary* infringement (as exemplified through the CJEU’s *Renckhoff* judgment), and those accused of facilitating infringement. It is submitted such difference of treatment is evidenced through the CJEU’s investigation of an intermediary’s knowledge regarding an infringement. In cases dealing with intermediaries, the CJEU has (during its application of the ‘new public’ criterion) tested for an intermediary’s ‘actual and

⁷⁷ A Ohly, ‘The broad concept of “communication to the public” in recent CJEU judgments and the liability of intermediaries: primary, secondary or unitary liability?’, page 670

⁷⁸ *Ibid.* page 675

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Ibid.* page 666

⁸² *Ibid.* page 675

⁸³ InfoSoc Directive, recital 1; E-Commerce Directive, recital 40

constructive knowledge’.⁸⁴ The knowledge under investigation here is of a general nature, requiring an awareness of widespread use of the service to provide illegitimate access to copyright-protected content. The most recent example of such a case before the CJEU is *Stichting Brein v Ziggo*⁸⁵ (*Ziggo*) – this case in fact leading one commentator to conclude that ‘‘knowledge’ replaced the ‘new public’ criterion as the determining factor for infringement’.⁸⁶ The court in *Ziggo* stated that, should it be found the party ‘could not be unaware’⁸⁷ that their platform provided access to copyright-protected works (without rightholder authorisation), and where the making available and management of the online sharing platform ‘is carried out with the purpose of obtaining profit therefrom’,⁸⁸ the making available and management of such a platform shall constitute a ‘communication to the public’.

It would appear a significant component of the knowledge test under EU copyright law is whether the alleged perpetrator of the infringement pursues profit. Indeed, the CJEU had previously (in its *GS Media* judgment dealing with hyperlinks to infringing communications of copyright-protected works) justified the liability of profit-making intermediaries on the basis that those pursuing profit can be ‘expected’ to carry out ‘necessary checks’ to ensure works have not been illegally published, such that they can be presumed to have the requisite knowledge of infringement.⁸⁹

⁸⁴ C Angelopoulos, ‘*Communication to the Public and Accessory Copyright Infringement*’, page 498

⁸⁵ *Ziggo*... although it should be noted that this judgment was delivered before *Renckhoff*, and thus it is not certain this component of the test shall be retained in other cases of ‘secondary’ liability post-*Renckhoff*

⁸⁶ J Koo, ‘*Away we Ziggo: the latest chapter in the EU communication to the public story*’, page 547

⁸⁷ *Ziggo*, paragraph 45

⁸⁸ *Ibid.* paragraph 46

⁸⁹ *GS Media*, paragraph 51

The combination of the above findings appears to demonstrate a trend in EU copyright law jurisprudence towards ‘an autonomous European theory of negligent contributory infringement’,⁹⁰ whereby profit-making intermediaries can be presumed to have knowledge of infringements occurring on their platform such that, where they do not take the ‘necessary steps’ to remove such content, they contribute sufficiently to render themselves complicit in the infringement.

Should this test be applied to an OCSSP, it could be argued an OCSSP ‘could not be unaware’ that access is given to copyright-protected works without rightholder authorisation given such intermediaries pursue their activities with the ‘purpose of obtaining profit therefrom’,⁹¹ and will in all likelihood constitute an intermediary which is ‘aware that their services can be used by infringers’ (despite potentially not having knowledge relating to individual infringements).⁹²

It is important, however, to note that the operators of the online sharing platform at issue in *Ziggo* were found by the Court to ‘expressly display, on blogs and forums available on that platform, their purpose to make protected works available to the users, and encourage the latter to make copies of those works’.⁹³ In such cases, the general knowledge of infringement is clear from their evident intention to provide the means to infringe rightholders’ exclusive rights. Indeed, in other jurisdictions the courts have found themselves able to distinguish between those intermediaries *inducing* users to engage in infringing activities, and those whose product *can*

⁹⁰ A Ohly, ‘*The broad concept of “communication to the public” in recent CJEU judgments and the liability of intermediaries: primary, secondary or unitary liability?*’, page 671

⁹¹ DSM Directive, recital 62

⁹² A Ohly, ‘*The broad concept of “communication to the public” in recent CJEU judgments and the liability of intermediaries: primary, secondary or unitary liability?*’, page 670

⁹³ *Ziggo*, paragraph 45

be used for infringement (without evidence of intent).⁹⁴ The point being made here is that the concept of ‘knowledge’ in the communication to the public jurisprudence is ‘opaque’⁹⁵ – it not being clear how this knowledge requirement would apply to those OCSSPs who do not demonstrate clear intent to facilitate the infringement of copyright.

Whilst it can be contemplated that ‘rogue’ intermediaries (who have a higher chance of giving access to infringing content)⁹⁶ may also fall under the OCSSP definition, this does not mean that all intermediaries meeting the OCSSP definition have such clearly evidenced knowledge. Indeed, a great many OCSSPs may conduct their business operations when making available and maintaining their platform with a much greater sense of legitimacy (for example by placing emphasis on the upload and sharing of user-created content). It is not necessarily a foregone conclusion that the CJEU would find such intermediaries to have the requisite knowledge, but this paper nevertheless proposes it is likely such a finding would be reached given the general trend under EU copyright law towards duties on intermediaries pursuing profit.

On the basis of the above this paper concludes it would be likely the CJEU would find an OCSSP meets the test for infringement of an author’s exclusive right to authorise/prohibit the communication of their works where such works are made available on the OCSSP’s platform. Indeed it should be noted that the CJEU is presently considering whether an online video

⁹⁴ CM Swartout, ‘*Toward a Regulatory Model of Internet Intermediary Liability: File-Sharing and Copyright Enforcement*’ (Spring 2011) *Northwestern Journal of International Law & Business* Vol 31 No 2, page 515

⁹⁵ A Ohly, ‘*The broad concept of “communication to the public” in recent CJEU judgments and the liability of intermediaries: primary, secondary or unitary liability?*’, page 672

⁹⁶ J van Hoboken, ‘*Legal space for innovative ordering: on the need to update selection intermediary liability in the EU*’, page 65

sharing platform performs an act of communication to the public, and the outcome of this request for a preliminary ruling could potentially confirm the findings reached above.⁹⁷

2.2.2 Article 17(1) DSM Directive

This paper now turns to consider Article 17(1) of the DSM Directive, and the extent to which it effects a doctrinal change from the ‘general test’ for communication to the public infringements outlined above.⁹⁸

Article 17(1) of the DSM Directive states ‘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’.⁹⁹

Little is changed regarding the first two criteria of the general test produced by the CJEU’s jurisprudence. An act of communication/making available to the public is still performed when an OCSSP provides access, and a public is a necessary precondition for infringement of the right. Interestingly, however, there is no mention of the ‘specific technical means’ or ‘new public’ criteria, nor any requirement of knowledge on the part of the OCSSP. This provision therefore appears to be inconsistent with the *Ziggo* judgment.¹⁰⁰

It could be argued Article 17(1) of the DSM Directive therefore marks an overhaul of any requirement of actual or constructive knowledge in the case of OCSSPs where infringement of

⁹⁷ Case C-682/18 *LF v Google LLC, Youtube Inc, Youtube LLC, Google Germany GmbH*

⁹⁸ This test is the ‘general test’ given it is retained for those parties not meeting the OCSSP definition, see: DSM Directive, recital 64

⁹⁹ DSM Directive, Article 17(1)

¹⁰⁰ C Angelopoulos, ‘*Communication to the Public and Accessory Copyright Infringement*’, page 499

the communication to the public right is alleged – thereby implementing a doctrine of strict liability for OCSSPs. Removal of a requirement for discussion of an OCSSP’s knowledge could be argued to make the law conceptually clearer, given it shall be seen later in this chapter that an OCSSP’s knowledge nevertheless becomes relevant when applying the criteria for exemption from liability for such infringements.

However, this paper notes that the DSM Directive states the purpose of Article 17(1) is to ‘clarify’ the position of OCSSPs in relation to the test for infringement of the communication to the public right¹⁰¹ – this implying not a change in the law, but an identification of the proper result where the general test for infringement is applied to an OCSSP.

On the basis of the above, it is proposed here that the EU legislator has stepped in to confirm that an OCSSP shall (due to its satisfaction of the OCSSP definition) fulfil the general test as set out by the CJEU. Specifically, it is argued that the EU legislator has taken the question of whether an OCSSP shall have the requisite level of general knowledge (regarding the use of their platform for copyright infringing activities) out of the courts’ hands. Whilst courts would previously have questioned whether an intermediary ‘could not be unaware’¹⁰² their platform provided access to copyright-protected works without rightholder authorisation, OCSSPs (post-DSM implementation) will be in the position that they *cannot* be unaware of the use of their platform to provide unauthorised access to copyright-protected works. The requisite knowledge shall be present due to satisfaction of the definition of an OCSSP. In this sense, the EU legislator has not misunderstood the test for infringement set by the CJEU by not including the ‘specific technical means’ or ‘new public’ tests, and related investigation of the ‘knowledge’ of an

¹⁰¹ DSM Directive, recital 64

¹⁰² *Ziggo*, paragraph 45

intermediary. Instead the EU legislator has found such requirements satisfied in the case of an OCSSP.

On this basis, it could be argued that implementing national legislatures shall have to change little in regard to their domestic law – given the DSM Directive produces the same outcome as has been predicted by this paper to have been the case under the pre-existing EU copyright *acquis*. A simple provision which confirms that an intermediary qualifying as an OCSSP satisfies the general test for an act of communication to the public (where such an intermediary gives the public access to copyright-protected works or other protected subject matter uploaded by its users) is all that is required.

2.3 **The conditions for exemption from liability**

On the basis of the conclusions reached above, OCSSPs can be certain (upon implementation of the DSM Directive) that they shall find themselves in infringement of the exclusive right to authorise/prohibit communication of a copyright-protected work online, where that work has been made available on the relevant OCSSP's platform without rightholder authorisation. Given this outcome, the conditions for exemption from such liability become important – these being explored below.

Articles 17(3) and (4) of the DSM Directive are the relevant provisions in this regard. Article 17(3) bars OCSSPs who give the public access to copyright-protected works uploaded by their users from seeking exemption from liability under the E-Commerce Directive,¹⁰³ whilst Article 17(4) provides for a new 'specific liability mechanism' for OCSSPs.¹⁰⁴ It shall be assessed

¹⁰³ E-Commerce Directive, Article 14

¹⁰⁴ DSM Directive, recital 66

whether OCSSPs were previously able to seek exemption from liability under the E-Commerce Directive. Following such analysis, the effect that Article 17(3) and (4) shall have on OCSSP liability shall be discussed.

2.3.1 The E-Commerce ‘safe harbour’ for hosting

Article 14 of the E-Commerce Directive provides an exemption from liability for information society service providers (ISSPs) who store information provided by the recipient of the service – where such information is infringing – provided such ISSPs do not ‘have actual knowledge of illegal activity or information’ and are ‘not aware of facts or circumstances from which the illegal activity or information is apparent’.¹⁰⁵ Furthermore, where an ISSP obtains ‘such knowledge or awareness’, the ISSP is required to act ‘expeditiously to remove or to disable access to the information’.¹⁰⁶ Satisfaction of such conditions provides intermediaries with a ‘safe harbour’ from liability, as fulfilment of these criteria permits intermediaries to escape from liability that they would otherwise attract.

An ISSP is, for the purposes of the E-Commerce Directive, ‘any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services’.¹⁰⁷ OCSSPs pursue profit,¹⁰⁸ and therefore receive remuneration for the service they provide. Additionally, an OCSSP is an online platform and the service they provide is therefore provided at a distance and by electronic means. Finally, copyright-protected content is stored,

¹⁰⁵ E-Commerce Directive, Article 14(1)(a)

¹⁰⁶ *Ibid.* Article 14(1)(b)

¹⁰⁷ *Ibid.* Article 2(a) – which uses the definition provided for in Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, Article 1(2)

¹⁰⁸ DSM Directive, recital 62

uploaded and accessed at the individual request of the user. It would appear, therefore, that an intermediary satisfying the OCSSP definition shall also constitute an ISSP.

Article 14 of the E-Commerce Directive essentially provides for a notice-and-takedown system in the EU with regard to the communication of works online – although such a system is only implied through the Directive’s ‘conditions for liability exemption’.¹⁰⁹ In a system of notice-and-takedown, it is only where the allegedly complicit party is put on notice regarding the communication of the work (and thus possesses actual or constructive knowledge of the infringement taking place) that the party has to take down the content in order to avoid liability. It should be emphasised at this point that the form of knowledge required by the E-Commerce Directive is narrower than the general knowledge tested for by the CJEU in its *Ziggo* judgment (outlined earlier in this chapter). Rather than a general awareness of infringements taking place using the online platform, the E-Commerce Directive requires knowledge of specific instances of infringement.

The E-Commerce Directive Article 14 ‘safe harbour’ is, owing to the case law of the CJEU, only available to an OCSSP that is passive rather than active in providing its service¹¹⁰ – this being used to distinguish between those intermediaries that should attract liability, and those that should not.¹¹¹ Specifically, in order to benefit from the Article 14 ‘safe harbour’, recital 42 of the E-Commerce Directive provides that an ISSP’s activities must be limited to ‘a mere technical, automatic and passive nature, which implies that the information society service

¹⁰⁹ A Kuczerawy, ‘*Intermediary liability & freedom of expression: Recent developments in the EU Notice & action initiative*’, *Computer Law & Security Review* 31 (2015), page 48

¹¹⁰ *L’Oreal*, paragraph 113

¹¹¹ Communia Association, ‘Guidelines for the Implementation of the DSM Directive – Article 17: Use of Copyrighted Content by Online Platforms’, available at: <https://www.notion.so/Article-17-Use-of-copyrighted-content-by-online-platforms-8e9ab9aaa4ce42c2a6f35cb7415b8b83>

provider has neither knowledge of nor control over the information which is transmitted or stored'.¹¹² The CJEU has identified this condition as being attached to the Article 14 'safe harbour',¹¹³ although certain commentators have criticized this finding as doctrinally incorrect – Manniko writing persuasively that recital 42 'would seem to refer to the exemptions discussed in the following recital 43' ('mere conduit' and 'caching').¹¹⁴ Manniko goes on to suggest that it is in fact recital 46 'which concerns hosting providers mentioned in Article 14',¹¹⁵ and that on this basis 'the limitation of liability of a hosting provider should not be conditioned and limited by attaching it to recital 42',¹¹⁶ but rather the sole condition under the E-Commerce Directive to benefit from the 'safe harbour' of Article 14 should have been the obtaining of actual or constructive knowledge.¹¹⁷ On this basis, OCSSPs should be able to avoid liability under the system of notice-and-takedown set out in Article 14 of the E-Commerce Directive by responding 'expeditiously'¹¹⁸ to notices of individual infringements occurring on their platform.

Despite several large platforms relying on this 'safe harbour',¹¹⁹ this paper proposes that based on the CJEU's jurisprudence requirement of passivity and neutrality (however doctrinally mistaken this is argued to be), it is probable that OCSSPs cannot benefit from the E-Commerce Directive 'safe harbour'. The CJEU has never confirmed this¹²⁰ however, given an OCSSP is defined as a platform which organises and promotes content uploaded by its users 'in order to

¹¹² E-Commerce Directive, recital 42

¹¹³ *L'Oreal*, paragraph 113

¹¹⁴ M Manniko, 'Intermediary Service Providers' Liability Exemptions: Where Can We Draw the Line?' in T Kerikmae, 'Regulating eTechnologies in the European Union – Normative Realities and Trends', page 126

¹¹⁵ *Ibid.* page 127

¹¹⁶ *Ibid.* page 127

¹¹⁷ E-Commerce Directive, recital 46 and Art 14(1)

¹¹⁸ *Ibid.* Article 14(1)(b)

¹¹⁹ Communia Association, 'Guidelines for the Implementation of the DSM Directive – Article 17: Use of Copyrighted Content by Online Platforms'

¹²⁰ *Ibid.*

attract a larger audience’ (including where the OCSSP categorises it and uses targeted promotion within it),¹²¹ it is unlikely an intermediary meeting the OCSSP definition could succeed in arguing its activities were ‘of a mere technical, automatic and passive nature’.¹²²

On the basis of the above, this paper concludes that – under the pre-DSM system – intermediaries meeting the OCSSP definition would have been unable to exempt themselves from liability for their infringements of a rightholder’s exclusive right to authorise/prohibit the communication to the public of their works due to the requirement of passivity. Again, it is worth noting that the CJEU has been asked to clarify whether an online video sharing platform falls within the scope of Article 14 of the E-Commerce Directive,¹²³ the ruling in this case having the potential to confirm the conclusion reached above.

2.3.2 The DSM Directive ‘specific liability mechanism’

Under the DSM Directive, the key provision regarding the ‘safe harbour’ is Article 17(3) which provides that – where an OCSSP performs an act of communication to the public covered by Article 17 – ‘the limitation of liability established in Article 14(1) of Directive 2000/31/EC shall not apply’.¹²⁴ Given the findings of the previous section of this chapter, this appears not to alter the position of an OCSSP. Again it would appear the DSM represents a mere clarification of the position of OCSSPs under the existing law. Thus, again, it can be concluded that little provision would have to be made in an implementing national legislature’s domestic law. A mere clarification that an OCSSP is unable to benefit from the existing test for exclusion would suffice.

¹²¹ DSM Directive, recital 62

¹²² E-Commerce Directive, recital 42

¹²³ Case C-682/18 *LF v Google LLC, Youtube Inc, Youtube LLC, Google Germany GmbH*

¹²⁴ DSM Directive, Article 17(3)

The DSM Directive does, however, introduce doctrinal change by providing OCSSPs with a new ‘specific liability mechanism’¹²⁵ through which an OCSSP can avoid liability. This has the potential, therefore, to improve the position of OCSSPs when compared with the pre-DSM Directive law – given it allows such platforms the possibility to avoid liability.

It must first be highlighted that such ‘specific liability mechanism’ only kicks in where an OCSSP does not secure rightholder authorisation for communication of the relevant work on the OCSSP platform. Article 17(1) provides that OCSSPs may obtain an authorisation (e.g. by concluding a license with the rightholder) to shield them from liability,¹²⁶ such an authorisation also applying to actions of their users under certain conditions.¹²⁷

Where rightholder authorisation is not obtained, the Article 17(4) ‘specific liability mechanism’ becomes important. Three cumulative criteria must all be satisfied for an OCSSP to avoid liability. The first of these demonstrates the EU legislator’s clear preference that OCSSPs obtain authorisation from the rightholder, preconditioning the avoidance of liability upon an OCSSP making ‘best efforts to obtain’ such authorisation.¹²⁸

The second criterion for exemption from liability is contained in Article 17(4)(b) of the DSM Directive, and provides for a system which (to be contrasted with the E-Commerce Directive system of notice-and-takedown system) can be termed platform-wide notice-and-staydown. In this system, rightholders can pre-empt infringement of their exclusive right to authorise/prohibit

¹²⁵ *Ibid.* recital 66

¹²⁶ *Ibid.* Article 17(1)

¹²⁷ *Ibid.* Article 17(2)

¹²⁸ *Ibid.* Article 17(4)(a)

the communication of their copyright-protected work to the public by providing OCSSPs with ‘the relevant and necessary information’ regarding a specific work.¹²⁹ Such ‘relevant and necessary information’ provides OCSSPs with a state of knowledge that is sufficient to put them on notice regarding the specified work across the entire OCSSP’s platform, not only in the present tense but also regarding future uploads. Where such information is provided, OCSSPs shall only be able to avoid liability where they make ‘in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject-matter’¹³⁰ across their platform.

The third and final condition for exemption from liability is provided by Article 17(4)(c), which requires OCSSPs to act expeditiously ‘upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject-matter’ and make ‘best efforts to prevent their future uploads’ as they would be required to do under Article 17(4)(b) (outlined above). The notice envisioned here is reactionary much like that under the E-Commerce Directive, relating to an individual infringement that is already taking place – however shall also have the effect of engaging the requirement placed on OCSSPs under Article 17(4)(b), again producing a system of platform-wide notice-and-staydown.

Only certain mitigating factors such as ‘the type, the audience and the size of the service and the type of works or other subject matter uploaded’ as well as ‘the availability of suitable and effective means and their cost for service providers’ can impact what action by OCSSPs shall

¹²⁹ *Ibid.* Article 17(4)(b)

¹³⁰ *Ibid.*

amount to meeting the standards of behaviour required by them under Article 17(4) of the DSM Directive.¹³¹

This section concludes that Articles 17(3) and (4) of the DSM Directive clarify and improve the situation of OCSSPs by providing them with an exemption from liability scheme which they can comply with. However, the new scheme places a significant burden on OCSSPs – requiring significantly more action than a notice-and-takedown system would.

The author of this paper contends that the DSM scheme cannot be termed a ‘strict liability’ scheme as some commentators have opined.¹³² This is not the case as there is still a requirement for rightholders to put the OCSSP on notice, either by pre-empting infringement through the provision of ‘relevant and necessary information’ or by notifying the OCSSP of an infringement having already taken a place through a ‘sufficiently substantiated notice’.

The ‘specific liability mechanism’ instead imposes a ‘duty of care’ on an OCSSP (a duty of care being a mechanism by which a party can be liable for careless conduct which results in harm to another,¹³³ careless conduct in this scenario being the ineffective action on behalf of the OCSSP after being put on notice). Once the OCSSP has been put on notice they shall be required to make ‘in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability’ of the copyright-protected work in both the present and future tense – this being the standard of care required in order to avoid liability. In this sense,

¹³¹ *Ibid.* Article 17(5)

¹³² GF Frosio, ‘*From horizontal to vertical: an intermediary liability earthquake in Europe*’, page 569

¹³³ J Thomson, ‘*Delictual Liability*’, page 63

rightholders now possess a ‘direct power to require intermediaries to aid them in their enforcement pursuits’.¹³⁴

2.4 **The practical result of the ‘specific liability mechanism’ and the EU law prohibition of a general monitoring obligation**

It is important to draw together the conclusions reached to ascertain the broader picture and practical reality that Article 17 of the DSM Directive shall bring about. The DSM Directive has produced clarity in the law where there previously existed uncertainty. It is now clear that OCSSPs infringe rightholder’s exclusive right to authorise/prohibit the communication of their work where access is given to such work on the OCSSP’s platform. The only method by which an OCSSP may avoid liability for such an infringement is through compliance with the ‘specific liability mechanism’ introduced by the DSM Directive.

Whilst it has been ascertained that a duty of care system shall be produced by Article 17, it is not denied that the standard of care required by an OCSSP will be exceptionally high. OCSSPs are expected to essentially ensure the unavailability (to ‘high industry standards of professional diligence’)¹³⁵ of specific copyright-protected content across their entire platform in perpetuity where provided with the ‘relevant and necessary information’ or a ‘sufficiently substantiated notice’. It is proposed that *de facto* this shall introduce a requirement for OCSSPs to use filtering technology on their platform, as other than ‘deploying automatic content recognition technologies that examine all uploaded content’ it is ‘hard to imagine’ another method by which these large-scale platforms could comply with the ‘specific liability mechanism’ such as to

¹³⁴ Suzor, Choi & Pappalardo, ‘*Moments of Flux in Intermediary Liability for Copyright Infringement in Australia*’, page 144

¹³⁵ DSM Directive, Article 17(4)(b)

avoid liability.¹³⁶ On the basis of the above, it can be concluded that OCSSPs are now in a position in which they have two available options to avoid liability – license or filter.¹³⁷

The use of monitoring and filtering technology raises certain concerns – most of which are better left to the policy-based discussion carried out in chapter two of this paper. However, one line of inquiry from a doctrinal standpoint is the statement made in Article 17(8) of the DSM Directive¹³⁸ which provides Article 17 shall not result in a violation of EU law’s prohibition – provided for in the E-Commerce Directive – of a general monitoring obligation being placed on intermediaries¹³⁹ (to ‘monitor the information which they transmit or store’ or ‘actively to seek facts or circumstances indicating illegal activity’).¹⁴⁰

It can legitimately be questioned whether the effect of Article 17 shall be to run afoul of this prohibition. This is especially so given the CJEU has previously found the prohibition of such a general monitoring obligation precluded domestic court injunctions requiring a hosting provider to install a filtering system.¹⁴¹ It could be argued that Article 17 shall result in a violation of this prohibition, on the basis that OCSSPs – in order to comply with the ‘specific liability mechanism’ – shall necessarily have to actively monitor ‘almost all of the data relating to all of its service users in order to prevent any future infringement of intellectual property rights’.¹⁴²

¹³⁶ Communia Association, ‘Guidelines for the Implementation of the DSM Directive – Article 17: Use of Copyrighted Content by Online Platforms’

¹³⁷ *Ibid.*

¹³⁸ DSM Directive, Article 17(8)

¹³⁹ E-Commerce Directive, recital 47 and Article 15

¹⁴⁰ *Ibid.* Article 15(1)

¹⁴¹ Case C-70/10 *Scarlet Extended SA v SABAM* (2011) ECLI:EU:C:2011:771; Case C-360/10 *SABAM v Netlog NV* (2012) ECLI:EU:C:2012:85 (*SABAM*)

¹⁴² *SABAM*, paragraph 38

It should be noted, however, that recital 48 of the E-Commerce Directive makes clear that Member States were not barred from legislating for a requirement of ISSPs to ‘apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities’.¹⁴³ It is possible to argue that implementing national legislatures – when transposing their obligations under the DSM Directive into national law – therefore possess the competence to legislate for a duty of care such as that provided by Article 17(4). However, given the above described case law of the CJEU, it is likely that the use of filtering technologies cannot be ‘reasonably... expected from them’ – the CJEU having stated that such systems would not strike a fair balance between protection of intellectual property rights and the freedom to conduct business enjoyed by operators of hosting service providers or other important fundamental rights such as freedom of information.¹⁴⁴

It is concluded here, therefore, that the DSM Directive’s *de facto* implementation of a requirement for OCSSPs to filter their platform is contrary to the CJEU’s jurisprudence on the prohibition of a general monitoring obligation. Given the EU legislator provided in the DSM Directive that the application of Article 17 ‘shall not lead to any general monitoring obligation’, this shall produce a conflict for implementing national legislatures between respecting their obligations under the E-Commerce or the DSM Directives.

¹⁴³ E-Commerce Directive, recital 48

¹⁴⁴ *SABAM*, paragraphs 51

3 CHAPTER TWO – A policy-based examination of Article 17 DSM Directive

Having identified the doctrinal changes effected by Article 17 of the DSM Directive, this chapter now seeks to undertake a policy-based analysis of the EU legislature’s decision to adopt this provision.

The debate regarding how liability should be apportioned for copyright infringement occurring online, as well as who should bear the burden of enforcement, is one of the most heated points of discussion in copyright law academia. The EU legislature appears to have adopted a ‘clear stand’¹⁴⁵ in this debate through the adoption of the DSM Directive. The previous chapter has identified that emphasis has been placed on shifting the burden of enforcement upon OCSSPs, through implementation of a system of platform-wide notice-and-staydown ‘predicated upon the threat of potential liability for non-compliance’.¹⁴⁶

The EU is not alone in this discussion, debates about the appropriate extent of intermediary liability continuing to ‘fester’ in a great many jurisdictions ‘without much hope of resolution’.¹⁴⁷ However, certain commentators have noted a broader international trend towards ‘greater sophistication in approaches to enrolling general purposes intermediaries in the regulatory project’¹⁴⁸ and there being a general ‘(r)ecalibration towards ‘more’ secondary liability for online intermediaries’.¹⁴⁹ The international debate occurring in this field aids the EU copyright law reform project – allowing for a breadth of scholarship from which to draw

¹⁴⁵ A Kuczerawy, *‘Intermediary liability & freedom of expression: Recent developments in the EU Notice & action initiative’*, page 56

¹⁴⁶ Suzor, Choi & Pappalardo, *‘Moments of Flux in Intermediary Liability for Copyright Infringement in Australia’*, page 131

¹⁴⁷ *Ibid.* page 144

¹⁴⁸ *Ibid.* page 129

¹⁴⁹ GF Frosio, *‘From horizontal to vertical: an intermediary liability earthquake in Europe’*, page 565

when making choices of policy, whilst permitting legislatures to draw on lessons learned and successes experienced in other jurisdictions.

This chapter shall examine the policy motivations which have convinced the EU legislature to take the above identified stance in the DSM Directive – and assess the likelihood that such goals shall be achieved once implementation by Member States is complete. To balance this discussion, it is necessary to also consider the risks which are posed by such implementation. It is of importance to scrutinise how well the goals pursued by the Directive shall match up with the effects of implementation, and question whether the right balance has therefore been struck between the relevant categories of stakeholders.

There are several factors which lawmakers must consider when regulating this area. Suzor, Choi and Pappalardo identify ‘at least four groups of serious competing tensions that are not easily reconcilable’ – these being effective enforcement of the law, individual liberty, intermediary liberty and the substantive intellectual property rights of rightsholders.¹⁵⁰ It will become obvious throughout this chapter that these themes re-surface, both as motivations for change and also as sacrifices that may have been made by the EU legislator in pursuit of other policy objectives.

¹⁵⁰ Suzor, Choi & Pappalardo, *Moments of Flux in Intermediary Liability for Copyright Infringement in Australia*, page 144

3.1 **Policy motivations underlying the DSM Directive’s system of OCSSP copyright liability**

This chapter shall begin by examining a few key policy motivations which underly the EU legislature’s move to shift the burden of enforcement towards OCSSPs, the objective being to investigate the extent to which such goals are likely to be achieved by the DSM Directive.

3.1.1 OCSSP as an efficient enforcer of rightholders’ copyright protection

Kuczerawy notes an important trend in EU law towards ‘efficiency, understood as a speedy procedure leading to a permanent removal of illicit content’.¹⁵¹ It is on this basis that one can understand the EU legislature’s clear singling out of OCSSPs, given such parties have a certain amount of control over content shared on their platform – such control being exemplified through their ability to remove access to information available on their platform where they wish to do so. Intermediaries in general are already recognised in EU law as in many cases being ‘best placed to bring... infringing activities to an end’,¹⁵² there being an ‘inescapable bias in favour of action on the part of the host’.¹⁵³ Additionally, it is the view of certain commentators that the imposition of ‘intermediary liability’ is the ‘only effective and scalable way to regulate the actions of large numbers of people on the internet’, given intermediaries are ‘the institutions that facilitate communication’.¹⁵⁴

There is a possibility that intermediaries were previously under-used in copyright enforcement efforts online. This can first be argued on the basis that, in systems of liability which require

¹⁵¹ A Kuczerawy, ‘*Intermediary liability & freedom of expression: Recent developments in the EU Notice & action initiative*’, page 55

¹⁵² InfoSoc Directive, recital 59

¹⁵³ D M Sithigh, ‘*The fragmentation of intermediary liability in the UK*’ (2013) *Journal of Intellectual Property Law & Practice* Vol 8 No 7, page 525

¹⁵⁴ Suzor, Choi & Pappalardo, ‘*Moments of Flux in Intermediary Liability for Copyright Infringement in Australia*’, page 130

the presence of ‘knowledge’ on behalf of an intermediary to be considered liable, there are two methods by which an intermediary can obtain such knowledge – these being their own activities or third-party notification.¹⁵⁵ By this fact, the conditions required to be fulfilled for an intermediary to benefit from the ‘safe harbour’ dissuaded intermediaries from taking any part in the policing of their service for copyright infringing activities – as such policing could give rise to the requisite knowledge to render them liable for infringing communications. This dissuasion of OCSSPs from policing their platforms can also be seen in the requirement of passivity to qualify for exemption under the E-Commerce Directive, such a condition encouraging intermediaries to take a step back from the activities of their users. One can therefore understand the intention of the EU legislator to rectify such a position by enlisting OCSSPs in the policing of copyright infringement online.

Despite such under-use of intermediaries, it does not necessarily follow that the EU legislator is justified in its adoption of Article 17 of the DSM Directive. It is understood here that an OCSSP, as a business, is not required to be protected from all risk – risk being a central part of commerce. It is on this basis that one can entertain the argument that such an intermediary ‘should be held accountable for the risks it poses to interested third parties’,¹⁵⁶ especially given the possibility that the OCSSP shall earn profit from the availability of copyright-protected content. On the above basis, issue is not taken with the responsibility of OCSSPs to aid in the enforcement efforts of rightholders. Nevertheless, it shall be questioned below whether the ‘specific liability mechanism’ introduced by Article 17(4) of the DSM Directive is a

¹⁵⁵ A Kuczerawy, *‘Intermediary liability & freedom of expression: Recent developments in the EU Notice & action initiative’*, page 48

¹⁵⁶ J van Hoboken, *‘Legal space for innovative ordering: on the need to update selection intermediary liability in the EU’*, page 65

proportionate response to the issue at hand – and indeed whether it accurately reflects the complicity of OCSSPs in infringements taking place on their platform.

It shall be argued here that the extensive requirements the ‘specific liability mechanism’ introduces for OCSSPs is disproportionate to the extent of editorial control that an OCSSP possesses over content shared on their platform. It is proposed that there is a fundamental misunderstanding of the concept of control in EU copyright law. The E-Commerce Directive equates an intermediary’s passivity (through confining its activities to the merely ‘technical, automatic and passive’) to a lack of control over the information transmitted or stored.¹⁵⁷ The CJEU takes this one step further by finding that, where an intermediary does not confine its activities to the ‘merely technical and automatic processing of the data provided by its customers’, such activities shall be active to the extent that the intermediary shall have ‘control over’ such data.¹⁵⁸ The presence of such control in the case of OCSSPs can be disputed.

The extent of an OCSSP’s control over content shared on its platform is perhaps best demonstrated by drawing an analogy with the difference between: ‘technical intermediaries’, whose business relates to the ‘provision of technical facilities for the dissemination of content’; and publishers, who have a say over the allegedly infringing material, the decision to publish it and the persons placing such material on their systems.¹⁵⁹ It is proposed here that an OCSSP is more akin to a ‘technical intermediary’, on the basis that an OCSSP provides only the facilities for the sharing of content. It should be noted in this regard that facilitation of infringement

¹⁵⁷ E-Commerce Directive, recital 42

¹⁵⁸ *L’Oreal*, paragraph 113

¹⁵⁹ R Julia-Barcelo & K J Koelman, ‘*Intermediary Liability in the E-Commerce Directive: so far so good, but it’s not enough*’ Computer Law & Security Report Volume 16, No 4 (2000), page 234

should be distinguished from causation.¹⁶⁰ Causation is present where control is had over the decision to infringe, whereas facilitation is present where control is had only over the mechanisms by which infringement is carried out. On this basis, different categories of intermediary shall exercise differing levels of control over the content they share.¹⁶¹ In this way, control is a multifaceted concept. Control over an infringement is often confused with an intermediary's power to prevent an infringement.¹⁶² The extent of control an OCSSP has is limited to merely removing the relevant content. Additionally, even this 'control' is limited – given an OCSSP shall *de facto* be required to use filtering technology across their platform, as without such technology an OCSSP would find themselves unable to keep up with the number of alleged infringements across their platform

The DSM Directive confuses the ability of an intermediary to hinder infringement with an ability to control, such as to justify the imposition of liability on OCSSPs.¹⁶³ The situation of an OCSSP, it is proposed here, is much like the owner of a wall on which graffiti has been performed¹⁶⁴ – duties on such an owner to pre-empt such graffiti, or to remove such graffiti immediately once it has been performed appearing disproportionate.

Indeed, the CJEU has also previously considered the burden of implementing filtering technologies – finding that a requirement for a hosting provider to introduce such a system would not represent a fair balance between protection of rightholders' intellectual property and

¹⁶⁰ K Pappalardo, 'Duty and Control in Intermediary Copyright Liability: An Australian Perspective', page 255

¹⁶¹ J van Hoboken, 'Legal space for innovative ordering: on the need to update selection intermediary liability in the EU', page 64

¹⁶² K Pappalardo, 'Duty and Control in Intermediary Copyright Liability: An Australian Perspective', pages 244 and 249

¹⁶³ *Ibid.* page 250

¹⁶⁴ Such a comparison was similarly drawn by Eady J, as referred to in D M Sithigh, 'The fragmentation of intermediary liability in the UK', page 526

the freedom to conduct business enjoyed by operators of hosting service providers.¹⁶⁵ This would result in a situation in which the DSM Directive does not adhere to the principle of proportionality which it expressly recognizes as relevant.¹⁶⁶ A related point here is that requiring OCSSPs to introduce a ‘complicated, costly, permanent system at its own expense’¹⁶⁷ would harm competition in this area, given potentially only the large OCSSPs would be able to comply with its obligations¹⁶⁸ and thereby a barrier to entry would be produced – potentially even where the burden of the ‘specific liability mechanism’ is reduced for ‘new’ OCSSPs.¹⁶⁹

On the basis of the above issues, the DSM Directive’s system of conditions for exemption from liability requires to be overhauled, as there is no practical way in which OCSSPs can comply with such conditions without the use of filtering technologies – and such filtering technologies are disproportionate to the level of control an OCSSP has over its users. One can understand the EU legislator’s keenness to utilise OCSSPs in their enforcement efforts, however the pursuit of an efficient remedy to the problem of copyright infringement online should not be prioritised over ensuring the remedy is proportionate to this aim.

3.1.2 The ‘value gap’

A key theme in the policy debate which led to Article 17 of the DSM Directive is the proposal that the present state of OCSSP liability under the EU copyright *acquis* has produced a ‘value gap’. This argument has two elements to it. Firstly, it is suggested that OCSSPs have been able to profit from the making available of copyright-protected works without rightholder

¹⁶⁵ *SABAM*, paragraph 47

¹⁶⁶ DSM Directive, Article 17(5)

¹⁶⁷ *SABAM*, paragraph 46

¹⁶⁸ J van Hoboken, ‘*Legal space for innovative ordering: on the need to update selection intermediary liability in the EU*’, page 67

¹⁶⁹ DSM Directive, Article 17(6)

authorisation. Secondly, it is argued that – as a result of OCSSPs enabling widescale infringement of rightholders’ exclusive right to authorise/prohibit the communication to the public of their copyright-protected works – rightholders have been forced to shoulder additional burdens in the enforcement of their copyright exclusive rights, and have also sustained damage to the ‘value’ of their copyright protection (i.e. their ability to earn revenue by monetizing the authorisations for communication of their work) given the alternative methods of accessing their work through non-authorized communications via OCSSP platforms.

It is useful to note, at this point, that several justificatory theories support the extensive scope of exclusive rights afforded to copyright holders. The task here is not to explore the justifications for copyright protection in any detail. However, when discussing the ‘value gap’ narrative, it is useful to note that a great many theoretical justifications for copyright protection have as a key element the existence of an economic reward as incentive for creating/finishing an original work. One can see this economic perspective in several of the *instrumental* theories of copyright protection – which view affording copyright protection to works as a means to an end. Of note in this discussion are those instrumental theories pushed by individuals that take a ‘law and economics’ stance, who view copyright as a ‘necessary evil’ to avoid a ‘tragedy of the commons’.¹⁷⁰ This ‘tragedy of the commons’ is an instance in which an idea is overused owing to what are termed ‘free riders’ overly exploiting the work on the market so as to reduce its value.¹⁷¹ Where copyright protection is provided, the law operates to create an ‘artificial scarcity’¹⁷² such as to ‘correct market failure (i.e. to prevent free-riding and undersupply) with

¹⁷⁰ MA Lemley, ‘*Ex Ante versus Ex Post Justifications for Intellectual Property*’ (2004) 71 *The University of Chicago Law Review*, page 130-131

¹⁷¹ *Ibid.*

¹⁷² A Rahmatian, ‘*Copyright and Creativity*’ (Northampton 2011), page 19

the purpose of encouraging further creation and dissemination of valuable works of the arts and culture'.¹⁷³

In the digital environment, there are those who suggest OCSSPs and their users constitute such free riders – profiting from authors works such as to reduce the reward authors receive (an ‘appropriate reward’ being deemed a necessity by the EU legislator).¹⁷⁴ Those who would argue this also propose that the law is not operating to create the above mentioned ‘artificial scarcity’ which is necessary to correct the market failure. It is on this foundation that the ‘value gap’ narrative rests.

It is therefore argued by those promoting this ‘value gap’ narrative that, so as to remedy this imbalance, OCSSPs should take on more responsibility of enforcement financially, and the revenues OCSSPs earn from copyright-protected content should (at least to some extent) be shared with rightholders. It should be stated at this point that reliance on the profit-intention of OCSSPs should not alone justify the imposition of steep conditions to avoid liability, other commentators having similarly concluded that arguments relying on the profit-motive of intermediaries should not be used too readily – especially given intermediaries generally ‘provide legitimate services’.¹⁷⁵ Frosio summarised the ‘value gap’ line of argument as pushing ‘modifications in the balance of copyright in favour of rightholders’, with the aim of achieving ‘a fairer allocation of value generated by the distribution of copyright-protected content by online platforms’.¹⁷⁶

¹⁷³ N Kawashima, ‘*The rise of ‘user creativity’ – Web 2.0 and a new challenge for copyright law and cultural policy*’, page 339

¹⁷⁴ InfoSoc Directive, recital 10

¹⁷⁵ J van Hoboken, ‘*Legal space for innovative ordering: on the need to update selection intermediary liability in the EU*’, page 64

¹⁷⁶ GF Frosio, ‘*From horizontal to vertical: an intermediary liability earthquake in Europe*’, page 567

The ‘value gap’ narrative is not without its critics. Frosio in particular has forcefully accused the trend as echoing ‘a discourse almost exclusively fabricated by the music and entertainment industry’,¹⁷⁷ certain commentators having critiqued proponents of the ‘value gap’ narrative as lacking empirical data which resoundingly supports their point of view.¹⁷⁸ In particular there has been doubt raised as to whether content industries have suffered substantial financial harm.¹⁷⁹ Additionally it has been questioned whether adequate attention has been paid to contrary evidence of positive externalities of the evolution in the way content is shared on the internet.¹⁸⁰

Even when such criticisms are ignored, it is proposed here that the DSM Directive does not necessarily guarantee that this proposed ‘value gap’ shall be remedied. The closing of this ‘value gap’ is predicated on the assumption that *de facto* requiring OCSSPs to filter their platform shall eradicate infringement. It is foreseeable that this outcome may not occur. For example, infringement could be pushed to smaller scale ‘rogue platforms’ whilst OCSSPs become efficient at avoiding liability through implementation of filtering technologies. In this sense an analogy to the Lernaean Hydra could be drawn – infringement via OCSSPs being halted, but new facilitators arising to fill the demand for access to copyright-protected content that filtering on OCSSPs creates. In such a scenario there would be ‘few intermediaries left to

¹⁷⁷ *Ibid.* page 568

¹⁷⁸ *Ibid.* in addition to Communia Association, ‘Updated position paper: Article 13 remains a terrible idea and needs to be deleted’, available at: <https://www.communia-association.org/2017/09/14/updated-position-paper-article-13-remains-terrible-idea-needs-deleted/>

¹⁷⁹ CM Swartout, ‘*Toward a Regulatory Model of Internet Intermediary Liability: File-Sharing and Copyright Enforcement*’, page 502

¹⁸⁰ GF Frosio, ‘*From horizontal to vertical: an intermediary liability earthquake in Europe*’, page 568

be sued’, whilst infringement would remain relatively widespread leaving rightholders with ‘few avenues for enforcement’.¹⁸¹

The author of this paper contends that rightholders shall only truly be satisfied that the ‘value gap’ has been filled by implementation of Article 17 if the burdensome conditions for exemption from infringement encourage OCSSPs to – when faced with the choice to either filter or license – attempt to obtain an authorisation from the rightholder. It is submitted this shall likely occur more often than at present, as where intermediaries are in a weaker legal position, they shall have a greater incentive to conclude such licenses.¹⁸² The extent that this outcome shall be produced remains to be seen, it being possible that OCSSPs shall instead invest in effective filtering technology.

3.2 **The risks posed by implementation of Article 17**

This paper shall now investigate the key risks which implementation of Article 17 of the DSM Directive poses – the overarching concern of this discussion being the increased emphasis on private enforcement of copyright law which the DSM Directive produces, and how this will impact on the various stakeholders.

3.2.1 Private enforcement of copyright law

It is unmistakable that the objective of Article 17 of the DSM Directive is to increase the role of OCSSPs in policing their platforms for infringing communications of copyright-protected content. This marks EU law following the ‘worrying’ trend internationally towards ‘unduly

¹⁸¹ Suzor, Choi & Pappalardo, ‘*Moments of Flux in Intermediary Liability for Copyright Infringement in Australia*’, page 131

¹⁸² *Ibid.* page 136

strengthening, through public law, the influence of private actors'.¹⁸³ Such a trend is 'worrying' for several reasons.

Firstly, criticism is rife in the academic community regarding the consequences of increasing the privatization of enforcement online – several commentators describing such a move as an 'inappropriate transfer of judicial authority to the private sector'.¹⁸⁴ This is before it is even considered that the method OCSSPs shall *de facto* be forced to utilise in order to comply with the conditions for liability exemption shall be filtering technologies.

Frosio predicts 'dire consequences' where legislatures push the 'privatization of enforcement online through algorithmic intelligence based on murky, privately enforced standards, rather than transparent legal obligations'.¹⁸⁵ Such a move has been argued to constitute the downgrading of the law 'to a second-class status, behind the "leading role" of private companies'.¹⁸⁶ The EU copyright *acquis* sets out fairly well-established tests for assessing matters of importance in adjudicating copyright law disputes, for example: originality;¹⁸⁷ the criteria for benefitting from exceptions and limitations to rightholders' exclusive rights.¹⁸⁸ This can be contrasted with algorithmic enforcement which, as other commentators have noted, gives rise to 'concerns related to transparency'.¹⁸⁹ The private nature of such methods 'tends to mean

¹⁸³ *Ibid.* page 130

¹⁸⁴ A Kuczerawy, 'Intermediary liability & freedom of expression: Recent developments in the EU Notice & action initiative', page 49

¹⁸⁵ GF Frosio, 'From horizontal to vertical: an intermediary liability earthquake in Europe', page 566

¹⁸⁶ *Ibid.*

¹⁸⁷ Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* (2009) ECR I-6569

¹⁸⁸ For example: Case C-201/13 *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others* ECLI:EU:C:2014:2132

¹⁸⁹ Suzor, Choi & Pappalardo, 'Moments of Flux in Intermediary Liability for Copyright Infringement in Australia', page 135

that they are shrouded in secrecy, especially as to the specific processes used for the collection and evaluation of data against users'.¹⁹⁰

Additionally, the 'most fundamental argument against automated preventive filtering' is that such technology is 'imperfect', producing both 'false positives and negatives' due to the complexity of judging issues of copyright law.¹⁹¹ Importantly, '(n)ot every unsanctioned use of someone else's content' constitutes an infringement.¹⁹² For example, it is likely that such technology will be unable to take into account the exceptions and limitations to rightholders' exclusive rights (harmonised to some extent under EU law)¹⁹³ – and therefore 'the legal use of protected material will be constrained'.¹⁹⁴ Indeed, the CJEU itself has noted that a system of filtering 'might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications'.¹⁹⁵ This is despite the EU legislators evident preference for ensuring the functioning of exceptions and limitations to copyright protection – this being clear from the DSM Directive repeatedly stating that Article 17 should not hamper the ability of users to benefit from the exceptions and limitations (in other words 'legitimate uses')¹⁹⁶ provided for under domestic law.¹⁹⁷ Indeed, the DSM Directive even promotes certain exceptions and limitations from being "optional" for

¹⁹⁰ *Ibid.*

¹⁹¹ J van Hoboken, '*Legal space for innovative ordering: on the need to update selection intermediary liability in the EU*', page 66

¹⁹² Communia Association, 'Updated position paper: Article 13 remains a terrible idea and needs to be deleted'

¹⁹³ InfoSoc Directive, Article 5

¹⁹⁴ Communia Association, 'Updated position paper: Article 13 remains a terrible idea and needs to be deleted'

¹⁹⁵ *SABAM*, paragraph 50

¹⁹⁶ DSM Directive, Article 17(7+9)

¹⁹⁷ *Ibid.* recital 61, recital 66, recital 70, Article 17(7), Article 17(9)

Member States to incorporate into their domestic law, to exceptions and limitations which must be available under national copyright law.¹⁹⁸

To balance the above criticism of algorithmic enforcement, it can be noted that the DSM Directive provides that decisions to disable access to or remove uploaded content ‘shall be subject to human review’.¹⁹⁹ However, this only exposes a further flaw in the system of private copyright enforcement – given an OCSSP when conducting such human review, and therefore adjudicating whether or not to take down content, shall be a ‘judge in their own cause’.²⁰⁰ A conflict of interest can clearly be identified, this tension arising from the choice between either complying with the requirement to expeditiously remove content and prevent its future availability on the platform, or to run the risk of liability for such availability. Given the lack of accountability of OCSSPs in such scenarios,²⁰¹ in most cases the ‘predictable result’²⁰² will be that the sensible OCSSP (who by definition pursues their activities ‘with the purpose of obtaining profit therefrom’)²⁰³ will ‘enforce the law in a way that errs on the side of over-enforcement’²⁰⁴ so as avoid the risk of liability.

Even if one were able to guarantee OCSSPs would not take into account their own vested interest in avoiding liability, in many cases such OCSSPs shall be ill-equipped to deal with issues arising in copyright infringement disputes which even courts have difficulty

¹⁹⁸ *Ibid.* Article 17(7)

¹⁹⁹ *Ibid.* Article 17(9)

²⁰⁰ A Kuczerawy, ‘*Intermediary liability & freedom of expression: Recent developments in the EU Notice & action initiative*’, page 48

²⁰¹ GF Frosio, ‘*From horizontal to vertical: an intermediary liability earthquake in Europe*’, page 574

²⁰² Suzor, Choi & Pappalardo, ‘*Moments of Flux in Intermediary Liability for Copyright Infringement in Australia*’, page 144

²⁰³ DSM Directive, recital 62

²⁰⁴ Suzor, Choi & Pappalardo, ‘*Moments of Flux in Intermediary Liability for Copyright Infringement in Australia*’, page 144

adjudicating.²⁰⁵ Indeed, passing responsibility to OCSSPs is likely a poor move for the functioning of the rule of law given intermediaries, ‘as private providers of technical facilities, do not have the skills, knowledge or personnel necessary to evaluate whether any particular material among the millions (perhaps billions) of bytes flowing over their facilities is infringing’.²⁰⁶ Indeed, it can be predicted that in the vast majority of cases the decision shall likely be left to the filtering technology itself – ‘human review’ being a murky standard not requiring the relevant human to be particularly knowledgeable regarding the intricacies of copyright law. It can therefore be expected that the system of copyright liability introduced by Article 17 shall encourage the ‘virtually automatic and systematic removal by intermediaries of material from the public domain’.²⁰⁷

The result of the above described attitude that shall be held by OCSSPs is that rightholders shall possess a great deal of power due to the weight that their accusation of infringement shall be given. Naturally, it can be predicted that certain rightholders will abuse the system by sending unwarranted abusive notifications of infringement.²⁰⁸ This risk of an increase in ‘fictitious victims’²⁰⁹ can be balanced by the DSM Directive’s stated requirement that a rightholder must ‘duly justify the reasons for their requests’ to have content removed.²¹⁰ Nevertheless, it can be expected that an OCSSP may well comply with such a notice without too great a level of inspection as to its validity due to the motivation to avoid liability at all costs. In any case it is not provided that a rightholder shall face any negative repercussions for sending such an abusive

²⁰⁵ R Julia-Barcelo & K J Koelman, ‘*Intermediary Liability in the E-Commerce Directive: so far so good, but it’s not enough*’, page 233

²⁰⁶ *Ibid.* page 234

²⁰⁷ *Ibid.*

²⁰⁸ A Kuczerawy, ‘*Intermediary liability & freedom of expression: Recent developments in the EU Notice & action initiative*’, page 52

²⁰⁹ *Ibid.* page 49

²¹⁰ DSM Directive, Article 17(9)

notification. Kuczerawy writes persuasively that a notification procedure instigated by a rightholder (such as that provided for by the DSM Directive) can lead to an expansion of the ability of private parties to take advantage of the system to impose a form of private censorship.²¹¹

It is proposed here that work needs to be done to address the ‘gap in knowledge’ regarding how algorithmic enforcement shall function in practice, and how OCSSPs will be affected by other parties – specifically rightholders.²¹²

3.2.2 Individuals’ freedom of expression and information

Given the above-mentioned likelihood that OCSSPs will err on the side of caution when deciding whether to take down content, the following paragraphs shall investigate the potential for internet users’ rights to be infringed – specifically users’ fundamental right to freedom of expression and information. A significant point of criticism in academic circles during the negotiation of the DSM Directive was that the EU legislature had rooted most of the debate in the conflict between intermediaries and rightholders, as is often the case internationally.²¹³

Where such prioritisation takes place, it is frequently the case that the interests of internet users are not given adequate attention.²¹⁴

The most obvious human right which may be interfered with by Article 17 of the DSM Directive is individuals’ right to receive and impart information and ideas (protected under various human

²¹¹ A Kuczerawy, ‘*Intermediary liability & freedom of expression: Recent developments in the EU Notice & action initiative*’, page 48

²¹² Suzor, Choi & Pappalardo, ‘*Moments of Flux in Intermediary Liability for Copyright Infringement in Australia*’, page 145

²¹³ *Ibid.* page 144

²¹⁴ *Ibid.*

rights treaties – important in the EU context being the Charter of Fundamental Rights of the European Union).²¹⁵ The concern here is that the exercise of this right is predicated upon the ability of users to legitimately upload, share and access in a manner that does not infringe rightholders’ exclusive rights – this ‘at least’ including communications of material in the public domain, material subject to an (express or implied) licence and material covered by exceptions/limitations available under national law²¹⁶ (the DSM Directive itself recognising certain exceptions/limitations have importance for the protection of fundamental rights).²¹⁷

As identified previously in this paper, filtering technology is unlikely to account for such legal use – and thus OCSSPs in order to comply with the conditions for exemption from liability may well take down legally posted content without much analysis of the extent that it infringes the rightholder’s copyright protection. A number of authors have noted that the DSM Directive ‘incentivises over-compliance’ by OCSSPs, the natural result of such encouragement²¹⁸ being ‘interference with fundamental human rights, specifically freedom of expression’.²¹⁹ The above runs contrary to the DSM Directive’s statement that Article 17 ‘shall in no way affect legitimate uses, such as uses under exceptions or limitations provided for in Union law’.²²⁰ The possibility that freedom of expression could be interfered with ‘should weigh heavily’ when deciding upon the liability of intermediaries.²²¹ This paper now moves to discuss whether the correct balance

²¹⁵ Charter of Fundamental Rights of the European Union (2000/C 364/01) (CFREU), Article 11

²¹⁶ JP Quintais et al, ‘*Safeguarding User Freedoms: Recommendations from European Academics*’ (November 2019), page 2

²¹⁷ DSM Directive, recital 70

²¹⁸ R Julia-Barcelo & K J Koelman, ‘*Intermediary Liability in the E-Commerce Directive: so far so good, but it’s not enough*’, page 234

²¹⁹ A Kuczerawy, ‘*Intermediary liability & freedom of expression: Recent developments in the EU Notice & action initiative*’, page 49

²²⁰ DSM Directive, Article 17(9)

²²¹ J van Hoboken, ‘*Legal space for innovative ordering: on the need to update selection intermediary liability in the EU*’, page 67

has been struck by Article 17, it being a clear goal of the DSM Directive to strike a balance between freedom of expression and the right to intellectual property.²²²

As identified above, the DSM Directive system's *de facto* requirement of OCSSPs to monitor and filter their platform for specific content produces an evident clash between two human rights. The conflict arises between the rightholder's right to protection of their intellectual property²²³ and the user's right to freedom of expression.²²⁴ It is worthy of note that a rightholder's right to protection of their intellectual property is not 'inviolable' – and thus does not have to be 'absolutely protected'.²²⁵ Similarly, a user's right to freedom of expression may also be restricted where 'prescribed by law' and as 'necessary in a democratic society... for the protection of the... rights of others'²²⁶ – restrictions on this right having to be proportionate to the aim sought to be achieved.²²⁷ It is on these grounds that the Republic of Poland has sought the annulment of Article 17(4)(b) and Article 17(4)(c) of the DSM Directive (the latter only *in fine*, requesting only the removal of the words 'and made best efforts to prevent their future uploads in accordance with point (b)') – or Article 17 in its entirety should the above not be possible – by bringing an action to the CJEU.²²⁸ In essence this would reduce the conditions for exemption from liability to making 'best efforts to obtain an authorisation' and acting 'expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject

²²² DSM Directive, recital 70

²²³ CFREU, Article 17.2

²²⁴ CFREU, Article 17.2

²²⁵ *SABAM* paragraph 41

²²⁶ Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), Explanation on Article 11 – Freedom of Expression and Information

²²⁷ A Kuczerawy, '*Intermediary liability & freedom of expression: Recent developments in the EU Notice & action initiative*', page 55

²²⁸ Case C-401/19 *Republic of Poland v European Parliament and Council of the European Union*

matter'.²²⁹ This would reduce the platform-wide notice-and-staydown DSM system to a mere notice-and-takedown system like that which exists under Article 14 of the E-Commerce Directive, along with a requirement for an OCSSP to make 'best efforts to obtain an authorisation' from the rightholder for the communication of the relevant work on the OCSSP platform.²³⁰ It is in this sense that one commentator concludes Poland does not necessarily oppose copyright reform 'as such', but only the DSM Directive's 'excesses'.²³¹

It is argued by the Republic of Poland that the contested provisions 'make it necessary for the service providers – in order to avoid liability – to carry out prior automatic verification (filtering) of content uploaded online by users, and therefore make it necessary to introduce preventive control mechanisms'.²³² Such mechanisms undermine 'the right to freedom of expression and information and do not comply with the requirement that limitations imposed on that right be proportional and necessary'.²³³ Targosz writes that this action shall probably 'come down to the principle of proportionality'.²³⁴ This does not necessarily look promising for the defendants in the action (the European Parliament and Council of the European Union) given the CJEU has previously found a system of filtering 'would not be respecting the requirement that a fair balance be struck between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information'.²³⁵ Thus a proportionality analysis may well result in the platform-wide system of notice-and-staydown being found disproportionate to the

²²⁹ DSM Directive, Articles 17(4)(a+c)

²³⁰ *Ibid.* Article 17(4)(a)

²³¹ T Targosz, 'Poland's Challenge to the DSM Directive – and the Battle Rages On...', available at <http://copyrightblog.kluweriplaw.com/2019/06/10/polands-challenge-to-the-dsm-directive-and-the-battle-rages-on/>

²³² Case C-401/19 *Republic of Poland v European Parliament and Council of the European Union*

²³³ *Ibid.*

²³⁴ T Targosz, 'Poland's Challenge to the DSM Directive – and the Battle Rages On...'

²³⁵ *SABAM*, paragraph 51

legitimate aim pursued (the protection of rightholders' fundamental right to protection of their intellectual property).

4 **CHAPTER THREE – An analysis of the legal space available to remedy the risks implementation of Article 17 of the DSM Directive poses**

This chapter seeks to undertake an analysis of the scope Article 17 of the DSM Directive provides for Member States to alleviate, through their implementation of the Directive, the risks identified in the previous chapter. Indeed – as much as the EU legislature may seek harmonisation of the copyright laws of the EU Member States – a great deal of the effectiveness of Article 17 depends on the steps Member States take to implement the provision. Whilst the UK has already confirmed it has no plans to transpose the DSM Directive,²³⁶ a great deal of focus exists in the remaining European Union Member States as to how national legislatures shall choose to implement Article 17.

Whilst Article 17 is fairly exact in its provisions discussed thus far, there do exist certain gaps, which Member States may utilise in order to remedy the defects which this paper has highlighted. This chapter seeks to explore these, both in their doctrinal availability as well as their ability to simultaneously comply with the other policy objectives valued by the EU legislator.

4.1 **Removal of the *de facto* requirement to filter**

Regarding the risks posed to OCSSPs, it is only through the removal of the *de facto* requirement for an OCSSP to use filtering technology that the author of this paper foresees the DSM Directive ‘specific liability mechanism’ being proportionate to the policy objectives pursued.

²³⁶ BBC News, ‘Article 13: UK will not implement EU copyright law’, available at: <https://www.bbc.co.uk/news/technology-51240785>

The key way in which this can be achieved shall be a finding by the CJEU that the *de facto* requirement for an OCSSP to filter is precluded by its being disproportionate when one considers the risk of infringement of users' fundamental right to freedom of expression and information, or the right of OCSSPs to conduct a business. Such an outcome has a very real possibility of materialising should the Republic of Poland be successful in the action it has brought to the CJEU.

Much the same could be achieved at the domestic level where a Member State's national law provides that the requirement of OCSSPs to make '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 rightholders have provided the service providers with the relevant and necessary information'²³⁷ does not require an OCSSP to utilise filtering technology, or should a national court reach the same conclusion.

In either scenario (unless the CJEU finds only an annulment of Article 17 in its entirety would ensure a disproportionate infringement of the fundamental rights at stake) the platform-wide system of notice-and-staydown envisioned by the DSM Directive would be reduced to a *de facto* system of notice-and-takedown relating to individual infringements with an added requirement that an OCSSP make 'best efforts' to obtain rightholder authorisation.²³⁸ It should, however, be noted that a finding by the CJEU that Article 17 is disproportionate should be favoured given this would ensure proportionality in every EU Member State.

²³⁷ DSM Directive, Article 17(4)(b)

²³⁸ *Ibid.* Article 17(4)(a)

The author of this paper finds the above an appropriate fix to the disproportionate ‘specific liability mechanism’. The resulting notice-and-takedown system under the DSM Directive would better reflect the state of knowledge and control that an OCSSP has because, given an OCSSP lacks editorial control, such intermediaries can ‘only foresee damage in general’ until put on notice regarding individual infringements.²³⁹ Meanwhile, the ‘value gap’ would to some extent be addressed by a requirement that such OCSSPs make ‘best efforts’ to obtain rightholder authorisation in order to avoid liability²⁴⁰ – this putting OCSSPs in a weaker legal position than a purely notice-and-takedown system, and thus likely encouraging OCSSPs to obtain authorisation on a greater number of occasions.²⁴¹ Such an authorisation would allow for rightholders to earn revenue from the availability of their content on OCSSP platforms. Where an OCSSP does not make such ‘best efforts’, rightholders would be able to retrieve compensation from the OCSSP for the damage caused by the availability of their copyright-protected content. In either case the ‘value gap’ would to some extent be addressed.

4.2 **The Article 17(9) ‘effective and expeditious complaint and redress mechanism’**

Implementing national legislatures are required by Article 17(9) of the DSM Directive to ensure OCSSPs put in place an ‘effective and expeditious complaint and redress mechanism’ for users of their service to utilise ‘in the event of disputes over the disabling of access to, or the removal of, works or other subject matter uploaded by them’.²⁴² A key concern in chapter two of this paper was that the procedure of platform-wide notice-and-staydown could produce a situation in which users’ interests are not adequately considered, and that rightholders are placed in a

²³⁹ J van Hoboken, ‘*Legal space for innovative ordering: on the need to update selection intermediary liability in the EU*’, page 65

²⁴⁰ DSM Directive, Article 17(4)(a)

²⁴¹ Suzor, Choi & Pappalardo, ‘*Moments of Flux in Intermediary Liability for Copyright Infringement in Australia*’, page 136

²⁴² DSM Directive, Article 17(9)

position of disproportionate power. Key in negating the discussed risks shall be ensuring the procedure for disputes regarding allegedly infringing communications allows for sufficient safeguards for users and introduces appropriate burdens on rightholders to counterbalance their now privileged position. The author of this paper views the discretion available to implementing national legislatures under Article 17(9) as a key method by which the possibility of widespread violation of users' rights as a result of Article 17 of the DSM Directive can be mitigated.

Article 17(9) provides that the 'effective and expeditious complaint and redress mechanism' must begin with a request from a rightholder 'to have access to their specific works or other subject matter disabled or to have those works or other subject matter removed', such requests being required to be duly justified by a rightholder.²⁴³

What shall amount to rightholder justification is slightly opaque, a specific standard not being set by the DSM Directive. It is suggested here that, in order to prevent abusive notifications by fictitious victims this should at least require the rightholder to identify the work, justify their conclusion that such work attracts copyright protection and describe how they believe such protection to have been infringed upon. For a complaint to proceed, and indeed certainly before a user's content is removed from an OCSSPs platform, some justification must clearly be provided by the rightholder – it being stated by one commentator that complainants 'should... be held to an appropriately high standard of proof, to counter the risks of harm to society that an uncertain and easy-to-establish intermediary liability doctrine can pose'.²⁴⁴ A point of particular critique regarding comparative schemes has been that a shift in the burden of proof has been effected 'from the copyright owner' (to prove an infringement has taken place) 'to the

²⁴³ *Ibid.* Article 17(9)

²⁴⁴ K Pappalardo, 'Duty and Control in Intermediary Copyright Liability: An Australian Perspective', page 258

accused user' (to prove they have not infringed the rightholder's exclusive right).²⁴⁵ The human rights at stake demand that one party's interests do not simply trump the other's, and therefore that the rightholder is required to provide sufficient justification.

The rightholder's request must then be processed 'without undue delay', and the decision taken at the conclusion of such processing must be 'subject to human review'.²⁴⁶ Extreme care must be taken with this requirement for 'human review', this standard being extremely flexible as to what it could require of OCSSPs. It can be presumed that the profit motivated OCSSP will not wish to allocate excessive expenditure on legal advice for each individual case identified by its filtering technology. The human allocated to review decisions shall therefore be unlikely to possess a great deal of expertise regarding the correct application of copyright law. Other than where some form of copyright law training is required, it is difficult to imagine how such human review shall contribute significantly as a safeguard against the infringement of users' fundamental rights.

Subsequent to a successful request by a rightholder to have access disabled to their copyright-protected works, or for such works to be removed, Member States are required to provide that OCSSPs put in place 'an effective and expeditious complaint and redress mechanism that is available to users of their services'.²⁴⁷ This process provides scope for Member States and OCSSPs to ensure users have 'meaningful ways to contest decisions regarding or actions against their uploaded content'.²⁴⁸

²⁴⁵ Suzor, Choi & Pappalardo, '*Moments of Flux in Intermediary Liability for Copyright Infringement in Australia*', page 135

²⁴⁶ DSM Directive, Article 17(9)

²⁴⁷ *Ibid.*

²⁴⁸ Communia Association, 'Updated position paper: Article 13 remains a terrible idea and needs to be deleted'

This paper proposes such parties (when crafting the required complaint and redress mechanism) should borrow from some of the concepts used in the USA's Digital Millennium Copyright Act (DMCA). The DMCA gives recognition to the fundamental rights at stake by giving users the ability to issue 'counter-notices' in a 'put-back'²⁴⁹ notice stage of the procedure – this allowing the user to issue the OCSSP with a 'counter-notice' by which they object to their content being removed or access to it being disabled. In order for an intermediary to avoid liability towards the user, they must restore access to the content once receiving such a notice. Such a 'counter-notice' stage appears attractive as it allows the user to have a 'right to respond'.²⁵⁰ Additionally, to address the problem of fictitious claims of infringement by rightholders and *mala fide* 'counter-notices', the DMCA introduces liability for damages where such notices are issued to the relevant intermediary.

Should the rightholder still allege infringement of their exclusive right to authorise/prohibit the communication of their work, it is suggested the only available route for such a dispute to be resolved should be for the rightholder to bring the matter before a national court. It should not be forgotten that the time between conclusion of the internal OCSSP complaint and redress mechanism and the outcome of a court case (including appeals and any potential references to the CJEU) is not insignificant. It is at this point that this paper advances that rather than either party automatically enjoying priority pending the result of the court case (through the content either continuing to be available or being taken down), such issues would best be dealt with under the national law implemented in accordance with Article 8(3) InfoSoc Directive or

²⁴⁹ R Julia-Barcelo & K J Koelman, '*Intermediary Liability in the E-Commerce Directive: so far so good, but it's not enough*', page 235

²⁵⁰ A Kuczerawy, '*Intermediary liability & freedom of expression: Recent developments in the EU Notice & action initiative*', page 51

Article 18(1) E-Commerce Directive. Under these provisions, rightholders may apply for injunctive relief against the OCSSP to disable access to the content uploaded by the user. It is worth pointing out, however, that – even in such injunctive actions – EU law may well contain an in-built bias towards the rightholder, given in the E-Commerce Directive provision it is stated that interim measures should be available to terminate ‘alleged infringement’.²⁵¹ Indeed, certain commentators have questioned whether such use of language is ‘merely a slip of the pen’ or rather a deliberate provision to provide for injunctions to be granted ‘even if it is unlikely that success on the merits of the case will follow’.²⁵² In order to retain a balance of the fundamental rights at stake, this paper proposes that OCSSPs and Member States must provide for a speedy process which can determine the issue of injunctive relief. However, an injunction should only be granted where the rightholder’s case has a likely chance of success.

²⁵¹ E-Commerce Directive, Article 18(3)

²⁵² R Julia-Barcelo & K J Koelman, ‘*Intermediary Liability in the E-Commerce Directive: so far so good, but it’s not enough*’, page 236

5 CONCLUSION

It can generally be said that the application of the traditional copyright law paradigm to the world of digital content has been ‘an utter disaster’,²⁵³ requiring flexible application of the old law to modern methods of communication and access to content online. In the EU, there has been increasing complexity regarding the regulation of secondary liability – the DSM Directive representing the EU legislator attempting to ‘reclaim the lead’ over the courts in legislating for this area.²⁵⁴

This paper concludes that Article 17 largely serves to clarify the position of OCSSPs in relation to their ability to infringe rightholders’ exclusive right to authorise/prohibit the making available of their copyright-protected works, and their inability to seek exemption from liability for such infringements under the E-Commerce Directive’s ‘safe harbour’. The largest doctrinal change which has been identified is that an OCSSP shall be able to benefit from a ‘specific liability mechanism’ which they may utilise to avoid liability for copyright infringements occurring on their platform. However, the result of this system is that *de facto* intermediaries who meet the definition of an OCSSP shall be required to filter their platform for content for which they are provided with the ‘relevant and necessary information’ unless they wish to risk liability for such infringement.

The above produces a situation in which several unfortunate consequences may arise due to increased private enforcement. Indeed, the risks of infringement of certain fundamental rights (including an OCSSP’s freedom to conduct business, and users’ right to freedom of expression

²⁵³ CM Swartout, ‘*Toward a Regulatory Model of Internet Intermediary Liability: File-Sharing and Copyright Enforcement*’, page 504

²⁵⁴ A Ohly, ‘*The broad concept of “communication to the public” in recent CJEU judgments and the liability of intermediaries: primary, secondary or unitary liability?*’, page 674

and information) have been justified on the basis of a ‘value gap’ narrative (which has dubious empirical support for its existence) and the pursuit of efficient enforcement of copyright protection in the digital environment.

Despite these findings, it has been concluded that Article 17 of the DSM Directive allows implementing national legislatures some scope to protect OCSSPs from the disproportionate duty of care inflicted on them by Article 17, as well as there being space available to mitigate the widespread violation of users’ rights which could result from the ‘specific liability mechanism’ introduced by the DSM Directive. The preference of most states to opt for verbatim implementation of the E-Commerce Directive²⁵⁵ would be inappropriate in the case of the DSM Directive given the risks Article 17 poses. Member States should actively seek to ensure that users’ rights receive adequate attention during the ‘effective and expeditious complaint and redress mechanism’ which they are required to ensure OCSSPs put in place. Should OCSSPs promulgate a system which broadly follows the suggestions made in chapter three of this paper, it is possible a settled practice could develop which gives users’ rights the weighting they deserve.

The effects of Article 17 of the DSM Directive remain to be seen. Indeed, the discussion conducted in this paper may be for nought given the very real possibility that the CJEU shall annul those provisions of Article 17 this paper takes issue with. Should this not occur, it shall be interesting to note what effect Article 17 has on OCSSP practice in relation to copyright infringement – whether it be to invest significantly in filtering technology, or to put more resources into the licensing of content. Alternatively, it is possible the DSM Directive shall

²⁵⁵ A Kuczerawy, *‘Intermediary liability & freedom of expression: Recent developments in the EU Notice & action initiative’*, page 49

have little effect on OCSSPs given ‘Most dominant selection intermediaries are based in the United States and have adapted to the U.S. legal regime’.²⁵⁶ It is predicted that the impact of Article 17 shall become clear in the years following its implementation by Member States.

²⁵⁶ J van Hoboken, ‘*Legal space for innovative ordering: on the need to update selection intermediary liability in the EU*’ (Winter 2009) *International Journal of Communications Law and Policy* Issue 13, page 51

Table of reference

5.1 Books

B Fitzgerald & J Gilchrist, '*Copyright Perspectives: Past, Present and Prospect*' (Springer International Publishing Switzerland 2015)

T Kerikmae, '*Regulating eTechnologies in the European Union – Normative Realities and Trends*' (Springer International Publishing Switzerland 2014)

K-C Liu & R M Hilty, '*Remuneration of Copyright Owners*' (Springer-Verlag GmbH Germany 2017)

M Perry, '*Global Governance of Intellectual Property in the 21st Century – Reflecting Policy Through Change*' (Springer International Publishing Switzerland 2016)

T Pihlajarinne, J Vesala and O Honkkila, '*Online Distribution of Content in the EU*' (Edward Elgar Publishing 2019)

J Pila & P Torremans, '*European Intellectual Property*' (Oxford 2016)

A Rahmatian, '*Copyright and Creativity*', (Northampton 2011)

E Rosati, '*Copyright and the Court of Justice of the European Union*' (Oxford 2019)

J Thomson, '*Delictual Liability*' (Bloomsbury Professional Ltd 2014) 5th Edition

5.2 Journal Articles

C Angelopoulos, '*Communication to the Public and Accessory Copyright Infringement*' (2017)

The Cambridge Law Journal Volume 76 Issue 3

GF Frosio, '*From horizontal to vertical: an intermediary liability earthquake in Europe*' (2016)

Journal of Intellectual Property Law & Practice Volume 12 No 7

C R Gellis, '*2012 State of the Law Regarding Intermediary Liability for User-Generated Content*' (2012) The Business Lawyer, Volume 68, No 1 (November 2012)

C R Gellis, '*2014 State of the Law Regarding Internet Intermediary Liability for User-Generated Content*' (2014) The Business Lawyer, Volume 70, No 1 (Winter 2014-2015)

B Hanuz, '*Liability implications of extending the communication to the public right to third-party re-posting of images already freely available online with rightholder permission*' (2019)

European Intellectual Property Review

N Helberger '*Legal aspects of User Created Content*' (2009), available at <https://ssrn.com/abstract=1499333>

PB Hugenholtz & S van Velze, '*Communication to a New Public? Three Reasons why EU Copyright Law Can Do Without a "New Public"*' (2016) International Review of Intellectual Property and Competition Law Volume 47 Issue 7

R Julia-Barcelo & K J Koelman, '*Intermediary Liability in the E-Commerce Directive: so far so good, but it's not enough*' (2000) Computer Law & Security Report Volume 16, No 4

N Kawashima, '*The rise of 'user creativity' – Web 2.0 and a new challenge for copyright law and cultural policy*' (2010) *International Journal of Cultural Policy*

A Kuczerawy, '*Intermediary liability & freedom of expression: Recent developments in the EU Notice & action initiative*' (2015) *Computer Law & Security Review* 31

J Koo, '*Away we Ziggo: the latest chapter in the EU communication to the public story*' (2018) *Journal of Intellectual Property Law & Practice* Vol 13 No 7

J Koo, '*Walking Forward with backward facing feet: the CJEU decision in Reha Training and the development of the communication to the public right*' (2016) *Journal of Intellectual Property Law & Practice* Volume 11 No 10

MA Lemley, '*Ex Ante versus Ex Post Justifications for Intellectual Property*' (2004) 71 *The University of Chicago Law Review*

A Ohly, '*The broad concept of "communication to the public" in recent CJEU judgments and the liability of intermediaries: primary, secondary or unitary liability?*' (2018) *Journal of Intellectual Property Law & Practice* Vol 13 No 8

JP Quintais, '*Untangling the hyperlinking web: In search of the online right of communication to the public*' (2018) *The Journal of World Intellectual Property* Vol 21 Issue 5-6

JP Quintais, G Frosio, S van Gompel, PB Hugenholtz, M Husovec, BJ Jutte, M Senftleben, ‘*Safeguarding User Freedoms: Recommendations from European Academics*’ (November 2019), available at: <https://ssrn.com/abstract=3484968>

E Rosati, ‘*Copyright in the EU: In Search of (In)Flexibilities*’, forthcoming in *Journal of Intellectual Property Law & Practice*

D M Sithigh, ‘*The fragmentation of intermediary liability in the UK*’ (2013) *Journal of Intellectual Property Law & Practice* Vol 8 No 7

W Smith & P Sherrell, Bird & Bird LLP ‘*Communication to the Public: the Only Right Worth Talking About?*’ in Global Legal Group ‘*The International Comparative Legal Guide to: Copyright 2018*’ 4th edition

CM Swartout, ‘*Toward a Regulatory Model of Internet Intermediary Liability: File-Sharing and Copyright Enforcement*’ (Spring 2011) *Northwestern Journal of International Law & Business* Vol 31 No 2

J van Hoboken, ‘*Legal space for innovative ordering: on the need to update selection intermediary liability in the EU*’ (Winter 2009) *International Journal of Communications Law and Policy* Issue 13, page 49-69

5.3 Conventions/EU Legislation

Berne Convention for the Protection of Literary and Artistic Works as amended 28th September 1979

Charter of Fundamental Rights of the European Union (2000/C 364/01)

European Convention on Human Rights

Explanations relating to the Charter of Fundamental Rights (2007/C 303/02)

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 (E-Commerce 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 (InfoSoc 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 (DSM Directive)

Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM/2016/0593 final

WIPO Copyright Treaty, 20th December 1996

5.4 Cases

Case C-70/10 *Scarlet Extended SA v SABAM* (2011) ECLI:EU:C:2011:771

Case C-160/15 *GS Media BV v Sanoma Media Netherlands BV* (2016) ECLI:EU:C:2016:644
(*GS Media*)

Case C-161/17 Opinion of Advocate General Campos Sanchez-Bordona ECLI:EU:C:2018:279

Case C-161/17 *Land Nordrhein-Westfalen v Dirk Renckhoff* (2018) ECLI:EU:C:2018:634
(*Renckhoff*)

Cases C-236/08 to C-238/08 *Google France SARL and Google Inc. v Louis Vuitton Malletier SA (Google France)* (2010) ECLI:EU:C:2010:159

Case C-279/13 *C More Entertainment AB v Linus Sandberg* (2015) ECLI:EU:C:2015:199

Case C-283/10 *Circul Globus Bucuresti v Uniunea Compozitorilor si Muzicologilor din Romania – Asociatia pentru Drepturi de Autor* (2011) ECLI:EU:C:2011:772

Case C-306/05 *SGAE v Rafael Hoteles SA* (2006) ECLI:EU:C:2006:764

Case C-324/09 *L’Oreal SA and Others v eBay International AG and Others* (2011)
ECLI:EU:C:2011:474 (*L’Oreal*)

Case C-325/14 *SBS Belgium v SABAM* (2015) ECLI:EU:C:2015:764

Case C-348/13 *BestWater International GmbH v Michael Mebes and Stefan Potsch* (2014)
ECLI:EU:C:2014:2315

Case C-360/10 *SABAM v Netlog NV* (2012) ECLI:EU:C:2012:85 (*SABAM*)

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

Case C-403/08 *Football Association Premier League Ltd and Others v QC Leisure and Others*
(2011) ECLI:EU:C:2011:631

Case C-466/12 *Svensson v Retriever Sverige AB* (2014) ECLI:EU:C:2014:76

Case C-527/15 *Stichting Brein v Filmspelers* (2017) ECLI:EU:C:2017:300

Case C-607/11 *ITV Broadcasting Ltd and Others v TVCatchup Ltd* (2013)
ECLI:EU:C:2013:147

Case C-610/15 *Stichting Brein v Ziggo BV* (2017) ECLI:EU:C:2017:456

Case C-682/18 *LF v Google LLC, Youtube Inc, Youtube LLC, Google Germany GmbH*

Case C-753/18 *Stim and SAMI v Fleetmanager Sweden AB and Nordisk Biluthyrning AB* (2020)
ECLI:EU:C:2020:268

5.5 Internet Articles

BBC News, 'Article 13: UK will not implement EU copyright law', available at:
<https://www.bbc.co.uk/news/technology-51240785>, accessed on 23rd March 2020

Communia Association, ‘Updated position paper: Article 13 remains a terrible idea and needs to be deleted’, available at: <https://www.communia-association.org/2017/09/14/updated-position-paper-article-13-remains-terrible-idea-needs-deleted/>, accessed on 10th March 2020

Communia Association, ‘Our Guidelines for the Implementation of the DSM Directive’, available at: <https://www.communia-association.org/2019/12/02/guidelines-implementation-dsm-directive/>, accessed on 10th March 2020

Communia Association, ‘Guidelines for the Implementation of the DSM Directive – Article 17: Use of Copyrighted Content by Online Platforms’, available at: <https://www.notion.so/Article-17-Use-of-copyrighted-content-by-online-platforms-8e9ab9aaa4ce42c2a6f35cb7415b8b83>, accessed on 10th March 2020

Communia Association, ‘Guidelines for the Implementation of the DSM Directive, available at: <https://www.notion.so/Guidelines-for-the-Implementation-of-the-DSM-Directive-45233be9c0e143338860ae5a03118bf3>, accessed on 10th March 2020

European Copyright Society ‘*Opinion on The Reference to the CJEU in Case C-466/12 Svensson*’, available at <https://europeancopyrightsocietydotorg.files.wordpress.com/2015/12/european-copyright-society-opinion-on-svensson-first-signatoriespaginatedv31.pdf>, accessed on 10th March 2020

N Mileszyk, ‘*The Copyright Directive challenged in the CJEU by Polish government*’, available at: <https://www.communia-association.org/2019/06/01/copyright-directive-challenged-cjeu-polish-government/>, accessed on 10th March 2020

M Peguera, ‘*The New Copyright Directive: Online Content-Sharing Service Providers lose eCommerce Directive immunity and are forced to monitor content uploaded by users (Article 17)*’, available at: <http://copyrightblog.kluweriplaw.com/2019/09/26/the-new-copyright-directive-online-content-sharing-service-providers-lose-e-commerce-directive-immunity-and-are-forced-to-monitor-content-uploaded-by-users-article-17/>, accessed on 10th March 2020

J P Quintais, ‘Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics’, available at: <http://copyrightblog.kluweriplaw.com/2019/11/12/safeguarding-user-freedoms-in-implementing-article-17-of-the-copyright-in-the-digital-single-market-directive-recommendations-from-european-academics/>, accessed on 10th March 2020

E Rosati, ‘The right of communication to the public... in a chart’, available at: <http://ipkitten.blogspot.com/2017/07/the-right-of-communication-to-public-in.html>, accessed on 10th March 2020

E Rosati, ‘Trying to understand Article 13’, available at: <http://ipkitten.blogspot.com/2019/03/trying-to-understand-article-13.html>, accessed on 10th March 2020

K Szkalej, ‘The New Copyright Directive: Article 17 and copyright limitations – picking two cherries and leaving the rest to spoil? Part I’, available at <http://copyrightblog.kluweriplaw.com/2019/10/29/the-new-copyright-directive-article-17->

[and-copyright-limitations-picking-two-cherries-and-leaving-the-rest-to-spoil-part-i/](#), accessed on 10th March 2020

K Szkalej, ‘The New Copyright Directive: Article 17 and copyright limitations – picking two cherries and leaving the rest to spoil? Part II’, available at <http://copyrightblog.kluweriplaw.com/2019/11/04/the-new-copyright-directive-article-17-and-copyright-limitations-picking-two-cherries-and-leaving-the-rest-to-spoil-part-ii/>, accessed on 10th March 2020

T Targosz, ‘Poland’s Challenge to the DSM Directive – and the Battle Rages On...’, available at <http://copyrightblog.kluweriplaw.com/2019/06/10/polands-challenge-to-the-dsm-directive-and-the-battle-rages-on/> accessed on 14th May 2020

J van Mil, ‘*German BGH – Does Youtube Perform Acts of Communication to the Public?*’, available at <http://copyrightblog.kluweriplaw.com/2019/01/27/german-bgh-does-youtube-perform-acts-of-communication-to-the-public/>, accessed on 10th March 2020

Wiggin, ‘*CJEU asked to rule on whether YouTube and Uploaded infringe copyright by communication to the public*’, available at: <https://www.wiggin.co.uk/insight/cjeu-asked-to-rule-on-whether-youtube-and-uploaded-infringe-copyright-by-communication-to-the-public/>, accessed on 10th March 2020