

ARTICLE 17, EU DSM DIRECTIVE
DEBATING UNSAFE HARBOURS AND CHILLING EFFECTS

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ABSTRACT

The EU Digital Single Market (“DSM”) Directive was adopted on 26th March 2019. Article 17 of the Directive seeks to modernise existing laws related to digital copyright protection and content-sharing platforms. In doing so, it disrupts the prevailing intermediary liability regime in more ways than one. It creates strict obligations on content-sharing platforms— obligations which may compel such platforms to proactively censor lawful speech. While on the one hand, Article 17 is both timely and necessary to protect the interests of right-holders, it is equally important to ensure that unintended consequences on the free flow of information and speech interests of users are prevented. To this end, this paper unpacks the ongoing debate on Article 17 and its potential impact on free speech and expression of platform users.

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INTRODUCTION

Ever since the first call was made to modernise the European Union’s (“EU”) copyright regime in 2016, there has been significant debate on the future of platform liability and information consumption, and consequent impact on users, right-owners and service providers. The text of the EU Directive on ‘Copyright and Related Rights in the Digital Single Market’ (“DSM or Directive”),¹ was adopted on 26th March 2019 in Strasbourg.² The Directive must be implemented by Member States by June 7, 2021. The DSM is a product of more than two years of multiple legislative drafts, Member State deliberations, and stakeholder consultations. A key objective of the Directive is to provide for a ‘single market’ where a free flow of goods, services, and people is possible across Member States.³ Among other things, it imposes heightened obligations on digital platforms in order to ensure transmission and hosting of lawful content. In the past few years, multiple drafts of the DSM have been scrutinised by scholars, activists and legal commentators for want of consistency with the existing human rights framework and techno-social realities of the region. Article 17 of the Directive,⁴ in particular, has witnessed significant controversy for its perceived impact on the service providers on the one hand, and unintended consequences on user rights on the other. It sheds new light on the existing uncertainty between intellectual property protection and competing fundamental rights, especially the right to free speech and expression. A plain reading of the text of the DSM makes it clear that the instrument seeks to achieve a ‘fair balance’ between interests of ‘authors and right-holders’ and those of ‘users’.⁵ However, the lack of adequate clarity on the obligations of Online Content Sharing Service Providers (“OCSSPs”) raises a few red flags with respect to the implementation of the DSM and its subsequent impact on free speech interests of individuals. Thus, while the intention of the DSM is unquestionable, certain expected measures which would be utilised by OCSSPs are debatable. It is feared that in the absence of subsequent clarity through Member State law or further judicial assessments, the central goal of the DSM—to strike a fair balance between competing fundamental rights of copyright-holders and OCSSP users— may be difficult to achieve. This paper explores the ongoing debate on the impact of Article 17 on the future of information consumption on the Internet, and its allied effects on free speech. Its scope of enquiry is limited but significant— to examine whether heightened obligations on OCSSPs to remove or

¹Directive 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, 2019 O.J. (L 130) 1. <http://www.europarl.europa.eu/news/en/press-room/20190321IPR32110/european-parliament-approves-new-copyright-rules-for-the-internet>. [Hereinafter, ‘Directive on Copyright and Related Rights in the DSM’]

²European Parliament Press Release, European Parliament approves new copyright rules for the internet, (March 26, 2019) <http://www.europarl.europa.eu/news/en/press-room/20190321IPR32110/european-parliament-approves-new-copyright-rules-for-the-internet>.

³ Directive on Copyright and Related Rights in the DSM, *supra* note 1, 1. >

⁴ *Id.* at 119, art. 17 (read with Article 2(6) and Recitals 61-71). <http://www.europarl.europa.eu/news/en/press-room/20190321IPR32110/european-parliament-approves-new-copyright-rules-for-the-internet>.

⁵ *Id.* at 93, recital 6.

restrict infringing content is likely to have an unpalatable impact on free speech interests of users. The paper recognises that in the absence of specific Member State law, these concerns may be premature. However, in order to ensure that preliminary concerns are adequately addressed by legislation or judicial clarity, it is crucial to examine their validity. To this end, the paper unpacks the debate as it has unfolded in Europe, particularly after the adoption of the DSM in 2019. At the same time, it explores possibilities which would address such concerns, i.e. EU Member State laws further clarifying the text and inserting tailored speech protections.

To this end, Part I provides a contextual background to the text of Article 17 insofar as it appears to be in conflict with the fundamental right to free speech and expression. Part II briefly examines the relationship between the right to free speech and expression of Internet users and intellectual property rights right-holders. It analyses European case law to highlight elements of Article 17 which can facilitate free speech violations. Specifically, it analyses the obligation on OCSSPs— specifically the obligation on ‘specific’ content monitoring (which would potentially involve technological tools) to identify and remove access to infringing content and its implications on the right to free speech of users.

PART I - ARTICLE 17 AND OCSSPs

Most digital or Internet-based communication platforms such as social media applications and video sharing websites do not generate their own content. They simply host and disseminate content generated by their users and third parties. In this sense, such platforms are legally treated as ‘passive’ actors. They are a medium for users to interact on, exchange information, or obtain/provide services. However, as these platforms have grown and generated significant network effects, their capability to cause harm to users through hosted content has risen exponentially. Further, the addition of new obligations of due diligence, monitoring, ensuring prompt action on content takedowns, and consumer protection has expanded the framework for liability considerably. This disrupts the traditional understanding of intermediaries. In fact, as more legal regimes are moving towards heightened obligations, particularly in the field of copyright, it becomes crucial to analyse the changing wave and its consequent effects on the future of information consumption on the Internet, and protection of allied rights of users.

Most content-based digital platforms in EU are regulated by the EU E-Commerce Directive (“**ECD**”). The ECD largely regulates ‘information society services’,⁶ which are services provided to users at a distance for some remuneration through an electronic medium. These would include a large class of digital platforms such as Internet Service Providers (“**ISPs**”), online sellers, search engines etc. Article 17 of the DSM, however,

⁶ The term ‘service’ has been defined to include Information Society Services under Directive 2015/1535, of the European Parliament and of the Council of 9 September 2019 on laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification), art. 1(b), 2015 O.J. (L 241) 1, 3.

carves out a smaller category of such ‘information society services’ called OCSSPs.⁷ OCSSPs are platforms which provide a medium for communication to the public.⁸ In order to qualify as an OCSSP, an ‘information society service’ must be involved in storage and facilitation of access to ‘large amount of copyright-protected works’ or ‘other protected subject matter’ which is uploaded by users/third parties.⁹ It must be engaged in the activity of ‘organising’ and ‘promoting’ such information for a profit.¹⁰ It should be noted that the profit-making aspect does not mean that there should be a direct monetary relationship between the user and the service provider. As a result, many social media websites, and video sharing platforms which provide ‘free’ access to users but may generate revenues through advertising may be classified as OCSSPs. Whenever an OCSSP provides public access to copyright protected content, which may be user-generated, it engages in an ‘act of communication to the public’.¹¹ In this scenario, the OCSSP cannot host or share protected content without obtaining necessary authorisation from the copyright holder through instruments such as a licensing agreement.¹² Further, Article 17 states that where an OCSSP commits an ‘act of communication to the public’ as established in the DSM itself, it shall not be protected by limitations to liability as laid down in the E-Commerce Directive¹³, what is commonly known as the ‘safe harbour’.¹⁴ Article 17 in its present form holds OCSSPs liable for hosting or transmitting infringing-content on their platform. The OCSSP must obtain requisite permission from right-holders as per the framework established under Articles 3(1) and 3(2) of the Directive 2001/29/EC (“**EU Copyright Directive**”).¹⁵ If such authorisation is not obtained and the OCSSP publishes infringing-content, it can be exempt from liability if the following conditions are met— the OCSSP must demonstrate that it has—(i) made ‘best efforts’ to obtain requisite authorisation from right-holders,¹⁶ (ii) made ‘best efforts’ to ensure that access to infringing ‘works or other subject-matter’¹⁷ is restricted or blocked based on existing information provided by right-holders, (iii) complied with a ‘high standard of professional diligence’¹⁸ while acting on the information provided,¹⁹ and (iii) promptly removed content (or restricted access)

⁷ Directive on Copyright and Related Rights in the DSM, *supra* note 1, art. 2(6).

⁸ Miquel Peguera, *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)*, KLUWER COPYRIGHT BLOG (Sept. 18, 2019), <http://copyrightblog.kluweriplaw.com/2019/09/26/the-new-copyright-directive-online-content-sharing-service-providers-lose-ecommerce-directive-immunity-and-are-forced-to-monitor-content-uploaded-by-users-article-17/?print=print>.

⁹ Directive on Copyright and Related Rights in the DSM, *supra* note 1, at 113 art. 2(6).

¹⁰ *Id.*

¹¹ *Id.*, at 119, art. 17(1).

¹² *Id.*

¹³ 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, recital 45, O.J. (L 178) 1, 6. [Hereinafter, ‘Directive on E-commerce’].

¹⁴ Directive on E-commerce. *id.* at art. 19(1).

¹⁵ Directive on Copyright and Related Rights in the DSM, *supra* note 1, at 119 art. 17(1).

¹⁶ *Id.* at 120, art. 17(4).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

upon receiving some information by the right-holder.²⁰ Further, in order to ascertain the nature and extent of compliance with these conditions, the principles of proportionality will be followed.²¹ Further, the nature and size of the service provider and its user-based, and the availability and affordability of 'suitable means' and feasibility for users will be factored in. It must be pointed out that certain OCSSPs which have a turnover that is less than a minimum prescribed limit, and which do not cater to a large number of users, enjoy certain relaxations under this provision.²² This may particularly benefit start-ups and small businesses which do not have the necessary infrastructure to comply with some of these conditions.

The provision also requires OCSSPs to ensure that the rights of content creators are adequately protected. OCSSPs must ensure that infringing content is not hosted or transmitted. Significantly, the law recognises the role played by certain content-sharing services, and seeks to do away with traditional intermediary exemptions in a bid to 'close the value-gap' between holders of the copyright and the platforms which violate such rights.²³ The term 'value-gap' refers to the use of copyright-protected content by digital service providers often in the absence of remuneration, or unfair terms of use to the right-holders.

Thus, the objective of Article 17 is both desirable and welcome, to ensure that large profit-driven platforms suitably compensate artists and creators of the content that they host. The conditions outlined in Article 17, also known as an 'ad-hoc safe harbour'²⁴ for OCSSPs are more stringent than the actual 'safe harbour' provided to 'information society services' under the ECD. This renewed framework for liability of certain 'information society services', is a culmination of several existing and proposed legislative frameworks of the EU. It must be pointed out that liability for copyright-infringing content has traditionally been higher in European intermediary liability laws. Therefore, it is no surprise that the DSM carries that position forward. In fact, a combined reading of EU jurisprudence and global legislative developments in the domain of platform liability for unlawful hosting of protected-content indicates that the traditional view of intermediaries as mere 'passive actors' has significantly evolved. Through the DSM, European legislators are hoping to 'future-proof' copyright protection in a rapidly changing digital world.²⁵ However, it is felt that the obligations imposed on

²⁰*Id.*

²¹*Id.* at art. 17(5)(a) and (b).

²²*Id.* at art. 17(6).

²³Giancarlo F. Frosio, *Reforming Intermediary Liability in the Platform Economy: A European Digital Single Market Strategy*, 112 NW. UNIV. L.R. 19, (2017), <https://osf.io/preprints/socarxiv/w7fxv/download>

²⁴Miquel 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)*, KLUWER COPYRIGHT BLOG (Sept. 26, 2019), <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/?print=print>.

²⁵Directive on Copyright and Related Rights in the DSM, *supra* note 1, recital 3, <https://eur-lex.europa.eu/eli/dir/2019/790/oj>

the OCSSPs may be difficult to implement and are ridden with ambiguity. In its present form, Article 17 creates a fair amount of legal ambiguity for OCSSPs and their liability in law. It places a significantly higher burden on platforms to ensure that third party content is lawful and not in violation of existing copyright protections. Further, the weakening of the 'safe harbour' would result in OCSSPs being liable for the smallest deviation. Perhaps, Member State laws can provide more clarity on what the triggers for liability may actually look like. At present, it is feared that OCSSPs may adopt an over-cautious approach while dealing with protected-content, or any content for that matter, on their platforms. Many commentators argue that genuine non-infringing content may be taken down from platforms if the slightest doubt over the legality of its use is raised. However, some of these concerns are already dealt with in the text of Article 17 which states that access to lawful content must not be restricted by OCSSPs. For instance, it is stated that any understanding between OCSSPs and right-holders under the DSM should not restrict users' access to content which is lawful or non-infringing.²⁶ Further, it is stated that any obligations placed on OCSSPs in this regard should not be construed as a 'general obligation to monitor'.²⁷ Further, in the event that content takedowns or restrictions to access affect a user, suitable measures for addressing complaints must be provided by the OCSSP.²⁸ Despite the measures outlined above, there is a predominant concern among scholars and legal commentators that the measures employed by OCSSPs to comply with Article 17 may have a disastrous impact on the fundamental rights of users. The success of the provision lies in its articulation by Member States and of course, its mindful implementation by OCSSPs. In fact, recently, the Republic of Poland has challenged the DSM, specifically Article 17, alleging violation of the fundamental right to speech and expression.²⁹ It has been pointed out that the obligations on OCSSPs to ensure and make 'best efforts' to restrict access to infringing content would result in the adoption of 'prior automatic verification (filtering)'³⁰ of third party content. Such tools are not proportionate to the aim that is sought to be achieved. In fact, there is a fear that such tools may be too intrusive, thereby also violating information the right to privacy of users. When Article 17 was first discussed by the European Commission (draft Article 13), there was severe criticism regarding its impact on the liability of intermediaries, and the significant dilution of hosting protections traditionally granted to such platforms. It can be seen that when it comes to OCCSPs, the EU has successfully transitioned from 'conditional liability' as envisaged under the ECD to 'organisational responsibility'.³¹ Most intermediary laws provide

²⁶Directive on Copyright and Related Rights in the DSM, *supra* note 1, at 120, art. 17(7).

²⁷*Id.* at art. 17(8).

²⁸*Id.* at art. 17(9).

²⁹Tomasz Targosz, *Poland's Challenge to the DSM Directive and the Battle Rages On...*, KLUWER COPYRIGHT BLOG, <http://copyrightblog.kluweriplaw.com/2019/06/10/polands-challenge-to-the-dsm-directive-and-the-battle-rages-on/>.

³⁰Natalia Mileszyk, *Finally! The text of Poland's Legal Challenge of Copyright Directive was published*, COMMUNIA (Aug. 21, 2019), <https://www.communia-association.org/2019/08/21/finally-text-polands-legal-challenge-copyright-directive-published/>.

³¹ Rhonda Brammer, *Safe Harbor in Deep Waters*, WALL ST. J. (Mar. 30, 2009), <https://www.wsj.com/articles/SB123820180286962525>.

exemptions to platforms which are distributors and not publishers of content. The distinction between distributor and publisher liability is well settled.³² It flows from a higher level of liability imposed content publishers—like newspapers which exercise editorial control, as opposed to a lower level of liability (and in some cases, absolute immunity) to mere distributors— Internet Service Providers (ISPs), web hosting platforms etc. For instance, a website which merely hosts third-party defamatory content on its platform would be akin to an online ‘bulletin board’ since it does not create or modify content. The lack of control on the content would make it immune from being liable for the defamatory content.³³ A key question which arises from the legal treatment of OCSSPs under Article 17 is whether they still qualify as intermediaries—mere hosting services. A single universally accepted legal definition of the term ‘intermediary’ does not exist. It is interpreted broadly and usually refers to a digital platform which facilitates access to information or services over the Internet. It may or may not actively modify and reorient information. The nature of activeness or passiveness of an intermediary varies. For instance, an Internet Service Provider (“ISP”) is traditionally an intermediary which provides a medium to users to access the Internet. An ISP does not actively monitor or control the content that a user accesses over the Internet. However, a video sharing platform such as YouTube would be more active in controlling or modifying content which is consumed by users.

In order to analyse the impact of Article 17 on the extant liability regime of intermediaries in EU, it is crucial to examine existing legislation which regulates such platforms. The ECD provides a ‘safe harbour’ to certain intermediaries like ISPs which are a ‘mere conduit’— do not actively initiate sharing and distribution of infringing content, and store data temporarily and exclusively for the purpose of transmission. The ECD categorises intermediaries on the basis of their role in the sharing and storage of content. It classifies most intermediaries under the broad umbrella term— ‘information society services’.³⁴ ‘Information society services’ provide a large number of varied online services which are largely free, and include services such as ‘offering online information’, ‘commercial communications’ or sharing of information by way of a ‘communication network’.³⁵ ‘Information society services’ are further sub-categorised as ‘caching’,³⁶ ‘mere conduit’³⁷ and ‘hosting’³⁸ services. The ‘safe harbour’ under the ECD, and most intermediary liability regimes is a significant legal protection granted to digital intermediaries to recognise their passive nature in hosting or publishing content. According to the ‘safe harbour’ principle established under the ECD, an intermediary is exempt from liability if it does not possess ‘actual knowledge’ of the illegality of the content hosted or disseminated through its platform. Immunity can also be provided if

³²Cubby v. CompuServe Inc. 776 F.Supp. 135 (S.D.N.Y. 1991); Stratton Oakmont v. Prodigy, 23 Media L. Rep 1794..

³³ See *Cubby id.* .

³⁴ Directive on E-commerce. *supra* note 14, at recital 18, gives the scope of ‘Information Society Services’.

³⁵ *Id.*

³⁶ *Id.* art. 13

³⁷ *Id.* at art. 12

³⁸ *Id.* at art. 14

the intermediary can provide that upon detection, the illegal content was removed or access to such content was blocked. The ECD imposes an obligation on intermediaries to apply a duty of care to ensure that illegal content and other activities are detected and promptly addressed.³⁹ However, it prohibits intermediaries from ‘general monitoring’ of content.⁴⁰ The DSM seeks to distinguish OCSSPs from existing ‘information society services’. The DSM recognises that many information society services ‘as part of their normal use’ provide access to protected content. The DSM clarifies that Article 17 would apply only to those services which occupy a significant role in the domain of digital content sharing, and which compete with other services targeting the same audience such as video or audio streaming services.⁴¹ However, with the use of phrases such as the provision of access to ‘large amount of copyright-protected works’, a lot is left to interpretation.⁴² Perhaps, subsequent clarification would be required on these terms, and what constitutes ‘large’ amounts of content for any platform to qualify as an OCSSP. In this context, one of the key concerns raised by detractors of the DSM is its impact on the broader category of ‘information society services’. The DSM recognises that OCSS would be different from the information society services as recognised under the ECD.⁴³ It would not include services which do not have the main objective of providing a medium to users to upload content which is copyright-protected, and which do not aim to derive profit out of such activity.⁴⁴ Therefore, general and B2B cloud-services, cyberlockers, e-commerce marketplaces would be excluded from the realm of this provision. Further, the status of social media platforms is uncertain, and open to debate. The DSM further lays down that case-by-case assessments would have to be made of whether a service would qualify as OCSSPs for the purpose of Article 17. They may potentially qualify as OCSSPs, however, as observed above, ambiguity in the text of Article 17 would make it difficult for black and white assessments to be made immediately. It is hoped that Member State law provides further definitional clarity on the exact categories of OCSSPs.

PART II – ARTICLE 17 AND THE RELATIONSHIP BETWEEN COPYRIGHT PROTECTION AND FREE SPEECH

Article 10 of the European Convention on Human Rights (‘ECHR’) provides a fundamental right to free speech and expression to every individual. This includes the freedom to hold opinions, and ‘receive and impart’ information without any ‘interference’ by a ‘public authority’.⁴⁵ Restrictions to this right can be made in very

³⁹ *Id.* art. 16

⁴⁰ *Id.* art. 15

⁴¹ “The services covered by this Directive are 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.”, Directive on Copyright and Related Rights in the DSM, *supra* note 1, recital 62, 106..

⁴² *Id.* at art. 2(6)

⁴³ *Id.* at recital 61, 105-106..

⁴⁴ *Id.*

⁴⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10(1), Nov. 4, 1950, E.T.S. 5.

specific circumstances, in the interest of a ‘democratic society, national security, territorial integrity, public safety, prevention of disorder or crime, protection of health or morals, reputation or rights of others...’.⁴⁶ Article 17 of the Charter of Fundamental Rights of the European Union, provides a fundamental right to property. Specifically, Article 17(2) provides that ‘intellectual property should be protected.’⁴⁷ Article 1 of Protocol 1 to the European Convention on Human Rights states that every ‘natural or legal person is entitled to the peaceful enjoyment of his possessions’ and that such possession or property should be protected. There is a view that the fundamental right to free speech and expression is also applicable to inter relationships between private parties where the state is not involved.⁴⁸ The right to freedom of speech as outlined in the ECHR has been applied horizontally by domestic European courts in a number of instances.⁴⁹ It must be pointed out that legislation which impacts the relationship between competing fundamental rights, such as free speech and intellectual property protection, often maintain the necessary balance required by carving out limitations and exceptions.⁵⁰

This part briefly examines the relationship between the free speech interests of users and the need to protect copyright owners as examined by European courts.⁵¹ For instance, in *Ashby Donald and Ors. v. France*, the European Court of Human Rights (“ECHR”) resolved the apparent conflict in favour of the copyright owners. In this case, a few fashion photographers had published pictures from a fashion show on a website without seeking permission of the fashion house. French courts found the photographers guilty of copyright violation. The ECHR too, while adjudicating upon the photographers’ claims of violation of their free speech interests under Article 10 versus the fashion house’s right to property (including intellectual property)⁵² as enshrined in Article 1 of Protocol No. 1, held that the restriction made by French copyright law was consistent with Article 10(2). It must be clarified that the position taken in *Ashby* may not squarely apply to large scale content infringement which takes place through OCSSPs today. However, there is ample evidence to suggest that European courts, including the CJEU, have been clear in their objective to balance competing rights of free speech and intellectual property protection in recent years, and have been committed to ensure that any tension is analysed not only in the context of the text of the legislation

⁴⁶ *Id.* at art. 10(2).

⁴⁷ Charter of Fundamental Rights of the European Union, art 17(2), Dec. 7, 2000, 2010 O.J. (C83) 389 <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:en:PDF>

⁴⁸ Research Handbook on Human Rights and Intellectual Property (Christophe Geiger ed.) (2015).

⁴⁹ For a general discussion on human rights and intellectual property, see *id.*; David Henningsson, *Copyright and Freedom of Expression in Sweden and the European Union - The Conflict Between Two Fundamental Rights in the Information Society*, (2012) (unpublished Grad, thesis, Lund University) (on file with the Lund University Library system) <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=3358162&fileId=3413117>.

⁵⁰ See e.g., 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, O.J. (L 167) 10, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001L0029>

⁵¹ For a larger discussion on the relationship between these rights, as settled in European law, see Research Handbook on Human Rights and IP, *supra* note 51.

⁵² *Anheuser-Busch Incl. v. Portugal*, Merits App. No. 73049/01, (2007) 44 EHRR 42.

(and its balancing objectives) but also in the larger context of the ECHR.⁵³ To take a more specific example, in *Scarlet v. SABAM*,⁵⁴ the CJEU examined the the legality of an intermediary's blocking of copyright protected content on its peer-to-peer file-sharing software through a 'filtering' system. The platform argued that the use of an effective filtering tool would necessarily involve monitoring of all information or communication on its network, thereby violating free speech and privacy rights of users. This concern was echoed by the court in its decision. Scholars note that courts tend to adopt a cautious approach while interpreting limitations and exceptions to intellectual property rights. Particularly, in the context of copyright protection, it has been observed that often while the core of the copyright protections as outlined in the text of the law is often maintained, specific measures of achieving that protection may be excluded if found to be inconsistent with existing rights and freedoms.⁵⁵

Article 17 of the DSM explicitly states that OCSSPs shall not engage in general monitoring of all content. This is in line with Article 15 of the ECD which prohibits 'information society services' from a 'general obligation to monitor'. Monitoring of content for a specific purpose, however, is permitted under the ECD.⁵⁶ Recital 47 of the ECD explicitly states that while Member State laws should not impose a 'general' monitoring obligation, monitoring conditions for 'specific cases' may be permitted.⁵⁷ It specifically points to 'orders by national authorities' which are in conformity with national laws. Recital 66 of the DSM, clarifies the implementation of Article 17 in a similar manner. It states that Member States should not impose general monitoring obligations on OCSSPs. It further states that in order to avoid liability for hosting infringing content, OCSSPs must demonstrate adoption of reasonable measures or 'best efforts' in line with 'high industry standards of professional diligence' to prevent dissemination of infringing content. However, in order to truly ensure that general monitoring obligations are avoided, Member State laws will have to specifically address what 'best efforts' mean, in order to avoid instances where intrusive and restricting technologies are employed.

In any case, at present, based on the existing technology being utilised by certain popular platforms, it is feared that obligations to accurately monitor and filter content will entail some level of general monitoring. The wording of Article 17 of the DSM indicates that intermediaries may have to necessarily adopt automatic mechanisms to filter content uploaded by users. While it may be argued that the obligation to monitor is for a specific purpose, it ostensibly covers all types of copyright-protected content and other material, and other content where other allied interests of users may be involved. In the absence of clarity in Article 17 and subsequent interpretation in

⁵³Case C-275/06 *Productores de Música de España (Promusicae) v. Telefónica de España SAU* 2008, ECR I-00271,

⁵⁴Case C-70/10, *Scarlet Extended SA v. Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM)* 2011, ECR I-771.

⁵⁵Stijn van Deursen & Thom Snijders, *The Court Of Justice At The Crossroads: Clarifying The Role For Fundamental Rights In The EU Copyright Framework*, 49 INT'L R. IP & COMP. L, 1080-1098, (2018).

⁵⁶ Directive on Copyright and Related Rights in the DSM, *supra* note 1, art. 14(3), , DSM

⁵⁷ *Id.* at recital 47.

Member State law, there may be a very fine line between ‘specific’ and ‘general’ monitoring.⁵⁸ It has been suggested that in order to distinguish between ‘specific’ and ‘general monitoring’ in this context— any monitoring obligations must be construed narrowly,⁵⁹ the scope and nature of infringements which can be reasonably identified and accordingly must also be narrow,⁶⁰ and there should be sufficient clarity on which materials or content constitute an infringement.⁶¹

It has been argued that as the volume and nature of content to be scrutinised for its lawfulness increases, platforms will necessarily have to monitor all content, in its entirety, as uploaded by users— thereby amounting to ‘general’ monitoring, something that both the ECD and the DSM prohibit. While the DSM does not actively require platforms’ to enable automatic copyright detection filters, the wording of Article 17, in effect, would ensure that platforms may have to necessarily adopt filters. Further, it is feared that automated filtering mechanisms may not be able to recognise finer aspects of the content, or identify whether such content falls under an exception in the relevant national law. What may be an exception in one EU Member State, may or may not be an exception in the other. It is feared that this level of nuance cannot be achieved with existing technological tools— although it is possible that this position may change given the pace at which technology is advancing. Another concern is whether such tools can distinguish between copyrighted-content which is in the nature of parody or satire.⁶² However, another view holds that concerns of this nature are premature and misplaced as technologies are being developed to cautiously tread the fine line between general and specific monitoring. In any case, it is hoped that Member States will outline tailored guidance to OCSSPs to ensure that unintended effects on communication of lawful and non-infringing content are avoided.

For instance, according to available literature on tools available for content-filtering, there exist two broad methods—‘fingerprinting’ and ‘watermarking’.⁶³ ‘Fingerprint’ entails matching of every new piece of content with an existing database of fingerprinted content, if a match is made, the new content (last added) is removed or blocked. ‘Watermarking’ ensures that only content which contains an ‘imprinted watermark’ is permitted to be uploaded or displayed on the platform. There is a view

⁵⁸Aleksandra Kuczerawy, *To Monitor or Not to Monitor? The Uncertain Future of Article 15 of the E-Commerce Directive*, KU LEUVEN CiTIP (July 10,2019), <https://www.law.kuleuven.be/citip/blog/to-monitor-or-not-to-monitor-the-uncertain-future-of-article-15-of-the-e-commerce-directive/><https://www.law.kuleuven.be/citip/blog/to-monitor-or-not-to-monitor-the-uncertain-future-of-article-15-of-the-e-commerce-directive/>.

⁵⁹ Frosio, *supra* note 25 at 19. . (2017), <https://osf.io/preprints/socarxiv/w7fxv/download>.

⁶⁰*Id.*

⁶¹*Id.*

⁶²Maria Lilla Montagnani &Alina Yordanova Trapova, *Safe harbours in deep waters: a new emerging liability regime for Internet intermediaries in the Digital Single Market*, 26(4) INT’L J. L. & IT, 294–310, (2018).

⁶³ In the specific context of this paper, the difference between ‘fingerprinting’ and ‘watermarking’ has been briefly examined to give an indicative idea about the nature of content identification and filtering technologies being used by popular platforms today. For a specific technical discussion, see, Chloe Johnson, *Watermarking, Fingerprinting, and Content ID for Creators... What’s the Future?*, MEDIUM (Jul. 29, 2019) <https://medium.com/verifimedia/watermarking-fingerprinting-and-content-id-for-creators-whats-the-future-d4222f197c84>.

that while this would ensure automatic filtering of infringing content, it can also prohibit legal/non-offending content from reaching users. This will have a significant impact on Internet users, and will also potentially violate free-flow of information. It is unclear if general monitoring can be absolutely avoided by platforms, either actively or passively. Scholars argue that the implicit obligation on intermediaries to adopt upload filters poses a direct conflict to the ECD. Perhaps, this concern can be extended to the implementation of Article 17.

A real, and perhaps immediately unavoidable problem lies in the adoption of 'upload filters' or 'automated content filters' by platforms. While the text of Article 17 in its final form does not make an explicit mention of their use, previous drafts indicated their adoption. In fact, the old text of Article 17 [Article 13] provided that 'effective content recognition technologies' should be adopted.⁶⁴ This was widely criticised by stakeholders and was subsequently removed. Despite this, there is a dominant view that adoption of such technological tools is unavoidable.⁶⁵ At the same time, it is also still felt that installation of upload filters may not be necessary, and therefore the concerns of restrictions to information flows and erroneous blocking of legitimate content are unfounded.⁶⁶ At present, platforms like YouTube are known to be using automated tools to weed out infringing content. Many video sharing may not have the resources to manually screen infringing content uploaded on their platform, owing to the sheer volume of it. Further, it must be pointed out that Article 17 lays down a stricter liability regime for 'large' content distributors, with more users, and a considerable turnover. This means a greater user-base, and even more, third party uploaded content to sift through. In such cases, it is feared that OCSSPs would be left with no choice but to adopt some level of automation to ensure accurate and prompt filtering. This would qualify as 'general monitoring'. In fact, in the case of *Scarlet v. SABAM*,⁶⁷ and *SABAM v. Netlog*,⁶⁸ the ECJ recognised that an injunction requiring the adoption of a 'filtering system' which

⁶⁴ *Explanatory Memorandum, Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market*, at art. 13(1), COM (2016) 593 final (Sept. 14, 2016), <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016PC0593>

⁶⁵ Information Society Project of Yale L. Sch., *New Controversies in Intermediary Liability* (Tiffany Li ed. 2019), https://law.yale.edu/sites/default/files/area/center/isp/documents/new_controversies_in_intermediary_liability_law.pdf; ; *Commission Recommendation on measures to effectively tackle illegal content online*, C (2018) 1177 final (Mar. 3, 2018), <https://ec.europa.eu/digital-single-market/en/illegal-content-online-platforms> Georgios N. Yannopoulos, *The Immunity of Internet Intermediaries Reconsidered?*, in RESPONSIBILITY OF ONLINE SERVICE PROVIDERS 45 (Mariosaria Taddeo, Luciano Floridi (eds.) 2017).

⁶⁶ Eleonara Rosati, *The EU's New Copyright Laws Won't "Wreck the Internet"*, SLATE, (Apr. 1, 2019) https://slate.com/technology/2019/04/eu-copyright-directive-article-13-wreckinternet.html?utm_source=GDPR&utm_campaign=91889b727e-EMAIL_CAMPAIGN_2019_03_29_10_54_COPY_01&utm_medium=email&utm_term=0_7c51e322b7-91889b727e-278644353.

⁶⁷ *SABAM supra* note 57.

⁶⁸ C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*, 2012, E.C.R. 85, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=119512&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=150383>; Kuczerawy, *supra* note 61.

can monitor any or all types of content on the concerned platform, and which is applicable to all information shared for an unspecified period of time— would amount to a general monitoring obligation.

While this part does not delve into the technical details of modern content filtering tools being used by digital platforms, the above description seeks to highlight the specific concern of lack of sophisticated technological tools which would strike the right balance between identifying infringing content and ensuring speech and privacy protections. Experts argue that such tools, in their present state, tend to throw up false positives and may not accurately filter out infringing content too.⁶⁹ This poses a real threat to free speech rights of OCSSP users. In order to ensure that the right tools are being deployed fairly and uniformly across such platforms, there is a need for Member States to outline measures of auditing and monitoring of such tools to ensure user protection.⁷⁰ Further, where lawful user speech is mistakenly taken down, OCSSPs must ensure consumer friendly services for grievance record and redress. While provisions to this effect have been made in Article 17, Member State law should ensure that such systems are fair and responsive to real-time user needs. Lastly, there must be adequate measures outlined in Member State laws to ensure that while deploying technologies which make subjective assessments, OCSSPs do not err on the side of copyright protection in cases where stakes for free speech are high. Lastly, the ‘best effort’ standard outlined in Article 17 requires clarity for OCSSPs. Since the liability for certain OCSSPs is high, such platforms will err on the side of caution by deploying the best available technology to promptly report infringing content, and perhaps even proactively monitor all content.⁷¹ This is also termed as ‘self-censorship’— a term which has become synonymous with digital platform governance laws. The term is often associated with the regulation of content sharing platforms. The term implies that the state can fulfil its goal of censorship through private content sharing platforms.⁷²

⁶⁹STEFAN KULK, INTERNET INTERMEDIARIES AND COPYRIGHT LAW: EU AND US PERSPECTIVES, (2019), https://books.google.co.in/books?id=e2a5DwAAQBAJ&pg=PT193&lpg=PT193&dq=Article+17+of+the+DSM+and+%27general+monitoring%27&source=bl&ots=3qlphr09ew&sig=ACfU3U08m0wc5dRFi7ci6iSsbidrc_bw1g&hl=en&sa=X&ved=2ahUKEwis_oTIwOHIAhXKLo8KHaNZBDc4ChDoATAIegQICRAB#v=onepage&q&f=falsehttps://books.google.co.in/books?id=e2a5DwAAQBAJ&pg=PT193&lpg=PT193&dq=Article+17+of+the+DSM+and+%27general+monitoring%27&source=bl&ots=3qlphr09ew&sig=ACfU3U08m0wc5dRFi7ci6iSsbidrc_bw1g&hl=en&sa=X&ved=2ahUKEwis_oTIwOHIAhXKLo8KHaNZBDc4ChDoATAIegQICRAB#v=onepage&q&f=false.

⁷⁰*Id.*

⁷¹Susan Wojcicki, *YouTube chief says EU copyright plan could lead to blocked access*, FIN. TIMES, (Nov. 12 2018), <https://www.ft.com/content/266e6c2a-e42e-11e8-a8a0-99b2e340ffeb>, Daniel Nazer and Mitch Stoltz, *Copyright Shouldn't Be A Tool of Censorship*, DEEPLINKS BLOG (Jan 19, 2017) <https://www.eff.org/deeplinks/2017/01/copyright-shouldnt-be-tool-censorship> (“We have already taken steps to address copyright infringement by developing technology, like our Content ID programme, to help rights holders manage their copyrights and earn money automatically. More than 98 per cent of copyright management on YouTube takes place through Content ID. To date, we have used the system to pay rights holders more than €2.5bn for third party use of their content. We believe Content ID provides the best solution for managing rights on a global scale.”)

⁷²Jack M. Balkin, *Free Speech is a Triangle*, 118 COLUM. BUS. L. REV. 7 (2018). See also, Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018)

Another aspect of textual unambiguity resulting in chaotic obligations on platforms can be located in Article 17(7). It provides that user-uploaded content (which may or may not be protected) which is in the nature of ‘quotations, criticism, or review’ or ‘caricature, parody or pastiche’. A key concern arising out of this exception, is the ability of OCSSPs to promptly identify these instances. Automatic technological tools may not have achieved the required level of sophistication to accurately identify memes and distinguish them from protected works. While a detailed examination of the technical capabilities of platforms identifying exceptions falls outside the remit of this article, subsequent judicial or legislative clarity on expected due-diligence will be required to address questions related to liability under Article 17.

CONCLUSION

The new copyright protections granted to content hosted or published by intermediaries renew and significantly disrupt the debate on impact right to free speech and expression, both—of intermediaries insofar as they facilitate flow of information to the public, and of users and their right to receive information. Both the rights, in European law, are relative rights. Any legislation impacting their relationship should maintain a balance between the two. As seen in Part I, European case law is abundantly clear on the need to ensure that measures to protected copyrighted content do not impinge upon the free speech interests of individuals. Article 17 in its present state leaves a lot of work to be done by Member States to ensure that OCSSPs tread cautiously on this path.

While on the one hand, it is important to ensure that protected-works are transmitted and published responsibly, there is also a need to prevent bad actors from misusing the provision. To some extent, the DSM recognises this challenge. It states that platforms should ensure that while a necessary mechanism is in place to ensure ‘cooperation with right-holders’,⁷³ this should not bar platforms from continuing to make non-infringing content available to users. However, at present, the text of the DSM is broad and will be further clarified through Member State law. The biggest challenge in this regard would be to ensure the adoption of privacy and speech friendly tools by OCSSPs. Tools which do not facilitate ‘general monitoring’. Until then, the utopian balance between interests of right-holders and users is precarious, and rests on the exact measures which OCSSPs will employ. As seen in Parts I and II, there is sufficient ambiguity in the text of the DSM to fuel such concerns. Further, in the absence of adequate guidance on technological tools and standards of review, viability of existing technology (given their inaccuracies) and overall industrial standards on the use of such tools, this balance is at best, an ideal that requires further articulation.

⁷³ Directive on Copyright and Related Rights in the DSM, *supra* note 1, at 106-07, recital 66.