

# Interim report on mapping of EU legal framework and intermediaries' practices on copyright content moderation and removal

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## Abbreviation list

AI	Artificial Intelligence
CDSM 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
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CMO	Collective Rights Management Organisation
DSA (proposal)	Proposal for a Regulation of the European parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC COM/2020/825 final
DSM	Digital Single Market
e-Commerce Directive	Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market [2000] OJ L178/1
EC	European Commission
ECL	Extended Collective License(s)
ECS	European Copyright Society
E&Ls	Exception and /or limitations
Enforcement Directive	Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004)
EP	European Parliament
EU	European Union
IGF	Internet Governance Forum
InfoSoc Directive	Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society OJ L 167, 22.6.2001, p. 10–19
IP	Intellectual Property
ISSPs	Information society service providers
OCSSP	Online content-sharing service provider
P2B	Platform to Business
Technical Standards Directive	Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (Text with EEA relevance) OJ L 241, 17.9.2015, p. 1–15
TEU	Treaty on the European Union
TOS	Terms of Service
TRIPS	Agreement on Trade Related Aspects in intellectual Property
UGC	User-generated content
UDHR	Universal Declaration of Human Rights
VLDP	Very Large Online Platform
WBM	Internet Archive's WayBack Machine
WIPO	World Intellectual Property Organisation
WCT	WIPO Copyright Treaty
WPPT	WIPO Performances and Phonograms Treaty



## Executive Summary

This interim report consists of six chapters. **Chapter 1** includes a brief introduction and outline of the Interim Report.

**Chapter 2** identifies our research questions, sets out our conceptual framework and methodology. The **main research question** of this Interim Mapping Report is as follows: How can we map the impact on access to culture in the Digital Single Market (DSM) of content moderation of copyright-protected content on online platforms? For the purposes of this Interim Report, we can divide this research question in the following **sub-research questions (SQR)**.

- **SQR1:** How to conceptualise and approach from a methodological approach the interdisciplinary analysis of content moderation of copyright-protected content on online platforms and its impact on access to culture in the DSM?
- **SQR2:** How is the private and public regulatory framework for content moderation for online platforms structured?
- **SQR3:** How do the various elements of that regulatory framework interact?
- **SQR4:** How are copyright content moderation rules organized by platforms?
- **SQR5:** What kind of copyright content moderation rules do platforms employ?
- **SQR6:** Which copyright content moderation rules do platforms employ?
- **SQR7:** How are the various elements of the regulatory framework and the online platforms' policies etc. likely to impact access to culture in DSM?

**Chapter 3** carries out a legal mapping of the topic of this report at EU level. This corresponds to our ongoing work on Task T.6.1.1 (EU Level Mapping). Our main focus here is the legal regime of art. 17 of the CDSM Directive. To explain this complex provision and its implications, we first provide some context on the legal regime that precedes the CDSM Directive. We then briefly explain the legislative process leading to the adoption of the CDSM Directive, followed by a snapshot of the legal regime, and some preliminary remarks relating to the European Commission's stakeholder consultations and Guidelines on art. 17, and the action for annulment of art. 17 initiated by the Polish government in Case C-401/19. We then offer a detailed analysis of art. 17, with an emphasis on its liability regime and rules with implication for copyright content moderation by OCSSPs, as well as an examination of its interface with the Digital Services Act proposal.

**Chapter 4** follows up on this analysis with preliminary findings of our comparative legal research at national level. The findings are based on legal questionnaires carried out with national experts in ten Member States. This corresponds to our work thus far on Task T.6.1.2 (Comparative National Level Mapping). The comparative analysis has evidenced the sensible differences of the national legal systems of 10 EU Member States. The analysis has addressed the direct and indirect liability of intermediaries, end-users' liability in the pre-CDSM landscape. It also tracked the implementation experiences of the Member States related to art. 17 CDSM Directive. The collected data highlighted similar and remarkably different doctrinal and practical issues present in the Member States legal system. These differences necessarily mean that the implementation of art. 17 will pose significantly different challenges for the Member States, which can ultimately challenge the effectiveness of the newly introduced regime.

**Chapter 5** describes our research on private regulation by platforms. This corresponds to the empirical research carried out in the context of Task T.6.1.3 (Private Regulations by Platforms: ToS, Community Guidelines). It mainly discusses and compares how the copyright content moderation regime of rules of two platforms (Facebook and Diaspora) changed over time in terms of their organization, kinds and content. Based on the qualitative analysis of dozens of versions of policy-like documents published by the platforms, and using mostly descriptive statistics to present the findings, the chapter arrives at four tentative conclusions: (1) platforms' copyright content moderation regimes became more complex, with more rules and spread on more types of documents; (2) over time, responsibilities over copyright content moderation tilted strongly towards platforms themselves, despite the fact that much of the discourse on their policies about the issue remained focused on users' self-regulatory actions; (3) in the past decade or so, rules that explicitly mentioned copyright content moderation became less prevalent, signalling a weakening of the status of this particular topic vis-à-vis broader concerns with content moderation; (4) Despite going towards the same overall direction, Facebook (a mainstream platform), changed much faster and more intensively than Diaspora (an alternative platform), a discrepancy that cannot be explained by regulatory shifts alone.

Finally, **Chapter 6** provides a summary of the preceding analysis, identifies the normative angles for subsequent research, and describes the next steps in the project





## 1. Introduction and Outline

This Interim Report is to provide a preliminary analysis of the research carried out in the context of WP6 on the mapping of the EU legal framework and intermediaries' practices on copyright content moderation and removal. This Interim Report (D.6.1.) provides the basis for the subsequent Mapping Report (D.6.2.), to be delivered in M21. This interim report consists of six chapters. **Chapter 1** includes a brief introduction and outline of the Interim Report.

**Chapter 2** identifies our research questions, sets out our conceptual framework and methodology. The **main research question** of this Interim Mapping Report is as follows: How can we map the impact on access to culture in the Digital Single Market (DSM) of content moderation of copyright-protected content on online platforms?

For the purposes of this Interim Report, we can divide this research question in the following **sub-research questions (SQR)**.

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**Chapter 4** follows up on this analysis with preliminary findings of our comparative legal research at national level. The findings are based on legal questionnaires carried out with national experts in ten Member States. This corresponds to our work thus far on Task T.6.1.2 (Comparative National Level Mapping). The comparative analysis has evidenced the sensible differences of the national legal systems of 10 EU Member States. The analysis has addressed the direct and indirect liability of intermediaries, end-users' liability in the pre-CDSM landscape. It also tracked the implementation experiences of the Member States related to art. 17 CDSM Directive. The collected data highlighted similar and remarkably different doctrinal and practical issues present in the Member States legal system. These differences necessarily mean that the implementation of art. 17 will pose significantly different challenges for the Member States, which can ultimately challenge the effectiveness of the newly introduced regime.

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Finally, **Chapter 6** provides a summary of the preceding analysis, identifies the normative angles for subsequent research, and describes the next steps in the project



## 2. Conceptual Framework, Methodology and Methods

This chapter identifies our interdisciplinary research questions, develops a conceptual framework, and explains our methods. Our analysis proceeds as follows. We first outline our main research question and sub-questions (2.1). The remaining sections explain our methodology, conceptual framework and specific methods. In that line, we start by framing content moderation in the context of the regulation of, by and on platforms (2.2), we develop a working definition of content moderation (2.3), we examine the concept of online platforms (2.4), and elucidate our approach and framing of “access to culture” (2.5). We then explain the specific legal and empirical research methods used to answer our research questions (2.6).

### 2.1 Research Questions

The **main research question** of this Interim Mapping Report is as follows:

- How can we map the impact on access to culture in the Digital Single Market (DSM) of content moderation of copyright-protected content on online platforms?

For the purposes of this Interim Report, we can divide this research question in the following **sub-research questions (SQR)**.

- **SQR1:** How to conceptualise and approach from a methodological approach the interdisciplinary analysis of content moderation of copyright-protected content on online platforms and its impact on access to culture in the DSM?
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- **SQR6:** Which copyright content moderation rules do platforms employ?
- **SQR7:** How are the various elements of the regulatory framework and the online platforms’ policies etc. likely to impact access to culture in DSM?

Sub-question **(1)** is addressed in the subsequent sections in this Chapter 2. The approach developed here informs the subsequent legal and empirical analysis.

Sub-questions **(2)** and **(3)** are addressed from a descriptive legal perspective – as a mapping exercise – in Chapters 3 (at EU law level) and 4 (at national level).

Sub-question **(4), (5) and (6)** are addressed in Chapter 5, building on the empirical methods described in this Chapter 2.

Sub-question **(7)** is not addressed in this Interim Report, since it will be the core of a subsequent normative assessment (D.6.3.) based on the Mapping Report (D.6.2.) that will build on this Interim Report (D.6.1.)

To answer these research questions we use a specific methodology, including an underlying conceptual framework and terminology (see sections 2.2 to 2.5 ) – and research methods (2.6). Because of the complex nature of the social science methods used in our research, that specific section contains not only a description of such methods but also a more detailed explanation of the underlying methodology (see 2.6.3).

### 2.2 Content moderation in the context of regulation of, by and on platforms

In this section we begin to address our first sub-research questions: How to conceptualise and approach from a methodological approach the interdisciplinary analysis of content moderation of copyright-protected content on online platforms and its impact on access to culture in the DSM?

Our framing is that the regulatory context of platforms can for analytical purposes be broken down into three dimensions, namely regulation *of*, *by* and *on* platforms, as described below.



### 2.2.1 (Platform) governance and (platform) regulation

Before moving further, it is important to disentangle the concepts of platform *regulation* and platform *governance*, since the latter is also used often in the analysis of content moderation.<sup>1</sup>

From our perspective, the (scholarly) debate on “platform regulation” and “platform governance” and the broader scholarly debate on “regulation” and “governance” concepts are not necessarily interconnected. The more recent terms of “platform regulation” and “platform governance” rather seem to emerge as concepts in each field that studies these topics.

Our aim is therefore to clarify our conceptual approach and how it relates to approaches followed in different scholarly traditions.

Regulation and governance are terms often used interchangeably, sometimes without further clarification regarding their demarcation or conceptual meaning.<sup>2</sup> In general terms, governance refers to broader processes of ordering whereas regulation is the narrower term that describes intentional and usually goal-directed interventions.<sup>3</sup>

Others differentiate regulation and governance; regulation regards the substantive rules, whereas governance relates to the institutional framework for rule-setting.<sup>4</sup>

In the work of media and legal scholars pursuing research on platforms, the terms are also often used interchangeably.<sup>5</sup> Yet, platform governance often indicates a slightly broader scope of investigation that “capture[s] all of the many facets of how a social network governs the activity of its participants”<sup>6</sup> and not only factual rule-making. This appears to resemble earlier discussions for instance in the Internet Governance literature.<sup>7</sup>

In the following, we explain in greater detail what is meant by regulation “of”, “on” and “by” platforms.<sup>8</sup>

### 2.2.2 Regulation “of” platforms

By regulation “of” platforms we refer to legislation and soft law of a public nature applicable to online platforms.<sup>9</sup> In other words, the regulation is induced and influenced, at least to a certain degree, from other actors than the platform. This category would also encompass industry standards and other coordinated self-regulation, for example compliance with Santa Clara Principles on transparency and accountability in content moderation.<sup>10</sup> Importantly, such regulation “of” platforms will not always have binding legal effect.

In this report, our focus is on the legal rules that shape the processes, norms and technologies that meet our definition of “content moderation” for certain types of online platforms. For example, in EU law, regulation of platforms would include the rules in: art. 17 CDSM Directive; arts. 12 to 15 e-Commerce Directive; the

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<sup>1</sup> See, e.g., on concept of platform governance and its relationship to content moderation Robert Gorwa, ‘What Is Platform Governance?’ (2019) 22 Information, Communication & Society 854; Robert Gorwa, Reuben Binns and Christian Katzenbach, ‘Algorithmic Content Moderation: Technical and Political Challenges in the Automation of Platform Governance’ (2020) 7 Big Data & Society 2053951719897945; Christian Katzenbach and Lena Ulbricht, ‘Algorithmic Governance’ (2019) 8 Internet Policy Review <<https://policyreview.info/concepts/algorithmic-governance>> accessed 27 January 2021.

<sup>2</sup> cf. for a discussion Hofmann/Katzenbach/Gollatz 2017.

<sup>3</sup> Black 2001.

<sup>4</sup> See e.g. Robert Baldwin, Martin Cave & Martin Lodge (2010) Introduction: Regulation - the Field and the Developing Agenda (available here: <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199560219.001.0001/oxfordhb-9780199560219-e-1>); Christel Koop & Martin Lodge (2017), What is regulation? An interdisciplinary concept analysis (available here: <https://onlinelibrary.wiley.com/doi/full/10.1111/rego.12094>).

<sup>5</sup> See, e.g., Gillespie.

<sup>6</sup> Robert Gorwa, ‘The Shifting Definition of Platform Governance’ Centre for International Governance Innovation <<https://www.cigionline.org/articles/shifting-definition-platform-governance>> accessed 21 April 2021.

<sup>7</sup> See, e.g. Lee A. Bygrave and Jon Bing: Internet Governance, Infrastructure and Institutions <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199561131.001.0001/acprof-9780199561131>

<sup>8</sup> Related distinctions on modalities of regulation have been proposed in other areas of cyberlaw, see e.g. in the context of software, Grimmelman, Regulation by Software, 114 Yale Law Journal (2005) 1719 or Lawrence Lessig, The New Chicago School, 27(2) The Journal of Legal Studies, 661. More recently also by social scientists in relation to platform governance, see Tarleton Gillespie 2016. “Governance of and by platforms”, in: Jean Burgess, Thomas Poell, and Alice Marwick (eds.), *SAGE Handbook of Social Media*. New York: SAGE Publishing. Available at: <https://www.microsoft.com/en-us/research/wp-content/uploads/2016/12/Gillespie-Regulation-of-by-Platforms-PREPRINT.pdf>

<sup>9</sup> NB the reference to public nature is meant to exclude e.g. MoUs from the scope of regulation *of* platforms; they are instead examples of regulation *by* platforms.

<sup>10</sup> Santa Clara Principles On Transparency and Accountability in Content Moderation, <https://santaclaraprinciples.org>.



Recommendation (EU) 2018/334 on measures to effectively tackle illegal content; and many of the rules governing online platforms in the proposed DSA.<sup>11</sup>

Our analysis in **Chapters 3 and 4** focuses on this type of regulation.

### 2.2.3 Regulation “by” platforms

Regulation *by* platforms refers to content moderation rules, technologies and processes adopted by “platforms” proper, i.e., a form of private ordering.

This type of regulation can fit into two broad categories. First, Terms of Service and similar documents (Policy Guidelines, etc.) adopted by platforms, referred hereafter jointly as Terms of Service or “TOS”. Some authors go as far as to refer to TOS as “platform law”.<sup>12</sup>

Second, regulation by platforms can be carried out through technological devices or code, such as in the case of algorithmic moderation systems (e.g., for filtering of illegal content).<sup>13</sup>

In this respect, we recognize that there exists an unexplored gap between what is stated in the substantive norms in TOS and how algorithmic systems actually moderate content on platforms. Nevertheless, in the context of our empirical research we focus on selected TOS and other norms that shape the processes, norms and technologies that meet our definition of “content moderation”.<sup>14</sup>

In EU law, this would include for instance what is covered by the definition of “terms and conditions” in the proposed DSA:

*‘terms and conditions’ means all terms and conditions or specifications, irrespective of their name or form, which govern the contractual relationship between the provider of intermediary services and the recipients of the services.*<sup>15</sup>

The scope and meaning of regulation “by” platforms are shaped by the regulation “of” platforms. For example, in EU law, terms and conditions and similar norms are (or will be post-DSA) bound by the legal framework on what qualifies as “illegal content”, i.e., “any information, which, in itself or by its reference to an activity, including the sale of products or provision of services is not in compliance with Union law or the law of a Member State, irrespective of the precise subject matter or nature of that law”.<sup>16</sup>

Furthermore, the regulation “by” platforms, including the actual moderation practices of the platforms, is shaped by the underlying regime that allocates the liability for copyright infringements between the platform and their users.

On the other hand, the regulation by platforms will to some extent influence and implement in practice the regulation of platforms. In this sense, TOS may determine for instance:

- open concepts advanced by law to assess whether content is illegal (e.g., regarding certain copyright exceptions and limitations that require assessment of context), and
- For content that does not qualify as illegal, what constitutes for each platform harmful or otherwise objectionable content, which they may limit on their platforms.<sup>17</sup>

Our empirical analysis in **Chapter 5** focuses on this type of regulation.

### 2.2.4 Regulation “on” platforms

Finally, regulation “on” platforms refers to content moderation actions and processes performed by online platforms (including their employees or subcontractors, which we refer to as “human moderators”) within the specific framework set out by the platform. This would also comprise the moderation performed by e.g., administrators of groups in accordance with the rights and responsibilities delegated by the platform itself. This term therefore refers to the procedural, organisational/institutional dimensions and factual implementation of the platforms’ self-regulation.

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<sup>11</sup> On the latter, see *infra* at #.

<sup>12</sup> David Kaye, *Speech Police: The Global Struggle to Govern the Internet* (Columbia Global Reports 2019). More broadly see, e.g., Belli L, & Venturini J. Private ordering and the rise of terms of service as cyber-regulation. *Internet Policy Review*. Vol 5. N° 4. (2016). <https://policyreview.info/articles/analysis/private-ordering-and-rise-terms-service-cyber-regulation>

<sup>13</sup> Cite.

<sup>14</sup> See below at #.

<sup>15</sup> Art. 2(q) proposed DSA. See also the more detailed definition of “terms and conditions” in art. 2(10) P2B Regulation.

<sup>16</sup> Art. 2(g) proposed DSA.

<sup>17</sup> Reference to source discussing illegal v harmful content.



Naturally, this framework is shaped by the regulation “of” and “by” platforms described above. One example is the human-in-the-loop (human review) requirement in art. 17 CDSM Directive as an ex-post safeguard in the context of complaint and redress mechanisms.<sup>18</sup>

Our research in this Interim Report does not directly address this type of regulation. Nevertheless, as pointers for future research we identify aspects at different stages aspects of the regulation “of”/“by” platforms that may affect the regulation “on” platforms.

## 2.3 What? Defining Content Moderation

### 2.3.1 EU Law definitions

The only example of a definition of content moderation in EU law is found in the recently proposed DSA

*‘content moderation’ means the activities undertaken by providers of intermediary services aimed at detecting, identifying and addressing illegal content or information incompatible with their terms and conditions, provided by recipients of the service, including measures taken that affect the availability, visibility and accessibility of that illegal content or that information, such as demotion, disabling of access to, or removal thereof, or the recipients’ ability to provide that information, such as the termination or suspension of a recipient’s account.*<sup>19</sup>

The definition must be seen within its context of the DSA and would not preclude deviating definitions of “content moderation” in other areas.<sup>20</sup>

It is useful to break down this definition into a positive (what is covered by the definition) and a negative scope (what is excluded from it).

Regarding its *positive scope*, “content moderation” covers activities of **intermediary service providers**.<sup>21</sup> In other words, it applies to several types of intermediaries across the “stack” beyond the application layer<sup>22</sup>, not just to types of hosting service providers.

In the second place, content moderation relates to *actions or activities that have a certain purpose* (“aimed at”), namely detecting, identifying and addressing either illegal content or information incompatible with the terms and conditions of intermediary service providers, which could also include provisions on harmful content.<sup>23</sup>

Third, in line with the scope of the DSA regulation, the *content at issue must be provided by the recipients of the service*.<sup>24</sup> In other words, the concept refers to content originating from the user and not the provider itself. For online platforms, at the current state of the technology, this is mostly content uploaded by users.

Fourth, the definition is merely *indicative and non-exhaustive*. It is an open clause that lists a range of measures that qualify as “content moderation”. This open definition comprises a general clause and different types of examples. The general definition states that content moderation includes measures that affect availability, visibility and accessibility *of that illegal content or that information*. There are then two sets of examples of such measures. One set refers to measures on content or information: demotion, disabling access, and removal. The

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<sup>18</sup> See art. 17(9), second paragraph CDSM Directive: “...Where rightholders request to have access to their specific works or other subject matter disabled or to have those works or other subject matter removed, they shall duly justify the reasons for their requests. Complaints submitted under the mechanism provided for in the first subparagraph shall be processed without undue delay, and decisions to disable access to or remove uploaded content shall be subject to human review”. On this provisions, see e.g. João Pedro Quintais and others, ‘Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics’ (2020) 10 JIPITEC <<https://www.jipitec.eu/issues/jipitec-10-3-2019/5042>>; Sebastian Schwemer and Jens Schovsbo, ‘What Is Left of User Rights? –Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime’ 17.

<sup>19</sup> Art. 2(p) proposed DSA.

<sup>20</sup> An example for this is, e.g., the varying definitions in secondary EU legislation of a specific type of online intermediary, online search engine, in EU legislation, see Schwemer, Mahler, Styri (2020).

<sup>21</sup> The proposed definition providers of intermediary services in the DSA comprises services relating to ‘mere conduit’, ‘caching’ and ‘hosting’ (art. 2(f)), continuing the ECD’s structure. For a more detailed discussion on different types of intermediaries, see *infra* at #

<sup>22</sup> In the engineering community, networks often are described in layers, which each relate to a separate functional level of the network, cf., e.g. the Open Systems Interconnection (OSI) model. See Wikipedia, OSI Model, [https://en.wikipedia.org/wiki/OSI\\_model](https://en.wikipedia.org/wiki/OSI_model). We refer to the OSI model merely as a reference point for the notion of “stack”, which is used with different meanings in different fields.

<sup>23</sup> By “harmful” content we mean that content that the platform defines as objectionable but that from a legal perspective is legal. This type of content is sometimes referred to as “lawful but awful”. See e.g., #.

<sup>24</sup> Art. 2(b) proposed DSA: ‘recipient of the service’ means any natural or legal person who uses the relevant intermediary service.



other exemplifies measures that relate to the user/account: termination of user account; suspension of user account.<sup>25</sup>

In contrast to this to this broad and open positive scope, the DSA proposal does not offer much in the way of negative delimitation of the definition. However, from the structure of definitions and legal obligations in the DSA proposal, we note that the notion of “content moderation” appears to exclude “**recommender systems**”, which are defined as

*fully or partially automated system used by an **online platform** to suggest in its online interface specific information to recipients of the service, including as a result of a search initiated by the recipient or otherwise determining the relative order or prominence of information displayed.*<sup>26</sup>

In principle, the *action or measure of recommendation* that is taken by a provider when using a recommender system could be viewed as a measure that affects availability, visibility and accessibility of content in an “online platform”. However, the concept of recommender system appears to be defined neutrally as applying to the operation of automated recommendation services for all types of content through an online interface, whereas “content moderation” targets measures aimed at illegal or harmful content that infringe terms and conditions of an information society provider.

Another question is whether activities performed under the **notice-and-action regime** for hosting<sup>27</sup> would be considered “content moderation” in the meaning of the definition. On the one hand, the definition in art. 2(p) DSA refers to “activities undertaken by providers of intermediary services” that are “aimed at detecting, identifying and addressing” *inter alia* illegal content. A narrow reading of this provision could lead to the conclusion that it covers only activities that go *beyond* notice-and-action mechanisms required by law. On the one hand, since the “disabling of access to” or “removal” of illegal content is covered by the definition, it is difficult to argue against the conclusion that also notice-and-action mechanisms (including e.g., trusted notifier/flagger arrangements) are considered content moderation. This latter reading is also supported in the recitals, which notes that content moderation *includes* “the measures taken as a result of the application and enforcement of their terms and conditions.”<sup>28</sup> Consequently, it also makes sense that measures resulting from or related to legal obligations to remove content are covered by the concept of “content moderation”.

### 2.3.2 Definitions in legal and other scholarship

In parallel with the legal definition highlighted above, it is useful to highlight how different authors have defined “content moderation”. We focus on selected examples that illustrate the variety of definitions.

Some authors advance broader – or at least more general – definitions. This is the case e.g. of Grimmelmann, Roberts, Myers West and Caplan.

- Grimmelmann defines content moderation as a *broad set of governance mechanisms*: “that structure participation in a community to facilitate cooperation and prevent abuse.”<sup>29</sup>
- Roberts views it as “the organized practice of screening user-generated content (UGC) posted to Internet sites, social media and other online outlets, in order to determine the appropriateness of the content for a given site, locality, or jurisdiction.”<sup>30</sup>

Other authors advance stricter – or at least narrower – definitions.

- Gorwa, Binns and Katzenbach, for instance, propose to define algorithmic commercial content moderation “as systems that classify user-generated content based on either matching or prediction, leading to a decision and governance outcome (e.g. removal, geoblocking, account takedown).”<sup>31</sup> This is a narrower definition of moderation than espoused by Grimmelmann and others, since the authors

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<sup>25</sup> NB that some of these examples are not fully technology neutral. For instance, the definition presupposes a recipient’s account that can be terminated or suspended, which may not be the case e.g., for platforms that are built on more de-centralized systems.

<sup>26</sup> Art. 2(o) proposed DSA. For the sake of completeness, “online interface” is defined as “any software, including a website or a part thereof, and applications, including mobile applications”. See art. 2(k) proposed DSA.

<sup>27</sup> art. 14 e-Commerce Directive and 5 DSA proposal respectively. On these provisions, see our analysis below at #.

<sup>28</sup> Recital 36 DSA.

<sup>29</sup> James Grimmelmann, ‘The Virtues of Moderation’ (2015) 17 Yale Journal of Law and Technology <<https://digitalcommons.law.yale.edu/yjolt/vol17/iss1/2>>.

<sup>30</sup> Sarah T Roberts, *Content Moderation* (2017) <<https://escholarship.org/uc/item/7371c1hf>> accessed 28 April 2021. cf. also Myers West 2018, Caplan 2019

<sup>31</sup> Gorwa, Binns and Katzenbach (n 1).



investigate only systems that make decisions about content and accounts (exerting ‘hard moderation’) and exclude the litany of ‘soft’ moderation systems (recommender systems, norms, design decisions, architectures) that form the base of Grimmelmann’s moderation taxonomy.”<sup>32</sup>

[To add:

- Eric Goldman<sup>33</sup>
- Giovanni de Gregorio<sup>34</sup>
- Bloch-Webha: “the set of practices that online platforms use to screen, rank, filter, and block user-generated content”.<sup>35</sup>]

### 2.3.3 Copyright content moderation: working definition

For the purposes of this Interim Report, we adopt as a working definition that which is advanced in the DSA proposal<sup>36</sup> with the following adjustments.

First, the content that is moderated must be protected by copyright (works) or related rights (other subject matter). We will only examine content moderation of other types of content (e.g., hate speech, terrorist content, etc.) to the extent necessary and relevant to the discussion on copyright-protected content.

Second, our focus is on providers of hosting services, which comprises online platforms. This will exclude other information society service providers (i.e., the provision of non-hosting services) related to functions of “mere conduit” and “caching”.<sup>37</sup> Although we explain this in further detail in the subsequent section 2.4, it is important to note here that (copyright) content moderation takes place at other levels of the “stack”, which directly affects the availability of content by providers of hosting services.<sup>38</sup> Importantly, for non-hosting service providers the moderation of content is not a legal consequence of the liability exemption regime.

Despite the relevance of content moderation activities outside hosting, our focus on providers of hosting services and copyright allows us to capture the most relevant players and activities for purposes of our research question, namely online content-sharing service providers (**OCSSPs**) under art. 17 CDSM Directive, and “**online platforms**” in the proposed DSA.

Third, although we consider them to be covered by the definition of “content moderation”, we will not investigate recommendation activities made by platforms via their **recommender systems**. Admittedly, the recommendation of content may very well have significant impact on access to culture (see below) in general, for example in relation to niche repertoires. Yet we delimit our study to forms of content moderation where the consequence is not increased visibility but unavailability of content. The reason for this is two-fold: firstly, from a copyright-perspective, the primary question relates to the availability/unavailability of copyright-protected content. Secondly, it is especially this form of moderation that has been in the focus by policy- and law-making at the EU level.

Considering the above, our working definition of copyright content moderation for this research is the following:

- ‘**copyright** content moderation’ means the activities undertaken by providers of **hosting** services – either as consequence of a legal notice-and-action obligation or as voluntary activity – aimed at detecting, identifying and addressing content or information that is illegal **under EU copyright law** and is incompatible with their terms and conditions, provided by recipients of the service, including measures taken that affect the availability, visibility and accessibility of that illegal content or that information, such as demotion, disabling of access to, or removal thereof, or the recipients’ ability to provide that information, such as the termination or suspension of a recipient’s account

In our view, this open-ended definition but precise definition is consistent with existing (and future) EU law and will enable the type of exploratory interdisciplinary research undertaken in this project.

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<sup>32</sup> Gorwa, Binns and Katzenbach (n 1).

<sup>33</sup> Eric Goldman, ‘Content Moderation Remedies’ (Social Science Research Network 2021) SSRN Scholarly Paper ID 3810580 <<https://papers.ssrn.com/abstract=3810580>> accessed 23 March 2021.

<sup>34</sup> Giovanni De Gregorio, ‘Democratising Online Content Moderation: A Constitutional Framework’ (2020) 36 Computer Law & Security Review 105374.

<sup>35</sup> Hannah Bloch-Wehba, ‘Automation in Moderation’, 53 Cornell International Law Journal , 41.

<sup>36</sup> See supra at #

<sup>37</sup> See arts 12 and 13 e-Commerce Directive, as well as the definitions in art. 2(f) proposed DSA.

<sup>38</sup> A prominent example outside copyright is the suspension of a right-wing website *The Daily Stormer* by the content delivery network Cloudflare. There exist for example MoU and trusted notifier/flagger arrangements with non-hosting intermediaries, see Schwemer/Mahler/Styri (2020); Schwemer (2019) Trusted notifier.



## 2.4 Who? “Online platforms” engaged in content moderation

### 2.4.1 The “platform” in platform regulation

As noted, we focus on copyright content moderation carried out by (or in the context of the services of) what can be broadly defined as a specific type of internet “intermediary”, namely online “platforms”. The exact meaning and scope of these terms and subsets thereof often varies across legal areas within information law, case law and scholarship. Moreover, the meaning of these terms is currently in flux, as the proposed DSA advances a set of new concepts that reshapes and adds to pre-existing legal concepts. It is therefore important to be precise about the type of intermediaries or platforms that are the object of our analysis, while placing them in the proper legal and interdisciplinary context. Our starting point is that the focus of our research is on “copyright content moderation” at the hosting layer of the stack. This perspective guides the following analysis.

#### **EU law terminology: a brief tour**

A good departure point for analysis is the often-cited OECD definition of “**Internet Intermediaries**” as those that:

*“bring together or facilitate transactions between third parties on the Internet. They give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties”.*<sup>39</sup>

This broad definition covers a wide range of online service providers. In contrast, there exists no uniform definition or concept of “intermediary” in EU law. To be sure, the term is mentioned in several legislative texts with relevance to copyright, namely in EU secondary legislation. For example, intermediaries are addressed in art. 8(3) InfoSoc Directive and art. 11 Enforcement Directive, laying out civil remedies for infringements of IPRs in the form of injunctions.<sup>40</sup> There is also a reference to “intermediary service providers” in the title of section 4 of the e-Commerce Directive, which regulates the liability exemptions for the provision of services of mere conduit, caching, and hosting, as further explained below.<sup>41</sup>

In addition, the CJEU appears to use the notion of intermediary in a broad manner. It was, for example, used by the Court for different types of service providers and services:<sup>42</sup>

- A search engine’s advertising service;<sup>43</sup>
- An online sales platform;<sup>44</sup>
- A social networking platform;<sup>45</sup>
- Internet access providers;<sup>46</sup>
- A provider of an open Wi-Fi network.<sup>47</sup>

Importantly, the notion intermediary is not relied in the context of the intermediary liability framework of the e-Commerce Directive. Instead, a related term that anchors much of the discussion of Internet intermediaries in EU law is that of “**service provider**” of “**information society services**”.<sup>48</sup> This term underpins the e-Commerce

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<sup>39</sup> OECD 2010, <http://www.oecd.org/digital/ieconomy/44949023.pdf>

<sup>40</sup> See, e.g., recitals 33 and 59, and arts 5(1)(a) and 8(3) InfoSoc Directive; [Enforcement Directive].

<sup>41</sup> See section 4 e-Commerce Directive, arts 12-15. See also references to “intermediary” or “intermediaries” in recitals 14, 40, 45, 50.

<sup>42</sup> See van Hoboken, Quintais et al.; Schwemer, Sebastian Felix. “On domain registries and unlawful website content: Shifts in intermediaries’ role in light of unlawful content or just another brick in the wall?” *International Journal of Law and Information Technology* 26.4 (2018): 273-293

<sup>43</sup> CJEU, 23 March 2010, case C-236/08 -Google France SARL and Google Inc. v Louis Vuitton Malletier SA et al(Google France).

<sup>44</sup> CJEU, 12 July 2011, case C-324/09 -L’Oréal SA and Others v eBay International AG and Others (L’Oréal)

<sup>45</sup> CJEU, 16 February 2012, case C-360/10 -Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV(Netlog).

<sup>46</sup> C-557/07 LSG v Tele2; C-70/10 Scarlet Extended

<sup>47</sup> C-484/14 -McFadden.

<sup>48</sup> Riordan for example, notes that the ‘information society service concept’ is ‘a slightly narrower category than the field of internet services at large, but it remains a very broad genus, and may be wider than the class of persons who can be said to act as internet intermediaries”. See Jaani Riordan, *The Liability of Internet Intermediaries* (Oxford University Press 2016) 387.





Directive<sup>49</sup> and is defined in the Technical Standards Directive.<sup>50</sup> The Technical Standards Directive advances the following complex autonomous definition of information society “service”:<sup>51</sup>

*(b) ‘service’ means any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.*

*For the purposes of this definition:*

- (i) ‘at a distance’ means that the service is provided without the parties being simultaneously present;*
- (ii) ‘by electronic means’ means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means;*
- (iii) ‘at the individual request of a recipient of services’ means that the service is provided through the transmission of data on individual request.*

*An indicative list of services not covered by this definition is set out in Annex I*

The mentioned Annex I provides an “indicative”, i.e., non-exhaustive list of services not covered by the above definition, either because they are not considered to be provided “at a distance”, “by electronic means”, or “at the individual request of the recipient of services”.<sup>52</sup> Information society service providers (**ISSPs**) can therefore be considered a type of Internet Intermediaries.

The e-Commerce Directive further stipulates three specific *functions* of ISSPs in the context of liability exemptions (or “safe-harbours”) namely the provision of services related to: “mere conduit”; “caching”, and hosting.<sup>53</sup> They can be represented as follows.

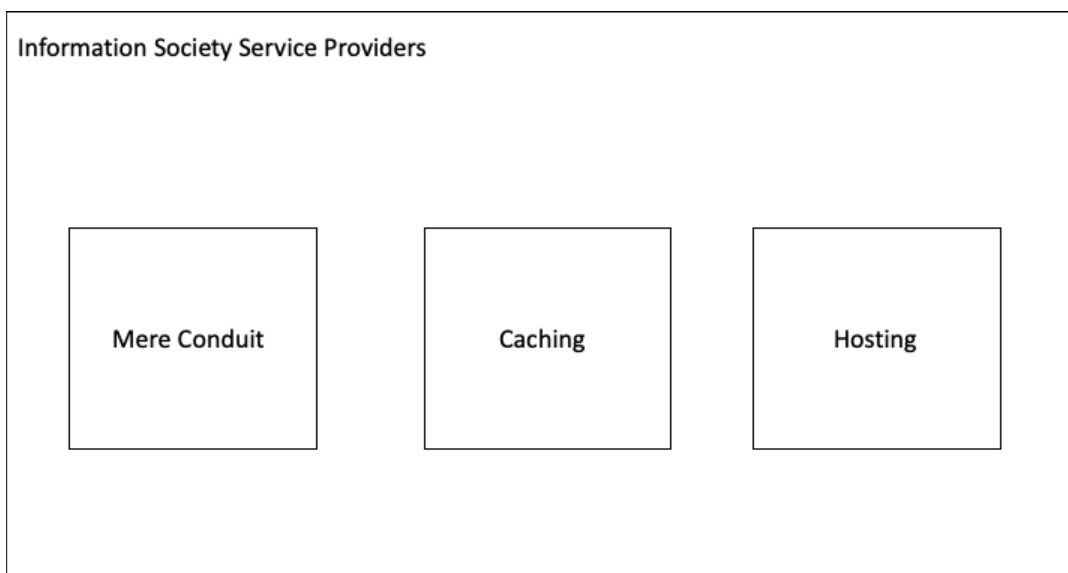


Figure 1. ISSPs Functions e-Commerce Directive

These functions are relevant at different levels of the “stack” and performed by different service providers. For our purposes, we are exclusively interested in the type of intermediaries that provide **hosting services**, i.e., those that provide an “information society service... that consists of the storage of information provided by a recipient

<sup>49</sup> See the definitions in art. 2(a) and (b) E-Commerce Directive

<sup>50</sup> Art. 2(a) E-Commerce Directive defines "information society services" as “services within the meaning of Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC”. The current version of the Technical Standards Directive is Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (**Technical Standards Directive**).

<sup>51</sup> Art. 1(1)(b) Technical Standards Directive.

<sup>52</sup> Annex I Technical Standards Directive. On the criteria and potential grey areas see e.g. Schwemer, S., Mahler, T. & Styri, H. (2020). Legal analysis of the intermediary service providers of non-hosting nature. Final report prepared for European Commission. p. 29-30.

<sup>53</sup> See arts 12 to 15 E-Commerce Directive.



of the service.”<sup>54</sup> In particular, we focus on those providers that host copyright-protected content. Considering the broad variety of copyright-protected works this includes *inter alia* music, audio-visual content, text, images, programming code, or any combination thereof.

In sociological (and some legal) scholarship, such providers are often referred to also “user-upload” or “user-generated content platforms”, or merely “platforms”.<sup>55</sup> But this commonly used terminology is not necessarily accurate from a legal and policy standpoint.

Take for instance the Regulation of Platform-to-Business Relations (**P2B Regulation**)<sup>56</sup>, which refers frequently to the “online platform economy”. Without defining “platform”, the P2B Regulation seems to relate it to the provision of “**online intermediation services**”<sup>57</sup>, which does not necessarily overlap with the notion of provider of hosting services.<sup>58</sup>

The notion of hosting services, as we note below, has been refined by the CJEU in the context of abundant case law, *inter alia* on the enforcement of IP rights, in a complex articulation of the liability exemptions in the e-Commerce Directive and rules on exclusive rights and enforcement in the InfoSoc and Enforcement Directives.<sup>59</sup>

To complicate things further, the 2019 CDSM Directive introduced a new legal concept, which is at the heart of this research, “online content-sharing service providers” (**OCSSP**). As we explain below, art. 17 CDSM Directive creates a new regime for OCSSPs.<sup>60</sup> While this concept is new to the copyright *acquis*, OCSSPs do not appear to constitute a new category of service providers in a technological or business sense. Rather, this is a new legal category covering a type of provider of hosting services whose activities are currently – until the implementation date of the CDSM Directive – regulated in different legal instruments, such as for our purposes, the e-Commerce Directive (especially art. 14), the InfoSoc Directive (especially arts. 3 and 8) and the Enforcement Directive (especially arts. 5 and 11).<sup>61</sup> The placement of OCSSPs within the context of the functions of ISSPs in the e-Commerce Directive can be represented as follows.

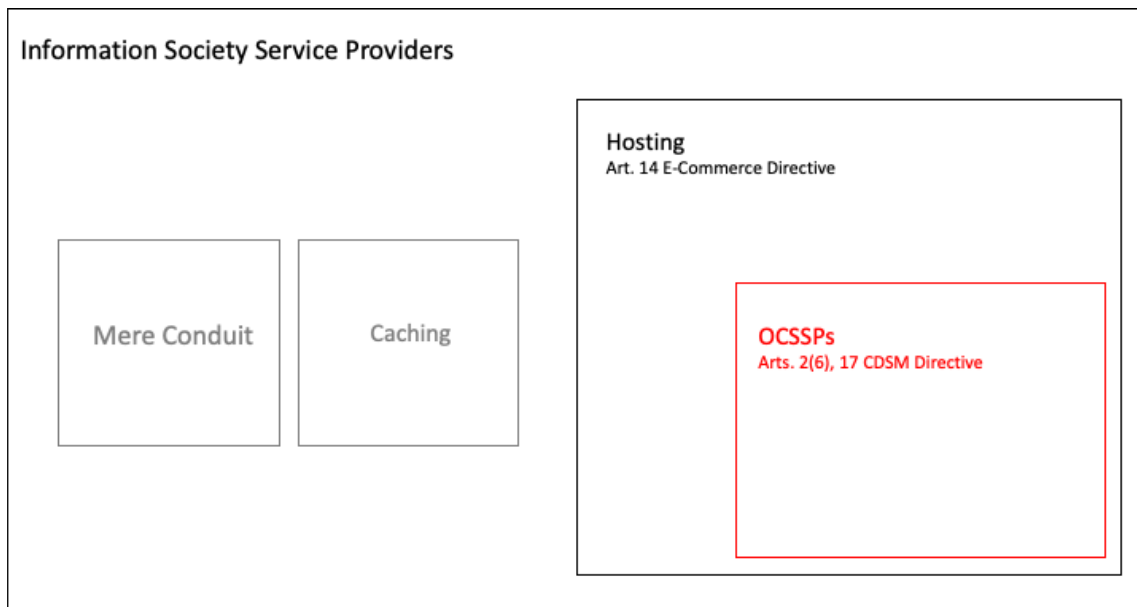


Figure 2. OCSSPs in the context of ISSPs

<sup>54</sup> Art. 14(1) E-Commerce Directive.

<sup>55</sup> [Refs]

<sup>56</sup> Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (**P2B Regulation**)

<sup>57</sup> NB that the term is distinguished from that of “online search engine” in art. 2(5) P2B Regulation: “‘online search engine’ means a digital service that allows users to input queries in order to perform searches of, in principle, all websites, or all websites in a particular language, on the basis of a query on any subject in the form of a keyword, voice request, phrase or other input, and returns results in any format in which information related to the requested content can be found”.

<sup>58</sup> See art. 2(2) and (3) P2B Regulation: “(2) ‘online intermediation services’ means services which meet all of the following requirements: (a) they constitute information society services within the meaning of point (b) of Article 1(1) of Directive (EU) 2015/1535 of the European Parliament and of the Council (12); (b) they allow business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded; (c) they are provided to business users on the basis of contractual relationships between the provider of those services and business users which offer goods or services to consumers; (3) ‘provider of online intermediation services’ means any natural or legal person which provides, or which offers to provide, online intermediation services to business users. NB ather potentially “competing” definitions: e.g., “digital service” in Art. 4(5) NIS Directive and Art. 2 Directive 2019/770.

<sup>59</sup> See *infra* at #

<sup>60</sup> See *infra* at #. OCSSPs are defined in art. 2(6), with further guidance in recitals 62 and 63.

<sup>61</sup> NB there is room to argue that the specific nature of the of the legal definition of OCSSP (see below at #) affects the nature of its “hosting function”.



Finally, it is important to note that much of the terminology discussed above in connection with the e-Commerce Directive is subject to discussion and change in the context of the proposed DSA. Although this will likely not (directly) affect the more recent definitions and regimes set forth in the CDSM Directive (such as OCSSP) and the P2B Regulation, it will certainly affect or at least further nuance the conceptualisation and legal treatment of ISSPs as it was developed in the e-Commerce Directive.

In fact, the proposed DSA advances a host of new notions that restructure the pre-existing legal framework. Although the text is still at the proposal stage and much can change, it is nonetheless instructive to understand the core tenets of the DSA approach as it regards the online service providers it targets. While retaining the definition of “information society service”<sup>62</sup> the DSA proposal makes a distinction between four categories of service providers, from general to increasingly more specific: (1) intermediary services, (2) hosting services, (3) online platforms, and (4) very large online platforms (VLOPs).

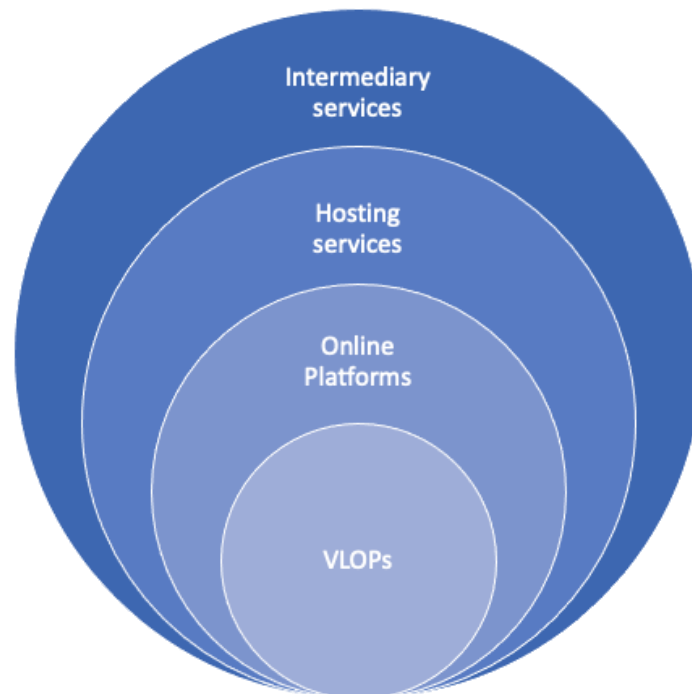


Figure 3. Intermediary service provider categories DSA Proposal<sup>63</sup>

Intermediary services as are defined as services of “mere conduit”<sup>64</sup>, “caching”<sup>65</sup> and hosting<sup>66</sup>. In addition to the aforementioned narrower categories of hosting services, online platforms and VLOPs, intermediary services also include, according to the European Commission’s press release, services “offering network infrastructure: Internet access providers, domain name registrars [sic]”.<sup>67</sup>

Hosting services are those that hat consists of the storage of information provided by, and at the request of, a recipient of the service.<sup>68</sup> They include also the subsequent categories of online platforms and VLOP.

“Online platforms” are defined as providers of “a hosting service which, at the request of a recipient of the service, stores and disseminates to the public information<sup>3</sup>, unless that activity is a minor and purely ancillary feature of another service and, for objective and technical reasons cannot be used without that other service, and the integration of the feature into the other service is not a means to circumvent the applicability of this Regulation.”<sup>69</sup> In simple terms, VLOPs are those online platforms provide their services to a number of average

<sup>62</sup> Art. 2(a) Proposed DSA

<sup>63</sup> Image adapted from: [https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en)

<sup>64</sup> A ‘mere conduit’ service is one that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network. Art. 2(f) proposed DSA

<sup>65</sup> Art. 2(f) proposed DSA.

<sup>66</sup> A ‘caching’ service is one that consists of the transmission in a communication network of information provided by a recipient of the service, involving the automatic, intermediate and temporary storage of that information, for the sole purpose of making more efficient the information’s onward transmission to other recipients upon their request. Art. 2(f) proposed DSA.

<sup>67</sup> Which providers are covered: [https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment\\_en#which-providers-are-covered](https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en#which-providers-are-covered) . NB that the correct reference should probably be to Internet “registries” rather than “registrars”.

<sup>68</sup> Art. 2(f) DSA proposal.

<sup>69</sup> Art. 2(h) DSA Proposal



monthly active recipients of the service in the EU equal to or higher than 45 million.<sup>70</sup> As we explain in detail below<sup>71</sup>, the definition of OCSSP in the CDSM Directive covers online platforms and VLOPs (see representation in Figure 4).

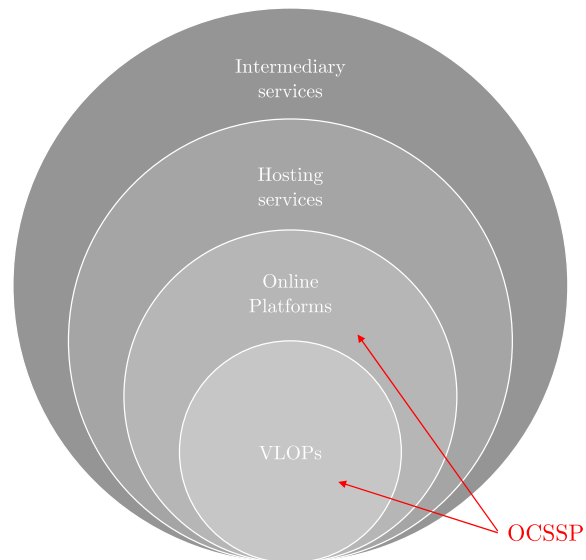


Figure 4. OCCSSPs as online platforms in DSA framework

### Other platform terminologies

There exist many different studies on platforms, both in digital and analogue contexts. Instead of an in-depth analysis, suffice it here to point towards some selected. With regards to digital platforms, de Reuver, Sørensen & Basole (2018) identify three main features, namely: (1) platforms are technologically mediated; (2) platforms enable interactions between different types of users; (3) platforms allow those types of users to implement specific activities.<sup>72</sup>

The IGF Coalition on Platform Responsibility, a multistakeholder group under the auspices of the UN Internet Governance Forum, has suggested a broad definition of platform as “any applications allowing users to seek, impart and receive information or ideas according to the rules defined into a contractual agreement.”<sup>73</sup>

Sociologists of technology and media scholars’ definitions tend to be mostly concerned with the politics of platforms’ discourses, materiality and business models.

Gillespie’s seminal paper indicated how digital technology firms themselves employ the term from contrasting angles: “*computational*, (as) something to build upon and innovate from; *political*, (as) a place from which to speak and be heard; *figurative*, in that the opportunity is an abstract promise as much as a practical one; and *architectural*, [as something; designed as an open-armed, egalitarian facilitation of expression, not an elitist gatekeeper with normative and technical restrictions”.<sup>74</sup>

Others noted that the novel complexity of platforms poses a challenge to any attempt to define them. As markets, Bratton argues, platforms distribute resources and individuals; as states, they govern the interactions between these resources and individuals, but on a global scale. And yet they are neither markets nor states. Bratton offers then his own “working definition”, according to which a “platform” is “[a] standards-based technical-economic system that simultaneously distributes interfaces through their remote coordination and centralizes their integrated control through that same coordination”.<sup>75</sup>

<sup>70</sup> art. 25 DSA Proposal

<sup>71</sup> See infra at #.

<sup>72</sup> de Reuver, M., Sørensen, C., & Basole, R. C. (2018). The Digital Platform: A Research Agenda. *Journal of Information Technology*, 33(2), 124–135.

<sup>73</sup> IGF Coalition on Platform Responsibility, *Recommendations on Terms of Service and Human Rights*, 2015, see <http://www.intgovforum.org/multilingual/book/export/html/11075>

<sup>74</sup> Gillespie 2010, p.352.

<sup>75</sup> Bratton 2016, p. 171.



Bratton’s conceptualization points to what various other sociological definitions have in common: platforms should be understood as “systems”. These systems are not isolated from each other, Van Djick, Poell & de Wall posit, but part of larger environments. In this way, an online platform might be defined as “programmable digital architecture designed to organize interactions between users... corporate entities and public bodies[, and] . . . geared toward the systematic collection, algorithmic processing, circulation, and monetization of user data” which, in conjunction with others, “form a “platform ecosystem, . . . an assemblage of networked platforms, governed by a particular set of mechanisms . . . that shapes everyday practices”.<sup>76</sup> An example of “ecosystem” is the one formed mostly by “Big Tech” companies (Alphabet, Apple, Facebook, Amazon, and Microsoft), they say.

Another concept that is commonly used in connection with online platforms is “infrastructure”. Both online platforms and infrastructures share several characteristics, “including embeddedness, a degree of invisibility, extensibility, and broad coverage”.<sup>77</sup> But equating platforms with infrastructure would be a mistake. Surely, most “influential” platforms are “infrastructural”, as they “they form the heart of the ecosystem upon which many other platforms and apps can be built”.<sup>78</sup> However, platforms might also play “sectoral” roles, serving “a particular sector or niche, such as news, transportation, food, education, health, finance, or hospitality”.

Gillespie’s (2018) conceptualization brings platform’s complexity and systemic and infrastructural components into a single definition. He contends that “platforms are sociotechnical assemblages and complex institutions” which, as online sites, “a) host, organize, and circulate users’ shared content or social interactions for them b) without having produced or commissioned (the bulk of) that content c) built on an infrastructure, beneath that circulation of information, for processing data for customer service, advertising, and profit.”<sup>79</sup>

## 2.5 Defining “access to culture”

The **main research question** of this Interim Report refers to the concept of “access to culture” in the DSM. This is in line with the broader focus of the ReCreating Europe project on a “culturally diverse, accessible, and creative Europe”.<sup>80</sup>

To assess the role of intermediaries (platforms) and their copyright content moderation’s impact on a culturally diverse, accessible and creative Europe within the remit of the ReCreating Europe project, it is necessary to locate our research in the context of these concepts.

Cultural diversity, accessibility and creativity are cornerstones of the EU. Art. 3(3) TEU, for example, sets out that the Union “shall respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced.” Instead of providing an in-depth analysis of the concepts and their deep and rich history<sup>81</sup>, however, we focus on the dimensions most relevant for the analysis of online platforms engaging in copyright content moderation.

The further analysis is based on our hypothesis that *cultural diversity* is both a property of as well as in an interdependent relationship with *access to culture*. Similarly, possibilities for unfolding *creativity* are in an interdependent relationship with access to culture. In the following, we focus on our analysis on access to culture.

### 2.5.1 “Access to culture” from an interdisciplinary perspective: a possible approach

At an international level, it is possible to identify a basis for a concept of access to culture as it relates to copyright in art. 27 of the UN Universal Declaration of Human Rights (UDHR). Art. 27 states that

(1) *Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits’.*<sup>82</sup>

(2) *Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.’*

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<sup>76</sup> Van Djick, Poell & de Wall, 2018, p. 4.

<sup>77</sup> Plantin et al, 2017.

<sup>78</sup> Van Djick, Poell & de Wall, 2018: 12-13.

<sup>79</sup> Gillespie, 2018.

<sup>80</sup> [Cit ReCreating Europe Project Proposal].

<sup>81</sup> [Refs].

<sup>82</sup> Cf. article 15 of the International Covenant on Economic, Social and Cultural Rights



In simple terms, from a legal technical perspective, copyright law predominantly *excludes access* to protected works for the purpose appropriating economic value from those works. Since many expressions of cultural phenomena and artifacts are protected by copyright, there is an inherent conflict of interests between copyright and access to culture. This is complicated by the low threshold of originality in the EU, broad exclusive rights, and relatively narrow exceptions and limitations in EU law, as interpreted by the CJEU.<sup>83</sup>

Online platforms constitute an important gateway for accessing copyright-protected works. The stress field of copyright-protected content and online platforms also concerns several fundamental rights<sup>84</sup>, such as the right to property (art. 17(2) CFR), the freedom of expression (art. 11 CFR), freedom of arts (art. 13 CFR), and the freedom to conduct a business (art. 16).

For the purpose of the following analyses, we distinguish between two dimensions of the concept of “access to culture” in relation to content moderation by online platforms:

- A descriptive dimension of access to culture (section 2.5.2); [downstream]
- A normative dimension of the concept (section 2.5.3). [upstream]

From each dimension we derive two different models against which to assess the impact of copyright content moderation on access to culture.

### 2.5.2 The descriptive dimension of access to culture in content moderation

Train (1991) notes that “[r]egulation in the real world is far from optimal, and it is perhaps unrealistic to believe that it ever will be”.<sup>85</sup> Nonetheless, for the analysis of the descriptive dimension of access to culture, we set out the following **assumption** for our basic analytical model: We assume that the EU copyright framework regarding substantive rights as well as the framework for intermediaries represent a point of “optimal” regulation.<sup>86</sup>

Transferred to the context of copyright content moderation<sup>87</sup> by online platforms this means the following. The “quality” of copyright content moderation is correlated to access to culture, because access to culture (as per the definition above) is considered embedded in the existing copyright framework. Since the existing framework is assumed to strike the appropriate balance between exclusivity in copyright protection and access to culture, any variation in that balance – beyond the margin of interpretation allowed by law – will impact on access to culture.

Consequently, both excessive and insufficient content moderation will have a negative impact on access to culture. Simply put, excessive content moderation by platforms restricts access to culture. Conversely, insufficient content moderation increases access to culture, but in a harmful way because it encroaches on the legitimate interest of copyright holders and thus distorts the optimal balance. In other words: the smaller the difference between actual content moderation performed by intermediaries and the correct application of the legal framework, the smaller the negative impact on access to culture.

This “**quality**” of content moderation can in simple terms be described in terms of correct and false results. For simplicity, in the following we differentiate between illegal content (infringement of copyright) and legal content (no infringement of copyright). The following attempt to describe outcomes is borrowed from statistics. There are four theoretical outcomes that need to be distinguished, as described in Table 1 below.

*Table 1. Error Types in Copyright Content Moderation*

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<sup>83</sup> Citations to be added There is ample scholarship describing these aspects. For recent overviews, see e.g. Eleonora Rosati, *Copyright and the Court of Justice of the European Union* (Oxford University Press 2019); Tito Rendas, *Exceptions in EU Copyright Law: In Search of a Balance Between Flexibility and Legal Certainty* | *Wolters Kluwer Legal & Regulatory* (Kluwer Law International 2021).

<sup>84</sup> See, e.g., recital 84 CDSM Directive: “This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter. Accordingly, this Directive should be interpreted and applied in accordance with those rights and principles.”

<sup>85</sup> Kenneth E. Train (1991), *Optimal Regulation*, (MIT Press), p. 297.

<sup>86</sup> By “optimal” regulation we mean in this context that the framework strikes the *appropriate* balance between conflicting interests and fundamental rights, namely by recognizing time-restricted (exclusive) rights and corresponding exceptions and limitations. By “appropriate” we mean the balance that was struck as a result of the normal operation of a democratic legislative process. In other words, we do not mean to pass a value judgment on the desirability of such balance from the perspective of any normative theory or viewpoint about copyright law.

<sup>87</sup> The use of copyright moderation for non-copyright purposes and the use of non-copyright moderation (e.g. privacy) for copyright purposes is not addressed in the following.



		Copyright infringing	
		yes	no
Takedown / "disabling" of access	yes	True positive (TP)	False positive (type-I error)
	no	False negative (type-II error)	True negative (TN)

SF Schwemer (2021), *Regulatory strategies for mitigating errors in automated content moderation* (in preparation)

The first set of outcomes relates to correct result of content moderation (i.e., the absence of error): if illegal content is taken down, there is no error in the moderation (**true positive**).<sup>88</sup> Similarly, if legal content is not taken down, there is no error in the moderation (**true negative**).<sup>89</sup>

The second set of outcomes relates to false results of content moderation (i.e., the presence of error).<sup>90</sup> Error is present, firstly, in instances where legal (i.e., non-infringing) content is taken down. This is also referred to as **false positive** (or type-I error). Secondly, error is present in instances where illegal content is not taken down. This is also referred to as **false negative** (or type-II error).

Based on the above assumption, this implies firstly that (a) any moderation by intermediaries that comes with type-I errors (false positives) or (b) type-II errors (false negatives) is assumed to have a negative impact on access to culture.<sup>91</sup> This suggests, in other words, that the pure availability of content is not always optimal for access to culture.<sup>92</sup> Secondly, if our basic hypothesis and framework are accepted, then true positives and true negatives are not detrimental to access to culture; their impact on access to culture is either neutral or positive.<sup>93</sup>

This simplified model is useful because it allows us to compartmentalise the specific issues of copyright content moderation by online platforms: in this model, the focus is consequently on the "downstream" issue of mitigation of (type-I and type-II) errors in content moderation. In this context, both ex ante obligations as well as ex post procedural redress mechanisms will become relevant.<sup>94</sup>

The simplified nature of this descriptive model, however, comes with several drawbacks. Chief among them the fact that it does not consider the normative aspects of copyright law. It is, for example, far from certain that true positive outcomes (i.e., takedown of illegal content), or over- and under-enforcement will always have a negative effect on access to culture. Furthermore, this model does not account for the uncertainty associated with the margin of discretion that platforms may have when designing their content moderation policies – what we call regulation "by" platforms – or other means such as licensing.

This normative "upstream" dimension of access to culture challenges the assumption on which our descriptive model is based, reintroducing the complexity regarding the copyright-balance as such. We address this in the following section.

### 2.5.3 The normative dimension of the concept of access to culture

In the model based on the normative dimension of the concept of access to culture, the notion that the existing copyright framework strikes the optimal balance between exclusivity in copyright protection and access to culture is rejected. The model does not exclusively focus on the copyright framework but also on other parts of

<sup>88</sup> The following example illustrate this scenario (true positive): Imagine that a copyright infringing (i.e. not covered by a limitation or exception) musical work uploaded by a user to the platform that is identified and removed by said platform's content moderation practices. The platform's content moderation comes with the correct result.

<sup>89</sup> The following example illustrates this scenario (true negative): Imagine the upload of a copyright-protected work that is covered by a limitation or exception and thus is not copyright-infringing and consequently not identified and reacted upon by said platform's content moderation practices. Also in this scenario, the platform's content moderation comes with the correct result.

<sup>90</sup> These errors can be introduced at various stages by the platform, for example, when its policies and practices deviate from substantive copyright rules or when the concrete decision fails to correctly assess limitations and exceptions.

<sup>91</sup> NB that a false negative viewed in isolation could be considered to have a positive impact on access to culture, even if it is harmful in other ways, as described in our analysis.

<sup>92</sup> Seen in isolation outside the broader copyright context, a false positive might have a positive impact on access to culture, but it is harmful in other ways, see above. We will challenge this assumption in the following part.

<sup>93</sup> Their impact on access to culture is either neutral or positive.

<sup>94</sup> What is meant by these ex ante and ex post measures from a legal perspective in the context of art. 17 CDSM Directive is explained in Chapter 3.



law that affect the *de facto* regulation of copyright-protected subject matter and in particular the liability regime that intermediaries are subject to. The model suggests that substantive law relevant in the field of copyright can be amended in a way that changes the balance with the result that it further increases access to culture by providing more freedoms to third parties to use and disseminate copyright-protected works, without encroaching on the legitimate interest of copyright holders.

The actual practices of content moderation by platforms are affected by the state-enacted law that platforms are subject to. In this context, ‘state-enacted’ law refers to statute and case law. In essence, this is what we describe above as regulation “of” platforms. In order to elaborate on the interrelationship between the practices of platforms and state-enacted law, we introduce the concept of “autonomy space”.

Autonomy spaces refers to the margin of discretion or space within which legal actors may act autonomously under applicable law. In essence, this corresponds to what we describe above as regulation “by platforms”. In parts of state-enacted law where public policy protection plays a minor role, the autonomy space or margin of discretion for platforms to engage in content moderation is wide. Conversely, in parts of state-enacted law where public policy protection is dominant the autonomy space is narrow.

Outside the autonomy spaces, private parties such as intermediaries are not allowed to act, as their conduct – their content moderation activity – is qualified as unlawful. Parties are not actually prevented from acting outside autonomy spaces; but if they do, they will face certain costs in the form of legal sanctions or remedies.<sup>95</sup>

If state-enacted law is amended for the purpose of changing the practices of intermediaries, this can be done in two ways. Either by narrowing down the autonomy space (*e.g.*, raising the liability standard for platforms) or by raising the costs of acting outside the autonomy space (*e.g.*, introducing more severe sanctions and more effective remedies).

## 2.6 Methods

In this section we identify the methods used in the legal and interdisciplinary research carried out so far. This includes two main components. First, multi-level doctrinal legal analysis, focusing on mapping of copyright content moderation rules in EU law (2.6.1) and select national laws, the latter through comparative legal research (2.6.2). Second, empirical research on copyright content moderation by online platforms (2.6.3).

### 2.6.1 EU Level Mapping

[To be completed: EU level mapping via descriptive (and normative) doctrinal legal research of EU copyright law, interpreted in light of international law; primarily desk research]

The scope of our analysis is delimited to EU copyright law, interpreted in light of international law. This means that the analysis covers the EU copyright *acquis*, which is mainly comprised of Directives, and its interpretation by the Court of Justice of the EU (CJEU). The most relevant instruments in this respect are the InfoSoc Directive (2001/29/EC), the Copyright in the Digital Single Market (CDSM) Directive (2019/790), the e-Commerce Directive, and the proposed Digital Services Act (DSA).<sup>96</sup> The relevant international legal framework includes the Berne Convention, the TRIPS Agreement, the WIPO Copyright Treaty (WCT), and the WIPO Performances and Phonograms Treaty (WPPT).<sup>97</sup>

### 2.6.2 Systematic and comparative legal research

In addition to the EU level mapping, we carry our national level mapping through comparative legal analysis.<sup>98</sup> This included both desk research and questionnaires completed by national experts in selected Member States.

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<sup>95</sup> Cf. Riis (2016), p. 10-12; and Riis/Schovsbo (forthcoming).

<sup>96</sup> Respectively: 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 [2019] OJ L 130/92 (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 [2019] OJ L 130/92 (CDSM Directive); [e-Commerce Directive]; [DSA proposal]

<sup>97</sup> Berne Convention for the Protection of Literary and Artistic Works, opened for signature Sept. 9, 1886, 828 U.N.T.S. 221 (Berne Convention); Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S.299 (TRIPS Agreement); WIPO Copyright Treaty, Dec. 20, 1996, 2186 U.N.T.S. 121 (WCT); WIPO Performances and Phonograms Treaty, 1996 O.J. (L 89) (WPPT).

<sup>98</sup> H. Patrick Glenn, “The Aims of Comparative Law” in Jan M. Smits (ed), *Elgar Encyclopedia of Comparative Law* (Edward Elgar 2006) 57-65.; Wolff (2019) 491.





Our comparative research focuses on the legal status of OCSSPs at EU level, with a focus on rules related to liability and content moderation that have a potential impact on accessing cultural goods and information.

Our comparative legal research adopts van Hoecke’s idea of “toolbox”, rather than a fixed methodological roadmap.<sup>99</sup> Within this toolbox, we mainly rely on the functional,<sup>100</sup> contextual,<sup>101</sup> and, consequently, the common core<sup>102</sup> methods. These aim to look at the effects and the “living” nature of the law, with special regards to the specific national regulatory sources and – to a certain degree – private ordering mechanisms, as well as the impact on access [to culture?] and content diversity.

The focal point of the research is art. 17 CDSM Directive. Our aim is not to reveal the legislative history of art. 17, but to focus on the probable impacts on content moderation, accessibility of user-generated content (UGC) and the liability of platforms. By applying the comparative legal method, the following questions must be defined: (a) why to compare, (b) what to compare, (c) how to compare.

First, regarding (a) what to compare, the new statutory framework drawn by art. 17 provides an opportunity to map the existing framework to understand the extent of the changes to the existing legal framework required by the new rules.

Second, on (b) why to compare, it is undeniable that OCSSPs play a crucial role in the “*platform-driven economy*.”<sup>103</sup> In this environment, it is inevitable to understand their legal position prior to formulating any policy or recommendation that might bring unwanted restrictions on platforms.<sup>104</sup>

Third, on (c) how to compare, we have selected a representative sample of ten Member States for comparison. Common features of these countries are the EU membership and similar level of legal development. What is different on the other hand are the economic, social and legal characteristics, including their size (small, medium and large Member States), as well as their role and relevance in the European copyright and platform discourse.

Furthermore, in order to map the pre- and post-CDSM (steps taken by the selected jurisdictions in the implementation of art. 17) regulatory environment and practices regarding both court cases and platform control, a two-phase questionnaire was designed. The national reporters of the selected Member States filled out the first-phase questionnaire during the period of December 2020 to March 2021 (including requested amendments). The details of the first-phase questionnaire and the interim findings of the research are included in Chapter 4. The questionnaire is reproduced in Annex #. .

### 2.6.3 Social science methods

In this section, we explain and justify our methodological decisions and strategies regarding the analysis of companies’ policies regarding copyright, as well as the specific methods we use. The section begins by explaining the criteria used to select which platforms to look at, as well as how we collected and qualitatively analysed their policies. This section ends with a brief reflection on the limitation and ethical issues that we considered during our research.

#### **Building a sample of platforms: mainstream, alternative and specialised**

In face of the growing number of social media platforms and the project’s constraints, we decided to focus on 15 platforms (see Table 2). They were selected through a purposive sampling procedure. This sampling was driven by two main criteria, and generated three different sets of platforms.

First and foremost, our choice was guided by the *relevance* of a given platform, in particular for European citizens. For our purposes, the relevance of a given platform was primarily a function of the number of users of such platform. There is no thoroughly reliable and verifiable public record of users’ numbers by platforms. We opted

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<sup>99</sup> Mark Van Hoecke, “Methodology of Comparative Legal Research” (2015) *Law and Method*, 1 ff.

<sup>100</sup> According to van Hoecke, this method practically means that “rules and concepts may be different, but that most legal systems will eventually solve legal problems in a similar way”. This method allows for the looking for functional equivalents and differences in various legal systems. Compare to *ibid.*, at p. 9. On the “functionalism” of comparative law see especially Konrad Zweigert & Hein Kötz: *Einführung in die Rechtsvergleichung*, Dritte Auflage, J. C. B. Mohr (Paul Siebeck), Tübingen, 1996.

<sup>101</sup> This method focuses on the political-technological-economic environment, which formed the body of the law; it necessitates the empirical observation of case law and more. Compare to van Hoecke (2015) 16-18.

<sup>102</sup> This method “looks for commonalities and differences between legal systems in view of the question to what extent harmonization on certain points would be possible among the compared legal systems or the question how a European rule (...) could be interpreted in such a way that it fits best the different national traditions”. Compare to *ibid.*, at p. 21.

<sup>103</sup> Andrej Savin, “Regulating Internet Platforms in the EU - The Emergence of the ‘Level Playing Field’” (2019) *Copenhagen Business School Law Research Paper Series No. 19-02*, 2.

<sup>104</sup> *Ibid.*



for what we judged was the best possible approximation. Using data compiled by StatCounter<sup>105</sup>, we found that Facebook, Twitter, YouTube and Instagram were the top platforms for market share in Europe. To counterbalance the dominance of American-based companies, we also added the Berlin-based music sharing platform SoundCloud. While we could have included other global giants with strong European presence, such as Tumblr and Pinterest, time and resources limitation led us to cap this group of what we term “mainstream social media platforms” to five.<sup>106</sup> Such limitation was important, largely, because we wanted to analyse other sorts of platforms.

This is related to our second criterion: *diversity* – a central concept to the wider *reCreating Europe* project. First, we wanted to understand how what we term “alternative social media platforms” (as opposed to the those classified as “mainstream” above) regulate copyright content moderation. These platforms share some characteristics: (i) their computational infrastructure is usually decentralised (e.g., users may be able to tweak the computational code of the platform, and content moderation decisions are not necessarily made by the any single controller of the platform); and (ii) many are predominantly non-commercial and not dependent on the datafication of users’ actions (i.e., the commercial exploitation of user’s data via ad-driven business models).

These much smaller platforms might not be relevant in the sense described above – their number of users rarely surpasses the dozens of thousands. Yet, our assumption is that, in examining them, we could encounter diverse private ordering regimes for copyright content moderation than in mainstream platforms. Cataloguing eventually different regimes might be interesting in itself – but this exploration may offer also paradigmatic examples that policymakers, technologists and scholars might consider when envisioning alternatives to what large platforms do and how to differently regulate smaller platforms in regards to copyright.

There is a plethora of alternative platforms, and many of them experiment a transient existence. We selected five platforms whose core functionalities could be compared coherently to mainstream ones. To be sure, we do not claim that this group of five are the *most* important alternative platforms.<sup>107</sup> They are treated in this report as key examples. Following this direction, at the time of the sampling (February 2020), we chose to investigate: (i) *DTube*, which positioned itself as an alternative to audio-visual platforms, such as YouTube; (ii) *Audius*, a blockchain-based service focussed on musical content, as SoundCloud is; (iii) *Diaspora* and (iv) *Mastodon*, widely described as “ethical” replacements of all-purpose large platforms, such as Facebook and Twitter, respectively; and (v) *Pixelfed*, an alternative to picture-based platforms such as Instagram. Since Mastodon and Diaspora are federated, they have different “pods”, that is, smaller platforms within the larger platform, a decision had to be made also about which of these pods we would look into. We decided to focus on their main pods.

However, diversity is not necessarily limited to platforms that are explicitly designed and defined as “alternatives”. There are platforms that while being mainstream in some respects – centralized, commercial, having significant revenues, large number of users, dealing with large amounts of copyright-protected content – do however present certain diversity characteristics that in our view justify examining them separately in our research, cater to some particular types of users and creators. We classify these as *specialised platforms*.

Our assumption was that, at least in principle, this particularity could also be connected to diverse copyright regimes, but in a way that is fundamentally different from that of alternative platforms. The decision of which specialised platforms we should look at was based on the following criteria: number of users, importance for discussions about copyright, variety of kinds of creators, and comparability with at least some of the mainstream and alternative platforms we selected. We ended up focussing on: (i) the software development platform *GitHub*, mainly because we were interested in how older cultures of sharing amongst coders clashed (or not) with copyright enforcement structures; (ii) the video-sharing platform *Vimeo*, which aims to offer a more sophisticated experience than YouTube and is quite popular amongst visual artists and professionals; (iii) *FanFiction*, a platform where ordinary people write fiction based on copyrighted characters and stories, such as “Harry Potter” and “Twilight”; (iv) *Dribbble*, an image-centred platform that is mainly used by designers; and (iv) *PornHub*, a highly popular pornographic video-sharing platform that has increasingly attracted sex workers and ordinary users interested in posting their own material.

Table 2. Sample of platforms selected to be analysed.

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<sup>105</sup> <https://gs.statcounter.com/social-media-stats/all/europe>

<sup>106</sup> Whereas we are lining the classification of mainstream to the number of users this classification also aligns well with these platforms’ organization size and structure, as well as revenue.

<sup>107</sup> Although Diaspora and Mastodon have generated much journalistic buzz, in particular after the so-called post-2016 “techlash”.



Online Platforms		
Mainstream	Alternative	Specialised
Facebook	Diaspora	Github
YouTube	DTube	Vimeo
Twitter	Mastodon	FanFiction
Instagram	Pixelfed	Dribble
Sound Cloud	Audius	Pornhub

This sample of 15 platforms served our research in different ways. When analysing broader structural elements (such as the of policies and copyright filters), we were able to look into the entirety of the sample. Yet, given the extension and complexity of the data we collected and examined qualitatively, deeper analyses could only be done in relation to a subset of platforms, in the form of case studies.

### Data collection

Having decided which platforms we would investigate, a second task involved deciding which policies we should focus on, and how we could collect these policies. Regarding the first question, we wanted to be as thorough as possible: instead of focussing on policies that have been already studied as regulating copyright, such as those expressly labelled as “Terms of Service”, we assumed that all policies could, in principle, be somehow related to copyright content moderation – this is in line with our own definition of “TOS”. Therefore, the goal is to investigate all versions of all policy-like document of those 15 platforms, from the day the platforms were created until the end of 2020 – the end date for our data collection. These choices enlarged considerably the data we had to collect and analyse, in comparison with a more traditional and non-longitudinal study.

Regarding the second question, our approach was to independently collect all the data. To do that, we resorted to platforms’ websites and, mainly, Internet Archive’s WayBack Machine (“WBM”), the largest online archive of websites’ past impressions.

Before we explain how we used the WBM, it is worth clarifying how this archive works. Beginning in 1996, the Internet Archive (the organization behind the WBM) had by November 2020 collected over 475 billion webpages.<sup>108</sup> The WBM use various “crawler” software to download and store all publicly available data about websites, producing a snapshot of a given page at a given moment. Yet, not all the history of all websites is stored in the WBM. There are three main reasons for this: “some sites may not be included because the automated crawlers were unaware of their existence at the time of the crawl”; others “were not archived because they were password protected, blocked by robots.txt, or otherwise inaccessible to our automated systems”; and finally, “site owners might have also requested that their sites be excluded” from the WBM.<sup>109</sup> In short, the WBM is by far the best tool to access previous versions of websites – but it is also flawed. Ultimately, it might be impossible to know what, after all, the archive does *not* contain.

We are certainly not the first ones to use WBM to research the private policies of digital technology companies. There’s a rich literature that uses the WBM to amass large quantities of data about websites’ policies. These studies cast a very wide net – their goal is to produce high level insights about how the regulation of the Internet as whole has changed over the years. Amos et al (2020), for instance, studied the snapshots of over 130,000 websites captured by the WBM in the period of 20 years, collecting a total of over 1 million documents.<sup>110</sup> This longitudinal element is common to other works<sup>111</sup> often with the goal of understanding the effect of certain new legislations on websites’ policies.<sup>112</sup> Yet, we could not find a study with our particular focus: to make of sense of

<sup>108</sup> Jessen, 2020.

<sup>109</sup> Internet Archive, 2021.

<sup>110</sup> Amos et al (2020)

<sup>111</sup> Milne and Culnan, 2002.

<sup>112</sup> Linden, Khandelwal, Harkous, & Fawaz, 2020.



the *policies* that *social media platforms* use to regulate *copyright content moderation*. Therefore, while not technically innovative, our collection procedures are original.

Through our inductive approach, we quickly learned that what counts as platform “policy” could hardly be limited to documents that resemble legal contracts – specifically, Terms of Service and Privacy Agreement (sometimes called Data Policy). For years now, platforms have used some sort of Community Guidelines, Help pages and various public communication spaces (such as corporate blogs) to further specify the rules that end users are subject to when using their services. Thus, the content in these spaces would have to be gathered longitudinally and stored as well, too – in addition to the said contractual policies. Also, there was a number of policies or policy-like documents that the (non-legal) literature only rarely paid attention to: law enforcement guidelines, Copyright Infringement Forms, Cookies Policy. In sum, platform’s policies were far from centralized, homogenous or stable. Names of policies and their URLs changed and expanded over time, without any transparent explanation. This unexpected fragmentation imposed additional hurdles, as we explain below.

The data collection followed some basic procedures for all platforms:

1. We visited the platforms’ corporate websites and checked whether and how policy-like documents were displayed and archived.
2. Using keywords (mainly, “policy”, “copyright”, “content moderation”, “regulation”), we searched for and saved corporate publications of interest.
3. If the platform provided no comprehensive and reliable public change log of its policies, we resorted to the WBM. Using a pre-existing list of URLs of the original versions of three kinds of policies (Terms of Service, Privacy Agreement and Community Guidelines) organized by Gollatz<sup>113</sup>, we located and saved all unique versions of all policies we could find. We strived to find the exact day that a given new version was archived in the WBM. To do so, we used online text comparison software<sup>114</sup> to manually compare the first archived version of a given policy to the latest version of the same policy in a given year. If there was no substantive change (i.e., change in the text of the policy that imported a change in the policy), we then moved to compare it with the latest version of the same policy in the next year, and so on, until we found a substantive change, namely a change in the policy text that implied a normative shift. When this sort of change was found, we then tried to ascertain its date by establishing, in this order, the year, semester, trimester, month and, finally, day of the change – although on many occasions the archive was too incomplete to allow us to be confident of even the year of the change. Several platforms, notably Facebook, YouTube and Instagram, have country- or region-specific versions of their policies. This posed a problem for the WBM neither captures country-specific versions of websites nor allows to know whether these differing versions exist. Therefore, it is likely that versions tailored specifically to the EU are missing from our archive.
4. When necessary, we annotated the URLs of the relevant hyperlinks of a policy with the aim of constructing a map of all URLs of all policy-related pages – what amounted to a sort of manual crawling.
5. We finally searched the URLs of the resulting map in the WBM, saving all available versions (see item 3.a above).

The relative simplicity of these steps might obscure how convoluted, uneven and time-consuming the data collection was. In fact, the above protocol was slowly developed through several attempts to understand how a complete collection of platforms’ policies could be gathered. The more we browsed the WBM and platforms’ own websites, the clearer it became how fragmented platforms’ policy landscape is. It is useful therefore to differentiate between various kinds of documents, which imposed different kinds of challenges for our data collection:

1. **Contractual policies** (Terms of Service and Privacy Agreement / Data Policy). Likely because these documents are widely understood as having legal purposes and consequences, they tended to be much more structured and monitored by WBM – thus, their versions and respective dates were much easier to collect and ascertain. Many platforms displayed the date of versions. Since these policies do not typically have internal subpages, steps 4 and 5 (see above) were largely unnecessary.
2. **Community Guidelines**. This sort of policy is much less structured and monitored by WBM’s crawlers than contractual policies. Two platforms had a change log. SoundCloud offered the same kind of unstructured change log mentioned above. Facebook displayed only shifts occurred after 2018. Furthermore, its “log” is not a series of unique webpages containing the different versions of its

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<sup>113</sup> Gollatz (2019).

<sup>114</sup> Mostly, <https://text-compare.com> and <https://www.diffchecker.com/diff>, which work essentially the same.



community guidelines. Rather, Facebook’s “log” displayed all changes in the same webpage, using strikethroughs, different colours and dates to indicate what was new and revoked, and when. Other platforms, such as Twitter and YouTube, were even more complex. Different topics of the guidelines were commonly located in unique URLs, which often had a list of internal articles – themselves displayed through unique URLs. The result was an intricate web of webpages and sub webpages, many of which the WBM had few if any record.

3. **Particular policies** (Copyright Policy, Music Guidelines, Principles). While not necessarily fragmented as community guidelines, there were much fewer versions of these policies recorded by the WBM. Platforms usually did not have an archive of previous versions.
4. **Help pages** (in some cases, the Copyright Policy was filed as a Help page). Extremely fragmented in all mainstream and specialised platforms, since each topic or “frequently asked question” was often accessible through unique URLs. This also meant that text comparison had to be done in much shorter amounts of words, making the process much slower.
5. **Whitepapers**. In the case of two of the alternative platforms we looked into (namely, Audius and DTube), a considerable part of their policies was described in quasi-academic papers, titled in both cases as “whitepapers”. These papers appear to be needed because both platforms rely on blockchain technology to govern content.
6. **Public communications** (press releases, blogs and other forms of corporate texts). Platforms seemed to have consistent records of these documents. Given that each text had its own URL, we usually did not use the WBM to look for this kind of document.

Our definition of TOS includes document types 1 through 4 and, in the specific case of Audius and DTube, document type 5. Document type 6 (not formally included in our definition of TOS) was used mostly to better understand and interpret the remaining documents.

We initially collected 1,353 versions of these six types of documents; of which we decided to focus on 1,215 (see Table 6 below), for the reasons explained in the next section. As of May 2021, we consider our collection to be, within the said limitations, complete, with the exception of GitHub’s documents, which are only partially complete. With the use of automated methods, we will consider the necessity to recollect the documents to ensure completeness. Therefore, these totals might change.

## Data analysis

Usually, longitudinal studies of changes of websites’ policies (e.g., the proportion of websites that have certain policies, or which of their policies mention certain topics) employ automated forms of textual analysis.<sup>115</sup> However, our case was considerably different. First, given our focus on social media platforms, our database was relatively much smaller – and, thus, more analytically manageable.

Second, since we were not only interested in mapping out broad aspects of these policies but also in mapping out of which *rules* different platforms employ to regulate copyright content moderation, and how these rules changed over time and across companies, our approach could hardly be quantitative. Indeed, what counts as a “rule” is not apparent when reading a policy. Much of the policy texts are non-normative, and their normative elements do not necessarily follow the same syntax or employ the same words. To put it differently, policy-like rules had to be inferred through manual human interpretation.

These conditions posed considerable hurdles to computational tools of textual analysis and invited qualitative methods. With the help of NVivo, we conducted a thematic analysis, a method of “pattern recognition within the data, where emerging themes become the categories for analysis”<sup>116</sup> through the “careful reading and re-reading of the data”.<sup>117</sup> In our case, the “emerging themes” corresponded to, mainly, particular *rules*. That is to say, we did not begin our analysis using any pre-defined rule as classifiers; rather, these rules emerged inductively from our reading of the documents, being iteratively changed and refined in the process until they became clear categories that we could use to classify our data. With the help of text analysis software NVivo, the analysis followed some steps.

1. **Creation a readable database**. When importing documents to NVivo, we assigned them certain metadata: date, kind of policy/policy-related text, and name of the platform. Furthermore, to simplify the analysis without losing substantive amounts of data, we decided that it was enough to focus on *two temporal points*: end of June

<sup>115</sup> Amos et al, 2020; Milne & Culnan, 2002; Linden, Khandelwal, Harkous, & Fawaz, 2020.

<sup>116</sup> Fereday & Cochrane, 2006, p. 82.

<sup>117</sup> Rice & Ezzy, 1999, p. 258.



and end of December of each year, up to 31 December, 2020. Thus, if a given policy of a given platform changed more than once during a given semester, only the version standing at the end of the semester would be considered.

2. **Familiarisation with the data.** Both during the data collection or in the beginning of the data analysis, we read extensive excerpts of the policies so as to understand some of its general characteristics. This step was important to develop the rest of the analysis.

3. **Focus on copyright.** Each document was read and only the elements that we understand as somehow pertaining to copyright content moderation were coded and separate for further analysis.<sup>118</sup> At this stage, we also concluded that platforms' Privacy Policies do not have a clear link with copyright. Thus, 138 versions of this kind of document which had already been collected were discarded and are not part of our database.

4. **Development of the coding frame.** Initially using SoundCloud's policies as a pilot, we developed a coding frame composed of 8 top-level themes (in reference to the kinds of documents where platforms' copyright rules are organized), 7 intermediary themes (in reference to the kinds of rules we found, in normative and directness terms) and 61 lower-level themes, which correspond to the actual rules that, according to our work, regulate copyright content moderation in the ten platforms examined so far. The crux of our work, meaning the drafting and re-drafting of these rules was far from linear. Rather, the rules emerged out of an iterative reading of the data, and were changed several times before stable themes could be defined. It is important to stress that only rarely these rules were explicit in the texts we read. More often, creating them involved considerable amounts of interpretation. As a rule of thumb, we strived to balance specificity and comprehensiveness, and tried to keep the terms used by platforms. The creation of the top-level themes, which came after the definition of the rules, was somewhat simpler but also demanded interpretation, in particular the definition of the areas each rule concerned.

5. **Report initial results.** On several occasions, after finishing the analysis of one kind of policy in a specific platform, we felt the need to write short reports which (1) described the findings, including how characteristics and rules have changed over time (2) compiled insights elicited during the analysis, including explanatory ones. The goal was to arrive at certain findings gradually, and avoid being overwhelmed by the complexity of the data.

6. **Making sense of change.** Once all data was coded, we employed NVivo's "Explore" functionality to create coding/thematic matrixes, which were exported as spreadsheets for further analysis. These analyses focussed on, in addition to the rules themselves, the prevalence of certain *kinds* of rules and the number of *mentions* ("references", as they are called by the NVivo system) in the documents to both rules and their kinds. "Mention", for our purposes, could entail for instance a single sentence or a whole paragraph. As long as rules' statements were uttered independently in the document, they were counted as separate mentions. If descriptive statistics of certain kinds of rules allowed us to develop a panoramic understanding of how platforms' normative framework evolved, the number of mentions illuminated discursive aspects of these rules. Our assumption was that number of mentions was a proxy for how concerned a given platform was with a given rule, that is, how much a platform wants a given rule to be enforced. The analyses of kinds of rules, and of mentions to these kinds were essentially done through descriptive statistics (see Chapter 5).

7. **Report final results.** Based on steps 4-6 above, we wrote up answers to our research questions. At this final stage, our broader evaluation frames were how some rules changed (a) over time and (b) across different platforms.

So far, we have been able to analyse in full 130 documents, which encompass (given the periodical limitation explained in step 1 above) all versions of Terms of Services and most versions of Community Guidelines, Copyright Policies and other specific policies of our sample of alternative and mainstream platforms. Public communications, Help pages and the documentation of specialised platforms are yet to be coded.

## Limitations

While reflecting our best efforts, this study has some important limitations, which can be discussed in relation to our data, analysis and conceptual choices.

Our data is unlikely to be complete, due to the limitations of the WBM explained in above. Another potential blind spot regards the fact that we looked into public rules of platforms. That is, it might be possible that platforms' actual policies regarding copyright are simply different from those they decided to make public. Considering for instance how Facebook's public content moderation guidelines differ from the guidelines actually used by the platform's human moderators<sup>119</sup>, this would not be surprising. However, given the increasing legal

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<sup>118</sup> Section 5.2.2 explains what we mean by direct and indirect rules.

<sup>119</sup> (REF)



obligations on platform's attached to TOS and the need to justify content moderation decisions on the basis of such TOS, this issue is likely of minor relevance for the purposes of our legal analysis.

As to our data analysis, it should be noted that, given the strongly interpretative nature of our thematic analysis, it is possible that other coders would arrive at a different set of rules, and/or code the same excerpts differently.

An additional limitation is conceptual. In this study, we take "rules" to mean not only the public but also written statements that are explicitly defined as "rules" by platforms themselves. However, it is possible that the actual regulation of copyright by platforms involves a series of informal and tacit "rules" that remain beyond the reach of our methods. One prominent example is the set of "rules" that structure how "rules" are internally discussed and defined – platforms' policymaking. Studying this process is key but would depend on the benevolence of platforms' controllers, who would have to accept to be observed and interviewed. Another example, mentioned above in Chapter 2, is the recognition that there might be a difference between what is stated in TOS and e.g., how algorithmic content moderation systems are actually deployed.

### ***Ethical concerns***

Throughout our data collection and analysis, we were vigilant about possible ethics issues that could emerge from our work. Since, at this stage, we were studying public documents of large corporations, we could not identify any potential harm caused by our research to any subject. Given the public interest that drives our work, we firmly believe this research can be considered as fair use of platforms' policies – thus, there was no need to seek their formal approval.



### 3. Legal Mapping at EU Level

This chapter carries out a legal mapping of copyright content moderation by online platforms at secondary EU law level. This chapter aims to answer the following sub-research questions, from an EU law perspective.

- Sub-research question **(2)**: How is the private and public regulatory framework for content moderation for online platforms structured?
- Sub-research question **(3)**: How do the various elements of that regulatory framework interact?

Our main focus here is the legal regime of art. 17 of the CDSM Directive. To explain this complex provision and its implications, we first provide some context on the legal regime that precedes the CDSM Directive (3.1). We then briefly explain the legislative process leading to the adoption of the CDSM Directive (3.2). In order to provide a blueprint for the legal analysis of art. 17, we first provide snapshot of the legal regime (3.3). This is followed by some preliminary remarks that are crucial for the interpretation of the provision, namely relating to the European Commission’s stakeholder consultations and Guidelines on art. 17, and the action for annulment of art. 17 initiated by the Polish government in Case C-401/19 (3.4). We then provide a detailed analysis of art. 17, with an emphasis on its liability regime and rules with implication for copyright content moderation by OCSSPs (3.5). We conclude the chapter with a likewise detailed analysis of the interface between art. 17 and the DSA, since in our view many of the content moderation obligations in the latter instrument overlap with those in art. 17 (3.6).

#### 3.1 Pre-existing legal framework: the interplay between the InfoSoc and e-Commerce Directive

[This section will include a brief discussion of pre-existing legal framework relevant for content moderation by online platforms, focusing on the interplay between the InfoSoc Directive and the e-Commerce Directive.]

##### 3.1.1 InfoSoc Directive: exclusive rights, E&Ls, enforcement (injunctions)

[This sub-section will focus on the InfoSoc Directive, especially expanding liability for communication to the public under art. 3 and relevant exceptions in art. 5, and well as rules on injunctions in art. 8(3). We will also make a reference to CJEU case law (including AG Opinion in Joined Cases C-682/18 and C-683/18, Frank Peterson v Google / YouTube and Elsevier Inc. v Cyando, ECLI:EU:C:2020:586; and the relevant judgement, which should be published in June 2021).]

##### 3.1.2 E-Commerce Directive: liability exemptions, duties of care and ban on general monitoring

[This sub-section will focus on the e-Commerce Directive, especially the regime of hosting functions by information society service providers (art. 14) and the ban on general monitoring (15). Reference also to acceptance by the directive of additional duties of care and injunctions. This will however be a brief analysis, since we examine the interface between art. 17 and the DSA in section 3.6 below. ]

#### 3.2 The road to the CDSM Directive

The story of the CDSM Directive can be traced back to the Public Consultation on the Review of EU Copyright Rules, held between December 2013 and March 2014.<sup>120</sup> The consultation covered a broad range of issues on the application of EU copyright rules in the digital environment, including territoriality, the definition of online rights and exceptions, fair remuneration, and even the possibility of single EU copyright title. The consultation produced thousands of responses, summarized by the Commission in a report published in July 2014.<sup>121</sup> This report was followed by a leaked Commission “white paper” in June 2014<sup>122</sup> and the Communication “Towards a

<sup>120</sup> Commission, “Public Consultation on the Review of EU Copyright Rules” (2013) (On file with the author).

<sup>121</sup> Commission, “Report on the responses to the Public Consultation on the Review of the EU Copyright Rules”, Directorate General Internal Market and Services, Directorate D – Intellectual property, D1 – Copyright (July 2014) (On file with the author).

<sup>122</sup> Commission, White Paper, “A Copyright Policy for Creativity and Innovation the European Union” (2014), <https://www.dropbox.com/s/Oxcflgrav01tqlb/White%20Paper%20%28internal%20draft%29%20%281%29.PDF> [Accessed 9 July 2019].





modern, more European copyright framework” in December 2015, which explicitly stated the intention to regulate content-sharing platforms.<sup>123</sup>

The proposal for a directive was published in September 2016 by the Commission.<sup>124</sup> The process followed the ordinary legislative procedure, which places the European Parliament and the Council of the European Union on equal footing, meaning that a separate process for assessing the proposal took place within each institution. At the Council, there was an agreement on 25 May 2018 on an amended version of the proposal, which set forth the Council’s position and provided the basis for its negotiating mandate.<sup>125</sup> At the EU Parliament, five Committees were involved in the discussions, ending with the JURI (Legal Affairs) Committee, which voted on a compromise version on 20 June 2018.<sup>126</sup> After some resistance,<sup>127</sup> the text eventually made it to the stage of trilogue negotiations, concluded on 13 February 2019. The surviving compromise text was approved by the EU Parliament on 26 March.<sup>128</sup> It was then approved by the Council on 15/17 April by a qualified majority.<sup>129</sup> Six countries voted against, issuing statements that either criticize the legislative text or lay out some interpretative guidelines on the most controversial issues.<sup>130</sup>

The legislative process was mired in controversy and heavily lobbied from all sides. The brunt of the criticism of the Directive focused on the new press publishers’ right (then art. 11, now art. 15) and the so-called value gap or “upload filters” provision (then art. 13, now art. 17). This criticism included civil society protests<sup>131</sup> reminiscent of the ACTA debate, opposition by digital rights NGOs<sup>132</sup> and Internet luminaries,<sup>133</sup> and multiple expert statements<sup>134</sup> by research institutes and academics. On balance, however, the lobbying by rights holders’ representatives – especially publishers, the recording industry and (music) collecting societies – appears to have been the most intense and effective, often outweighing empirical research in support of opposite views.<sup>135</sup>

The CDSM Directive is one of the longest in the copyright *acquis*, with 86 recitals and 32 articles. It is divided into five titles: general provisions (I), measures to adapt exceptions and limitations to the digital and cross-border environment (II), measures to improve licensing practices and ensure wider access to content (III), measures to achieve a well-functioning marketplace for copyright (IV), and final provisions (V). The table below summarises the Directive’s structure. The second chapter of Title IV contains the much-debated art. 17<sup>136</sup>, which we examine next.

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<sup>123</sup> Commission, “Towards a modern, more European copyright framework”, COM(2015) 626 final (9.12.2015), p. 10.

<sup>124</sup> Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM/2016/0593.

<sup>125</sup> Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market – Agreed negotiating mandate, ST 9134 2018 INIT.

<sup>126</sup> EDRI, ‘Press release: MEPs ignore expert advice and vote for mass internet censorship’ (20 June 2018) <https://edri.org/press-release-meps-ignore-expert-advice-and-vote-for-mass-internet-censorship/> [Accessed 9 July 2019].

<sup>127</sup> European Parliament News, ‘Parliament to review copyright rules in September’ (5 June 2018) <http://www.europarl.europa.eu/news/en/press-room/20180628IPR06809/parliament-to-review-copyright-rules-in-september> [Accessed 9 July 2019].

<sup>128</sup> CREATE, ‘Copyright Directive approved at plenary vote’ (26 March 2019) <https://www.create.ac.uk/copyright-directive-approved-at-plenary-vote> [Accessed 9 July 2019].

<sup>129</sup> Commission, “Copyright reform clears final hurdle: Commission welcomes approval of modernised rules fit for digital age” (15 April 2019) <[http://europa.eu/rapid/press-release\\_IP-19-2151\\_en.htm](http://europa.eu/rapid/press-release_IP-19-2151_en.htm) [Accessed 9 July 2019].

<sup>130</sup> See Draft Directive of the European Parliament and of the Council on copyright and related rights in the Digital Single Market amending Directives 96/9/EC and 2001/29/EC (first reading) – adoption of the legislative act – statements (2019). For an excellent timeline of the legislative process, see CREATE, ‘EU Copyright Reform’ (26 March 2019) at <https://www.create.ac.uk/policy-responses/eu-copyright-reform/> [Accessed 9 July 2019].

<sup>131</sup> Julia Reda, “EU copyright reform: Our fight was not in vain” (18 April 2019), <https://juliareda.eu/2019/04/not-in-vain/> [Accessed 9 July 2019].

<sup>132</sup> Liberties, “Article 13 Open letter – Monitoring and Filtering of Internet Content is Unacceptable” (16 October 2017) <https://www.liberties.eu/en/news/delete-article-thirteen-open-letter/13194> [Accessed 9 July 2019].

<sup>133</sup> Danny O’Brien & Jeremy Malcolm, “70+ Internet Luminaries Ring the Alarm on EU Copyright Filtering Proposal” (12 June 2018), EFF, <https://www.eff.org/deeplinks/2018/06/internet-luminaries-ring-alarm-eu-copyright-filtering-proposal> [Accessed 9 July 2019].

<sup>134</sup> CREATE, “The Copyright Directive: Articles 11 and 13 must go – Statement from European Academics in advance of the Plenary Vote on 26 March 2019” (24 March 2019) <https://tinyurl.com/yxmudrdg> [Accessed 9 July 2019]. (Disclosure: I have signed and coordinated a number of these statements).

<sup>135</sup> See Corporate Europe Observatory, “Copyright Directive: how competing big business lobbies drowned out critical voices” (10 December 2018) <<https://corporateeurope.org/en/2018/12/copyright-directive-how-competing-big-business-lobbies-drowned-out-critical-voices>> [Accessed 9 July 2019] On this topic, see also Martin Kretschmer, “European copyright reform: Is it possible?” (7 May 2019), re:publica 2019, <https://www.youtube.com/watch?v=ZyujNlpxu9k> [Accessed 9 July 2019], and Benjamin Farrand, “Towards a modern, more European copyright framework”, or, how to rebrand the same old approach? E.I.P.R. 2019, 41(2), 65-69

<sup>136</sup> For analysis of this provision during the legislative process, see, e.g., Christina Angelopoulos, On Online Platforms and the Commission’s New Proposal for a Directive on Copyright in the Digital Single Market (2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2947800](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947800); Martin Senftleben, Christina Angelopoulos, Giancarlo Frosio et al., “The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform” (2018) 40 E.I.P.R. 3, pp. 149-163.



Table 3. Structure CDSM Directive

Title	Chapter	Articles	Recitals (Indicative)
I. General provisions	-	1, 2	1–4
II. Measures to adapt exceptions and limitations to the digital and cross-border environment	-	3 to 7	5–29
III. Measures to improve licensing practices and ensure wider access to content	1. Out-of-commerce works and other subject matter	8 to 11	30–43
	2. Measures to facilitate collective licensing	12	44–50
	3. Access to and availability of audiovisual works on video-on-demand platforms	13	51–52
	4. Works of visual art in the public domain	14	53
IV. Measures to Achieve a Well-Functioning Marketplace For Copyright	1. Rights in publications	15, 16	54–60
	2. Certain uses of protected content by online services	17	61–71
	3. Fair remuneration in exploitation contracts of authors and performers	18 to 23	72– 81
V. Final Provisions	-	24 to 32	82–86

### 3.3 Article 17: a snapshot of the legal regime

Article 17 is an extremely complex legal provision. As Dusollier notes, it is the “monster provision” of the directive, “both by its size and hazardousness”.<sup>137</sup> There is perhaps no better testament to this than the wealth of legal scholarship that already exists on art. 17, even before its national implementation deadline.<sup>138</sup> In order to understand art. 17, it is useful to have a high-level overview of its legal regime, before diving into the details. This is what we propose to do in this section.

Art. 17 applies to OCSSPs. These are defined in art. 2(6) CDSM Directive, with further guidance in recitals 62 and 63. OCSSPs are providers of an information society service whose main purposes is to store and give the public access to a large amount of protected content by its users, provided it organises and promotes that content for profit-making purposes. The definition also contains a number of exclusions aimed at services that are either not aimed primarily at giving access to copyright-protected content and/or are primarily not for-profit.

As noted, while this concept is new to the copyright *acquis*, OCSSPs do not appear to constitute a wholly new category of service providers in a technological or business sense. Rather, this is a new legal category covering

<sup>137</sup> Séverine Dusollier, ‘The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a Few Bad Choices, and an Overall Failed Ambition’ (2020) 57 Common Market Law Review 979.

<sup>138</sup> There is already significant scholarship art 17. See e.g. Matthias Leistner, ‘European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive Compared to Secondary Liability of Content Platforms in the U.S. – Can We Make the New European System a Global Opportunity Instead of a Local Challenge?’ [2020] Zeitschrift für Geistiges Eigentum/Intellectual Property Journal (ZGE/IPJ) <<https://papers.ssrn.com/abstract=3572040>> accessed 17 April 2020; Axel Metzger and others, ‘Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market into National Law – Comment of the European Copyright Society’ (European Copyright Society 2020) European Copyright Society Opinion ID 3589323 <<https://papers.ssrn.com/abstract=3589323>> accessed 4 July 2020; Sebastian Felix Schwemer, ‘Article 17 at the Intersection of EU Copyright Law and Platform Regulation’ (2020) 3/2020 Nordic Intellectual Property Law Review <<https://papers.ssrn.com/abstract=3627446>> accessed 4 July 2020; Thomas Spoerri, ‘On Upload-Filters and Other Competitive Advantages for Big Tech Companies under Article 17 of the Directive on Copyright in the Digital Single Market’ (2019) 10 JIPITEC <<https://www.jipitec.eu/issues/jipitec-10-2-2019/4914>>; Giancarlo Frosio, ‘Reforming the C-DSM Reform: A User-Based Copyright Theory for Commonplace Creativity’ [2020] IIC - International Review of Intellectual Property and Competition Law <<https://doi.org/10.1007/s40319-020-00931-0>> accessed 4 July 2020; Maxime Lambrecht, ‘Free Speech by Design – Algorithmic Protection of Exceptions and Limitations in the Copyright DSM Directive’ (2020) 11 JIPITEC <<http://www.jipitec.eu/issues/jipitec-11-1-2020/5080>>; Gerald Spindler, ‘The Liability System of Art. 17 DSMD and National Implementation – Contravening Prohibition of General Monitoring Duties?’ 10 JIPITEC 334; Krzysztof Garstka, ‘Guiding the Blind Bloodhounds: How to Mitigate the Risks Art. 17 of Directive 2019/790 Poses to the Freedom of Expression’, *Intellectual Property and Human Rights* (4th edn, Kluwer Law International 2019) <<https://papers.ssrn.com/abstract=3471791>> accessed 8 April 2020; Dusollier (n 135); Jan Bernd Nordemann and Julian Wiblinger, ‘Art. 17 DSM-RL – Spannungsverhältnis Zum Bisherigen Recht?’ [2020] GRUR 569; Martin Husovec and João Pedro Quintais, ‘How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms under the Copyright in the Digital Single Market Directive’ [2021] GRUR International <<https://doi.org/10.1093/grurint/ikaa200>> accessed 3 May 2021; Martin Husovec and João Quintais, ‘Too Small to Matter? On the Copyright Directive’s Bias in Favour of Big Right-Holders’ in Tuomas Mylly and Jonathan Griffiths (eds), *Global Intellectual Property Protection and New Constitutionalism. Hedging Exclusive Rights*. (OUP 2021) <<https://papers.ssrn.com/abstract=3835930>> accessed 3 May 2021.



a type of provider of hosting services whose activities or functions were previously currently regulated in different legal instruments, such as the e-Commerce, InfoSoc and Enforcement Directives.

In simple terms, art. 17 states that OCSSPs carry out acts of communication to the public when they give access to works/subject matter uploaded by their users. As a result, these providers become directly liable for their users' uploads. They are also expressly excluded in paragraph (3) from the hosting safe harbour for copyright relevant acts, previously available to many of them under art. 14(1) e-Commerce Directive. Arguably, this makes Article 17 *lex specialis* to the E-Commerce Directive.

The provision then introduces a complex set of rules to regulate OCSSPs, including a liability exemption mechanism in paragraph (4), and a number of what can be referred to as mitigations measures and safeguards. The liability exemption mechanism is comprised of best efforts obligations for preventive measures, including those aimed at filtering content *ex ante*, at notice and stay-down, and at notice and takedown.<sup>139</sup>

Among the mitigations measures and safeguards that art. 17 includes we find the following. First, the requirements of a proportionality assessment and the identification of relevant factors for preventive measures.<sup>140</sup> Second, a special regime for small and new OCSSPs.<sup>141</sup> Third, a set of mandatory exceptions akin to user rights or freedoms that are designed as obligations of result expressly based on fundamental rights.<sup>142</sup> Fourth, a clarification that art. 17 does not entail general monitoring – a similar prohibition to that set out in art. 15 e-Commerce Directive.<sup>143</sup> Fifth, a set of procedural safeguards, including an in-platform complaint and redress mechanism and rules on out of court redress mechanisms.<sup>144</sup>

Finally, art. 17(10) tasks the European Commission (EC) with organising stakeholder dialogues to ensure uniform application of the obligation of cooperation between OCSSPs and rights holders and to establish best practices regarding the appropriate industry standards of professional diligence. As we explain in the subsequent section, these stakeholder dialogues have taken place and we are currently waiting for the publication of the EC Guidelines resulting from them.

### 3.4 Preliminary remarks: EC Guidelines and the Polish Challenge

[This section will describe some key legal developments that will occur between the date of this Interim Report and the date of the Final report, such as the publication of the EC Guidelines on art. 17 and at least the AG Opinion in the C- 401/19, the Polish government challenge to art. 17.]

■ **EC Stakeholder Dialogues and Guidelines under art. 17(10)**

■ **The Polish challenge: Poland v EP and Council (C-401/19)**

### 3.5 Article 17 in depth

#### 3.5.1 Who does art. 17 apply to? OCSSPs<sup>145</sup>

Article 17 CDSM Directive regulates OCSSPs. These are defined in Art. 2(6) as platforms with a profit-making purpose that store and give the public access to a large amount of works or other subject matter uploaded by their end-users, which they organise and promote. Recital 62 gives further guidance on how to interpret the definition, in particular the importance of a relevant service's substitution effects and of a case-by-case assessment of a provider's profit-making purposes.

There is no doubt that the definition of OCSSP includes well-known user-upload or user-generated content video-sharing platforms like YouTube. It probably also includes social networking platforms with similar functionalities

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<sup>139</sup> Art. 17(4) (b) and (c).

<sup>140</sup> Art. 17 (5))

<sup>141</sup> Art. 17 (6)

<sup>142</sup> Art. 17 (7).

<sup>143</sup> Art. 17(8). See, on this topic, Martin Senftleben and Christina Angelopoulos, 'The Odyssey of the Prohibition on General Monitoring Obligations on the Way to the Digital Services Act: Between Article 15 of the E-Commerce Directive and Article 17 of the Directive on Copyright in the Digital Single Market' (IViR; CIPIIL 2020) <<https://papers.ssrn.com/abstract=3717022>> accessed 29 October 2020.

<sup>144</sup> Art. 17(9).

<sup>145</sup> This section relies and develops upon Husovec and Quintais, 'How to License Article 17?' (n 136).



(e.g., Facebook), although some authors point out that certain aspects in the legal definition raise doubts in this regard.<sup>146</sup>

The scope of the definition is further clarified by a *non-exhaustive* list of exclusions in art. 2(6), which includes electronic communication services (e.g., Skype), providers of business-to-business cloud services and cloud services (e.g., Dropbox), online marketplaces (e.g., eBay), not-for profit online encyclopaedias (e.g., Wikipedia), not-for-profit educational and scientific repositories (e.g., ArXiv.org), and open-source software developing and sharing platforms (e.g., GitHub). Not all the types of excluded platforms listed follow neatly from the application of the definition. Some of them are undoubtedly the result of lobbying and political expediency. However, the exclusions share one or both of the following characteristics: (a) the main activity of these services is *not* giving access to protected content; and (b) the listed services are wholly or predominantly not for-profit.<sup>147</sup>

A further aspect in the definition is noteworthy. Recital 62 contains an ambiguous reference to piracy websites that would at first glance open the door to exclude them from the definition of OCSSP. However, a closer reading suggests otherwise. Piracy websites can qualify as OCSSPs but are subject to a stricter regime, since they cannot benefit from the special liability exemption mechanism in art. 17(4). As a result, if a piracy website qualifies as an OCSSP. It will be strictly liable without the possibility of benefiting from the liability exemption mechanism in paragraph (4).<sup>148</sup>

For the purposes of our study, this definition has important implications since it clarifies that certain of the platforms examined in our empirical research (see *supra* at 2.6 and *infra* at Chapter 5) qualify as OCSSP, while others do not.

Table 4. Legal Qualification of Studied Platforms (TO BE COMPLETED)

	Platform	OCSSP?	Reason for exclusion (if applicable)
"Mainstream"	Facebook	YES (probably)	
	Twitter	YES	
	Instagram	YES	
	YouTube	YES	
	Soundcloud	YES	
Alternative	Diaspora		
	DTube		
	Mastodon		
	Pexelfed		
	Audius		
Specialized	Github	NO	Explicit exclusion in art. 2(6) CDSM Directive
	Vimeo	YES	
	FanFiction		
	Dribble		
	Porhub	YES	

### 3.5.2 Direct liability and merger of restricted acts

TBD

### 3.5.3 Relation to e-Commerce Directive: *lex specialis* on safe-harbours

TBD

### 3.5.4 Best efforts to obtain an authorization (also as a condition for liability exemption)<sup>149</sup>

Article 17 imposes direct liability on OCSSPs for content uploaded by their users. However, it leaves OCSSPs with two avenues to avoid direct liability. The first avenue is the legal default and consists of an OCSSP obtaining an

<sup>146</sup> See Metzger and others (n 11) 2-4; Dusollier (n 11).

<sup>147</sup> This aligns with recital 62 CDSM Directive, which states that that the definition 'should not include services that have a main purpose other than that of enabling users to upload and share a large amount of copyright-protected content with the purpose of obtaining profit from that activity.'

<sup>148</sup> On art 17(4), see below at II.3. Recital 62 CDSM Directive states that 'the liability exemption mechanism provided for in this Directive should not apply' to piracy websites.

<sup>149</sup> This section relies on and develops Husovec and Quintais, 'How to License Article 17?' (n 136); Husovec and Quintais, 'Too Small to Matter?' (n 136).



authorisation to communicate to the public the content uploaded by users. The example provided is of (direct) licensing from the rightholder but leaves open other modalities of authorisation.<sup>150</sup> In theory, other authorisation mechanisms include different collective licensing schemes (voluntary, extended or mandatory), as well as statutory licensing – relying on remunerated or compensated E&Ls.<sup>151</sup>

The basic idea of Art. 17 is to encourage parties to arrange a license for online exploitation. But licensing ex ante all content users might potentially upload upfront is not possible. Therefore, art. 17(4)(a) limits this to a ‘best efforts’ obligation. In essence, this constitutes an obligation on OCSSPs to proactively negotiate with common suspects given the content associated with the service.<sup>152</sup>

For instance, the European Copyright Society (ECS) suggests the following calibration of the ‘best efforts’ obligation, to be carried out on a case-by-case basis. For obvious materials, OCSSPs must contact the publicly known right-holders and “offer serious negotiations on licensing terms”. Differently, for “*non-obvious protected materials or right-holders*”, OCSSP could “remain passive” until they receive notice from right-holders (including collective rights management organisations or CMOs), upon which they must “react immediately”.<sup>153</sup> Publicly known right-holders for obvious protected material would include commercially successful sound recordings and films owned by music majors, big film studios or streaming giants. But as we move down the well-known and obviousness ladders the assessment gets trickier. In this respect, the ECS adds, “if the rights are held by small or medium-sized companies or by individual authors without a collective representation, ‘best efforts’ should not require extensive monitoring and search activities”; a reactive approach should suffice.<sup>154</sup>

An important point to retain is that art. 17(4)(a) is a cumulative condition for the liability exemption mechanism embedded in art. 17. In other words, if an OCSSPs cannot demonstrate that it has complied with its best efforts to obtain an authorisation obligation, then it will be directly liable for communication works to the public. This is even if the OCSSP puts in place the preventive measures mentioned in art. 17(4)(b) and (c), which we discuss in the subsequent sub-section.

### 3.5.5 Liability exemption mechanism proper

As noted, it will be nearly impossible to obtain all the required authorisations for the potentially millions of works uploaded by users, even with recourse to voluntary or extended collective licensing. This is especially true for types of content other than online music, where collective rights management is most developed as a matter of law and practice.

This design will therefore lead many OCSSPs to rely on the liability exemption mechanism in art. 17(4). The first cumulative condition of this mechanism (paragraph (a)), discussed in the previous sub-section, was that OCSSPs must demonstrate to have made best efforts to obtain an authorisation. If this obligation is met, then OCSSPs are subject to two further cumulative conditions in paragraphs (b) and (c). Namely, they must demonstrate that they have made: (i) best efforts to ensure the unavailability of specific works for which the right holders have provided them with the relevant and necessary information; and (ii) acted expeditiously, subsequent to notice from right holders, to take down infringing content and made best efforts to prevent its future upload. Condition (i) appears to impose what critics label an upload filtering obligation<sup>155</sup>, whereas condition (ii) introduces both a notice-and-takedown mechanism (similar to that of art. 14 e-Commerce Directive) and a notice-and-stay-down (or re-upload filtering) obligation.<sup>156</sup> Let’s exam these conditions in turn.

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<sup>150</sup> art 17(1), second paragraph, CDSM Directive: ‘An [OCSSP] shall therefore obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, for instance by concluding a licensing agreement...’. N.B. art. 17(8), second paragraph, CDSM Directive, refers to “licensing agreements... concluded between service providers and rightholders.’

<sup>151</sup> Husovec and Quintais, ‘How to License Article 17?’ (n 136). With further details

<sup>152</sup> For a detailed analysis of the duties of OCSSPs under Arts. 17(1) and (4)(a) – see Martin R. F. Senftleben and Axel Metzger, ‘Comment of the European Copyright Society on Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market Into National Law’ (*European Copyright Society*, 27 April 2020) 4–6 <<https://europeancopyrightsocietydotorg.files.wordpress.com/2020/04/ecs-comment-article-17-cdsm.pdf>> accessed 14 October 2020 (hereafter ECS, ‘Comment’).

<sup>153</sup> ECS, ‘Comment’ (n 152) 6.

<sup>154</sup> Ibid.

<sup>155</sup> On the use of the term, see Julia Reda, “Article 13 in conjunction with Recitals 38 and 39 of the proposed EU copyright reform/expansion”, <https://juliareda.eu/eu-copyright-reform/censorship-machines/> [Accessed 9 July 2019].

<sup>156</sup> For an analysis of these preventive obligations see Martin Husovec, “How Europe Wants to Redefine Global Online Copyright Enforcement” (2019). In: Tatiana Eleni Synodinou (ed.), *Pluralism or Universalism in International Copyright Law* (Kluwer law, Forthcoming), <http://dx.doi.org/10.2139/ssrn.3372230>.



### Preventive measures and the possibility of “upload filters”

TBD (art. 17(4)(b))

### Preventive and reactive measures: notice and takedown and notice and staydown (re-upload filters)

TBD (art. 17(4)(c))

#### 3.5.6 Proportionality assessment and factors

TBD (art. 17(5))

#### 3.5.7 Special regime for (small and) new OCSSPs

Article 17(6) contains a partial exception to the liability regime explained above. The beneficiaries of this partial exception are OCSSPs that are “new service providers with small turnover and audience”. These new providers remain covered by the regime in art. 17 but are subject to mitigated obligations in order to benefit from the liability exemption mechanism in para. (4).

In particular, art. 17(6) and recital 67 CDSM Directive identify two exclusion scenarios, i.e., cases in which OCSSPs are exempted from *some* of the preventive obligations in art. 17(4)(b) and (c). In the first scenario, OCSSPs that are under three years old and have an annual turnover below EUR 10 Million are only subject to the notice-and-takedown obligation in art 17(4)(c). The second scenario applies to OCSSPs that meet the conditions of the first scenario and additionally have more than 5 million monthly unique visitors. These OCSSPs are in addition subject to the notice-and-stay-down obligations in art 17(4)(c), meaning that they are only exempt from the strictest preventive obligations in this paragraph.<sup>157</sup>

Although this exceptional regime modulates the “best efforts” obligations for certain platforms, it is not meant to affect the availability of remedies against them. In other words, smaller and newer OCSSPs have to comply with fewer obligations than their larger or older counterparts, but they remain subject to the same remedies as larger platforms. In particular, they are still subject to injunctions under art. 8(3) InfoSoc Directive if their services are used by a third-party user to infringe copyright.<sup>158</sup>

[TBD (reference to similar exclusion in DSA and counterpoint to VLOPs; example of varying regulation for “size” of platforms)]

#### 3.5.8 Mandatory exceptions and limitations or user rights or freedoms<sup>159</sup>

The CDSM Directive acknowledges the general importance of fundamental rights, e.g., in recital 84, where it stipulates broadly:

*“This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter. Accordingly, this Directive should be interpreted and applied in accordance with those rights and principles.”*

In addition to the general acknowledgement of fundamental rights, the Directive comes with specific safeguards regarding users. Recital 70 notes:

*“The steps taken by online content-sharing service providers in cooperation with rightholders should be without prejudice to the application of exceptions or limitations to copyright, including, in particular, those which guarantee the freedom of expression of users. Users should be allowed to upload and make available content generated by users for the specific purposes of quotation, criticism, review, caricature, parody or pastiche. **That is particularly important for the purposes of striking a balance between the fundamental rights laid down in the Charter of Fundamental Rights of the European Union (‘the Charter’), in particular***

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<sup>157</sup> N.B. some of the thresholds used to define the exclusion scenarios are taken from other legislative instruments: art 16(2) Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (Text with EEA relevance) (CRM Directive); and Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (Text with EEA relevance) (notified under document number C(2003) 1422) ([2003] OJ L124/36).

<sup>158</sup> Recital 66, first paragraph, third sentence CDSM Directive. For a detailed analysis of the legal regime of injunctions in art 8(3) InfoSoc Directive, see Martin Husovec, *Injunctions against Intermediaries in the European Union: Accountable but Not Liable?* (Cambridge University Press 2017).

<sup>159</sup> This section relies on and develops prior research from some of authors of this report, namely: Quintais and others (n 18); Schwemer and Schovsbo (n 18).



*the freedom of expression and the freedom of the arts, and the right to property, including intellectual property. Those exceptions and limitations should, therefore, be made mandatory in order to ensure that users receive uniform protection across the Union. It is important to ensure that online content-sharing service providers operate an effective complaint and redress mechanism to support use for such specific purposes.*<sup>160</sup>

The Commission's Explanatory Memorandum accompanying the proposal for the DSM Directive commented on the role of mitigation measures:

*'the Directive has a limited impact on the freedom to conduct a business and on the freedom of expression and information, as recognised respectively by Articles 16 and 11 of the Charter, due to the mitigation measures put in place and a balanced approach to the obligations set on the relevant stakeholders'.<sup>161</sup>*

The most distinct feature relates to this latter point, namely the balancing within art. 17(7) (addressed in this section) and (9) (addressed in section # below), which has only been introduced relatively late in the legislative process. Art. 17(7) reads:

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

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

- (i) quotation, criticism, review;*
- (ii) use for the purpose of caricature, parody or pastiche."*

Art.17(7) includes a general and a specific clause on E&Ls. The general clause is contained in the first subparagraph, which states that the preventive obligations in 4(b) and (c) should not prevent that content uploaded by users is available on OCSSPs if such an upload does not infringe copyright, including if it is covered by an E&L.<sup>162</sup> The second paragraph of art. 17(7) CDSM Directive includes a special regime for certain E&Ls: (i) quotation, criticism, review; (ii) use for the purpose of caricature, parody or pastiche.<sup>163</sup> Additionally, art. 17(9) requires that OCSSPs inform users in their terms and conditions of the user's right to use works under E&Ls.<sup>164</sup>

In our view, the reference in the provision to uploaded material that does not infringe copyright and related rights as mentioned in the general clause includes at least the following: (i) material in the public domain; (ii) material subject to an (express or implied) license; (iii) material covered by an E&L, whether in this Directive or in art. 5 InfoSoc Directive (if implemented by the national law).<sup>165</sup>

On the special regime for certain E&Ls, Recital 70 (first subparagraph) explicitly recognizes that these are particularly important to strike a balance under the CFREU between the right to intellectual property (art. 17(2)) and two fundamental freedoms/rights in particular: freedom of expression (art. 11) and freedom of the arts (art. 13). In this way, the legislator awards special status to these E&L due to their basis in fundamental rights.<sup>166</sup>

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<sup>160</sup> Emphasis added

<sup>161</sup> *Ibid.*, Explanatory Memorandum, p. 9. See also European Commission, *Impact Assessment*, *supra* note 16, pp. 154-155, noting that '[t]he freedom of expression and information may be affected negatively in cases where the services limit user uploaded content in an unjustified manner (e.g., when an exception or a limitation to copyright applies or the content is in public domain) or when the technologies fail to identify the content correctly'.

<sup>162</sup> This should be read in combination with the statement in Article 17(9) to the effect that the DSM Directive "shall in no way affect legitimate uses, such as uses under exceptions or limitations provided for in Union law". In this respect, Recital 70 emphasizes the need for the preventive obligations to be implemented without prejudice to the application of E&Ls, "in particular those that guarantee the freedom of expression of users". See Quintais and others (n 18).

<sup>163</sup> These were optional E&L in Articles 5(3)(d) and (k) of the InfoSoc Directive, which have not been implemented in all Member States; where they have, the implementations differ.

<sup>164</sup> Article 17(9) para. 4 DSM Directive.

<sup>165</sup> In situations of conflict between art. 17(7) CDSM Directive and art. 5 InfoSoc Directive, along with other scholars, we argue that the former creates an obligation under EU law to implement national E&Ls that offer the minimum user privileges to which art. 17(7) refers. See Quintais and others (n 18).

<sup>166</sup> See Quintais and others (n 18).



Furthermore, the second paragraph of art. 17(7) CDSM Directive operates a change in legal qualification of the E&Ls it covers as compared to the InfoSoc Directive, since such E&Ls become mandatory in the context of their application under Article 17.<sup>167</sup> This has led some scholars – including among the authors of this report – to argue that these E&Ls should be qualified as user rights or freedoms, and that Member States and courts must ensure that they remain fully operative even in the context of licensing arrangements or the application of preventive measures under art. 17(4)(b) and (c).<sup>168</sup>

It has further been suggested that the in order to ensure the systematic and conceptual consistency of the E&Ls in the InfoSoc and CDSM Directives, the concepts of “quotation”, “criticism”, “review”, “caricature”, “parody” and “pastiche” in art. 17(7) should be considered autonomous concepts of EU law. This would ensure that such concepts would be interpreted consistently across both directives. In this line, CJEU case law on the concepts of parody and quotation parody” and “quotation” in the InfoSoc Directive as autonomous concepts of EU Law in a number of judgements.<sup>169</sup> The same should be done for the remaining concepts in art. 17(7), in particular pastiche, in order to ensure the effectiveness of that provision.<sup>170</sup>

In fact, it is suggested that combined broad interpretation and national implementation of the concepts in the E&Ls in art. 17(7) would cover the majority of transformative types of user-generated content uploaded by users to OCSSP, such as remixes and mash-ups.<sup>171</sup>

One key feature of the legal design of art. 17 is that paragraph (7) translates into an **obligation of result**. That is to say, Member States must ensure that these E&Ls are respected despite the preventive measures in art. 17(4). This point matters because paragraph (4) merely imposes “best efforts” obligations. The different nature of the obligations, underscored by the fundamental rights-basis of paragraph (7), indicates a normative hierarchy between the higher-level obligation in paragraph (7) and the lower-level obligation in paragraph (4). This matters not only for legal interpretation of art. 17 in general but also for the assessment of content moderation obligations in this legal regime. For instance, this legal understanding justifies the view that to comply with art. 17 it is insufficient to rely on *ex post* complaint and redress mechanisms in art. 17(9). It is also required to have *ex ante* safeguards that avoid the overlocking of uploaded content by filtering content technologies used by OCSSPs that are incapable to carry out the type of contextual assessment required under art. 17(7).<sup>172</sup>

### 3.5.9 Ban on general monitoring

TBD (art. 17(8))

### 3.5.10 Procedural or ex post safeguards<sup>173</sup>

Besides the copyright-internal balancing system of E&Ls (see above), art. 17 CDSM Directive also foresees what Schwemer and Schovsbo (2020) refer to as “an institutionalized system of checks and balances in form of procedural safeguards”.<sup>174</sup>

These mechanisms do not concern substantive copyright, but rather its exercise and are foreseen at several levels: (i) at the platform level, (ii) at the out-of-court level, and (iii) at the judicial authority or court level.

“At the platform level, Member States are in art. 17(9) mandated to provide that OCSSPs “put in place an *effective and expeditious complaint mechanism* that is available to users of their services in the event of disputes over the disabling of access to, or the removal of, works or other subject matter uploaded by them’.<sup>175</sup> The

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<sup>167</sup> See the text of the provision – “shall ensure” – and Recital 70 (first subparagraph), which states that such E&L “should, therefore, be made mandatory in order to ensure that users receive uniform protection across the Union.”

<sup>168</sup> Quintais and others (n 18). (further arguing that this interpretation is not precluded by the reference to “existing exceptions” in art. 17(7), and that it is supported by a systematic and teleological interpretation of the CDSM Directive).

<sup>169</sup> See: Painer (C-145/10), Deckmyn (C-201/13), Funke Medien (C-469/17), Pelham (C-467/17) and Spiegel Online (C-516/17). From those judgements emerges an interpretation of the corresponding E&Ls, which recognizes their fundamental rights justification, clarifies their requirements for application, and restricts the ability of national lawmakers to further restrict their scope. See Quintais and others (n 18).

<sup>170</sup> See Quintais and others (n 18). For pastiche in particular, see Martin Senftleben, “Bermuda Triangle – Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market” (2019) 41 European Intellectual Property Review 480.

<sup>171</sup> Quintais and others (n 155).

<sup>172</sup> [Cite]

<sup>173</sup> This section relies on and develops prior research from some of authors of this report, namely: Quintais and others (n 18); Schwemer and Schovsbo (n 18).

<sup>174</sup> Schwemer and Schovsbo (n 18).

<sup>175</sup> Emphasis added. Note that the requirement is on Member States, compared to the ensuring of unavailability which is on the platforms. This first aspect resembles the Commission’s original proposal from September 2016, where it suggested in Article 13(2) that ‘Member States shall ensure that the service providers ... put in place complaints and redress mechanisms that are available to users in case of disputes over the application of the measures ...’, see [European Commission...].





mechanisms of this first procedural safeguard are further circumscribed in art. 17(9)(2), second sub-paragraph, where it is stated that complaints “shall be processed without undue delay, and decisions to disable access to or remove uploaded content shall be subject to human review”.<sup>176</sup> The latter human review-criterion implies that everything leading up to a dispute can be processed by the platform in an automated fashion by algorithms.<sup>177</sup> It is further specified in recital 70 that these mechanisms should allow “users to complain about the steps taken with regard to their uploads, *in particular* where they could benefit from an *exception or limitation* to copyright in relation to an upload to which access has been disabled or that has been removed’.<sup>178</sup>

Furthermore, the provision stipulates a justification-duty on rights holders. The reasons for a rights holder’s request to make content unavailable needs to be “duly justified”.<sup>179</sup> The decision at this level remains with the platform, but as Senftleben notes, “[t]he underlying legal assessment, however, is likely to be cautious and defensive ... [and] a generous interpretation of copyright limitations serving freedom of expression seems unlikely, even though a broad application of the right of quotation and the parody exemption would be in line with CJEU jurisprudence’.<sup>180</sup> In other words, there is a risk of overenforcement.<sup>181</sup>

In addition to the platform-based procedural safeguards, also out-of-court redress mechanisms for the impartial settlement of disputes are to be put in place by Member States.<sup>182</sup> This out-of-court mechanism is “without prejudice to the rights of users to have recourse to efficient judicial remedies ....”.<sup>183</sup> Specifically in relation to E&Ls, “Member States shall ensure that users have access to a court or another relevant judicial authority to assert the use of” the same.<sup>184</sup> Member States enjoy a considerable amount of discretion when implementing the procedural safeguards and such mechanisms might also be informed by the stakeholder dialogues and the Commission’s guidance on the application of art. 17.<sup>185</sup>

Conceptually, it is unclear whether these procedural safeguards should be understood as independent additions to the E&L safeguards or rather as a further specification of those safeguards. Recital 70 CDSM Directive puts art. 17(9) in the context of situations where ‘*in particular* [users] could benefit from an exception or limitation’ (emphasis added). Thus, on the one hand, the existence of these specific safeguards relating to the institutional setting can be interpreted as an attempt to create procedural transparency and safeguards. Without such setup, user rights might end up under- or even unenforced. The existing regime under the e-Commerce Directive does not directly impose any restrictions on platforms on what content they remove. Seen in a broader European intermediary liability exemption perspective, where the notice-and-takedown regime based on art. 14 e-Commerce Directive has lacked a counter-notice idea or general procedural safeguards, such attempt is to be welcomed, as it strengthens the enforcement of user rights vis-à-vis content moderation practices by large online platforms. On the other hand, however, their very existence implies an understanding of art. 17(7) that the prevention mechanisms foreseen in – or incentivized by – art. 17(4) CDSM Directive will inevitably lead to false-

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<sup>176</sup> Emphasis added. On a critique of the ‘elastic timeframe’ see Senftleben (n 168). In its Council vote, Germany suggests the timeframe to be understood ‘as rapidly as possible’, see [Statement by Germany... point 7].

<sup>177</sup> See similarly Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online, 6.3.2018, [2018] L 63/50, points 20 and 27 in relation to proactive measures on human oversight and in the context of data protection see, e.g., Article 22(3) GDPR.

<sup>178</sup> Recital 70 (emphasis added).

<sup>179</sup> Article 17(9) sub-para. 2 CDSM Directive.

<sup>180</sup> see Senftleben (n 168).

<sup>181</sup> For empirical work on overenforcement, see, e.g., Kris Erickson & Martin Kretschmer, *Empirical Approaches to Intermediary Liability*, CREATE Working Paper 2019/6, (2019), pp. 10 ff.; Jennifer Urban, Joe Karaganis, & Brianna Schofield, *Notice and Takedown: Online Service Provider and Rightsholder Accounts of Everyday Practice*, 64 *Journal of the Copyright Society* (2017); Sharon Bar-Ziv & Niva Elkin-Koren, *Behind the Scenes of Online Copyright Enforcement: Empirical Evidence on Notice & Takedown*, 50 *Connecticut Law Review* (2017); specifically in the context of YouTube and parodies, see Kris Erickson & Martin Kretschmer, *This Video Is Unavailable: Analyzing Copyright Takedown of User-Generated Content on YouTube*, *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* (2018) 9, 75 and Sabine Jacques et al., *An Empirical Study of the Use of Automated Anti-Piracy Systems and Their Consequences for Cultural Diversity*, *SCRIPTed* (2018) 15(2), 277-312. For a recent overview of existing studies in this areas, see also Daphne Keller and Paddy Leerssen, ‘Facts and Where to Find Them: Empirical Research on Internet Platforms and Content Moderation’, *ocial Media and Democracy: The State of the Field and Prospects for Reform* (Social Science Research Network 2019) <<https://papers.ssrn.com/abstract=3504930>> accessed 4 May 2021.

<sup>182</sup> Art. 17(9) sub-para. 2 CDSM Directive.

<sup>183</sup> Art. 17(9) sub-para. 2 CDSM Directive.

<sup>184</sup> Art. 17(9) sub-para. 2 CDSM Directive.

<sup>185</sup> Art. 17(10) CDSM Directive reads: ‘As of 6 June 2019 the Commission, in cooperation with the Member States, shall organize stakeholder dialogues to discuss best practices for cooperation between online content-sharing service providers and rightholders. ... When discussing best practices, special account shall be taken, among other things, of the need to *balance fundamental rights* and of the use of exceptions and limitations. For the purpose of the stakeholder dialogues, users’ organizations shall have access to adequate information from online content-sharing service providers on the functioning of their practices with regard to paragraph 4’ (emphasis added).



positives, i.e., to situations where platforms will falsely take-down or block content which is covered by a E&L.<sup>186</sup> In other words, it can also be understood as a confession that – in practice – automatically distinguishing copyright infringements from legitimate uses will be a challenging exercise.

At least from the lawmaker’s perspective, procedural safeguards *in themselves* are seen as a means of mitigating negative impact on fundamental rights. Already the Commission’s Impact Assessment accompanying the Proposal from 2016, for example, noted that procedural safeguards will mitigate the negative impact on freedom of expression and information.<sup>187</sup> However, as noted by some authors, the legislative text evolved since then to include the user rights or freedoms embodied in art. 17(7), in essence due to the recognition that ex post complaint and redress mechanisms were insufficient per se to safeguard users fundamental rights.<sup>188</sup> Similarly, Germany in its Statement accompanying its Council vote notes that ‘[e]ach permanent “stay down” mechanism (“uploadfilter”) must comply with the principle of proportionality. Procedural guarantees, in particular, could be considered, for example, when users notify that they are lawfully uploading content from third parties.’<sup>189</sup> In other words, the procedural safeguards are in itself a weight on the scale of the fundamental rights balance.”

In light of this analysis, and as noted above, in a context where content recognition technologies are incapable of ensuring the effective application of E&L in art. 17(7), the normative hierarchy of art. 17 – and in particular the need to respect fundamental rights and freedoms of users – indicates the need for ex ante safeguards in the implementation of art. 17.<sup>190</sup>

### 3.5.11 Other aspects

TBD (art. 17(9) and other issues, including compliance with GDPR)

## 3.6 Interface with DSA: how special is copyright?<sup>191</sup>

Against this background, the DSA proposal was published in 15 December 2021. The DSA is a regulation that is meant inter alia as “REFIT”<sup>192</sup> of certain parts of the e-Commerce Directive. Other than the different legal nature of the proposed instrument – Regulation vs Directive – the DSA has a broader scope than the e-Commerce Directive<sup>193</sup> and sets up a much more detailed procedural framework, which is further explored below.<sup>194</sup>

The DSA is divided into five chapters: general provisions (I), liability of providers of intermediary services (II), Due diligence obligations for a transparent and safe online environment (III), Implementation, Cooperation, Sanctions and Enforcement (IV), and final provisions. For the purposes of this report, we are mostly concerned with Chapters I to III.

### 3.6.1 Are rules on copyright excluded from the DSA?

In this report, we are interested in the potential overlap between the proposed DSA and art. 17 CDSM Directive. This is visualized in the Venn-diagram below (**Errore. L'origine riferimento non è stata trovata.**).

<sup>186</sup> In the Council vote, Germany lays out its reading of Article 17(7) and (8) ‘that protective measures must not impede the permitted use of protected content’, see Statement by Germany, *supra* note 8, point 7. To this point see also European Commission, *Impact Assessment*, *supra* note 16, pp. 153 ff.

<sup>187</sup> European Commission, *Impact Assessment*, *supra* note 16, pp. 153-154, reading ‘[t] his negative impact should be mitigated by the fact that the services would be obliged to put in place the necessary procedural safeguards for the users which in the majority of cases already exist in the related context of notice and take down requests.’

<sup>188</sup> See e.g. Paul Keller, ‘Article 17: (Mis)Understanding the Intent of the Legislator’ (*Kluwer Copyright Blog*, 28 January 2021) <<http://copyrightblog.kluweriplaw.com/2021/01/28/article-17-misunderstanding-the-intent-of-the-legislator/>> accessed 4 May 2021. Providing recommendation on how to enable ex ante safeguards, see Quintais and others (n 18).

<sup>189</sup> Statement by Germany, *supra* note 8, point 8.

<sup>190</sup> See, in this line, Quintais and others (n 18); Christophe Geiger and Bernd Justin Jütte, ‘Platform Liability Under Art. 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match’ [2021] GRUR International <<https://academic.oup.com/grurint/advance-article-abstract/doi/10.1093/grurint/ikab037/6169057?redirectedFrom=fulltext>> accessed 4 May 2021; Martin Husovec, ‘Over-Blocking: When Is the EU Legislator Responsible?’ (LSE 2021) Working Paper ID 3784149 <<https://papers.ssrn.com/abstract=3784149>> accessed 4 May 2021.

<sup>191</sup> This section largely reproduces João Quintais and Sebastian Felix Schwemer, ‘The Interplay between the Digital Services Act and Sector Regulation: How Special Is Copyright?’ <<https://papers.ssrn.com/abstract=3841606>> accessed 9 May 2021.

<sup>192</sup> European Commission, REFIT – making EU law simpler, less costly and future proof, [https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-less-costly-and-future-proof\\_en](https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-less-costly-and-future-proof_en).

<sup>193</sup> See art. 1 DSA proposal.

<sup>194</sup> See *infra* at 3.2.2.a).



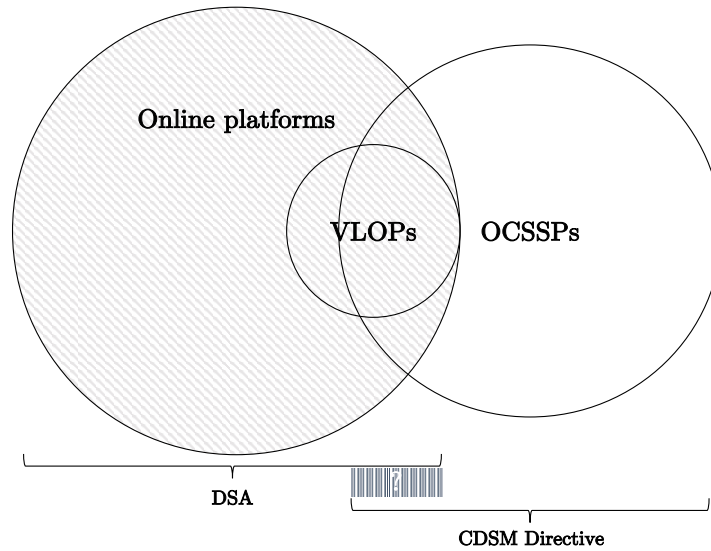


Figure 5. Overlap between DSA and CDSM Directive

A preliminary question for our purposes is whether the DSA applies to OCSSPs in the first place. Importantly, the special “copyright”-regime for OCSSPs *only* relates to the *copyright*-relevant portion of an online platform that qualifies as an OCSSP. Art. 17(3) subpara. 2 CDSM Directive states clearly that the hosting safe harbour of art. 14 e-Commerce Directive – and correspondingly that in art. 5 DSA – still applies to OCSSPs “for purposes falling outside the scope of this Directive.” Consider the example of YouTube, which qualifies as OCSSP. If the relevant information or content it hosts relates to copyright, art. 17 CDSM Directive applies. If the relevant information, however, relates to hate speech or child sexual abuse material or any other illegal information or content<sup>195</sup>, the e-Commerce Directive’s – and correspondingly DSA’s – hosting liability exemption is the place to look. In other words, YouTube would be considered an OCSSP (in the context of copyright) and also a VLOP (in the context of other information).

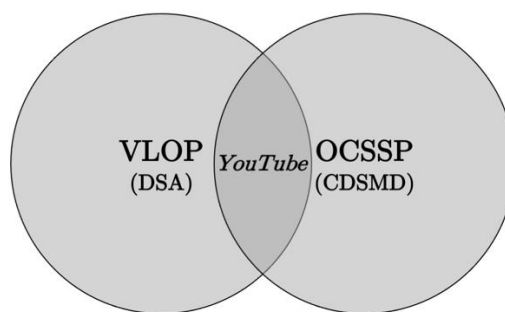


Figure 6. Example of overlap between regulatory regimes in the case of OCSSPs

In the following, we focus on the copyright aspects. Art. 1(5)(c) DSA states that the Regulation is “without prejudice to the rules laid down by (...) Union law on copyright and related rights.” Supporting Recital 11 adds that the “Regulation is without prejudice to the rules of Union law on copyright and related rights, which establish specific rules and procedures that should remain unaffected.” Read alone, this Recital could be understood as the Commission’s view that art. 17 CDSM Directive, in our example, indeed contains the answers to all questions regarding obligations of OCSSPs. In our view, however, “unaffected”<sup>196</sup> can only relate to aspects which indeed are specifically covered by those rules.

<sup>195</sup> Art. 2(g) DSA proposal defines “illegal content” as “any information, which, in itself or by its reference to an activity, including the sale of products or provision of services is not in compliance with Union law or the law of a Member State, irrespective of the precise subject matter or nature of that law”.

<sup>196</sup> Confusingly, the Explanatory Memorandum in one instance notes that “the proposal does not amend sector-specific legislation or the enforcement and governance mechanisms set thereunder, but provides for a horizontal framework to rely on, for aspects beyond specific content or subcategories of services regulated in sector-specific acts” (explanatory memorandum p. 6). The wording “amend” could

Recital 11 (similar to Recital 10), however, is only a further example of areas of application of the general principle contained in Recital 9, aimed at providing further clarity on the interplay between the horizontal rules of the DSA and sector-specific rules. Recital 9 states that the DSA

*“should complement, yet not affect the application of rules resulting from other acts of Union law regulating certain aspects of the provision of intermediary services (...). Therefore, this Regulation leaves those other acts, which are to be considered *lex specialis* in relation to the generally applicable framework set out in this Regulation, unaffected. However, the rules of this Regulation apply in respect of issues that are not or not fully addressed by those other acts as well as issues on which those other acts leave Member States the possibility of adopting certain measures at national level.”<sup>197</sup>*

The Explanatory Memorandum repeats this text and provides as one example the obligations set out in the AVMS Directive<sup>198</sup> on video-sharing platform providers as regards audiovisual content and audiovisual commercial communications. It continues that such rules “will continue to apply” but that the DSA “applies to those providers to the extent that the AVMSD or other Union legal acts, such as the proposal for a Regulation on addressing the dissemination on terrorist content online, do not contain more specific provisions applicable to them.”<sup>199</sup>

Applying this logic to the CDSM Directive, this means that the specific rules and procedures contained in art. 17 for OCSSPs are likely considered *lex specialis* to the DSA. Conversely, the DSA will apply to OCSSPs insofar as it contains: (i) rules that regulate matters not covered by art. 17 CDSM Directive; and (ii) specific rules on matters where art. 17 leaves margin of discretion to Member States. As we demonstrate below, whereas category (i) is more or less straightforward, category (ii) is more challenging.

### 3.6.2 Potentially applicable rules

At this stage, it is important to note that the DSA contains a bifurcated approach to regulation. On the one hand, Chapter II sets out a regime for the liability of providers of intermediary services.<sup>200</sup> This regime distinguishes between *functions*, namely ‘mere conduit’, ‘caching’ and hosting. It is in essence a revamped version of the existing rules on liability exemption (also known as safe harbours) and ban on general monitoring in arts. 12 to 15 e-Commerce Directive.<sup>201</sup> The main differences are the addition of a quasi-“Good Samaritan” rule in art. 6<sup>202</sup>, and provisions on orders to act against illegal content (art. 8) and to provide information (art. 9). On the other hand, Chapter III sets out “horizontal”<sup>203</sup> due diligence obligations for a transparent and safe online environment.<sup>204</sup> This regime distinguishes between categories of providers, by setting out asymmetric obligations that apply in a tiered way to different categories of providers of information society services. As a starting point, the liability exemption regime, on the one hand, and the due diligence obligations, on the other hand, are separate from each other. In other words: the availability of a liability exemption is not dependent on compliance with due diligence obligations and vice-versa.<sup>205</sup>

In this respect, the DSA retains in art. 2(a) the definition of “information society services” of the e-Commerce Directive that underpins the notion of information society service provider (ISSP). For the purposes of due diligence obligations, it then proposes a distinction between four categories of *services*, from general to increasingly more specific: (1) intermediary services, (2) hosting services, (3) online platforms, and (4) very large online platforms (VLOPs).<sup>206</sup> These are visualised in **Errore. L'origine riferimento non è stata trovata.** below.

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suggest a broader exclusion than “unaffected”. Since Recitals and articles of the proposal, however, do not take this up, we refrain from further analysis. At the same time,

<sup>197</sup> Recital 9 DSA Proposal (our emphasis).

<sup>198</sup> Directive 2010/13/EC, as amended by Directive (EU) 2018/1808,

<sup>199</sup> Unfortunately, the Explanatory Memorandum refrains from specifically addressing its relation to the CDSM Directive. Since the AVMS Directive explicitly only serves as one example, however, there is no indication that this general principle would not apply to other specific rules.

<sup>200</sup> See arts. 3 to 9 DSA proposal.

<sup>201</sup> See also art. 71 DSA proposal.

<sup>202</sup> On which, see Aleksandra Kuczerawy, ‘The Good Samaritan That Wasn’t: Voluntary Monitoring under the (Draft) Digital Services Act’ (*Verfassungsblog*, 12 January 2021) <<https://verfassungsblog.de/good-samaritan-dsa/>> accessed 5 May 2021.

<sup>203</sup> Cf. Recital 73 DSA proposal.

<sup>204</sup> arts. 10 to 37 DSA proposal.

<sup>205</sup> Note, however, e.g. Art.14(3) DSA proposal (“Notices that include the elements referred to in paragraph 2 shall be considered to give rise to actual knowledge or awareness for the purposes of Article 5 in respect of the specific item of information concerned.”)

<sup>206</sup> Art. 1(f) and 25 DSA proposal.



Intermediary services, the broadest category, comprises ‘mere conduit’, ‘caching’, or ‘hosting’ services.<sup>207</sup> ‘Hosting’ services consist “of the storage of information provided by, and at the request of, a recipient of the service”.<sup>208</sup> Online platforms are defined as providers of “a hosting service which, at the request of a recipient of the service, stores and disseminates to the public information, unless that activity is a minor and purely ancillary feature of another service and, for objective and technical reasons cannot be used without that other service, and the integration of the feature into the other service is not a means to circumvent the applicability of this Regulation.”<sup>209</sup> In simple terms, VLOPs are those online platforms provide their services to a number of average monthly active recipients of the service in the EU equal to or higher than 45 million.<sup>210</sup> Under the asymmetric obligations approach of Chapter III DSA, VLOPs are subject to the highest number of cumulative obligations.<sup>211</sup>

In our view, when contrasting the definitions in the DSA and CDSM Directive, it is clear that the notion of OCSSP covers at least (certain) online platforms and VLOPs (see *supra* Figure 4. OCCSSPs as online platforms in DSA framework, at 2.4).

In light of this overlap, the question that arises is to what extent the DSA’s liability rules (in Chapter II) and the asymmetric obligations (in Chapter III) apply to OCSSPs as online platforms or VLOPs.

### DSA Liability Regime and OCCSPs

In our view, the liability regime in the DSA is partly excluded for OCSSPs. First, the hosting safe harbour (in art. 5 DSA) is meant to replace art 14 e-Commerce Directive.<sup>212</sup> As such, its application is set aside by the express reference in art. 17(3) CDSM Directive.<sup>213</sup>

The general monitoring ban in art. 7 DSA, which aims to replace the similar prohibition<sup>214</sup> in art. 15 e-Commerce Directive, on the other hand, appears to not be touched by the CDSM Directive. Art. 17(8) CDSM Directive merely states that “[t]he application of this Article shall not lead to any general monitoring obligation.” It does not set aside the application of art. 15 e-Commerce Directive, meaning that it can be understood as being of a merely declaratory nature.

Things are, however, less clear for the “good Samaritan” rule in art. 6 DSA on “[v]oluntary own-initiative investigations and legal compliance”. In our view, this provision probably does not apply to OCSSPs. Given the direct reference<sup>215</sup> to the liability exemptions in the DSA, its application appears to be directly connected (for our purposes) to the specific hosting safe harbour, which does not apply to OCSSPs as per art. 17(3) CDSM Directive. In addition, art. 6 DSA is meant to enable “activities aimed at detecting, identifying and removing, or disabling of access to, illegal content, or take the necessary measures to comply with the requirements of Union law, including those set out in this Regulation.” But art. 17(4)(b) and (c) CDSM Directive already set forth a liability exemption mechanism requiring OCSSPs make best efforts to apply preventive measures to ensure the unavailability or removal of copyright infringing content. These specific rules for OCSSPs would appear to leave little space for voluntary own-initiative investigations by online platforms, and consequently the application of art. 6 DSA. As a result, there may be no need to look for interpretations that would include voluntary activities by OCCSPs.<sup>216</sup>

Finally, the rules on orders against illegal content and orders to provide information in arts. 8 and 9 DSA may apply to OCSSPs. Art. 8 DSA, in particular, sets out a detailed regime not available elsewhere to OCSSPs. To be sure, one could argue that art. 8(3) InfoSoc Directive, as interpreted by the CJEU, already provides specific rules on injunctions. But the latter provision applies only to “intermediaries whose services are used by a third party

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<sup>207</sup> art. 2(f) DSA Proposal.

<sup>208</sup> Similar to the current wording of the e-Commerce Directive’s art. 14.

<sup>209</sup> art. 2(h) DSA Proposal.

<sup>210</sup> Art. 25 DSA Proposal.

<sup>211</sup> Arts. 25–33 DSA proposal. For a visual representation, see European Commission, The Digital Services Act: ensuring a safe and accountable online environment, New Obligations, [https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en)

<sup>212</sup> See art. 71 DSA proposal.

<sup>213</sup> See *supra* at **Errore. L'origine riferimento non è stata trovata.**

<sup>214</sup> A further analysis of the differences between art. 7 DSA proposal and art. 15 e-Commerce Directive is outside the scope of this paper.

<sup>215</sup> We will get back to this point further below at 3.2.2 a).

<sup>216</sup> This may be different in other sector-specific legislation, which is outside the scope of this paper.



to infringe a copyright or related right”, a rule consistent with art. 14(3) e-Commerce Directive.<sup>217</sup> In other words, art. 8(3) InfoSoc Directive applies to intermediaries that are not directly liable for the content they host. This is not the case of OCSSPs, who by virtue of the legal regime in art. 17(1) CDSM Directive are directly liable for the content they host and is publicly available. If that is the case, then it would seem that art. 8 DSA applies to OCSSPs.

### ■ What due diligence obligations for OCSSPs?

It is outside the scope of this report to discuss in depth all potential obligations that apply to online platforms and VLOPs. Instead, we will focus on selected key obligations that apply to both categories and might be relevant for OCSSPs. This includes certain due diligence obligations for all providers of intermediary services (arts. 10-13), online platforms (arts. 14-24) and VLOPs (arts. 25-33).

As a preliminary remark, we see no obstacle to the application to OCSSPs of general obligations<sup>218</sup> that extend all intermediary services on points of contact, legal representatives, terms and conditions<sup>219</sup>, and transparency reporting. This includes the obligations set out in arts. 10 to 13 (with aggravation in arts. 23, and 33 DSA).

#### Notice-and-action and statement of reasons<sup>220</sup>

A far trickier question is whether or not the detailed regimes on notice-and-action (art. 14) and statement of reasons (art. 15) are suggested to apply to OCSSPs.

As explained above, art. 17(4)(b) and (c) CDSM Directive set out a specific notice-and-action regime, which includes in paragraph (c) obligations regarding notice-and-takedown as well as notice-and-stay-down.<sup>221</sup> This could point in the direction of the DSA being excluded here, since the copyright sector-regulation contains rules on the matter. At the same time, however, art. 17 CDSM Directive remains vague around the concrete notice-and-action setup: it merely mentions “a sufficiently substantiated notice”.<sup>222</sup> In a vacuum, this would for instance allow Member States margin of discretion in regulating the details of such notice.<sup>223</sup>

Thus, it is also arguable that some components of the notice-and-action regime, such as the minimum elements that should be contained in a notice to a platform<sup>224</sup>, add a level of specificity not found in the *lex specialis* rules of the CDSM Directive. Then again, already today the European landscape for notices is varying, since some Member States chose to amend the implementation of art. 14 e-Commerce Directive with procedural rules, whereas others did not. On this point, it is important to remember that the very choice of instrument for the DSA – a Regulation vis-à-vis Directive – was considered necessary to provide legal certainty, transparency and consistent monitoring.<sup>225</sup> Furthermore, the accompanying Explanatory Memorandum points out that sector-specific instruments do not cover all regulatory gaps, especially with regards to “fully-fledged rules on the procedural obligations related to illegal content and they only include basic rules on transparency and accountability of service providers and limited oversight mechanisms”.<sup>226</sup> Similarly, art. 1(2)(b) DSA notes that the aim of the Regulation is to set out uniform rules. All these considerations suggest the application of DSA rules to OCSSPs. Against this application, the strongest argument we find is the consideration that the rationale for the vaguer regime of art. 17 CDSM Directive in this regard was precisely to allow some margin of discretion to platforms and rights holders on how to define the content of notices for the specific subject matter of copyright.

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<sup>217</sup> Art. 14(3) e-Commerce Directive states the hosting safe harbour “shall not affect the possibility for a court or administrative authority, in accordance with Member States’ legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.”

<sup>218</sup> Chapter III, Section 1 DSA proposal, with certain further adjustments of the obligations for specific intermediary services.

<sup>219</sup> Art. 12 DSA obliges intermediary service *inter alia* to provide information on content moderation including algorithmic decision making and human review. Art. 19(9) subpara. 4 CDSM Directive, too, stipulates a duty on OCSSPs to inform in users in their terms and conditions, however, only with respect to the possibility to use copyright-protected works under copyright limitations and exceptions provided for in the copyright acquis.

<sup>220</sup> Chapter III, Section 2 DSA proposal.

<sup>221</sup> See supra at **Errore. L'origine riferimento non è stata trovata.**

<sup>222</sup> See art. 17(4)(c) CDSM Directive.

<sup>223</sup> It is still unclear whether this margin of discretion would be subject to consistency with: (i) the “high industry standards of professional diligence” mentioned in art. 17(4)(b) applicable ex vi the last sentence of paragraph (c); and (ii) any potential the guidance from the Commission pursuant to art. 17(10).

<sup>224</sup> Art. 14(2) DSA proposal.

<sup>225</sup> Explanatory memorandum, DSA proposal p. 7.

<sup>226</sup> Explanatory memorandum, DSA proposal p. 4.



The answer to the question in any case also depends on the nature of art. 14 DSA: is it to be understood as supplement to the *specific* hosting liability exemption in art. 5 DSA or as due diligence obligation applicable to hosting services more broadly? On the one hand, it is clear that due diligence obligations are to be seen as separate from liability exemptions. The (non-)compliance with due diligence obligations does not affect the hosting safe harbour, and vice-versa. On the other hand, this distinction between safe harbours and due diligence obligations is blurred by the – we think problematic and probably unintended – effect a notice is suggested to have on the actual knowledge of a hosting service.<sup>227</sup> Since art. 14(3) DSA makes direct reference to the hosting liability exemption in art. 5 DSA, at least art. 14(3) DSA cannot directly apply to OCSSPs.

A similar logic applies to the rules on statement of reasons (art. 15 DSA), which apply to the justification provided by platforms to users regarding decisions to remove or disable access to specific items of information. In the scheme of art. 17 CDSM Directive, users *appear* to be informed about these reasons *only* through a complaint and redress mechanism. Under art. 17(9), rights holders “shall duly justify the reasons for their [removal] requests” to OCSSPs, who will then take a decision on removal or disabling. There are no explicit rules on whether, when, and how these decisions are communicated to users, which suggests that there is ample margin for application of the specific rules set out in art. 15 DSA.

#### Internal complaint mechanism and out-of-court dispute settlement

In the context of online platforms, arts. 17 and 18 DSA set forth a detailed internal complaint mechanism as well as out-of-court dispute settlement. Art. 17 CDSM Directive also mandates such mechanisms in paragraph (9) for the specific genus of OCSSPs, but in a much less detailed fashion. In various forms, both the DSA and art. 17 CDSM Directive stipulate that such internal complaint mechanisms need to be effective, processed within a reasonable timeframe (undue delay/timely manner), and involve some form of human review. The DSA, however, is more detailed and includes, for instance, a requirement of user-friendliness and a minimum period for filing such complaint of six months following the takedown decision.

The question is, thus, again whether the DSA is able or intended to “fill” the holes that the *lex specialis*-regulation in the CDSM Directive left open. First, however, even if answered in the negative, it could be argued that arts. 17 and 18 DSA – in the view of the EU-lawmaker – represent the archetypes of “effective and expeditious” mechanisms. Complaint and redress mechanisms *should* therefore be modelled after the horizontal DSA example where the CDSM Directive falls short. In our view, this is desirable outcome.

Second, we should not forget that OCSSPs are not relevant from a copyright-perspective *only*. If a video on *YouTube* contains illegal hate speech, the notice-and-action mechanism (and following redress mechanisms) would not fall under the regime of art. 17 CDSM Directive but rather that of the e-Commerce Directive and future DSA.<sup>228</sup> Having various similar but different redress mechanisms for the *very same* platform depending only on the legal regime governing the content at issue (copyright, personal data, hate speech, etc.) can hardly be in the interest of the lawmaker<sup>229</sup>, OCSSPs, internet users or other stakeholders.

A counter argument would be that such differentiated approach is justified in light of the specific character of the rights concerned. The question then is: What part of *substantive* copyright law would prescribe a different treatment for the *complaint handling* of copyright-related content takedowns? The immediate starting point for such special place for copyright in the heart of the EU *acquis* would be its protection in art. 17(2) Charter of Fundamental Rights of the European Union<sup>230</sup> and the high-level of protection as set out in the recitals of the InfoSoc Directive and emphasized time and again by the CJEU.<sup>231</sup> In our view, however, that high-level protection can hardly be undermined by safeguarding complaint mechanisms. The latter only become relevant once content has been taken down and a potential infringement of the protected rights is prevented. Instead, redress mechanisms relate *inter alia* to users’ fundamental rights (*vis-à-vis* a platform’s right to conduct a business). Consequently, we argue that arts. 17 and 18 DSA should apply to OCSSPs to fill the gaps left open by the vaguer rules on the complaint and redress in art. 17(9) CDSM Directive.

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<sup>227</sup> See art. 14(3) DSA proposal.

<sup>228</sup> Another related question is what framework would apply if one and the same video is relevant from a copyright-perspective and a non-copyright perspective; e.g., a parody of a copyright-protected work that also contains hate speech.

<sup>229</sup> See, e.g., recitals 4 and 7 DSA proposal.

<sup>230</sup> Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407.

<sup>231</sup> For a scholarly analysis of the use of the “high level of protection” justificatory argument by the CJEU in this context, see e.g. Marcella Favale, Martin Kretschmer and Paul C Torremans, ‘Is There an EU Copyright Jurisprudence? An Empirical Analysis of the Workings of the European Court of Justice’ (2016) 79 *The Modern Law Review* 31.



## Trusted flaggers/notifiers and measures against misuse

Another noteworthy novelty relates to the obligation for online platforms to collaborate with *certain* trusted flaggers/notifiers in art. 19 DSA. Trusted notifiers are “an individual or entity which is considered by a hosting service provider to have particular expertise and responsibilities for the purposes of tackling illegal content online”.<sup>232</sup> Despite the regime in art. 17 CDSM Directive, we expect trusted flaggers to play an important role on OCSSPs also for the flagging of copyright-protected material in the foreseeable future.

Recital 46 DSA, for example, notes that for “intellectual property rights, organisations of industry and of right-holders could be awarded trusted flagger status, where they have demonstrated that they meet the applicable conditions”. Once again, however, art. 19(1) DSA puts itself in direct connection to the notice-and-action mechanism in art. 14 DSA, meaning that this regime could be related to only those online platforms that are not OCSSPs. Thus, the applicability of art. 19 in the context of OCSSPs depends at least to some extent on the question whether the notice-and-action mechanism applies to OCSSPs, as discussed above.<sup>233</sup>

In the field of copyright and OCSSPs, rights holders may also have an interest that online platforms are *obliged* to collaborate with certain trusted notifiers. Already today, however, trusted flagger arrangements are a common occurrence, at least on larger scale online platforms.<sup>234</sup> The notable twist of the DSA is that the trusted flagger status is awarded by the relevant Digital Services Coordinator of the Member States if certain requirements are met.<sup>235</sup> Furthermore, the platform is obliged to inform the Coordinator if a trusted flagger submits “a significant number of insufficiently precise or inadequately substantiated notices”.<sup>236</sup> Ultimately, then, the trusted flagger status can be revoked.<sup>237</sup> In light of uncertainty around the data quality of copyright notices, such oversight could be also in particular importance in the context of OCSSPs.<sup>238</sup>

But even if art. 19 DSA indeed were not applicable to OCSSPs, it is important to note that already the non-binding Recommendation (EU) 2018/334 on measures to effectively tackle illegal content online encouraged platforms to *voluntarily* collaborate with trusted flaggers.<sup>239</sup> Similarly, nothing in the DSA prevents “voluntary” trusted notifier arrangements. These would however be outside the scope of art. 19 and therefore outside the supervision of the Digital Services Coordinator.<sup>240</sup> This apparent gap is, however, at least partly tackled by art. 20 DSA.

Art. 20 DSA on measures and protection against misuse contains two main angles. First, the obligation to suspend the accounts of *users* who “frequently provide manifestly illegal content”.<sup>241</sup> Secondly, the obligation to suspend the *processing of notices and complaints* by individuals or entities or by complainants who “frequently submit notices or complaints that are manifestly unfounded”.<sup>242</sup> In our view, art. 20 proposal is central to mitigating misuse both by users and by any type of flaggers, probably excluding at least partly “trusted flaggers”, regulated by art. 19 but including flaggers covered by “voluntary” trusted notifier arrangements with platforms.

Again, art. 20(2) DSA proposal, however, directly references arts. 14 and 17 DSA. For the application of art. 20 on OCSSPs, thus, once, the central question is whether art. 14 and (at least part of) art. 17 DSA apply the *lex specialis* of art. 17 CDSM Directive.

The issue of users repeatedly uploading illegal content is as relevant for OCSSPs as for other online platforms. Likewise, the misuse of notices and complaints is a concern on OCSSPs. Art. 17(7) and (9) subpara. 3 CDSM Directive require that the copyright-regime must not lead to the unavailability of non-infringing works, without however explicitly putting in place a misuse protection. In this absence of specific regulation, we argue that art. 20 DSA should be fully applicable to copyright misuse. Art. 20 DSA is central also for voluntary arrangements (e.g., trusted notifiers falling outside the regime set forth in art. 19 DSA), for which we equally argue it is fully

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<sup>232</sup> Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online, *OJ L 63*, 6.3.2018, p. 50–61, point 4(g).

<sup>233</sup> See supra at b) 0.

<sup>234</sup> See, e.g., Google Support, YouTube Help, YouTube Trusted Flagger program, <https://support.google.com/youtube/answer/7554338?hl=en>

<sup>235</sup> Art. 19(2) DSA proposal.

<sup>236</sup> Art. 19(5) DSA proposal.

<sup>237</sup> Art. 19(6) DSA proposal.

<sup>238</sup> See e.g. Keller and Leerssen (n 179).

<sup>239</sup> See for an in-depth analysis, Sebastian Felix Schwemer, ‘Trusted Notifiers and the Privatization of Online Enforcement’ (2019) 35 *Computer Law & Security Review* 105339.

<sup>240</sup> See, e.g., recital 46, that states: “the rules of this Regulation on trusted flaggers should not be understood to prevent online platforms from giving similar treatment to notices submitted by entities or individuals that have not been awarded trusted flagger status (...)”.

<sup>241</sup> Art. 20(1) DSA proposal.

<sup>242</sup> Art. 20(2) DSA proposal.





applicable. For reasons of legal certainty, it is desirable that the wording of art. 20 DSA is clarified during the legislative process to state this unequivocally.<sup>243</sup>

#### Additional obligations on VLOPs

Finally, VLOPs are subject to certain specific due diligence obligations, *inter alia*, risk assessment (art. 26) and risk mitigation (art. 27). The functioning and use made of the services of very-large OCSSPs (e.g., YouTube or Pornhub) might come with systemic risks, e.g., “dissemination of illegal content” or “negative effects for the exercise” of fundamental rights including freedom of expression. Since the CDSM Directive does in no way address these issues, we do not see any argument that precludes the application of arts. 26 and 27 (as well as other relevant provision such as data access) to VLOPs that are also OCSSPs. The same reasoning holds for other relevant obligations, such as data access and transparency.

The liability exemptions in Chapter II largely resemble the system set forth 21 years ago in the e-Commerce Directive<sup>244</sup>, with notable adjustments such as a Good Samaritan clause<sup>245</sup> and provisions on orders. Separate from this, the proposal suggests the introduction of asymmetric due diligence obligations in Chapter III, which are a novelty compared to the e-Commerce Directive.

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<sup>243</sup> Outside the scope of this report, it is also surprising that the misuse mechanism is only foreseen for online platforms, but not other intermediary services (e.g., hosting or even non-hosting intermediary services). Arguably, in light of the DSA’s goals, it would be desirable that such misuse mechanism is applicable to all voluntary notice-and-action mechanisms for all intermediary services.

<sup>244</sup> I.e., the specific liability exemptions for ‘mere conduit’, ‘caching’ and hosting remain largely unchanged.

<sup>245</sup> See, e.g., Kuczerawy (n 200).



## 4. Legal Mapping at National Level: Comparative Analysis

This chapter carries out a legal mapping of copyright content moderation by online platforms at the national level in selected EU Member States EU. This chapter aims to answer the following sub-research questions, from a national law perspective.

- Sub-research question **(2)**: How is the private and public regulatory framework for content moderation for online platforms structured?
- Sub-research question **(3)**: How do the various elements of that regulatory framework interact?

The chapter starts with preliminary information on the questionnaire that forms the basis of the national level mapping (4.1). It then summarises the key findings from the responses by national experts (4.2). It concludes with a brief summary of the analysis (4.3).

### 4.1 Preliminary information

In line with the methodology introduced in 2.6.2, we collected data related to the legal status of some online platforms in connection to the CDSM Directive. The data involves responses to legal questionnaires by national from ten selected EU Member States.<sup>246</sup> [The questionnaire is reproduced in Annex I.]

The comparative legal questionnaire is designed to run in two main periods or phases. The *phase one* questionnaire collected and analysed legal data from the period preceding the implementation deadline of the CDSM Directive. As such, it focused on the status quo in this field of law. The *phase two* questionnaire will be dedicated to the national implementations of art. 17 CDSM Directive, and the consequences of such implementation, and will be carried out after the completion of the final mapping report. The phase one and two questionnaires aim to allow a comparison of the legal environment of the service providers at issue in the pre- and post-implementation periods of the CDSM Directive.

The questionnaire's focus is on ISSPs that store or host copyright-protected content uploaded by the users or recipients of the service. Art. 17 CDSM Directive creates a new regime for a subset of hosting service providers, OCSSPs. This regime is explained in detail in Chapter 3. Our questionnaire therefore focuses on ISSPs that host copyright-protected content, with a particular emphasis on OCSSPs.

The first phase questionnaire was formulated between September and December 2020. At the same time, the national reporters were selected. The first phase questionnaire consisted of four main chapters. *Chapter I* focused on hosting service providers as *users* of copyright-protected content (as such, theoretically subject to direct liability for their services). *Chapter II* focused on hosting service providers as *intermediaries* for access to copyright-protected content (as such, theoretically subject to indirect liability for their services). *Chapter III* addressed legal issues related to end-users (as such, theoretically subject to direct liability for their own activities). Finally, *Chapter IV* requested the provision of preliminary information related to the steps of implementation of art. 17 of the CDSM Directive in the national reporters' countries.

The selected national reporters received the questionnaire on 2 December 2020, and the submission date was 22 January 2021. As the COVID pandemic has limited the availability of several national reporters, some of the responses were submitted to us as late as 19 February 2021. Two of the ten reports were declared to be complete by the research team, no changes were requested related to these reports. Eight national reporters were required to slightly amend/clarify their responses. The updated versions were submitted to us as late as 11 April 2021. (Where necessary, however, our summary highlights the key developments with respect to the implementation of art. 17 CDSM Directive.)

This part of the interim mapping report intends to summarize the key findings and trends of the ten national reports. The (final) mapping report will provide for a thorough analysis and comparison of the national reports, including the detailed analysis of the statutory provisions and case law of the selected Member States.

### 4.2 Key findings

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<sup>246</sup> These countries are Denmark (DEN); Estonia (EST); France (FRA); Germany (GER); Hungary (HUN); Ireland (IRL); Italy (ITA); the Netherlands (NED); Portugal (POR); Sweden (SWE).



This section summarises the main findings from the national questionnaires. For clarity purposes, the analysis follows the structure of the questionnaire, as explained above (0).

#### 4.2.1 Hosting service providers as users of copyright-protected content

This sub-section refers to the question contained in *Chapter I* focused on hosting service providers as users of copyright-protected content.

- **Question 1.** *Is there a legal definition or specific legal regime in your country for information society service providers that store and give the public access to a large amount of protected content<sup>247</sup> uploaded by their users?*

The majority (eight) of national reporters noted that the legal definition related to service providers that store and give the public access to a large amount of protected content uploaded by their users is included in their countries' e-Commerce Laws.<sup>248</sup> Two reports answered to the negative.<sup>249</sup>

- **Question 2.** *Are “good faith” hosting service providers<sup>250</sup> directly or primarily liable under copyright law or general civil law for providing access to protected content uploaded by their users? If yes, please explain.*

The responses of the national reporters to this question showed greater diversity. In the first distinct group of responses, three reports generally affirmed the direct or primary liability of good faith service providers under copyright law or general civil law for providing access to protected content uploaded by their users.<sup>251</sup> Two of these reports confirmed the applicability of criminal law provisions against the service providers as well.<sup>252</sup> At the same time, two of the three reporters expressly stated that such a direct liability has little practical relevance in their country.<sup>253</sup>

Another three countries can be listed in the second distinct group, where responses answered in the affirmative, but indicated that direct liability applies under the domestic e-Commerce Act.<sup>254</sup>

Another three respondents provided a negative answer to the question.<sup>255</sup>

Finally, the *Danish* report has highlighted that the contributory liability of The Pirate Bay per the Danish Supreme Court's decision in case Ugeskrift for Retsvæsen, 2010.2221H, does not seem to be applicable since the CJEU's ruling in *The Pirate Bay* case.

- **Question 3.** *Besides direct licensing, is there any method, mechanism, or model of authorization in your country that covers the uploading of protected content by end-users to the platforms of hosting service providers?*

The majority (eight) of the national reporters answered negatively to the question.<sup>256</sup> Sweden and Germany have a special regime in place.

- **Question 3.1.** *If yes, could you please describe the model, including the legal basis, mechanism, the scope of protected content and rights covered, beneficiaries, and sectoral variations?*

In *Sweden*, since 2013, the Copyright Act provides for a general extended collective licensing (ECL) mechanism within any specified area of use, covering any relevant economic rights. It is thus open to any market actor. The

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<sup>247</sup> We used the short-hand “protected content” to refer to works or other subject-matter protected by copyright or related/neighborhood rights laws.

<sup>248</sup> FRA; IRL; ITA; POR; SWE; EST; HUN; DEN.

<sup>249</sup> NED; GER.

<sup>250</sup> In Case C-610/15, the ECJ, by focusing on The Pirate Bay, concluded that “those operators, by making available and managing an online sharing platform such as that at issue in the main proceedings, intervene, with full knowledge of the consequences of their conduct, to provide access to protected works, by indexing on that platform torrent files which allow users of the platform to locate those works and to share them within the context of a peer-to-peer network.” (Para. 36.) At the same time, in Joined Cases C-682/18 and C-683/18, Advocate General Øe has differentiated between service providers, like The Pirate Bay, and other service providers who have no direct intent to infringe copyright law. This questionnaire calls the latter group “good faith” hosting service providers.

<sup>251</sup> POR; SWE; GER.

<sup>252</sup> POR; SWE.

<sup>253</sup> SWE; GER.

<sup>254</sup> ITA; EST; HUN.

<sup>255</sup> NED; FRA; IRL.

<sup>256</sup> NED; FRA; IRL; ITA; POR; EST; HUN; DEN. The Dutch report nevertheless noted that it is unclear whether an “umbrella licensing agreements” cover UGC contents or not. The Estonian reporter noted that “self-moderation” is the closest analogy to the issue at hand. The Danish report also noted that extended collective licensing is a “different angle” solution to the same issue.



Copyright Act nevertheless expressly indicates typical fields for ECL: the use by public authorities, business, organisations to meet internal needs for information; for the purpose of teaching; for the benefit of archives and libraries; and in relation to radio and TV broadcasts. In *Germany*, uploading of protected contents by end-users can be covered by usual E&La. Furthermore, under Art. 51 of the Collecting Societies Act (VGG), the competence of the collecting society to administer the rights related to out-of-commerce works, even if the right holder has not concluded an agreement with the collecting society. This regime is similar to, albeit a bit more limited than the system envisaged by art. 8 CDSM Directive.

- **Question 3.2.** Please indicate the leading cases which are dealing with the direct liability of service providers.

The *Swedish* national reporter indicated several relevant judgments, but also added that due to the persuasive force of preparatory works, civil case law is “scarce”, but criminal cases exist. (Leading cases include “*BBS Case*”; “*Wikimedia*”; “*Dreamfilm*”; “*Swefilmer*”; “*Rarat*”). The *German* national reporter indicated the existence of three relevant judgments in this field.<sup>257</sup> The *Danish* report referred to a Danish decision from 2005.

The *French* and *Estonian* national reports also referred to some cases (in France: “*Radioblog*”, “*Les Dissimulateurs*”, and “*Clearstream*”; in Estonia: “*Delfi*”) that are related to the upload of contents by end-users to online platforms. These are nevertheless either irrelevant in a copyright environment (“*Delfi*”) or do not put any alternative authorization obligation on intermediaries (as in the *French* cases).

#### 4.2.2 Hosting service providers as intermediaries for access to copyright-protected content

This sub-section refers to the question contained in *Chapter II of the questionnaire* focused on hosting service providers as intermediaries for access to copyright-protected content.

- **Question 4.** Does your country allow rights holders to apply for an injunction against service providers for copyright-infringing content uploaded by third-party users of the service?

The vast majority (nine) of the reporters<sup>258</sup> answered the question affirmatively. In *Germany*, injunctions are inapplicable in cases where art. 10 of the E-Commerce Act (TMG) applies to the case at hand.

- **Question 4.1.** If yes, could you please cite the relevant legal requirements, provision(s), and leading case law?

The nine national reporters duly covered the relevant national rules on the applicability of injunctions.<sup>259</sup> Seven of these reporters indicated the existence of case law relevant to the field,<sup>260</sup> and the two remaining reporters reported no published domestic case law on this issue.<sup>261</sup>

- **Question 5.** Are hosting service providers indirectly or secondarily liable under copyright law or general civil law for providing access to content uploaded by their users?

The national reports indicate the existence of two main groups here. The majority of countries (seven) have an affirmative answer to this question.<sup>262</sup> On the other hand, hosting providers are not indirectly or secondarily liable under copyright law or general civil law for providing access to content uploaded by their users in the minority of countries (three).<sup>263</sup>

- **Question 5.1.** If yes, could you please cite the relevant legal requirements, provision(s), and leading case law?

The national reporters duly covered the relevant national rules on the applicability of injunctions.<sup>264</sup> Five reporters indicated the existence of case law relevant to the field,<sup>265</sup> and one reporter reported no published domestic case law on this issue.<sup>266</sup>

<sup>257</sup> These judgments will be introduced in greater details in the (final) interim report.

<sup>258</sup> NED; FRA; IRL; ITA; POR; SWE; EST; HUN; DEN.

<sup>259</sup> These rules will be introduced and compared in the (final) interim report.

<sup>260</sup> NED; FRA; IRL; ITA; POR; SWE; DEN.

<sup>261</sup> EST; HUN.

<sup>262</sup> NED; IRL; POR; SWE; GER; DEN; EST.

<sup>263</sup> FRA; ITA (although the Italian respondent noted that the development of “active provider” doctrine might be indirectly relevant in this field); HUN.

<sup>264</sup> These rules will be introduced and compared in the (final) interim report.

<sup>265</sup> NED; IRL; POR; SWE; GER; DEN.

<sup>266</sup> EST.



- **Question 6.** *Does your country have any regime in place for the moderation of infringing content by hosting service providers?*<sup>267</sup>

Countries show a diverse picture in this regard. On the one hand, the majority (seven) of the reporters responded affirmatively.<sup>268</sup> From them the *Swedish* reporter noted that such regime applies “to a limited extent”; the *Estonian* report stated that the regime is “mostly self-regulatory”; the *German* reporters noted that a mixed (statutory and case law) regime applies; and the *Dutch* reporters noted that the system is not based on law, but indirectly on duty of care. The three other countries responded negatively;<sup>269</sup> although the Irish reporter highlighted that *Ireland* might move to this direction by a pending implementation bill on the AVMS Directive; and the *Italian* reporters coined the issue at hand as “a recurring idea”.

- **Question 6.1.** *If yes, describe whether the regime is statutory, co-regulatory, self-regulatory, and/or best practices-based?*

From the seven national reporters four<sup>270</sup> declared regime purely statutory; one<sup>271</sup> declared it to be a mixture of statutory and case law; one<sup>272</sup> found it mainly self-regulatory; and another<sup>273</sup> report stated the relevance of duty of care in this field.<sup>274</sup>

- **Question 6.2.** *If yes, is such a regime applicable to exclude the liability of platforms for storing and giving access to contents uploaded by their users?*

The majority (six) reporters answered in the negative;<sup>275</sup> and four of the national respondents answered affirmatively on this question.<sup>276</sup>

- **Question 6.3.** *If yes, do the obligations for service providers result from a duty of care, or any other legal construct?*

Countries show a diverse picture in this regard. Three countries have a purely statutory regime;<sup>277</sup> and three other countries have a system based purely on duty of care.<sup>278</sup> *Hungary* has a mixed system (having a statutory basis and requiring the compliance with the duty of care). Finally, three other respondents answered negatively to this question.<sup>279</sup>

- **Question 6.4.** *If yes, does the existing regime include complaint and redress (C&R) mechanisms? If so, please briefly explain these.*

The majority (seven) of respondents answered negatively to this question.<sup>280</sup> *Portugal* and *Hungary* have a system that include a C&R mechanism. In *Germany*, a mixed system exists. On the one hand, it is conceivable that the duty of care requires C&R, although no case law has confirmed this yet. On the other hand, the “*Netzwerkdurchsetzungsgesetz*”, which only applies to UGC that violates offences (e.g., incitement, libel) under the Criminal Code, explicitly requires the application of C&R in the relevant cases. Albeit not directly relevant for copyright law, these rules serve as a model for the upcoming Digital Services Act of the EU. The German reporters also added that *similar provisions have been introduced into § 10a-§ 10c of the German E-Commerce Act (TMG) in November 2020.*

- **Question 7.** *Did your country introduce any liability exemption or “safe harbour” provisions for the benefit of search engines or linking service providers?*<sup>281</sup>

<sup>267</sup> Such regimes include e.g. preventive measures (e.g. for filtering and blocking content) and notice-and-action rules (e.g. notice-and-notice, notice-and-takedown, notice and stay-down, notice-and-notice, etc.).

<sup>268</sup> FRA; POR; SWE; EST; HUN; GER; NED.

<sup>269</sup> IRL; ITA; DEN.

<sup>270</sup> FRA; POR; SWE; HUN.

<sup>271</sup> GER.

<sup>272</sup> EST.

<sup>273</sup> NED.

<sup>274</sup> These discussions will be introduced and compared in the (final) interim report.

<sup>275</sup> NED; IRL; ITA; POR; SWE; DEN.

<sup>276</sup> FRA; GER; EST; HUN.

<sup>277</sup> FRA; SWE; EST.

<sup>278</sup> NED; POR; GER.

<sup>279</sup> IRL; ITA; DEN.

<sup>280</sup> NED; FRA; IRL; ITA; SWE; EST; DEN.

<sup>281</sup> Compare to art. 21(2) of the E-Commerce Directive: “[i]n examining the need for an adaptation of this Directive, the report shall, in particular, analyse the need for proposals concerning the liability of providers of hyperlinks and location tool services, “notice and take



The majority (seven) of respondents reported the existence of such safe harbour regime for at least one of the two services.<sup>282</sup> The exact scope of these regimes is, however, very diverse. In three countries, statutory provisions cover both types of ISSPs.<sup>283</sup> In *Hungary*, the e-Commerce Act expressly covers search engines, but not linking service providers. In *Sweden*, statute law indirectly (through interpretation) covers search engines, but such interpretation is questionable regarding linking service providers. Finally, in *France* and *Germany*, such safe harbour regime applies to search engines, but only under case law. In the three other countries, no such safe harbour regime applies.<sup>284</sup>

- **Question 7.1.** *If yes, how do courts apply concurring safe harbour provisions regarding service providers offering mixed services (e.g., a platform with both hosting and search/linking functions)? Please cite leading case law.*

Only one national report has stated that there is relevant case law to this question. Under the *Italian Reti Televisive Italiane S.p.A. v. Yahoo!* case, the Supreme Court distinguished the position of Yahoo Video! host from the position of Yahoo as a search engine. In the case of Yahoo Video, the Supreme Court excluded the application of the safe harbour provision, judging its conduct as active and thus triggering direct liability. On the contrary, it refused to hold liable Yahoo! as a search engine, arguing that the mere indexing and linking constitutes a neutral *caching* activity which shields the ISP from liability. The Supreme Court also added that the service provider is not expected to remove allegedly infringing materials only on the basis of rightholders' notice or claim in court, since the neutral position of the caching service provider causes the removal obligation to arise only in case of explicit judicial order. A more recent Italian judgement of the Supreme Court confirmed the legal qualification of search engines as caching services.<sup>285</sup>

- **Question 7.2.** *If yes, which right(s) are users infringing?*<sup>286</sup>

Countries show a diverse picture in this regard. In two countries, the right of reproduction, communication to the public and making available to the public might be infringed.<sup>287</sup> The *Estonian* report stated that the right of reproduction and making available to the public might be infringed. In *Portugal*, the communication to the public might be infringed. In *Sweden*, none of these rights might be infringed. The *German* and *Danish* reports indicated that such liability is not applicable. In Italy, however, the judicial wording in ISP liability cases generally limits itself to the "copyrights or related rights/the specific copyrights alleged by the right holder/the fundamental right of intellectual property" ("diritti d'autore o diritti connessi/diritti d'autore specificatamente allegati dall'autore/il diritto fondamentale alla proprietà intellettuale"). No specific reference is made to any exclusive right in particular.

This question is not relevant under the laws of France and Ireland. Nevertheless, the *Irish* reporter noted that "if reform occurs, it would be reasonable to assume that the making available right naturally will come into play and also the reproduction right in line with sections 39 & 40 of the CRR Act".

#### 4.2.3 End-users

This sub-section refers to the question contained in *Chapter III* of the questionnaire focused on end-users of online platforms hosting and providing access to copyright protected content.

- **Question 8.** *Are end-users directly liable under copyright law for uploading content to the services of ISSPs without authorisation?*

The responses to this question unanimously confirm that end-users are directly liable under copyright law for uploading copyright-protected content to the services of information society service providers without authorisation.

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down" procedures and the attribution of liability following the taking down of content. The report shall also analyse the need for additional conditions for the exemption from liability, provided for in Articles 12 and 13, in the light of technical developments, and the possibility of applying the internal market principles to unsolicited commercial communications by electronic mail".

<sup>282</sup> ITA; POR; EST; HUN; SWE; FRA; GER.

<sup>283</sup> ITA ("caching"); POR ("content association services"); EST ("information storage service").

<sup>284</sup> NED (although the reporters stated that under the Dutch case law, the quotation exception used to cover online search results; the legitimacy of such case law has, however, become questionable since the ECJ's ruling in *Pelham*); IRL; DEN

<sup>285</sup> Cass. civ. Sez. I, 19/03/2019, n. 7709. Re.Te.It. S.p.A. c. Ya.In.

<sup>286</sup> E.g. reproduction and/or communication/making available to the public.

<sup>287</sup> NED; HUN.



- **Question 8.1.** *If yes, which right(s) are users infringing?*<sup>288</sup>

Countries show a diverse picture in this regard. Half (five) of the countries reported that users might infringe the right of reproduction and making available to the public by the unauthorized uploading of contents.<sup>289</sup> Similarly, but with a bit different terminology, users might infringe the right of reproduction or “representation” under *French* copyright law. In two countries, the users’ acts might run against the right of making available to the public.<sup>290</sup> In the *Netherlands*, such activity is covered by the “openbaarmaking” right. In *Hungary*, users might infringe right(s) communication or making available to the public. The national reporter also added that until the content reaches public, the private copying exception covers uploads to private folders.

- **Question 8.2.** *If yes, could you please cite the relevant legal provision(s) and leading case law?*

The national reporters duly cited the relevant national rules.<sup>291</sup> Three national reporters indicated the existence of case law in this field. The Dutch report noted that case law speaks against large scale users, if their identity can be obtained; criminal law shall also be applicable in the *Netherlands*. The *French* report highlighted that the case law precedes the amendments of August 1, 2006 of the French Copyright Act. Finally, the *Swedish* respondent introduced a rich case law in this field.<sup>292</sup>

- **Question 9.** *Did your Member State implement the E&Ls on quotation, criticism, review and caricature, parody, and pastiche set forth in arts. 5(3)(d) and 5(3)(k) InfoSoc Directive?*

Countries show a diverse picture in this regard. In the majority (six) of countries, the answer was affirmative to both groups of E&Ls.<sup>293</sup> In two countries only quotation, criticism, review is covered by the effective domestic norms.<sup>294</sup> Finally, in two countries quotation, criticism, review is covered by the effective domestic copyright law, and caricature, parody, and pastiche is covered indirectly, through case law.<sup>295</sup>

- **Question 9.1.** *If yes, please briefly describe how they were implemented.*

All reporters duly described how the domestic legislation implemented the respective E&Ls.

- **Question 9.2.** *If yes, can these E&LS effectively cover end users’ uploading activities in your country?*

Countries show a diverse picture in this regard. The majority (six) of the reporters responded that E&Ls can theoretically cover end-users’ uploading activities.<sup>296</sup> The German report noted that the relevant E&L for quotation, criticism, review theoretically applies to end users’ activities, but concerns exist regarding the applicability of rules related to parody. (As indicated earlier, the CDSM implementation will clarify these concerns by introducing a new statutory permission for parody uses.) The Swedish reporter noted that due to moral rights concerns, the applicability of E&Ls in this field is not straightforward. In Italy, the answer to the question was negative, but the reporters noted that “this [answer] is based on a rather scant case law”. The remaining four reporters answered to the negative.

- **Question 9.3.** *If yes, could you please cite the leading case law on the application of these E&Ls in an online environment?*

The half (five) of the national reporters indicated the existence of case law of case law on E&Ls in an online environment.<sup>297</sup>

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<sup>288</sup> E.g. reproduction and/or communication/making available to the public. Please note that the questionnaire intends to focus solely on the period that follows the implementation of the InfoSoc-Directive.

<sup>289</sup> IRL; ITA; SWE (although the reporter noted that preparatory uploads might be treated to meet the temporary acts of reproduction exception); GER (where the reporter also noted that reproduction is a “subordinate preparatory act in preparation for making the work available to the public”); EST.

<sup>290</sup> POR; DEN.

<sup>291</sup> These rules will be introduced and compared in the (final) interim report.

<sup>292</sup> The case law will be introduced in greater details in the (final) interim report.

<sup>293</sup> NED; FRA (where the reporter highlighted that the wording of the French IP Code and the InfoSoc Directive is not identical in this regard); IRL (where the reported noted that parody is covered only since 2019); ITA; GER [where the reported noted that parody is currently covered only via UrhG §24(1); the pending CDSM implementation will change the normative basis of parody, according to which §24 will be repealed and a new statutory permission will be introduced for parody]; EST.

<sup>294</sup> POR [where the reporter noted that “original” parodies are granted copyright protection on their own; these rules are, however, distinct from Article 5(3)(k) of the InfoSoc Directive and the ECJ preliminary judgment in *Deckmyn*]; HUN.

<sup>295</sup> SWE (where the reporter noted that the relevant case law was published post-*Deckmyn*); DEN.

<sup>296</sup> NED; FRA; IRL; POR; EST; HUN.

<sup>297</sup> NED (“*Mercis and Bruna v. Punt*”); FRA (where the reporter noted that no distinction exists between online and offline uses; “Decision of 19 December 2014”); SWE; GER (where the reported noted that the case law is nevertheless not connected to UGC); ITA (although the national reporters called this case law “scant”). The case law will be introduced in greater details in the (final) interim report.



- **Question 10.** *In your country, are L&Es treated as:*
- **Question 10.1.** *Defences against infringement claims? If yes, please explain.*

The majority (eight) of the reporters answered affirmatively,<sup>298</sup> and only two answered negatively.<sup>299</sup>

- **Question 10.2.** *Subjective or affirmative rights to use protected content? If yes, please explain.*

Countries show a diverse picture in this regard. In three countries, E&Ls work as subjective rights,<sup>300</sup> and in Estonia they work as affirmative rights. Two reporters responded that E&Ls might theoretically work as subjective or affirmative rights, but this is not confirmed by case law yet.<sup>301</sup> Finally, four more reports answered negative to this question.<sup>302</sup>

- **Question 10.3.** *Other? Please explain.*

The *Danish* reporter has elaborated an answer for this question. According to the Danish report, answering question 10 turned out to be difficult, as there is no distinction between ‘defences’ and ‘affirmative rights’ in Danish law. Some rules are declaratory, i.e., can be deviated from by contract, others are mandatory in character (e.g., exhaustion). Apart from exhaustion, it is disputed which E&Ls are mandatory and which are declaratory.

- **Question 11.** *Is there any generally applicable C&R mechanism for the benefit of users of hosting service providers to ensure the exercise of L&Es in general, or for the specific L&Es of quotation, criticism, review, and caricature, parody, pastiche?*

The majority (seven) of the reporters answered negative to this question.<sup>303</sup> In two countries, such C&R mechanism applies.<sup>304</sup> In *Germany*, a C&R mechanism applies indirectly.

- **Question 11.1.** *If yes, does such mechanism exist as a result of (i) statute or case law or (ii) private practices of hosting service providers?*

In Portugal and Hungary, the C&R mechanism exists as a result of statute law; and in Germany it indirectly exists as a combination of interpretation of contracts in light of fundamental rights (“*mittelbare Grundrechtsbindung*”) and private practices, e.g., Content ID.

- **Question 11.2.** *If yes, can you describe this mechanism?<sup>305</sup>*

The three national reporters mentioned above duly summarized the functioning of these C&R mechanisms.<sup>306</sup>

#### 4.2.4 Preparation for the implementation of Article 17 CDSM Directive

This sub-section refers to the question contained in Chapter IV of the questionnaire, focused on Member States’ efforts in implementing art. 17 CDSM Directive.

- **Question 12.** *Did your country take any steps to implement art. 17 CDSM Directive by the submission date of your national report?*

The majority (nine) of the reporters answered to this question affirmatively. In *the Netherlands* and *France*, art. 17 has already been transposed. In *Germany* and *Hungary*, several public consultations took place, and the official drafts were already published. (In Hungary, the official bill was submitted to the Parliament on March 31, 2021, a few weeks after the Hungarian report was officially closed.) In *Denmark*, the Danish Ministry of Culture introduced its implementation proposal in the Danish Parliament on 26 March 2021. In *Ireland* and *Sweden*, public consultations took place, but no official drafts were published yet. In *Italy*, the Delegation Law is under preparation yet, and only scarce texts are available. In *Portugal*, public consultations took place, but no news are

<sup>298</sup> NED; FRA; IRL (“fair dealing defence”); ITA; POR; GER (“The encroachment on copyright would not be unlawful if the defendant could successfully invoke the barrier provision of § 52 b p. 1 and 2 UrhG”); SWE (where the reporter noted that the “majority of L&Es” apply as defences); HUN.

<sup>299</sup> EST.

<sup>300</sup> ITA; SWE; GER.

<sup>301</sup> IRL; HUN.

<sup>302</sup> NED; FRA; POR.

<sup>303</sup> NED; FRA (where the national reporter noted that some discussion of HADOPI’s role regarding technical protection measures does exist); IRL (where the national reporter noted that “no policy mandated mechanism exists”); ITA; SWE; EST; DEN.

<sup>304</sup> POR (“interim dispute resolution”); HUN (notice-and-take-down system under E-Commerce Law). These rules will be introduced and compared in the (final) interim report.

<sup>305</sup> E.g. counter-notice; human oversight; flagging; time limits for responses etc.

<sup>306</sup> These rules will be introduced and compared in the (final) interim report.





available regarding the text of the implementation bill. Although no official implementation draft is available in Estonia yet, the government of Estonia opposes art. 17 of the CDSM Directive on the basis that "it will affect the freedom of the internet and innovation and it suffers from shortcomings in balancing the rights of owners of copyright materials, people and enterprises."

- **Question 12.1.** *If yes, could you please provide a full text of the draft/accepted document containing the draft implementation text of art. 17?*

National reporters from the countries where any documents are officially published on the implementation of Art. 17 of the CDSM Directive duly provided the text of the domestic rules in English and/or in their native language.

- **Question 12.2.** *If yes, could you briefly describe how such a proposal diverges from the text of the Directive regarding: (a) The authorization by and liability of service providers; (b) E&Ls to the benefit of end-users; (c) Compliance and overlap of new domestic copyright and existing e-commerce rules?*

National reporters from the countries where any documents are officially published on the implementation of art. 17 of the CDSM Directive duly introduced the basic features of the domestic rules.<sup>307</sup>

### 4.3 Summary and conclusion

The first phase questionnaire collected and analysed data on four distinct groups of issues to acquire comparable knowledge on the pre-implementation status quo of ten selected Member States' copyright regime.

**Part I** was dedicated to *hosting service providers as users of copyright-protected content*. Here, our first key finding is that the majority of the Member States has already conceptualized service providers that store and give the public access to a large amount of protected content uploaded by their users via the domestic e-commerce laws; but the direct or primary liability of such service providers was far from uniform in the Member States. E-Commerce, criminal and civil law concepts are alternatively or complementarily applied in these countries; and several national reporters noted the lack of such liability at all. At the same time, the majority of countries noted that besides direct licensing, there is no other meaningful method, mechanism or model of authorization in place to cover the upload of protected contents by end-users to the service providers' servers. As such, the new (art. 17-based) regime of the CDSM Directive will lead to brand new mechanisms in the Member States that service providers shall comply with.

**Part II** of the first phase questionnaire collected information on *hosting service providers as intermediaries for access to copyright-protected content*. The vast majority of respondents confirmed that injunctions against service providers are duly applicable to tackle the upload of copyright-infringing contents by third-party users of the service.

The Member States show a sensible difference (7 v. 3) with respect to the question of indirect or secondary liability of service providers for (passive) hosting of contents uploaded by third-party users of the service. Similarly, seven respondents out of ten affirmed the existence of content moderation regimes. Among them, however, the picture is diverse in the sense that the existing regime is purely statutory in four countries; a mixture of statutory and case law in one country; mainly self-regulatory in another country; and the duty of care dominates a final country. Conversely, seven out of ten countries have *no complaint-and-redress (C&R) mechanism in place yet*. These, in essence, mean that the majority of Member States have already gathered some form of experience with content moderation; however, the majority of countries lack such knowledge with respect to C&R mechanisms – both of which are conceptual elements of the system set up in art. 17 CDSM Directive (see Chapter 3).

Seven countries do also have existing safe harbour provisions for the benefit of search engines and/or linking service providers (with only three countries having both safe harbour concepts).

**Part III** focused on *end-users*. The national respondents unanimously confirmed that end-users are directly liable under copyright law for uploading copyright-protected content to the services of online platforms without authorisation. The exact right(s) that end-users might infringe in such a case do(es), however, significantly differ in the Member States. The most relevant are the right of reproduction, communication or making available to the public; with notable terminological and conceptual differences in France ("representation") and the Netherlands ("openbaarmaking").

Countries show a diverse picture in regard the implementation of quotation, criticism, review & caricature, parody, and pastiche as set forth in arts. 5(3)(d) and 5(3)(k) InfoSoc Directive. Countries unanimously implemented quotation, criticism, and review. Caricature, parody, and pastiche has been implemented

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<sup>307</sup> These rules will be introduced and compared in the (final) interim report.



statutorily in six countries; is applied indirectly, through case law, in two countries; and two other countries missed to implement these E&Ls so far. Against this background, art. 17(7) CDSM Directive seems to necessitate regulatory changes in a number of countries.

Responses were, however, more diverse with respect to the question, whether the said E&Ls can be effectively applied with respect to end-users' uploading activities. The majority (six out of ten) of responses were affirmative; but respondents generally expressed that due to the lack of case law, such conclusion is mainly based on the theoretical interpretation of law. Eight reporters declared that E&Ls represent "defences" against infringement claims.

A much more diverse picture is visible with respect to the question whether E&Ls represent "subjective" or "affirmative" rights. In three countries, E&Ls work as subjective rights; and in Estonia they work as affirmative rights. Two other reporters responded that E&Ls might theoretically work as subjective or affirmative rights, but this is not confirmed by case law yet. Four reporters denied that E&Ls are subjective or affirmative rights. This seems to suggest that the "user right approach" of the CDSM Directive – via mandatory non-overrideable E&Ls in art. 17(7) – might result a conceptual change in a sensible number of Member States. Seven out of ten respondents reported that no C&R mechanism exists for the benefit of users of hosting service providers to ensure the exercise of E&Ls in general, or for the specific cases of quotation, criticism, review, and caricature, parody, pastiche. This means that a sensible number of Member States shall introduce the novel regime of the CDSM Directive.

Finally, Part IV collected and summarized the state-of-the art of the *implementation of art. 17 CDSM Directive*. Accordingly, nine reporters could provide meaningful information on the key steps of the implementation procedure (with the single exception of Estonia). By the time that the national respondents concluded their original or amended national reports, only the Netherlands and France have transposed art. 17, with meaningful parliamentary work in Germany and Hungary. In the rest of the countries, either ministerial drafts are known, or public consultations are completed.



## 5. Longitudinal Mapping of Online Platforms' Structures of Copyright Content Moderation

This chapter carries out a longitudinal mapping of online platforms structures of copyright content moderation. In so doing, it aims to answer the following sub-research questions.

- Sub-research question (4): How are copyright content moderation rules organized by platforms?
- Sub-research question (5): What kinds of copyright content moderation rules do platforms employ?
- Sub-research question (6): Which copyright content moderation rules do platforms employ?

The chapter proceeds as follows. Section 5.1 first conceptualizes copyright content moderation as composed of different structural component that can be studied separately, explain our present focus on rules, and contextualises sub-research questions 4, 5 and 6. Sections 5.2.1 to 5.2.3 seek to answer each of these questions, resorting to descriptive statistics and the identification of patterns in how rules appeared and disappeared over time. These sections begin with an overview of our findings regarding all platforms; then, they zoom in on the findings about Facebook and Diaspora, which are treated here as case studies. The final section draws on the empirical findings detailed in the previous sections to advance some tentative conclusions.

### 5.1 The structures of copyright content moderation

In this chapter, we take a sociological understanding of platforms' copyright content moderation regime and define it as a more or less stable ensemble of *structural components*. Resorting to the idea of "structure" poses conceptual hurdles, since the term is overly used but rarely defined. The perhaps clearest theoretical articulation of structures is Sewell's (1994). By reviewing and critiquing the work of key social theorists, Sewell advances his own definition of structures as composed of schemas and resources, which both delimits and informs our work. On the one hand, he argues, structures are symbolic and virtual "schemas", not only the "binary oppositions that make up a given society's fundamental tools of thought, but also the various conventions, recipes, scenarios, principles of action, and habits of speech and gesture built up with these fundamental tools" (Sewell, 1994: 8). Translating this conceptualization to platforms' regulation of copyright might mean paying attention to the vast and likely contradictory bundle of abstract normative assumptions that platforms' controllers and users hold of what copyright is, what and whom it serves, how it should be protected, when it can and should be – to put another way, how copyright is *imagined* by the actors that subject and object of such regulation. These symbolic schemas might be said to be behind much of platforms and users' everyday actions and decisions, and play thus a crucial role in the enactment of the said copyright regulation regime.

There is much to be said about these schemas. In this report, though, we shall discuss a different aspect of platforms' copyright content moderation structure. As Sewell proposes, structures are made not only of virtual schemas but also of actual *resources*. These, he posits, may be both nonhuman ("objects, animate and inanimate, naturally occurring or manufactured") and human ("physical strength, dexterity, knowledge"), and are used to "enhance or maintain power" and are "unevenly distributed" (Sewell, 1994: 9-10). In the context of copyright regulation, resources encompass (a) human actions and knowledge needed to enforce copyright (b) and the unhuman objects on which those actions and knowledge are based on. Importantly, in saying that resources are medium of unequal kinds of power relations, Sewell does not assume that these relations are unidirectional and necessarily lead to a crude form of "domination" of some groups and individuals over others – resistance and negotiation are actually constitutive elements of these resources.

In the section below, we discuss elements of the latter sort of resource, and in particular one kind of nonhuman object: the formal, "publicly fixed codifications of rules" (Sewell, 1994: 8) in which platforms explain how they regulate copyright content moderation and, to some extent, through which such regulation is realised. For the sake of clarity, we name them *platforms' copyright content moderation rules*, which are unequally designed by platforms to sustain their power to define how users express themselves.

Platforms' policies containing these rules have been extensively studied before. Our approach advances this literature in three ways. Firstly, while most of previous works tended to focus on a particular kind of policy, namely the Terms of Service, our approach was open-ended. Based on the fact that platforms policies might take various forms, we tried to collect all policy-like documents created by platforms that could be understood as regulating copyright content moderation in their services. This decision increased the complexity of our work considerably – but also led us to realise that the way policies are organised is an important and rarely considered aspect of the said regulation.

Secondly, we assume that the study of platforms' copyright policies should have a strong *comparative* element. That is, instead of looking into one or another platform, we wanted to study the copyright policy of various kinds of platforms. This comparative element addresses the possibility that the different functionalities, designs, nationalities and goals of different platforms are likely linked with a diverse range of copyright policies. As a



consequence, an initial and key methodological decision involved defining which platforms we would like to study.

Finally, there was much to be gained from the study of how the copyright content moderation rules of various platforms evolved over time. As with our decision to look beyond the Terms of Service, this *longitudinal* approach created various methodological difficulties for our data collection but also greatly expanded the analytical potential of the project. Such expanded scope seemed critical because platforms are incessantly changing how they function. We wanted to be able to examine whether and how platforms' copyright policies changed so as to interrogate the origins of these shifts and be able to consider the consequences of these policies for access to culture.

These premises can be synthesised into the following research questions:

**How are copyright content moderation rules organized by platforms?** In not making assumptions about the location of copyright rules, we quickly realised that there are various ways in which these rules could be organised into policy-like documents. Most platforms say that the collection of these documents make up a legal binding contract between them and users – and not only policies that have long been understood as contractual policies. This organizational element (explained by our macro themes) also matters if we are to consider users' ability to access and know platforms' copyright content moderation rules.

**What kinds of copyright content rules do platforms employ?** Considerations about organization aside, we also found out that there was no single *kind* of copyright rule. This was not an aspect that we anticipated at the time of the design of this study; rather, it emerged out of our data analysis. By iteratively reading the documents and drafting the rules that could summarise the normative statements contained in them, it became clear that these statements differ, broadly, in at least two regards: their (1) normative types and (2) directness. These were our intermediary themes. Section 5.2.2 suggests that investigating these kinds of rules allows us to mainly (a) identify macro shifts in imbalances that characterize platforms' copyright regime and (b) consider whether and how platforms' attention to copyright changed over time.

**Which copyright content moderation rules do platforms employ to regulate copyright?** While the second question starts to address the normative nature of platforms' rules, it is by answering this third sub-research question that the Chapter explores the actual content of these rules, which make up our lower-level analytical themes. As Section 5.2.3 indicates, doing so allows us to identify and examine distinct periods of platforms' regime of copyright content moderation.

## 5.2 Preliminary findings

The preliminary findings the following sections present refer to a subset of the collected and analysed data. Firstly, most of the below sections are dedicated to *particular documents* of only *two platforms* – Facebook and Diaspora, respectively. The systematic comparison of these two platforms, treated here as case studies, can cast light on patterns and characteristics that appear to be, at this point of the investigation, largely representative of mainstream and alternative types of platforms. The analysis of documents regarding the third group of platforms (specialised platforms), and of public communications and Help pages are underway and are not commented on here.

Moreover, this report looks mostly into (a) the presence / absence of certain rules and kinds of rules, with a view to mapping out their continuation and interruptions, and (b) how many times these rules were mentioned, over time and in regards to either Facebook or Diaspora. Other interpretative angles, e.g., how many words each rule or kind of rule takes up in the documents we analysed, are not discussed, although they can be taken in the future. Textual comparisons were carried out, too. Finally, these are merely preliminary findings. As such, they are subject to future change, refinement and corrections.

### 5.2.1 How are copyright content moderation rules organized by platforms?

Our analysis found eight kinds of policy-like documents related to copyright content moderation (see Table 5 below). While all platforms of our sample have published Terms of Service (sometimes called Terms of Use) and all but two have some sort of Community Guidelines, the other sorts of documents are unevenly distributed. Consider for instance the near ubiquity among mainstream platforms of two key policies for copyright (Copyright Policies and Copyright Help Pages), which barely exist in our dataset in relation to alternative platforms. A similar disparity exists in relation to pieces of public communication. At the same time, alternative platforms which use blockchain systems to store and manage content resort to quasi-academic whitepapers to explain its rules – including how copyright is enforced. These differences will become clearer when we consider our case studies.



Table 5. Number of versions collected of eight kinds of police-like documents, for both mainstream and alternative platforms; GitHub's collection remains incomplete. Source: Authors.

		Terms of Service	Community Guidelines	Copyright Policy	Help pages (copyright)	Principles	Music Guidelines	Whitepaper	Public communications	Total
Mainstream platforms	Facebook	27	47	19	22	3	1	0	329	448
	YouTube	12	27	0	185	0	0	0	89	313
	Twitter	16	67	5	0	0	0	0	89	177
	Instagram	3	15	0	8	0	0	0	60	86
	SoundCloud	7	3	6	2		0	0	26	44
Alternative platforms	Mastodon	1	1	0	0	0	0	0	11	13
	PixelFed	2	1	0	0	0	0	0	0	3
	Diaspora	1	2	0	0	0	0	0	1	4
	Dtube	1	0	0	0	0	0	1	0	2
	Audius	2	0	1	0	0	0	1	0	4
Niche platforms	Vimeo	27	9	6	9	0	0	0	6	57
	FanFiction	3	2	1	0	0	0	0	0	6
	GitHub*	19	1	0	1	0	0	0	0	21
	Dribbble	9	7	2	0	0	0	0	2	20
	PornHub	6	1	10	0	0	0	0	0	17
<b>Total</b>		136	183	50	227	3	1	2	613	<b>1215</b>

The sorts of documents we collected have different histories and enjoy different statuses and visibilities. It is reasonable to suppose, thus, that a provision buried in a Help page, which is usually written in an informal manner, might not be understood by users as authoritative as a provision published in a much more traditional document such as the Terms of Service. At the same time, it might be that the Help page provision might at least be seen while the second one most likely will never be read by most users. Furthermore, the very fact that copyright rules are scattered through several documents, located in multiple URLs, might be understood as a hurdle to the transparent communication of copyright content moderation rules. These considerations can be eventually tested empirically – i.e., through a study of the assumptions held by users about these documents and how they access them.

#### a) Case studies

There is a clear difference between how Facebook and Diaspora organize their copyright-related rules. As Table 6 below demonstrates, we found one hundred times as many documents from Facebook (448) than from Diaspora (4). In the case of Facebook, this number is clearly inflated by public communication pieces (blogs, press releases). However, even if we discard these, the difference remains quite substantive (119 vs. 4).

It is not only the number of versions of policies that matters when looking at the organization of rules by platforms – the diversity of kinds of documents should also be taken into consideration. Again, the differences between Facebook and Diaspora are stark. The former has published, since its creation, six kinds of policies that might be said to bear upon copyright. In addition to Terms of Service, Community Guidelines, Copyright Policy and a Help Page dedicated exclusive to copyright, they also created two unique kinds of policies. One, Facebook Principles, aims to explain the platform's purported beliefs. Most of the platforms examined by us also have some form of principles but only Facebook, in our sample, decided to have a separate document to explain these principles. The other kind of policy is termed by Facebook as Music Guidelines. As its title suggests, it explains the rules that users should follow when posting music – again, a sort of policy that no other platform among those we studied appears to have. Diaspora's copyright-related rules, on the other hand, are concentrated in two sorts of policy: Terms of Service and Community Guidelines (the latter appears as a general Help page).

Table 6. Presence and absence of different kinds of policy-like documents over time, for Facebook and Diaspora. Source: Authors.



	Facebook	Facebook Terms of Service	Facebook Community Guidelines	Facebook Copyright Policy	Facebook Principles	Facebook Copyright Help	Facebook Music Guidelines	Diaspora	Diaspora Terms of Service	Diaspora Community Guidelines
2004.1		Yes	No	No	No	No	No		No	No
2004.2		Yes	No	No	No	No	No		No	No
2005.1		Yes	No	No	No	No	No		No	No
2005.2		Yes	No	No	No	No	No		No	No
2006.1		Yes	No	No	No	No	No		No	No
2006.2		Yes	No	No	No	No	No		No	No
2007.1		Yes	Yes	No	No	No	No		No	No
2007.2		Yes	Yes	Yes	No	No	No		No	No
2008.1		Yes	Yes	Yes	No	No	No		No	No
2008.2		Yes	Yes	Yes	No	No	No		No	No
2009.1		Yes	Yes	Yes	Yes	No	No		No	No
2009.2		Yes	Yes	Yes	Yes	No	No		No	No
2010.1		Yes	Yes	Yes	Yes	No	No		No	No
2010.2		Yes	Yes	Yes	Yes	No	No		No	No
2011.1		Yes	Yes	Yes	Yes	No	No		No	No
2011.2		Yes	Yes	Yes	Yes	No	No		No	No
2012.1		Yes	Yes	Yes	Yes	No	No		No	No
2012.2		Yes	Yes	Yes	Yes	Yes	No		No	No
2013.1		Yes	Yes	Yes	Yes	Yes	No		Yes	No
2013.2		Yes	Yes	Yes	Yes	Yes	No		Yes	No
2014.1		Yes	Yes	Yes	Yes	Yes	No		Yes	No
2014.2		Yes	Yes	Yes	Yes	Yes	No		Yes	No
2015.1		Yes	Yes	Yes	Yes	Yes	No		Yes	No
2015.2		Yes	Yes	Yes	Yes	Yes	No		Yes	No
2016.1		Yes	Yes	Yes	Yes	Yes	No		Yes	No
2016.2		Yes	Yes	Yes	Yes	Yes	No		Yes	No
2017.1		Yes	Yes	Yes	Yes	Yes	No		Yes	Yes
2017.2		Yes	Yes	Yes	Yes	Yes	No		Yes	Yes
2018.1		Yes	Yes	Yes	Yes	Yes	Yes		Yes	Yes
2018.2		Yes	Yes	Yes	Yes	Yes	Yes		Yes	Yes
2019.1		Yes	Yes	Yes	Yes	Yes	Yes		Yes	Yes
2019.2		Yes	Yes	Yes	Yes	Yes	Yes		Yes	Yes
2020.1		Yes	Yes	Yes	Yes	Yes	Yes		Yes	Yes
2020.2		Yes	Yes	Yes	Yes	Yes	Yes		Yes	Yes

Lastly, we can consider the same data but from a different perspective – time. As Table 6 above shows, Facebook and Diaspora appear to have created their policies gradually, beginning with their terms of service, which for some years was the sole policy of both platforms. Facebook kept publishing new copyrighted-related policies up to 2018 (Music Guidelines); interestingly, there is a gap of around 5 years in our records between the two policies that are exclusively about copyright: Copyright Policy and Copyright Help Page.

Diaspora’s documents suggest that, at least for some years, the platform had no policy at all, since it was founded in 2011 and the first record of its Terms of Service was published in the second semester of 2013. (There is of course the possibility that our collection is incomplete). The next section further discusses how these different policies differ in terms of the kinds of rules they contain.

### 5.2.2 What kind of copyright content moderation rules do platforms employ to regulate copyright?

If the last section looked into purely organizational aspects of the rules that regulate copyright content moderation, we can now start to examine the content of these rules. Before considering which rules these are after all (the topic of Section 5.2.3), we will first explore the *kinds* of copyright-related rules used by those platforms. Let us first explain what we mean by *normative type* and *directness* and how they can be useful for our analysis.

#### Normative types

The rules we studied aim to engage users and platforms in varying sorts of interaction, with particular levels of prescriptive intensity. We call these categories *normative types*.

We have found five of them, which we used as intermediary themes to organize the lower-level themes we found in our data (see Table 7 below). Although we acknowledge the rich theories on many of these types, we chose to adopt a vernacular conceptualization of them. Thus, *rights* are rules that say what either users or platforms *can* but will not necessarily do; they denote a potentiality. *Obligations* are rules that either users or platforms *must* comply with; in the case of users, obligations involve the risk of punishment; in the case of platforms, obligations expose them to legitimate accountability. Obligations can be positive (when they say that users/platforms *must do* something) or negative (when they say that users/platforms *must not do* something, a prohibition). While these two sorts of normative type apply to both platforms and users, others are presented as addressing only one kind of actor. *Expectations* refer to actions that, from the perspective of the platform, users *should* but are not obliged to perform. These expectations might appear in terms that can be stronger (as if they were obligations) or weaker (as if they were friendly tips) – but none of them can be enforced by the platform. On the other hand, *principles* concern platforms’ (not users’) goals – what companies allegedly *aspire*



to do and be. This kind of rule is often uttered in the form of vague corporate mission statements, making it easier in principle for companies to deflect accountability for not complying with them. Principles have thus a low prescriptive intensity. Lastly, we found a sort of type that is rarely described in normative terms – what we call *procedures*. Ostensibly, this type regards what happens and will happens in the relationship between platforms and users, as if they were describing unavoidable facts. Yet, in a second look, what is depicted in neutral terms also stems from a choice by platforms and can, therefore, be considered to have a normative nature: they are premised and foster some notion of un/desirability. In fact, they are arguably the most intense normative type of the five we discussed so far, as they do not allow, discursively at least, the possibility of disobedience. Procedures might address users, platforms or both.

Table 7. Rules' normative types, their addressees, prescriptive intensities and verbs that best describe them. Source: Authors.

	Rule addressee(s)	Prescriptive intensity	Typical verb
Obligations	Platform or users	High	Must
Rights	Platform or users	High	Can
Expectations	Users	Low	Should
Principles	Platform	Low	Aspire
Procedures	Platform, users or both	Highest	None

Surely, these five normative types, by themselves, are too generic to illuminate how exactly platforms regulate copyright content moderation. Yet, since they enable and constrain users and platforms in certain ways and with particular intensities, these categories can be used as broad analytical frames to discuss the uneven regulation of those two actors over time. Our main assumption is that the balance between who and how is regulated is, by itself, meaningful. This will become clearer below, when we explore the balance between obligations, rights, expectations, principles and procedures in the copyright content moderation rules of Facebook and Diaspora.

## Directness

A simpler way of categorising the rules we studied involves its directness, that is, whether the rule directly regulates copyright (*direct* rules) or if regulates copyright as an *indirect* rule. The former is characterized by an explicit discursive link with copyright-related topics; they mention terms such as “copyright”, “intellectual property”, and “license”. The latter consists of vaguer provisions that aim to regulate a much wider range of actions, which may or may not be related to copyrights. Policies usually have several general rules. During our analysis, we made sure to only include general rules that could potentially be used by platforms to justify and support content moderation protocols and decisions – and be understood by users as such.

As with normative types, directness is only one element if we are to understand platforms' copyright regimes. It is quite helpful however if we are to develop a more sophisticated grasp of the array of tools used by platforms to ensure that copyright is respected and enforced in particular ways. For instance, a rule on how users should generally respect others' “rights” might not mention “copyright” but it might be interpreted as encompassing copyrights. Put another way, including indirect rules in our analysis expanded considerably what counts as a “copyright rule”. Saying so does not imply that direct and indirect rules must be understood as having the same valence, though. The latter is a much weaker way of regulating copyright. We assume, thus, that the relative distribution of direct and indirect rules is suggestive of how much emphasis platforms have put on copyright regulation over time.

Table 8. Kinds of copyright rules, according to the directness. Source: Authors

	Indirect rules	Direct rules
Language	Do not mention copyright or related terms	Mention copyright and related terms
Scope	Regulate several types of behaviours	Regulate only copyright-related behaviours



Having explained the general contours of these two analytical categories, and their usefulness for our work, we can now explore how they can answer sub-research question 5 in the case of Facebook and Diaspora. We first discuss how the number of kinds of rules, and their mentions, changed over time in these two case studies, using their proportional and nominal evolution. The differences between these platforms are also examined. It worth noting that this section does *not* look into which rules changed – the topic of Section 5.2.3.

### 1) Number of Facebook’s copyright content moderation rules, per their normative type

Consider first the evolution of the numbers of Facebook’s content moderation rules, clustered according to their respective normative type.

It is possible to observe a considerable increase in the overall number of content moderation rules, which went from nine in 2004 to 24 in 2020 (Figure 5). This evolution was however uneven. The number first increased steadily until 2007 then fell for consecutive years up to 2010 and suddenly peaked in 2012 (28 rules), only to fall again (2012-2014) and finally grow and stabilize at the current level. Another fairly clear element is the sheer pace of changes. Figures 5 and 6 are full of sudden increases and abrupt declines in the number and prevalence of various types of rules. These intense shifts can be seen in Figure 5, which presents nominal numbers, but are clearer in Figure 6, which shows the same trajectory but in proportional terms.

When we break down these numbers by normative types, some clearly distinguished movements in this trajectory surfaces. In 2004, Facebook focussed disproportionately on users’ obligations and platforms’ rights, which, together, represented almost 90% of the existing rules (Figure 6); we did not find a single provision that could be understood as a platform obligation and only a tenth of the rules were users’ rights. In other words, the platform’s initial normative regime of copyright content moderation was marked by a remarkable inequality between users, subjected to several obligations but with just a few rights, and the platform, who enjoyed a broad freedom to act, without any explicit limitation.

However, this uneven state of affairs is sharply rebalanced during Facebook’s first years. By the end of the 2009, the platform’s obligations already comprised almost 38% of the platform’s rules; both users’ obligations and the rights of the platform plummeted to around less than 20%, each. Such movement peaked in 2012, when platforms obligations comprised almost half of all copyright content moderation rules. This period also sees more rights of users and the emergence of platforms’ principles (evidencing perhaps the rapid corporatization of what initially was an amateur website). These proportional movements appear to be caused more by the sheer increase in number of Facebook’s obligations (which rose from zero to a 11 in 2012) than by the decrease in the number of other types of rules. In the next six years, a new realignment occurred, with an increased focus on the rules about Facebook’s rights and less emphasis on obligations – of both the platform and users.

Finally, from 2018 to 2020, changes in the proportions of rules produced a copyright content moderation regime that is fairly balanced between, mainly, obligations of the platform and of users, the platform’s rights and principle, and procedures. Users’ rights, on the other hand, which never occupied a prominent position, stopped being mentioned at all in the analysed documents in 2018.

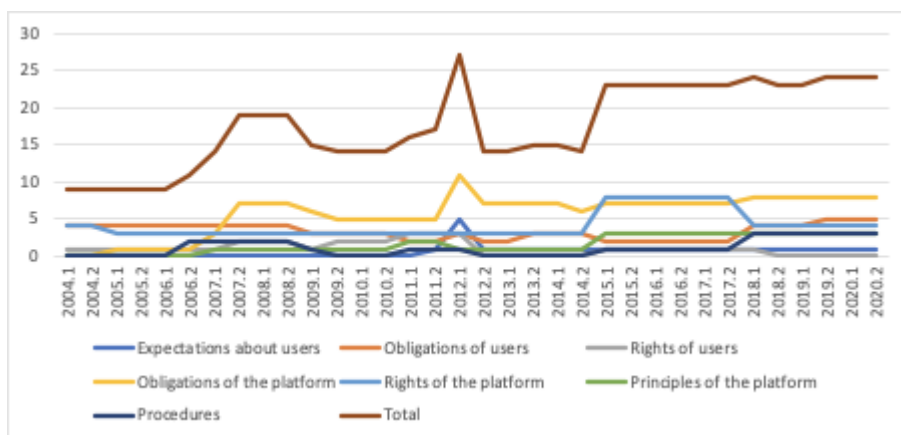


Figure 7. Evolution of the number of Facebook’s copyright content moderation rules, grouped according to their normative type.





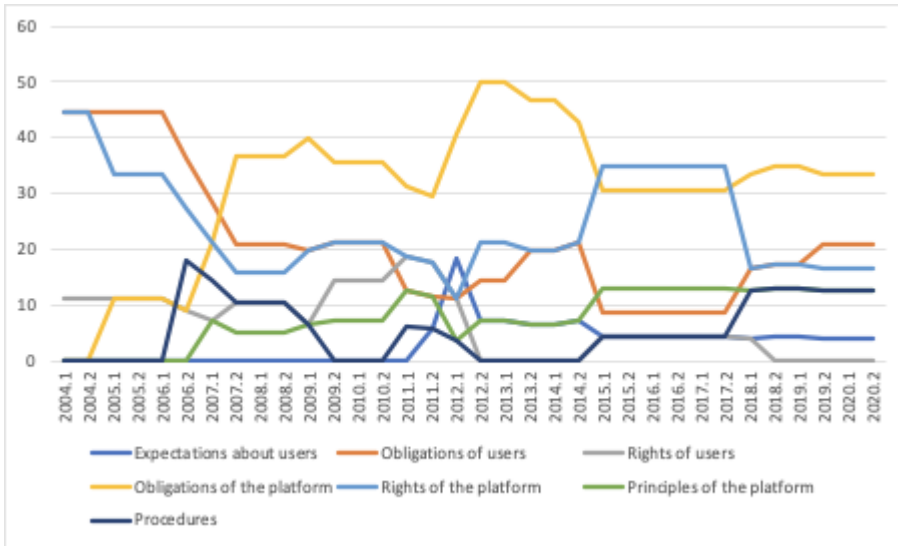


Figure 8. Evolution in the relative proportions of numbers of Facebook’s copyright content moderation rules, grouped according to their normative type.

2) Number of Diaspora’s copyright content moderation rules, per their normative type

Diaspora, as it will become clear below, presents a much simpler case. Consider first how its number of copyright content moderation rules, according to their normative kinds, evolved. The arguably most glaring aspect of Figures 7 and 8 is how stable Diaspora’s rules have been since 2013, the year of the first policy-like document we could find. The only shifts occurred in 2017, when there was an increase in the number of obligations of the platform and the appearance of two principles of the platform.

Logically, thus, the overall number of rules did not change substantially from 2013 to 2020, going from 10 to 13. Another evidence of how simpler Diaspora’s rules are is the number of normative types that they are associated with – 4 out of possible 7. We could not find any statement on copyright content moderation in Diaspora’s policies that could be considered to be an example of users’ rights, expectations about user and procedures.

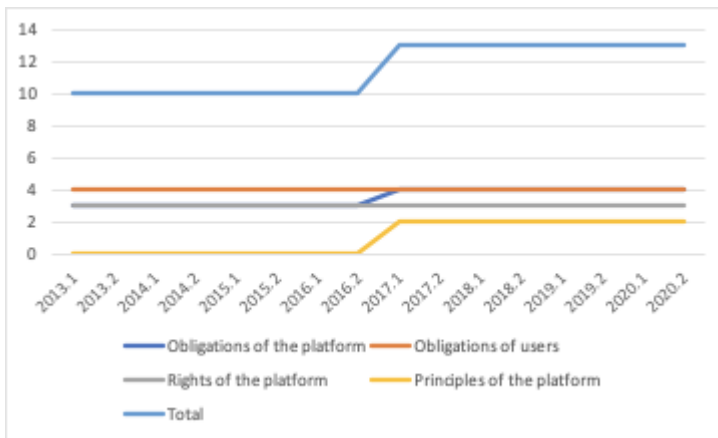


Figure 9. Evolution of the number of Diaspora’s copyright content moderation rules, grouped according to their normative type.

Figure 8 shows how the relative proportion of these rules changed over time. Differently from Facebook, most Diaspora’s initial rules addressed the platform itself: the platform’s obligations and rights amounted to 60% of the rules, with user’s obligations representing the rest of the rules. So, Diaspora’s initial normative regime was hardly unequal as Facebook’s. This fairer balance became even more pronounced with the said shifts in 2017. Since then, users’ and platform’s obligations share the exact same proportion of rules, with a smaller number of them regarding the rights and principles of the platform. This evolution suggests that, as with Facebook, Diaspora’s rules did become more concerned with the role of the platform itself in regards to copyright content moderation. Yet, this shift did not represent a drastic change.



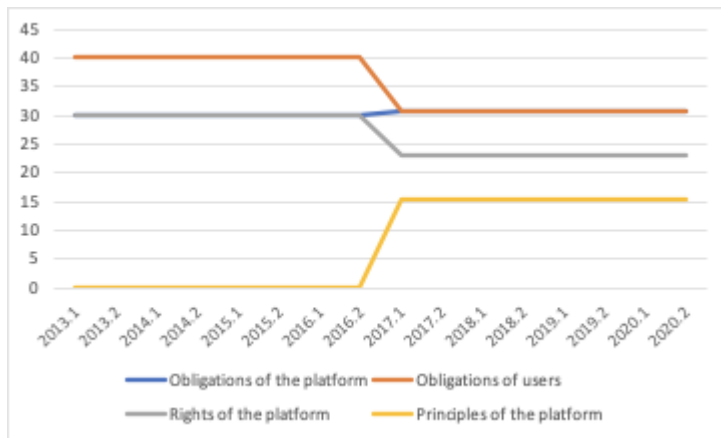


Figure 10. Evolution in the relative proportions of numbers of Diaspora's copyright content moderation rules, to their normative type.

### 3) Number of *mentions* to Facebook's copyright content moderation rules, per their normative type

So far, we have considered the evolution of normative types by the number of rules, in nominal and proportional terms. Yet, a somewhat different picture emerges once we look at the number of times these rules are *mentioned* in analysed documents.

Initially, we should note that mentions to Facebook's copyright content moderation rules more than doubled since 2004, going from 19 to 46 (Figure 10). As with the number of rules, this growth was irregular. It quickly peaked at 57 in 2007, was halved in the next couple of years, experienced sharp changes between 2011 and 2014 and then soared more gradually in the past five years to its 2020 level. In addition, we can note – again – a considerable (if relative) instability, throughout Facebook's history, in the nominal and proportional mentions to the platform's copyright content moderation. Generally, though, two groups of types of rules remained more or less dominant over time. Obligations of users and the platform, and the right of the platform, almost always topped Figures 10; on the other hand, procedures, principles, expectations and users' rights occupy the bottom part of these charts.

Let us turn now to the proportional predominance of mentions to certain normative types (Figure 9). In 2004, the number of mentions to copyright content moderation rules suggested an even sharper inequality between users and platforms than that observed above in regard to the number of rules. At the time, around 95% of all mentions regarded either users' obligations or the platform's rights; the rest concerned users' rights. This striking imbalance was attenuated but never inverted in the same way that occurred to the number of rules. The proportions of mentions to users' and the platform's obligations reached the same level in 2009 and, since then, remained largely similar, alternating relatively small differences. References to another central normative type of rule (rights of the platform), dominant in 2004, fell sharply a year later. From 2009 to 2014, mentions to the platform's rights remained largely close to references to the obligations of users and the platform, were dominant between 2015 and 2017 and suddenly halved in 2018, remaining at a comparable level until 2020.

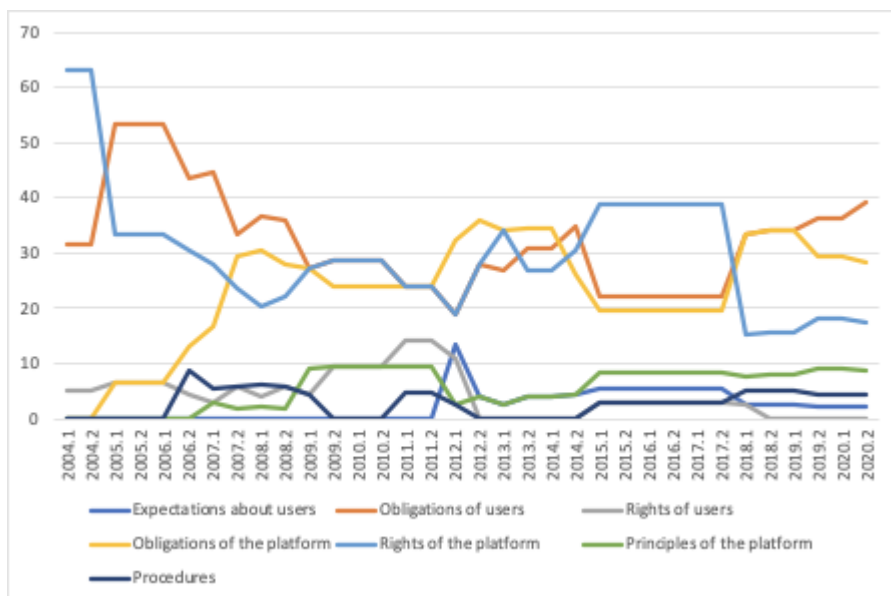


Figure 11. Evolution of the relative proportions of the number of mentions to Facebook's copyright content moderation rules, grouped according to their normative type.



In comparison with the developments in the number of Facebook’s copyright content moderation rules, the evolution of mentions to these rules also points to a much fairer equilibrium between users and platforms. But the platform’s obligations never became as central as in the case of the number of rules. In fact, by the end of 2020, mentions to users’ obligations was the most cited type of copyright content moderation rule in the Facebook’s policies we examined, and the gap between these mentions and those to platform’s obligation were the larger since 2008.

Nominal variations (Figure 10) are slightly different but do not tell a significantly different story: the adjustment of that acutely unequal initial situation was less accentuated than what occurred with the number of rules.

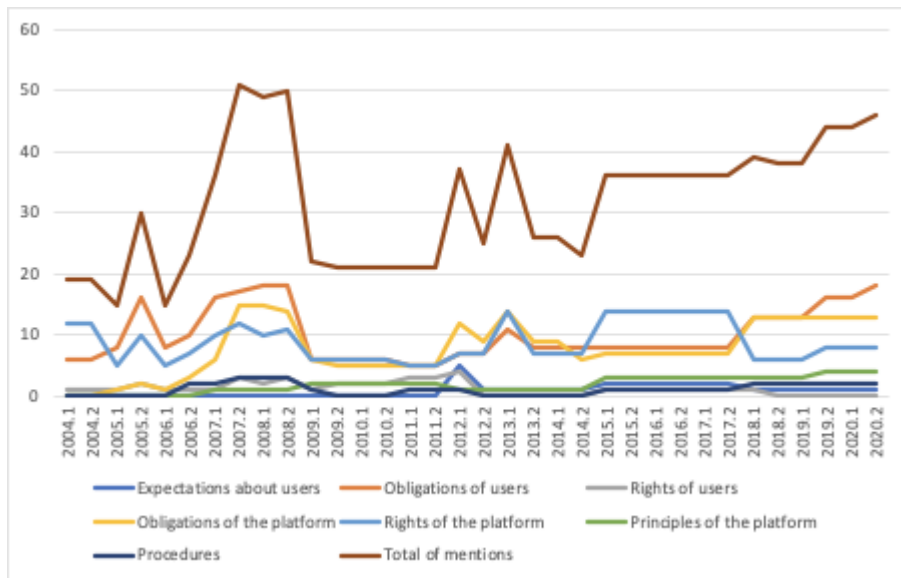


Figure 12. Evolution of the number of mentions to Facebook’s copyright content moderation rules, grouped according to their normative type.

#### 4) Number of *mentions* to Diaspora’s copyright content moderation rules, per their normative type

Figures 11 and 12 demonstrate quite clearly that, unlike Facebook, the number of mentions to Diaspora’s copyright content moderation rules remained remarkably stable over years. Changes happened, again, only in 2017. This shows that, in the case of Diaspora, the number of mentions shifted thanks to the publication of new rules; the number of mentions to existing rules remained the same. Overall, the nominal number of mentions barely changed, going from 21 to 24 in 2017 and remaining at the same level since.

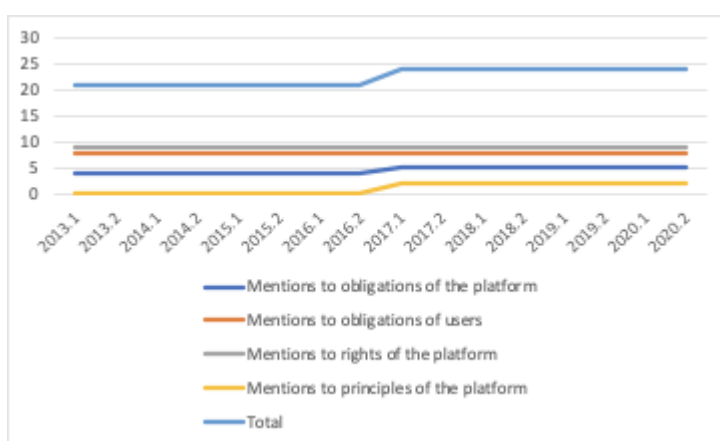


Figure 13. Evolution of the number of mentions to Diaspora’s copyright content moderation rules, grouped according to their normative type

In the case of Facebook, we noted an important difference between changes in the number of rules and changes in number of mentions to these rules. The case of Diaspora’s also presents some discrepancies between norms and their discursive intensity. For, from 20013 to 2016, rights of the platform dominated the number of mentions – and not users’ obligations, as with the number of rules). Overall, assessing the evolution of Diaspora’s mentions

to rules suggests a subtly more unequal initial situation than the one which emerged from the analysis of the number of rules themselves. Unlike Facebook, however, this difference tilts towards the role of the platform, and not of users. In 2017, the proportional ranking of mentions did not change. But there was an increase in the percentage of rules concerning the platform – thanks to the growth of the number of obligations and principles of the platform, as explained above.

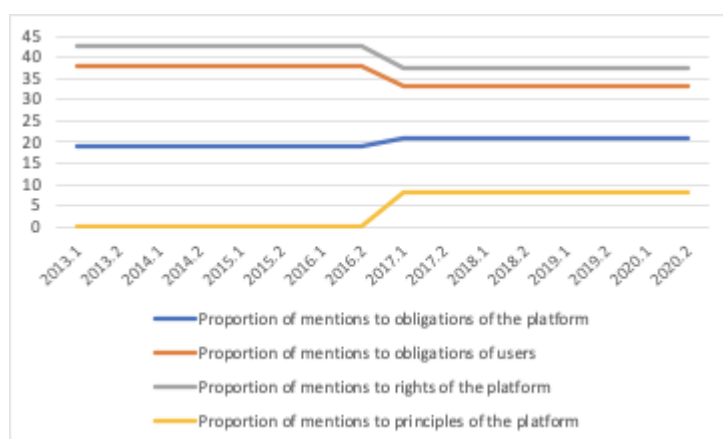


Figure 14. Evolution of the proportions of mentions to Diaspora's copyright content moderation rules, grouped according to their normative type.

The data commented on so far regard the normative categorization of rules. What about the other categorization, regarding the object of these rules, i.e., their directness? This is the topic of the next four sections.

#### 5) Number of Facebook's copyright content moderation rules, per their directness

As Figure 13 below shows, the relative preponderance of the number of Facebook's direct and indirect copyright content moderation rules have changed noticeably in the past 17 years, with at least three moments in which these two kinds of rules swapped positions (2011 and twice in 2012).

In its first years (2004-2007), Facebook regulated copyright directly, mostly. In 2007, rules that cited copyright explicitly comprised almost 75% of the total. After said various changes, between 2011 and 2012, the situation had already been fully reverted. The gap between the proportion of indirect and direct rules widened between 2013 and 2017, when the former represented more than three quarters of all provisions. Since 2017, however, the number of direct rules became more prominent, a picture that remained largely stable since. However, let us highlight that for almost then years now, most Facebook's copyright content moderation rules do not explicitly cite copyright.

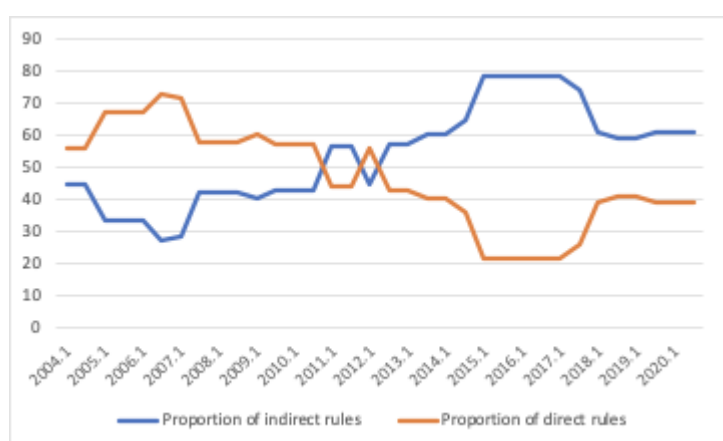


Figure 15. : Evolution of the relative proportion of Facebook's direct and indirect copyright content moderation rules.

As with the normative types, looking at the nominal number of rules can offer a more complete portrait of the changes in their directness. Figure 14 below indicates that the nominal number of both sorts of rules grew over time. Yet, with the exception of steep jumps in 2006 and 2012, the number of direct rules has remained largely unaltered since 2009. The number of indirect rules, however, has suffered much more dramatic changes, more than doubling between 2006 and 2007, tripling between 2010 and 2015 and then decreasing between 2017 and



2020. That is to say, Facebook appeared to have become, over time, much more concerned with the broad problem of content moderation than with the more specific issue of *copyright* content moderation.



Figure 16. Evolution of the number of Facebook’s direct and indirect copyright content moderation rules.

6) Number of Diaspora’s copyright content moderation rules, per their directness

Again, in contrast to the patterns of change of Facebook’s normative framework, the evolution of Diaspora’s copyright content moderation changed only once. From 2013 to the end of 2016, direct and indirect shared represented exactly half of Diaspora’s rules. Then, with the addition of two rules in 2017, the proportion of indirect rules became dominant – but not overwhelmingly so (Figure 15).

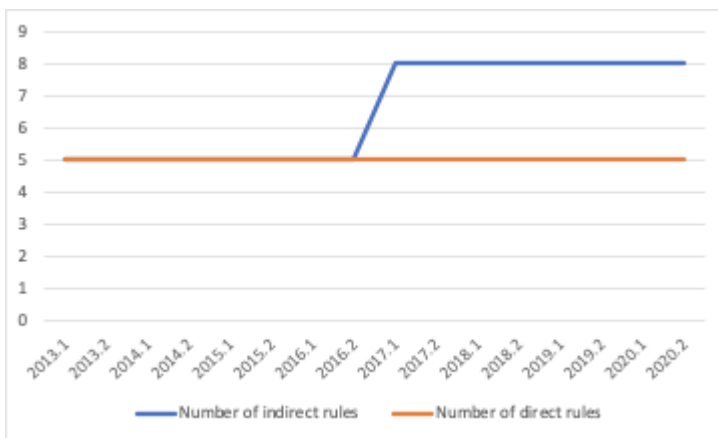


Figure 17. Evolution of the number of Diaspora’s direct and indirect copyright content moderation rules.

It can be seen in Figure 16 that this was not a product of a decrease in the nominal number of direct rules. What happened was that the two added rules were indirect ones. Put another way, it’s not that Diaspora downgraded its attention to the explicit regulation of copyright. Rather, and similarly to Facebook, the platform became more attentive to general issues of content moderation.



Figure 18. Evolution of the relative proportion of Diaspora’s direct and indirect copyright content moderation rules.



Having discussed how the number of direct and indirect rules changed over time, the next section turns to the evolution to the *mentions* to these kinds of copyright content moderation rules.

### 7) Number of *mentions* to Facebook’s copyright content moderation rules, per their directness

Overall, as Figure 17 shows, the mentions to both kinds of rules increased considerably, and similarly, between 2004 and 2020: 12 to 28 (indirect rules) and 7 to 18 (direct rules). These broad changes are roughly comparable to those in the *number* of direct and indirect rules, discussed above. Changes in the number of direct/indirect rules and changes in the number of mentions to these rules have roughly mirrored one another, both pointing to a decrease in the importance of direct rules in the past decade or so. Yet, some differences can be noted.

In 2004, as Figure 18 suggests, while most Facebook’s copyright content moderation rules did cite copyright explicitly the number of mentions were mainly to indirect rules. By 2005, this situation had already been inverted, and direct rules became dominant, peaking in 2008 at 33 mentions. Since then, with the exception of the first semester of 2012, references to Facebook’s direct copyright content moderation rules have mostly decreased, although hardly steadily, and never reached the same importance that they had in 2012 – despite its growth in 2018 and 2019. This is true mainly in proportional terms – but, to a lesser extent, in nominal terms as well.

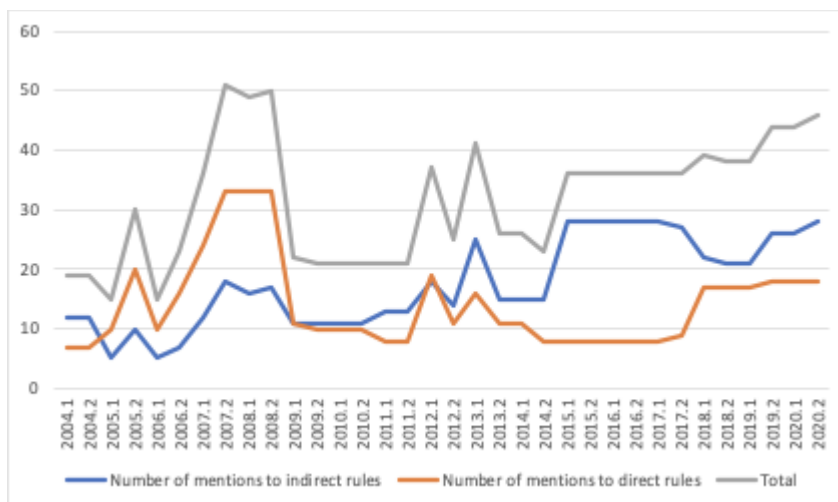


Figure 19. Evolution of the number of mentions to direct and indirect Facebook’s copyright rules.

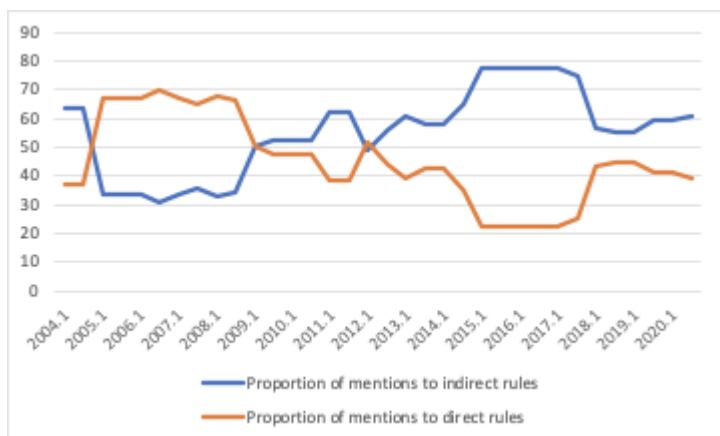


Figure 20. Evolution of the relative proportion of mentions to direct and indirect Facebook’s copyright content moderation rules.

### 8) Number of mentions to Diaspora’s copyright content moderation rules, per their directness

Figures 19 and 20 below add more evidence to the relative simplicity of this alternative platform’s rules of copyright content moderation – but demonstrate, once again, that the number of rules and the discursive attention to these rules might vary considerably.

As seen above, from 2013 to 2016, the number of direct and indirect rules were exactly the same, and only changed in 2017, with the addition of two indirect rules. Nevertheless, changes in the number of mentions to



these rules indicate that an imbalance already existed since 2013. In that first period, references to indirect rules amounted to almost 60% of the total of mentions, a percentage that grew subtly in 2017.

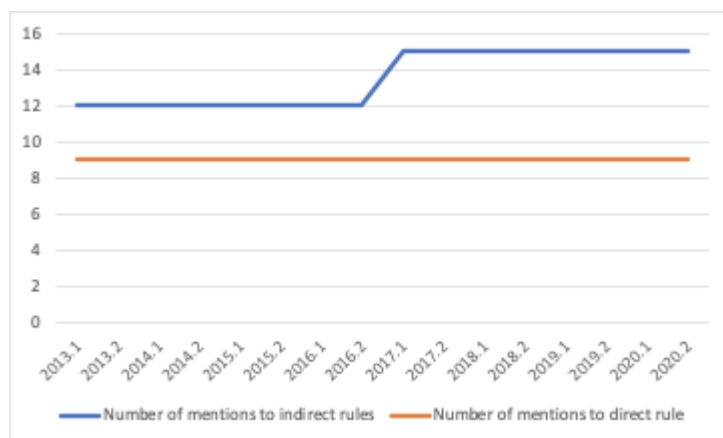


Figure 21. Evolution of the number of mentions to direct and indirect Facebook's copyright rules.

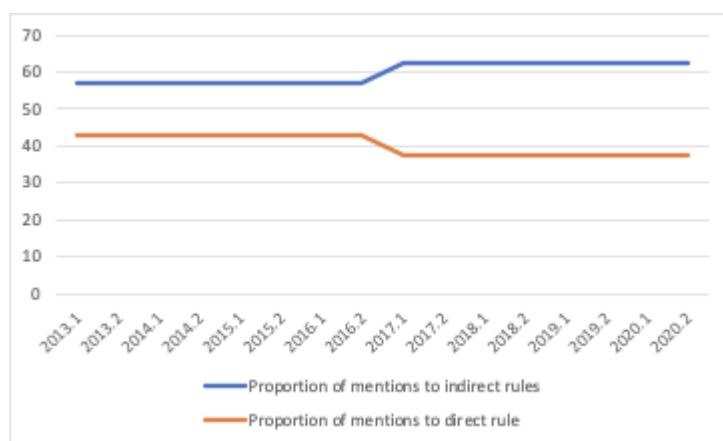


Figure 22. Evolution of the relative proportion of mentions to direct and indirect Facebook's copyright content moderation rules.

So far, our analysis has provided a panoramic view of how Facebook and Diaspora's copyright content moderation changed since the creation of these platforms. The analyses of the nominal and proportional variations in the number and mentions to certain kinds of rules are useful first steps to make sense of our complex dataset. Yet, they are insufficient to understand how platforms' regimes evolved. In the following sections, we dive into sub-research question 6 and discuss the *actual* rules whose kinds were examined above.

### 5.2.3 Which rules do platforms employ to regulate copyright content moderation?

Since platforms' copyright content moderation rules are plenty and varied, there is no single, all-encompassing way of presenting their content and historical development. Our strategy was to look for meaningful appearances, continuities, and deletions of these rules, that is, temporal patterns that could suggest the existence of more or less homogenous time *periods* in the development of Facebook and Diaspora's copyright content moderation regimes. This approach inevitably entails some simplifications but also offers a synoptic angle to make sense of platforms' shifting rules. In essence, the findings presented below help flesh out the movements described in Section 5.2.2. In the case of Facebook, they further unveil a convoluted process whereby the company became gradually more involved in the regulation of copyright content moderation. The direction taken by Diaspora's regime is similar but much simpler and stabler.

#### Facebook

##### 1. 2004-2006

From 2004 to 2006, Facebook's copyright content moderation comprised a relatively small and stable set of ten rules (see Table 9). Of these, four would prove to be what we might refer as *core rules*, that is, rules that were



established in the first years of the platform and remained, in some form and shape, in place until the end of 2020. Of these initial core rules, only one (“Users must respect copyrights of platforms and third parties”) refer to copyright. The other three (“The platform can remove infringing content”, “The platform can avoid responsibility and liability”, “The platform can terminate, block access to accounts”) were indirect, and involved all sorts of behaviours and contents.

It is possible to identify two characteristics of this first period. First, this was a bare-bones regime, mainly concerned with enforcing some very basic rules. Such conclusion stems from both the prevalence of and number of mentions to some core rules: stopping users from posting copyrighted content, establishing the protocols for take down requests and asserting that Facebook had the power to punish those who did not follow these rules.

Second, and perhaps primarily, this period can be described as user-centred. That is, copyright content moderation was defined by Facebook as a burden to be carried by users. This meant, on the one hand, that content moderation was depicted as a pre-emptive action of self-regulation by users on themselves. Surely, the platform had the *right* to take down infringing content and punish users who breached others’ copyrights, and, for some time, even investigate and sue users. But Facebook did not describe itself as *obliged* to do any of this. In fact, the platform was not responsible nor liable for not taking content down, a general provision that, we can assume, encompassed copyrighted content. Ultimately, it was up to users to act upon themselves (be “responsible” for their actions, as one rule said) and do not post content they did not own. That burden also meant that, to ask the platform to take down the content, a user would have to do all the work of collecting detailed and accurate information about the infringing content to prove that she was its legal owner. Facebook’s role was essentially a passive one. It is only in the first semester of 2005 that the company decided to say the obvious – that it also must respect copyright.

Table 9. Facebook’s copyright content moderation rules from 2004 to 2006, with the number of times they were mentioned in the analysed documents; rules in blue indicate core rules. Source: Authors.

	2004.1	2004.2	2005.1	2005.2	2006.1
Users must respect copyrights of platforms and third parties	3	3	5	1	5
Users must provide accurate information in copyright disputes	1	1	1	2	1
Users must be responsible for what they do	1	1	1	2	1
Users must be legally entitled to report copyright infringement	1	1	1	2	1
Users can send written complaint	1	1	1	2	1
The platform must respect and protect copyright			1	2	1
The platform can remove infringing content	2	2	1	2	1
The platform can investigate and sue users	2	2			
The platform can avoid responsibility and liability	5	5	3	6	3
The platform can terminate, block access to accounts	3	3	1	2	1

## 2. 2006-2012

If Facebook’s first two years was marked by relative stability and simplicity, the next period identified by our analysis (2006-2012) saw a much longer and complex set of 37 rules (see Table 10), and the apex of Facebook’s normative density (the first semester of 2012). This second period was marked by considerable variability (e.g., seven rules were created and then dropped between those years) and, on the other hand, the consolidation of the platform’s core copyright content moderation rules. If four of these core rules emerged between 2004 and 2006, other five between 2007 and 2009: “Users must be truthful to the platform” (a generic provision that essentially replaced the more specific similar norm on providing accurate information during copyright disputes), the principle according to which the platform aspires to protect intellectual rights, and three obligations: the





platform would have to “remove or block access to content” and “disable/suspend accounts” due to copyright infringement, and then notify users about the latter.

These then new core rules changed the nature of copyright content moderation on Facebook, and established a much more balanced regime. For taking content down due to copyright infringement ceased being described as rights, something that the platform could or not do and became (at least discursively) compulsory, something that Facebook was obliged to do. The platform would *have to* intervene. The fact that the rules that described content moderation as a right were not dropped suggest a differentiation between copyright infringement and other issues, with the former defined in stricter – and, consequentially, more serious – terms.

Table 10. Facebook’s copyright content moderation rules from 2006 to 2012, with the number of times they were mentioned in the analysed documents; rules in blue indicate core rules; column in salmon shows data for the year immediately before this period. Source:

	2006	2006	2007	2007	2008	2008	2009	2009	2010	2010	2011	2011	2012
	.1	.2	.1	.2	.1	.2	.1	.2	.1	.2	.1	.2	.1
Users who violate policy might face legal consequences											1	1	
Users should report violation of others' copyright													1
Users should report rules violation													1
Users should report copyright infringement													1
Users should contact third-party apps directly about copyright issues													1
Users should contact platforms if contact with third-party apps about copyright issues doesn't work													1
Users must respect copyrights of platforms and third parties	5	5	9	1	11	11	2	2	2	2	2	2	3
Users must provide accurate information in copyright disputes	1	1											
Users must not interfere with anti-copyright infringement features			1	1	1	1	1	1	1	1			
Users must be truthful to the platform			2	2	2	2	3	3	3	3	3	3	3
Users must be responsible for what they do	1	3	4	4	4	4							
Users must be legally entitled to report copyright infringement	1	1											1
Users might face legal consequences if they make false copyright infringement claims				2	2	2	1						
Users might face legal consequences if they infringe others' copyrights		1	1										
Users can submit counter-notification				2	1	1		1	1	1	1	1	1
Users can send written complaint	1	1	1	1	1	2	1	1	1	1	1	1	2
Users can report infringing content											1	1	
Users can report fake profiles													1
The platform must try to review copyright infringement reports quickly													1
The platform must tell alleged infringer that they can appeal				1	1	1							
The platform must share claim of infringement with infringer													1
The platform must respect and protect copyright	1		1	3	3	3	1						



The platform must remove or block access to content due to copyright infringement			1	4	4	3	1	1	1	1	1	1	1
The platform must provide users' with tools to control their copyrights							1	1	1	1	1	1	1
The platform must provide an opportunity to appeal content removal							1	1	1	1	1	1	1
The platform must protect expressions that comply with rules													1
The platform must notify users of content removal				1	1	1							
The platform must notify users of account suspension, deletion							1	1	1	1	1	1	1
The platform must disable/suspend accounts due to copyright infringement		3	4	5	5	4	1	1	1	1	1	1	2
The platform must assist with copyright violations by third parties													1
The platform cannot remove content in third-party apps													1
The platform can remove infringing content	1	2	3	3	3	3	2	2	2	2	2	2	1
The platform can avoid responsibility and liability	3	4	5	7	5	6	2	2	2	2	2	2	5
The platform aspires to protect intellectual rights			1	1	1	1	2	2	2	2	1	1	1
The platform aspires to fosters an environment where freedom expression and rights are balanced											1	1	
Platforms must notify alleged infringer				1	1	1							1
The platform can terminate, block access to accounts	1	1	2	2	2	2	2	2	2	2	1	1	1

The advent of other, non-core rules further suggests that the period between the second semester of 2006 and 2012 established a more rebalanced regime between users and the platform. In 2007, the company started mentioning explicitly that users who disagreed with allegations of copyright infringement had the right to submit a counter notification, something reinforced by the obligation of the platform to communicate users of this right and share with alleged infringers information about the complaint. The platform's new obligations to review copyright infringement reports quickly and provide users with tools to control their copyrights, and the generic principle of aspiring to balance freedom of expression with other rights compounded Facebook's responsibilities, and to some extent offset the disappearance in 2009 of the provision according to which the platform had to protect copyrights. The general provision on how the platform also had to "protect expressions that comply with rules" is also worth mentioning here.

This rebalancing movement was not clear-cut – various older and new users' obligations either remained in place or were created. In 2012, for instance, the platform apparently made a discursive push to incentivise users to report infringing content, in particular regarding copyright, theirs or others' (see e.g., "Users should report copyright infringement" / "Users should report violation of others' copyright" / "Users should report rules violation" / "Users can report infringing content"). This was done without losing sight of potential abuses of reporting mechanisms. In this period, various rules reminded users of the need to be truthful in their reports ("Users must be legally entitled to report copyright infringement", "Users might face legal consequences if they make false copyright infringement claims"), enabled them to tattle on others ("Users can report fake profiles") and created the possibility that they would be punished if they tried to circumvent technologies used to protect copyright ("Users must not interfere with anti-copyright infringement features").

A last movement that can be seen here is the appearance of rules about third-party apps – which, as the platform expanded, became important actors of Facebook's ecosystem. It seems that the platform was ambiguously reacting to copyright disputes between users and the apps. While the platform did not want to be involved in these disputes ("Users should contact third-party apps directly about copyright issues"), seemingly because they simply had their hands tied ("The platform cannot remove content in third-party apps"), it also expected that



users would get Facebook involved if they were unable to solve disputed on their own (“Users should contact platforms if contact with third-party apps about copyright issues doesn't work”).

### 3. 2012-2014

After the normative extravaganza that marked the first semester of 2012, the second part of that year saw an abrupt simplification of Facebook’s copyright content moderation regime which lasted, mostly without changes, until 2014 (see Table 11).

Table 11. Facebook’s copyright content moderation rules from 2012 to 2014, with the number of times they were mentioned in the analysed documents; rules in blue indicate core rules; column in salmon shows data for the year immediately before this period. Source:

	2012.1	2012.2	2013.1	2013.2	2014.1	2014.2
Users should report violation of others' copyright	1					
Users should report rules violation	1	1	1	1	1	1
Users should report copyright infringement	1					
Users should contact third-party apps directly about copyright issues	1					
Users should contact platforms if contact with third-party apps about copyright issues doesn't work	1					
Users must respect copyrights of platforms and third parties	3	4	6	4	4	4
Users must post content responsibly				1	1	1
Users must be truthful to the platform	3	3	5	3	3	3
Users must be legally entitled to report copyright infringement	1					
Users can submit counter-notification	1					
Users can send written complaint	2					
Users can report fake profiles	1					
The platform must try to review copyright infringement reports quickly	1					
The platform must share claim of infringement with infringer	1					
The platform must respect and protect copyright		1	1	1	1	
The platform must remove or block access to content due to copyright infringement	1	2	3	2	2	1
The platform must provide users' with tools to control their copyrights	1	1	2	1	1	1
The platform must provide an opportunity to appeal content removal	1	1	2	1	1	1
The platform must protect expressions that comply with rules	1	1	1	1	1	1
The platform must notify users of account suspension, deletion	1	1	2	1	1	1
The platform must disable/suspend accounts due to copyright infringement	2	2	3	2	2	1
The platform must assist with copyright violations by third parties	1					
The platform cannot remove content in third-party app	1					
The platform can remove infringing content	1	1	2	1	1	1
The platform can avoid responsibility and liability	5	5	1	5	5	5
The platform aspires to protect intellectual rights	1	1	1	1	1	1
Platforms must notify alleged infringer	1					
The platform can terminate, block access to accounts	1	1	2	1	1	1

This remarkable simplification can be noticed in both the disappearance of 13 rules that were in place in the previous semester and the creation of only one new rule (“Users must post content responsibly”). And even the novelty of this rule is relative, as it appears to be a more specific version of a provision that was dropped in 2008. The other rule published by December 2012 that was not part of the analysed policies in June 2012 (“The



platform must respect and protect copyright”) was merely the reinstatement of the same rule that had been abandoned in 2009. By December 2014, it had disappeared again from the analysed policies.

Given the dearth of novel provisions, it is worth analysing in more detail the sorts of rules that were suddenly shed in the second semester of 2012. One important shift: rules which explicitly regulated copyright (i.e., direct rules) became much less prevalent. Consider for instance how rules which explained and detailed copyright disputes protocols (“Users can send written complaint”, “Users can submit counter-notification”, “The platform must try to review copyright infringement reports quickly”) stopped being mentioned in these documents. Provisions related to copyright infringement reports specifically (“Users should report violation of others’ copyright”, “Users should report copyright infringement”, “Users must be legally entitled to report copyright infringement”) and those related to conflicts with external applications (“Users should contact third-party apps directly”, “Users should contact platforms if contact with third-party apps about copyright issues doesn’t work”) were also dropped. Other rules that were abandoned included “Users can report fake profiles” and the obligation of the platform to “share claim of infringement with infringer”. (It is possible that some of these rules were relegated to Help pages, which are not commented on in this report).

In sum, the regime that had emerged by December 2014 was an extended version of that first, bare-bones regime, with core rules making 9 out of the 14 rules. But this one was based on the perhaps intuitive idea that *both* users and platforms *must* act to moderate copyright-infringing content. The first through *a priori* self-regulation; the second could act *a posteriori* but not as passively as it was assumed between 2004 and 2006. This remained the backbone of Facebook’s copyright content moderation until the end of 2020, at least.

#### 4. 2015-2017

The stability that largely defined that 2012-2014 regime had been already been considerably disrupted by June 2015, when two rules were abandoned (“Users must post content responsibly” and “The platform must protect expressions that comply with rules”) and 12 were either created or reinstated (see Table 12).

Zooming in on these added provisions, one clearly identifiable movement is the attempt by Facebook to impose (or communicate) a sort of interpretative latitude to how it moderated content, generally. In the first semester of 2015, the platform decided to tell users that it had two more obligations (“consider principles when enforcing rules” and “consider context when enforcing rules”) and one more right (“change decision on content removal”). While it is impossible to know from our data what these norms meant in reality, they can be understood as having ambiguous consequences. For, while they constitute, in part, obligations for which the platform could be held accountable, they also imply that Facebook could arrive at decisions that did not strictly follow specific provisions – and even make mistakes about these decisions. Given that it is unlikely that “context” (and maybe “principles”) was until then ignored, or that Facebook had not previously altered its content moderation decisions, it is not unreasonable to suggest that these rules were used as a form of discursive shield to defend the platform against critical views of how its content moderation practices. The inclusion of the procedure about the existence of human content moderators appears to go in the same direction: less an actual novel reality than a communicative effort to legitimise itself by making content moderation a somewhat outsourced and possibly fallible (“human”) endeavour.

A different set of direct and indirect rules concerned the notice and take-down process. Two of them determined (or made explicit) that the platform could (but was not obliged) to warn users who infringed Facebook’s general (“The platform can warn copyright violators”) or copyright (“The platform can warn rules violators”) provisions before punishing them – with, for instance, the suspension of their account. Other novel indirect rules created two modalities of punishment. One, only laterally relevant for debates on copyright, was linked to truthfulness (“The platform can require user to delete false accounts”); the second (“The platform can ban users”) established, for the first time, the possibility that the Facebook could prevent someone from being a user. The latter is a considerable change, given the platform’s strong focus on growth and expansion. It might suggest that, after over a decade of existence, Facebook was much more confident of its dominant market position and losing users who repeatedly violated its rules was not deemed as an issue any longer. Reversely, the appearance only in 2015 of the possibility of banishment suggests how importantly was for the platform to *not* bar anyone (not even rule-breaking individuals) from its services.

Table 12. Facebook’s copyright content moderation rules from 2015 to 2017, with the number of times they were mentioned in the analysed documents; rules in blue indicate core rules; column in salmon shows data for the year immediately before this period. Source:

	20	20	20	20	20	20	20
	17	18	18	19	19	20	20
	.2	.1	.2	.1	.2	.1	.2
Users should report rules violation	2						



Users should report copyright infringement		1	1	1	1	1	1
Users must respect copyrights of platforms and third parties	4	5	5	5	6	6	6
Users must not post music in video format		1	1	1	1	1	1
Users must not misuse reporting system					1	1	1
Users must be truthful to the platform	4	5	5	5	6	6	8
Users must be responsible for what they do		2	2	2	2	2	2
Users can report infringing content	1	1					
The platform uses automated content moderation		1	1	1	1	1	1
The platform shares information about content moderation with affiliates		1	1	1	1	1	1
The platform must terminate account due to legal order		2	2	2			
The platform must respect and protect copyright		3	3	3	3	3	3
The platform must remove or block access to content due to copyright infringement	1	2	2	2	2	2	2
The platform must remove infringing content		1	1	1	1	1	1
The platform must publish transparency report on copyrights		1	1	1	1	1	1
The platform must provide users' with tools to control their copyrights	1						
The platform must provide an opportunity to appeal content removal	1						
The platform must notify users of content removal					1	1	1
The platform must notify users of account suspension, deletion	1	1	1	1	2	2	2
The platform must disable/suspend accounts due to copyright infringement	1	1	1	1	1	1	1
The platform must disable or suspend account because its required or allowed by law		2	2	2	2	2	2
The platform must consider principles when enforcing rules	1						
The platform must consider context when enforcing rules	1						
The platform employs human content moderators	1						
The platform can warn copyright violators	1						
The platform can require user to delete false accounts	1						
The platform can remove infringing content	1	2	2	2	2	2	2
The platform can change decision on content removal	1						
The platform can ban users	1	1	1	1	2	2	2
The platform can avoid responsibility and liability	5	2	2	2	2	2	2
The platform can act against infringing content	1						
The platform aspires to protect its community		1	1	1	2	2	2
The platform aspires to protect intellectual rights	1	1	1	1	1	1	1
The platform aspires to fosters an environment where freedom expression and rights are balanced	1						
The platform aspires to create a self-regulated environment	1						
The platform aspires to be a place where users feel welcome and safe		1	1	1	1	1	1
The platform can terminate, block access to accounts	3	1	1	1	2	2	2

Other added rules reinforced elements that were already clear: Facebook's powers to take down content, related or not to copyright ("The platform can act against infringing content"), the aspiration to ensure both freedom and safety ("The platform aspires to fosters an environment where freedom expression and rights are balanced") and the ideal that users' had to actively and pre-emptively regulate themselves ("The platform aspires to create a self-regulated environment").

## 5. 2018-2020



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Between 2018 and 2020, the main change we could observe to Facebook’s copyright content moderation regime was how it treated the issue of automation (see Table 13). In 2018, for the first time, Facebook decided to mention in the analysed documents algorithmic kinds of content moderation tools (“The platform uses automated content moderation”). It must be noted that, in the case of copyright, at least since 2015 the platform already employed an automated content identification, in some way or another, what was deepened in 2016 with the creation of “Rights Manager”, Facebook’s current monetization system. Therefore, the inclusion of this procedure should be understood as essentially a discursive decision.

Table 13. Facebook’s copyright content moderation rules from 2018 to 2020, with the number of times they were mentioned in the analysed documents; rules in blue indicate core rules; column in salmon shows data for the year immediately before this period. Source:

	2017	2018	2018	2019	2019	2020	2020
	2	1	2	1	2	1	2
Users should report rules violation	2						
Users should report copyright infringement		1	1	1	1	1	1
Users must respect copyrights of platforms and third parties	4	5	5	5	6	6	6
Users must not post music in video format		1	1	1	1	1	1
Users must not misuse reporting system					1	1	1
Users must be truthful to the platform	4	5	5	5	6	6	8
Users must be responsible for what they do		2	2	2	2	2	2
Users can report infringing content	1	1					
The platform uses automated content moderation		1	1	1	1	1	1
The platform shares information about content moderation with affiliates		1	1	1	1	1	1
The platform must terminate account due to legal order		2	2	2			
The platform must respect and protect copyright		3	3	3	3	3	3
The platform must remove or block access to content due to copyright infringement	1	2	2	2	2	2	2
The platform must remove infringing content		1	1	1	1	1	1
The platform must publish transparency report on copyrights		1	1	1	1	1	1
The platform must provide users' with tools to control their copyrights	1						
The platform must provide an opportunity to appeal content removal	1						
The platform must notify users of content removal					1	1	1
The platform must notify users of account suspension, deletion	1	1	1	1	2	2	2
The platform must disable/suspend accounts due to copyright infringement	1	1	1	1	1	1	1
The platform must disable or suspend account because its required or allowed by law		2	2	2	2	2	2
The platform must consider principles when enforcing rules	1						
The platform must consider context when enforcing rules	1						
The platform employs human content moderators	1						
The platform can warn copyright violators	1						
The platform can require user to delete false accounts	1						
The platform can remove infringing content	1	2	2	2	2	2	2
The platform can change decision on content removal	1						
The platform can ban users	1	1	1	1	2	2	2
The platform can avoid responsibility and liability	5	2	2	2	2	2	2
The platform can act against infringing content	1						
The platform aspires to protect its community		1	1	1	2	2	2



The platform aspires to protect intellectual rights	1	1	1	1	1	1	1
The platform aspires to fosters an environment where freedom expression and rights are balanced	1						
The platform aspires to create a self-regulated environment	1						
The platform aspires to be a place where users feel welcome and safe		1	1	1	1	1	1
The platform can terminate, block access to accounts	3	1	1	1	2	2	2

At the same time, the defensive provisions included in the previous period were all abandoned (“The platform must consider principles when enforcing rules”, “The platform must consider context when enforcing rules”, “The platform can change decision on content removal”, “The platform employs human content moderators”) all disappeared. It could be said, tentatively, that the two movements (mentioning automation and deleting defensive rules) are linked. Once algorithms are described as largely in charge of content moderation, the need to explain and justify human decisions arguably becomes less important. Another procedure likely involving automation regards the sharing of content moderation data among Facebook, the platform, and other companies owned by Facebook, Inc. While this point is only vaguely discussed in the documents we read, it indicates attempts to track down (and possibly ban) users across various platforms. Whether and how this involves copyright is unclear.

This last shift is a good example of another movement that can be identified in this period: Facebook’s copyright content moderation regime started to be described as not only automated but also as stricter than before. Some older expectations and obligations reappeared (“Users should report copyright infringement”, “Users must be responsible for what they do”, “The platform must respect and protect copyright”); others were used for the first time (“The platform must terminate account due to legal order”, “The platform aspires to protect its community”, “The platform aspires to be a place where users feel welcome and safe”, “Users must not post music in video format”, “The platform must disable or suspend account because its required or allowed by law”) and a number of provisions that gave users some room to manoeuvre disappeared (“The platform must provide an opportunity to appeal content removal”, “The platform aspires to fosters an environment where freedom expression and rights are balanced”, “The platform aspires to create a self-regulated environment”). While quite different, these rules all point to the same overall direction: more control over users’ actions in the name of users’ safety. Importantly, most these rules were indirect – i.e., did not mention copyright explicitly.

## **Diaspora**

Overall, and expectedly, Facebook’s rules presented a much more complex history than Diaspora’s. While we identified five deeply different eras in the evolution of the former’s rules, the latter’s is essentially composed of only two, and quite similar, periods.

### 1. 2013-2016

Over its first four years, Diaspora’s copyright content moderation regime operated with what might be described as a terser version of the post-2009 Facebook’s core rules (see Table 14). The 10-rule regime tried, on the one hand, to inculcate into users the same sort of a priori self-regulatory behaviour, telling them multiple times that they had to be sure that their posts would not violate others’ copyright (“Users must respect copyrights of platform and third parties”, “Users must be responsible for what they do”) and that they were prohibited from abusing the reporting system (“Users must be legally entitled to report copyright infringement”, “Users must be truthful to the platform”).

On the other, Diaspora defined itself, from the very beginning, as having the obligation to protect copyright and take down infringing content (“The platform must respect and protect copyright”, “The platform must remove or block access to content due to copyright infringement”, “The platform must disable or suspends accounts due to copyright infringement”, in addition to similar rights) while, simultaneously, claiming repeatedly that it was not necessarily responsible nor liable for what users did (“The platform can avoid responsibility and liability”).



Table 14. *Diaspora's copyright content moderation rules from 2018 to 2020, with the number of times they were mentioned in the analysed documents. Source: Authors.*

	2013.1	2013.2	2014.1	2014.2	2015.1	2015.2	2016.1	2016.2
The platform must respect and protect copyright	2	2	2	2	2	2	2	2
The platform must remove or block access to content due to copyright infringement	1	1	1	1	1	1	1	1
The platform must disable or suspends accounts due to copyright infringement	1	1	1	1	1	1	1	1
Users must respect copyrights of platform and third parties	4	4	4	4	4	4	4	4
Users must be responsible for what they do	2	2	2	2	2	2	2	2
Users must be legally entitled to report copyright infringement	1	1	1	1	1	1	1	1
Users must be truthful to the platform	1	1	1	1	1	1	1	1
The platform can avoid responsibility and liability	6	6	6	6	6	6	6	6
The platform can terminate, block access to accounts	2	2	2	2	2	2	2	2
The platform can remove infringing content	1	1	1	1	1	1	1	1

## 2. 2017-2020

The second period of *Diaspora's* copyright content moderation regime started in 2017 (see Table 15). The original arrangement was essentially kept in place (no rule was dropped) with the addition of three rules that did not fundamentally challenged the 10 rules described in the previous section.

Two of the new provisions were principles. By adding the ideal of creating a “a self-regulated environment”, *Diaspora* reminded users of their role in the governance of the platform; “the platform aspires to ensure a free and safe public conversation” reinforced the idea that this regulation should aim at not only freedom of expression but also safety. The third new rule, on users’ banishment, is perhaps more interesting as it points to a clear difference between *Diaspora* and Facebook. The latter likely postponed this provision due to the risk that it could harm its growth; the former would not ban users due to a technical choice that decentralized content moderation and made banishments impossible, as the wording of the rule made clear.

Table 15. *Diaspora's copyright content moderation rules from 2018 to 2020, with the number of times they were mentioned in the analysed documents. Source: Authors.*

	2016.2	2017.1	2017.2	2018.1	2018.2	2019.1	2019.2	2020.1	2020.2
The platform must respect and protect copyright	2	2	2	2	2	2	2	2	2
The platform must remove or block access to content due to copyright infringement	1	1	1	1	1	1	1	1	1
The platform must disable or suspends accounts due to copyright infringement	1	1	1	1	1	1	1	1	1
The platform must not ban users		1	1	1	1	1	1	1	1
Users must respect copyrights of platform and third parties	4	4	4	4	4	4	4	4	4
Users must be responsible for what they do	2	2	2	2	2	2	2	2	2
Users must be legally entitled to report copyright infringement	1	1	1	1	1	1	1	1	1
Users must be truthful to the platform	1	1	1	1	1	1	1	1	1
The platform can avoid responsibility and liability	6	6	6	6	6	6	6	6	6
The platform can terminate, block access to accounts	2	2	2	2	2	2	2	2	2
The platform can remove infringing content	1	1	1	1	1	1	1	1	1





The platform aspires to create a self-regulated environment		1	1	1	1	1	1	1	1
The platform aspires to ensure a free and safe public conversation		1	1	1	1	1	1	1	1

By exploring initial results of our analysis of part of our sample of 15 platforms, with a special focus on Facebook and Diaspora, this chapter started to answer three sub-research questions: (4) **How are copyright content moderation rules organized by platforms?** (5) **What kind of copyright content moderation rules do platforms employ?** and (6) **Which copyright content moderation do platforms employ to regulate copyright?** Taken together, these questions help map out how a key structure of copyright content moderation, namely platforms' *rules*, changed over time and across different services.

### 5.3 Conclusions

Whilst the preliminary findings discussed above might be revised and will be enriched with the data from other platforms, they seem to point to four general conclusions.

First, *platforms' copyright content moderation rules became more complex over time*. This complexification is perhaps the clearest conclusion of our analysis. It is apparent in the steep increase in the number of policy-like documents, the progressive diversification in the kinds of rules, as well as the growth of the very number of rules that platforms used to govern content in relation to copyright. In addition to these numerical changes, there have also been shifts in the transparency of these rules. When rules get fragmented into several kinds of documents, some of them hidden in Help pages that are many clicks away from the platform's landing page, it is expected that users might have a harder time finding them. The pace of changes also presents challenges to user's ability to know the rules that govern content moderation – is it reasonable to expect that they will be able to keep up with so many shifts? In sum, in the past decades, users had to deal with increasingly denser and opaquer copyright content moderation regimes. Nevertheless, this process seems to have been sharply different for mainstream (Facebook) and alternative (Diaspora) platforms. Diaspora's regime experienced only a very mild change, with only two distinct periods, both of them quite similar to each other. Facebook, alternatively, experienced at least five periods, and what appeared to be an incessant process of transformation.

Second, *platforms' role became more important – but discursive focus remained on users*. Another general finding regards the subject of copyright content moderation. Initially, policies were characterized by a focus on users' self-regulation: they were expected to be sure that others' copyright (including platform's) would not be violated. Over time, however, platform-oriented rules, such as platform's obligations, became considerably more prominent. In other words, platforms' roles shifted over time, from one in which they worked as a mostly passive recipients of complaints to one that involved actively identifying and taking down content – including through automated means. This trend suggests a fundamental transformation of platforms' copyright content moderation regimes. At the same time, this normative transformation was not accompanied by a comparable change in the discursive focus – which remained mostly on users' actions, as revealed by our analysis of how mentions to rules evolved. As with the complexification discussed above, the changing roles of platforms' regimes was clearer and deeper in relation to Facebook than to Diaspora.

Third, *copyright content moderation lost preponderance*. The examination of platform's direct and indirect rules points to a clear tendency: in the past decade, rules that mention copyright-related terms explicitly (what we named direct rules) became less common in platforms' regimes. It is not that the number of these direct rules, or of mentions to them, decreased – both figures actually increased or remained stable. However, the number of and mentions to what we termed indirect rules increased much more. In a way, copyright went from a central content moderation issue to just another one content moderation issue. Since indirect rules are a much weaker kind of provision, it can be said that copyright content moderation lost much of its normative and discursive preponderance – even though this process was much more pronounced in the case of Facebook.

Fourth, *regulation cannot explain differences between mainstream and alternative platforms*. The development of Facebook and Diaspora's copyright content moderation regimes can be said to have gone towards the same general direction: both became more complex, assigned a more interventionist role to platforms themselves, and paid relatively less attention to copyright. At the same time, their transformations were, as noted repeatedly above, starkly different in their pace and depth. Facebook's regime changed severely, and many times; Diaspora's moved only slightly. Given that both companies are regulated by the same laws and public policies, such distinct trajectories cannot be explained by regulation alone. Our methodological choices do not allow us to answer conclusively what is associated with these differing processes – but some tentative possibilities seem clear. The most relevant distinction between the two platforms regards their size, which are in turn associated with their different business models. It is likely that Facebook's changes stem from the enormous pressures created by its equally enormous influence – pressures exerted by both markets and society, and which do not necessarily translate into public policies or laws. Despite being celebrated by its innovative design and "ethical" philosophy,



Diaspora remained a much smaller and less relevant platform. Naturally, it has seen only a tiny fraction of the sort of criticisms and expectations directed at Facebook, having no clear incentive to transform its regime.



## 6. Conclusions Interim Report and Next Steps

This Interim Report consists of six **chapters**. After a brief introduction in **Chapter 1**, **Chapter 2** identifies our research questions, sets out our conceptual framework and methodology. The **main research question** of our mapping analysis – of which this Interim Report is but an intermediate point – is as follows: how can we map the impact on access to culture in the DSM)of content moderation of copyright-protected content on online platforms? We have further split this question into multiple sub-research questions (SQR):

- **SQR(1)**: How to conceptualise and approach from a methodological approach the interdisciplinary analysis of content moderation of copyright-protected content on online platforms and its impact on access to culture in the DSM?
- **SQR(2)**: How is the private and public regulatory framework for content moderation for online platforms structured?
- **SQR(3)**: How do the various elements of that regulatory framework interact?
- **SQR(4)**: How are copyright content moderation rules organized by platforms?
- **SQR(5)**: What kind of copyright content moderation rules do platforms employ?
- **SQR(6)**: Which copyright content moderation rules do platforms employ?
- **SQR(7)**: How are the various elements of the regulatory framework and the online platforms' policies etc. likely to impact access to culture in DSM?

**Chapter 2** addresses SQR(1) by developing a conceptual framework and interdisciplinary methodological approach to examine copyright content moderation on online platforms and its potential impact on access to justice.

**Chapter 3** carries out a mapping of copyright content moderation by online platforms at secondary EU law level. It aims to answer SQR(2) and SQR(3) from the perspective of EU law. This corresponds to our ongoing work on Task T.6.1.1 (EU Level Mapping). The main focus of our analysis is on the complex legal regime of art. 17 CDSM Directive. As noted in the Interim Report, it is premature to draw conclusions at this stage since the puzzle that is copyright content moderation under art. 17 CDSM Directive is at this stage missing 2 central pieces: the European Commission's stakeholder consultations and Guidelines on art. 17, and the outcome of the action for annulment of art. 17 initiated by the Polish government in Case C-401/19. One important aspect that however result from our analysis is the significant changes that this new provision will bring about in the legal status of online platforms that carry out copyright content moderation, both as regards liability and the need to recognize ex ante and ex post safeguards. To a large extent, there is legal uncertainty on the extent of these changes, resulting not only from the complexity of the regime of art. 17 but also from its interplay with the Digital Services Act proposal.

**Chapter 4** follows up on this analysis with preliminary findings of our comparative legal research at national level. It aims to answer SQR(2) and SQR(3) from the perspective of national law. The findings are based on legal questionnaires carried out with national experts in ten Member States. This corresponds to our work thus far on Task T.6.1.2 (Comparative National Level Mapping). The key findings on the four parts of the questionnaire are as follows.<sup>308</sup>

First, the majority of the Member States has conceptualized service providers that store and give the public access to a large amount of protected content uploaded by their users; but the direct liability of such service providers was far from uniform in the Member States. E-Commerce, criminal and civil law concepts are alternatively or complementarily applied; and such liability is missing in some countries at all. The new art. 17 regime will necessitate the introduction of new mechanisms in the majority of the Member States.

Second, the questionnaire indicated the need for the transformation of the liability regime of OCSSPs in the Member States' laws. So far injunctions, secondary liability, safe harbour and content moderation practices were mainly present in the analysed countries, unlike complaint-and-redress mechanisms. Art. 17 will necessitate the existence of all of these elements, and hence several Member States will be required to amend their legal system to a greater extent.

Third, the analysis highlighted that the end-users might be directly liable for unauthorized uploading of protected subject matter to OCSSPs systems, but such liability is rarely enforced in the Member States. Art. 17 will also tend to push OCSSPs to authorize online users, and Member States' practices regarding end-user activities won't need to be amended heavily. On the other hand, several Member States will need to make more significant changes related to user flexibilities (especially parody, caricature and pastiche) and complaint-and-redress mechanisms. Similarly, based on the national respondents' reactions, it is conceivable that the "user right approach" of the CDSM Directive might necessitate a conceptual change in a sensible number of Member States.

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<sup>308</sup> See supra at 4.3.



Fourth, on the state-of-the art of the implementation of art. 17, the collected data evidences that its timely implementation is at stake in the majority of the Member States. (As of May 7, 2021, only the Netherlands and Hungary has implemented the said rule.)

**Chapter 5** describes our research on private regulation by platforms. This corresponds to the empirical research carried out in the context of Task T.6.1.3 (Private Regulations by Platforms: ToS, Community Guidelines). This chapter aims carries out a longitudinal mapping of online platforms structures of copyright content moderation with the aim of answering SQR(4), SQR(5), and SQR(6). At this stage, our preliminary findings seem to point to four general conclusions. First, platforms' copyright content moderation rules became more complex over time. Second, platforms' role became more important – but discursive focus remained on users. Third, copyright content moderation lost preponderance. That is to say, rules that mention copyright-related terms explicitly (what we named direct rules) became less common in platforms' regimes. Fourth, regulation alone does not seem capable of explaining differences between what we term mainstream and alternative platforms.<sup>309</sup>

Finally, as regards **next steps**, we will in the coming months refine and complete our analysis in T6.1 (Mapping the regulatory framework public/private) with a view to deliver the Mapping Report (D.6.2.) in M21. In particular, this entails the following work:

- Incorporate QE's feedback in the report;
- Refine conceptual framework and methodology (Chapter 2);
- In subtask T6.1.1 EU Level Mapping, incorporate new developments (EC guidelines on art. 17 CDSM Directive and CJEU case law) in the analysis, update analysis in light of new scholarship, and conclude drafting of Chapter 3;
- In subtask T6.1.2 Comparative National Level Mapping, refine analysis and update in light of national implementations (due by 7 June 2021) to the extent possible with available resources;
- In Subtask T6.1.3 Private Regulations by Platforms: ToS, Community Guidelines, conclude analysis on remaining online platforms and refine analytical framework.

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<sup>309</sup> See supra at 5.3.



## References

[To be inserted in Final Report]



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## Annexes



## Annex I. Phase 1 Questionnaire National Legal Mapping

[To be inserted in Final Report]



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