

Final 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
DMCA	Digital Millenium Copyright Act
DSA	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
NTD	Notice-and-takedown
NSD	Notice-and-staydown
OCSSP	Online content-sharing service provider
P2B	Platform to Business
Technical Directive	Standards 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
T&Cs	Terms and Conditions
TRIPS	Agreement on Trade Related Aspects in intellectual Property



UGC	User-generated content
UDHR	Universal Declaration of Human Rights
VLOP	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 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 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? This is further broken down into several sub-research questions (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? (2): How is the private and public regulatory framework for content moderation for online platforms structured? (3): How do the various elements of that regulatory framework interact? (4): How are copyright content moderation rules organized by platforms into public documents? (5): Which copyright content moderation rules do different platforms employ to regulate copyright, and how have they changed over time? (6): How do platforms' automated copyright content moderation systems work? (7): How are the various elements of the regulatory framework and the online platforms' Terms and Conditions 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. The analysis clarifies our terminology, distinguishes between platforms governance and regulation, elucidates the concept of online platform that anchors our analysis, and positions our research in the context of regulation “of”, “by” and “on” platforms. In this respect, our legal analysis focuses on the regulation “of” platforms and our empirical analysis on a subset of the regulation “by” platforms, mainly their T&Cs. The chapter further advances a working definition of “copyright content moderation” as the activities undertaken by providers of hosting services aimed at detecting, identifying and addressing content or information that is illegal under EU copyright law and is incompatible with their T&Cs, provided by recipients of the service, including measures taken that affect the availability, visibility and accessibility of that illegal content or that information, or the recipients' ability to provide that information. Finally, we outline a possible approach to define access to culture (from a descriptive and normative perspective) for purposes of content moderation.

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. The chapter starts with an analysis of the baseline regime from which art. 17 CDSM Directive departs from as regards the legal status of copyright content moderation by online platforms, which is mostly set by the Court's interpretation of arts 3 and 8(3) InfoSoc Directive – on direct liability for communication to the public and injunction against intermediaries –and arts 14 and 15 e-Commerce Directive – on the hosting liability exemption and the prohibition on general monitoring obligations. We explain this case law and its implications for platform liability and content moderation obligations up to its most recent instalment in *YouTube and Cyando*, and how developments contributed to the proposal and approval of art. 17 CDSM Directive. The heart of the analysis in this chapter is the regime of art. 17 CDSM Directive, which we carry out in light of existing scholarship, the Commission's Guidance, and the AG Opinion in Case C-401/19. We detail the different components of this hybrid regime, including the creation of a new legal category of “OCSSPs”, the imposition of direct liability on OCSSPs for content they host and provide access to, the merged authorization regime for acts of OCSSPs and their users, the *lex specialis* nature of art. 17 in relation to art. 3 InfoSoc and art. 14 e-Commerce Directive, the relationship between the general monitoring obligation in art. 15 e-Commerce and art. 17(8) CDSM Directive, the complex liability exemption mechanism comprised of best efforts obligations on OCSSPs (to obtain an authorization and to impose preventive and reactive measures) in art. 17(4), and the substantive and procedural safeguards in the form of user rights and in-/out-of-platform (complaint and) redress mechanisms in art. 17(7) and (9).

Crucially, our analysis highlights the primacy of user rights (as obligations of result) over preventive measures (as obligations of best efforts) and provides a critical analysis of the Commission's Guidance in this respect, drawing from the AG Opinion in C-401/19. In particular, we doubt that the Guidance's approach to automated content moderation for “manifestly infringing” content and “earmarked” content is consistent with previous case law, the fundamental right to freedom of expression and the prohibition on general monitoring. We further provide a detailed analysis of the interplay between art. 17 and the DSA, arguing that multiple provisions in the DSA may apply to OCSSPs, particularly the due diligence obligations for online platforms. Another important conclusion from our analysis is the emergence of a bifurcated legal framework for online platforms engaging in copyright content moderation. On the one hand, OCSSPs are subject to the regime of art. 17 as regards liability and content moderation. On the other hand, non-OCSSP providers are subject to the pre-existing regime under the InfoSoc and e-Commerce Directives, as interpreted by the CJEU (most recently in *YouTube and Cyando*). The structural differences in the regimes may lead to further fragmentation, on top of the fragmentation that is to be expected by the national implementations of the complex mechanisms in art. 17 CDSM Directive. To this we must add the application of the horizontal rules on content moderation liability and obligations arising from the DSA. In sum,



the multi-level and multi-layered EU legal landscape on copyright content moderation that emerges from our mapping analysis is extremely complex.

Chapter 4 then follows with a detailed analysis of the 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 addressed the direct and indirect liability of intermediaries, end-users' liability in the pre-CDSM Directive landscape. The questionnaire also tracked the implementation experiences of the Member States related to art. 17 of the new directive. The collected data highlighted similar and remarkably different doctrinal and practical issues present in the Member States' legal systems. This, on the one hand, confirms the validity of the need for harmonization at EU level. On the other hand, due to these differences Member States face significantly different challenges; hence, it is both plausible and likely that Member States will implement art. 17 CDSM Directive with notable differences. This can ultimately challenge the effectiveness of the newly introduced regime.

Chapter 5 maps out the copyright content moderation structures of key social media platforms, with a focus on their Terms and Conditions (T&Cs) (rules) and automated systems. This corresponds to the empirical research carried out in the context of T.6.1.3 (Private Regulations by Platforms: ToS, Community Guidelines). Looking into a sample of 15 mainstream, specialised and alternative platforms, the chapter first explores which kinds of public documents and rules these platforms have adopted to regulate copyright content moderation, then examines in detail how the rules of six of those platforms changed over time, and finally discusses and compares three automated copyright content moderation systems. Based on these analyses, the chapter suggests that two dual processes seem to mark the development of platforms' copyright content moderation structures over time. First, complexification/opacification. Our empirical work indicates that virtually all 15 platforms' T&Cs have become more intricate, in various ways and to different extents, a process that was deepened by the emergence of automated copyright content moderation systems. It seems evident that the structures we studied became increasingly harder to understand and, sometimes, observe. But opacification was neither necessarily not necessarily justifiable. We term the second process platformisation/concentration, that is, when platforms alter their rules so as to subsume copyright content moderation to their interests, logics and technologies – without necessarily shifting their discursive focus from users-oriented rules. As with complexification, platformisation has been experienced differently by different platforms and deepened by the rise of automated systems. This has seemingly led to a concentration of power in the hands of not only platforms themselves but large rightsholders as well, the chapter argues.

Chapter 6 provides the conclusions from our mapping report and identifies next steps in the project.



1. Introduction

This Report describes the results 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. The nature of the research described in this report is that of a mapping exercise, on which the subsequent evaluative work in WP6 is developed, in particular the deliverables D.6.3 (Final Evaluation and Measuring Report - impact of moderation practices and technologies on access and diversity) and D.6.4 (Best Practices and Policy Recommendations Brief).

This mapping report consists of six chapters. This Chapter 1 includes a brief introduction and outline of the Report. Chapter 2 identifies our research questions, sets out our conceptual framework and methodology. The main research question of this 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 Report, we can divide this research question in the following seven sub-research questions (SQR).

- SQR(1): How to conceptualise and approach from a methodological perspective 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 into public documents?
- SQR (5): Which copyright content moderation rules do different platforms employ to regulate copyright, and how have they changed over time?
- SQR (6): How do platforms' automated copyright content moderation systems work?
- SQR(7): How are the various elements of the regulatory framework and the online platforms' Terms and Conditions 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 work on Task T.6.1.1 (EU Level Mapping). Our focus here is the legal regime of art. 17 of the Copyright in the Digital Single Market (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 Directive, followed by a snapshot of the legal regime, including remarks relating to the European Commission's stakeholder consultations and Guidance 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 (DSA) proposal.

Chapter 4 then follows with a detailed analysis of the 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 addressed the direct and indirect liability of intermediaries, end-users' liability in the pre-CDSM Directive landscape. The questionnaire also tracked the implementation experiences of the Member States related to art. 17 of the new directive. The collected data highlighted similar and remarkably different doctrinal and practical issues present in the Member States' legal systems. This, on the one hand, confirms the validity of the need for harmonization at EU level. On the other hand, due to these differences Member States face significantly different challenges; hence, it is both plausible and likely that Member States will implement art. 17 CDSM Directive with notable differences. This can ultimately challenge the effectiveness of the newly introduced regime.¹

Chapter 5 uses qualitative methods to map out the copyright content moderation structures of key social media platforms, with a focus on their Terms and Conditions (rules) and automated systems. This corresponds to the empirical research carried out in the context of Task T.6.1.3 (Private Regulations by Platforms: ToS, Community Guidelines). The chapter first presents empirical findings regarding which kinds of public documents and rules have been adopted by a sample of 15 platforms, categorised as *mainstream* (Facebook, YouTube, Instagram, Twitter, SoundCloud), *alternative* (Diaspora, Mastodon, DTube, Pixelfed, Audius) and *specialised* (Vimeo, Twitch, Pornhub, FanFiction, Dribbble). It also provides an in-depth longitudinal examination of how the copyright content

¹ NB in a subsequent revision to this report we will include the findings from the comparative legal analysis of the national implementation of art. 17 in the same ten EU Member States.



moderation rules of six case studies (Facebook, SoundCloud, PornHub, FanFiction, Diaspora, and DTube) changed since these platforms' launch, as well as a comparison between three automated copyright content moderation systems: Content ID (YouTube), Audible Magic (several platforms), and Rights Manager (Facebook), with a thorough description of the last one. Then, the chapter suggests that two dual processes seem to mark the evolution of platforms' copyright content moderation structures: (1) over time, these structures became more complex (more rules, spread on more types of documents), and opaquer (harder to access and understand); and (2) the control over copyright content moderation tilted strongly towards platforms themselves, a development that helped concentrate power in the hands of both platforms and large rights holders, at the expense of ordinary users and creators. While not equally true to all platforms we analysed, *complexification/opacification*, and *platformisation/concentration* seem to be some of the clearest developments in the recent history of private regulation of copyright content moderation.

Finally, Chapter 6 concludes with a summary of our analysis and description of the next steps of our research.



2. Conceptual Framework, Methodology and Methods

This chapter identifies our interdisciplinary research questions, develops a conceptual framework, and explains our methods. The 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. We start by framing content moderation in the context of the regulation “of”, “by” and “on” platforms (2.2). We then develop a working definition of “copyright content moderation” from a legal perspective (2.3), discuss the structures of copyright content moderation from a sociological angle (2.4), examine the concept of online platform (2.5), and elucidate our approach and framing of “access to culture” (2.6). We conclude the chapter by explain the specific legal and empirical research methods used to answer our research questions (2.7).

2.1 Research Questions

The main research question of this Mapping Report 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?

For the purposes of this Report, the main research question is divided in the following sub-research questions (SQR).

- SQR(1): How to conceptualise and approach from a methodological perspective the interdisciplinary analysis 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 into public documents?
- SQR (5): Which copyright content moderation rules do different platforms employ to regulate copyright, and how have they changed over time?
- SQR (6): How do platforms’ automated copyright content moderation systems work?
- SQR(7): How are the various elements of the regulatory framework and the online platforms’ Terms and Conditions etc. likely to impact access to culture in DSM?

SQR(1) is addressed in the subsequent sections in this Chapter 2. The approach developed here informs the subsequent legal and empirical analysis. SQRs(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). SQRs (4), (5) and (6) are addressed in Chapter 5, building on the empirical methods described in this Chapter 2. SQR(7) is only framed but not addressed in this Report, since it will be the core of a subsequent normative assessment (D.6.3.) based on our mapping research here. For ease of reference, Table 1 provides a schematic representation of this relationship.

Table 1. Relationship SQRs and Chapters/Deliverables

SQR		Chapter / Deliverable
1	How to conceptualise and approach from a methodological perspective the interdisciplinary analysis of content moderation of copyright-protected content on online platforms and its impact on access to culture in the DSM?	2
2	How is the private and public regulatory framework for content moderation for online platforms structured?	3 (EU Level)
3	How do the various elements of that regulatory framework interact?	4 (National Level)
4	How are copyright content moderation rules organized by platforms into public documents?	5
5	Which copyright content moderation rules do different platforms employ to regulate copyright, and how have they changed over time?	5
6	How do platforms’ automated copyright content moderation systems work?	5



7	How are the various elements of the regulatory framework and the online platforms' Terms and Conditions etc. likely to impact access to culture in DSM?	D.6.3
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To answer these research questions, we develop and use a specific methodology, including an underlying conceptual framework and terminology (see sections 2.2 to 2.6) – and research methods (2.7). 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 2.7.2).

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:

- 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?

The framing for our analysis is that the regulatory context of platforms be understood along three dimensions, namely the regulation *of*, *by* and *on* platforms. We explain this and associated terms in greater detail 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.² From our perspective, the (scholarly) debate on “platform regulation” and “platform governance”, as well as 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.³ In general terms, governance refers to broader processes of ordering whereas regulation is the narrower term that describes intentional and usually goal-directed interventions, often of a legal nature.⁴ Others differentiate regulation and governance: regulation regards the substantive rules, whereas governance relates to the institutional framework for rule-setting.⁵

In the work of media and legal scholars researching on platforms, the terms are also often used interchangeably.⁶ 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”⁷ and not only factual rulemaking. This appears to resemble earlier discussions for instance in the “Internet Governance” literature.⁸

² 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.

³ Cf. for a discussion Jeanette Hofmann, Christian Katzenbach and Kirsten Gollatz, ‘Between Coordination and Regulation: Finding the Governance in Internet Governance’ (2017) 19 *New Media & Society* 1406.

⁴ Julia Black, ‘Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes’ (2008) 2 *Regulation & Governance* 137.

⁵ See e.g. Robert Baldwin, Martin Cave and Martin Lodge, ‘Introduction: Regulation—the Field and the Developing Agenda’, *The Oxford Handbook of Regulation* (2010) <<https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199560219.001.0001/oxfordhb-9780199560219-e-1>> accessed 17 February 2022; Christel Koop and Martin Lodge, ‘What Is Regulation? An Interdisciplinary Concept Analysis’ (2017) 11 *Regulation & Governance* 95.

⁶ See, e.g., Tarleton Gillespie, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions That Shape Social Media* (Yale University Press 2018).

⁷ 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.

⁸ See, e.g. Lee A Bygrave and Jon Bing (eds), *Internet Governance: Infrastructure and Institutions* (Oxford University Press 2009) <<https://oxford.universitypressscholarship.com/10.1093/acprof:oso/9780199561131.001.0001/acprof-9780199561131>> accessed 17 February 2022.



In the following, we explain in greater detail what is meant by regulation “of”, “on” and “by” platforms.⁹

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.¹⁰ 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.¹¹ 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 Recommendation (EU) 2018/334 on measures to effectively tackle illegal content; and many of the rules governing online platforms in the proposed DSA.¹² Our analysis in **Chapters 3 and 4** focuses on this type of regulation at the EU and national levels, respectively.

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 (Community/Policy Guidelines, etc.) adopted by platforms. Some authors go as far as to refer to terms of service as “platform law”.¹³

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). In this respect, we recognize that there exists an underexplored gap between what is stated in the substantive norms in terms of service and how algorithmic systems moderate content on platforms. Nevertheless, in the context of our empirical research we focus on selected terms of service and other norms that shape the processes, norms and technologies that meet our definition of “content moderation”. 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.*¹⁴

⁹ Related distinctions on modalities of regulation have been proposed in other areas of cyberlaw, see e.g. in the context of software, James Grimmelman, ‘Regulation by Software’ (2005) 114 *Yale Law Journal* 1719; Lawrence Lessig, ‘The New Chicago School’ (1998) 27 *The Journal of Legal Studies* 661. More recently also by social scientists in relation to platform governance, see Tarleton Gillespie, ‘Regulation of and by Platforms’, *The SAGE Handbook of Social Media* (SAGE Publications Ltd 2018) <<https://sk.sagepub.com/reference/the-sage-handbook-of-social-media/i2081.xml>> accessed 17 February 2022.

¹⁰ 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.

¹¹ ‘Santa Clara Principles on Transparency and Accountability in Content Moderation’ (*Santa Clara Principles*) <<https://santaclaraprinciples.org/images/santa-clara-OG.png>> accessed 20 January 2022.

¹² 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. For ease of reference, we refer to this legislative proposal as “DSA” in the main body of the text and “DSA proposal” in the footnotes. Unless otherwise specified, our analysis refers to the text of the original proposal and not to the amendments advanced so far in the legislative process. For further details on this process, see European Parliament, Legislative Train Schedule, DSA proposal, <https://www.europarl.europa.eu/legislative-train/theme-a-europe-fit-for-the-digital-age/file-digital-services-act>.

¹³ David Kaye, *Speech Police: The Global Struggle to Govern the Internet* (Columbia Global Reports 2019). More broadly see, e.g. Luca Belli and Jamila Venturini, ‘Private Ordering and the Rise of Terms of Service as Cyber-Regulation’ (2016) 5 *Internet Policy Review* <<https://policyreview.info/articles/analysis/private-ordering-and-rise-terms-service-cyber-regulation>> accessed 17 February 2022.

¹⁴ Art. 2(q) proposed DSA. See also the more detailed definition of “terms and conditions” in art. 2(10) P2B Regulation. For an analysis of art. 12 DSA proposal, see Naomi Appelman, João Pedro Quintais and Ronan Fahy, ‘Article 12 DSA: Will Platforms Be Required to Apply EU Fundamental Rights in Content Moderation Decisions?’ (*DSA Observatory*) <<https://dsa-observatory.eu/2021/05/31/article-12-dsa-will-platforms-be-required-to-apply-eu-fundamental-rights-in-content-moderation-decisions/>> accessed 28 August 2021; Naomi Appelman, João Pedro Quintais and Ronan Fahy, ‘Using Terms and Conditions to apply Fundamental Rights to Content Moderation’ (*Verfassungsblog*) <<https://verfassungsblog.de/power-dsa-dma-06/>> accessed 7 October 2021.



For the purposes of this report, we will adopt this definition of **terms and conditions or “T&C”** to refer to all the 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, namely those referring to copyright content moderation (defined below at 2.3) and examined in the context of our research.

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”.¹⁵ Importantly, copyright infringing content is one type of illegal content. 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 infringement 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: (i) 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 (ii) 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.

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.¹⁶ 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.

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.¹⁷

Our research 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 Defining Content Moderation: a Legal Perspective

“Content moderation” is a broad concept with fuzzy borders. Without being exhaustive, it is possible to illustrate this point by identifying a variety of definitions that fall within a wide spectrum of activities by platforms.

On the one hand, some authors advance broader – or at least more general – definitions. For instance, in an influential article, Grimmelmann defines content moderation as a *broad set of governance mechanisms* “that

¹⁵ Art. 2(g) DSA proposal.

¹⁶ See, for early influential work on this topics, Sarah T Roberts, *Content Moderation* (2017) <<https://escholarship.org/uc/item/7371c1hf>> accessed 28 April 2021; Sarah T Roberts, *Behind the Screen* (Yale University Press 2019) <<https://yalebooks.yale.edu/book/9780300235883/behind-screen>> accessed 17 February 2022.

¹⁷ See art. 17(9), second paragraph 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): “...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’ in Paul Torremans (ed), *Intellectual Property Law and Human Rights*, (4th edition, Wolters Kluwer 2020).



structure participation in a community to facilitate cooperation and prevent abuse.”¹⁸ Roberts, for her part, 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.”¹⁹ Bloch-Webha similarly defines it as “the set of practices that online platforms use to screen, rank, filter, and block user-generated content”.²⁰ Finally, Gillespie et al. have recently defined the term as “the detection of, assessment of, and interventions taken on content or behavior deemed unacceptable by platforms or other information intermediaries, including the rules they impose, the human labor and technologies required, and the institutional mechanisms of adjudication, enforcement, and appeal that support it”.²¹

On the other hand, some 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).”²² This is a narrower definition of moderation than espoused by authors above, since the authors 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 e.g., Grimmelmann’s moderation taxonomy.”²³

In this Report, while taking these definitions as a background, we develop our own working definition of “copyright content moderation”, built on the legal definition advanced in the proposed DSA.²⁴

2.3.1 The content moderation definition in the DSA proposal

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.*²⁵

The definition must be seen within its context of the DSA and would not preclude deviating definitions of “content moderation” in other areas.²⁶

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.²⁷ In other words, it applies to several types of intermediaries across the “stack” beyond the application layer²⁸, not just to types of hosting service providers.

¹⁸ James Grimmelmann, ‘The Virtues of Moderation’ (2015) 17 Yale Journal of Law and Technology <<https://digitalcommons.law.yale.edu/yjolt/vol17/iss1/2>>. See also Giovanni De Gregorio, ‘Democratising Online Content Moderation: A Constitutional Framework’ (2020) 36 Computer Law & Security Review 105374. (building on Grimmelmann’s definition).

¹⁹ Roberts, *Content Moderation* (n 16). cf. Sarah Myers West, ‘Censored, Suspended, Shadowbanned: User Interpretations of Content Moderation on Social Media Platforms’ (2018) 20 New Media & Society 4366; Robyn Caplan, ‘Content or Context Moderation?’ (Data & Society 2018) <<https://datasociety.net/library/content-or-context-moderation/>> accessed 21 February 2022.

²⁰ Hannah Bloch-Wehba, ‘Automation in Moderation’ (2020) 53 Cornell International Law Journal 41.

²¹ Tarleton Gillespie and others, ‘Expanding the Debate about Content Moderation: Scholarly Research Agendas for the Coming Policy Debates’ (2020) 9 Internet Policy Review <<https://policyreview.info/articles/analysis/expanding-debate-about-content-moderation-scholarly-research-agendas-coming-policy>> accessed 14 September 2021.

²² Gorwa, Binns and Katzenbach (n 2).

²³ Gorwa, Binns and Katzenbach (n 2).

²⁴ In this effort we will largely rely on the text of the legal proposal and not make reference to legal doctrine.

²⁵ Art. 2(p) DSA proposal.

²⁶ 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 Sebastian Felix Schwemer, Tobias Mahler and Håkon Styri, ‘Liability Exemptions of Non-Hosting Intermediaries: Sideshow in the Digital Services Act?’ (2021) 8 Oslo Law Review 4.

²⁷ The proposed definition providers of intermediary services in the DSA comprises services relating to ‘mere conduit’, ‘caching’ and ‘hosting’ (art. 2(f)), continuing the e-Commerce Directive’s structure.

²⁸ 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 ‘OSI Model’, *Wikipedia* (2022) <https://en.wikipedia.org/w/index.php?title=OSI_model&oldid=1072600519> accessed 20 February 2022. 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.



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.²⁹

Third, in line with the scope of the DSA regulation, the *content at issue must be provided by the recipients of the service*.³⁰ 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*.³¹ 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 other exemplifies measures that relate to the user/account: termination of user account; suspension of user account.³²

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;*³³

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”.³⁴ 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 disabling *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 hosting³⁵ 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. But 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.”³⁶ 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”.

²⁹ 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., Eric Goldman and Jess Miers, ‘Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules’ (2021) 1 Journal of Free Speech Law 191, 194.

³⁰ Art. 2(b) DSA proposal: ‘recipient of the service’ means any natural or legal person who uses the relevant intermediary service.

³¹ It is also possible to conceptualise these measures to some extent as content moderation “remedies”. On this topic, under US law, see Eric Goldman, ‘Content Moderation Remedies’ [2021] Michigan Technology Law Review, Forthcoming <<https://papers.ssrn.com/abstract=3810580>> accessed 23 March 2021.

³² 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.

³³ Art. 2(o) DSA proposal. 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.

³⁴ See e.g. on this topic Sebastian Felix Schwemer, ‘Recommender Systems in the EU: From Responsibility to Regulation?’ [2021] FAccTRec Workshop ’21 <<https://papers.ssrn.com/abstract=3923003>> accessed 26 October 2021.

³⁵ Art. 14 e-Commerce Directive and 5 DSA proposal respectively. On these provisions, see our analysis below at 3.5.

³⁶ Recital 36 DSA proposal.



2.3.2 Copyright content moderation: working definition

For the purposes of this Report, we adopt as a working definition an adjusted version of that which is advanced in the DSA proposal.

- ‘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.

It is important to briefly explain some adjustments to our definition, as compared to that proposed in the DSA. 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, a term 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”.³⁷ Although we explain this in further detail in section 2.5 below, it is important to note here that (copyright) content moderation may also take place at other levels of the “stack”, which directly affects the availability of content by providers of hosting services.³⁸ 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 to date 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 in the area of copyright.

In our view, our working definition is consistent with existing (and future) EU law and it both sufficiently precise and flexible to enable the type of mapping exercise and exploratory interdisciplinary research undertaken in this Report.

2.4 The Structures of Copyright Content Moderation: a sociological perspective

From the perspective of the empirical research in this Report, we take a sociological understanding of platforms’ copyright content moderation and define it as a more or less stable ensemble of structures.

The concept of structure is overly used but rarely defined. Perhaps the clearest theoretical articulation of it was proposed by Sewell³⁹. By reviewing and critiquing the work of key social theorists, Sewell advances his own definition of structures as composed of two kinds of elements. On the one hand, he argues, structures are made of 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”⁴⁰. *Resources*, on the other hand, are not symbolic but actual, and comprise both non-human (“objects, animate and inanimate, naturally occurring or manufactured”) and

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

³⁸ 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 and Styri (n 26); Sebastian Felix Schwemer, ‘Trusted Notifiers and the Privatization of Online Enforcement’ (2019) 35 Computer Law & Security Review 105339.

³⁹ Sewell William H, ‘A Theory of Structure: Duality, Agency, and Transformation’ (1992) 98 American Journal of Sociology 1.

⁴⁰ Sewell (n 39) 8.



human (“physical strength, dexterity, knowledge”) elements, which are used to “enhance or maintain power” and are “unevenly distributed”⁴¹. Structures retain some level of independence but are continuously shaping one another, Sewell posited.

How can we translate this conceptualization to platforms’ regulation of copyright? In this context, *schemas* might include the bundle of abstract normative assumptions that various actors (platforms, users, states) hold of what copyright is, whom it serves, and how it should or not be protected and enforced. There is much to be said – and studied – about these schemas. Yet, this report focuses on the *resources* that *platforms* create and employ to regulate copyright. There are innumerable elements that could be understood as platforms’ copyright content moderation resources: what their owners or executives and employees know about copyright legislation, their computational skills, the physical devices and computational code that underpins platforms’ interfaces, the actions taken by platforms’ controllers and employees, to name a few.

Two kinds of resources appear to be particularly relevant, though. Firstly, the (platform’s) *rules* that copyright content moderation are based on. Here, rules should not be mistaken for unsaid social norms. Rather, they are the “publicly fixed codifications”⁴² in which platforms explain to users, regulators and – to some extent – their own employees how copyright content moderation is and ought to be executed in their services.

Rules play a dual role, which is simultaneously *normative* and *performative*. Evidently, they are a central element in the definition of what is permitted and prohibited to not only users but platforms themselves. For even when these provisions do not explicitly define what platforms ought to do, they unavoidably make platforms responsible for their nature (are these rules ethical, legal, realistic?) and enforcement (do platforms follow their own precepts?). That is, the very public codification of what counts as an acceptable conduct creates expectations of accountability that are potentially mutual, even if radically unequitable. Since normativity is inherent to rules, our empirical analysis understands that the very examination of which copyright content moderations provisions are employed by platforms suffices to map out their normative role.

The second role is less evident and deserves further clarification. Our argument is that, by the virtue of being public, these rules are, inevitably, an organizational performance.⁴³ When a platform publishes its TOS, it most certainly takes into consideration how others will understand them, and the ways in which this understanding will reflect back on opinions and assumptions about the platforms. Rules *might* lead users (or at least influence them) to leave or join a social network, prompt policymakers to seek legal action or refrain from doing so, attract and repel potential employees and investors. In fact, rules will shape how people understand a platform even if the platform does not consciously approach such rules as a performance. For what a platform is depends considerably on what it aspires to be, and rules unavoidably suggest such telos.

Performativity directs our attention to the discursive aspects of rules. Put another way, how these provisions are conveyed matters. Our empirical research highlights two of those discursive aspects that, in our view, seem to be particularly relevant in the context of digital platforms. One of them refers to the rules’ location, i.e., the sort of public documents whereby platforms choose to communicate their codes – termed here as Terms and Conditions or T&Cs. While this expression often refers to documents whose language resembles that of formal contracts (e.g., Terms of Service), it means here any public document drafted and published by platforms with the intention to communicate their rules. Different T&Cs-related documents enjoy different statuses and visibilities. It is reasonable to suppose, for instance, 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 or Community Guidelines. At the same time, it might also be that the Help page provision might at least be read – while those in the Terms of Service most likely will never be seen by most users. Second, there is the issue of how much emphasis a platform gives to a certain rule in their documents. It is likely that different rules are understood by companies as being more important than others, and thus, as deserving more prominence. One way of assessing the discursive prominence of a rule is measuring how many times such provision is mentioned in the documents of a given platform. It is logical to assume that a rule that appears only once in one version of a given document and then vanishes is considered by the platform as less relevant than a rule that is mentioned several times in several documents for several years. This is not to say that users will indeed perceive rules that are more often mentioned as necessarily more important, of course. But from the perspective of the platforms, the one our research considers, charting these emphases via the number of mentions offers an entry point into platforms’ priorities and concerns.

⁴¹ Sewell (n 39) 9–10.

⁴² Sewell (n 39) 8.

⁴³ Tarleton Gillespie (n 6).



The second structure our empirical research investigates is the systems that platforms deploy to automatically enforce copyright. By this we mean the ways in which companies can automatically identify and remove supposedly infringing content through computational techniques, in particular filtering through “fingerprinting”.

Our interest in these systems stems from their sheer importance. The enforcement of copyright in the digital sphere was an early challenge of internet regulation and has become one of the first use-cases for the employment of large-scale algorithmic content moderation systems. While online copyright enforcement practices were initially shaped by laws such as the DMCA under US law⁴⁴, the algorithmic copyright enforcement systems developed in the past two decades might extend beyond what is legally mandated and operate in a largely automated fashion. Over time, these systems have become the primary structures of some platforms’ copyright content moderation efforts. Yet, in contrast to rules, these systems are not a typical or single resource; they are far from trivial. Thus, it seems necessary to clarify in more depth how scholars have defined and criticized these systems.

Generally, automated copyright content moderation systems (sometimes called simply if vaguely “copyright filters”) employ algorithms to automatically identify copyrighted works within a set of content, and to enforce the will of rights holders by carrying out predefined actions, such as blocking, monitoring or monetising the detected piece of content. The emergence of these systems has been described as part of a broader shift towards algorithmic content moderation and algorithmic law enforcement by online intermediaries.⁴⁵ In the special case of copyright enforcement, the rise of these automated systems has been at least in part facilitated or made possible by regulatory factors such as the DMCA in the US (in 1998), which led to an immense volume of takedown requests sent by copyright owners to online platforms, especially those mainstream large-scale platforms originating from the US.⁴⁶ In Europe, the turn towards this type of enforcement measures was at least partially enabled (for notice and action measures) by the implementation of the 2000 e-Commerce Directive, in particular through the application of the liability exemptions or “safe-harbours” for providers of hosting services, as better described in Chapter 3. To be sure, actual deployment of automated moderation tools appears to have started only later, as the technological solutions available to platforms developed sufficiently to enable their application.

Prompted in part by these legal developments and increasing pressure from rightsholders, social media platforms such as YouTube (in-house) and digital technology companies such as Audible Magic (as a third-party provider) started to develop their own solutions for how to deal with copyright-protected content (see Chapter 5). Eventually, these systems evolved beyond a mere notice-and-takedown approach to the incorporation of notice-and-staydown and pre-emptive filtering mechanisms. This evolution has been described as a “shift from an ex-post to an ex-ante system of technological enforcement of the law”.⁴⁷ In recent years, this development has been further amplified through the proposal and eventual adoption of art. 17 CDSM Directive, which as we detail below strongly incentivizes or even requires the adoption of preventive measures by online platforms, namely, to filter uploaded content for copyright-protected content.⁴⁸ This provision has been described as the “*de facto* imposition”⁴⁹ of the use of automated systems for online platforms.

A variety of concerns have been raised about the employment of these systems. A first set of problems has been identified in relation to their lack of accountability. As Maayan Perel and Niva Elkin-Koren lay out, this is evidenced by 1) a lack of transparency regarding the ways in which these systems operate and which content they block, 2) a lack of due process, i.e., the absence of standardized and legally mandated redress mechanisms, which allow users to dispute algorithmic decisions, as well as 3) a lack of public oversight.⁵⁰ Another problematic factor about accountability is seen in the convergence of the hitherto separate functions of law enforcement and adjudication powers in the hands of private companies.⁵¹ The introduction of automated copyright enforcement

⁴⁴ On which, see generally Matthew Sag, ‘Internet Safe Harbors and the Transformation of Copyright Law’ (2017) 93 Notre Dame Law Review <<https://papers.ssrn.com/abstract=2830184>> accessed 1 September 2021; Pamela Samuelson, ‘Pushing Back on Stricter Copyright ISP Liability Rules’ [2020] Michigan Technology Law Review, Forthcoming <<https://papers.ssrn.com/abstract=3630700>> accessed 13 July 2020.

⁴⁵ Maayan Perel (Filmar) and Niva Elkin-Koren, ‘Accountability in Algorithmic Copyright Enforcement’ (2016) 19 Stanford Technology Law Review 473.

⁴⁶ Maayan Perel (Filmar) and Niva Elkin-Koren, ‘Accountability in Algorithmic Copyright Enforcement’ (Social Science Research Network 2016) SSRN Scholarly Paper ID 2607910 477 <<https://papers.ssrn.com/abstract=2607910>> accessed 3 September 2021.

⁴⁷ Maria Lilla Mongnani, ‘Virtues and Perils of Algorithmic Enforcement and Content Regulation in the EU - A Toolkit for a Balanced Algorithmic Copyright Enforcement’ (2020) 11 Journal of Law, Technology, & the Internet 1. See also Thomas Riis and Sebastian Felix Schwemer, ‘Leaving the European Safe Harbor, Sailing Towards Algorithmic Content Regulation’ (2019) 22 Journal of Internet Law 1.

⁴⁸ See Chapter 3 below.

⁴⁹ Schwemer and Schovsbo (n 17).

⁵⁰ Perel (Filmar) and Elkin-Koren (n 45).

⁵¹ Perel (Filmar) and Elkin-Koren (n 45) 481.



has hence been described as “an example of a controversial institutional shift from public to private modes of regulation”.⁵²

In this way, automated copyright content moderation systems are seen a potential threat to the protection of fundamental rights. Indeed, “the use of opaque codes to implement discretionary legal doctrines that effectively adjudicate online content, at the hands of private, profit-maximizing mega-players, can have worrying impacts over freedom of speech and the rule of law”.⁵³ Specifically, these criticisms concern the possibility of overenforcement, i.e., the erroneous removal of content because of automated decision-making. In the US, the inability of algorithmic fingerprinting to recognise valid copyright exceptions such as fair use has been described as the “de facto loss of the fair use exception”⁵⁴ – a problem to which no automated solution appears to exist⁵⁵. In Europe, as discussed below, much of the same freedom of expression-based concerns have challenge before the CJEU on the validity of art. 17, as well as to an interpretation of the provision that recognised the normative superiority of exceptions and limitations in paragraph (7) (as obligations of result) over preventive measures in paragraph 4 (as obligations of best efforts), as well as the requirement of ex ante safeguards to prevent the negative consequences from the implementation of preventive measures of filtering content by platforms.⁵⁶

Studies have furthermore problematized the potential negative effects of over blocking on cultural diversity.⁵⁷ As Sabine Jacques and colleagues point out, regarding YouTube’s Content ID, the automated nature of algorithmic fingerprinting can result in “a chilling effect on creativity, diversity and more generally, citizen participation in a democratic society”.⁵⁸

Finally, authors have mentioned the risk of built-in biases and the deepening of power imbalances that favour the interests of specific user groups at the expense of others. As it has been argued about Content ID, the system was developed in cooperation between YouTube and large rights holder organizations.⁵⁹ It is not a surprise, then, that large rights holders are said to greatly benefit from these systems, largely against the interests of ordinary users and less powerful creators, in areas such as dispute resolution mechanisms⁶⁰ and monetisation.⁶¹

These theoretical premises lead us to propose the empirical sub-research questions (SQR) in this research, which we restate below, with additional remarks:

- How are copyright content moderation rules organized by platforms into public documents? (SQR4)

In not making assumptions about the location of rules, we realised that there are various ways in which these rules could be organised into public documents. This organizational element also matters if we are to consider users’ ability to access and know platforms’ copyright content moderation rules.

- Which copyright content moderation rules do different platforms employ to regulate copyright, and how have they changed over time? (SQR5)

Considerations about organization aside, one of our main goals was to understand what these rules are. This involves analysing the number of rules (and mentions to rules) over time. We do that using rules’ *normative types*, *subjects*, and *normative periods* – expressions we explain below in Chapter 5.

- How do platforms’ automated copyright content moderation systems work? (SQR6)

This question aims to map out the different systems used by platforms to moderate copyright-protected content automatically and explain, in as much detail as our data allow, how these systems work. By “work” here we mean not merely their mechanics but also the (unequal) relationships between users, platforms and rights holders they enable.

⁵² ‘Playing with Machines: Using Machine Learning to Understand Automated Copyright Enforcement at Scale - Joanne E Gray, Nicolas P Suzor, 2020’ 2 <<https://journals.sagepub.com/doi/full/10.1177/2053951720919963>> accessed 3 September 2021.

⁵³ Perel (Filmar) and Elkin-Koren (n 45).

⁵⁴ Dan L Burk, ‘Algorithmic Fair Use’ (2019) 86 University of Chicago Law Review 283.

⁵⁵ Burk (n 54) 306.

⁵⁶ See below at 3.4.9.

⁵⁷ S Jacques and others, ‘The Impact on Cultural Diversity of Automated Anti-Piracy Systems As Copyright Enforcement Mechanisms: An Empirical Study of YouTube’s Content ID Digital Fingerprinting Technology’ (2017).

⁵⁸ Jacques and others (n 57) 29.

⁵⁹ Rebecca Tushnet, ‘All of This Has Happened before and All of This Will Happen Again: Innovation in Copyright Licensing’ [2014] Georgetown Law Faculty Publications and Other Works <<https://scholarship.law.georgetown.edu/facpub/1459>>.

⁶⁰ Jacques and others (n 57).

⁶¹ Grosse Ruse-Khan and Henning, ‘Automated Copyright Enforcement Online: From Blocking to Monetization of User-Generated Content’ (Cambridge University Press 2021) <<https://papers.ssrn.com/abstract=3565071>> accessed 8 May 2020.



2.5 “Online platforms” engaged in content moderation

2.5.1 The “platform” in platform regulation

The focus of our analysis is 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 and associated terms 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.

2.5.1.1 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”.*⁶²

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.⁶³ 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.⁶⁴

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:⁶⁵ a search engine’s advertising service;⁶⁶ an online sales platform;⁶⁷ a social networking platform;⁶⁸ Internet access providers;⁶⁹ a provider of an open Wi-Fi network.⁷⁰

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”.⁷¹ This term underpins the e-Commerce

⁶² Karine Perset, ‘The Economic and Social Role of Internet Intermediaries’ (OECD Publishing 2010) 171 <<https://ideas.repec.org/p/oec/stiaab/171-en.html>> accessed 20 February 2022.

⁶³ See, e.g., recitals 33 and 59, and arts 5(1)(a) and 8(3) 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); art. 11 Enforcement Directive.

⁶⁴ See section 4 e-Commerce Directive, arts 12-15. See also references to “intermediary” or “intermediaries” in recitals 14, 40, 45, 50.

⁶⁵ See J van Hoboken and others, *Hosting Intermediary Services and Illegal Content Online: An Analysis of the Scope of Article 14 ECD in Light of Developments in the Online Service Landscape* (Brussels European Commission 2018) <<https://dare.uva.nl/search?identifier=db3fa078-e225-4336-95ec-5d6f25731799>> accessed 23 August 2020; Sebastian Felix Schwemer, ‘On Domain Registries and Unlawful Website Content: Shifts in Intermediaries’ Role in Light of Unlawful Content or Just Another Brick in the Wall?’ (2018) 26 *International Journal of Law and Information Technology* 273.

⁶⁶ CJEU, 23 March 2010, case C-236/08 -Google France SARL and Google Inc. v Louis Vuitton Malletier SA et al (Google France/Louis Vuitton).

⁶⁷ CJEU, 12 July 2011, case C-324/09 -L’Oréal SA and Others v eBay International AG and Others (L’Oréal/Ebay)

⁶⁸ CJEU, 16 February 2012, case C-360/10 -Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV (Netlog.)

⁶⁹ CJEU, 16 May 2009, case C-557/07 LSG v Tele2; CJEU, 24 November 2011, case C-70/10, Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) (Scarlet Extended)

⁷⁰ CJEU, 15 September 2016, case C-484/14 Tobias Mc Fadden v Sony Music Entertainment Germany GmbH (McFadden)

⁷¹ 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.



Directive⁷² and is defined in the Technical Standards Directive.⁷³ The Technical Standards Directive advances the following complex autonomous definition of information society “service”:⁷⁴

(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”.⁷⁵ 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.⁷⁶ They can be represented as follows.

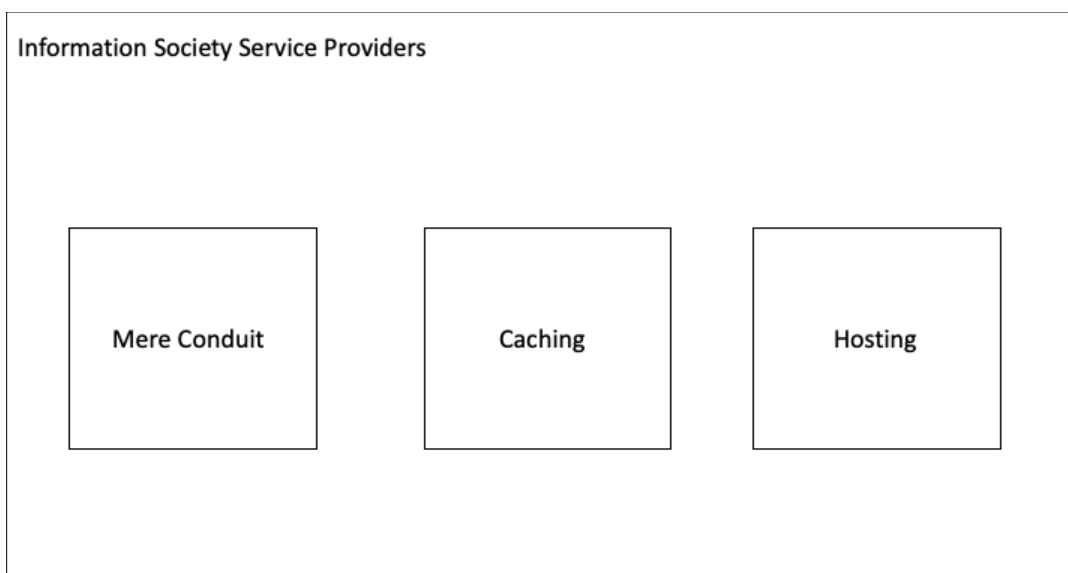


Figure 1. ISSPs Functions e-Commerce Directive

⁷² See the definitions in art. 2(a) and (b) E-Commerce Directive

⁷³ 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).

⁷⁴ Art. 1(1)(b) Technical Standards Directive.

⁷⁵ Annex I Technical Standards Directive. On the criteria and potential grey areas see e.g. Content and Technology (European Commission) Directorate-General for Communications Networks and others, ‘Legal Analysis of the Intermediary Service Providers of Non-Hosting Nature: Final Report’ (Publications Office of the European Union 2020) 29–30 <<https://data.europa.eu/doi/10.2759/498182>> accessed 22 February 2022.

⁷⁶ See arts 12 to 15 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 of the service.”⁷⁷ 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”. But this commonly used terminology is not necessarily accurate from a legal standpoint.

Take for instance the Regulation of Platform-to-Business Relations (P2B Regulation)⁷⁸, 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”⁷⁹, which does not necessarily overlap with the notion of provider of hosting services.⁸⁰

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.⁸¹

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.⁸² 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).⁸³ The placement of OCSSPs within the context of the functions of ISSPs in the e-Commerce Directive can be represented as follows.

⁷⁷ Art. 14(1) E-Commerce Directive.

⁷⁸ 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).

⁷⁹ 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”.

⁸⁰ 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.

⁸¹ See *infra* at 3.1.

⁸² See *infra* at 3.4.1. OCSSPs are defined in art. 2(6), with further guidance in recitals 62 and 63.

⁸³ NB there is room to argue that the specific nature of the of the legal definition of OCSSP affects the nature of its “hosting function”.



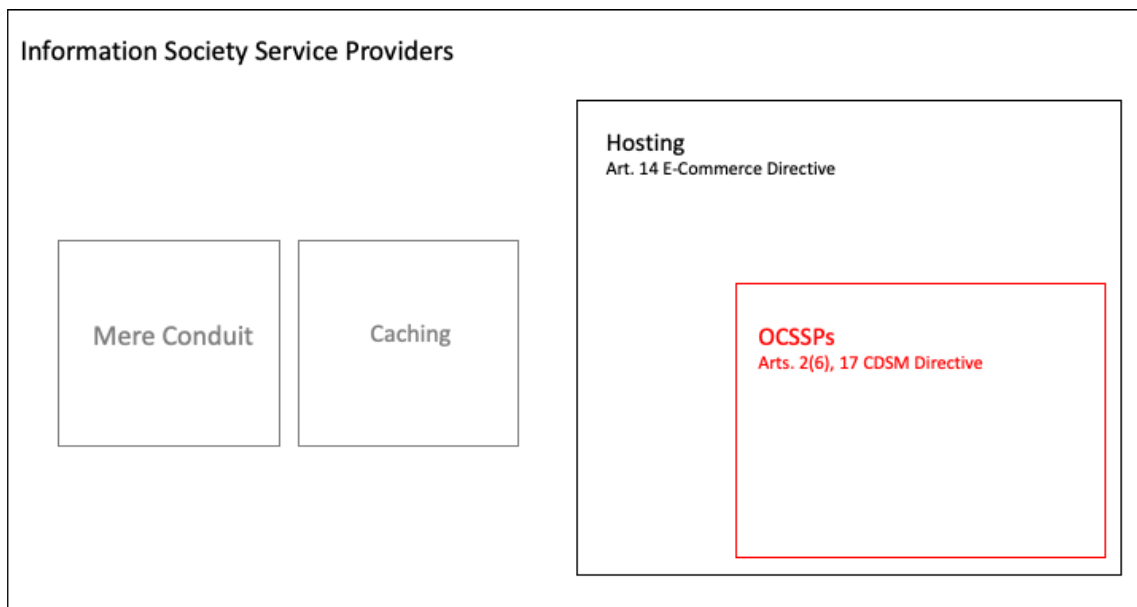


Figure 2. OCSSPs in the context of ISSPs

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”⁸⁴ 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).

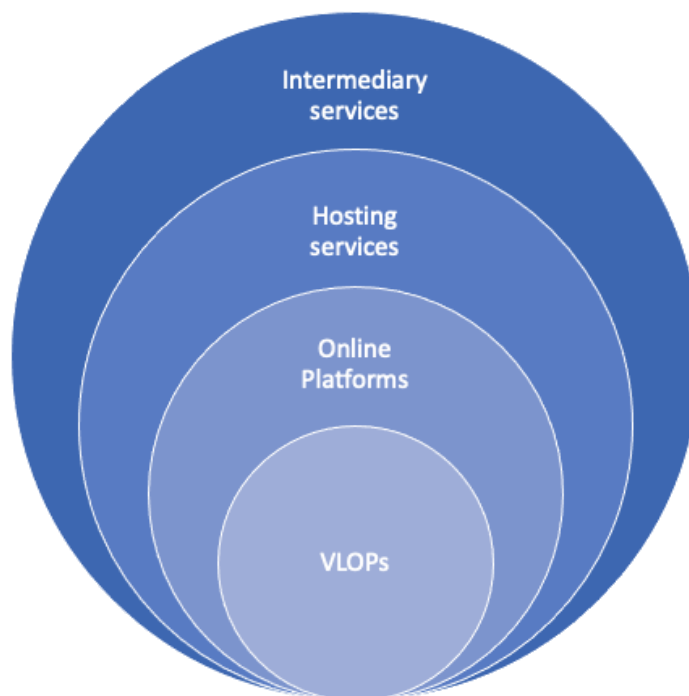


Figure 3. Intermediary service provider categories DSA Proposal⁸⁵

⁸⁴ Art. 2(a) DSA proposal.

⁸⁵ Image adapted from: European Commission, ‘The Digital Services Act: Ensuring a Safe and Accountable Online Environment - Which Providers Are Covered?’ (European Commission - European Commission) <https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en> accessed 21 February 2022.



Intermediary services as are defined as services of “mere conduit”⁸⁶, “caching”⁸⁷ and hosting⁸⁸. 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]”.⁸⁹

Hosting services are those that consist of the storage of information provided by, and at the request of, a recipient of the service.⁹⁰ They include also the subsequent categories of online platforms and VLOPs.

“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 information³, 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.”.⁹¹ In simple terms, VLOPs are those online platforms that provide their services to a number of average monthly active recipients of the service in the EU equal to or higher than 45 million.⁹² As we explain in detail below⁹³, the definition of OCSSP in the CDSM Directive covers online platforms and VLOPs (see representation in Figure 4).

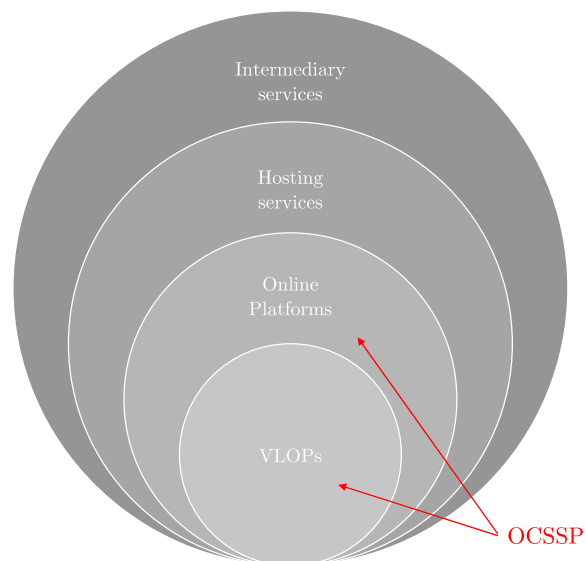


Figure 4. OCSSPs as online platforms in DSA framework

2.5.1.2 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 literature. With regards to digital platforms, de Reuver, Sørensen & Basole (2018) identify three main features, namely: (1) platforms are technologically mediated; (2)

⁸⁶ 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

⁸⁷ Art. 2(f) DSA proposal.

⁸⁸ 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) DSA proposal.

⁸⁹ European Commission, ‘The Digital Services Act: Ensuring a Safe and Accountable Online Environment - Which Providers Are Covered?’ (n 85). (“Which providers are covered?”). NB that the correct reference should probably be to Internet “registries” rather than “registrars”.

⁹⁰ Art. 2(f) DSA proposal.

⁹¹ Art. 2(h) DSA proposal

⁹² Art. 25 DSA proposal.

⁹³ See *infra* at 3.4.1.



platforms enable interactions between different types of users; (3) platforms allow those types of users to implement specific activities.⁹⁴

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.”⁹⁵

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”.⁹⁶

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”.⁹⁷

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 Dijck, Poell & de Waal posit, but are 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”.⁹⁸ An example of “ecosystem” is the one formed mostly by “Big Tech” companies (Alphabet, Apple, Facebook, Amazon, and Microsoft), they say.⁹⁹

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”.¹⁰⁰ 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”.¹⁰¹ 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.”¹⁰²

⁹⁴ Mark de Reuver, Carsten Sørensen and Rahul C Basole, ‘The Digital Platform: A Research Agenda’ (2018) 33 *Journal of Information Technology* 124.

⁹⁵ Luca Belli, Primavera de Filippi and Nicolo Zingales, ‘IGF Coalition on Platform Responsibility: Recommendations on Terms of Service and Human Rights’ (IGF Coalition on Platform Responsibility 2015) <<https://www.intgovforum.org/cms/documents/igf-meeting/igf-2016/830-dcpr-2015-output-document-1/file>>.

⁹⁶ ‘The Politics of “Platforms” - Tarleton Gillespie, 2010’ 352 <<https://journals.sagepub.com/doi/10.1177/1461444809342738>> accessed 20 February 2022.

⁹⁷ Benjamin H Bratton, *The Stack: On Software and Sovereignty* (MIT Press 2016) 171.

⁹⁸ José van Dijck, Thomas Poell and Martijn de Waal, *The Platform Society* (Oxford University Press 2018) 4 <<https://oxford.universitypressscholarship.com/10.1093/oso/9780190889760.001.0001/oso-9780190889760>> accessed 20 February 2022.

⁹⁹ van Dijck, Poell and de Waal (n 98) 4.

¹⁰⁰ Jean-Christophe Plantin and others, ‘Infrastructure Studies Meet Platform Studies in the Age of Google and Facebook’ (2018) 20 *New Media & Society* 293.

¹⁰¹ van Dijck, Poell and de Waal (n 98) 12–13.

¹⁰² Gillespie, 2018. Gillespie (n 9).



2.6 Defining “access to culture”

Our main research question 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”.¹⁰³ 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, 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.

2.6.1 “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’.*¹⁰⁴

(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.’*

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. In EU law as interpreted by the CJEU, this is complicated by a relatively low threshold of originality for the copyright protection of works, broad exclusive rights and enforcement measures recognised to rights holders, and relatively narrow exceptions and limitations to the benefit of users.¹⁰⁵

Online platforms constitute an important gateway for accessing protected content. The stress field of copyright-protected content and online platforms also concerns several fundamental rights¹⁰⁶, such as the right to property (art. 17(2) CFR), the rights to privacy and data protection (arts 7 and 8 CFR), the freedom of expression (art. 11 CFR), freedom of arts (art. 13 CFR), and the freedom to conduct a business (art. 16 CFR).

For the purpose of the following analysis, we distinguish between two dimensions of the concept of “access to culture” in relation to copyright content moderation by online platforms: a descriptive dimension (2.6.2); and a normative dimension of the concept (2.6.3). From each dimension we derive two different models against which to assess the impact of copyright content moderation on access to culture.

2.6.2 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”.¹⁰⁷ Nonetheless, for the analysis of the descriptive dimension of access to culture, we set out

¹⁰³ reCreating Europe, ‘ReCreating Europe - The Project: Discover the 4 Pillars of ReCreating Europe’ <<https://www.recreating.eu/the-project/>> accessed 25 February 2022.

¹⁰⁴ Cf. art. 15 of the International Covenant on Economic, Social and Cultural Rights.

¹⁰⁵ 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).

¹⁰⁶ 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.”

¹⁰⁷ Kenneth Train, *Optimal Regulation: The Economic Theory of Natural Monopoly* (MIT Press 1991) 297.



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.¹⁰⁸

Transferred to the context of copyright content moderation¹⁰⁹ 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 2 below.

Table 2. Error Types in Copyright Content Moderation

		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).¹¹⁰ Similarly, if legal content is not taken down, there is no error in the moderation (true negative).¹¹¹

The second set of outcomes relates to false results of content moderation, i.e., the presence of error.¹¹² 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 (1) any moderation by intermediaries that comes with type-I errors (false positives) or (2) type-II errors (false negatives) is assumed to have a negative impact on access

¹⁰⁸ 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.

¹⁰⁹ 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.

¹¹⁰ 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.

¹¹¹ 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.

¹¹² 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.



to culture.¹¹³ This suggests, in other words, that the pure availability of content is not always optimal for access to culture.¹¹⁴ 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.¹¹⁵

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.¹¹⁶

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 T&Cs – what we call regulation “by” platforms – or other means such as licensing.

This normative “upstream” dimension of access to culture therefore 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.

2.6.3 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 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.¹¹⁷

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., by broadening the scope of liability for platforms) or by raising the costs of acting outside the autonomy space (e.g., introducing more severe sanctions and more effective remedies).

¹¹³ 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.

¹¹⁴ 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.

¹¹⁵ Their impact on access to culture is either neutral or positive.

¹¹⁶ 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.

¹¹⁷ Thomas Riis, *User Generated Law: Re-Constructing Intellectual Property Law in a Knowledge Society* (Edward Elgar Publishing 2016).



2.7 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 and select national laws, the latter through comparative legal research (2.7.1). Second, empirical research on copyright content moderation by online platforms (2.7.2).

2.7.1 Doctrinal Legal Research: EU Level Mapping and Comparative Legal Research

Our legal analysis in this report is comprised of descriptive and normative doctrinal legal research aimed at the EU and national level mapping of copyright content moderation rules. For the EU level mapping, the scope of our analysis is delimited to EU law, and in particular the copyright *acquis* and adjacent legal instruments 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 CJEU. The most relevant instruments in this respect are the InfoSoc Directive, the CDSM Directive, the e-Commerce Directive, and the proposed DSA. 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).¹¹⁸ The primary means of research is desk research.

In addition to the EU level mapping, we carry our national level mapping through comparative legal analysis.¹¹⁹ This included both desk research and questionnaires completed by national experts in selected Member States. 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.¹²⁰ Within this toolbox, we mainly rely on the functional,¹²¹ contextual,¹²² and, consequently, the common core¹²³ 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: (1) why to compare, (2) what to compare, (3) how to compare.

First, Second, on why to compare (1), it is undeniable that OCSSPs play a crucial role in the "platform-driven economy."¹²⁴ 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.¹²⁵ Second, regarding what to compare (2), 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. Third, on how to compare (3), 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

¹¹⁸ 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).

¹¹⁹ H Patrick Glenn, 'The Aims of Comparative Law', *Elgar Encyclopedia of Comparative Law* (Second Edition, Edward Elgar Publishing 2012) <<https://www.elgaronline.com/view/edcoll/9781849804158/9781849804158.00009.xml>> accessed 21 February 2022; Lutz-Christian Wolff, 'Artificial Intelligence Ante Portas: The End of Comparative Law?' (2019) 7 *The Chinese Journal of Comparative Law* 484, 491.

¹²⁰ Mark Van Hoecke, 'Methodology of Comparative Legal Research' [2015] *Law and Method* <<https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001>> accessed 20 February 2022.

¹²¹ 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 Hoecke (n 120) 9.. On the "functionalism" of comparative law see especially Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung: Auf dem Gebiete des Privatrechts* (3., neubearbeitete edition, Mohr Siebeck 1996).

¹²² 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. Hoecke (n 120) 16–18.

¹²³ 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 Hoecke (n 120) 21.

¹²⁴ Andrej Savin, 'Regulating Internet Platforms in the EU - The Emergence of the "Level Playing Field"' (2018) 34 *Computer Law & Security Review* 1215.

¹²⁵ Savin (n 124).



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 I.

2.7.2 Social science methods

In this section, we explain and justify our methodological decisions and strategies concerning the collection and analysis of data about companies' copyright content moderation structures, namely, *rules* and *automated copyright content moderation systems*, as explained above ¹²⁶.

Our approach is based on three main decisions. First, we took an open-ended and inductive perspective. The goal was to collect *all* platforms' public documents that could be understood as concerning the regulation of copyright content moderation. This decision both drastically expanded the projects' dataset and unveiled the importance of this organizational aspect for the very governance regimes we wanted to understand. Also, different social media platforms might have multiple functionalities, designs, goals and users. This comparative element addresses the possibility that these variations can be linked with a diverse range of copyright content moderation structures. Furthermore, while all platforms of our sample had their own rules, not all of them used automated moderation systems. Our work provides an overview of the most important existing rules and enforcing systems, comparing and contrasting them. Finally, we assumed that there was much to be gained from the investigation of how the copyright content moderation structures evolved over time. This longitudinal approach greatly expanded the analytical potential of the project: platforms' rules are constantly changing; our work helps interrogate the nature of these shifts. Importantly, uncertainties about the collected data led us to not extend this longitudinal approach to the automated copyright content moderation systems.

This sub-section begins by explaining the criteria used to select which platforms we should investigate (2.7.2.1). This is followed by an analysis of how we collected and qualitatively analysed data (2.7.2.2 and 2.7.2.3). It closes with a brief reflection on the limitations and ethical issues that we considered during our research (2.7.2.4).

2.7.2.1 Building a sample of platforms: mainstream, alternative and specialised platforms

In face of the growing number of social media platforms and the project's constraints, we decided to focus on 15 platforms (see Table 3). They were selected through a purposive sampling procedure. This sampling was driven by two main criteria – *relevance* and *diversity* – and generated three different sets of platforms that we label *mainstream*, *alternative*, and *specialised*. 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. Figures matter because very large services are also central channels to access and produce culture, attracting the interest of ordinary users, creators, large rights holders and policymakers. There is no thoroughly reliable and verifiable public record of users' numbers by platforms. We opted for what we judged was the best possible approximation. Using data compiled by StatCounter¹²⁷, we found that *Facebook*, *Twitter*, *YouTube* and *Instagram* were among 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*, *TikTok*, and *Pinterest*, time limitation led us to cap this group of what we term “mainstream social media platforms” to five services.¹²⁸ 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 whether and how what we term “alternative social media platforms” (as opposed to the those classified as “mainstream”) regulate copyright content moderation differently. These “alternative”

¹²⁶ On which, see below at Chapter 5.

¹²⁷ StatCounter Global Stats, ‘Social Media Stats Europe’ (*StatCounter Global Stats*) <<https://gs.statcounter.com/social-media-stats/all/europe>> accessed 21 February 2022.

¹²⁸ Whereas we are linking 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.



platforms share some characteristics: (1) their computational infrastructure is usually decentralised (e.g., users may be able to tweak or even control the design of the platform, and content moderation decisions are not necessarily made by any single controller); and (2) many are predominantly non-commercial and do not depend 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, since their number of users rarely surpasses the dozens of thousands. Yet, our initial assumption was that, in examining them, we could encounter diverse copyright content moderation structures, organized in different ways, than those of mainstream platforms.

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.¹²⁹ They are treated in this report merely as key examples. Following this direction, we chose to investigate: (1) *DTube*, which positioned itself as an alternative to audio-visual platforms, such as YouTube; (2) *Audius*, a blockchain-based service focussed on musical content, as SoundCloud is; (3) *Diaspora* and (4) *Mastodon*, widely described as "ethical" replacements of all-purpose large platforms, such as Facebook and Twitter, respectively¹³⁰; and (5) *PixelFed*, an alternative to picture-based platforms such as Instagram.

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, and dealing with large amounts of copyright-protected content – 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 structures, 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, variety of kinds of creators, and comparability with at least some of the mainstream and alternative platforms we selected. We ended up focussing on: (1) game streaming platform *Twitch*; (2) the video-sharing platform *Vimeo*, which aims to offer a more sophisticated experience than YouTube and is quite popular amongst visual artists and professionals; (3) *FanFiction*, an older platform where ordinary people can post and archive fiction based on characters and stories from copyright-protected works, such as "Harry Potter" and "Twilight"; (4) *Dribbble*, an image-centred platform that is mainly used by designers; and (5) *PornHub*, a highly popular pornographic video-sharing platform that has attracted sex workers and ordinary users interested in posting their own material.

Table 3. Sample of 15 platforms chosen to be analysed. Source: Authors.

Online Platforms		
Mainstream	Alternative	Specialised
Facebook	Diaspora	Twitch
YouTube	DTube	Vimeo
Twitter	Mastodon	FanFiction
Instagram	PixelFed	Dribbble
Sound Cloud	Audius	Pornhub

This sample of 15 platforms served our research in different ways. When analysing broader structures (such as the of rules and automated systems), 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. Chapter 5 explains the decisions on these case studies.

¹²⁹ However, Diaspora and Mastodon have generated much journalistic buzz, in particular after the so-called post-2016 "techlash".

¹³⁰ Mastodon and Diaspora 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 two main pods.



2.7.2.2 Data collection

Having decided which platforms we would investigate, a second task involved deciding how to collect data that could answer the empirical sub-research questions (SQR) (4), (5) and (6), reproduced below for ease of reference.

- SQR (4): How are copyright content moderation rules organized by platforms into public documents?
- SQR (5): Which copyright content moderation rules do different platforms employ to regulate copyright, and how have they changed over time?
- SQR (6): How do platforms' automated copyright content moderation systems work?

Our goal of *mapping out* selected platforms' copyright content moderation rules and automated copyright content moderation systems demanded, mainly, the direct analysis of platforms' public documents. Auxiliary approaches were also employed. Procedures regarding the research of rules and systems followed different procedures, as explained next.

a) Copyright Content Moderation Rules

Instead of focussing on documents that have been already studied as regulating copyright, such as those expressly labelled as "Terms of Service", we assumed that all T&Cs-related public documents could, in principle, be somehow related to copyright content moderation. Therefore, the initial goal was to investigate *all* versions of all public documents of those 15 platforms, from the day the platforms were created until the 31st of December 2020 – when our data collection ended.

To collect these documents, we resorted to platforms' websites and, mainly, Internet Archive's WayBack Machine (henceforth, WBM), the largest online archive of websites' previous 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 December 2020 collected over 475 billion webpages.¹³¹ The WBM use "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.¹³² In short, the WBM is the best tool to access previous versions of websites – but it is also unavoidably flawed. Ultimately, it might be impossible to know what, after all, the archive does *not* contain.

There's a rich literature that uses the WBM to amass large quantities of data about websites' T&Cs. These studies typically cast a very wide net as their goal is to produce high level insights about how the private regulation of the Internet as whole has changed over the years. Amos et al (2020),^{133/134} often with the goal of understanding the effect of certain new legislations on websites' T&Cs.¹³⁵ Yet, we could not find a study with our particular focus: to make of sense of the rules 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 T&Cs could hardly be limited to documents that resemble legal contracts – specifically, Terms of Service and Privacy Agreements (sometimes called Data Policy). For years now, platforms have used some sort of Community Guidelines, Help pages and various specific kinds of public documents (e.g., Principles) to further specify the rules that users should comply with when using their services. Thus, these documents would have to be gathered, too – in addition to the said contractual T&Cs. Also, there was a number of documents that the (non-legal) literature only rarely paid attention to: law enforcement guidelines and Cookies Policy. In sum, platform's T&Cs were far from centralized, homogenous or stable. Names of T&Cs and their URLs changed and expanded over time, without any transparent

¹³¹ Jenica Jessen, 'Looking Back on 2020' (*Internet Archive Blogs*, 19 December 2020) <<http://blog.archive.org/2020/12/19/looking-back-on-2020/>> accessed 20 February 2022.

¹³² 'Using The Wayback Machine' (*Internet Archive Help Center*) <<https://help.archive.org/hc/en-us/articles/360004651732-Using-The-Wayback-Machine>> accessed 20 February 2022.

¹³³ Ryan Amos and others, 'Privacy Policies over Time: Curation and Analysis of a Million-Dataset' [2021] Proceedings of the Web Conference 2021 2165.

¹³⁴ George R Milne and Mary J Culnan, 'Using the Content of Online Privacy Notices to Inform Public Policy: A Longitudinal Analysis of the 1998-2001 U.S. Web Surveys' (2002) 18 *The Information Society* 345.

¹³⁵ Thomas Linden and others, 'The Privacy Policy Landscape After the GDPR' (2020) 2020 Proceedings on Privacy Enhancing Technologies 47.



explanation. This unexpected fragmentation both imposed additional hurdles, as we explain below, and can be a finding in itself, as we explore in Chapter 5.

The data collection followed some basic procedures for all platforms¹³⁶:

- We visited the platforms' corporate websites and checked whether and how documents were displayed and archived.
- Using keywords (mainly, "policy", "copyright", "content moderation", "regulation"), we searched for and saved corporate publications of interest.
- If the platform provided no comprehensive, reliable change log of its documents, we resorted to the WBM. Using a pre-existing list of URLs of the original versions of three kinds of T&Cs (Terms of Service, Privacy Agreement and Community Guidelines)¹³⁷, we located and saved all unique versions of all documents we could find. "Unique version" is defined here as the version containing at least one change in the T&Cs text that somehow changed any of the platform's rules – not only copyright content moderation.
- 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 software¹³⁸ to manually compare the first archived version of a given document to the latest version of the same document in a given year. If there was no substantive change, we then moved to compare it with the latest version of the same document in the next year, and so on, until we found a substantive change. 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.¹³⁹
- When necessary, we annotated the URLs of the relevant hyperlinks of a document with the aim of constructing a map of all URLs of all T&Cs – what amounted to a sort of manual crawling.
- We finally searched the URLs of the resulting map in the WBM, saving all available versions.

The relative simplicity of these steps might obscure how convoluted, uneven and time-consuming the data collection was. The more we browsed the WBM and platforms' own websites, the clearer it became that several platforms' T&Cs landscape is acutely fragmented into a web of pages, sub-pages and sub-subpages, each one with its own URL. This imposed a methodological challenge. For the WBM seemingly tends not to archive many of the URLs of the various sub-pages and sub-subpages that platforms created over time to explain their T&Cs. In total, after discarding the collection of types of T&Cs that, we realised, do not explicitly regard copyright at all (e.g., Privacy Policy), we collected 626 versions of relevant versions published by the 15 platforms of our sample since the early 2000s (see Table 6 in Chapter 5).

The sheer number of versions, the limitations of our project, and the inconsistent nature of the available data, led us to adjust our research. First, due to time and resources constraints, we analysed 318 of the 626 documents collected. The difference between these numbers is explained by two decisions, which aimed at making the analysis doable and our conclusions as valid as possible: (1) to focus on two temporal points: 30 of June and 31 of December of each year; that is, if a given document of a given platform changed more than once during a given semester, only the version standing at the end of the semester was analysed; (2) not to examine YouTube's huge and highly fragmented collection of "Copyright Policy" documents – selected available versions of their Terms of Service, Community Guidelines and Help pages were examined, though.

This second decision warrants further explanation. More than demanding more time than we had to complete this element of the project, the examination of these versions could also lead to misleading conclusions. Since WBM's often had only one or two versions of the various URLs that YouTube created to host the pages and sub-pages of their T&Cs, our collection of these versions, while large in absolute numbers, was likely incomplete. With more time, it would be possible to curate this sub-collection, something that we plan to do in the future. Furthermore, of all platforms of our sample, YouTube appears to be the most researched one. Focussing on other services could generate new insights, we judged.

¹³⁶ Eventually, we also used WBM's API to automatically collect hundreds of versions at once. Yet, this procedure was not systematically followed for all platforms of our sample; what is more, no document was added to our sample without passing through a manual check to be sure that it was a unique version.

¹³⁷ This initial list was part of Kirsten Gollatz's doctoral work, partially developed at the HIIG.

¹³⁸ Mostly, 'Text Compare! - An Online Diff Tool That Can Find the Difference between Two Text Files' <<https://text-compare.com/>> accessed 17 February 2022. and 'Diffchecker' <<https://www.diffchecker.com/diff#>> accessed 17 February 2022. which work essentially the same.

¹³⁹ On this point, see our analysis below in Chapter 5.



The other way in which these methodological difficulties shaped our research concerns the very understanding of what “mapping” platforms’ copyright content moderation structures should mean. If platforms’ rules are spread-out through various documents, located at different spaces of services’ websites, as we learnt during the data collection, their very organization of rules into documents should be understood as one element of platforms’ T&Cs. For this component will affect whether and how users can see these rules, and the discursive status these rules may enjoy. Put another way, making sense of which kinds of documents exist is, in itself, relevant – hence, our decision to pose *SQR(4): How are copyright content moderation rules organized by platforms into public documents?*

Time limitations led us to use case studies to present our data. We focus on six platforms, two per group of services (see the three groups in Table 3 above). When choosing which services should be discussed in depth, we took into consideration two main elements. To ensure that our conclusions would be as accurate as possible, we privileged the platforms with the most complete collection of collected documents. Thus, for instance, while YouTube is a hugely important actor when it comes to copyright, our database of their highly fragmented T&Cs is not robust enough to allow for a precise longitudinal examination of their rules, as we said above. Secondly, we wanted to make sure that platforms represented the diversity of their group. Instead of, say, examining two platforms with similar functionalities, models and audiences, we sought to detail services that had contrasting technical approaches to regulating copyright. In so doing, this case studies showcase most rules our analysis has found. Following these criteria, we chose the following case studies: Facebook and SoundCloud (mainstream platforms); Diaspora and DTube (alternative platforms); and Pornhub and FanFiction (specialised platforms).

b) Automated copyright content moderation systems

When deciding how to examine platforms’ documents on automated copyright content moderation systems, we early on realised that a longitudinal approach was either too unreliable (in the case of YouTube) or largely unnecessary (in the case of Facebook and Instagram). Documents regarding YouTube’s Content ID, which was launched in 2006, are mostly buried in the companies’ “Copyright Policy” section – which, as we explained in the previous section, is deeply fragmented, casting credible doubts on the completeness of WBM’s collection of their various pages and sub-pages. It is certainly possible to discuss these older documents. But our confidence in the possibility of a rigorous reconstruction of this trajectory, with our methods at least, was low. Facebook and Instagram’s shared system, Rights Manager, in contrast, is much younger – it was made public in 2016. A preliminary analysis of the older documents we could find on WBM did not surface differences that, we judged, were important enough to justify a longitudinal analysis.

Therefore, the data collection happened between June and August 2021 and involved accessing and gathering a range of different publicly accessible materials in which the companies describe their systems, such as Help pages, blog posts, presentations, documents, webpages, videos and patent applications. Before, in order to understand which platform employed these systems, we visited the webpages of all 15 services to learn which one of them discussed in their webpages the eventual use of these systems. To do so, we read their current T&Cs and searched their websites using with some keywords, namely “copyright”, “intellectual rights”, and “fingerprinting”.

When analysing the material, which is self-reported and often played a promotional role, we were confronted with a high degree of opacity. Their information is blatantly incomplete, and the language is often vague, leaving a lot of room for interpretation and several unanswered questions.

We tried then different data collection approaches. First, we decided that, at least in relation to our case study (Facebook’s Rights Manager), we should try to directly approach the platform to clarify several aspects of that system. On 9 July 2021, we contacted, via e-mail, a representative of Facebook with a list of 61 questions (see Annex III). They pertain, for instance, to the criteria that a content owner has to fulfil in order to be granted access to the system, the inner workings of the fingerprinting process, the details of the monetisation processes and potential ways for disputing the decisions of these automated systems. The representative redirected our questions to a public policy officer with a focus on IP and media policy for EMEA (Europe, Middle East and Africa), who agreed to answer. Facebook sent their clarifications in writing, also via e-mail, on 15 September 2021. Their answers did not address each question directly and left most of our doubts unresolved.

Second, we repurposed a non-private Facebook Page, not active and with almost no original content, to test how long it would take for Facebook to reject / accept an application to Rights Manager. We also wanted to know if Facebook would provide any insights on why the application was accepted / rejected and if there is any information about a possible dispute of an eventual rejection. Importantly, the page we used had been created years ago by one of the authors for his personal use, and not for the purposes of this study.



2.7.2.3 Data analysis

Again, procedures used to analyse data concerning copyright content moderation rules and automated copyright content moderation systems differed considerably and are thus divided into two subsections.

a) Copyright Content Moderation Rules

Usually, longitudinal studies of changes of websites' T&Cs (e.g., the proportion of websites that have certain T&Cs or which of their T&Cs mention certain topics) employ computational techniques of textual analysis. However, our case was considerably different. First, given our focus on social media platforms, our database was smaller – and, thus, more analytically manageable. Second, since we were interested 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. For what counts as a “rule” in a document is not necessarily apparent. Much of the documents' texts are non-normative, and their normative elements do not necessarily follow the same syntax or employ the same words. To put it differently, rules had to be inferred through human interpretation.

These conditions posed considerable hurdles to standard computational tools of textual analysis¹⁴⁰ and invited qualitative methods. In light of our goal of mapping out these rules, we opted for a method that could allow us to chart their general characteristics. Hence, with the help of the manual text analysis software NVivo, we conducted a thematic analysis, a method of “pattern recognition within the data, where emerging themes become the categories for analysis”¹⁴¹ through the “careful reading and re-reading of the data”¹⁴². 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. The analysis followed some steps:

- **1. Creation a readable database.** When importing documents to NVivo, we assigned them certain metadata: date, kind of document, and name of the platform.
- **2. Familiarisation with the data.** Both during the data collection or in the beginning of the data analysis, we read extensive excerpts of the documents so as to understand some of its general characteristics.
- **3. Focus on copyright.** Each document was read and only the elements that we understood as somehow pertaining to copyright content moderation were coded and separate for further analysis.
- **4. Development of the coding frame.** Initially using SoundCloud's documents as a pilot, we developed a coding frame, which was slowly enhanced. The crux of our work, meaning the drafting and re-drafting of said rules, was far from linear. Rather, rules emerged out of an iterative reading of the data, and were changed several times before stable formats 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, a relevant observation in terms of replicability of our research. The most important difficulty regards specificity, that is, how many rules a given document excerpt contains. Since one rule (e.g., “Users must respect copyrights”) might contain different specific determinations (e.g., “users must only post their own content”, “users should not post content they do not have rights over”, etc) coders might arrive at different conclusions regarding how many rules a particular excerpt contains and, naturally, which rules these are. As a rule of thumb, we strived to balance specificity and comprehensiveness, and tried to keep the terms used by platforms. Returning to the example we just used, while it is possible to say that “Users must respect copyrights” is in fact composed of those particular and potentially different specific provisions, we coded all of them as part of the same, main provision. There is no single, all-encompassing way to cogently make sense of the large and diverse set of rules we found. To attain our goal of *mapping out* platforms' provisions – as opposed to an exhaustive examination of the documents' texts, we also decided to create intermediary themes around which rules could be organized. At the end of our analysis, our coding frame contained eight top-level themes (the kinds of documents where platforms' copyright rules are located), 15 intermediary themes (the kinds of rules we found, in terms of *normative types* and *subject*, terms explained in Chapter 5) and 95 lower-level themes, which correspond to the actual rules that, according to our work, regulate copyright content moderation in the 15 platforms examined (see Annex II).

¹⁴⁰ Whether properly trained machine learning algorithms can perform this analysis is an interesting methodological avenue that we did not pursue.

¹⁴¹ Jennifer Fereday and Eimear Muir-Cochrane, ‘Demonstrating Rigor Using Thematic Analysis: A Hybrid Approach of Inductive and Deductive Coding and Theme Development’ (2006) 5 International Journal of Qualitative Methods 80, 82.

¹⁴² Fereday and Muir-Cochrane (n 141).



- **5. Report initial results.** On several occasions, after finishing the analysis of one kind of document in a specific platform, we wrote short reports which described the findings, including how characteristics and rules have changed over time and 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 and mentions.** 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 (grouped by normative type, subject and normative period), the number of mentions (“references”, as they are called by the NVivo system) to them. “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 unique mentions. To assess how rules and mentions fluctuated over time, we employed, mainly, descriptive statistics.
- **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 copyright content moderation rules changed (1) over time and (2) across different platforms.

b) Automated copyright content moderation systems

Since (1) the amount of data we were dealing with regarding automated copyright content moderation systems was much smaller, (2) we did not want to trace these systems’ historical evolution, and (3) we did not want to identify their rules in a formal manner but merely explain how these systems work, no systematic analysis of the accessed and collected documents was carried out. Instead, we merely transposed and reorganized the information found in the documents we accessed or collected, enriched by the information directly provided by Facebook over e-mail. Our findings are, thus, based on the information contained in the pages and the email, not on insights arising from formal textual analysis, as in the case of copyright content moderation rules.

As with copyright content moderation rules, however, we judged that it would be useful to provide at least one case study, in which we could discuss an automated copyright content moderation system in-depth. We chose Rights Manager, which serves both Facebook and Instagram, as it is both highly relevant, in terms of affected users, and, to date, rarely researched.

2.7.2.4 Limitations

While reflecting our best efforts, our empirical analysis has some important limitations, which relate to our data collection, analysis and conceptual choices.

First and foremost, our data is unlikely to be complete, due to the limitations of the WBM and platforms’ websites, as explained above. The collection of T&Cs versions of some platforms appeared to be more complete than others, however. In particular, findings about YouTube should be taken cautiously, as we decided not to examine most of their “Copyright Policy” versions¹⁴³. Moreover, several platforms, notably Facebook, YouTube and Instagram, have country- or region-specific versions of their T&Cs. This posed a problem since the WBM neither groups websites into country-specific pages nor allows researchers to know whether these differing versions exist. Therefore, it is likely that versions tailored specifically to the EU are missing from our archive. Finally, as we discovered during our work, copyright content moderation structures are always changing. Our insights should be considered as valid to December 2020 (in relation to rules) and September 2021 (in relation to automated copyright content moderation systems). In regards to Facebook’s answers to our questions, it is important to remember that we had no means to independently validate the accuracy of the information given. That is, while coming from the company itself, their answers are not *necessarily* complete, up-to-date, or true.

As to our data analysis, it should be noted that, despite our efforts to make our process transparent, the strongly interpretative nature of our thematic analysis makes it likely that other coders would arrive at a different set of rules, and/or code the same excerpts differently. This is a natural and arguably unavoidable consequence of the sort of qualitative analysis our research questions demanded. We are confident, however, that eventual disagreements would not be substantial enough to contradict our top-level conclusions.

An additional limitation is conceptual. In this study, we take “rules” to mean both the public and written statements that are explicitly defined as “rules” by platforms themselves. It might be possible, however, that platforms’ actual rules regarding copyright are simply different from those they decided to make public. That is, platforms’ copyright content moderation might involve internal and informal “rules” that remain beyond the

¹⁴³ See Section 2.7.2.2 above.



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 2.2), is the recognition that there might be a difference between what is stated in public documents and how algorithmic content moderation systems are actually deployed. Therefore, we cannot guarantee that our conclusions correspond to the *real* deployment of these systems. That said, given the increasing legal obligations on platform’s attached to T&Cs and the need to justify content moderation decisions based on such T&Cs, these issues will likely have reduced impact for the purposes of our legal analysis.

2.7.2.5 Ethical concerns

Throughout our data collection and analysis, we were vigilant about possible ethics issues that could emerge from our work. Since we were mainly 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’ T&Cs – thus, there was no need to seek their formal approval. Furthermore, since no deception was involved in our repurposing of a real and previously created Facebook page to test Rights Manager’s application process, this method cannot be said to be detrimental to the company.



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 (SQRs), from an EU law perspective.

- 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?

Our main focus here is the legal regime of art. 17 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 (**Errore. L'origine riferimento non è stata trovata.**). 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 (3.4). We conclude the chapter with a likewise detailed analysis of the interface between art. 17 CDSM Directive and the DSA, since in our view many of the content moderation obligations in the latter instrument overlap with those in art. 17 (3.5).

3.1 Pre-existing legal framework: the interplay between the InfoSoc and e-Commerce Directive¹⁴⁴

Before delving into the new regime of OCSSPs, it is important to set the baseline regime from which art. 17 CDSM Directive departs from. EU law has been subject to a high level of harmonization stemming from many directives on copyright and related rights, the interpretation of which is determined by the case law of the Court of Justice of the EU (CJEU). This copyright *acquis communautaire* often surpasses international minimum standards of protection. For our purposes, the most relevant instruments preceding the CDSM Directive are the 2001 InfoSoc Directive and the 2000 e-Commerce Directive. This section explains how the relevant provisions in these directives have been interpreted to impose liability on online platforms that host and provide access to copyright-protected content/materials, and how such interpretation ultimately led to art. 17 CDSM Directive.

3.1.1 The evolution of the right of communication to the public

The InfoSoc Directive implements the WIPO Treaties into EU law and adapts it to the information society.¹⁴⁵ It recognizes exclusive rights applicable to online use, namely reproduction and communication to the public (including making available), as well as number of exceptions or limitations to the same.¹⁴⁶ The case law of the CJEU traditionally interprets the exclusive rights broadly and the exceptions strictly.¹⁴⁷

Particularly important in this context is the Court's case law on the right of communication to the public in art. 3 InfoSoc Directive. This provision grants authors a broad right of communication to the public, including making available (paragraph 1) and related right holders a narrower right of making available (paragraph 2). The distinction is justified because the directive leaves intact specific rights of communication recognized for the related rights holders elsewhere in the *acquis*.¹⁴⁸

¹⁴⁴ This section reproduces parts of and relies on João Pedro Quintais, 'The New Liability Paradigm for Online Platforms in EU Copyright Law [Forthcoming]' (Edward Elgar 2022).

¹⁴⁵ Recitals 15, 19, 61 InfoSoc Directive.

¹⁴⁶ Arts. 2-5 InfoSoc Directive.

¹⁴⁷ See e.g. João Pedro Quintais, *Copyright in the Age of Online Access: Alternative Compensation Systems in EU Law* (Kluwer Law International 2017); Rendas (n 105).

¹⁴⁸ See Art. 4 SatCab Directive and Art. 8 Rental and Lending Rights Directive, which remain applicable by virtue of Art. 1(2)(b) and (c) InfoSoc Directive.



The exclusive right applies to communication at a distance, covers online use and is not subject to exhaustion.¹⁴⁹ The “making available” prong applies to interactive “on-demand” use (e.g., uploading), but does not require reception or access of the work by the public.¹⁵⁰

There is a vast body of CJEU case law on the right and concept of communication to the public across different directives, including its applicability online.¹⁵¹ It is beyond the scope of this chapter to examine this case law in detail. However, it is important to highlight some of the main conclusions from these judgments, since they have direct bearing on our analysis.

First, the right must be interpreted broadly.¹⁵² Second, “communication to the public” is an autonomous concept of EU law.¹⁵³ Third, communication to the public involves different types of activities both offline and online. In the online context, the Court has confirmed that the exclusive right applies to myriad uses: the “live streaming” or broadcasting by a third party over the Internet of signals from commercial television broadcasters (*ITV Broadcasting*); the provision of “clickable links” giving access to protected works (*Svensson*); the provision of framing links to protected works (*BestWater*); the direct broadcast of a sporting fixture on an Internet site (*C More Entertainment*); the posting of hyperlinks to works on third party websites without the right holder’s consent (*GS Media*); the sale of multi-media players with pre-installed add-ons that contain hyperlinks to websites making available works to the public without the consent of the right holders (*FilmSpeler*); the provision of an online peer-to-peer (p2p) platform that enables the sharing of protected files without the consent of right holders (*Ziggo*); the embedding, by means of the technique of framing, in a third-party website page, of freely accessible protected content on another website, where that embedding circumvents technical protection measures (*VG Bild Kunst*); and the uploading by users of a p2p networks of media files containing a protected work (*Mircom*).¹⁵⁴

Interestingly, in one of the last and crucial instalments of this case law, the Court ruled that a video-sharing platform (YouTube) or a file-hosting and -sharing platform (Upload), “on which users can illegally make protected content available to the public, does not make a ‘communication to the public’ of that content, within the meaning of that provision, unless it contributes, beyond merely making that platform available, to giving access to such content to the public in breach of copyright.”¹⁵⁵

In any case, the Court’s case law has significantly expanded the scope of the right of communication to the public, and as a result the scope of primary or direct liability for copyright infringement in EU law.¹⁵⁶ In doing so, the Court has engaged in a veritable legal jiu-jitsu, namely through the development of criteria and conditions to interpret art. 3 InfoSoc Directive. These can be summarized as follows.

A use triggers the exclusive right if it meets two cumulative conditions: it is (1) an act of communication (2) to the public. An “act of communication” (1) in this sense has at least two pre-requisites or sub-criteria. First, there

¹⁴⁹ Recital 25 InfoSoc Directive. See e.g. CJEU, 15 March 2012, case C-135/10 *Società Consortile Fonografici (SCF) v Marco Del Corso (SCF)*, para. 59; CJEU, 26 March 2015, case C-279/13 *C More Entertainment AB v Linus Sandberg (C More Entertainment)*, para. 26; CJEU, 19 December 2019, case C-263/18 *Nederlands Uitgeversverbond en Groep Algemene Uitgevers tegen Tom Kabinet Internet BV e.a. (Tom Kabinet)*

¹⁵⁰ Art. 3(3) and Recital 29 InfoSoc Directive. NB since the judgments in *Coditel I* and *II*, the CJEU has considered communication to the public to be a service and, therefore, not subject to exhaustion.

¹⁵¹ See generally, João Pedro Quintais, ‘Untangling the Hyperlinking Web: In Search of the Online Right of Communication to the Public’ (2018) 21 *The Journal of World Intellectual Property* 385; Eleonora Rosati, ‘When Does a Communication to the Public Under EU Copyright Law Need to Be to a “New Public”?’ [2020] *European Law Review* <<https://papers.ssrn.com/abstract=3640493>> accessed 26 May 2021.

¹⁵² See recital 23 InfoSoc Directive. See: CJEU, 7 March 2013, case C-607/11 *ITV Broadcasting Ltd v TVCatchUp Ltd (ITV Broadcasting)*, para. 20 (and case-law cited therein); OSA, para. 23;

70 CJEU, 19 November 2015, case C-325/14 *SBS Belgium NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM)*, para. 14; CJEU, 31 May 2016, case Case C-117/15, *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA)(Reha Training)*, para. 36.

¹⁵³ CJEU, 7 December 2006, case C-306/05, *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA (Rafael Hoteles)*, para. 31.

¹⁵⁴ See: CJEU, 7 March 2013, case C-607/11 (*ITV Broadcasting*); CJEU, 13 February 2014, case C-466/12, *Nils Svensson v Retriever Sverige AB (Svensson)*; CJEU, 21 October 2014, case C-348/13, *BestWater International GmbH v Michael Mebes and Stefan Potsch (BestWater)*; C-279/13 (*C More Entertainment*); CJEU 8 September 2016, case C-160/15, *GS Media BV v Sanoma Media Netherlands BV and Others (GS Media)*; CJEU, 26 April 2014, case C-527/15, *Stichting BREIN v Jack Frederik Wullums (FilmSpeler)*; CJEU, 14 June 2017, *Stichting Brein v Ziggo (Ziggo)*; CJEU, 9 March 2021, *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz (VG Bild Kunst)*; CJEU, 17 June 2021, case C-597/19, *Mircom International Content Management & Consulting (M.I.C.M.) Limited v Telenet BVBA, (Mircom)*

¹⁵⁵ CJEU 22 June 2021, *Joined Cases C-682/18 and C-683/18, Frank Peterson v Google LLC, YouTube Inc., YouTube LLC, Google Germany GmbH (C-682/18), and Elsevier Inc. v Cyando AG (C-683/18), (Youtube and Cyando)*

¹⁵⁶ Giancarlo Frosio, ‘It’s All Linked: How Communication to the Public Affects Internet Architecture’ (2020) 37 *Computer Law & Security Review* 105410; 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; Quintais, ‘Untangling the Hyperlinking Web’ (n 151).



must be “indispensable role” of the user for that act to take place.¹⁵⁷ In addition, the intervention of that user must be deliberate. This means for instance that a “platform operator makes an “act of communication” when it intervenes, in full knowledge of the consequences of its action, to give its customers access to a protected work, particularly where, in the absence of that intervention, those customers would not, in principle, be able to enjoy the broadcast work”.¹⁵⁸

That act is made “to the public” (2) if it reaches an indeterminate and fairly large number of recipients as potential beneficiaries of the communication. In addition, the public in question must either be a “new public” (i.e., a public not considered by the copyright holder when they authorized the initial communication) or a public reached through a separate or specific technical means.

In parallel to these cumulative conditions, the CJEU sometimes refers to the profit-making nature or purpose of the communication and other complementary and interdependent factors or sub-criteria, which are taken into consideration to varying degrees in order to make an individual assessment of the concept of communication to the public.¹⁵⁹

Most of the Court’s interpretative activity expanding the scope of this exclusive right takes place in the analysis of two separate criteria, pre-requisites or sub-factors: “deliberate intervention” and the “new public”. Under the shadow of these criteria, the Court has steadily included the consideration of elements of knowledge, commerciality, and technological restrictions in the assessment of primary or direct liability.¹⁶⁰ To be precise, after a steady stream of cases where the court mostly developed in great minutiae the new public criterion (from *Svensson* to *VG Bild Kunst*), the most recent case law has taken aim at a refinement of the concept of “deliberate intervention” (*Mircom* and *YouTube and Cyando*).

Although this report does not examine the intricacies of this case law, it is important to emphasize an important development in the later cases. In particular, the fact that they clearly import mental elements into the assessment of “act of communication” requirement of the concept of communication to the public – something that had only previously been done with any level of detail for the “new public” criterion. For instance, the Court in *Mircom* clarified the legal status of uploading in the context of a p2p network using the BitTorrent protocol, especially as regards the act of the uploading user. In essence, the CJEU states that if it is established (as a factual matter) by the national court that the user is aware of how the software works (i.e., that it automatically uploads pieces of files that have been downloaded by the user), and if the user has not actively turned off the “automatically upload” feature, then that user’s conduct is capable of constituting an act of making available. In a departure from the AG Opinion in this case¹⁶¹, the Court requires a mental element when assessing the conduct of the user, i.e., that s/he acts “in full knowledge of the consequences of what he or she is doing”.¹⁶² This shift is even more pronounced in *YouTube and Cyando*, as further explained below at 3.1.3.

These later judgments therefore solidify the Court’s gradual transformation of the right, away from a traditional strict liability paradigm, incorporating elements that are more typical of the analysis of intermediary, secondary or accessory liability.¹⁶³ As a result, the Court has eroded the lines between direct/primary and secondary/intermediary/accessory liability in EU copyright law, especially as it regards the activities of online platforms hosting and providing access to copyright-protected content. It is this development that is at the heart of call for new legal rules for online platforms, which were eventually adopted in art. 17 CDSM Directive.

¹⁵⁷ C-682/18 and C-683/18, *YouTube and Cyando*, paras. 66–68.

¹⁵⁸ C-682/18 and C-683/18, *YouTube and Cyando*, para. 68.

¹⁵⁹ For a detailed analysis of the case law developing this conceptual framework, see Quintais, ‘Untangling the Hyperlinking Web’ (n 151). See also, incorporating latter case law, Rosati, ‘When Does a Communication to the Public Under EU Copyright Law Need to Be to a “New Public”?’ (n 151).

¹⁶⁰ See e.g. Jane C Ginsburg and Luke Budiardjo, ‘Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives’ (2018) 41 *Columbia Journal of Law & the Arts* 153; Christina Angelopoulos and João Pedro Quintais, ‘Fixing Copyright Reform: A Better Solution to Online Infringement’ (2019) 10 *JIPITEC* 147. On the consideration of technical protection measures as a precondition for the application of art. 3 in certain online scenarios, see C-392/19, *VG Bild-Kunst*. For commentary on the latter case, see Sebastian Felix Schwemer, ‘Linking: Essential Functionality on the Internet and Never-Ending Story?’ in M Rosenmeier (ed), *Festschrift til Jørgen Blomqvist (Ex Tuto, 2021)*, pp. 623–640 (Ex Tuto 2021) <<https://papers.ssrn.com/abstract=3844548>> accessed 11 October 2021.

¹⁶¹ CJEU, 17 December 2020, Case C-597/19, *Mircom International Content Management & Consulting (M.I.C.M.) Limited v Telenet BVBA (Mircom)*, Opinion of Advocate General Szpunar, paras 54-61, suggesting that actual knowledge of the consequences of the act of uploading by the user was not relevant since in this situation such knowledge concerned not an intermediary service provider (as in the preceding case law) but end-users carrying out an initial and autonomous act of communication.

¹⁶² C-597/19, *Mircom*, para. 49.

¹⁶³ Christina Angelopoulos, ‘Harmonising Intermediary Copyright Liability in the EU: A Summary’ in Giancarlo Frosio (ed), *The Oxford Handbook of Online Intermediary Liability* (Oxford University Press 2020) <<https://papers.ssrn.com/abstract=3685863>> accessed 26 May 2021.



Still, to properly understand this development, we must first briefly examine two other pieces of legal puzzle in EU copyright law, namely the rules on injunctions in the InfoSoc Directive and the liability exemption for hosting service providers in the e-Commerce Directive. These are discussed in the following sub-section.

3.1.2 Injunctions and liability exemptions

The first additional element of the legal puzzle is the InfoSoc Directive's provisions on sanctions and remedies, and in particular the rule in art. 8(3) obligating Member States to ensure that rights holders can apply for injunctions against intermediaries whose services are used by a third party to infringe copyright, even if the intermediary is not itself directly liable for infringement (and, thus, for damages under art. 8(1) and (2)).¹⁶⁴

Art. 8(3) has played a significant role in determining the liability of providers of intermediary services and articulates the liability exemptions for intermediaries in the e-Commerce Directive. Although it is up to national law to determine the scope and procedures to seek injunctions, the same is limited inter alia by the operation of fundamental rights recognized in the EU Charter. This implies that an injunction must strike a fair balance between conflicting fundamental rights: to copyright as property, on the one hand (art. 17(2) EU Charter); and to the protection of personal data and privacy of Internet users, their freedom to receive and impart information, and intermediary service provider's freedom to conduct a business (respectively, arts. 7, 8, 11 and 16 EU Charter).¹⁶⁵

The second additional element of the legal puzzle refers to the e-Commerce Directive's rules on intermediary liability.¹⁶⁶ In EU law, there is no comprehensive harmonization of intermediary *liability*. The e-Commerce Directive contains conditional liability *exemptions*, or "safe harbours", for certain types of intermediary services involving claims for damages: mere conduit (or access), caching, and hosting.¹⁶⁷ The directive further contains a prohibition on the imposition by Member States on intermediary service providers of general monitoring obligations.¹⁶⁸ Under this regime, intermediaries may still be required to take measures against the infringement of copyright, since it remains possible to subject intermediaries to injunctions (e.g., under the InfoSoc Directive) and duties of care.¹⁶⁹

The interpretation of this constellation of provisions is incredibly complex and far from settled.¹⁷⁰ In its case law on the topic, the CJEU has noted that safe harbours require a sufficient degree of "neutrality" from the intermediary. This approach creates a grey area for the qualification of certain web 2.0 platforms as "neutral"/"passive" vs "active" intermediaries for the purposes of the hosting safe harbour.¹⁷¹

The approach finds its legal basis in Recital 42 of the e-Commerce Directive, according to which the directive's safe harbours are applicable only if the provider's activities are of "a mere technical, automatic and passive nature". For instance, in *Google France/Louis Vuitton*, this meant that a platform should play a "neutral" role regarding the data it stores to enjoy safe harbour protection.¹⁷² When a provider plays "an active role of such a kind as to give it knowledge of, or control over, the data stored", it falls outside of the scope of safe-harbour protection.¹⁷³

The distinction between "active and "passive" role in this context is unclear. The CJEU has provided some guidance in this respect. Thus, in *L'Oréal/eBay* the Court stated that if the online sales platform eBay assists users in "optimising the presentation of the offers for sale in question or promoting those offers", it does not merely

¹⁶⁴ NB art.8(3) InfoSoc Directive remains applicable despite the existence of a provision on injunctions in Article 11 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (Enforcement Directive) [2004] OJ L157 (hereafter Enforcement Directive). Despite the Enforcement Directive generally regulating interlocutory injunctions against intermediaries, the regulation of such injunctions for copyright infringement is dealt with by art. 8(3) InfoSoc Directive.

¹⁶⁵ Charter of Fundamental Rights of the European Union, art. 52, 2000 O.J. (C 364) 1, 21 (EC) (hereinafter Charter). On the CJEU case law on fair balancing in the copyright field see e.g. Christina Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis* (Kluwer Law International 2016); Martin Husovec, *Injunctions against Intermediaries in the European Union: Accountable but Not Liable?* (Cambridge University Press 2017)..

¹⁶⁶ See, generally, Riordan (n 71).

¹⁶⁷ Arts 12-14 e-Commerce Directive.

¹⁶⁸ Art. 15 e-Commerce Directive.

¹⁶⁹ See arts. 13(2), 14(3), 18 e-Commerce Directive.

¹⁷⁰ Christina Angelopoulos and Martin Senftleben, 'An Endless Odyssey? Content Moderation Without General Content Monitoring Obligations' (IViR; CIPIL 2021) <<https://papers.ssrn.com/abstract=3871916>> accessed 24 June 2021.

¹⁷¹ The approach finds its legal basis in Recital 42 e-Commerce Directive, according to which the directive's safe harbours are applicable only if the platform's activities are of "a mere technical, automatic and passive nature". In its case law, the CJEU has applied art. 14 of this directive to a search engine's advertising service, an online sales platform, and a social networking platform. See C-236/08, C237/08 & C-238/08, *Google France/Louis Vuitton*,; C-324/09, *L'Oréal/Ebay*,; C-360/10, *Netlog*. See generally van Hoboken and others (n 65).

¹⁷² C-236/08, C237/08 & C-238/08, *Google France/Louis Vuitton* para. 114.

¹⁷³ C-236/08, C237/08 & C-238/08, *Google France/Louis Vuitton*, para. 120.



play a neutral role but must be considered an active service provider.¹⁷⁴ However, the mere fact that eBay “sets the terms of its service, is remunerated for that service and provides general information to its customers” does not mean it plays an active role.¹⁷⁵ By contrast, in *Google France/Louis Vuitton*, the role played by a service provider in the drafting of a commercial message which accompanies an advertising link or in the establishment or selection of keywords was considered relevant in determining whether the provider is active or passive.¹⁷⁶

A further aspect of the legal framework is controversial. Art. 15 e-Commerce Directive (supported by Recital 47) requires that a distinction be made between “general” monitoring obligations and obligations to monitor in “specific” cases. Whereas the earlier would be prohibited, the latter would be permitted. In *L’Oréal/eBay*, the CJEU found that “active monitoring of all the data of each of a [service provider’s] customers in order to prevent any future infringement of intellectual property rights” is not allowed under art. 15.¹⁷⁷ In line with *L’Oréal/eBay*, the CJEU found in *Scarlet Extended* and *Netlog* that requiring a platform to actively monitor “almost all the data relating to all of its service users in order to prevent any future infringement of intellectual-property rights” is also prohibited under art. 15.¹⁷⁸

But in a later case of *Eva Glawischnig-Piesczek*, which concerns not copyright but *defamation*, the Court took a different approach. In this judgement, the Court accepts that a hosting service provider may monitor all or most of the information uploaded by users if there is a court order identifying a “specific” illegality. Furthermore, the content at issue must be identical or “equivalent” to the content of information which was previously declared to be unlawful. The CJEU however identified a number of constraints on such monitoring, namely that it is: (1) “limited to information conveying a message the content of which remains essentially unchanged compared with the content which gave rise to the finding of illegality and containing the elements specified in the injunction; and (2) “the differences in the wording of that equivalent content, compared with the wording characterising the information which was previously declared to be illegal, are not such as to require the host provider to carry out an independent assessment of that content”.¹⁷⁹ This suggests for instance that such a specific injunction must be carefully delimited and tailored, as well as susceptible to be implemented via automated means by the provider (i.e., without a human in the loop making the decision).

It is not clear whether and to what extent the reasoning in *Glawischnig-Piesczek* applies to copyright law as well, especially given the differences in assessment of defamation via a short textual post on a social media network vs audio-visual material in a video-sharing platform.¹⁸⁰ Furthermore, considering all the above case law, it also remains unclear – in the framework of the e-Commerce Directive – precisely what type of “specific” (as opposed to “general”) monitoring duties may be lawfully imposed on providers to prevent infringement, namely in what concerns pro-active measures like filtering.¹⁸¹

YouTube and Cyando, the most recent judgement relevant to our analysis, has also not fully elucidated this point. As noted by Angelopoulos¹⁸², the Court re-states pre-*Glawischnig-Piesczek* case law when it concludes that: “measures that consist in requiring a service provider to introduce, exclusively at its own expense, a screening system which entails general and permanent monitoring in order to prevent any future infringement of intellectual property rights [is] incompatible with Article 15(1) of the Directive on Electronic Commerce”.¹⁸³ On this basis, the Court goes on to conclude for the validity of the current German law that conditions the obtaining of an injunction under the national version of art. 8(3) InfoSoc Directive to the requirements that: (1) rights holders to notify a host service provider of infringements on their platform; and (2) that the intermediary fails to intervene expeditiously in order to remove and/or block access to the content in question, and to ensure that

¹⁷⁴ C-324/09, *L’Oreal/Ebay*, para. 116.

¹⁷⁵ C-324/09, *L’Oreal/Ebay* para. 115. See also C-236/08, C237/08 & C-238/08, *Google France/Louis Vuitton*, para. 116.

¹⁷⁶ C-236/08, C237/08 & C-238/08, *Google France/Louis Vuitton*, para 118.

¹⁷⁷ C-324/09, *L’Oreal/Ebay*, para. 139.

¹⁷⁸ C-360/10, *Netlog*, para 38. See also C-70/10, *Scarlet Extended*, para. 40.

¹⁷⁹ Case C-18/18, *Eva Glawischnig-Piesczek v Facebook Ireland Limited* (3 October 2019), ECLI:EU:C:2019:821 (operative part).

¹⁸⁰ In this respect, see [Favalle 2021] concluding that “it is not legally viable to implement the same norms on such different areas of law [copyright infringement vs hate speech/defamation] as the consequences of these norms infringements are incomparable.”

¹⁸¹ Contrast e.g. Jan Bernd Nordemann, ‘The Functioning of the Internal Market for Digital Services: Responsibilities and Duties of Care of Providers of Digital Services’ (European Parliamentary IMCO Committee 2020) <[https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2020\)648802](https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2020)648802)>. with Christina Angelopoulos, ‘Study on Online Platforms and the Commission’s New Proposal for a Directive on Copyright in the Digital Single Market’ (Greens/EFA Group 2017) Report <<https://www.repository.cam.ac.uk/handle/1810/275826>> accessed 28 May 2021.

¹⁸² Christina Angelopoulos, ‘YouTube and Cyando, Injunctions against Intermediaries and General Monitoring Obligations: Any Movement?’ (*Kluwer Copyright Blog*, 9 August 2021) <<http://copyrightblog.kluweriplaw.com/2021/08/09/youtube-and-cyando-injunctions-against-intermediaries-and-general-monitoring-obligations-any-movement/>> accessed 5 October 2021.

¹⁸³ C-682/18 and C-683/18, *YouTube and Cyando*, para. 135.



such infringements do not recur.¹⁸⁴ Importantly, the Court does not rely on *Glawischnig-Piesczek* for its interpretation or conclusion on general monitoring obligations, leaving the matter to be ultimately clarified in future cases.¹⁸⁵

As explained below, art. 17 CDSM Directive aims to a certain extent to target this uncertainty, namely by incentivizing – within certain constraints – proactive preventive measures to curtail copyright infringement. However, the new regime does not necessarily add clarity to this complex question.¹⁸⁶

3.1.3 Direct liability and liability exemptions at a crossroad

The analysis of the pre-existing legal framework shows a trend towards expanding direct liability for communicating works to the public to cover players other than those that are the source or origin of the act of communication, often through the introduction of a multi-factor analysis comprising mental elements. This expansion has taken place in the shadow of the horizontal rules on e-Commerce Directive’s safe-harbours and their interpretation by the Court, in a dialectic relationship between the sector specific (InfoSoc Directive) and horizontal (e-Commerce Directive) rules as they apply online platforms hosting and providing access to copyright-protected content.

Thus far, the expansion of the scope of art. 3 InfoSoc Directive has stopped short of clearly extending direct liability to mainstream hosting platforms, such as those covered by the new regime as OCSSPs.¹⁸⁷ This conclusion is clear from the multiple judgments that qualify them as hosting service providers under art. 14 E-Commerce Directive, and it appears unequivocal after the Court’s judgment in *YouTube and Cyando* and the AG Opinion in Case C-401/19.

YouTube and Cyando is particularly relevant for our analysis here. The judgement joined two cases. The first concerned the video-sharing platform operated by YouTube and takedown and staydown requests of phonograms uploaded by its users. The second has as a defendant a file-hosting and -sharing platform (Uploaded) operated by Cyando, and concerned files uploaded by users and hosted on Uploaded and accessible to the public via links in third-party websites (link collections, blogs, forums), some of which contained unauthorized copies of works. This complex judgment involved the joint interpretation of arts. 3(1) and 8(3) InfoSoc Directive (regarding direct liability for communication to the public and injunctions, respectively), art. 14 e-Commerce Directive (regarding indirect liability and hosting safe harbours) and arts. 11 and 13 Enforcement Directive (concerning damages). As the Court was careful to note, this judgment did not concern the interpretation of art. 17 CDSM Directive¹⁸⁸, even if this new provision will henceforth govern the liability of at least some of the providers covered in the judgment, such as YouTube.

For our purposes here, the key question is whether *YouTube and Cyando* leads to an identical liability regime (under the InfoSoc and e-Commerce Directives) as that of art. 17 CDSM Directive. The answer is that it clearly does not. In simple terms, the Court rules that providers such as YouTube and Uploaded are in principle not directly liable for copyright infringements resulting from uploads by their users. The crux of the analysis is found in the “act of communication” requirement, and in particular the “deliberate intervention” criterion. The Court states that end-users make the (primary) act of communication; the platform does play an “indispensable role” but not necessarily “deliberate”. To assess whether there is a “deliberate intervention”, the Court develops a multi-factor test.¹⁸⁹

For instance, there is a deliberate intervention if the platform operator, despite general or constructive knowledge of illegal content available via its platform, refrains from putting in place the appropriate technological measures that can be expected from a reasonably diligent operator in its situation in order to counter credibly and effectively such infringements. It is also relevant that such operator: (1) participates in selecting protected content illegally communicated to the public, and provides tools on its platform specifically intended for the illegal sharing of such content; *or*, alternatively, (2) knowingly promotes such sharing, which

¹⁸⁴ C-682/18 and C-683/18, *YouTube and Cyando*, operative part. The Court further concludes that this law strikes a fair balance between the competing fundamental rights provided the conditions at issue do “not result in the actual cessation of the infringement being delayed in such a way as to cause disproportionate damage to the rightholder”, which is for the national court to determine.

¹⁸⁵ But see CJEU, 15 July 2021, Case C-401/19, *Poland v Parliament and Council*, Opinion of Advocate General Saugmandsgaard Øe, (hereafter AG Opinion C-401/19, *Poland*), paras 111-115, arguing that the standard for general monitoring obligations for copyright cases has indeed been changed in the wake of *Glawischnig-Piesczek*.

¹⁸⁶ See *infra* at 3.4.

¹⁸⁷ 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) 70 GRUR International 325.

¹⁸⁸ C-682/18 and C-683/18, *YouTube and Cyando*, para. 59.

¹⁸⁹ C-682/18 and C-683/18, *YouTube and Cyando* paras 84ff.



may be attested by the fact that it has adopted a financial model that encourages users illegally making available infringing content on its platform.¹⁹⁰

The Court further notes that for purposes of finding a “deliberate intervention” it is not enough to establish that the provider has “general knowledge” of illegal content on platform, or the mere profit-making nature of platform.¹⁹¹ The later point is important as the Court sets aside the application of the GS Media rebuttable presumption of knowledge to this effect, which is conceptually consistent, since such presumption operated at the level of the “new public” criterion; in any case, the Court clarifies that no such analogy is possible.¹⁹² On the other hand, it is clarified that “actual knowledge” via a sufficient substantiated notice, followed by the lack of appropriate (i.e., not expeditious) action by the platform provider, is sufficient to establish a “deliberate intervention”.¹⁹³ In this way, the Court attempt to align its assessment of direct liability with its prior considerations on the “active” role of intermediaries under art. 14 e-Commerce Directive.¹⁹⁴

In the end, it will be up to national Courts to assess the different factors to establish whether a platform operator carries out a deliberate intervention leading to direct liability. But in the present case the Court concludes that neither YouTube nor Uploaded are liable for communicating works to the public.¹⁹⁵ As we shall see, both the underling complexity in the assessment of direct vs intermediary liability under this regime and the exclusion of direct liability for platform providers like YouTube are in stark contrast with the novel rules in art. 17 CDSM Directive. The result is a bifurcation of legal regimes for online platforms hosting copyright-protected content, translating into different rules for OCSSPs vs non-OCSSPs.

In any case, it is important to note that art. 17 CDSM Directive preceded the judgment in *YouTube and Cyando*. In the light of then-existing case law, the new provision was demanded by right holders to effectuate a change in the existing legal landscape, forcing OCSSPs outside the scope of the hosting safe harbour and into licensing agreements with OCSSPs under the threat of direct liability for their core activities.¹⁹⁶

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 2014.¹⁹⁷ 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 a single EU copyright title. The consultation produced thousands of responses, summarized by the Commission in a report published in July 2014.¹⁹⁸ This report was followed by a leaked Commission “white paper” in June 2014¹⁹⁹ and the Communication “Towards a modern, more European copyright framework” in December 2015, which explicitly stated the intention to regulate content-sharing platforms.²⁰⁰

The proposal for a directive was published in September 2016 by the Commission.²⁰¹ 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.²⁰² At the EU Parliament, five Committees were involved in the discussions, ending with the JURI (Legal Affairs) Committee, which voted on a

¹⁹⁰ C-682/18 and C-683/18, *YouTube and Cyando*, para. 84.

¹⁹¹ C-682/18 and C-683/18, *YouTube and Cyando*, paras 85ff.

¹⁹² C-682/18 and C-683/18, *YouTube and Cyando*, paras 89.

¹⁹³ C-682/18 and C-683/18, *YouTube and Cyando*, para. 85.

¹⁹⁴ See considerations *supra* at 3.1.2

¹⁹⁵ C-682/18 and C-683/18, *YouTube and Cyando*, paras 92 ff.

¹⁹⁶ *Husovec and Quintais* (n 187). (and references cited therein).

¹⁹⁷ Commission, “Public Consultation on the Review of EU Copyright Rules” (2013) (On file with the authors).

¹⁹⁸ 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 authors).

¹⁹⁹ Commission, White Paper, “A Copyright Policy for Creativity and Innovation the European Union” (2014), <https://www.dropbox.com/s/Oxcflgrav01qlb/White%20Paper%20%28internal%20draft%29%20%281%29.PDF>.

²⁰⁰ Commission, “Towards a modern, more European copyright framework”, COM(2015) 626 final (9.12.2015), p. 10.

²⁰¹ Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM/2016/0593.

²⁰² 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.



compromise version on 20 June 2018.²⁰³ After some resistance,²⁰⁴ 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.²⁰⁵ It was then approved by the Council on 15/17 April by a qualified majority.²⁰⁶ Six countries voted against, issuing statements that either criticize the legislative text or lay out some interpretative guidelines on the most controversial issues.²⁰⁷

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 protests²⁰⁸ reminiscent of the ACTA debate, opposition by digital rights NGOs²⁰⁹ and Internet luminaries,²¹⁰ and multiple expert statements²¹¹ 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.²¹²

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. 17²¹³, which we examine next.

Table 4. 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
	1. Out-of-commerce works and other subject matter	8 to 11	30–43

²⁰³ EDRI, ‘Press Release: MEPs Ignore Expert Advice and Vote for Mass Internet Censorship’ (*European Digital Rights (EDRI)*, 20 June 2018) <<https://edri.org/our-work/press-release-meps-ignore-expert-advice-and-vote-for-mass-internet-censorship/>> accessed 17 February 2022.

²⁰⁴ *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].

²⁰⁵ CREATE Centre: University of Glasgow, ‘Copyright Directive Approved at Plenary Vote’ (*CREATE Blog*, 26 March 2021) <<https://www.create.ac.uk/copyright-directive-approved-at-plenary-vote/>> accessed 17 February 2022.

²⁰⁶ European Commission, ‘Press Release: Copyright Reform Clears Final Hurdle: Commission Welcomes Approval of Modernised Rules Fit for Digital Age’ (*European Commission - European Commission*, 15 April 2019) <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2151> accessed 22 February 2022.

²⁰⁷ 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 Centre: University of Glasgow, ‘EU Copyright Reform: Evidence on the Copyright in the Digital Single Market Directive’ <<https://www.create.ac.uk/policy-responses/eu-copyright-reform/>> accessed 17 February 2022.

²⁰⁸ Felix Reda, ‘EU Copyright Reform: Our Fight Was Not in Vain’ (*Felix Reda*, 18 April 2019) <<https://felixreda.eu/2019/04/not-in-vain/>> accessed 22 February 2022.

²⁰⁹ European Liberties, ‘Article 13 Open Letter – Monitoring and Filtering of Internet Content Is Unacceptable’ (*Liberties.eu*, 16 October 2017) <<https://www.liberties.eu/en/stories/delete-article-thirteen-open-letter/13131>> accessed 22 February 2022.

²¹⁰ Danny O’Brien and Jeremy Malcolm, ‘70+ Internet Luminaries Ring the Alarm on EU Copyright Filtering Proposal’ (*Electronic Frontier Foundation*, 12 June 2018) <<https://www.eff.org/deeplinks/2018/06/internet-luminaries-ring-alarm-eu-copyright-filtering-proposal>> accessed 22 February 2022.

²¹¹ CREATE, ‘The Copyright Directive: Articles 11 and 13 Must Go – Statement from European Academics in Advance of the Plenary Vote on 26 March 2019’ (*CREATE Blog*, 24 March 2019) <<https://www.create.ac.uk/blog/2019/03/24/the-copyright-directive-articles-11-and-13-must-go-statement-from-european-academics-in-advance-of-the-plenary-vote-on-26-march-2019/>> accessed 22 February 2022.

²¹² See Corporate Europe Observatory, ‘Copyright Directive: How Competing Big Business Lobbies Drowned out Critical Voices’ (*Corporate Europe Observatory*, 10 December 2018) <<https://corporateeurope.org/en/2018/12/copyright-directive-how-competing-big-business-lobbies-drowned-out-critical-voices>> accessed 22 February 2022. On this topic, see also *Re:Publica 2019 – Martin Kretschmer: European Copyright Reform: Is It Possible?* (2019) <<https://www.youtube.com/watch?v=ZyujNlpxu9k>> accessed 22 February 2022. and B Farrand, ‘Towards a Modern, More European Copyright Framework’, or, How to Rebrand the Same Old Approach?’ (2019) 41 *European Intellectual Property Review* 65.

²¹³ For analysis of this provision during the legislative process, see, e.g., Angelopoulos, ‘Study on Online Platforms and the Commission’s New Proposal for a Directive on Copyright in the Digital Single Market’ (n 181); Martin Senftleben and others, ‘The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform’ (2018) 40 *European Intellectual Property Review* 149.



Title	Chapter	Articles	Recitals (Indicative)
III. Measures to improve licensing practices and ensure wider access to content	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 CDSM Directive: brief overview

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”.²¹⁴ 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.²¹⁵ 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 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.²¹⁶

²¹⁴ 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.

²¹⁵ There is already significant scholarship art 17. See e.g. Leistner (n 156); 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 214); Jan Bernd Nordemann and Julian Wiblinger, ‘Art. 17 DSM-RL – Spannungsverhältnis Zum Bisherigen Recht?’ [2020] GRUR 569; Husovec and Quintais (n 187); 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.

²¹⁶ Art. 17(4) (b) and (c) CDSM Directive.



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.²¹⁷ Second, a special regime for small and new OCSSPs.²¹⁸ Third, a set of mandatory exceptions akin to user rights or freedoms that are designed as obligations of result expressly based on fundamental rights.²¹⁹ Fourth, a clarification that art. 17 does not entail general monitoring – a similar prohibition to that set out in art. 15 e-Commerce Directive.²²⁰ Fifth, a set of procedural safeguards, including an in-platform complaint and redress mechanism and rules on out of court redress mechanisms.²²¹

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. These stakeholder dialogues have resulted in the publication of Commission Guidance on the interpretation of art. 17.²²² We discuss the Guidance below, as well as its implications in key parts of the legal regime of art. 17. However, a few points should be made already at this stage. First, the Guidance was adopted as a Communication and is therefore not binding.²²³ Furthermore, as the Guidance itself states, it might have to be reviewed in light of the CJEU judgement in C-401/19.²²⁴ In fact, the Opinion of the Advocate General (AG) in that case suggests that key aspects of the Guidance might not be in conformity with fundamental rights.²²⁵ Still, the Guidance is a rich document that is bound to strongly influence national implementations, including on the topics of copyright content moderation of the relationship between platforms and users.

In sum, as regards the relationship between platforms and users, art. 17 mostly sets rules for (certain types of) content moderation by platforms. These moderation actions result from the application of best efforts obligations vis-à-vis rights holders to apply preventive measures, a pre-condition for platforms to benefit from a liability exemption regarding content uploaded by users. Such measures must be applied with respect for users' rights embodied in certain freedom of expression-based exceptions. As we explain below, this will in principle require national laws to recognize the need for platforms to adopt ex ante safeguards, since ex post complaint and redress mechanisms are insufficient to ensure the respect of user rights.

3.4 Article 17 CDSM Directive: in depth analysis

3.4.1 The concept of Online Content-Sharing Service Provider (OCSSPs)²²⁶

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.

²¹⁷ Art. 17 (5) CDSM Directive.

²¹⁸ Art. 17 (6) CDSM Directive.

²¹⁹ Art. 17 (7) CDSM Directive.

²²⁰ Art. 17(8) CDSM Directive. 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; CIPIL 2020) <<https://papers.ssrn.com/abstract=3717022>> accessed 29 October 2020.

²²¹ Art. 17(9) CDSM Directive.

²²² Communication from the Commission to the European Parliament and the Council, Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market, COM/2021/288 final (hereafter "Guidance Art 17 CDSM Directive"). For early analysis of the Guidance Art. 17 CDSM Directive, see João Pedro Quintais, 'Commission's Guidance on Art. 17 CDSM Directive: The Authorisation Dimension' (*Kluwer Copyright Blog*, 10 June 2021) <<http://copyrightblog.kluweriplaw.com/2021/06/10/commissions-guidance-on-art-17-cdsm-directive-the-authorisation-dimension/>> accessed 17 August 2021; Julia Reda and Paul Keller, 'European Commission Back-Tracks on User Rights in Article 17 Guidance' (*Kluwer Copyright Blog*, 4 June 2021) <<http://copyrightblog.kluweriplaw.com/2021/06/04/european-commission-back-tracks-on-user-rights-in-article-17-guidance/>> accessed 24 June 2021; Christophe Geiger and Bernd Justin Jütte, 'Towards a Virtuous Legal Framework for Content Moderation by Digital Platforms in the EU? The Commission's Guidance on Article 17 CDSM Directive in the Light of the YouTube/Cyando Judgement and the AG's Opinion in C-401/19' [2021] *European International Property Review* <<https://papers.ssrn.com/abstract=3889049>> accessed 17 August 2021.

²²³ See arts. 288 and 290 288 of the Treaty on the Functioning of the European Union (TFEU).

²²⁴ Guidance Art. 17 CDSM Directive (n. 222), p. 1.

²²⁵ See C-401/19, AG Opinion C-401/19, Poland, paras 221-223.

²²⁶ This section relies and develops upon Husovec and Quintais (n 187). and Quintais, 'The New Liability Paradigm for Online Platforms in EU Copyright Law [Forthcoming]' (n 144).



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 (e.g., Facebook), although some authors point out that certain aspects in the legal definition raise doubts in this regard.²²⁷

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.²²⁸

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).²²⁹

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 a type of provider of hosting services whose activities or functions were previously regulated in different legal instruments, such as the e-Commerce, InfoSoc and Enforcement Directives. However, the legal design of art. 17 constitutes a new development. Until now, EU copyright law did not attach liability to a legally specified category of providers, but rather on the basis of acts (communication to the public) and services or functions (hosting). Now, direct liability for communication to the public is attached to the legal qualification of a provider as an OCSSP.

For the analysis of this new legal category, it is instructive to critically look at the Commission's Guidance, which dedicates a separate section to the topic.²³⁰

First, the Guidance states that the concept of OCSSP is maximum harmonization: Member States may not widen or reduce the scope of application of the definition in art. 2(6). Apparently clear on its face, the statement is problematic insofar as the Guidance itself is unclear about the actual scope of the concept. The inherent incentive for Member States is for a verbatim transposition. However, that would not suffice, since the Guidance states that Member States should transpose into their laws the elements in Recitals 61, 62 and 63. But since the elements in the recitals are to some extent open to interpretation, it remains unclear what exactly is the scope of the OCSSP definition, from which Member States cannot deviate from. As an example, Recital 63 explicitly requires a case-by-case assessment of what providers qualify as an OCSSP. To mitigate these concerns and add clarity for national legislators, the Guidance addresses each requirement of the OCSSP definition. First, on the requirement on "main purpose" of the service provider, it states that that main purpose (or one of the main purposes) must mirror the chief or predominant function or role of service provider. This assessment "should be technology and business model neutral in order to be future proof."²³¹

Second, on the requirement that a service provider must store a "large amount" of protected content, Member States should "refrain from quantifying" that amount in national law due to risk of fragmentation of national approaches. Consequently, this too must be assessed on a case-by-case basis, combining elements mentioned in Recital 63.²³²

Third, on the requirement that the service provider pursues a "profit-making purpose" when organizing or promoting content, it is not enough that the provider is an economic operator or to look at its legal form. Profits

²²⁷ See Metzger and others (n 11) 2-4; Dusollier (n 11).

²²⁸ 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.'

²²⁹ On art 17(4), see below at 3.4.4–3.4.5. Recital 62 CDSM Directive states that "the liability exemption mechanism provided for in this Directive should not apply" to piracy websites.

²³⁰ Guidance Art. 17 CDSM Directive (n. 222), pp.3-5 (Section III).

²³¹ Guidance Art. 17 CDSM Directive (n. 222), p. 4.

²³² Guidance Art. 17 CDSM Directive (n. 222), p. 5. NB it remains unclear if all the elements in the recital must be combined in the assessment.



must be connected to “organisation and promotion of the content uploaded by the users in a manner to attract a wider audience”, e.g., via advertisement next to uploaded content.²³³ In addition, certain activities are insufficient to qualify as for profit. These include receiving a fee from users to cover the operating costs of hosting their content or soliciting donations.²³⁴

Finally, in an interesting legal twist in the Commission’s interpretation, the Guidance states that if a provider offers multiple services, then there is a need for service-by-service analysis to assess whether it qualifies as an OCSSP.²³⁵ With this statement, the Guidance attempts to walk a legal tightrope by trying to fit logic of art. 2(6), which is focused on defining a certain type of service provider to whom direct liability is attributed, with traditional liability analysis under copyright law, which focuses on acts, services or functions by/of providers.

In fairness, the Guidance does a good job of aligning the new regime with the existing framework and CJEU case law on communication to the public. However, it cannot square the circle. Such an effort can at best approximate the regimes and improve their consistency. It cannot change the fact that the arts. 2(6) and 17 CDSM Directive mark a conceptual departure from previous law on how to attribute liability to a sub-set of online service providers. In short, in the new regime, if a provider is an OCSSP, then direct liability follows; in the old regime, if an act of a provider qualifies as communication to the public, then direct liability follows. How a provider is qualified as an OCSSP depends inter alia on several open-ended factors; some of these may be similar to the factors developed by the Court to establish direct liability in the old regime. Still, the structural differences in legal design of both are undeniable, and they translate into distinct approaches to the attribution of liability.

3.4.2 The Authorisation Dimension: Direct liability and merger of restricted acts²³⁶

As the Commission’s Guidance recognises, art. 17 “creates a legal basis” for rightsholders to authorise the use of their works when uploaded by users. It is therefore more than a “clarification” of the existing law, as it changes the pre-existing legal framework, namely vis-à-vis art. 3 InfoSoc Directive.²³⁷

There has been discussion in scholarship surrounding the legal nature of art. 17. Four interpretative options exist: A) art. 17 is fully encompassed in the minimum international standard; B) art. 17 is fully encompassed in the EU standard of art. 3 InfoSoc Directive, as interpreted by the CJEU; C) art. 17 introduces a special right; D) art. 17 introduces a sui generis right.²³⁸ A special right would mean that although the scope of acts it covers is *within* the pre-existing scope of the right of communication to the public in art. 3 InfoSoc Directive, it follows a separate regime with its own particular rules. Conversely, a new (sui generis) right would mean that it amounts to a wholly new right of communication to the public, which extends the concept beyond the already broad EU notion of the communication to the public in art. 3 InfoSoc Directive as interpreted by the CJEU.²³⁹ In its Guidance, the Commission endorses Option C) by stating that art. 17 is *lex specialis*, and rejects other options, including that the provision introduces a new right.²⁴⁰

An important consequence of the *lex specialis* nature of art. 17 is that the provision requires specific implementation into national law. That is to say, it is not possible for Member States to rely on their previous implementation of art. 3 InfoSoc Directive. In this regard, a key aspect of the legal regime is that OCSSPs provide access to content originating from user uploads. As a result, national laws must explicitly introduce “specific conditions” that reflect this composite nature of the act of communication.²⁴¹ Building on the qualifications above, it is important to further explore the concept and scope of the authorisations mentioned in arts. 17(1) and (2).

An initial consideration in the interpretation of art. 17(1) is that does not define “authorisation”, which is viewed as an open-ended concept. Member States can therefore provide for different authorisation models.²⁴² In the

²³³ Guidance Art. 17 CDSM Directive (n. 222), p. 5.

²³⁴ Guidance Art. 17 CDSM Directive (n. 222), p. 5.

²³⁵ Guidance Art. 17 CDSM Directive (n. 222), p. 5.

²³⁶ This section reproduces parts of and relies on Quintais, ‘The New Liability Paradigm for Online Platforms in EU Copyright Law [Forthcoming]’ (n 144).

²³⁷ Guidance Art. 17 CDSM Directive (n. 222), p. 2. The point is clear from the statement that art. 17 is *lex specialis* to arts. 3 InfoSoc Directive and 14 e-Commerce Directive.

²³⁸ Husovec and Quintais (n 187).

²³⁹ Husovec and Quintais (n 187).

²⁴⁰ Guidance Art. 17 CDSM Directive (n. 222), p. 3.

²⁴¹ Guidance Art. 17 CDSM Directive (n. 222), p. 2.

²⁴² Guidance Art. 17 CDSM Directive (n. 222), pp. 5-6. An interesting clarification in this respect is that the concept of authorisation does not require a remunerative counter performance. Indeed, it is also acceptable that an authorisation is given for free (e.g., as with Creative Commons licenses) for “data or promotional activities”. *Id.*, p. 6.



second place, in line with the Guidance, it is argued that the acts of communication/making available to the public in art. 17(1) include any necessary reproductions for those purposes.²⁴³ In other words, there is a functional merger between reproduction and communication to the public. The result is that no separate permission is required for reproductions in this context.²⁴⁴

From these statements it results that certain authorisation models are possible for the right in art. 17(1). This is the case, first, of individual and voluntary forms of collective licensing, provided the requirements of the Collective Rights Management Directive²⁴⁵ are met.²⁴⁶ It is also the case for collective licensing with extended effect, provided the authorisation at issue is compliant with the requirements of art. 12 CDSM Directive, as transposed into national law.²⁴⁷

More controversial is the question of whether mandatory collective licensing and statutory licensing are viable authorisation models, since they are not voluntary for rightsholders, or at the very least do not include an opt-out safeguard. I have argued elsewhere that this should be a possibility if it is accepted that the right in art. 17(1) is *lex specialis*, since this theoretically opens the door for non-voluntary and hybrid authorisation models, within certain limits, namely the *effet utile* of the provision.²⁴⁸ The Commission's Guidance is silent in this respect, seemingly not endorsing this option.

As regards art. 17(2), the objective of this provision is legal certainty for as many uploading users as possible. The provision states that authorisations obtained by OCSSPs shall also cover acts carried out by users of the services. The scope of the authorisation for these users extends to all their uploading acts that are: 1) for a non-commercial purpose; or 2) generating non-significant revenues.

In defining these concepts, Member States are told not to pre-set quantitative thresholds for "significant revenues". This means that these concepts must be defined pursuant to a case-by-case analysis.²⁴⁹ One important clarification is that if the user has explicit authorisation to upload content, there is no need for additional authorisation to the OCSSP.²⁵⁰ This subsequent availability is within the scope of the initial authorisation, and *not* a presumption in favour of OCSSPs.²⁵¹ In other words, and as argued elsewhere, art. 17(2) merges the act of OCSSP with the non-commercial acts of their users. Once an authorisation is granted, these acts cannot be split.²⁵² This is a clear distinction from the pre-existing regime, where acts of platforms and users were assessed separately, and could only under specific scenarios and interpretations be considered functionally merged.

The final dimension of the authorisation mechanism in art. 17 relates to the obligation of best efforts to obtain an authorisation in art. 17(4)(a). We address this below at 0.

3.4.3 Relation to the hosting liability exemption in the e-Commerce Directive

The relation between the art. 17 CDSM Directive regime and the horizontal e-Commerce Directive is relevant in at least two dimensions: firstly, the relation between the hosting liability exemption in art. 14 e-Commerce Directive and the novel regime in art. 17(4) CDSM Directive; and secondly, the relation between the prohibition

²⁴³ Guidance Art. 17 CDSM Directive (n. **Errore. Il segnalibro non è definito.**), pp. 5-7. Relatedly, the Guidance states that it should be possible for rightsholders to not grant an authorisation to OCSSPs for acts of communication to the public under art. 17. See also Recital 61 CDSM Directive, making reference to contractual freedom.

²⁴⁴ Arguably, a similar conclusion could be drawn from some of the CJEU case on communication to the public, namely CJEU, 7 August 2018, Case C-161/17, Land Nordrhein-Westfalen v Dirk Renckhoff (*Renckhoff*). On which, see Tatiana Synodinou, 'The Renckhoff Judgment: The CJEU Swivels the Faces of the Copyright Rubik's Cube (Part I)' (*Kluwer Copyright Blog*, 27 September 2018) <<http://copyrightblog.kluweriplaw.com/2018/09/27/renckhoff-judgment-cjeu-swivels-faces-copyright-rubiks-cube-part/>> accessed 20 October 2021.

²⁴⁵ 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.

²⁴⁶ Guidance Art. 17 CDSM Directive (n. 222), pp. 6-7. NB at least in the context of individual agreements, the Guidance encourages Member States to use, establish or maintain voluntary mechanisms to facilitate agreements between rightsholders and OCSSPs, perhaps nodding at mechanisms similar to those envisaged in art. 13 CDSM Directive. See *id.*, p.6. On the topic of authorization models for the right in art. 17, see also Husovec and Quintais (n 187).

²⁴⁷ Guidance Art. 17 CDSM Directive (n. 222), pp. 6-7. See also on the validity of CLEE as an authorization model in this area, Husovec and Quintais (n 187).

²⁴⁸ For a detailed argument, see Husovec and Quintais (n 187).

²⁴⁹ Guidance Art. 17 CDSM Directive (n. 222), p.7.

²⁵⁰ See Recital 69 CDSM Directive.

²⁵¹ Guidance Art. 17 CDSM Directive (n. 222), pp. 7-8. However, the Guidance adds that it is up to rightsholders to expressly exclude subsequent uploading from the authorisation to end-users. To do so, the Commission encourages sharing of information to prevent blocking of legitimate uses.

²⁵² See, for a detailed analysis of the consequences of this qualification, Husovec and Quintais (n 187).



of general monitoring in art. 15 e-Commerce Directive and art. 17(8) CDSM Directive. The second dimension is addressed below at 3.4.8.2.

As for the first dimension, we recall here what was described above regarding art. 14 e-Commerce Directive and the Courts interpretation thereof (at 3.1.2–3.1.3). In this respected, as noted at 3.3 and 3.4.2 above, art. 17(3) CDSM Directive is clear. If an act of an OCSSP is covered by art. 17(1) and (2), then the hosting liability exemption in art. 14(1) does not apply to that act. In other words, the OCSSP is directly liable without the possibility of benefiting from the liability exemption for hosting service providers in the e-Commerce Directive. For acts of those same online platforms that do not fall under the scope of arts. 17(1) and (2) – especially the hosting of illegal content that is not copyright infringement – art. 14 e-Commerce Directive remains applicable.²⁵³ The logic conclusion of this regime, therefore, is that art. 17 is not only *lex specialis* to art. 3 InfoSoc Directive, but also to art. 14 e-Commerce Directive.²⁵⁴

3.4.4 Best efforts to obtain an authorization (also as a condition for liability exemption)²⁵⁵

The liability exemption mechanism on art. 17(4) CDSM encompasses a series of *cumulative* “best efforts” obligations to: (a) obtain an authorisation; (b) ensure unavailability of specific protected content; and (c) put in place notice and take down and notice and stay down mechanisms. This section focuses on first obligation (a), which is also a complete novelty as compared to the pre-existing regime under art. 3 InfoSoc Directive. Indeed, this obligation has a dual role: it qualifies the extent of the authorisation requirement for OCSSPs in art. 17(1); and is the first condition OCSSPs to benefit from the liability exemption in art. 17(4).

Three important clarifications on best efforts obligations result from the Commission's Guidance. First, “best efforts” is an autonomous concept of EU law. Second, “best efforts” obligations are hierarchically inferior – and therefore must bend the figurative knee to – to the obligations of result in arts. 17(7), (8) and (9). Third, the proportionality principle in 17(5) should “be considered” when assessing *all* best efforts obligations in 17(4). This latter consideration is particularly important to protect OCSSPs’ freedom to conduct a business in art. 16 Charter.²⁵⁶

According to the Commission, the obligation of “best efforts” to obtain authorisation in 17(4)(a) requires case-by-case analysis of actions of OCSSPs to seek out and/or engage with rightsholders. More concretely, a minimum threshold of that obligation is that OCSSPs engage proactively with rightsholders that can be easily identified and located, notably those with broad catalogues (e.g., collective management organisations). On the flipside, OCSSPs should not be expected to proactively seek out rightsholders “not easily identifiable by any reasonable standard”.²⁵⁷

The Guidance further notes that the obligations under art. 17(4)(a) should be asymmetric depending on the OCSSP in question. In simplified terms, larger OCSSPs (“with a big audience in several or all Member States”) must seek out “high number of rightholders”, at least for the content that is predominant on their services. OCSSPs that are smaller, i.e., with a limited or national audience, must seek at least CMOs and “possibly a few other easily identifiable rightholders.” Those small and new OCSSPs covered by art. 17(6) must also seek out licenses, although the extent of their obligations should be assessed on a case-by-case basis with consideration for the principle of proportionality. In any case, smaller OCSSPs must provide contact details to potential licensees and engage with these if contacted by them.²⁵⁸

Against this basic set-up, the Guidance states that refusals to negotiate or unreasonable refusals to license by rightsholders result in OCSSPs meeting their obligation to seek authorisation under art. 17(4)(a). However, it is up to OCSSPs to demonstrate this, which might be challenging in practice, at least in the context of individual licensing deals.²⁵⁹ A relevant wrinkle is suggested for cases where a type of content is present but not common or prevalent on a certain platform. Here, OCSSPs do not need to proactively seek out licenses but must still “engage” with rightsholders that offer them.²⁶⁰

²⁵³ Art. 17(3) CDSM Directive, second subparagraph.

²⁵⁴ Guidance Art. 17 CDSM Directive (n. 222), p. 2.

²⁵⁵ This section reproduces parts of and relies on Quintais, ‘The New Liability Paradigm for Online Platforms in EU Copyright Law [Forthcoming]’ (n 144).

²⁵⁶ Guidance Art. 17 CDSM Directive (n. 222), p. 8.

²⁵⁷ Guidance Art. 17 CDSM Directive (n. 222), p.9. To facilitate this, the Guidance suggests that Member States may encourage development of registries of rightholders to be consulted by OCSSPs, in compliance with data protection rules. Id. p. 9 On how the structure of art. 17 favors big rights holders, see Husovec and Quintais (n 215).

²⁵⁸ Guidance Art. 17 CDSM Directive (n. 222), p.9.

²⁵⁹ Guidance Art. 17 CDSM Directive (n. 222), pp. 9-10.

²⁶⁰ For criticism, see Quintais, ‘Commission’s Guidance on Art. 17 CDSM Directive’ (n 222).



This point is trickier than it seems. At first glance, it is legally sound, since art. 17(1) leads to direct liability for protected content hosted by OCSSPs. Therefore, where the content is identified, it is susceptible of licensing. But if content is less common or prevalent on a service, then an OCSSP might have no interest in hosting it and could therefore legitimately choose to take it down (e.g., under art. 17(4)(c)). However, the structure of the provision means that in order to benefit from a liability exemption, OCSSPs must demonstrate best efforts under 17(4)(a).

What the Guidance is saying then is that OCSSP must make best efforts to license content in which they might not be at all interested. Seen in this light, this is quite a far-reaching statement, perhaps inconsistent with the proportionality provision in art. 17(5) CDSMD and providers' freedom to conduct a business in art. 16 of the Charter.

Reading the Guidance, it is unclear whether OCSSPs they have an obligation to license the less common or prevalent content under the same terms as the content that is core to their platform. If yes, then the only difference in this scenario is that OCSSPs are not required to proactively seek authorisation. On the other hand, and as potential mitigation on this obligation, it could be argued that this content is of less importance and value to the OCSSP. Therefore, the obligation on OCSSPs pursuant to art. 17(4)(a) should be modulated accordingly, e.g., requiring a lower remuneration.

One key criterion to assess compliance with the obligation in art. 17(4)(a) is that licensing terms “should be fair and keep a reasonable balance between both parties” and be subject to the payment of “appropriate remuneration”.²⁶¹ As a result, OCSSPs must accept to conclude licenses that are “offered on fair terms” and maintain “a reasonable balance between the parties”. Whether art. 17(4)(a) ends up in practice as a “best efforts” obligation or a more far-ranging obligation to license will depend on how these “fair terms” and “reasonable balance” are ultimately defined and applies to different OCSSPs and types of content.²⁶²

3.4.5 The Liability exemption mechanism proper: preventive/proactive and reactive measures²⁶³

Assuming OCSSPs are able to demonstrate best efforts to obtain an authorization, they must then comply with the additional requirements of art. 17(4)(b) and (c) to benefit from a liability exemption for the user-uploaded content they host. As noted, these obligations relate to preventive/proactive and reactive measures.

For preventive or proactive measures, OCSSPs must first receive from rights holders “relevant and necessary information”, upon which they must either carry out “best efforts to ensure the unavailability of specific works” (4(b)) or ensure the works already taken down do not resurface on the platform (4(c)). The first obligation provides clear incentives for the adoption of ex-ante filtering measures, what some have called “upload filters”; the second institutes a notice-and-staydown (NSD) regime, also labelled “re-upload filters”. Differently, the other measure foreseen in paragraph art. 17 (4)(c) is reactive: OCSSPs must put in place a notice-and-takedown (NTD) system, pursuant to which they must act “expeditiously” to remove or disable access to content they host upon receiving a “sufficiently substantiated notice from the rightholders”.²⁶⁴ This regime is like that existing previously under art. 14 e-Commerce Directive.

All obligations of best efforts must be interpreted in accordance with the principle of proportionality and the factors described in art. 17(5) CDSM Directive: the type, the audience and the size of the service and the type of protected content uploaded by their users; and the availability of suitable and effective means and their cost for OCSSP. Furthermore, art. 17(6) partially exempts from this regime OCSSPs that are “new service providers with small turnover and audience”. Such OCSSPs must only comply with mitigated obligations to benefit from the liability exemption mechanism in paragraph (4).²⁶⁵

On *preventive or proactive measures*, the Commission's Guidance states that information is considered “relevant” if it is at least “accurate about the rights ownership of the particular work or subject matter in

²⁶¹ Guidance Art. 17 CDSM Directive (n. 222), p.10. The Guidance takes this to mean, first, that “fair terms” are to be assessed on a case-by-case basis. In addition, a fair licensing deal means that OCSSP must be transparent about criteria used to identify and remunerate use of works, including as regards the use of content recognition technology. See also Recital 61 CDSM Directive.

²⁶² Guidance Art. 17 CDSM Directive (n. 222), p.10. The situation is clearer and perhaps less problematic for licenses that are negotiated with CMOs, which must comply with the requirements of art. 16 of the Collective Rights Management Directive. Arguing that “[f]or that reason alone, it might be worth seriously exploring collective authorisation models for the right in art. 17”, see Quintais, ‘Commission's Guidance on Art. 17 CDSM Directive’ (n 222).

²⁶³ This section reproduces parts of and relies on Quintais, ‘The New Liability Paradigm for Online Platforms in EU Copyright Law [Forthcoming]’ (n 144).

²⁶⁴ See Guidance Art. 17 CDSM Directive (n. 222), pp.14-16, suggesting that what constitutes a “sufficiently substantiated notice” in this respect should follow the Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online C/2018/1177, points 6–8.

²⁶⁵ On the interpretation of art. 17(6), see Guidance Art. 17 CDSM Directive (n. 222), pp. 16-17.



question”. The consideration of whether it is “necessary” is trickier, and it will vary on the technical solutions deployed by OCSSPs; in any case, such information must allow for the effective application of the providers’ solutions, where they are used.²⁶⁶

The Guidance also provides some detail on how such *preventive or proactive measures* should be implemented. Any measures deployed by OCSSPs must follow “high industry standards of professional diligence”, to be assessed especially against “available industry practices on the market” at the time, including technological solutions. OCSSPs have flexibility only in choosing between available solutions, assuming such choice exists on the market.²⁶⁷

When discussing current market practices that emerged from the Stakeholder Dialogues, the Guidance highlights content recognition based on fingerprinting as the main example, although recognising that is not the market standard for smaller OCSSPs.²⁶⁸ Other technologies identified include hashing, watermarking, use of metadata and keyword search; these can also be used in combination.²⁶⁹ Such technologies are sometimes developed in-house (e.g., YouTube’s ContentID or Facebook’s Rights Manager), and other times acquired from third parties (e.g., from Audible Magic or Pex).

Ultimately, whether an OCSSP complies with its best efforts obligations regarding proactive measures will depend on a multi-factor case-by-case assessment considering paragraphs (5), (7) and (9), and including: the consideration of the asymmetric nature of the obligations (depending on size and type of platform); the cost assessment of available technological solutions; and the type of content hosted by the platform and in relation to which a measure is deployed.²⁷⁰

This brief tour of the liability exemption mechanism in art. 17(4) is sufficient to explain how it stands apart from the pre-existing regime of copyright liability for online platforms under art. 3 InfoSoc Directive.²⁷¹ One crucial difference is that the new regime embeds a multi-pronged liability exemption mechanism within the scheme of direct or primary liability for OCSSPs. This mechanism contains several original features: cumulative best efforts requirements; a gateway requirement of best efforts to obtain an authorisation as a pre-condition for the exemption; clear preventive/proactive obligations to avoid availability of notified content in the first place, and to prevent its reappearance (NSD); reactive obligations in the form of an NTD scheme that is located within the assessment of direct liability as opposed to intermediary or secondary liability; a clear identification of the proportionality principle and assessment factors for the best efforts obligations; a mitigated regime for small and new OCSSPs; and the specific requirement to comply with substantive and procedural safeguards in arts. 17(7) and (9), both discussed in greater detail below.²⁷² The “hybrid character” of art. 17 in general²⁷³, and of its liability exemption mechanism, highlight the turn of the EU legislator towards a new liability paradigm for copyright content-sharing platforms.

As we note below, at 3.4.9, the Commission’s Guidance provides several recommendations on how to implement the preventive measures in art. 17(4) in a manner that is compliant with the obligations in the rest of the provision, namely paragraph (7). As it is also noted below, and in line with the AG Opinion C-401/19, it is questionable whether this aim was achieved.

3.4.6 Proportionality assessment and factors²⁷⁴

As noted, art. 17(5) CDSM Directive states that several elements shall be part of the assessment when determining whether an OCSSP complies with the obligations in order to benefit from the liability exemption provided for in art. 17(4).

A first group of elements relates to the specific OCSSP, namely its type, audience, size of the service and type of works or other subject matter uploaded by the users. A second group of elements relates to the broader and more general “availability of suitable and effective means and their cost for service providers.”²⁷⁵ Additionally,

²⁶⁶ Guidance Art. 17 CDSM Directive (n. 222), p.14 (providing examples related with “fingerprinting” and “metadata-based solutions”).

²⁶⁷ Guidance Art. 17 CDSM Directive (n. 222), p.12.

²⁶⁸ Guidance Art. 17 CDSM Directive (n. 222), p. 12.

²⁶⁹ Guidance Art. 17 CDSM Directive (n. 222), pp. 12-13.

²⁷⁰ Guidance Art. 17 CDSM Directive (n. 222), pp. 13-14.

²⁷¹ See supra at **Errore. L'origine riferimento non è stata trovata.**

²⁷² On the latter, see Quintais and others (n 17); Garstka (n 215); Schwemer and Schovsbo (n 17).

²⁷³ Leistner repeatedly refers the hybrid character of the provision. See Leistner (n 156) 8, 23, 34.

²⁷⁴ This section reproduces parts of and relies on Schwemer, ‘Article 17 at the Intersection of EU Copyright Law and Platform Regulation’ (n 215) 419.

²⁷⁵ For specific suggestions on how to interpret these factors in the context of art. 17(4) CDSM Directive, see Guidance Art. 17 CDSM Directive (n. 222), pp. 13-14.



the lengthy recital 66 supplements that “account should be taken of whether the service provider has taken all the steps that would be taken by a diligent operator to achieve the result of preventing the availability of unauthorized works (...) taking into account best industry practices and the effectiveness of the steps taken (...) as well as the principle of proportionality”.

Thus, even if an online platform falls under the scope of art. 17, the specific circumstances both in relation to the platform itself and the broader industry standards as well as the proportionality of the “means”, will have to be considered. Importantly, given that there is no specific reference to art.17(4)(a) or (b) exclusively, this “specific circumstances test” is also to be applied also in relation to the NTD and NSD mechanisms contained in art. 17(4)(c). This is also the conclusion of the Commission’s Guidance, which endorses the application of the same criteria for these measures as those advanced for the preventive measures under art. 17(4)(b).²⁷⁶

This could be, for example, of relevance for online discussion fora, start-ups or small or medium-sized OCSSPs, which cannot benefit from a softer liability exemption regime once they have been operating for more than three years. In any case, it is noted that art. 17(5) – and the principle of proportionality – must be taken into consideration when interpreting the provision on in art. 17(6) on the special regime for small and new OCSSPs, namely in assessing whether such providers complied with their best efforts obligations regarding preventive measures.²⁷⁷

3.4.7 Special regime for (small and) new OCSSPs

Art. 17(6) contains a partial exception to the liability regime in paragraph (4), to the benefit of OCSSPs that are “new service providers with small turnover and audience”.²⁷⁸ These small and 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.²⁷⁹

Art. 17(6) and recital 67 CDSM Directive identify two scenarios in which OCSSPs are exempted from *some* of the preventive obligations in art. 17(4)(b) and (c). First, OCSSPs that are under three years old and have an annual turnover below EUR 10 million are only subject to the NTD obligation in art. 17(4)(c). Second, OCSSPs that meet the conditions of the first scenario and additionally have more than 5 million monthly unique visitors, are also subject to the NSD obligations art 17(4)(c).²⁸⁰ As noted, in both scenarios these obligations must be assessed considering the principle of proportionality in art. 17(5).²⁸¹

Importantly, this mitigated regime does not affect the availability of other remedies against small and new OCSSPs, since these providers 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.²⁸²

3.4.8 Substantive and procedural safeguards

In order to mitigate the potential negative effects of the preventive measures on users and platforms’ fundamental rights, the remainder of art. 17 introduces the following substantive and procedural safeguards, which we analyse in this subsection: mandatory E&Ls or “user rights” (3.4.8.1); a prohibition on general monitoring obligations (3.4.8.2); and procedural or ex post safeguards (3.4.8.3).

²⁷⁶ See Guidance Art. 17 CDSM Directive (n. 222), p. 15.

²⁷⁷ See Guidance Art. 17 CDSM Directive (n. 222), p.17.

²⁷⁸ On art. 17(6), see See Guidance Art. 17 CDSM Directive (n. 222), pp. 16-17. NB art. 16 DSA proposal contains also a somewhat similar exclusion from due diligence obligations applicable to online platforms, but to the benefit of online platforms who qualify as micro or small enterprises within the meaning of the Annex to Recommendation 2003/361/EC.

²⁷⁹ See Schwemer, ‘Article 17 at the Intersection of EU Copyright Law and Platform Regulation’ (n 215). noting that only very new services will be able to benefit from this eased liability exemption regime even though the respective criteria have been described as covering SMEs during the legislative process. Germany, in its statement accompanying its vote in the Council, for example underlined that it aims to clarify that services like blogs and online fora as well as messenger services like WhatsApp fall out of the scope of Article 17. See Council of the European Union, Statement by Germany, (5 April 2019), point 6, p. 4.

²⁸⁰ See recital 66 CDSM Directive, stating that visitors from across the EU must be considered when calculating this threshold. N.B. some of the thresholds used to define the exclusion scenarios are taken from other legislative instruments: art 16(2) 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).

²⁸¹ See supra at 3.4.6 and Guidance Art. 17 CDSM Directive (n. 222), p.17.

²⁸² 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 Husovec (n 165).



3.4.8.1 Mandatory exceptions and limitations or user rights²⁸³

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, 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 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.”²⁸⁴*

The Explanatory Memorandum accompanying the proposal for the 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’.*²⁸⁵

The most distinct feature relates to this latter point, namely the balancing within art. 17(7) (addressed in this section) and (9), which was only 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.²⁸⁶ The second paragraph of art. 17(7) CDSM Directive includes a special regime for certain E&Ls: (i)

²⁸³ This section reproduces parts of, relies on and develops prior research from some of authors of this report, namely: Quintais and others (n 17); Schwemer and Schovsbo (n 17).

²⁸⁴ Emphasis added.

²⁸⁵ See European Commission, Proposal for a Directive on copyright in the Digital Single Market, COM/2016/0593 final - 2016/0280 (COD), Explanatory Memorandum p. 9. See also European Commission, Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, Brussels, 14.9.2016 SWD(2016) 301 final, Part 1, 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’.

²⁸⁶ This should be read in combination with the statement in Article 17(9) to the effect that the CDSM 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



quotation, criticism, review; (ii) use for the purpose of caricature, parody or pastiche.²⁸⁷ 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.²⁸⁸

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).²⁸⁹

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.²⁹⁰

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 art. 17.²⁹¹ 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).²⁹²

It has further been suggested that 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.²⁹³ The same should be done for the remaining concepts in art. 17(7), namely pastiche, in order to ensure the effectiveness of that provision.²⁹⁴

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 most transformative types of user-generated content uploaded by users to OCSSP, such as remixes and mashups.²⁹⁵

3.4.8.2 Prohibition on general monitoring obligations

As noted in section 3.1 above, art. 15 e-Commerce Directive sets out a prohibition on the imposition on general monitoring obligations, which has been subject to extensive interpretation by the CJEU, most recently in *Eva Glawischnig-Piesczek* and *YouTube and Cyando*. The previous analysis also highlights the multiple open questions surrounding the Court's interpretation, namely as to where to draw the line separating prohibited general monitoring from permissible “specific” monitoring, as well as to the applicability of the interpretation of the Court in *Glawischnig-Piesczek* to the area of copyright.

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 17).

²⁸⁷ These were optional E&L in arts. 5(3)(d) and (k) InfoSoc Directive, which have not been implemented in all Member States; where they have, the implementations differ.

²⁸⁸ Article 17(9) para. 4 CDSM Directive.

²⁸⁹ 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 17).

²⁹⁰ See Quintais and others (n 17).

²⁹¹ 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.”

²⁹² Quintais and others (n 17). (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).

²⁹³ See: CJEU, 1 December 2011, Case C-145/10, *Eva-Maria Painer v Standard VerlagsGmbH and others* (Painer); CJEU, 3 September 2014, Case C-201/13, *Johan Deckmyn, Vrijheidsfonds VZW v Helena Vandersteen, and others* (Deckmyn); CJEU, 29 July 2019, Case C-469/17, *Funke Medien NRW GmbH v Bundesrepublik Deutschland* (Funke Medien); CJEU, 29 July 2019, Case C-476/17, *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben* (Pelham); and CJEU, 29 July 2019, Case C-516/17, *Spiegel Online GmbH v Volker Beck* (Spiegel Online). 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 17).

²⁹⁴ See Quintais and others (n 17). 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.

²⁹⁵ Quintais and others (n 155).



Against this background art. 17(8) para. 1 states, at first glance, rather declaratory fashion that “[t]he application of this Article shall not lead to any general monitoring obligation.” The concrete stress test for this provision lies in its articulation with art. 17(4)(c). In this respect, the Commission states that “Member States should also bear in mind that Article 17(4) is subject to the obligations... in Article 17(8), whereby Article 17 should not be transposed or applied in a way, which leads to any general monitoring obligation.”²⁹⁶ It is apparent from the historical background of the CDSM Directive and the Commission’s Guidance, that the primary means to comply with the obligations set out in art. 17(4)(c) as regards preventive measures is with proactive technological measures, i.e., content recognition systems and tools.²⁹⁷ The question that arises therefore is whether such tools are compatible with the prohibition on general monitoring obligations in paragraph (8).

The question is particularly relevant since a closer look at art. 17(8) shows that the provision prohibits not only Member States from mandating general monitoring obligations, but also clearly focuses on the “application” of art. 17. In other words, OCSSPs *themselves* are restricted from applying measures that constitute a general monitoring obligation. The point is striking since online platforms have in some instances voluntarily employed monitoring mechanisms, which is not prohibited by art. 15 e-Commerce Directive.²⁹⁸

As discussed, art. 17(4)(c) refers to “high industry standards of professional diligence”, which the Commission has interpreted as referring inter alia to content recognition technologies used by OCCSPs. Given that some of the large OCSSPs already had content recognition technologies in place for more than a decade, it is difficult to reconcile these two perspectives. It is clearly not the intent of the legislator that these pre-existing models, like YouTube’s ContentID, should be rendered unlawful by the Directive. But if that is the case, then the logical conclusion is that from the legislator’s perspective, such content recognition technologies do not lead to general monitoring. One opening for such a reading could be to rely on the fact art. 17(4)(b) and (c) rely on information provided by rights holders – respectively, “relevant and necessary information” and a “sufficiently substantiated notice”. From a conceptual perspective, however, such reading overlooks whether it is even technically feasible to perform such check on previously identified works without checking all works that are being uploaded.²⁹⁹

It is instructive to look at the legislative history of art. 17 to better understand its relationship to arts. 14 and 15 of the e-Commerce Directive. The Council’s Legal Service noted that there is no hierarchy between secondary legislative acts and is governed “in accordance with the principles of ‘lex specialis derogat legi generali’ and ‘lex posterior derogat legi priori’”.³⁰⁰ Based on this logic, it deemed the introduction of the measures foreseen in the then-art. 13 of the Commission’s proposal as “not legally problematic”, and that they could be considered as “a lex specialis or as a ‘monitoring obligation in a specific case’ and ‘duty of care’ for the [OCSSP] concerned”.³⁰¹ The Council’s Legal Service seems, however, to avoid the point that also the lex posterior or lex specialis needs to strike a fair balance between competing fundamental rights. Thus, implicitly this view seems to assume that art. 15 of the e-Commerce Directive, if prohibiting such measures as anticipated by the Directive, fails to strike that balance in the first place and comes with a bias of valuing users’ fundamental rights higher than rights holders’ fundamental rights.

The final version of art. 17 avoided taking a stance on this conceptual question by clarifying in art. 17(8) that “[t]he application of this Article shall not lead to any general monitoring obligation”. This statement must be understood as more than the mere lip service to critics of the Directive. Since the judgements in *Scarlet Extended* and *Netlog*, we know in the context of injunctions that filtering all information of all users constitutes a general monitoring obligation and the respective filtering systems do not strike a fair balance between the competing

²⁹⁶ Guidance Art. 17 CDSM Directive (n. 222), p.8.

²⁹⁷ Schwemer, ‘Article 17 at the Intersection of EU Copyright Law and Platform Regulation’ (n 215) 428.

²⁹⁸ A related question is whether intermediaries when voluntarily engaging in such behaviour – sometimes referred to as “good Samaritan” action – and thus having gained “actual knowledge of illegal activity or information” lose their liability exemption, if firstly not acting expeditiously according to art. 14(1)(b) e-Commerce Directive and secondly are not considered passive. Recommendation (EU) 2018/334 stipulates in recital 26, for example, reiterates that “in its Communication of 28 September 2017 on tackling illegal content online, the Commission has set out its view that taking such voluntary proactive measures does not automatically lead to the hosting service provider concerned losing the benefit of the liability exemption provided for in Article 14 of Directive 2000/31/EC.”. In the literature, it has been debated whether implementation of voluntary measures gradually influence the standard of liability by erosion, for example when the de facto practice of such measures changes the diligent economic operator concept. See, e.g., Riis and Schwemer (n 47) 12–13.

²⁹⁹ Schwemer, ‘Article 17 at the Intersection of EU Copyright Law and Platform Regulation’ (n 215) 429. In this regard, it is noteworthy that a German report from December 2019, for example, comes to the conclusion that the duty to license leads to a proactive control of all content on a platform and is in contradiction with the jurisprudence of the CJEU in relation to the prohibition of general monitoring. See in this respect Spindler (n 215).

³⁰⁰ Council of the European Union, Contribution of the Legal Service to Working Party on Intellectual Property, Brussels 11 October 2017, 13140/17 LIMITE, para. 23, p. 16.

³⁰¹ Council of the European Union, Contribution of the Legal Service to Working Party on Intellectual Property, Brussels 11 October 2017, 13140/17 LIMITE, para. 30, p. 20.



fundamental rights.³⁰² In relation to the freedom to conduct business by OCSSPs, it has been argued by the Legal Service of the Council, however, that the provision in question is compatible with the CJEU's findings in *Scarlet Extended* and *Netlog*, because the OCSSP would not have to determine itself whether the content is copyright infringing or not given that the obligation is restricted to works identified by rightsholders. As discussed above, the case law from *L'Oréal v eBay to Glawischnig-Piesczek* has opened for filtering of identical and equivalent future content of identical or equivalent future infringements. Importantly, the Court notes that this refers only to similar infringements that do not "require the host provider to carry out an independent assessment of the content".³⁰³

Considering the above, what is then the legal nature of art. 17(8) CDSM Directive vis-a-vis art. 15 e-Commerce Directive? In answering this question, Angelopoulos and Senftleben lay out different interpretative options, eventually concluding that art. 17(8) "contains a further manifestation of the overarching principle expressed in Article 15(1) ECD: an unspecified, general content monitoring obligation would be excessive and incompatible with EU law".³⁰⁴ In a previous work, one of us has alternatively suggested, along the lines of our analysis above, that art. 17(8) does not necessarily introduce a *new* general monitoring prohibition but is rather a declaratory provision vis-a-vis the obligation of art. 15 e-Commerce Directive.³⁰⁵ In addition, according to that analysis, art. 17(8) would extend the general monitoring obligation beyond Member States and also to OCSSPs.³⁰⁶

It will be perhaps necessary for the Court to clarify this conceptual discussion in future judgments. However, the Commission's Guidance does offer something in this regard. The Guidance states that, "[w]hilst the concept of general monitoring is not defined in Article 17 (8), it is expressed therein in the same terms as in Article 15 of Directive 2000/31. However, when applying Article 17(8) first paragraph the context, scheme and objective of Article 17 and the special role of [OCSSPs] providers under this provision should be considered."³⁰⁷ In other words, according to the Commission, art. 17(8) does not necessarily introduce a new general monitoring obligation in the *acquis* separate from art. 15 e-Commerce Directive. But the Commission does expect that the interpretation of what constitutes general monitoring is adjusted to consider the specific regime of art. 17.

In attempting to strike this balance and ensure the substantive and procedural safeguards in paragraphs (7) and (9), the Commission advances a set of recommendations in its Guidance as to what types of automated content filtering measures are permissible or not. We examine these below in greater detail at **Errore. L'origine riferimento non è stata trovata.**

3.4.8.3 Procedural or ex post safeguards³⁰⁸

Besides the copyright-internal balancing system of E&Ls in paragraph (7) and the prohibition of general monitoring obligations in paragraph (8), art. 17 also foresees what Schwemer and Schovsbo (2020) refer to as "an institutionalized system of checks and balances in form of procedural safeguards".³⁰⁹

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'.³¹⁰ The 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

³⁰² See supra at 3.1.

³⁰³ Schwemer, 'Article 17 at the Intersection of EU Copyright Law and Platform Regulation' (n 215) 420.

³⁰⁴ Angelopoulos and Senftleben (n 170).

³⁰⁵ Schwemer, 'Article 17 at the Intersection of EU Copyright Law and Platform Regulation' (n 215).

³⁰⁶ Schwemer, 'Article 17 at the Intersection of EU Copyright Law and Platform Regulation' (n 215).

³⁰⁷ Guidance Art. 17 CDSM Directive (n. 222), p.22.

³⁰⁸ This section relies on and develops prior research from some of authors of this report, namely: Quintais and others (n 17); Schwemer and Schovsbo (n 17).

³⁰⁹ Schwemer and Schovsbo (n 17).

³¹⁰ 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, Proposal for a Directive on copyright in the Digital Single Market, COM/2016/0593 final - 2016/0280 (COD), art. 13.



remove uploaded content shall be subject to human review”.³¹¹ 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.³¹² 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’.³¹³

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”.³¹⁴ 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’.³¹⁵ In other words, there is a risk of overenforcement.³¹⁶

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.³¹⁷ This out-of-court mechanism is “without prejudice to the rights of users to have recourse to efficient judicial remedies”.³¹⁸ 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.³¹⁹ 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. 17.³²⁰

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-

³¹¹ Emphasis added. On a critique of the “elastic timeframe” see Senftleben (n 294). In its Council vote, Germany suggests the timeframe to be understood ‘as rapidly as possible’, see Draft Directive of the European Parliament and of the Council on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (first reading), Statements (Council of the European Union, 15 April 2019) <https://data.consilium.europa.eu/doc/document/ST-7986-2019-ADD-1-REV-2/en/pdf> (Statement by Germany, point 7).

³¹² 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.

³¹³ Recital 70 (emphasis added).

³¹⁴ Article 17(9) sub-para. 2 CDSM Directive.

³¹⁵ See Senftleben (n 294).

³¹⁶ For empirical work on overenforcement, see, e.g., Jennifer M Urban, Joe Karaganis and Brianna Schofield, ‘Notice and Takedown: Online Service Provider and Rightsholder Accounts of Everyday Practice’ (2017) 64 J. Copyright Soc’y 371; Kris Erickson and Martin Kretschmer, ‘Empirical Approaches to Intermediary Liability’ in Giancarlo Frosio (ed), *Oxford Handbook on Intermediary Liability Online* (OUP 2019) <<https://papers.ssrn.com/abstract=3400230>> accessed 22 February 2022; Sharon Bar-Ziv and Niva Elkin-Koren, ‘Behind the Scenes of Online Copyright Enforcement: Empirical Evidence on Notice & Takedown’ (2017) 50 Connecticut Law Review <<https://papers.ssrn.com/abstract=3214214>> accessed 22 February 2022. Specifically in the context of YouTube and parodies, see Kris Erickson and Martin Kretschmer, ‘“This Video Is Unavailable”: Analyzing Copyright Takedown of User-Generated Content on YouTube’ (2018) 9 JIPITEC <<https://papers.ssrn.com/abstract=3144329>> accessed 17 January 2022; Jacques and others (n 57). 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’, *Social Media and Democracy: The State of the Field and Prospects for Reform* (Cambridge University Press 2019) <<https://papers.ssrn.com/abstract=3504930>> accessed 4 May 2021.

³¹⁷ Art. 17(9) sub-para. 2 CDSM Directive.

³¹⁸ Art. 17(9) sub-para. 2 CDSM Directive.

³¹⁹ Art. 17(9) sub-para. 2 CDSM Directive.

³²⁰ 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.³²¹ 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.³²² 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.³²³ 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 could be considered, for example, when users notify that they are lawfully uploading content from third parties.’³²⁴ In other words, the procedural safeguards are a weight on the scale of the fundamental rights balance.

Considering 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 the need to respect fundamental rights and freedoms of users – indicates the need for *ex ante* safeguards in the implementation of art. 17.³²⁵

3.4.9 The normative hierarchy of art. 17: User rights and safeguards vs preventive measures

The above constellation of provisions on preventive measures and substantive rights and safeguards translates into a normative hierarchy that is embedded art. 17. This hierarchy is crucial to how OCSSPs must carry out copyright content moderation. This sub-section first examines the primacy of user rights (as obligations of result) over preventive measures (as obligations of best efforts) in the overall scheme of art. 17. It further investigates how the Commission’s Guidance has attempted to address this hierarchy and strike the balance between the competing rights and interests of rightsholders, platforms and users, while contrasting this with the AG Opinion in C-401/19.

A key feature of the legal design of art. 17 is that paragraph (7) translates into an obligation of result. Member States must ensure that these E&Ls are respected despite the preventive measures in art. 17(4). This matters because paragraph (4) merely imposes “best efforts” obligations. The different nature of the obligations, underscored by the fundamental rights-basis of paragraph (7)³²⁶, indicates a normative hierarchy between the higher-level obligation in paragraph (7) and the lower-level obligation in paragraph (4).

This is relevant 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 overblocking of uploaded content by filtering content

³²¹ 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 Draft Directive of the European Parliament and of the Council on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (first reading), Statements (Council of the European Union, 15 April 2019) <https://data.consilium.europa.eu/doc/document/ST-7986-2019-ADD-1-REV-2/en/pdf> (Statement by Germany, point 7). To this point see also European Commission, Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, Brussels, 14.9.2016 SWD(2016) 301 final, Part 1, pp. 153 ff.

³²² European Commission, Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, Brussels, 14.9.2016 SWD(2016) 301 final, Part 1, p., 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.’

³²³ 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 17).

³²⁴ Draft Directive of the European Parliament and of the Council on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (first reading), Statements (Council of the European Union, 15 April 2019) <https://data.consilium.europa.eu/doc/document/ST-7986-2019-ADD-1-REV-2/en/pdf> (Statement by Germany, point 8).

³²⁵ See, in this line, Quintais and others (n 17); 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 <<https://papers.ssrn.com/abstract=3784149>> accessed 4 May 2021.

³²⁶ See e.g., recital 70 CDSM Directive.



technologies used by OCSSPs that are incapable to carry out the type of contextual assessment required under art. 17(7).³²⁷

In addressing the normative tension between user rights and preventive measures, while attempting to operationalise art. 17, the Commission's Guidance advances a set of recommendations for Member States to implement these parts of the provision, in an attempt to balance the competing rights and interests of rightsholders, platforms and users. The Guidance recognises many of the key aspects highlighted in our analysis so far, including the *lex specialis* nature of art. 17 vis-a-vis art. 3 InfoSoc and art. 14 e-Commerce Directive, the primacy of user rights (as obligations of result) over preventive measures (as obligations of best efforts), the need to avoid that preventive measures result in general monitoring (albeit considering the specific regime of art. 17), and the need to ensure effective ex post procedural safeguards.

In the scheme of the Guidance, some of the potential problems deriving from the application of preventive measures for fundamental rights can be addressed through a cautious and nuanced interpretation of arts. 17(4)(b) and (c), also considering the art. 17(5), as explained above at 3.4.5 and 3.4.6. Still, the Guidance states clearly that ex ante safeguards are needed due to the different nature of the obligations in paragraphs (4) and (7), considering the current capabilities of content recognition tools used by platforms to implement preventive and proactive measures, namely under art. 17(4)(b). Since these tools work predominantly through algorithmically matching uploaded content with the "relevant and necessary information" provided by rightsholders, they are incapable of recognising legitimate uses, like those identified in paragraph (7). Hence, in order to ensure application of user rights, it is not sufficient to rely on the ex post complaint and redress mechanism set out in art. 17(9).³²⁸

The Guidance therefore suggests that automated filtering and blocking measures are "in principle" only admissible for two categories of content: (1) "manifestly infringing" content and (2) "earmarked" content.³²⁹ Conversely, uploaded content that is "not manifestly infringing, should in principle go online and may be subject to an ex post human review when rightsholders oppose by sending a notice."³³⁰

What constitutes "manifestly infringing" content is not exactly clear, despite the Commission's optimistic view that this is a "reasonable practical standard to determine whether an upload should be blocked or go online, and to ensure the respect for Article 17(7), taking into account the existing limitations of technology."³³¹ The Guidance advances criteria and some bright line rules on how to assess this category. For instance, "[e]xact matches of entire works or of significant proportions of a work should normally be considered manifestly infringing", whereas content where a "user has significantly modified the work in a creative manner, for example by adding elements to a picture to create a 'meme', would generally not be manifestly infringing (this example may be covered by the parody exception)". But a closer reading of these criteria and rules leaves serious doubts as to whether the threshold for categorising and upload as "manifestly infringing" is not too low, especially since this category would cover also "complex cases where additional criteria or a combination of criteria may need to be taken into account". This is hardly a harbinger of legal certainty for a category that should be strictly delimited due the potential risks it poses to freedom of expression.³³²

The second category of content for which automated filtering and blocking measures are admissible pursuant to the Guidance – "earmarked" content – is even more controversial. This category: (1) "should be limited to cases of high risks of significant economic harm, which ought to be properly justified by rightsholders"; and (2) refers to content that "is particularly time sensitive", such as "pre-released music or films or highlights of recent broadcasts of sports events" but not excluding "[o]ther types of content".³³³

It is crucial to note that earmarked content does not need to also qualify as "manifestly infringing" content. The two categories may overlap in practice, but that is not a requirement under the Guidance. In fact, they are

³²⁷ See Quintais and others (n 17); Husovec (n 325); Geiger and Jütte (n 325). See also, agreeing with this interpretation, Guidance Art. 17 CDSM Directive (n. 222), pp. 2-3.

³²⁸ Guidance Art. 17 CDSM Directive (n. 222), p.20.

³²⁹ Guidance Art. 17 CDSM Directive (n. 222), pp.20, 23.

³³⁰ Guidance Art. 17 CDSM Directive (n. 222), p. 20. NB OCSSPs "should inform rightsholders without undue delay that the content has been put online"; if rightsholders object, the OCSSP "should carry out a swift ex post human review for a rapid decision as to whether the content should remain online or be removed".

³³¹ Guidance Art. 17 CDSM Directive (n. 222), pp. 21-22.

³³² According to the Guidance, "the identification of manifestly infringing content and other content by automated means does not represent a legal assessment of the legitimacy of an upload, including whether it is covered by an exception. Therefore, the criteria applied to operate this distinction should not have an impact on the best efforts to be made by service providers to obtain an authorisation under Article 17.4 (a)." Guidance Art. 17 CDSM Directive (n. 222), pp. 20ff. This is noteworthy because, as we note below in the text, the Guidance takes the opposite view regarding "earmarked" content.

³³³ Guidance Art. 17 CDSM Directive (n. 222), pp. 22 and fn. 34.



designed predominantly as distinct categories. This aspect, together with the somewhat vague definition of the requirements on rightsholders to “earmark” content, has led to strong criticism by scholars as to the compatibility of this part of the Guidance with the fundamental right to freedom of expression. Reda and Keller, for instance, call it “loophole big enough to drive a truck through”³³⁴, whereas Geiger and Jütte note that this it risks “watering down user rights”.³³⁵ It is difficult to disagree

If content is earmarked by rightsholders in the context of providing the “relevant and necessary information” to OCSSPs pursuant to art. 17(4)(b), then providers should – when “when proportionate and where possible, practicable – carry out “a rapid ex ante human review... of the uploads containing such earmarked content”. While this human review is carried out, the content remains (at least temporarily) blocked. Leaving aside the consideration that this potentially burdensome requirement on OCSSPs is questionable from the perspective of its compliance with fundamental right to conduct a business in art. 16 Charter, it appears in to be in direct contradiction with CJEU case law. If we accept the application of *Glawischnig-Piesczek* to copyright, then the constraints that judgment imposes on “specific” monitoring of “equivalent” content should apply to “earmarked” content. One of such constraints, as noted above at 3.1.2, is that providers should not be required to carry out an independent assessment of such content. In other words, for such monitoring to be accepted, it should be susceptible of implementation via automated means. The requirement of “rapid ex ante human review” would rarely if ever meet this condition, even if cushioned by references to proportionality and practicality, especially since many of these cases might require complex contextual independent assessments by reviewer’s considering the specificities of national laws implementing art. 17.

The consequences for OCSSPs are spelled out clearly in the Guidance. Providers are presumed to have not complied with their best efforts obligations and “be held liable for copyright infringement if they have made available uploaded content disregarding the information provided by rightsholders, including – as regards content that is not manifestly infringing content - the information on earmarked content.”³³⁶ It is difficult to imagine a stronger incentive on OCSSPs not to preventively filter all content that is “earmarked” by rights holders, in addition to content that is identified as “manifestly infringing”.

In light of the above, it is undeniable the internal scheme of art. 17 poses potential risks to the fundamental right to freedom of expression, particularly as regards the best efforts obligations on preventive measures in art. 17(4)(b) and (c). Such risks were already clear from the text of art. 17, even before the Commission’s Guidance potentially circumscribed them to the categories of “manifestly infringing” and “earmarked” content.

These concerns with freedom of expression were at the basis for an action for annulment by Poland filed against art. 17.³³⁷ At time of writing, only the Opinion by AG Saugmandsgaard Øe in this case has been issued. This is a rich and thoughtful Opinion that examines in detail many of the concerns surrounding art. 17. It is beyond the scope of this section to provide a detailed analysis of the entire Opinion. Rather, we limit ourselves to examining its main arguments in contrast to the Commission’s Guidance on issues that are crucial for copyright content moderation in the scheme of art. 17.³³⁸

As a general description the Opinion AG Øe delineated the scope of permissible filtering of users’ uploads.³³⁹ While acknowledging that OCSSPs will have to deploy filtering and content-recognition systems to comply with their best efforts obligations, the AG relies on the judgement in *Glawischnig-Piesczek* to argue that any filtering must be “specific” to the content and information at issue, so as to not run afoul of the prohibition of general monitoring obligations in art. 15 e-Commerce Directive (and 17(8) CDSM Directive).³⁴⁰ However, such filtering must be proportionate and avoid the risk of chilling effects on freedom of expression through overblocking; in

³³⁴ Reda and Keller (n 222).

³³⁵ Geiger and Jütte (n 222). Geiger and Jütte contain a detailed analysis, that we subscribe to, of points of criticism to this part of the Commission’s Guidance.

³³⁶ Guidance Art. 17 CDSM Directive (n. 222), p. 23.

³³⁷ Case C-401/19, Poland v Parliament and Council. Arguing that the Court should invalidate art. 17 on these ground, see Geiger and Jütte (n 325); Husovec (n 325). See also Case C-401/19, Poland v Parliament and Council, Opinion of Advocate General Saugmandsgaard Øe delivered on 15 July 2021, ECLI:EU:C:2021:613 (hereafter AG Opinion C-401/19, Poland).

³³⁸ For further analysis, see e.g. Bernd Justin Jutte and Giulia Piora, ‘On the Necessity of Filtering Online Content and Its Limitations: AG Saugmandsgaard Øe Outlines the Borders of Article 17 CDSM Directive’ (*Kluwer Copyright Blog*, 20 July 2021) <<http://copyrightblog.kluweriplaw.com/2021/07/20/on-the-necessity-of-filtering-online-content-and-its-limitations-ag-saugmandsgaard-oe-outlines-the-borders-of-article-17-cdsm-directive/>> accessed 6 October 2021; Geiger and Jütte (n 222).

³³⁹ Jutte and Piora (n 338).

³⁴⁰ C-401/19, AG Opinion C-401/19, Poland, paras 112-114 and 196, citing the Court’s judgment in Case C-18/18, *Eva Glawischnig-Piesczek v Facebook Ireland Limited* (3 October 2019), ECLI:EU:C:2019:821. On the topic of general monitoring obligations in the context of EU copyright law, see Angelopoulos and Senftleben (n 170); Angelopoulos, ‘YouTube and Cyando, Injunctions against Intermediaries and General Monitoring Obligations’ (n 182).



order to do so, it must be applied only to manifestly infringing or “equivalent” content.³⁴¹ All other uploads should benefit from a “presumption of lawfulness” and be subject to the *ex ante* and *ex post* safeguards embedded in art. 17, notably judicial review.³⁴²

Divin into the details, the Opinion is particularly relevant for our analysis in that it offers counter arguments – and even an explicit rejection – of key aspects of the Commission’s Guidance in relation to permissible *ex ante* or preventive filtering measures.³⁴³

First, according to the AG, such measures should only be allowed for “manifestly infringing”. But crucially, this category is viewed in narrower terms by the AG than those set out in the Guidance. The AG states that³⁴⁴

[OCSSPs] may be obliged to detect and block only content which is ‘identical’ and ‘equivalent’ to that subject matter, that is to say, content the unlawfulness of which seems manifest in the light of the ‘relevant and necessary’ information provided by the rightholders. In such cases, since an infringement is highly probable, that content may be presumed to be illegal. It is therefore proportionate to block it preventively, with the onus being on the users concerned to demonstrate its lawfulness – for example, that they have a licence, or that the work is in fact in the public domain – in the context of the complaint mechanism. In short, the ‘best efforts’ imposed on sharing service providers under the contested provisions consist of blocking those manifest infringements.

Conversely, in all ambiguous situations – short extracts from works included in longer content, ‘transformative’ works, and so forth – in which, in particular, the application of exceptions and limitations to copyright is reasonably conceivable, the content concerned cannot be the subject of a preventive blocking measure.

The main difference here is that the AG’s interpretation leaves little room (as compared to the Guidance) to include in this category – and therefore to preventively filter/block – content in relation to which there is ambiguity as to its infringing nature.

The AG is clear that OCSSPs should not subject “transformative” content to preventive filtering. Such content may be privileged by an E&L and must be subject to “independent assessment” by OCSSPs in order to “evaluate the context of those uses”. To allow preventive filtering by OCSSPs of this type of content would lead to an “unacceptable risk of ‘over-blocking’”. Such questions must therefore “be left to the Court”.³⁴⁵ This is also the interpretation that is most consistent with the prohibition of general monitoring obligations in art. 17(8) CDSM Directive.³⁴⁶ To be sure, this is a significant departure from the Guidance, as it recognises a much more prominent role to courts in adjudicating disputes under art. 17. Relatedly, the Opinion also recognises a more prominent role to supervisory authorities than the Guidance.³⁴⁷

The AG emphasizes that it is crucial to ensure that the error rate of “false positives” resulting from the deployment of content recognition tools by OCSSPs “should be as low as possible”. Hence, where “it is not possible, in the current state of technology... to use an automatic filtering tool without resulting in a ‘false positive’ rate that is significant, the use of such a tool should... be precluded under” art. 17(7).³⁴⁸ In the AG’s view, it would be disproportionate to apply these tools for *ex ante* filtering of “all – more questionable – cases of any potential damage caused, for example, by ‘transformative’ content that may or may not fall within the scope of the [E&Ls] to copyright, which is not in direct competition with the original protected subject matter”; rather, such an application would “risk causing ‘irreparable’ damage to freedom of expression”.³⁴⁹ This is especially true since copyright protection is not absolute and rightholders are left with an array of measures to protect their rights in relation to such “equivocal content”.³⁵⁰ This ensures “a ‘fair balance’ between the measures imposed

³⁴¹ C-401/19, AG Opinion C-401/19, Poland, paras 196 ff. In this respect the Opinion deviates from and strongly criticizes the Commission’s Guidance, which suggests a separate category of “earmarked” content susceptible of filtering, with lesser safeguards. See *Id.*, para 223 and Guidance Art. 17 CDSM Directive (n. 222), pp. 22-24. For criticism, see Reda and Keller (n 222); Geiger and Jütte (n 222).

³⁴² C-401/19, AG Opinion C-401/19, Poland, para 193.

³⁴³ For a similar analysis, see Geiger and Jütte (n 222).

³⁴⁴ C-401/19, AG Opinion C-401/19, Poland, paras 205-206 (footnotes omitted).

³⁴⁵ C-401/19, AG Opinion C-401/19, Poland, para. 203

³⁴⁶ C-401/19, AG Opinion C-401/19, Poland, paras 194-203.

³⁴⁷ See C-401/19, AG Opinion C-401/19, Poland, paras 211-212, concluding: “... In view of the importance of those solutions for users’ freedom of expression, they must not be defined by those private parties alone in a way which lacks transparency, rather the process should be transparent and under the supervision of public authorities.”. See, making an identical point, Geiger and Jütte (n 222).

³⁴⁸ C-401/19, AG Opinion C-401/19, Poland, para. 214.

³⁴⁹ C-401/19, AG Opinion C-401/19, Poland, para. 216 (referring back to para. 188).

³⁵⁰ C-401/19, AG Opinion C-401/19, Poland, paras 217-218.



on users, in some cases, to be able to upload their content and those required of rightholders, in other cases, to have content removed.”.³⁵¹

Finally, the strongest divergence between the AG Opinion and the Guidance is in relation to the category of “earmarked” content. In a “postscript” to his Opinion, the AG notes that after the draft of his Opinion, two important documents were published: the judgement in *YouTube and Cyando* and the Commission’s Guidance.³⁵² As to the first, examined in detail above at 3.1, the AG considers that it is consistent with his Opinion in the present case.³⁵³ As to the Guidance, the AG states the following in relation to “earmarked” content:³⁵⁴

However, that guidance also states, in an unprecedented fashion, that rightholders should have the possibility to ‘earmark’ subject matter the unauthorised uploading of which ‘could cause significant economic harm to them’. Those providers should exercise particular diligence with regard to such subject matter. It is further stated that they would not be fulfilling their ‘best efforts’ obligations if they allowed content reproducing that same subject matter to be uploaded despite such ‘earmarking’. If this is to be understood as meaning that those same providers should block content ex ante simply on the basis of an assertion of a risk of significant economic harm by rightholders – since the guidance does not contain any other criterion objectively limiting the ‘earmarking’ mechanism to specific cases– even if that content is not manifestly infringing, I cannot agree with this, unless I alter all the considerations set out in this Opinion.

In essence, the AG rejects the compatibility with fundamental rights of the Guidance’s approach to “earmarked” content that is not also “manifestly infringing”. For the reasons offered above, including those advanced by the AG, we agree with this view. Naturally, the last answer on this issue will belong to the Court in its judgment in C-401/19. Still, assuming the Court does not annul the provision, it is likely that many of the copyright content moderation issues related with the balance and interplay between competing rights and interests of users, rightholders and OCSSPs in the framework of art. 17, will need to be ironed out in multiple future judgments of the Court.

3.4.10 Privacy and Data Protection

Finally, art. 17 mentions that the Directive shall not lead to any identification of individual users nor to the processing of personal data, except in accordance with the e-Privacy Directive (2002/58/EC) and the GDPR (Regulation (EU) 2016/679). The question is not clear, especially as regards the application of preventive measures under art. 17(4) and the complaint and redress mechanism under art. 17(9) and the potential that these have for the identification and processing of personal data.³⁵⁵ In fact, concerns in this regard were raised during the legislative process by the German Data Protection authority, the European Data Protection Board and some commentators. In response, the reference above was added to art. 17(9). In addition, the Guidance contains several statements in this respect, including the somewhat circular statement that

When implementing Article 17, the Member States need to respect the Union’s data protection acquis, in particular with regard to possible technological measures taken by service providers in cooperation with rightholders under Article 17(4) and in the context of complaints and redress mechanism for users under Article 17(9). The Member States should ensure the correct application of these rules when transposing Article 17.³⁵⁶

This topic is outside the scope of the present report, since it falls outside of our focus on copyright content moderation. But it is important to flag that further research is needed in this regards, especially as regards the compliance of preventive measures under art. 17 with the provision on automated decision making under art. 22 GDPR.

³⁵¹ C-401/19, AG Opinion C-401/19, Poland, para. 219.

³⁵² C-401/19, AG Opinion C-401/19, Poland, para. 219.

³⁵³ C-401/19, AG Opinion C-401/19, Poland, para. 221.

³⁵⁴ C-401/19, AG Opinion C-401/19, Poland, para. 222 (footnote omitted).

³⁵⁵ See Christoph Schmon, ‘Copyright Filters Are On a Collision Course With EU Data Privacy Rules’ (*Electronic Frontier Foundation*, 3 March 2020) <<https://www.eff.org/it/deeplinks/2020/02/upload-filters-are-odds-gdpr>> accessed 8 April 2020.

³⁵⁶ Guidance Art. 17 CDSM Directive (n. 222), p. 3.



3.5 Interface with DSA: how special is copyright?³⁵⁷

Against this background, the DSA proposal was published on 15 December 2021. The DSA is a regulation that is meant inter alia as “REFIT”³⁵⁸ 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 Directive³⁵⁹ and sets up a much more detailed procedural framework, which is further explored below.

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.

3.5.1 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.

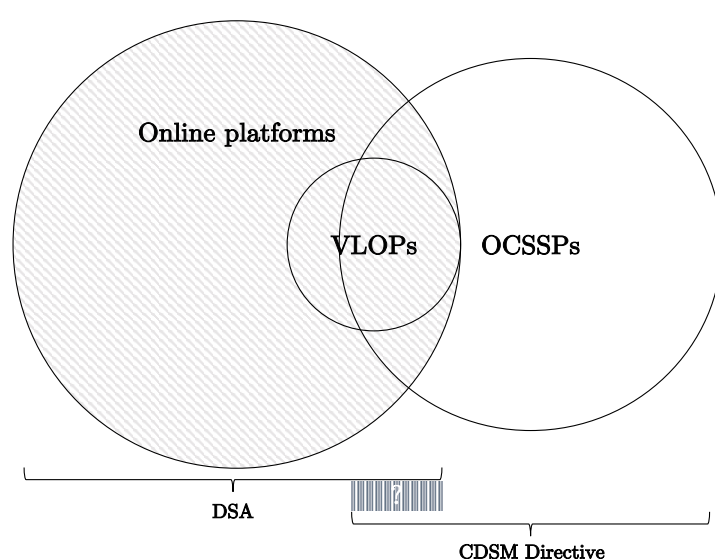


Figure 5. Overlap between DSA and CDSM Directive

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,

³⁵⁷ This section reproduces parts of and relies on 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. On this topic, see also Alexander Peukert and others, ‘European Copyright Society: Comment on Copyright and the Digital Services Act Proposal’ (European Copyright Society 2022) <<https://europeancopyrightsocietydotorg.files.wordpress.com/2022/01/2022-01-17-ecs-comment-on-copyright-and-the-digital-services-act-proposal-3.pdf>>; Eleonora Rosati, ‘The Digital Services Act and Copyright Enforcement: The Case of Article 17 of the DSM Directive’, *Unravelling the Digital Services Act Package* (European Audiovisual Observatory 2021).

³⁵⁸ European Commission, ‘REFIT – Making EU Law Simpler, Less Costly and Future Proof’ (*European Commission - European Commission*) <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> accessed 22 February 2022.

³⁵⁹ See art. 1 DSA proposal.



however, relates to hate speech or child sexual abuse material or any other illegal information or content³⁶⁰, 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).

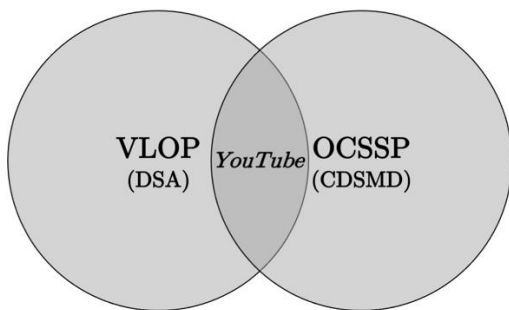


Figure 6. Example of overlap between regulatory regimes in the case of OCSSPs

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”³⁶¹ can only relate to aspects which indeed are specifically covered by those rules.

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.”³⁶²*

The Explanatory Memorandum repeats this text and provides as one example the obligations set out in the AVMS Directive³⁶³ 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.”³⁶⁴

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

³⁶⁰ 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”.

³⁶¹ 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 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,

³⁶² Recital 9 DSA proposal (our emphasis).

³⁶³ Directive 2010/13/EC, as amended by Directive (EU) 2018/1808,

³⁶⁴ 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.



where art. 17 leaves margin of discretion to Member States. As we demonstrate below, whereas category (i) is straightforward, category (ii) is more challenging.

3.5.2 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.³⁶⁵ 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.³⁶⁶ The main differences are the addition of a quasi-“Good Samaritan” rule in art. 6³⁶⁷, 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”³⁶⁸ due diligence obligations for a transparent and safe online environment.³⁶⁹ 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.³⁷⁰

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).³⁷¹ These are visualised in Figure # below.

Intermediary services, the broadest category, comprises ‘mere conduit’, ‘caching’, or ‘hosting’ services.³⁷² ‘Hosting’ services consist “of the storage of information provided by, and at the request of, a recipient of the service”.³⁷³ 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.”³⁷⁴ . 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.³⁷⁵ Under the asymmetric obligations approach of Chapter III DSA, VLOPs are subject to the highest number of cumulative obligations.³⁷⁶

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

Considering 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 OCCSPs as online platforms or VLOPs.

³⁶⁵ See arts. 3 to 9 DSA proposal.

³⁶⁶ See also art. 71 DSA proposal.

³⁶⁷ 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.

³⁶⁸ Cf. Recital 73 DSA proposal.

³⁶⁹ arts. 10 to 37 DSA proposal.

³⁷⁰ 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.”)

³⁷¹ Art. 1(f) and 25 DSA proposal.

³⁷² art. 2(f) DSA proposal.

³⁷³ Similar to the current wording of the e-Commerce Directive’s art. 14.

³⁷⁴ Art. 2(h) DSA proposal.

³⁷⁵ Art. 25 DSA proposal.

³⁷⁶ 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’ (*European Commission - European Commission*) <https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en> accessed 21 February 2022.



3.5.2.1 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.³⁷⁷ As such, its application is set aside by the express reference in art. 17(3) CDSM Directive.

The general monitoring ban in art. 7 DSA, which aims to replace the similar prohibition³⁷⁸ 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 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.³⁷⁹

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 to infringe a copyright or related right”, a rule consistent with art. 14(3) e-Commerce Directive.³⁸⁰ 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.

3.5.2.2 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 obligations³⁸¹ that extend all intermediary services on points of contact, legal representatives, terms and conditions³⁸², and transparency reporting. This includes the obligations set out in arts. 10 to 13 (with aggravation in arts. 23, and 33 DSA).

a) Notice-and-action and statement of reasons³⁸³

³⁷⁷ See art. 71 DSA proposal.

³⁷⁸ A further analysis of the differences between art. 7 DSA proposal and art. 15 e-Commerce Directive is outside the scope of this paper.

³⁷⁹ This may be different in other sector-specific legislation, which is outside the scope of our analysis.

³⁸⁰ 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.”

³⁸¹ Chapter III, Section 1 DSA proposal, with certain further adjustments of the obligations for specific intermediary services.

³⁸² Art. 12 DSA Proposal 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.

³⁸³ Chapter III, Section 2 DSA proposal.



A far trickier question is whether 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. 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”.³⁸⁴ In a vacuum, this would for instance allow Member States margin of discretion in regulating the details of such notice.³⁸⁵

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 platform³⁸⁶, 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.³⁸⁷ 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”.³⁸⁸ 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.

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, 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.³⁸⁹ 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.

b) 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.

³⁸⁴ See art. 17(4)(c) CDSM Directive.

³⁸⁵ 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).

³⁸⁶ Art. 14(2) DSA proposal.

³⁸⁷ Explanatory memorandum, DSA proposal p. 7.

³⁸⁸ Explanatory memorandum, DSA proposal p. 4.

³⁸⁹ See art. 14(3) DSA proposal.



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.³⁹⁰ 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 lawmaker³⁹¹, 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 Union³⁹² and the high-level of protection as set out in the recitals of the InfoSoc Directive and emphasized time and again by the CJEU.³⁹³ 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.

c) 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”.³⁹⁴ Despite the regime in art. 17 CDSM Directive, we expect trusted flaggers to play an important role on OCCSPs 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.

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.³⁹⁵ 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.³⁹⁶ Furthermore, the platform is obliged to inform the Coordinator if a trusted flagger submits “a significant number of insufficiently precise or inadequately substantiated notices”.³⁹⁷ Ultimately,

³⁹⁰ 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.

³⁹¹ See, e.g., recitals 4 and 7 DSA proposal.

³⁹² Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407.

³⁹³ 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.

³⁹⁴ Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online, pp. 50–61, point 4(g).

³⁹⁵ See, e.g., YouTube, ‘YouTube Trusted Flagger Program - YouTube Help’ (*YouTube Help*) <<https://support.google.com/youtube/answer/7554338?hl=en>> accessed 22 February 2022.

³⁹⁶ Art. 19(2) DSA proposal.

³⁹⁷ Art. 19(5) DSA proposal.



then, the trusted flagger status can be revoked.³⁹⁸ Considering uncertainty around the data quality of copyright notices, such oversight could be also in particular importance in the context of OCSSPs.³⁹⁹

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.⁴⁰⁰ 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.⁴⁰¹ 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”.⁴⁰² 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”.⁴⁰³ 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 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.⁴⁰⁴

d) 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 Directive⁴⁰⁵, with notable adjustments such as a Good Samaritan clause⁴⁰⁶ 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.

³⁹⁸ Art. 19(6) DSA proposal.

³⁹⁹ See e.g. Keller and Leerssen (n 316).

⁴⁰⁰ See for an in-depth analysis, Schwemer, ‘Trusted Notifiers and the Privatization of Online Enforcement’ (n 38).

⁴⁰¹ 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 (...)”.

⁴⁰² Art. 20(1) DSA proposal.

⁴⁰³ Art. 20(2) DSA proposal.

⁴⁰⁴ 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.

⁴⁰⁵ I.e., the specific liability exemptions for ‘mere conduit’, ‘caching’ and hosting remain largely unchanged.

⁴⁰⁶ See, e.g., Kuczerawy (n 367).



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 (**SQR**), *from a national law perspective*.

- 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?

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 **Errore. L'origine riferimento non è stata trovata.**, we collected data related to the legal status of information society service providers in connection to the CDSM Directive. The data involves responses to legal questionnaires by national respondents from ten selected EU Member States.⁴⁰⁷ [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, our summary highlights the key developments with respect to the implementation of art. 17 CDSM Directive.)

This part of the final mapping report intends to 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.

⁴⁰⁷ These countries are Denmark (DEN); Estonia (EST); France (FRA); Germany (GER); Hungary (HUN); Ireland (IRL); Italy (ITA); the Netherlands (NED); Portugal (POR); Sweden (SWE).



4.2 Key findings

This section includes the main findings from the national questionnaires. For clarity purposes, the analysis follows the structure of the questionnaire.

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 content⁴⁰⁸ 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/covered by their countries' e-Commerce Laws.⁴⁰⁹ In *Sweden*, ISSPs shall normally be considered as intermediaries, which fall within the ambit of various Swedish laws.⁴¹⁰ None of these laws include, however, any express definition of intermediaries. In *Estonia*, ISSPs in general are defined by the local e-Commerce Law,⁴¹¹ but there is no specific definition for ISSPs that store and give access to a large amount of protected content uploaded by their users. Similarly to this, the e-commerce law in *Portugal* defines only "online intermediary service providers" in a general sense,⁴¹² and offers no definition for ISSPs storing UGC.

Two reports answered to the negative.⁴¹³

- **Question 2.** Are "good faith" hosting service providers⁴¹⁴ 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.

Based on the responses of the national reporters to this question, Member States might be ordered in four distinct groups.

In the case of the first group of three countries, the reporters 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.⁴¹⁵ Two of these reports confirmed the applicability of criminal law provisions against the service providers as well.⁴¹⁶ At the same time, two of the three reporters expressly stated that such a direct liability has little practical relevance in their country.⁴¹⁷ In *Germany*, direct liability applies to perpetrators and participants alike. The national reporters, however, noted that the liability of participants ("Teilnehmerhaftung") is rarely relevant for service providers. The reporters also noted that case law exists in Germany that forms the basis of primary liability of good faith hosting platforms for the sharing of UGC, if the platform presents the

⁴⁰⁸ We used the short-hand "protected content" to refer to works or other subject-matter protected by copyright or related/neighborhood rights laws.

⁴⁰⁹ Report Phase 1 *France* [L. No. 2004-575, 21 June 2004 (LCEN), §6.I.2]; Report Phase 1 *Ireland* [S.I. No. 68/2003 – European Communities (Directive 2000/31/EC) Regulations 2003]; Report Phase 1 *Italy* [D.Lgs. 9 april 2003, no.70, §2; 14-17]; Report Phase 1 *Portugal*; Report Phase 1 *Sweden*; Report Phase 1 *Estonia*; Report Phase 1 *Hungary* [2000. évi CVIII. törvény, §2(lc)]; Report Phase 1 *Denmark* [E-handelsloven, LOV nr 227 af 22/04/2002, §16].

⁴¹⁰ These Swedish statutes are on copyright law [Lag (1960:729); hereinafter URL]; on e-commerce law [Lag (2002:562)] and on the responsibility for electronic bulletin boards (BBS) [Lag (1998:112)].

⁴¹¹ Report Phase 1 *Estonia* [Infoühiskonna teenuse seadus §2(1)].

⁴¹² Report Phase 1 *Portugal* [Decree-Law no. 7/2004 of January 7; §4(5)].

⁴¹³ Report Phase 1 *Netherlands*; Report Phase 1 *Germany*.

⁴¹⁴ In Case C-610/15, the CJEU, 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.

⁴¹⁵ Report Phase 1 *Portugal*; Report Phase 1 *Sweden*; Report Phase 1 *Germany* [the German reporters nevertheless remarked that the terminology of "direct/primary or indirect/secondary liability" is not used in German law. Instead of these, the two key concepts are "Täter- oder Teilnehmerhaftung" (liability of perpetrators and participants) and "Störerhaftung" (liability for breach of duty of care)].

⁴¹⁶ Report Phase 1 *Portugal*; Report Phase 1 *Sweden*.

⁴¹⁷ Report Phase 1 *Sweden*; Report Phase 1 *Germany*.



content to the public in such a way that it appears to be its own (“Zu-Eigen-Machen”);⁴¹⁸ however, the German reporters argued that this case law applies only in certain circumstances and arguably cannot be applied to video content sharing platforms such as YouTube.

Another four reporters answered in the negative, but indicated that direct liability applies either in under the domestic e-Commerce Act;⁴¹⁹ or in a “round-about manner”, through the application of various obligations stemming from the Copyright Act, Information Society Services Act (e-Commerce Act) and the Law of Obligations Act.⁴²⁰ In *Italy*, case law confirms the direct liability of active providers.⁴²¹ The Italian reporters nevertheless noted that the local case law shows inconsistencies, too. E.g. hosting providers “presumed to carry out a merely technical, automatic and passive activity”, and declared not liable on this basis.⁴²² A hosting provider was considered “active”, hence liable, if it carried out an “activity that goes beyond services of merely technical, automated and passive nature, and engages in active behaviour, thus joining other parties in the infringement”.⁴²³ At times this is described as “manipulation or transformation of the information or of the content”.⁴²⁴ Hosting providers were deemed to act as a de facto content provider, and were thus held liable, if they transformed the uploaded content into “new” products by organizing, indexing and commercially exploiting the videos uploaded by its users.⁴²⁵ Relevance was also given to their “economic profits and advertising activities accompanying the organized presentation and displaying of [users’] content”.⁴²⁶ The notion of active hosting provider was at times found to be misleading and detached from the reality of hosting services.⁴²⁷ Online encyclopaedias were deemed passive hosting providers, as “they limit themselves to host information given by the users”.⁴²⁸ Furthermore, in Italy, hosting providers are always declared liable if they behave negligently by failing to promptly respond to users’ notices,⁴²⁹ react with removal/blocking of infringing content⁴³⁰ and/or notify the authorities.⁴³¹ The Italian case law shows inconsistencies as regards to the “sufficient or necessary” awareness of the hosting service provider.⁴³²

Another two respondents provided a negative answer to the question.⁴³³

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?

⁴¹⁸ BGH, 12 Nov 2009, I ZR 166/07, GRUR 2010, 616 para. 22-29 – marions-kochbuch.de; confirmed by BGH, 16 May 2013, I ZR 216/11, GRUR 2013, 1229 para. 31 – Kinderhochstühle im Internet II.

⁴¹⁹ Report Phase 1 *Italy* [Decree 60/2003, §16 and 17]; Report Phase 1 *Hungary* [2001. évi CVIII. törvény, §10 and 13]; Report Phase 1 *France* [LCEN, §6.I.2. and §6.I.5.].

⁴²⁰ Report Phase 1 *Estonia*.

⁴²¹ E.g., Tribunal of Turin, First Civil Section, Order, 6 May 2014 (docket n. 38113/2013).

⁴²² E.g., Tribunal of Turin, First Civil Section, Order, 6 May 2014 (docket n. 38113/2013).

⁴²³ E.g., Court of Civil Cassation, First Section, Decision of 19 March 2019 n. 7708 (original text: “attività che esula da un servizio di ordine meramente tecnico, automatico e passivo, e pone, invece, in essere una condotta attiva, concorrendo con altri nella commissione dell’illecito”).

⁴²⁴ Tribunal of Rome, 10 January 2019, n.693 (“manipolazione o trasformazione delle informazioni o dei contenuti trasmessi o memorizzati”).

⁴²⁵ E.g., Tribunal of Turin, First Civil Section, 7 April 2017, n.1928 (docket n.38112/2013); Tribunal of Turin, First Civil Section, Order, 23 June 2014 (docket n. 15218/2014); Tribunal of Rome, Order, 16 December 2009 (docket n. 54218/2008); Tribunal of Rome, 27 April 2016, n.8437; Court of Appeal of Rome, 29 April 2017, n. 2833 (docket n. 24716/2012).

⁴²⁶ Tribunal of Milan, 9 September 2011, n.10893. Original text of the quote: “(...) trae sostegno finanziario in ragione dello sfruttamento pubblicitario connesso alla presentazione (organizzata) di tali contenuti.”

⁴²⁷ E.g., Court of Appeal of Milan, 7 January 2015, n.29 (docket nr. 3821/2011).

⁴²⁸ Tribunal of Rome, First Civil Section, 9 July 2014, n. 4986 (docket n. 70572/09). Original text of the quote: “(...) in quanto si limita ad offrire ospitalità ad informazioni fornite dal pubblico degli utenti.”

⁴²⁹ E.g., Tribunal of Milan, 9 September 2011, n.10893 (*RTI vs. Yahoo!*); Tribunal of Rome, 27 April 2016, n. 8437.

⁴³⁰ E.g., Tribunal of Rome, 10 January 2019, n. 693; Tribunal of Rome, 15 February 2019, n. 3512.

⁴³¹ E.g., Tribunal of Milan, 11 June 2018 (docket nr.51624/2017).

⁴³² E.g. Tribunal of Milan, 9 September 2011, n.10893 (*RTI vs. Yahoo!*); Tribunal of Rome, order of 16 December 2009; Tribunal of Rome, order of 11 February 2010.; Tribunal of Rome, IX Section, 16 June 2011 (docket n. 58871/2010); Court of Appeal of Milan, 7 January 2015, n. 29 (docket nr. 3821/2011); Tribunal of Turin, Order, 3 June 2015 (*Delta vs Dailymotion*) (docket n. 11343/2015); Tribunal of Rome, 12 July 2019, n. 14757.; Court of Appeal of Rome, 19 February 2018, n.1065.

⁴³³ Report Phase 1 *Netherlands*; Report Phase 1 *Ireland*.



The majority (eight) of the national reporters answered negatively to the question.⁴³⁴ *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 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 the existence of several relevant judgments, but also added that due to the persuasive force of preparatory works of the copyright and e-commerce laws, civil case law is “scarce”, but criminal cases exist.⁴³⁵ The *German* national report also indicated the existence of three relevant judgments in this field.⁴³⁶

The French and Estonian national reports also referred to some cases (in France: “*Radioblog*”,⁴³⁷ “*Les Dissimulateurs*”,⁴³⁸ and “*Clearstream*”;⁴³⁹ the “*Delfi*”⁴⁴⁰ case originated from Estonia) 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 reporters⁴⁴¹ 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?

⁴³⁴ Report Phase 1 *Netherlands*; Report Phase 1 *France*; Report Phase 1 *Ireland*; Report Phase 1 *Italy*; Report Phase 1 *Portugal*; Report Phase 1 *Estonia*; Report Phase 1 *Hungary*; Report Phase 1 *Denmark*. 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.

⁴³⁵ Leading Swedish cases include *BBS Case* (Supreme Court, Case B 363-95; NJA 1996 s. 79; which judgment served the basis for the legislative work on the BBS Act of 1998); *Wikimedia* [Patent and Market Court, Case PMT 8448-14]; *Dreamfilm* [Göta Court of Appeal, Case B 1565-17]; *Swefilmer* [Court of Appeal for Western Sweden, Case B 3142-17]; *Rarat* [Patent and Market Court of Appeal, Case B 10356-18]. In these cases, the competent courts did not consider the application of the e-commerce act.

⁴³⁶ BGH, 13 Sept 2018, I ZR 140/14, GRUR 2018, 1132 – YouTube; BGH, 20 Sept 2018, I ZR 53/17, GRUR 2018, 1239 – uploaded; BGH, 12 Nov 2009, I ZR 166/07, GRUR 2010, 616 – marions-kochbuch.de; confirmed by BGH, 16 May 2013, I ZR 216/11, GRUR 2013, 1229 – Kinderhochstühle im Internet II.; OLG Düsseldorf, 8 Nov 2011, I-20 U 42/11, ZUM 2012 – Embedded Content, 327; OLG Hamburg, 29 Sept 2010, 5 U 9/09, ZUM 2011, 500 – Sevenload; OLG Hamburg, 1.7.2015, 5 U 87/12 ZUM-RD 2016, 83 – YouTube; OLG München 28 Jan 2016, 29 U 2798/15, GRUR 2016, 612 – Allegro barbaro. From these, the uploaded and the YouTube cases reached the ECJ, which – following the closure of the completion of national reports – published its judgment in YouTube and Cyando.

⁴³⁷ CA Paris, pôle 5, ch. 12, 22 March 2011, *SPPF et SCPP v. société Mubility, Benoît et Jean-Louis T.*; Crim., 25 September 2012, n° 11-84.224, *Radioblog*, D. 2012. 2444.

⁴³⁸ Civ. 1re, 12 July 2012, n° 11-13.666, *Google v. Bac Films, The Factory et Canal+* (« *Les Dissimulateurs* »).

⁴³⁹ Civ. 1, 12 July 2012, no. 11-13.669, *Google v. Bac Films*.

⁴⁴⁰ *Delfi AS v. Estonia* (2015) ECtHR 64669/09.

⁴⁴¹ Report Phase 1 *Netherlands*; Report Phase 1 *France*; Report Phase 1 *Ireland*; Report Phase 1 *Italy*; Report Phase 1 *Portugal*; Report Phase 1 *Sweden*; Report Phase 1 *Estonia*; Report Phase 1 *Hungary*; Report Phase 1 *Denmark*.



The nine national reporters duly covered the relevant national rules on the applicability of injunctions. There are two main groups of countries regarding the regulation of the framework of injunctions. In the majority (seven) of these countries,⁴⁴² the local copyright act has exclusive or special rules on injunctions; in two countries,⁴⁴³ however, general administrative/procedural codes cover the provisions on injunctions.

In *Italy*, rightsholders who have reason to fear the violation or continuation of violation of their rights may ask for a declaratory judgment or an injunction against the infringer or the intermediary, whose service was used to commit the infringement. The judge can impose a sum due for the violation or the non-compliance of the injunction.⁴⁴⁴ In *Portugal*, the Copyright and Related Rights Code includes a special regime for interlocutory injunctions that might be applied against infringers or intermediaries for the infringement or the reasonable fear that someone will cause damages that would be serious or difficult to repair.⁴⁴⁵ In *Hungary*, the Hungarian Copyright Act regulates that rightsholders shall be in a position to apply for an injunction against direct infringers and such intermediaries – including information society service providers – whose services are used by third parties to infringe copyrights.⁴⁴⁶ The relevant remedies are the obligation to cease providing services and the provision/disclosure of data.⁴⁴⁷ These special copyright rules are based on/backed by the general rules of the Civil Procedure Code on injunctions.⁴⁴⁸ In *the Netherlands*, the Dutch Civil Code provides explicitly that a service provider's eligibility for invoking the safe harbour for hosting does not affect the possibility for right holders to obtain a court order to terminate or prevent an infringement, or an injunction for the removal or disabling of access to infringing content.⁴⁴⁹ Moreover, the Dutch Copyright Act stipulates that, upon application by the author, Dutch courts may order a hosting service provider whose services are used by a third party to infringe copyright, to cease and desist from providing the services that are used for that infringement.⁴⁵⁰ In *Ireland*, rightsholders might apply for an injunction against intermediaries under the Copyright and Related Rights Act since 2012.⁴⁵¹ In *Sweden*, injunctions might be issued against infringers and intermediaries alike under the Swedish Copyright Act;⁴⁵² injunctions shall be flexible, delimited and clearly formulated, and they cannot exceed what is justified in a specific case. Hence, open injunctions are not allowed. In *France*, injunctions might be applied under the IP Code and the E-Commerce Act.⁴⁵³

In *Denmark*, rightsholders might apply for an injunction under the general rules of the Danish Administration of Justice Act.⁴⁵⁴ The Danish national reporters further added that Denmark has missed to implement Article 15 of the E-Commerce Directive on the prohibition of general monitoring obligation. The Danish national reporters flag that such a failure of implementation can have direct relevance with respect to injunctions, too. In *Estonia*, injunctions might be applied for the violation of copyrights or related rights in line with the Law of Obligations Act,⁴⁵⁵ and in compliance with the procedural rules under the Code of Civil Procedure Law.⁴⁵⁶

⁴⁴² Report Phase 1 *Italy*; Report Phase 1 *Portugal*; Report Phase 1 *Hungary*; Report Phase 1 *Netherlands*; Report Phase 1 *Ireland*; Report Phase 1 *Sweden*; Report Phase 1 *France*.

⁴⁴³ Report Phase 1 *Denmark*; Report Phase 1 *Estonia*.

⁴⁴⁴ Legge Italiana sul Diritto d'Autore, Law 22 April 1941, n.633, §156 and 163(1), as amended by D.Lgs no. 140 of 16 March 2006, IPRED.

⁴⁴⁵ Copyright and Related Rights Code, §210-G.

⁴⁴⁶ 1999. évi LXXVI. törvény, §94(1) and §95(3), (4) and (6), respectively.

⁴⁴⁷ Ibid, at §94(1)(b) and (d).

⁴⁴⁸ 2016. évi CXXX. törvény, §§103-107.

⁴⁴⁹ Dutch Civil Code, §6:196c(5).

⁴⁵⁰ Dutch Copyright Act, §26d.

⁴⁵¹ Copyright and Related Rights Act of 2000 as amended, §40(5A)(a).

⁴⁵² URL, §53b.

⁴⁵³ CPI, §336-2; LCEN, §6.1.8.

⁴⁵⁴ The Danish Administration of Justice Act, §§413-414.

⁴⁵⁵ Estonian Law of Obligations Act, §1055(3).

⁴⁵⁶ Estonian Civil Procedure Code, §386.



Seven of these reporters indicated the existence of case law relevant to the field.⁴⁵⁷ Importantly enough, however, in four of the above countries⁴⁵⁸ the relevant case law has focused on injunctions against The Pirate Bay's bad faith service; and hence such case law is less relevant for the purposes of our research.

The *Irish* national reporter further added that the significance of the Irish case law lies in the recognition of the supremacy of EU law when it came to injunctive relief against service providers by the Court of Appeal. The position under the Irish law of equity is such that in order for an injunction of this type to be granted, the intermediary must be engaged in some sort of wrongdoing. No question of wrongdoing arises in these good faith situations, so under Irish law, no injunction would traditionally have been granted. The recent Court of Appeal case law has altered this position. The *Swedish* national reporter further added that the local case law is mainly from the field of criminal law. There is also another layer of case law, where injunctions are sought against internet service providers to block access to the given infringing intermediaries' service.⁴⁵⁹

The two remaining reporters reported no published domestic case law on this issue.⁴⁶⁰

- **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.⁴⁶¹ The *Dutch* national reporters noted, however, that the indirect liability of service providers only arises, if it does not fall under the safe harbour of the e-commerce act. The *Irish* reporter added that Irish law requires joint tortfeasance to establish primary liability through joint common design. The *Swedish* reporter stressed the criminal law dimension of secondary liability. On the other hand, the Swedish report also stressed that Swedish courts tend to consider the *social benefits* of certain acts, and absolve defendants from liability, if the respective act does more good than cause harm. This criterion was tested (but practically denied) in *The Pirate Bay* case. The national reporter notes that good faith service providers might be able to rely on this doctrine; although the reporter is sceptical of the relevance of the doctrine since it was completely ignored by the PMÖD in the *B2 Bredband* case, which was the first ever website blocking injunction case in Sweden.

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).⁴⁶²

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

⁴⁵⁷ Report Phase 1 *Netherlands* [Court of Appeals of The Hague, 28 January 2014, ECLI:NL:GHDHA:2014:88, Ziggo & XS4ALL/Stichting Brein; final judgment on the blocking of The Pirate Bay's website: Court of Appeals of Amsterdam, 2 June 2020, ECLI:NL:GHAMS:2020:1421]; Report Phase 1 *France*; Report Phase 1 *Ireland* [*Sony Music Entertainment Ireland Ltd v UPC Communications Ireland Ltd No.1* [2015] IEHC 317; *Sony Music Entertainment Ireland Ltd v UPC Communications Ireland Ltd No.2* [2015] IEHC 386; *Sony Music Entertainment Ireland Ltd & Ors v UPC Communications Ireland Ltd* [2016] IECA 231]; Report Phase 1 *Italy* [Tribunal of Milan, Sez. Spec. Materia impresa, Orders of 11 and 18 June 2018 (docket nr.51624/2017); Tribunal of Milan, Order of 8 May 2017 (docket nr.11837/2017)]; Report Phase 1 *Portugal* [Judgment of the Intellectual Property Court of 24 February 2015, Proc. no. 153/14.OYHLSB]; Report Phase 1 *Sweden* [*The Pirate Bay* (Svea Court of Appeal, case B 4041-09); *Dreamfilm* (Göta Court of Appeal, Case B 1565-17); *Swefilmer* (Court of Appeal for Western Sweden, Case B 3142-17); *Rarat* (Patent and Market Court of Appeal, Case B 10356-18)]; Report Phase 1 *Denmark* [TDC, U2006.1474H; *The Pirate Bay*, U.2010.2221H].

⁴⁵⁸ Report Phase 1 *Netherlands*; Report Phase 1 *Italy*; Report Phase 1 *Denmark*; Report Phase 1 *Sweden* (Swedish case law nevertheless includes cases against other intermediaries, too).

⁴⁵⁹ E.g. *B2 Bredband* (PMÖD, case PMT 11706-15) concerning final website blocking injunction [granted]; *Telia* (PMÖD, case PMÖ 9945-18) concerning interim website blocking injunction [denied]; *Elsevier* (PMÖD, case PMÖ 7648-19) concerning interim website blocking injunction [granted]; *Telia dynamic injunction* (PMÖD, case PMT 13399-19) concerning final dynamic website blocking injunction [granted]; *Black Internet* (Svea Court of Appeals, case Ö 7131-09) concerning interim (blocking) injunction against ISP of TPB [granted].

⁴⁶⁰ Report Phase 1 *Estonia*; Report Phase 1 *Hungary*.

⁴⁶¹ Report Phase 1 *Netherlands*; Report Phase 1 *Ireland*; Report Phase 1 *Portugal*; Report Phase 1 *Sweden*; Report Phase 1 *Germany*; Report Phase 1 *Denmark*; Report Phase 1 *Estonia*.

⁴⁶² Report Phase 1 *Germany*; Report Phase 1 *Italy* (although the Italian respondent noted that the development of "active provider" doctrine might be indirectly relevant in this field); Report Phase 1 *Hungary*.



The seven national reporters, answering to Q5 affirmatively, duly covered the relevant national rules on the applicability of injunctions (in line with Q4). Six reporters indicated the existence of case law relevant to the field,⁴⁶³ and one reporter reported no published domestic case law on this issue.⁴⁶⁴

- **Question 6.** Does your country have any regime in place for the moderation of infringing content by hosting service providers?⁴⁶⁵

Countries show a diverse picture in this regard. On the one hand, the majority (seven) of the reporters responded affirmatively.⁴⁶⁶ 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;⁴⁶⁷ 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 three⁴⁶⁸ declared the regime purely statutory; one⁴⁶⁹ declared it to be a mixture of statutory and self-regulatory; one⁴⁷⁰ declared it to be a mixture of statutory and case law; one⁴⁷¹ found it mainly self-regulatory; and another report⁴⁷² stated the relevance of duty of care in this field.

- **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;⁴⁷³ and four of the national respondents answered affirmatively on this question.⁴⁷⁴

- **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;⁴⁷⁵ and three other countries have a system based purely on duty of care.⁴⁷⁶ *Hungary* has a mixed system (having a statutory

⁴⁶³ Report Phase 1 *Netherlands* [Dutch Supreme Court, 7 June 2019, ECLI:NL:HR:2019:849, Stichting BREIN/News-Service Europe, Nederlandse Jurisprudentie 2019, no. 250, para. 4.4.2 and 4.7]; Report Phase 1 *Ireland* [*EMI v Eircom* [2010] IEHC 108; *EMI Records Ireland Ltd v UPC Communications Ireland Ltd* [2010] IEHC 377]; Report Phase 1 *Portugal* [compare to case law mentioned in Question 2]; Report Phase 1 *Sweden* [compare to case law mentioned in Question 3 and 4]; Report Phase 1 *Germany* [there is plenty of cases from Germany; the national reporters flagged the following leading judgments: BGH, 13 Sept 2018, I ZR 140/14, GRUR 2018, 1132 para. 46-52 – YouTube; BGH, 20 Sept 2018, I ZR 53/17, GRUR 2018, 1239 para. 41 – uploaded; BGH, 26 July 2018, I ZR 64/17, GRUR 2018, 1044 – Dead Island; BGH, 21 Sept 2017, I ZR 11/16, GRUR 2018, 178 – Vorschaubilder III]; Report Phase 1 *Denmark* [Ugeskrift for Retsvæsen, 2010.2221H].

⁴⁶⁴ Report Phase 1 *Estonia*.

⁴⁶⁵ 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.).

⁴⁶⁶ Report Phase 1 *France*; Report Phase 1 *Portugal*; Report Phase 1 *Sweden*; Report Phase 1 *Estonia*; Report Phase 1 *Hungary*; Report Phase 1 *Germany*; Report Phase 1 *Netherlands*.

⁴⁶⁷ Report Phase 1 *Ireland*; Report Phase 1 *Italy*; Report Phase 1 *Denmark*.

⁴⁶⁸ Report Phase 1 *France* [in line with LCEN]; Report Phase 1 *Sweden* [in line with the BBS Act and the E-Commerce Act]; Report Phase 1 *Hungary* [in line with the E-Commerce Act].

⁴⁶⁹ In *Portugal*, on the one hand, Decree-Law 7/2004, §18 applies to these questions. Under these rules, an administrative agency, ANACOM, was also founded. The national reporter also noted that these rules apply in a broader scope, they also cover actions against sexual abuse materials. On the other hand, the national reporter informed about the self-regulatory Memorandum of Understanding concluded by rightholder representatives, the General Inspection of Cultural Activities (IGAC), the Portuguese Association of Telecom Operators, the Portuguese Directorate-General for Consumers, the organization responsible for the .pt domain registrations (DNS.PT), the anti-piracy group MAPINET, advertising associations and consumer associations on 30 July 2015. The Memorandum of Understanding targeted the facilitation of the blocking of copyright-infringing websites. A new agreement was concluded in 2018. Since this second agreement came into force in January 2019, the national reporter added, approximately 13.000 illegal streams of national football championship matches have been identified. Of these, approximately 1.000 temporary blockings have been refused by MAPINET and IGAC, while the remaining ones have been carried out.

⁴⁷⁰ Report Phase 1 *Germany* [where the statutory basis is found in the E-Commerce Act].

⁴⁷¹ Report Phase 1 *Estonia* [the national reporter adds that the Information Society Services Act does not contain detailed rules on the notice-and-take-down procedure].

⁴⁷² Report Phase 1 *Netherlands*.

⁴⁷³ Report Phase 1 *Netherlands*; Report Phase 1 *Ireland*; Report Phase 1 *Italy*; Report Phase 1 *Portugal*; Report Phase 1 *Sweden*; Report Phase 1 *Denmark*.

⁴⁷⁴ Report Phase 1 *France*; Report Phase 1 *Germany*; Report Phase 1 *Estonia*; Report Phase 1 *Hungary*.

⁴⁷⁵ Report Phase 1 *France*; Report Phase 1 *Sweden*; Report Phase 1 *Estonia*.

⁴⁷⁶ Report Phase 1 *Netherlands*; Report Phase 1 *Portugal*; Report Phase 1 *Germany*.



basis and requiring the compliance with the duty of care). Finally, three other respondents answered negatively to this question.⁴⁷⁷

- **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.⁴⁷⁸ *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?⁴⁷⁹

The majority (seven) of respondents reported the existence of such safe harbour regime for at least one of the two services.⁴⁸⁰ The exact scope of these regimes is, however, very diverse. In three countries, statutory provisions cover both types of ISSPs.⁴⁸¹ 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.⁴⁸²

- **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 based on rightsholders’ 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.⁴⁸³

- **Question 7.2.** If yes, which right(s) are users infringing?⁴⁸⁴

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.⁴⁸⁵ 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

⁴⁷⁷ Report Phase 1 *Ireland*; Report Phase 1 *Italy*; Report Phase 1 *Denmark*.

⁴⁷⁸ Report Phase 1 *Netherlands*; Report Phase 1 *France*; Report Phase 1 *Ireland*; Report Phase 1 *Italy*; Report Phase 1 *Sweden*; Report Phase 1 *Estonia*; Report Phase 1 *Denmark*.

⁴⁷⁹ Compare to art. 21(2) 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 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”.

⁴⁸⁰ Report Phase 1 *Italy*; Report Phase 1 *Portugal*; Report Phase 1 *Estonia*; Report Phase 1 *Hungary*; Report Phase 1 *Sweden*; Report Phase 1 *France*; Report Phase 1 *Germany*.

⁴⁸¹ Report Phase 1 *Italy* (“caching”); Report Phase 1 *Portugal* (“content association services”); Report Phase 1 *Estonia* (“information storage service”).

⁴⁸² Report Phase 1 *Netherlands* (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*); Report Phase 1 *Ireland*; Report Phase 1 *Denmark*.

⁴⁸³ Cass. civ. Sez. I, 19/03/2019, n. 7709. Re.Te.It. S.p.A. c. Ya.In.

⁴⁸⁴ E.g. reproduction and/or communication/making available to the public.

⁴⁸⁵ Report Phase 1 *Netherlands*; Report Phase 1 *Hungary*.



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 CRRA 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.

- **Question 8.1.** If yes, which right(s) are users infringing?⁴⁸⁶

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.⁴⁸⁷ 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.⁴⁸⁸ 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.

Four 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,⁴⁸⁹ on the one hand, and a sensible portion of case law stems from the field of criminal law,⁴⁹⁰ on the other hand. Finally, the *Swedish* respondent introduced a rich case law in this field.⁴⁹¹ In Germany, according to the prevailing opinion, the reproduction in the context of uploading to a server for the purpose of online use is a subordinate preparatory act in preparation for making the work available to the public. However, it remains an independent use of the work, even if it is followed by making it available to the public, and is not consumed by this act of use. Thus, making a work available to the public is a further use of the work following the reproduction based on the reproduced work.⁴⁹² On the other hand, when the fixing of works for the purpose

⁴⁸⁶ 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.

⁴⁸⁷ Report Phase 1 *Ireland*; Report Phase 1 *Italy*; Report Phase 1 *Sweden* (although the reporter noted that preparatory uploads might be treated to meet the temporary acts of reproduction exception); Report Phase 1 *Germany* (where the reporter also noted that reproduction is a “subordinate preparatory act in preparation for making the work available to the public”); Report Phase 1 *Estonia*.

⁴⁸⁸ Report Phase 1 *Portugal*; Report Phase 1 *Denmark*.

⁴⁸⁹ TGI Vannes, 29 avril 2004; TGI Pontoise, 2 février 2005; TGI Meaux, 21 avril 2005; TGI Bordeaux, 10 mai 2005; TGI Toulouse, 10 mai 2005; TGI Créteil, 19 mai 2005; TGI Bayonne, 15 novembre 2005.

⁴⁹⁰ T. corr. Vannes, 29 Apr. 2004, CCE 2004. Comm. 86, note Caron. T. corr. Pontoise, Feb. 2, 2005, D. 2005. 1435 note Legros.

⁴⁹¹ Besides the above mentioned *BBS* case, the national reporter flagged the existence of the following judgments from the copyright law arena: *Blog photograph* (PMÖD, Case B 10527-18); and from the field of criminal law (all cases reflected P2P filesharing activities): Svea Court of Appeals, Case B 2160-12; Göteborg District Court, Case B 16995-11; Göta Court of Appeals, Case B 838-14. End-users were found liable for communication contents available to the public in all of these cases.

⁴⁹² OLG München, 29 April 2010, 29 U 3698/09, GRUR-RR 2011, p. 1, 2 et seq. – Videodateien.



of making them available to the public impairs the copyright holder's right of reproduction within the meaning of Section 16 UrhG, such acts can be prosecuted independently.⁴⁹³

- **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.⁴⁹⁴ In two countries only quotation, criticism, review is covered by the effective domestic norms.⁴⁹⁵ 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.⁴⁹⁶

- **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. Quotation has been present in all Member States since decades. The implementation of the caricature, parody and pastiche exceptions shows, however, a more diverse picture. In four countries,⁴⁹⁷ such L&Es were duly implemented by legislation. In one country,⁴⁹⁸ no express harmonization occurred, but another – indirect – rule could be applied for a long time. In three countries,⁴⁹⁹ the existence of these L&Es are based on case law. Finally, two countries⁵⁰⁰ have missed to implement these L&Es before the acceptance of the CDSM Directive.

- **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.⁵⁰¹ 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?

Half (five) of the national reporters indicated the existence of case law on E&Ls,⁵⁰² but the majority of these judgments are less relevant for the application of L&Es in the online environment.

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

⁴⁹³ BGH, 19. January 2017, I ZR 242/15, GRUR 2017, p. 390, para. 28 – East Side Gallery; BGH, 10. January 2019, I ZR 267/15, GRUR 2019, p. 813, para. 47 ff. – Cordoba II.

⁴⁹⁴ Report Phase 1 *Netherlands*; Report Phase 1 *France* (where the reporter highlighted that the wording of the French IP Code and the InfoSoc Directive is not identical in this regard); Report Phase 1 *Ireland* (where the reporter noted that parody is covered only since 2019); Report Phase 1 *Italy*; Report Phase 1 *Germany* [where the reporter 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]; Report Phase 1 *Estonia*.

⁴⁹⁵ Report Phase 1 *Portugal* [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*]; Report Phase 1 *Hungary*.

⁴⁹⁶ Report Phase 1 *Sweden* (where the reporter noted that the relevant case law was published post-*Deckmyn*); Report Phase 1 *Denmark*.

⁴⁹⁷ Report Phase 1 *Ireland* [the implementation happened only in 2019]; Report Phase 1 *France*; Report Phase 1 *Netherlands*; Report Phase 1 *Estonia*.

⁴⁹⁸ Report Phase 1 *Germany* (the legitimacy of §24 of the German Copyright Act has been seriously questioned by the *Pelham* judgment of the CJEU; the German legislation has addressed the parody issue during the implementation of the CDSM Directive; compare to the new §51a of the German Copyright Act).

⁴⁹⁹ Report Phase 1 *Italy*; Report Phase 1 *Denmark*; Report Phase 1 *Sweden*.

⁵⁰⁰ Report Phase 1 *Portugal*; Report Phase 1 *Hungary* (although Hungary has inserted the caricature, parody and pastiche exceptions as a part of the implementation process of the CDSM Directive).

⁵⁰¹ Report Phase 1 *Netherlands*; Report Phase 1 *France*; Report Phase 1 *Ireland*; Report Phase 1 *Portugal*; Report Phase 1 *Estonia*; Report Phase 1 *Hungary*.

⁵⁰² Report Phase 1 *Netherlands* ("*Mercis and Bruna v. Punt*"); Report Phase 1 *France* (where the reporter noted that no distinction exists between online and offline uses; "Decision of 19 December 2014"); Report Phase 1 *Sweden* [*Metal Pole* (PMÖD, Case PMT 1473-18); *Swedish tiger* (PMD, Case B 7348-20; pending at PMÖD)]; Report Phase 1 *Germany* (where the reporter noted that the case law is not connected to UGC); Report Phase 1 *Italy* (the national reporters called this case law "scant").



The majority (seven) of the reporters answered affirmatively,⁵⁰³ and two answered negatively.⁵⁰⁴ The *German* reporters noted that German copyright law does not recognize “defences” as a dogmatic category, but the Federal Court of Justice (BGH) understands “barriers” as grounds for justification, when it writes: “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”.⁵⁰⁵

- **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, L&Es work as *subjective rights*,⁵⁰⁶ and in one country⁵⁰⁷ they work as *affirmative rights*. Two reporters responded that L&Es might theoretically work as *subjective or affirmative rights, but this is not confirmed* by case law yet.⁵⁰⁸ Finally, four more reports answered *negative* to this question.⁵⁰⁹

- **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 L&Es 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.⁵¹⁰ In two countries, such C&R mechanism applies.⁵¹¹ In *Germany*, a C&R mechanism applies indirectly. The French national reporter noted that Article L. 331-31(2) of the CPI only designates a public authority, called *Haute Autorité pour la diffusion des œuvres et la protection des droits sur internet* (HADOPI), to ensure that technological protection measures do not prevent beneficiaries of certain exceptions or limitations from taking advantage of them (notably by providing the HADOPI with a competence to determine modalities of the exercise of the exceptions and limitations concerned). The exceptions and limitations of quotation, criticism, review, and caricature, parody, pastiche are not among these exceptions and limitations.

- **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?⁵¹²**

The three national reporters mentioned above duly summarized the functioning of these C&R mechanisms.

In *Portugal*, Article 18 of the Decree-Law 7/2004 establishes a regime of provisional dispute resolution concerning infringing content made available via hosting providers and/or content association services (e.g., search engines). The regime provides an administrative entity (ANACOM – the National Telecommunications Authority) with the competence to decide provisionally if certain contents should be removed or if access to

⁵⁰³ Report Phase 1 *Netherlands*; Report Phase 1 *France*; Report Phase 1 *Ireland* (“fair dealing defence”); Report Phase 1 *Italy*; Report Phase 1 *Portugal*; Report Phase 1 *Sweden* (as the national reporter noted, there is a sensible inconsistency on this field: some provisions are called as “limitations”, others are coined as “rights”; L&Es are, in practice, defences in Sweden); Report Phase 1 *Hungary*.

⁵⁰⁴ Report Phase 1 *Estonia*; Report Phase 1 *Denmark*.

⁵⁰⁵ BGH, 20 September 2012, I ZR 69/11, GRUR 2013, 503, para 9 – *Elektronische Leseplätze*.

⁵⁰⁶ Report Phase 1 *Italy* [Tribunal of Rome, Specialized Intellectual Property Section, Order 16 December 2009, stating that “If there is considerable amount of commercial advertising on the webpages where the illegally inserted videos appear, neither the right to report for information purpose nor the right to criticize or discuss can be validly invoked.”]; Report Phase 1 *Sweden*; Report Phase 1 *Germany*.

⁵⁰⁷ Report Phase 1 *Estonia*.

⁵⁰⁸ Report Phase 1 *Ireland*; Report Phase 1 *Hungary*.

⁵⁰⁹ Report Phase 1 *Netherlands*; Report Phase 1 *France*; Report Phase 1 *Portugal* [as the national reporter elaborated: “From a substantive perspective, users do not have actual control over the protected work. From a procedural perspective, users have no available legal action to ensure the enforcement of this entitlement and, as such, cannot require courts to impose upon rightholders a given action or omission with a view to satisfying their interests.”]; Report Phase 1 *Denmark*.

⁵¹⁰ Report Phase 1 *Netherlands*; Report Phase 1 *France* (where the national reporter noted that some discussion of HADOPI’s role regarding technical protection measures does exist); Report Phase 1 *Ireland* (where the national reporter noted that “no policy mandated mechanism exists”); Report Phase 1 *Italy*; Report Phase 1 *Sweden*; Report Phase 1 *Estonia*; Report Phase 1 *Denmark*.

⁵¹¹ Report Phase 1 *Portugal* (“interim dispute resolution”); Report Phase 1 *Hungary* (notice-and-take-down system under E-Commerce Law).

⁵¹² E.g. counter-notice; human oversight; flagging; time limits for responses etc.



specific information should be blocked. The aim is to obtain the rapid resolution of this kind of disputes, where the slowness of the judicial decision-making process may have harmful consequences, particularly for those who are affected by the maintenance of illegal content online. Under this provision, where the unlawfulness is not manifest, hosting providers are not obliged to remove or disable the disputed content just because an interested party claims that there is an infringement. In such cases, the interested party may appeal to the administrative authority, which will present a provisional solution within 48 hours and communicate it immediately to the intervening parties by electronic means. It is also provided that anyone with a legal interest in preserving the content online may, under the same terms, resort to the administrative authority to dispute a removal decided by the hosting providers. Whatever the decision, no responsibility will fall on the administrative authority, nor on the intermediary provider for having removed, or not, the content, as long as the lawfulness or unlawfulness of the content is not manifest. It is expressly established that the use of this dispute resolution mechanism is without prejudice to the possibility of seeking judicial redress, even if simultaneously.

In *Hungary*, the E-Commerce Act includes a detailed C&R mechanism [Art. 13(6)-(8)]. The general right to object against the removal of protected subject-matter upon the notification of rights holders shall be lodged in a private document with full probative force or in an authentic instrument at the service provider within 8 days upon the receipt of the information on content removal. The document shall consist of various substantive elements (identification of content; statement that the user's activity was not illegal). Upon receipt of the objection, the service provider shall expeditiously restore access to the contested content and inform the rights holder about the restoration. If the rights holder still wants to remove the contested content, she shall initiate a court proceeding. (It is the rights holder's task to inform the service provider about the outcome of any court proceedings.)

In *Germany*, the Content ID procedure can be described as followed: "Copyright owners can use a system called Content ID to identify and manage their content on YouTube in an instant. Videos uploaded to YouTube are checked and compared against a database containing files submitted to us by rights holders."⁵¹³ Facebook also provides a similar option in the case of hate speech via the complaints management system, where potentially infringing postings can be reported by other users.

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 been transposed by the time of the submission deadline of national reports. 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. In *Italy*, the Delegation Law is under preparation, and only scarce texts are available. In *Portugal*, public consultations took place, but no news are available regarding the text of the implementation bill. Although no official implementation draft is available in *Estonia*, 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?**

⁵¹³ YouTube, 'How Content ID Works - YouTube Help' (2022) <<https://support.google.com/youtube/answer/2797370?hl=de>> accessed 17 February 2022.



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.

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 most 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, most 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*. Most 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, irrespective of service providers' liability for the unlawful activities of end-users.

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 most of the Member States have already gathered some form of experience with content moderation; however, most 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 regarding 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 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 several 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 had 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. Mapping of Online Platforms' Structures of Copyright Content Moderation

This chapter carries out a comparative mapping of online platforms' structures of copyright content moderation. The Chapter builds on the conceptual framework in Chapter 2, in particular the understanding of copyright content moderation as composed of different structures, which explains our present focus on rules and automated moderation systems. The aim of the chapter is to answer the following empirical sub-research questions (SQR).

- SQR (4): How are copyright content moderation rules organized by platforms into public documents?
- SQR (5) Which copyright content moderation rules do different platforms employ to regulate copyright, and how have they changed over time?
- SQR (6): How do platforms' automated copyright content moderation systems work?

The chapter focuses on our empirical findings and is organised so as to tackle each of the three sub-research questions proposed above.

Section 5.1. presents the findings regarding the evolution of kinds of public documents the 15 platforms of our sample published over time to communicate the rules that regulate copyright content moderation.

Sections 5.2.1 and 5.2.2 consider copyright content moderation rules. Section 5.2.1 discusses some of the general characteristics of the rules we identified in relation to all the 15 platforms we examined. We posit that provisions might be grouped according to at least two broad categories: *normative types* (whether they are rights, obligations, expectations, procedures, or principles); and *subjects* (the particular topics they address). This section does not systematically break down rules by platform nor comment on how these kinds have changed over time. However, in offering an overview of all rules found during the analysis of the 15 platforms' documents, it provides a useful panorama about what copyright content moderation provisions *are* and, perhaps more important, *can* be.⁵¹⁴ In this sense, these two categories are treated here as both empirical findings and analytical constructs that facilitated our mapping exercise.

Section 5.2.2 tackles the longitudinal analysis of six case studies (Facebook, SoundCloud, PornHub, FanFiction, Diaspora and DTube). We explain how the copyright content moderation rules of these platforms changed over time through the analysis of the two categories unpacked in Section 5.2.1. The section presents and explores descriptive statistics of the presence / absence of these kinds of rules over time and, to grasp discursive aspects, how many times these provisions are mentioned. A more qualitative approach is used to group platforms' rules into particular time periods – what we term *normative periods*. 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 eras in the development of those six companies' provisions. This approach inevitably entails some simplifications but also offers a synoptic angle to make sense of their copyright content moderation regimes. For the sake of clarity, some rules will be referred 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 (the end of our data collection).

Finally, the Discussion section (5.3) argues that the evolution of platforms' copyright content moderation structures seems to be characterized by two sets of processes (complexification and opacification / platformisation and concentration), which have unfolded differently in relation to different platforms.

5.1 How are copyright content moderation rules organized by platforms into public documents?

The first research question of this chapter (SQR4) interrogates the often taken for granted fact that copyright content moderation rules might be published in various kinds of public documents. Table 6 below condenses the information we used to gathered to answer this question. It presents which kinds of public documents platforms

⁵¹⁴ In a previous iteration of this Chapter, we also mentioned a third category: the *directness* of a given rule, 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. While we coded documents for this category, we ultimately decide that the current report should focus on direct rules, as indirect rules' meaning is much more diffuse.



have published to regulate copyright, the number of versions we collected and analysed and the year in which the first collected version was published. In total, we collected 626 versions, of which 318 were analysed (for more information on this, see Section 2.7.2). Let us reinforce that these should not be taken as encompassing all kinds of documents and versions these platforms have indeed published; we cannot guarantee that dates are accurate across the board, either.

Table 4 Total number of versions collected (“C”) and analysed (“A”) of eight kinds of police-like documents, for mainstream, alternative and specialised platforms⁵¹⁵

		Terms of Service			Community Guidelines			Copyright Policy			Help pages (copyright)			Principles			Terms of Service of Enforcement System			Music Guidelines			Whitepaper			Total collected versions	Average versions per year	
		Y	C	A	Y	C	A	Y	C	A	Y	C	A	Y	C	A	Y	C	A	Y	C	A	Y	C	A			
Mainstream	Facebook	2004	27	21	2007	47	16	2007	8	8	2007	13	13	2009	3	3	2018	2	2	2018	1	1					101	5,9
	YouTube	2005	12	8	2006	27	11	2009	185	0	2007	17	17													241	15,1	
	Twitter	2006	16	12	2009	67	21				2009	7	7													90	6	
	Instagram	2011	3	3	2011	15	11				2012	8	7													26	2,6	
	SoundCloud	2008	7	6	2008	4	4				2010	14	14													25	1,9	
Alternative	Mastodon	2013	1	1	2018	1	1																			2	0,3	
	Pixelfed	2018	2	2	2019	1	1																			3	1	
	Diaspora	2013	1	1										2017	1	1										2	0,3	
	Dtube	2019	1	1																		2019	1	1		2	1	
	Audius	2020	2	2							2020	1	1									2019	1	1		4	1	
Specialised	Vimeo	2006	27	20	2008	10	10	2009	6	5	2005	15	15													58	3,4	
	FanFiction	2001	4	4	2005	2	2	2000	1	1																7	0,4	
	Twitch	2009	13	13	2014	10	10	2011	8	8																31	2,6	
	Dribbble	2009	9	8	2013	10	10				2017	2	2													21	1,8	
	PornHub	2010	6	5				2007	6	6				2020	1	1										13	1,2	
Total																										626		

That said, our analysis suggests that, over time, the 15 platforms of our sample have created a total of eight types of documents related to copyright content moderation. Below, we list and describe them.

1. **Terms of Service (or Terms of Use).** Typically, a contractual document written in legal jargon and focused on users’ rights and obligations. At least Facebook has a Terms of Service that contemplates their automated copyright content moderation system, Rights Manager.
2. **Community Guidelines.** Commonly written in an informal (as opposed to legal) language, this kind of document tends to emphasise what users should not do.
3. **Particular documents** (Copyright Policy, Music Guidelines, Principles). Some documents appear to be focussed on one topic (e.g., copyright, the posting of music files) or a normative type (e.g., principles).
4. **Help pages** (in some cases, the Copyright Policy was archived by platforms as a Help page). Usually, copyright Help pages contain FAQs (Frequently Asked Questions) and information that is also explained in other documents. Many, however, present information that apparently cannot be found anywhere else in platforms’ websites.
5. **Whitepapers.** In the case of two of the alternative platforms we investigated (namely, Audius and DTube), a considerable part of their rules was described in “whitepapers”. These papers appear to be needed because both platforms rely on blockchain technology to monetise and govern content.

These documents are rarely published at once. Typically, Terms of Service is the first to appear, often at the very launch of the service. Other documents usually come later, at a pace that varies from company to company, as Table 6 suggests. Facebook is the clearest example of this gradual expansion in the number of kinds of

⁵¹⁵ This table includes the total number of versions collected (“C”) and analysed (“A”) of eight kinds of police-like documents, for mainstream, alternative and specialised platforms, with the year (“Y”) in which the first collected version of each kind of document was published and average number of collected versions per year and platform. Source: Authors.



documents. From 2004 to 2007, the company seemingly had only a Terms of Service. Then, in 2007, they published their first versions of their Community Guidelines and Copyright Policy. Two years later, they decided to have a public chart of Principles and, in 2018, published another two documents: one regulating how users can post music and another on its automated copyright content moderation system – Rights Manager. (It might be that users of Instagram, which is owned by Facebook Inc., are also subjected to these specific documents; since we found these documents in URLs of Facebook.com, they appear here as pertaining to this platform.) This pattern is not universal, though. Consider Vimeo, which apparently published a Help page about copyrights even before having a Terms of Service.

Generally, while all services in our sample have published at least one version of a Terms of Service, the presence of other kinds of documents are unevenly distributed among the different kinds of platforms. Mainstream ones (Facebook, YouTube, Twitter, Instagram and SoundCloud) appear to be the best documented group. All have at some point published Community Guidelines and copyright Help pages, and two (Facebook and YouTube) also have a Copyright Policy. Specialised platforms (Vimeo, FanFiction, Dribbble, Twitch and Pornhub) are not so different. All but one service within this group (PornHub) have a document that is explicitly named Community Guidelines; only Dribbble has not published at least one version of their Copyright Policy. Meanwhile, only two (Vimeo and Dribbble) have Help pages dedicated to explaining copyright content moderation practices and conditions. The most obvious contrast is between both mainstream and specialised services and alternative ones (Mastodon, Pixelfed, Diaspora, DTube and Audius). Only two of the latter group (Mastodon and Pixelfed) have Community Guidelines and just Audius has a (very brief) Help page about Copyright. At the same time, alternative platforms that use blockchain to decentralize their services (such as Audius and DTube) have published whitepapers, as said above.

Different patterns seem to exist regarding the *number* of unique versions of documents we collected, an information that suggests how plastic platforms' normative framework has been. In this regard, those three groups of platforms appear to matter less as Facebook, YouTube and Twitter seem to constitute a group of their own. They are, by far, the ones that have changed their T&Cs more often; the figures of other mainstream platforms (Instagram and SoundCloud) are closer to those of specialised ones, which, in turn, are higher than those of alternative services – although not by extraordinarily large margins.

Our data do not allow for any clear explanation of the reasons behind these differences. It seems important though to discuss some hypotheses, and in which ways our findings complicate them. The fact that mainstream platforms' copyright content moderation rules are so richly documented (many kinds of documents, high number of versions) suggests that the number of users might be a factor. The gradual increase in the kinds of documents might also be correlated with the growth of their user base. And yet Instagram, for instance, is not as well document as Vimeo, which has a fraction of users and has not grown so rapidly as Instagram has. Similarly, the age of a given platform is certainly an element to be considered but does not, by itself, determine these discrepancies. For instance: Instagram and Diaspora were both launched in 2010 but the former has published 26 versions of T&Cs-related documents, ten times as much as the latter. Legal regimes are also not so important, as all platforms are quasi global and, thus, essentially subjected to the same set of laws. Another, more credible factor appears to be the kind of content the service focuses on. Platforms that focus on audio-visual content (in our sample, YouTube, Vimeo and Twitch), which are more exposed to copyright legal complaints by powerful traditional media companies and well-organized professional classes (e.g., musicians), are all considerably covered by various kinds of documents and constantly tweaking their T&Cs. The contrast between audio-visual services and text-only platforms, such as FanFiction, is evident.

The next section tackles the second research question of this chapter (SQR5).

5.2 Which copyright content moderation rules do different platforms employ to regulate copyright, and how have they changed over time?

5.2.1 Copyright content moderation rules' two main categories

Based on our analysis, we propose that platforms' copyright content moderation rules can be studied through at least two broad categories: *normative types* allows for a relational and understanding of which actor ought (or not) to do what; *subjects indicate* platforms' assumptions about what copyright content moderation rules (should) regulate. Sections below further explain these terms.



5.2.1.1 Normative types

The rules we studied aim to engage users and platforms in varying sorts of interaction, with particular levels of prescriptive intensity. The notion of *normative type* tries to capture these elements. Through an inductive process, we have found five *types*, as shown in Table 5 below.

Table 5. Copyright content moderation rules' normative types, their addressees, prescriptive intensities and verbs that best describe them. Source: Authors.

	Rule addressee(s)	Prescriptive intensity	Typical verb	Number
Rights	Platform or users	High	Can / Might	17 (users)
				15 (platforms)
Obligations	Platform or users	High	Must / Will	14 (users)
				18 (platforms)
Expectations	Users	Low	Should	20
Principles	Platform	Low	Aspire	2
Procedures	Platform, users or both	Highest	None	9

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 different intensity, these categories can be used as broad analytical frames to discuss the uneven regulation of those two actors (users and platforms) over time. Our assumption is that the *balance* between who and how is regulated is, by itself, meaningful. This will become clearer when we explore the balance between obligations, rights, expectations, principles and procedures in the copyright content moderation rules of our six case studies below.

Although we acknowledge the rich theories on many of these types, we chose to adopt a simpler, vernacular conceptualization of them. In what follows, we briefly explain what each normative type means and list the copyright content moderation rules that fall into it, commenting on the most important ones. It is important to note that most rules we identify below logically depend on a set of *unsaid* rules. For instance, if a platform is obliged to remove content, this is premised on platforms' right to do so, and users' obligation to accept this provision. Similarly, if users are given by the platform the right to appeal a copyright-related content removal, it goes without saying that the platform must provide them with the means for such appeal. It is, in principle, possible to unpack and map out all the unsaid rules which support explicit rules. Yet, given our interest in the discursive element of platforms' T&Cs, i.e., in what is openly said, we decided to not do so in this project.

a) Rights

Rights are rules that say what either users or platforms *can* but might not necessarily do; they denote a potentiality. In sociological terms, to have a right is conducive to have the power to act or to refuse an obligation to act, and entails, thus, a particular freedom.

Rights are pervasive and appear central to platforms' copyright content moderation efforts. Some of the most important copyright content moderation rules are users' rights (Table 6). Provisions such as their right to report infringement and appeal copyright-related appear are part of virtually all 15 platforms' core rules – largely, because these rights are also guaranteed by laws such as the DMCA. Other users' rights are surprisingly absent from T&Cs – e.g., users' right to claim fair use, to which we will come back below. Numerically, though, most of the users rights we found are not core rules. They refer to specific platforms / documents – e.g., their right to apply DRM to their content (from Vimeo) and post remixes (SoundCloud) and moderate their own content directly (SoundCloud).



Table 6. List of users' rights regarding copyright content moderation. Source: Authors.

User can apply DRM on their content
Users can appeal copyright-related content removal
Users can appeal copyright-related penalties to account
Users can avoid liability for content removed by platforms
Users can decide on fair use claims
Users can disable download of their content to avoid copyright infringement
Users can earn cryptocurrency by posting their content
Users can moderate copyrighted content directly
Users can post content under fair use
Users can post remixes
Users can report copyright infringement
Users can report fake profiles who reported copyright infringement
Users can repost content that was falsely reported
Users can stop using automated copyright content moderation system at any time
Users can use and assign CC license to their content
Users can use automated content moderation to monetise, block and track access to content
Users can withdraw copyright report

Platforms' rights, on the other hand, do not appear to be as important as users': none of them can be said to be a core rule of platforms. As Table 7 suggests, most of them concern platforms' ability (but not the obligation) to punish users in case they do not follow other copyright provisions: block account functionalities, deny refunds, disable access to automated content moderation systems, limit the visibility of infringing content, withhold payments etc. The most important penalties, as explained below, are particular kinds of platforms' obligations.

Table 7. List of platforms' rights regarding copyright content moderation. Source: Authors.

The platform can apply DRM technology
The platform can block account functionalities of copyright infringers
The platform can consider the nature of the copyright infringement when deciding on punishment
The platform can decide unilaterally on copyright infringement
The platform can deny refunds to users terminated due to copyright infringers
The platform can disable access to automated copyright content moderation in case of misuse
The platform can disable and suspend accounts who provide false information in copyright disputes
The platform can limit the visibility of content automatically identified as infringing copyright
The platform can modify and discontinue automated copyright content moderation system at any time
The platform can monitor users' compliance with automated copyright content moderation system



The platform can punish users who submit false information during copyright disputes
The platform can require from users evidence of their copyright over content
The platform can require more information during copyright disputes
The platform can restore content if copyright report is false or withdrew
The platform can withhold payments from users if they infringe copyrights

b) Obligations

Obligations are rules that either users or platforms *must* comply with; in the case of users, obligations involve the threat of punishment (i.e., having one’s account deleted); 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).

If rights are inherently empowering, obligations can be much more ambiguous. In a way, all obligations (and in particular prohibitions) necessarily represent a limit to users and platforms’ freedom to act or refuse acting. At the same time, some positive obligations might well be portrayed as compulsory forms of power over other actors, typically platforms’ power over users. In this way, these rules might both constrain and enable certain freedoms. To understand what we mean, consider some of the most important copyright content moderation rules of platforms’ T&Cs – platforms’ obligations, described in Table 8. Core rules such as platforms’ obligation to disable / suspend accounts and remove / block access to content due to copyright infringement are, in a way, a way of restricting platforms’ freedom to act. After all, in principle, they cannot choose *not* to comply with their own obligations, at the risk of even behaving unlawfully. At the same time, these rules also empower platforms to exercise a considerable amount of control over users. Importantly, the wording of this sort of platform obligation is often vague, allowing a lot of wiggle room for companies to decide how exactly they will comply with these provisions.

Table 8. List of platforms’ obligations regarding copyright content moderation. Source: Authors.

The platform must assist with copyright violations by third parties
The platform must decide on fair use claims
The platform must disable or suspend accounts due to copyright infringement
The platform must document notices of alleged copyright infringement
The platform must have a fair copyright content moderation system
The platform must have an automated copyright content moderation system that respects copyright exceptions
The platform must keep content online during automated copyright content moderation disputes
The platform must not count restored content as a strike
The platform must not decide unilaterally what is a copyright infringement
The platform must not scan private videos via automated copyright content moderation
The platform must not take copyright exceptions as a reason to restore video
The platform must notify parties during copyright disputes
The platform must publish a report on copyright content moderation
The platform must remove or block access to content due to copyright infringement
The platform must respect and protect copyright



The platform must restore accounts after strikes removal by users

The platform must restore content if report was false or withdrew

The platform must visually mark content taken down due to copyright reports

In contrast, users' obligations (see Table 9), are hardly empowering. They comprise some of the most important core rules we found. E.g., the provision that users must respect copyrights is arguably the central copyright content moderation rule all platforms' have in place, in both presence over time and number of mentions. Sometimes, it appears as a simple "Respect others people's copyrights"; other times, as the positive obligation to post only what the user has created herself or has the explicit rights over to post. Other key provisions include the obligation to be legally liable for infringing others' copyrights and to provide accurate and complete information during copyright disputes. Other, less important and common users' obligations reflect particular platforms' peculiar aspects and designs – e.g., the idea that, in blockchain-empowered services, users must moderate copyright infringing content (Audius) or that users must use English during copyright disputes (mentioned in a recent PornHub document).

Table 9. List of users' obligations regarding copyright content moderation. Source: Authors.

Users must act as copyright content moderators
Users must apply to get access to automated copyright content moderation system
Users must be legally entitled to report copyright infringement
Users must be liable for copyright infringement
Users must be solely responsible for enforcing their copyright
Users must become a registered DMCA agent
Users must file a lawsuit against alleged copyright infringer
Users must indemnify the platform regarding copyright infringement
Users must not interfere with anti-copyright infringement features
Users must not teach others how to violate copyright
Users must provide accurate information in copyright disputes
Users must provide the required information in copyright disputes
Users must respect copyrights
Users must use English in copyright disputes

c) Expectations

While these two sorts of normative type apply to both platforms and users, others are presented as addressing only one kind of actor. *Expectations*, listed in Table 10 below, 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, nor lead to any sort of penalty. In this way, expectation is a soft attempt by platforms to direct users' conduct, a kind of incentive that allows for disagreement and agency.

Particular expectations are rarely part of platforms' core rules. More often, they come and go in the history of companies' T&Cs. Some of the most important ones, in terms of frequency of appearance, are those that prompt users to consult a lawyer if they are unsure about some aspect of copyright law, and those that aim to make



users self-reflexive about their own behaviours – such as thinking twice before reporting copyright infringement, claiming fair use and posting risky content.

Table 10. List of platforms' expectations about users regarding copyright content moderation. Source: Authors.

Users should act as copyright content moderators
Users should consult a lawyer on copyright
Users should contact owner of violated copyrighted content
Users should contact the platform if contact with apps on copyright violation doesn't work
Users should contribute their content to public domain
Users should give due credit
Users should officially copyright their content
Users should provide references to original work
Users should react to content instead of violating copyright
Users should report repeat infringers of copyright
Users should report violation of others' copyright
Users should repost content instead of infringe copyright
Users should specify their role in the uploaded content
Users should think twice before appealing copyright infringement report
Users should think twice before claiming fair use
Users should think twice before posting risky content
Users should think twice before reporting copyright infringement
Users should think twice before using CC-licensed content
Users should try to solve copyright dispute independently
Users should use an agent to report violation in case they are concerned with their information being shared with infringer

d) Principles

Principles concern platforms' (not users') goals – what companies allegedly *aspire* to do and be. This normative type is often uttered in the form of vague corporate mission statements or promises, making it, in theory at least, easier for companies to deflect accountability when not complying with them. Principles have thus a low prescriptive intensity, and a strong performative component.

Maybe because of their haziness, principles about copyright content moderation in particular were also rare in our dataset: we found only two of them, as shown in Table 11 below. Furthermore, they appear in less than 20 documents of only three platforms – Facebook, Vimeo and SoundCloud.

Table 11. List of platforms' principles regarding copyright content moderation. Source: Authors.

The platform aspires to balance copyright and freedom of expression
The platform aspires to protect intellectual rights



e) Procedures

Lastly, there are what we call *procedures*. Ostensibly, this normative type regards what happens and will happens in the relationship between platforms and users, as if platforms were describing unavoidable facts of their functioning, material possibilities and impossibilities, or external impositions (e.g., state regulation) which they did not create and cannot, thus, be accountable for – a key difference between this type and obligations.

Despite the neutral terms in which they are depicted, however, procedures – or companies’ decision to mention them in public documents – are premised on 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 contemplate, discursively at least, the possibility of disobedience.

Procedures might address users, platforms or both, and be both positive (i.e., describe what *is* done) and negative (i.e., what *is not* done). But as Table 12 below makes clear, most procedures we found regard platforms’ behaviour, ranging from rules regarding their functionalities (e.g., companies’ choice not to employ DRM technologies) to content moderation practices (e.g., whether platforms use human moderators and automated copyright content moderation systems) to legal consequences of infringing actions.

Table 12. List of procedures regarding copyright content moderation. Source: Authors.

The platform cannot remove a content from another website or app
The platform does not employ DRM
The platform does not monetise copyrighted content
The platform does not remove or suspend copyright infringing content posted in it
The platform employs automated copyright content moderation
The platform employs human content moderation
The platform is not liable for copyright-related issues
The platform publicises information about copyright disputes
Users who falsely report copyright infringement risk suffering legal consequences

5.2.1.2 Subjects

The second category we used to parse our rules concern the *subject* of platforms’ copyright content moderation, that is, *what* these provisions actually regulate (see Table 13). This component might be more straightforward than normative types but their definition is not self-evident. Example: when platforms tell users to not violate others’ copyright, they are essentially attempting to control users’ posting behaviour. At the same time, in doing so, they are also trying to lead users to, themselves, enforce copyright. In view of this Chapter’s goals, we took the second interpretative angle and clustered rules according to which area of copyright content moderation they refer to. Doing so allowed us to understand, generally, how companies define what their regulatory practice is, and chart the ways in which their concerns with copyright shifted across the years. Our analysis uncovered five macro subjects that copyright content moderation rules refer to: enforcement and, somewhat unexpectedly, transparency and monetisation.

Table 13. List of copyright content moderation rules’ subjects. Source: Authors

Macro Subjects	Specific Subjects	Number of rules ⁵¹⁶
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⁵¹⁶ Please note that one rule, on the use of automated content moderation system for monetisation purposes, appears in two subjects, “automated moderation” and “monetization”, thus the discrepancy between the total numbers in Table xx and the total number of rules, which is 95.



Copyright enforcement	Infringement avoidance	18	90
	Manual content removal	12	
	Automated moderation	10	
	Disputes	23	
	Penalties	19	
	Exceptions	8	
Transparency		3	
Monetisation		3	

The following sections describe both macro and specific subjects, along which the same rules listed in the previous section are reorganized.

a) Copyright enforcement

Perhaps unsurprisingly given our interest in content moderation, most rules we identified (90/95) refer to copyright enforcement – vernacularly defined here as acts that aim to compel actors to comply with a provision. Yet, enforcement in itself is a multi-faceted subject, encompassing several specific subjects. We inductively further categorised those rules into five specific subjects, which roughly describe different enforcement techniques: *infringement avoidance*, *manual content moderation*, *automated content moderation*, *disputes*, *penalties*, and *exceptions*. We detail them in the following sections.

- *Infringement avoidance*

A central enforcement technique involves platforms’ attempts to avoid any instance of copyright infringement in the first place (see Table 14).

Table 14. List of platforms’ infringement avoidance rules. Source: Authors.

The platform aspires to balance copyright and freedom of expression
The platform aspires to protect intellectual rights
The platform can apply DRM technology
The platform does not employ DRM
The platform must respect and protect copyright
User can apply DRM on their content
Users can disable download of their content to avoid copyright infringement
Users must be solely responsible for enforcing their copyright
Users must not teach others how to violate copyright
Users must not interfere with anti-copyright infringement features
Users must respect copyrights
Users should give due credit
Users should officially copyright their content



Users should provide references to original work
Users should react to content instead of violating copyright
Users should repost content instead of infringe copyright
Users should specify their role in the uploaded content
Users should think twice before posting risky content

Of the 18 infringement avoidance rules we identified, 13 focus on users. Typically, these rules aim to prompt a sort of ex-ante self-governance. That is, users should read the rule and consciously moderate their own actions, without any intervention from the platform. Thus, the dominance of expectations and users' obligations. The central provision of this subgroup is the one that establishes that users must not infringe others' copyrights. But the avoidance of infringement has other, more subtle facets – e.g., reflecting on the decision to post risky content, refrain from telling others how to violate copyright, avoid mistakes that can lead to unnecessary infringements etc. Some rules appear to be misguided in face of copyright law, such as the one that incentivizes users to give due credit, published by Mastodon and Dribbble. Even if the goal is to create a friendly, honest relationship between, it is obvious that credit, by itself, does not avoid or offset copyright violations.

Whilst infringement avoidance tends to put the burden of regulation on the user, and leave the platform in a mostly passive and arguably comfortable role, some rules listed in Table 16 refer to the platform. Many platforms say explicitly that they also must ensure that they will not engage in infringing behaviour – a provision that is echoed in principles such as “The platform aspires to protect intellectual rights”. Other provisions refer to, e.g., DRM technologies, which aims to make copyright infringement materially impossible and is cited only in a set of documents published by Vimeo.

- *Manual content removal*

Another important set of provisions address the manual removal of infringing content (see Table 15). For the sake of clarification, the expression “manual” is used here in contrast to the moderation systems centred on algorithmic fingerprinting – or “automated moderation”, the topic of the next section. Much of the “manual” work we refer to is actually dependent on various computational interfaces and processes.

Table 15. List of platforms' manual content removal rules. Source: Authors.

The platform can decide unilaterally on copyright infringement
The platform can restore content if copyright report is false or withdrew
The platform cannot remove a content from another website or app
The platform does not remove or suspend copyright infringing content posted in it
The platform employs human content moderation
The platform must not decide unilaterally what is a copyright infringement
The platform must remove or block access to content due to copyright infringement
The platform must restore content if report was false or withdrew
Users can moderate copyrighted content directly
Users must act as copyright content moderators
Users should act as copyright content moderators
Users must become a registered DMCA agent



If infringement avoidance focusses on users, content removal is, essentially, an activity carried out by platforms. The primary rule listed in Table 15 is the one that enables companies to remove infringing content, which is a core rule of various platforms of in sample and a requirement of the American law (DMCA). Other provisions concern procedures (such as the use of human moderators, and the material limitations of platforms' content removal capacity) and the provision on who, after all, can decide on copyright infringement – which platforms usually describe as involving not only them. The rules directed to users in this list are particular to platforms that have a decentralized content moderation system, such as DTube. In them, users are indeed expected to remove content, in which case they might need to even register as DMCA agents.

- *Automated moderation*

Automated moderation rules are the rules of the algorithmic copyright enforcement systems that we will scrutinize in much more detail in Section 5.2.3. The provisions listed in Table 16 indicate the basic obligations, rights and procedures related to those systems. The central one is the very information that platforms employ automated copyright content moderation, something that is far from pervasive, as we will explain below. These rules point the capabilities and limitations of these systems, and the conditions that platforms and, chiefly, users must follow when operating them and within them. It is interesting to note how generic these rules are usually conveyed – e.g., they rarely explain how exactly their protocols are executed. This is representative of the deep opacity of these system, a point to which we return in this Chapter's Discussion Section 5.3.

Table 16. List of platforms' automated moderation rules. Source: Authors.

The platform can disable access to automated copyright content moderation in case of misuse
The platform can modify and discontinue automated copyright content moderation system at any time
The platform can monitor users' compliance with automated copyright content moderation system
The platform employs automated copyright content moderation
The platform must have a fair copyright content moderation system
The platform must have an automated copyright content moderation system that respects copyright exceptions
The platform must not scan private videos via automated copyright content moderation
Users can stop using automated copyright content moderation system at any time
Users can use automated content moderation to monetise, block and track access to content
Users must apply to get access to automated copyright content moderation system

- *Copyright disputes*

We define a copyright dispute the process that initiates when a user reports copyright infringement or challenges a content removal decision – either manual or automatic. This process is detailed in the law and much of the rules listed in Table 17 mirror such legal provisions, resulting in a fairly common set of obligations (e.g., platforms need to notify all parties, users must provide all the required information) and rights (the very possibility of reporting infringement, or companies' ability to restore content after a dispute is solved or abandoned). Other provisions are not part of any law, however.

They range from PornHub's peculiar requirement that users had to file their claims in English (which was patently detrimental to non-English speakers and did not last long) to the expectation that users should try to solve copyright issues without resorting to any formalized reporting / appeal protocol, as well as thinking twice before starting a dispute. This set of rules has become particularly prominent in large mainstream platforms' frameworks and seems to be an attempt to, more than simplify quarrels, reduce companies' responsibility over disputes that are costly in terms of human, financial and computational resources.



Table 17. List of copyright dispute rules. Source: Authors.

The platform can require from users evidence of their copyright over content
The platform can require more information during copyright disputes
The platform must assist with copyright violations by third parties
The platform must decide on fair use claims
The platform must keep content online during automated copyright content moderation disputes
The platform must notify parties during copyright disputes
Users can appeal copyright-related content removal
Users can report copyright infringement
Users can repost content that was falsely reported
Users can withdraw copyright report
Users must be legally entitled to report copyright infringement
Users must file a lawsuit against alleged copyright infringer
Users must provide accurate information in copyright disputes
Users must provide the required information in copyright disputes
Users must use English in copyright disputes
Users should consult a lawyer on copyright
Users should contact owner of violated copyrighted content
Users should contact the platform if contact with apps on copyright violation doesn't work
Users should report violation of others' copyright
Users should think twice before appealing copyright infringement report
Users should think twice before reporting copyright infringement
Users should try to solve copyright dispute independently
Users should use an agent to report violation in case they are concerned with their information being shared with infringer

- *Penalties*

Finally, copyright enforcement is heavily dependent on a variety of *penalties*, listed in Table 18. We categorise as penalties any provision related to the punishments that users are subject to when they infringe copyrights or copyright-related rules. Penalties are similar to infringement avoidance provisions, as both aim to lead actors to refrain from infringing rules. Differently from infringement avoidance provisions, though, penalties specify the consequences (and conditions) of doing so.

Table 18. List of penalties rules. Source: Authors.

The platform can block account functionalities of copyright infringers
The platform can consider the nature of the copyright infringement when deciding on punishment



The platform can deny refunds to users terminated due to copyright infringers
The platform can disable and suspend accounts who provide false information in copyright disputes
The platform can limit the visibility of content automatically identified as infringing copyright
The platform can punish users who submit false information during copyright disputes
The platform can withhold payments from users if they infringe copyrights
The platform is not liable for copyright-related issues
The platform must disable or suspend accounts due to copyright infringement
The platform must not count restored content as a strike
The platform must restore accounts after strikes removal by users
Users can appeal copyright-related penalties to account
Users can avoid liability for content removed by platforms
Users can report fake profiles who reported copyright infringement
Users must be liable for copyright infringement
Users must indemnify the platform regarding copyright infringement
Users should report repeat infringers of copyright
Users who falsely report copyright infringement risk suffering legal consequences
Users who infringe others' copyrights risk suffering legal consequences

The provisions listed in Table 19 demonstrates how rich and central penalties can be platforms' copyright regulatory framework. They go much beyond the disablement of the account of repeat infringers, or the legal consequences that posting infringing content may entail, and encompass other, softer forms of punishments: blocking functionalities of the account, limiting visibility of users' content, and denying refunds (in case of platforms that offer paid services, such as SoundCloud). While defined as platforms' obligations, these rules materialize companies' power over users. Other provisions point to the restriction this power is subjected to. But these are less common and themselves limited. E.g., users are sometimes told they have the right to appeal the deletion of their account; but they are rarely – if ever – told whether they can appeal the reduction of their content's visibility.

- *Copyright “exceptions”*

While copyright “exceptions”⁵¹⁷ are inherently linked with both manual and automated moderation rules, setting it apart from those subjects enables us to see in more detail the remarkable lack of interest that essentially all platforms in our sample appear to have in them – with the notable exceptions of Vimeo and SoundCloud, Twitter, Twitch, and YouTube.

Table 19. List of copyright exceptions rules. Source: Authors.

The platform must not take copyright exceptions as a reason to restore video
Users can decide on fair use claims

⁵¹⁷ “Exceptions” in the context of this section of the empirical research is a term used in the non-legal technical sense to refer to situations in which copyright is made somehow more flexible in the context of the operation of a platform's content moderation systems.



Users can post content under fair use
Users can post remixes
Users can use and assign CC license to their content
Users should contribute their content to public domain
Users should think twice before claiming fair use
Users should think twice before using CC-licensed content

The perhaps most important aspect of the provisions listed in Table 19 is the lack of any rule directly concerning platforms. For instance, no document we analysed say explicitly that platforms have the obligation to take into consideration exceptions, or that this is done at all.

To be sure, many platforms do discuss fair use, particularly in their Help pages. Interestingly, they rarely do so in a normative manner. Typically, they explain what fair use is, in a distanced, scholarly manner, and point to some external resources so as users can “learn” more about it. But only rarely these explanations encompass any right, obligation, or procedure. The suggestion that fair use can be claimed by users is, at best, indirect.

When platforms do discuss copyright exception rules, these concern users. Users’ right to claim fair use might appear self-evident – but of the platforms we examined, only Twitter, YouTube and Vimeo, in some of their documents, appear to have mentioned it. The possibility of using and posting content under a Creative Content license appears only in YouTube and Vimeo’s documents; of publishing remixes is cited only by SoundCloud; and the suggestion that users contribute their content to the public domain appeared once in a 2006 version of Twitter’s Terms of Service.

- *Transparency*

Since copyright content moderation is, by definition, a form of rule enforcement, we did not anticipate that its regulation would involve provisions that do not regard enforcement of copyright per se. Yet, as we discovered, the rules around two other subjects, transparency and monetisation, are also important to understand how platforms regulate copyright content moderation, as this one and the next sections explain.

Transparency rules concern the provisions platforms follow to make information about their content moderation decisions somehow public (see Table 20). These rules are rare and have been adopted by few platforms. They comport two, indirect regulatory dimensions.

Some provisions seem to enable external actors (policymakers, researchers) to assess platforms’ removal actions and, at least in theory, hold them accountable. That is the case of Facebook, which is the only platform in our sample that publishes a report with data on how it processes copyright reports, take-downs and appeals. Twitter, Dribbble and Vimeo say they send information about disputes to public databases, such as Lumen. Some Pornhub’s documents claim the company “document(s)” notices of copyright infringement – albeit it is hard to understand what this sentence means, and no further clarification is given.

Another regulatory dimension of transparency rules, present in Twitter’s Terms of Service, is oriented towards users. Per this provision, the platform obliges themselves to mark content that have been taken down due to copyright infringement. While this is not said explicitly in the T&Cs, it is reasonable to assume that users’ who see this visual mark will be reminded of platforms’ ability to take down infringing content and, potentially, refrain from posting copyrighted content themselves.

Table 20. List of transparency rules. Source: Authors.

The platform must document notices of alleged copyright infringement

The platform must publish a report on copyright content moderation

The platform must visually mark content taken down due to copyright reports

The platform publicises information about copyright disputes



- *Monetisation*

Monetisation of content is the practice through which platforms share with some users the revenue generated by their content – regardless of who is posting it. There appear to exist two main models of monetisation among the sample of platforms we examined, as rules listed in Table 21 indicate. One is offered by YouTube, Facebook and PornHub, and made possible by their automated copyright enforcement systems – which, as Section 5.3 will explain, is often quite selective as to which user can benefit from it. In this case, economic resources are generated by ads linked with the content. We found at least one platform (Vimeo) that explicitly say that they do not monetise content. The other model is offered by platforms whose governance of content is done via blockchain, e.g., DTube and Audius, in which users can earn cryptocurrencies for posting their content, among other actions. Monetisation in this case is more complex, as platforms’ cryptocurrencies might not have value outside of the platform.

Either way, monetisation may help regulate copyright content moderation as it can, in principle, disincentivise disputes and incentivize the upload of copyright-protected material by various users. That is, copyright owners might, instead of reporting infringement, allow others to post their content so as to receive the revenues that such use might generate – or post their content so as to earn cryptocurrencies. This regulatory consequence fits well most platforms’ business model, which depends on and benefits from the free circulation of content.

Table 21. List of monetisation rules. Source: Authors.

The platform does not monetise copyrighted content
Users can use automated content moderation to monetise, block and track access to content
Users can earn cryptocurrency by posting their content

5.2.2 Case Studies

After presenting the empirical findings related to all 15 platforms in our sample, we consider in the next sections the six case studies that we selected to carry out a longitudinal and comparative examination of the evolution of their copyright content moderation rules: Facebook, SoundCloud, PornHub, FanFiction, Diaspora, and DTube. The analyses of each of these six platforms contain (1) an overview of the evolution of the number of kinds of documents, rules and mentions to rules (2) an examination of the evolution of the relative proportions of rules *per normative type*; (3) a description of the evolution of the relative proportions of rules *per subject* and, finally, (4) a more detailed exploration of platforms’ *normative periods*.

5.2.2.1 Facebook

a) Overview

Of our six case studies, Facebook is the most complex, if one considers the sheer number of kinds of documents, rules and mentions to rules, and how they evolved between their launch, in 2004, and the end of 2020.



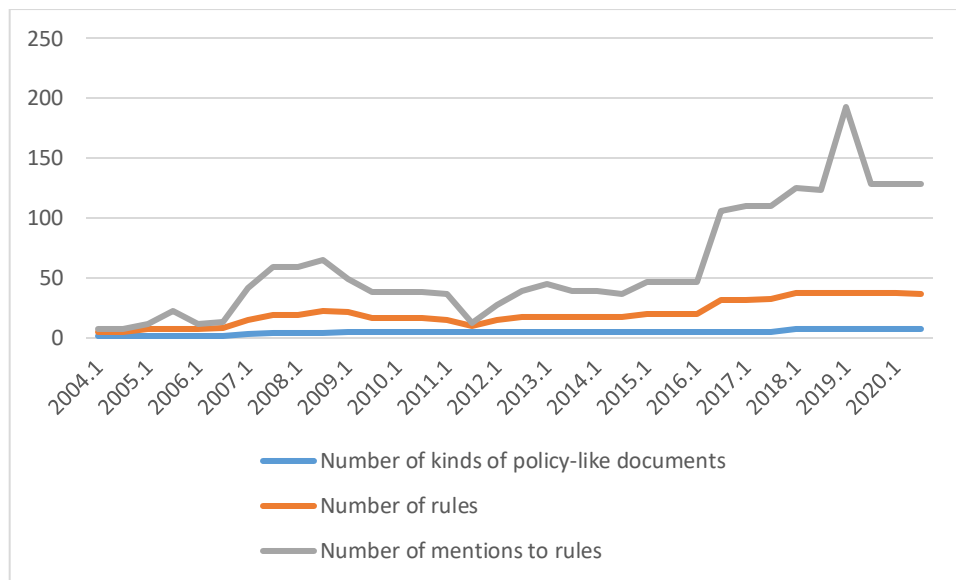


Figure 7. Number of Facebook's kinds of public documents, rules and mentions to rules related to copyright content moderation, 2004-2020. Source: Authors

As Figure 7 above suggests, these indicators all increased immensely and, mostly, steadily. The quantity of kinds of documents went from one to seven; of rules, from five to 36; and of mentions, from seven to 128. Logically, these numbers are roughly correlated: more documents will likely contain more rules which will likely contain more mentions, a pattern that, to some degree, holds true to all platforms. But their evolution is not wholly symmetrical. It seems that, over time, Facebook decided to increase the *discursive* emphasis on copyright content moderation (thus, the jump in the number of mentions since 2016), which was not accompanied by a comparable growth in the number of rules or documents.

b) Evolution of Facebook's copyright content moderation rules, per their normative type

Figure 8 displays the evolution of the numbers of Facebook's content moderation rules, clustered according to their respective normative type. This chart suggests an acute fragmentation. The platform's normative framework, initially heavily reliant on one kind of rule (users' obligation), started in 2006 already to encompass other normative types and, by the end of 2020 almost evenly split into six kinds of provisions, each of which with a proportion between 20% and 10% of the total rules.

Within this fragmentation, some developments are quite clear and highly consequential. First, the fairly consistent decrease in the proportion of user's obligations, and the increase in the percentage of platforms' obligations. In 2004, when Facebook launched, copyright content moderation concerned primarily users: around 60% of all provisions described their obligations, e.g., not to violate others' copyright. This number decreased sharply until 2011, moderately in 2012 and has since remained mostly stable, fluctuating between 24% and 16%, as of December 2020. The percentage of platforms' obligations went through a somewhat similar, if inverted, process: rapid increase until 2011, slight decrease in 2012 and then relative stability, oscillating between 30% (2015/2016) and 20% (2020). It is not that users' burdens have factually decreased – in absolute terms, their obligations in fact went from 3 to 5; but the growth of platform's obligations was relatively much more pronounced, going from none to seven in around 16 years.

The evolution of the platform's rights is also noticeable. Until 2016, the documents we examined seemingly mentioned no such kind of rule whatsoever. In that year, however, four rights of platforms were included, mostly around the platform's ability – but not obligation – to impose certain penalties to copyright infringers. In 2018, this number increased to seven, making this kind of rule one of the most prevalent normative types in Facebook's framework by the end of 2020.



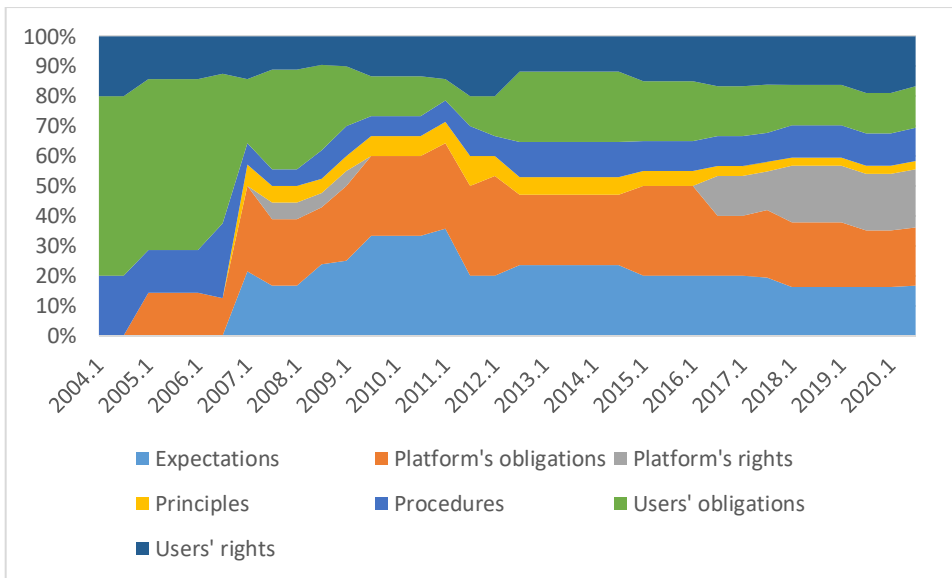


Figure 8. Proportions of Facebook’s copyright content moderation rules, grouped according to their normative type, 2004-2020. Source: Authors.

The discursive development of Facebook’s T&Cs is not quite the same as this normative evolution. As showed in Figure 9, the decrease of mentions to users’ obligations seems to be less severe than that of the proportion of this kind of provision. In fact, the inversion between users’ and platform’s obligation did not quite materialize. At the end of 2020, mentions to users’ obligations accounted for 30% of all mentions; the proportion of platform’s duties amounted to 25%. Something similar can be said of the increase of platforms’ rights, whose mentions increased in a much milder way than the sheer number of rules of this kind.

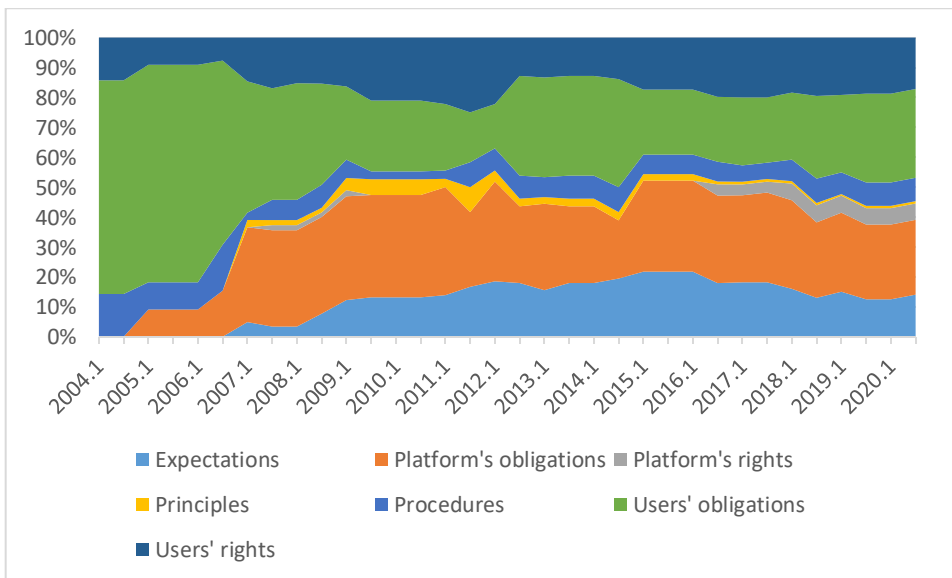


Figure 9. Proportions of mentions to Facebook’s copyright content moderation rules, grouped according to their normative type, 2004-2020. Source: Authors.

c) Evolution of Facebook’s copyright content moderation rules, per their subject

If we turn our attention to the subject of Facebook’s copyright content moderation rules, we can also identify a sort of fragmentation. Figure 10 shows that, from 2004 to 2007, Facebook’s framework concerned, mainly, infringement avoidance and, to a lesser extent, penalties and copyright disputes; then, in 2007, the organization published manual content removal provisions; and, in 2016, several other subjects were included, such as automated moderation, monetisation and transparency. Overall, the clearest development appears to concern the relative decrease in the proportion of rules on infringement avoidance, particularly since 2012, and the emergence of provisions that depend on the active intervention of the platform – such as, again, automated content moderation. To be clear, this discrepancy regards mainly how the number of different rules increased at different paces, since Facebook’s infringement avoidance provisions actually went from three to four in 2016.



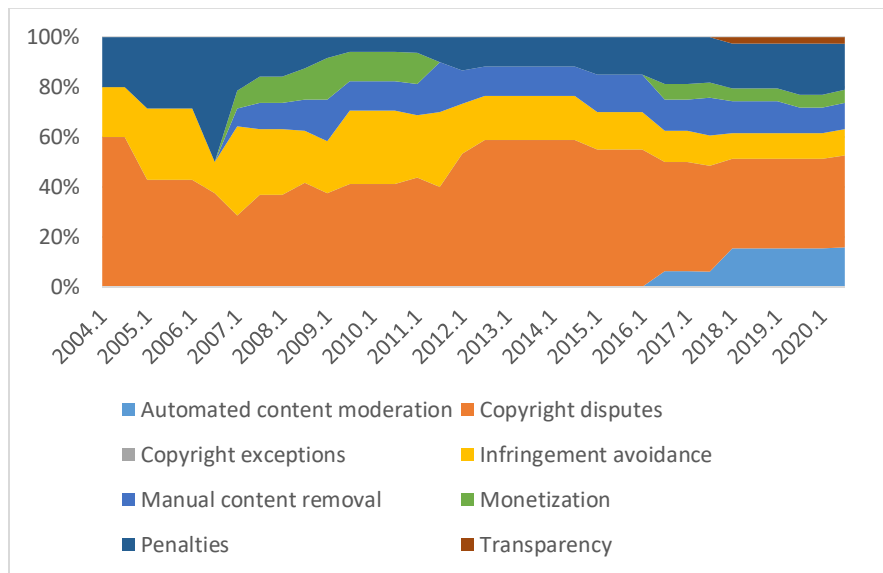


Figure 10. Proportions of Facebook's copyright content moderation rules, grouped according to their subject, 2004-2020. Source: Authors.

This tendency is strongly reinforced by Figure 11, on the percentage of mentions to rules. Mentions to infringement avoidance rules went from 36% (2011) to 12% (2020) of the total. At the same time, there is a sizable increase in the number of mentions to disputes, which almost doubled between 2011 (36%) and 2020 (64%), for instance. It suggests that not only Facebook became seemingly more concerned with disputes but also more concerned with *communicating* disputes provisions to users.

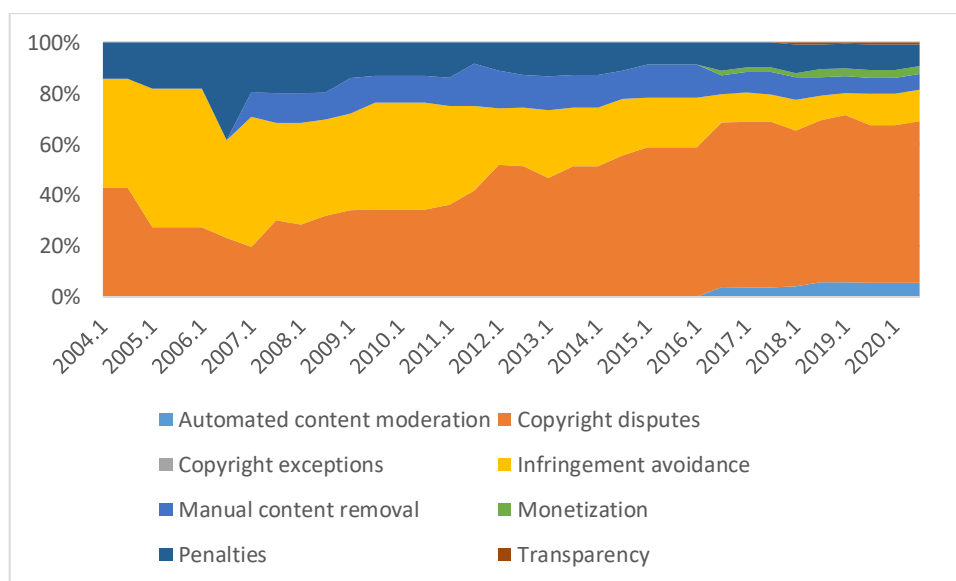


Figure 11. Proportion of mentions to Facebook's copyright content moderation rules, grouped according to their subject, 2004-2020. Source: Authors.

d) Facebook's normative periods

We move now into an examination of Facebook's various normative periods, which can be roughly divided into four moments, as described below.

- **2004-2006**

In their first two years, Facebook's copyright content moderation rules were few (7, in total), and regarded, essentially, users' behaviour, as Table 22 indicates. According to them, both users and platforms had to avoid infringing copyrights, disputes were possible but only lightly specified, infringers could be potentially penalised



– but in courts, not by the platform itself. Discursive focus was clearly on users’ obligation to respect copyright: the number of mentions to this provision totalled around half – or more, depending on the semester – of all mentions.

Table 22. Facebook’s content moderation rules with the number of mentions to them, 2004-2006. Source: Authors.

	2004.1				2006.1
Copyright disputes					
Users can report copyright infringement	1	1	1	2	1
Users must be legally entitled to report copyright infringement	1	1	1	2	1
Users must provide accurate information in copyright disputes	1	1	1	2	1
Infringement avoidance					
The platform must respect and protect copyright	0	0	1	2	1
Users must respect copyrights	3	3	5	10	5
Penalties					
Users must indemnify the platform regarding copyright infringement	0	0	1	2	1
Users who falsely report copyright infringement risk suffering legal consequences	1	1	1	2	1

What was *not* said in the documents we analysed is as important as the provisions that appear in them. It is remarkable that, for two years, Facebook’s Terms of Services (their only document at the time) did not mention responsibilities such as of deleting infringing content, allowing for appeals of removal decisions and deleting the account of repeat infringers. In fact, no rule addressed how and whether infringing content could be deleted. It might be that, in the background, the company followed these legal prescriptions – but they made an intentional decision to leave these restrictive measures outside of their public documents.

- **2006-2009**

In the next three years, as Facebook grew into a major social media platform, their copyright content moderation rules went through a consolidation phase. In it, the platform finished publishing all their seven core provisions, highlighted in light orange in Table 23. In addition to users’ right to report infringement of their copyright – and theirs and the platform’s need to respect others’ copyright⁵¹⁸ – Facebook fleshed out their initial bare-bones regime with four other provisions that would remain in place until at least the end of 2020. Regarding disputes, the company finally said that users could appeal content removal decisions and started mentioning that they would have to notify users’ during disputes; as to content removal, their duty to delete infringing content firstly appeared in 2007, it seems, together with their obligation of deleting accounts of repeat infringers. At the same time, some rules disappeared for years from the documents we examined and cannot in our view to be defined as part of the platform’s core framework – e.g., that users must be legally entitled to report copyright infringement, or that users must provide the required information in copyright disputes.

Table 23. Facebook’s content moderation rules, with the number of mentions to them and core rules highlighted in light orange, 2006-2009. Source: Authors.

	2006.1	2006.2					2009.1
Copyright disputes							
The platform must notify parties during copyright disputes	0	0	1	3	3	3	1
Users can appeal copyright-related content removal	0	0	3	7	6	6	5

⁵¹⁸ We assume that “The platform must respect and protect copyright” is a core rule of Facebook, despite being enigmatically deleted for a brief moment in the second semester of 2006.



Users can report copyright infringement	1	1	3	3	3	4	3
Users must be legally entitled to report copyright infringement	1	1	0	0	0	0	0
Users must file a lawsuit against alleged copyright infringer	0	0	0	1	1	1	1
Users must provide accurate information in copyright disputes	1	1	0	1	1	1	1
Users must provide the required information in copyright disputes	0	0	0	1	1	1	0
Users should consult a lawyer on copyright	0	0	0	0	0	1	2
Users should contact owner of violated copyrighted content	0	0	1	1	1	1	1
Users should contact the platform if contact with apps on copyright violation doesn't work	0	0	0	0	0	1	1
Users should try to solve copyright dispute independently	0	0	0	0	0	1	1
Infringement avoidance							
Users must not interfere with anti-copyright infringement features	0	0	1	1	1	1	1
The platform aspires to protect intellectual rights	0	0	1	1	1	1	2
The platform must respect and protect copyright	1	0	2	3	3	5	6
Users must respect copyrights	5	5	16	17	18	17	9
Users should think twice before posting risky content	0	0	1	1	1	1	1
Manual content removal							
The platform can restore content if report is false or withdrew	0	0	0	1	1	1	1
The platform cannot remove a content from another website or app	0	0	0	0	0	1	1
The platform must remove or block access to content due to copyright infringement	0	0	4	6	6	5	4
The platform must restore content if report was false or withdrew	0	0	0	0	0	0	1
Penalties							
The platform must disable or suspend accounts due to copyright infringement	0	2	6	7	7	8	5
Users must indemnify the platform regarding copyright infringement	1	1	1	1	1	1	0
Users who falsely report copyright infringement risk suffering legal consequences	1	1	0	4	4	4	2
Users who infringe others' copyrights risk suffering legal consequences	0	1	1	0	0	0	0

By consolidation we also mean the establishment of a more specific framework, which explained in much more detail, and through five different kinds of documents, how the platform would proceed in case of copyright infringement. Consider provisions regarding disputes, whose number of rules went from three, in 2006, to ten, in 2009. By then, copyright owners were informed that they would have to be ready to file a lawsuit if they wanted to stay in a dispute after a take-down appeal, that content could be restored in case of a successful challenge to a complaint, that such challenge was indeed possible, among other rules. This is not to mention the addition of several expectations, which aimed to further modulate user's view and approach to disagreements over copyright. An important one is the idea that users should try to avoid formal disputes by trying to solve problems amongst themselves, which would become a mainstay of the platform's framework. In terms of penalties, the focus changed from the public/legal to the private/administrative sphere, as provisions about indemnification stopped being mentioned and Facebook's duty to disable infringers' accounts became discursively prominent. Another area that was dramatically expanded – or, rather, that began to be publicly discussed at all – concerned the manual removal of content. By 2009, the platform had determined both their powers (to remove and restore content⁵¹⁹) and limitations (to remove content hosted by third parties, such as apps). Infringement avoidance was considerably beefed up as well, with the addition of new users' obligations (of not trying to interfere with anti-copyright infringement features) and expectations (to exert caution before posting). Overall, five years after their launch, while users still were the main subject of copyright infringement rules, the role of Facebook itself was more pronounced – a process that would increase in the next years.

⁵¹⁹ The action of restoring content was described as both a right and an obligation.



- 2009-2016

Between 2009 and 2016, Facebook's copyright content moderation normative framework was to some degree simplified, without however undergoing any major changes in comparison with the preceding period, as shown in Table 24.

Table 24. Facebook's content moderation rules, with the number of mentions to them, 2009-2016. Source: Authors.

	2009.1	2009.2														2016.1
Copyright disputes																
The platform must assist with copyright violations by third parties	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0
The platform must notify parties during copyright disputes	1	1	1	1	1	0	2	1	1	1	1	1	5	5	5	5
Users can appeal copyright-related content removal	5	5	5	5	5	2	2	2	3	2	2	2	2	2	2	2
Users can report copyright infringement	3	3	3	3	3	1	3	3	3	3	3	3	5	5	5	5
Users can repost content that was falsely reported	0	0	0	0	0	0	0	0	0	0	0	0	1	1	1	1
Users must be legally entitled to report copyright infringement	0	0	0	0	0	0	1	2	2	2	2	2	2	2	2	2
Users must file a lawsuit against alleged copyright infringer	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Users must provide accurate information in copyright disputes	1	0	0	0	0	0	0	3	3	3	3	3	3	1	1	1
Users must provide the required information in copyright disputes	0	0	0	0	0	0	0	2	2	2	2	2	2	1	1	1
Users should consult a lawyer on copyright	2	1	1	1	1	0	0	3	3	3	3	3	3	3	3	3
Users should contact owner of violated copyrighted content	1	1	1	1	1	0	0	1	1	1	1	1	1	1	1	1
Users should contact the platform if contact with apps on copyright violation doesn't work	1	1	1	1	1	1	2	1	1	1	1	1	1	1	1	1
Users should report violation of others' copyright	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0
Users should try to solve copyright dispute independently	1	1	1	1	1	1	2	2	2	2	2	2	5	5	5	5
Infringement avoidance																
Users must not interfere with anti-copyright infringement features	1	1	1	1	0	0	0	0	0	0	0	0	0	0	0	0
The platform aspires to protect intellectual rights	2	2	2	2	1	1	1	1	1	1	1	1	1	1	1	1
The platform must respect and protect copyright	6	4	4	4	4	1	2	2	3	2	2	1	2	2	2	2
Users must respect copyrights	9	8	8	8	8	2	3	6	8	6	6	6	6	6	6	6
Users should think twice before posting risky content	1	1	1	1	1	0	0	0	0	0	0	0	0	0	0	0
Manual content removal																
The platform can restore content if copyright report is false or withdraw	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
The platform cannot remove a content from another website or app	1	1	1	1	1	1	2	1	1	1	1	1	2	2	2	2
The platform must remove or block access to content due to copyright infringement	4	3	3	3	3	1	2	4	5	4	4	3	3	3	3	3



The platform must restore content if report was false or withdrew	1	0	0	0	0	0	0	0	0	0	0	0	0	1	1	1
Penalties																
The platform must disable or suspend accounts due to copyright infringement	5	5	5	5	5	1	2	3	4	3	3	2	2	2	2	2
The platform must not count restored content as a strike	0	0	0	0	0	0	0	0	0	0	0	0	0	1	1	1
Users can report fake profiles who reported copyright infringement	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0
Users who falsely report copyright infringement risk suffering legal consequences	2	0	0	0	0	0	0	2	2	2	2	2	2	1	1	1

Simplification affected infringement avoidance and manual content removal rules. In regard to both subjects, the company discarded – or at least stopped discussing – some less relevant rules, such as users’ obligation to not interfere with anti-copyright infringement features and Facebook’s right to restore content after the resolution of a dispute, an element that ended up covered by a similar obligation. There also occurred a further specification of copyright disputes, and in particular user’s obligations. Three of these rules (“Users must be legally entitled to report copyright infringement”, “Users must provide accurate information in copyright disputes” and “Users must provide the required information in copyright disputes”) reappeared in 2012 and did not leave Facebook’s T&Cs until December 2020, at least. They reinstated key barriers for initiating a dispute that the analysed documents had stopped discussing at different points between 2007 and 2009.

Indeed, this period highlights the puzzling fluctuations of the platform’s framework. Some provisions, as the ones we mentioned or platform’s duty to restore previously removed content, come and go; other are cited only once, such as users’ right to report profiles used to report copyright infringement, platform’s obligation to assist users’ when third parties illegally use their content, and the expectation that users should report the infringement of others’ copyright. It is unclear what one should make of these movements.

- **2016-2020**

Between the second semester of 2016 to the end of 2020, Facebook’s copyright content moderation rules underwent a second profound transformation, comparable to that which happened between 2006 and 2009, as it can be noted in Table 25.

Table 25. Facebook’s content moderation rules, with the number of mentions to them, 2016-2020. Source: Authors.

	2016.1	2016.2								2020.2
Automated moderation										
The platform can disable access to automated copyright content moderation in case of misuse	0	0	0	0	1	1	1	1	1	1
The platform can modify and discontinue automated copyright content moderation system at any time	0	0	0	0	1	1	1	1	1	1
The platform can monitor users' compliance with automated copyright content moderation system	0	0	0	0	1	1	1	1	1	1
The platform employs automated copyright content moderation	0	3	3	3	3	4	7	4	4	4
Users can stop using automated copyright content moderation system at any time	0	0	0	0	1	1	1	1	1	1
Users can use automated content moderation to monetise, block and track access to content	0	1	1	1	1	2	3	2	2	2
Copyright disputes										
The platform must notify parties during copyright disputes	5	15	15	15	15	14	26	16	16	17
Users can appeal copyright-related content removal	2	6	6	7	6	5	9	4	4	3
Users can report copyright infringement	5	10	12	11	12	13	19	13	13	13
Users can repost content that was falsely reported	1	2	2	2	2	2	3	2	2	2



Users can withdraw copyright report	0	2	1	1	1	1	2	1	1	1
Users must be legally entitled to report copyright infringement	2	4	6	6	7	7	10	6	6	6
Users must file a lawsuit against alleged copyright infringer	0	1	1	1	1	1	2	1	1	1
Users must provide accurate information in copyright disputes	1	4	4	4	6	8	11	8	8	8
Users must provide the required information in copyright disputes	1	7	6	6	6	12	18	13	13	13
Users should consult a lawyer on copyright	3	6	6	5	5	3	6	3	3	4
Users should contact owner of violated copyrighted content	1	2	3	3	3	3	5	3	3	3
Users should contact the platform if contact with apps on copyright violation doesn't work	1	1	1	1	1	1	2	1	1	1
Users should think twice before reporting copyright infringement	0	1	1	1	1	1	2	1	1	1
Users should try to solve copyright dispute independently	5	8	8	9	9	7	12	7	7	8
Infringement avoidance										
The platform aspires to protect intellectual rights	1	1	1	1	1	1	1	1	1	1
The platform must respect and protect copyright	2	3	3	3	5	4	5	4	4	4
Users must respect copyrights	6	7	8	7	8	6	9	10	10	10
Users should think twice before posting risky content	0	1	1	1	1	1	2	1	1	1
Manual content removal										
The platform can restore content if copyright report is false or withdraw	0	1	1	1	1	1	2	1	1	1
The platform cannot remove a content from another website or app	2	1	1	1	1	1	1	1	1	1
The platform must not decide unilaterally what is a copyright infringement	0	0	0	1	1	1	1	0	0	0
The platform must remove or block access to content due to copyright infringement	3	4	5	5	6	5	7	5	5	5
The platform must restore content if report was false or withdrew	1	3	3	3	3	2	4	2	2	2
Penalties										
The platform can block account functionalities of copyright infringers	0	1	1	1	1	1	2	1	1	1
The platform can consider the nature of the copyright infringement when deciding on punishment	0	1	1	1	1	1	2	1	1	1
The platform can punish users who submit false information during copyright disputes	0	1	1	1	1	1	2	1	1	1
The platform is not liable for copyright-related issues	0	0	0	0	2	2	2	2	2	2
The platform must disable or suspend accounts due to copyright infringement	2	3	3	3	3	2	3	2	2	1
The platform must not count restored content as a strike	1	3	3	3	3	2	4	2	2	2
Users can appeal copyright-related penalties to account	0	0	0	0	0	0	0	1	1	0
Users who falsely report copyright infringement risk suffering legal consequences	1	3	2	2	3	3	4	3	3	3

Two main developments marked this period. Firstly, the introduction of automated copyright content moderation. Facebook's Rights Manager system (which will be examined in detail in Section 5.3) was initially implemented in 2016, when, logically, users' right to benefit from it (what includes monetising their content) was first published as a rule. For two years, this was the only normative element on Rights Manager present in the documents we examined. Over time, namely in 2018, the platform published various other rules that regulate



the system, which were communicated mainly through the Rights Manager’s own Terms of Service. Most of these other provisions were platform’s rights: to disable access to the Rights Manager copyright content systems in case of misuse; modify and discontinue the system at any time; and monitor users’ compliance with automated copyright content moderation system. These provisions empowered Facebook to curb and restrict Rights Manager usage via direct intervention. Surely, it is unlikely that, from 2016 to 2018, Facebook were unable to perform such intervention, as the seeming lack of *public* rules would suggest. Nonetheless, in finally making these rights explicit, the platform made them into possible grounds for accountability *and* prepared the legal terrain for scaling up Rights Manager.

The second main development concerned a widespread increase in the number of rules. The area that experienced the most intense increase densification was that of penalties – three (2016) to seven (2020) rules. These new rules represented an amplification and sophistication of the tools at the disposal of Facebook to punish users in the context of copyright violation. More than simply deleting the account of infringers, they could block account functionalities of copyright infringers and go after those who submit false information in disputes, while allowing themselves some leeway to decide on the exact nature of the punishment. They also reaffirmed that they should not be considered liable in case of copyright violation and mentioned users’ right to appeal these penalties. It should be foregrounded, however, that this right was seemingly in place for just one year, in total. The other new rules appear to be less relevant and were either reinstatements of provisions that had been previously abandoned (e.g., “Users must file a lawsuit against alleged copyright infringer”) or mentioned once and then dropped (e.g., “The platform must not decide unilaterally what is a copyright infringement”).

Overall, when we compare Facebook’s initial framework in 2004 with the one in place after 16 years, it becomes clear the astounding normative densification and sophistication that the platform’s copyright content moderation provisions experienced. In this sense, Facebook is, among our six case studies, the most extreme example of what we will term *complexification*. Yet, this process affected all platforms we examined, including SoundCloud, the next case study.

5.2.2.2 SoundCloud

a) Overview

The evolution of SoundCloud’s copyright content moderation framework (see Figure 12) is comparable to that of Facebook: all indicators increased since the platform’s launch, in the second semester of 2007 – but the growth of the number of mentions to rules has been much more intense. In fact, the number of kinds of public documents remained mostly stable, going from none in the first months of the platform, to two in 2008 and then three in 2011. Rules increased more than five-fold, starting at five and reaching 27 in 2018. Mentions to these provisions, in contrast, grew almost incessantly since 2008, and, in the second part of 2015, experienced an explosion. That is when SoundCloud’s Help pages ballooned into a web of pages and subpages. Running as long as a 30-page document, in total, these pages repeatedly mention the same rules dozens of times – thus, the outstanding discrepancy between the number of mentions and of rules.



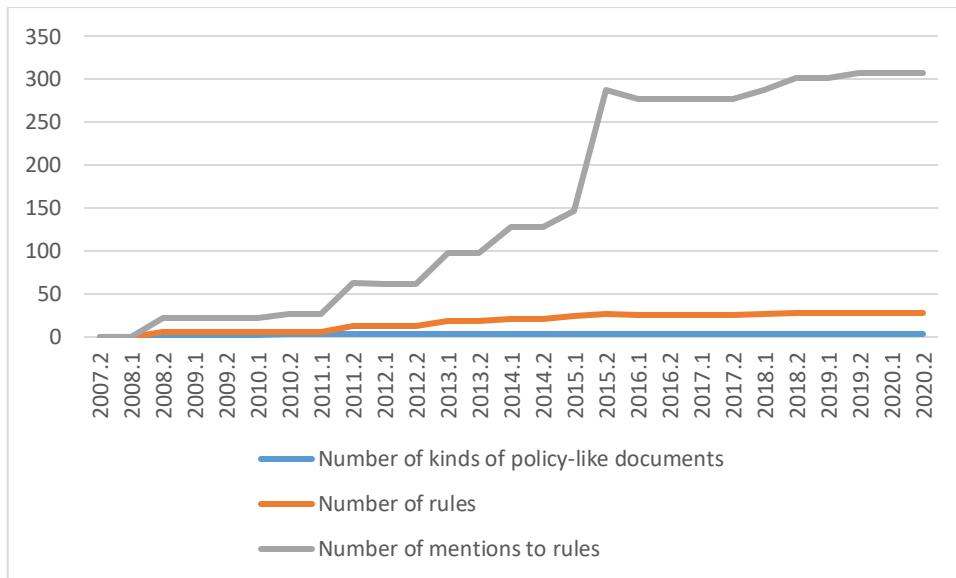


Figure 12. Number of SoundCloud's kinds of public documents, rules and mentions to rules related to copyright content moderation, 2007-2020. Source: Authors.

b) Evolution of SoundCloud's copyright content moderation rules, per their normative type

While less convoluted, the evolution of the relative proportion of SoundCloud's copyright content moderation rules, when categorized per their normative type, is strikingly analogous to that of Facebook, as both seem to be marked by fragmentation and the progressive inversion of the main normative actor.

In their first three years, SoundCloud's framework was dominated by users' obligation (40%), with users' rights, procedures and expectations equally splitting the rest (see Figure 13). By 2015, however, the platform's collection of rules had been considerably diversified, and contained all seven kinds of normative types, with a very strong focus on the platform's obligations (which first appeared only in 2011, though) and the percentage of users' obligations limited to only 15%. The increase in the proportion of platform's rights (again, similarly to Facebook) and the introduction of a principle in 2015 are also notable movements. From that year until 2020, at least, the picture remained mostly stable.

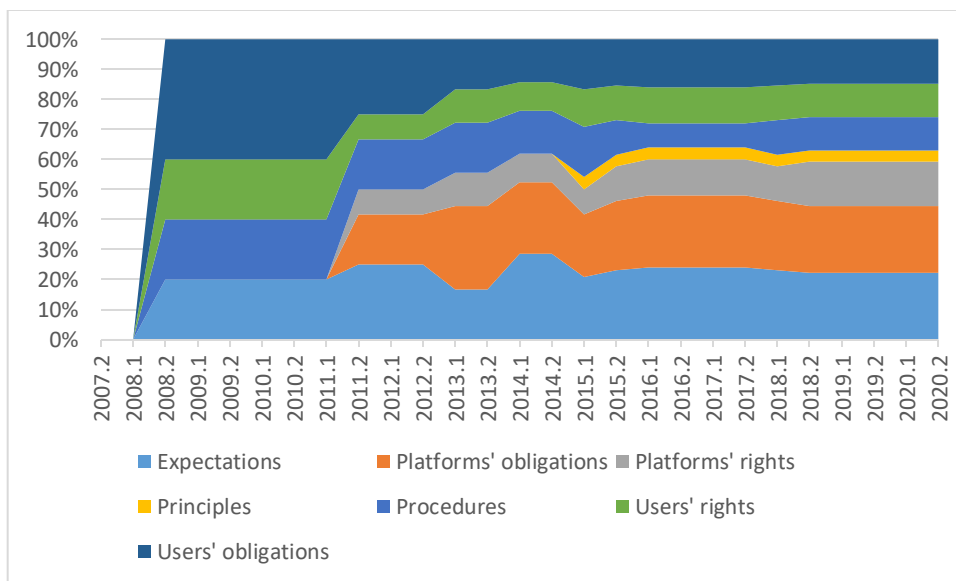


Figure 13. Proportions of SoundCloud's copyright content moderation rules, grouped according to their normative type, 2007-2020. Source: Authors.

There is a substantial discrepancy between this normative development and the discursive emphasis SoundCloud's T&Cs put on different types of rules. Figure 14 demonstrates that the percentage of mentions to user's obligations remained overwhelmingly (and constantly) dominant. This is chiefly explained by the repetitions of users' duty to respect others' copyright: since 2015, this specific provision has been cited at least



55 times per year in the documents we analysed. Surely, from 2011 on, platforms’ obligations started being cited more and more – but the increase in their proportion ate up mostly those of expectations and users’ rights.

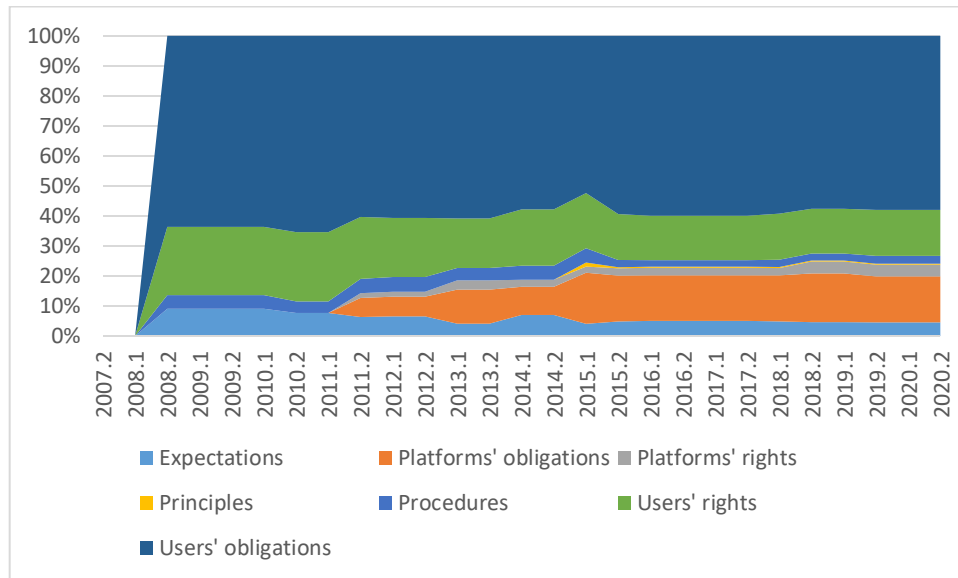


Figure 14. Proportions of mentions to SoundCloud’s copyright content moderation rules, grouped according to their normative type, 2007-2020. Source: Authors.

c) Evolution of SoundCloud’s copyright content moderation rules, per their subject

Fragmentation also marked the evolution of the subjects covered by SoundCloud’s copyright content moderation rules – another development that resembles that of Facebook. Figure 15 shows that, in their start, the platform’s provisions regulated just disputes between users (50%) and the penalties that infringers could be subjected to (50%). In 2013, this framework already included both manual and automated moderation rules. At the end of 2020, no subject received more than 31% of the total provisions. In terms of emphasis, the introduction of new rules happened at the expense of the proportion of penalties and, mostly, copyright disputes – which however remained the dominant subject throughout the years we examined.

Discursively, the picture is quite similar, as it can be seen in Figure 16. The perhaps main difference regards the prevalence of mentions to copyright disputes provisions, which has been higher and decreased less intensely than that of the number of rules about the same subject. The opposite can be said about penalties, whose proportion of mentions was smaller and decreased more acutely than that of the relative number of provisions about it.

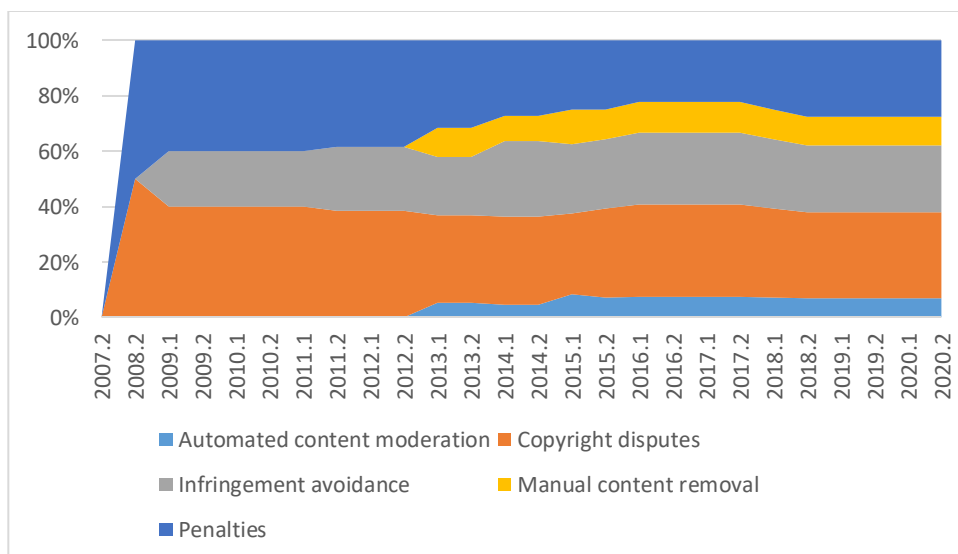


Figure 15. Proportions of SoundCloud’s copyright content moderation rules, grouped according to their subject, 2007-2020. Source: Authors.



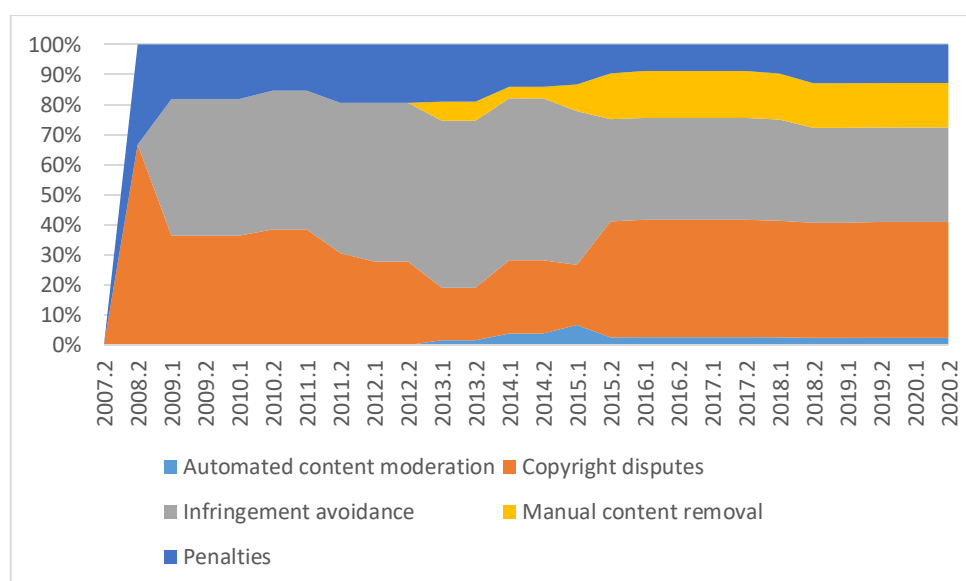


Figure 16. Proportions of mentions to SoundCloud's copyright content moderation rules, grouped according to their subject, 2007-2020. Source: Authors.

While the subjects of normative framework of both Facebook's and SoundCloud (the two mainstream platforms we are analysing in-depth) multiplied over time, this fragmentation is less intense in the case of the latter – which up to 2020 had no provision on monetisation and transparency, for instance. Likewise, SoundCloud did not diminish their discursive emphasis on infringement avoidance as much as Facebook apparently.

d) SoundCloud's normative periods

Our analysis suggests that SoundCloud's copyright content moderation rules experienced three normative periods, which are detailed in the next sections.

- **2007-2011**

SoundCloud's first normative period can be said to last more than three years (see Table 26). A notable aspect of SoundCloud's initial set of copyright content moderation rules is, in fact, its absence. In their first months, the platform simply had no publicly-available document – evidence, perhaps, of the amateurish nature of the platform in its beginning, something that was not uncommon in the Internet of the 2000s. When a framework was finally published, the focus appeared to be on the possibility of reporting copyright infringement and the legal consequences that users could experience if they lied during these disputes. While SoundCloud stated in that very first version that users would have to indemnify the platform if they infringed others' copyright, it is somewhat surprising that it took some time for SoundCloud to say explicitly that users had to respect others' copyright and could face legal trouble if they did not.

Table 26. SoundCloud's copyright content moderation rules, with the number of mentions to them, 2007-2011. Source: Authors.

	2007.2						2011.1
Copyright disputes							
Users can report copyright infringement	0	2	2	2	2	3	3
Users should report violation of others' copyright	0	2	2	2	2	2	2
Infringement avoidance							
Users must respect copyrights	0	0	5	5	5	6	6
Penalties							
Users must indemnify the platform regarding copyright infringement	0	1	1	1	1	1	1
Users who falsely report copyright infringement risk suffering legal consequences	0	1	1	1	0	0	0



Users who infringe others' copyrights risk suffering legal consequences	0	0	0	0	1	1	1
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- 2011 – 2014

As with Facebook, however, years after the launch of the service, most of what can be said to be SoundCloud's core rules were still not mentioned. The consolidation of their framework would only take place between the second semester of 2011 and the first part of 2014, as seen in Table 27 below.

Table 27. SoundCloud's copyright content moderation rules, with the number of mentions to rules and the core rules highlighted in light orange, 2011-2014. Source: Authors.

	2011.1	2011.2					2014.1
Automated moderation							
The platform employs automated copyright content moderation	0	0	0	0	1	1	3
Copyright disputes							
The platform must notify parties during copyright disputes	0	2	2	2	2	2	4
Users can appeal copyright-related content removal	0	0	0	0	1	1	5
Users can report copyright infringement	3	5	4	4	4	4	4
Users must provide accurate information in copyright disputes	0	1	1	1	1	1	1
Users should consult a lawyer on copyright	0	2	2	2	2	2	3
Users should contact owner of violated copyrighted content	0	1	1	1	1	1	1
Users should report violation of others' copyright	2	0	0	0	0	0	0
Users should think twice before appealing copyright infringement report	0	0	0	0	0	0	1
Infringement avoidance							
The platform must respect and protect copyright	0	0	0	0	1	1	2
Users must not interfere with anti-copyright infringement features	0	2	2	2	2	2	2
Users must respect copyrights	6	15	#	#	#	#	34
Users should officially copyright their content	0	0	0	0	0	0	1
Users should repost content instead of infringe copyright	0	0	0	0	0	0	1
Users should think twice before posting risky content	0	1	1	1	1	1	2
Manual content removal							
The platform must remove or block access to content due to copyright infringement	0	0	0	0	3	3	1
The platform must restore content if report was false or withdrew	0	0	0	0	1	1	2
Penalties							
The platform can deny refunds to users terminated due to copyright infringers	0	0	0	0	2	2	2
The platform can disable and suspend accounts who provide false information in copyright disputes	0	1	1	1	1	1	1
The platform must disable or suspend accounts due to copyright infringement	0	2	2	2	4	4	3
Users must indemnify the platform regarding copyright infringement	1	1	1	1	2	2	2
Users who falsely report copyright infringement risk suffering legal consequences	0	2	2	2	2	2	2
Users who infringe others' copyrights risk suffering legal consequences	1	1	1	1	1	1	1

In this period, SoundCloud instituted key DMCA-based rules in an even more comprehensive manner than Facebook, regarding reporting, manual removals, notifications, and appeals. SoundCloud's consolidation period is considerably different from that of Facebook in other regards as well. Firstly, the platform started using an



automated moderation system, seemingly provided by Audible Magic, relatively early – seven years after their launch, almost half the time that it took for Facebook to put their Rights Manager in place. Indeed, SoundCloud and YouTube are the only services in our sample that have the existence of an automated copyright enforcement system as a core provision of their framework. Another difference regards SoundCloud’s relatively high number of core rules (16, or more than half of all the provisions that were in place at the end of 2020), which is an indication of the fact that their framework has been considerably stable, certainly more than that of Facebook (only seven out of a total of Facebook’s 38 rules can be considered to be core ones, we concluded).

Generally, SoundCloud’s copyright content moderation framework is unique in its focus on penalties. Not only they include a diverse range of kinds of punishments (from account disabling to the possibility of denying refunds to infringers – the platform offers a set of paid functionalities) but most their penalties appear to be core rules (Later, they would drop the reminder about the legal consequences of posting others’ content but quickly reinstated it). It is also interesting that SoundCloud appears to be quite keen on expectations, something relatively rare in the services we examined. This soft form of regulation encompasses two of their core rules.

- **2014-2020**

After consolidating their core rules, SoundCloud spent six years, from 2014 to 2020, substantiating and sophisticating their framework. This third normative period, represented in Table 28, essentially built upon and expanded the previous one. That is, differently from Facebook, SoundCloud seems to have rarely abandoned rules permanently or for long time. Dropped provisions were largely minor, such as the expectation that users should think twice before appealing an infringement report.

The 2014-2020 expansion affected, mostly, copyright disputes. Of the three new rules of this kind, two seemingly aimed to restrict reporting and appeals. From 2014 on, users could only report the infringement of their own copyright and had to provide all the required information during a dispute. Surely, since these provisions are in line with the DMCA’s, it is highly likely that most users were already obliged to, in practice, comply with them. That SoundCloud decided to make this explicit is meaningful, though.

Other additions seemed to make the platform’s copyright content moderation more nuanced but did not make SoundCloud’s framework fundamentally different. Consider the platform duty of having a fair automated moderation system – a vague provision which is likely a response to users’ complaints against eventual mistakes made by their Audible Magic-based system. In terms of penalties, they gave themselves the right to also block account functionalities of infringers, and apply some kind of penalty to users who submit false information during disputes.

One movement that might be highlighted regards two provisions that attempted to decrease the burden of SoundCloud in the regulation of copyright content moderation. One, the expectation that, as much as possible, users should try to solve their disputes independently – similarly to Facebook. The other, the creation of functionalities that allowed users to directly take down content that they judged to be theirs.

Table 28. SoundCloud’s copyright content moderation rules, with the number of mentions to them, 2016-2020. Source: Authors.

	2014.1	2014.2												2020.2
Automated moderation														
The platform employs automated copyright content moderation	3	3	3	4	4	4	4	4	4	4	4	4	4	4
The platform must have a fair copyright content moderation system	0	0	3	1	1	1	1	1	1	1	1	1	1	1
Copyright disputes														
The platform must notify parties during copyright disputes	4	4	5	7	6	6	6	6	7	9	9	8	8	8
Users can appeal copyright-related content removal	5	5	3	15	15	15	15	15	15	16	16	16	16	16
Users can report copyright infringement	4	4	5	10	10	10	10	10	10	10	10	10	10	10
Users must be legally entitled to report copyright infringement	0	0	1	5	5	5	5	5	5	5	5	7	7	7
Users must provide accurate information in copyright disputes	1	1	1	8	8	8	8	8	8	9	9	9	9	9



Users must provide the required information in copyright disputes	0	0	0	22	22	22	22	22	22	22	22	22	22	22
Users should consult a lawyer on copyright	3	3	2	6	6	6	6	6	6	6	6	6	6	6
Users should contact owner of violated copyrighted content	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Users should think twice before appealing copyright infringement report	1	1	0	0	0	0	0	0	0	0	0	0	0	0
Users should try to solve copyright dispute independently	0	0	0	2	2	2	2	2	2	2	2	2	2	2
Infringement avoidance														
The platform aspires to protect intellectual rights	0	0	2	1	1	1	1	1	1	1	1	1	1	1
The platform must respect and protect copyright	2	2	7	2	2	2	2	2	2	2	2	2	2	2
Users must not interfere with anti-copyright infringement features	2	2	2	2	2	2	2	2	2	2	2	2	2	2
Users must respect copyrights	34	34	32	57	55	55	55	55	56	56	56	56	56	56
Users should officially copyright their content	1	1	1	2	2	2	2	2	2	2	2	2	2	2
Users should repost content instead of infringe copyright	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Users should think twice before posting risky content	2	2	1	2	2	2	2	2	2	2	2	2	2	2
Manual content removal														
The platform employs human content moderation	0	0	1	0	0	0	0	0	0	0	0	0	0	0
The platform must remove or block access to content due to copyright infringement	1	1	6	11	11	11	11	11	11	12	12	12	12	12
The platform must restore content if report was false or withdrew	2	2	0	17	17	17	17	17	17	17	17	17	17	17
Users can moderate copyrighted content directly	0	0	1	2	2	2	2	2	2	2	2	2	2	2
Penalties														
The platform can block account functionalities of copyright infringers	0	0	0	0	0	0	0	0	0	3	3	3	3	3
The platform can deny refunds to users terminated due to copyright infringers	2	2	2	3	3	3	3	3	3	4	4	4	4	4
The platform can disable and suspend accounts who provide false information in copyright disputes	1	1	1	3	3	3	3	3	3	4	4	4	4	4
The platform can punish users who submit false information during copyright disputes	0	0	0	1	1	1	1	1	1	1	1	1	1	1
The platform must disable or suspend accounts due to copyright infringement	3	3	4	6	5	5	5	5	6	8	8	7	7	7
Users must indemnify the platform regarding copyright infringement	2	2	2	3	3	3	3	3	3	4	4	4	4	4
Users who falsely report copyright infringement risk suffering legal consequences	2	2	2	2	2	2	2	2	2	2	2	3	3	3
Users who infringe others' copyrights risk suffering legal consequences	1	1	1	1	0	0	0	0	1	1	1	1	1	1



Having examined our two case studies of mainstream platforms, the chapter moves into the analysis of specialised platforms, beginning by PornHub.

5.2.2.3 PornHub

a) Overview

As with Facebook and SoundCloud’s, PornHub’s copyright content moderation framework has become increasingly more complex: after starting seemingly without a public document, the platform saw their numbers of kinds of documents, rules and mentions to rules increase progressively from the launch of the platform, in 2007, until the end of 2020 (see Figure 17). Differently from the mainstream platforms we have just explored, though, PornHub’s overall numbers are considerably smaller than those of Facebook and, in regards to mentions, of SoundCloud as well.

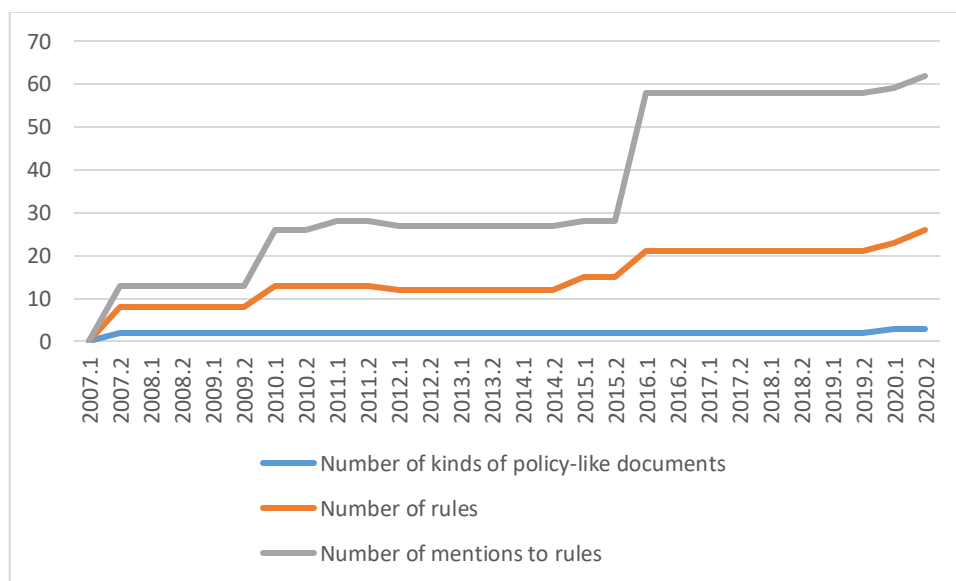


Figure 17. Number of PornHub’s kinds of public documents, rules and mentions related to copyright content moderation, 2007-2020. Source: Authors.

b) Evolution of PornHub’s copyright content moderation rules, per their normative type

Figure 18 indicates, again, a process of fragmentation – but with a decrease in the proportion of platform’s obligations. PornHub’s first copyright content moderation framework was considerably dominated by platform’s obligations (it adopted both moderations and penalties right away), with users’ obligations and procedures having smaller shares. While the absolute number of these normative types would either increase (for both forms of obligations) or remain the same (procedures), their percentage in relation to the whole collection of rules decreased significantly over time as the proportion of platforms and users’ rights surged. By 2020, PornHub’s framework was a mix of six different types, with users’ obligations the most present one (31%). The appearance and then increase in the proportion of expectations points to other strategies used by the platform to regulate users’ actions.



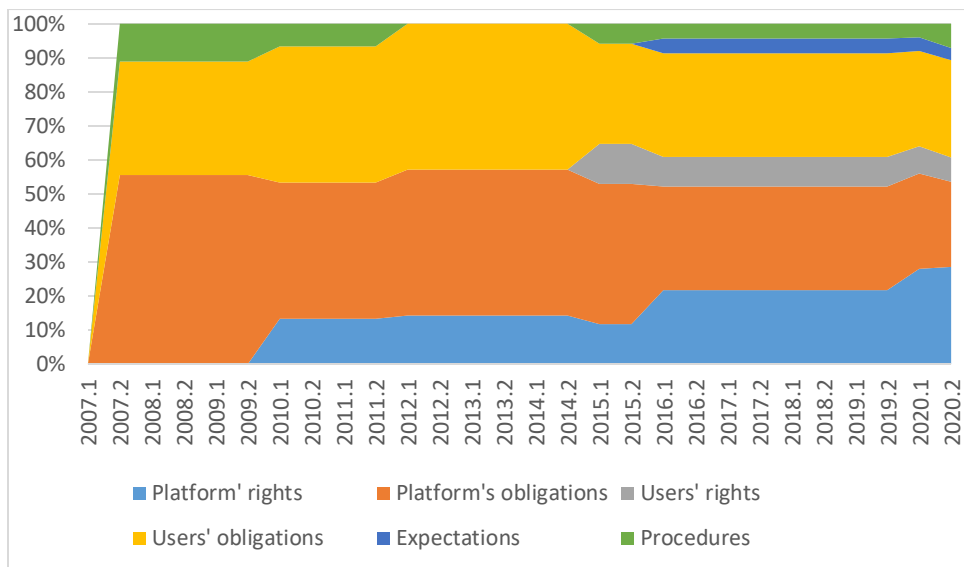


Figure 18. Proportions of Pornhub's copyright content moderation rules, grouped according to their normative type, 2007-2020. Source: Authors.

Discursively, however, Figure 19 suggests a different evolution. At their start, Pornhub T&Cs mentioned almost exclusively users' and platform's obligations. Over time, however, the proportions of citations to these types of rules diverged. Mentions to users' obligations became slightly more prevalent, despite a drop between 2014 and 2015; citations to platform's obligations, in contrast, decreased almost steadily, and, by 2020, represented half of the mentions they did in 2007. And yet, these two obligations still amounted to almost 70% of all mentions to copyright content moderation rules in 2020. That is, the discursive fragmentation was less prominent than the normative dispersal we just commented on. Overall, it worthy pointing out that Pornhub's seems to be a remarkably restrictive framework for users: in the end of 2020, only 6% of their rules (or mentions to rules) regarded users' rights.

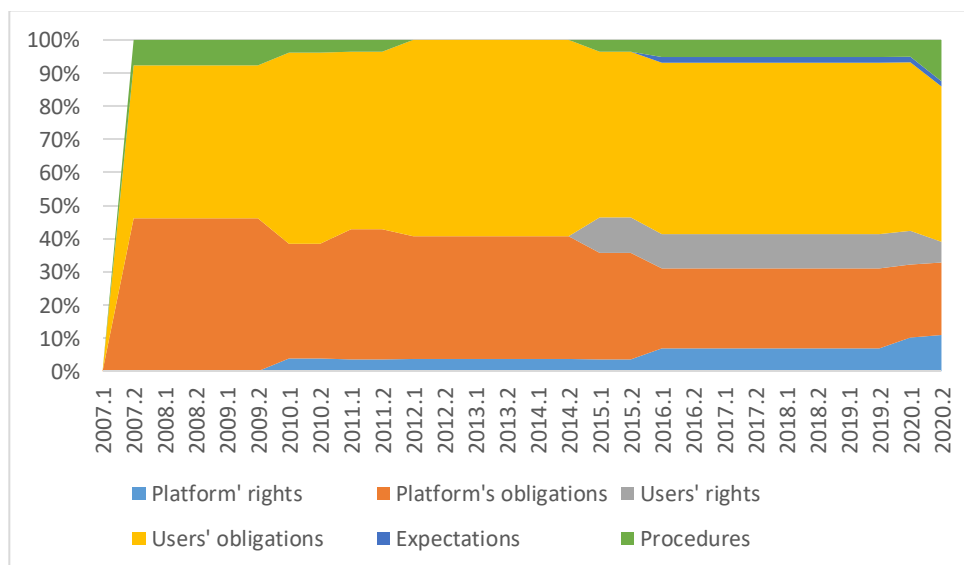


Figure 19. Proportions of mentions of Pornhub's copyright content moderation rules, grouped according to their normative type, 2007-2020. Source: Authors.

c) Evolution of Pornhub's copyright content moderation rules, per their subject

While, over time, Pornhub's framework become more diverse also in terms of the subjects, as Figure 20 makes clear, this fragmentation appear to be much less acute than that of normative types. The areas that concentrated the largest proportion of rules have been, since their launch in 2007, copyright disputes and penalties, even though these subject's shares decreased from 50% to 34% and from 34% to 24%, respectively, between 2007 and 2020. The perhaps most notable developments are the increase in the proportion of infringement avoidance rules and the introduction of automated content removal provisions in 2020.



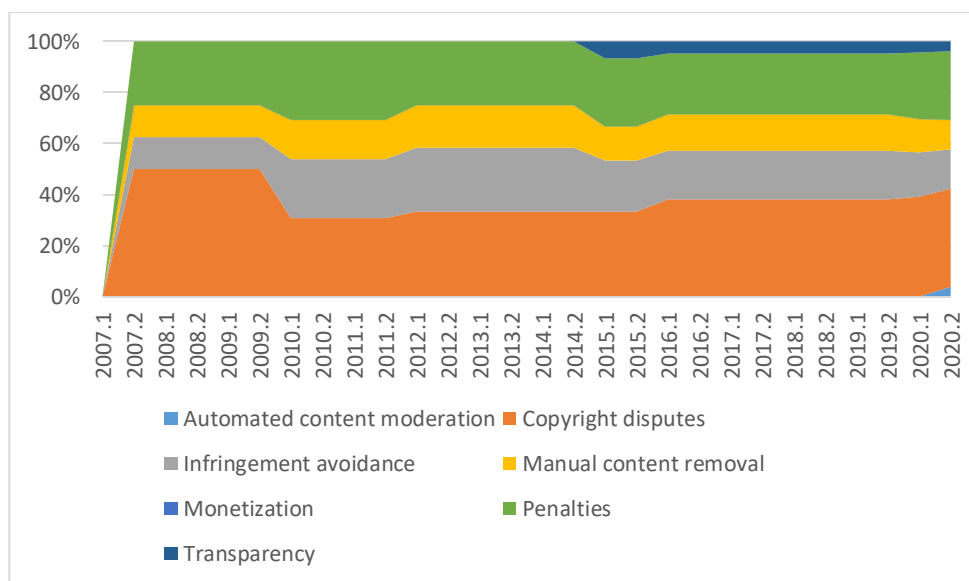


Figure 20. Proportions of Pornhub's copyright content moderation rules, grouped according to their subject, 2007-2020. Source: Authors.

In terms of mentions (Figure 21), the overall development is not really different. One element that might be highlighted is how, discursively at least, Pornhub has put over time much more weight on infringement avoidance rules – mostly, as we discuss in the next the sections, provisions that aim to stop users – not platforms – from infringing copyright.

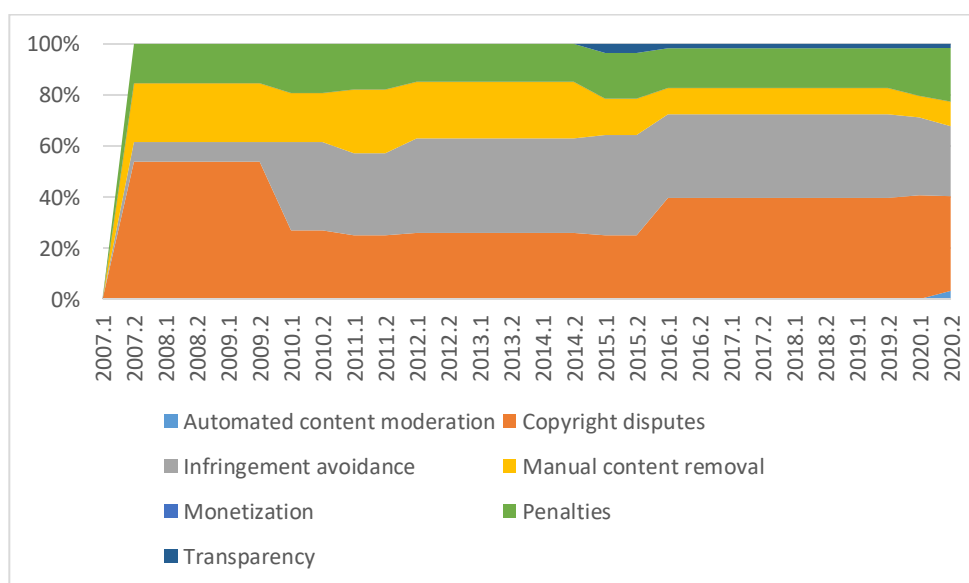


Figure 21. Proportions of mentions of Pornhub's copyright content moderation rules, grouped according to their subject, 2007-2020. Source: Authors.

d) The normative periods of Pornhub

As with SoundCloud, Pornhub's copyright content moderation framework is one that has grown almost steadily, as their four normative periods suggest.

- **2007-2009**

After some months seemingly without any public document, in the second semester of 2007 Pornhub put in place an initial copyright content moderation framework containing most of the key DMCA rules about disputes (the platform's obligation to notify parties, users' duties to provide accurate and complete information, as well as be legally entitled to report copyright infringement), moderation (the platform's obligation to remove infringing content) and penalties (the platform's duty to disable repeat infringers). In other words, this initial set of provisions were already quite strict as they made both infringements and the act of reporting infringements quite costly – at least if we compare them with the other platforms we analysed above. At the same time, as Table 29 shows, other primary rules were not mentioned at all – i.e., users' right to report infringement in their



first place, or appeal a complaint, or their primary duty to respect others' copyright. Let us notice that considerable discursive emphasis was placed on the accuracy of the information users provided during copyright disputes: mentions to these rules made up around third of all mentions.

Table 29. PornHub's copyright content moderation rules, with the number of mentions to them, 2007-2009. Source: Authors.

	2007.1					2009.2
Copyright disputes	0					
The platform must notify parties during copyright disputes	0	1	1	1	1	1
Users must be legally entitled to report copyright infringement	0	1	1	1	1	1
Users must provide accurate information in copyright disputes	0	4	4	4	4	4
Users must provide the required information in copyright disputes	0	1	1	1	1	1
Infringement avoidance	0					
The platform must respect and protect copyright	0	1	1	1	1	1
Manual moderation						
The platform must remove or block access to content due to copyright infringement	0	3	3	3	3	3
Penalties						
The platform must disable or suspend accounts due to copyright infringement	0	1	1	1	1	1
Users who falsely report copyright infringement risk suffering legal consequences	0	1	1	1	1	1

- **2010-2014**

Three years after being created, as Table 30 shows, PornHub added five new rules, consolidating their core rules and main framework. There was a specific concern with penalties: users who infringed copyright would not only see their accounts disabled but also be denied refunds – PornHub offers paid products. They also finally added multiple explicit mentions to users' need to respect others' copyright. Disputes, on the other hand, remained with the same provisions, an indication of how sturdily regulated this subject already was. In total, the platform arguably has 10 core rules. That might seem a lot but it does not cover other key provisions, which would only be added in the next round of changes.

Table 30. PornHub's copyright content moderation rules, with the number of mentions to them and the core rules highlighted in light orange, 2010-2014. Source: Authors.

	2009.2	2010.1									2014.2
Copyright disputes											
The platform must notify parties during copyright disputes	1	1	1	1	1	1	1	1	1	1	1
Users must be legally entitled to report copyright infringement	1	1	1	1	1	1	1	1	1	1	1
Users must provide accurate information in copyright disputes	4	4	4	4	4	4	4	4	4	4	4
Users must provide the required information in copyright disputes	1	1	1	1	1	1	1	1	1	1	1
Infringement avoidance											
The platform must respect and protect copyright	1	1	1	1	1	1	1	1	1	1	1
Users must not interfere with anti-copyright infringement features	0	1	1	1	1	1	1	1	1	1	1
Users must respect copyrights	0	7	7	7	7	8	8	8	8	8	8
Manual moderation											
The platform must not decide unilaterally what is a copyright infringement	0	1	1	2	2	2	2	2	2	2	2
The platform must remove or block access to content due to copyright infringement	3	4	4	5	5	4	4	4	4	4	4



Penalties											
The platform can deny refunds to users terminated due to copyright infringers	0	1	1	1	1	1	1	1	1	1	1
The platform must disable or suspend accounts due to copyright infringement	1	2	2	2	2	2	2	2	2	2	2
Users must indemnify the platform regarding copyright infringement	0	1	1	1	1	1	1	1	1	1	1
Users who falsely report copyright infringement risk suffering legal consequences	1	1	1	1	1	0	0	0	0	0	0

- **2015-2019**

Between 2015 and 2016, PornHub added nine new rules, leading their total to 21 (Table 31). Most of them regarded disputes. By now stating clearly that users could report copyright infringements, appeal moderation decisions and needed to file a lawsuit to keep a disputed content down, the platform’s framework arguably contemplated – eight years after their launch – the main DMCA rules. Other additions regulated the restoration of taken down content, a reminder on the possible legal penalties of lying during copyright disputes, and a vague mention to “document” notices of copyright infringement – an apparent attempt to make their content moderation practices more transparent. Then, for more than three years, their set of rules would remain remarkably stable – until 2020.

Table 31. PornHub’s copyright content moderation rules, with the number of mentions to them, 2015-2019. Source: Authors.

	2014.2	2015.1										2019.2
Copyright disputes												
The platform must notify parties during copyright disputes	1	1	1	2	2	2	2	2	2	2	2	2
Users can appeal copyright-related moderation	0	1	1	2	2	2	2	2	2	2	2	2
Users can report copyright infringement	0	2	2	4	4	4	4	4	4	4	4	4
Users must be legally entitled to report copyright infringement	1	0	0	3	3	3	3	3	3	3	3	3
Users must file a lawsuit against alleged copyright infringer	0	0	0	1	1	1	1	1	1	1	1	1
Users must provide accurate information in copyright disputes	4	1	1	7	7	7	7	7	7	7	7	7
Users must provide the required information in copyright disputes	1	2	2	3	3	3	3	3	3	3	3	3
Users should try to solve copyright dispute independently	0	0	0	1	1	1	1	1	1	1	1	1
Infringement avoidance												
The platform can apply DRM technology	0	0	0	1	1	1	1	1	1	1	1	1
The platform must respect and protect copyright	1	1	1	3	3	3	3	3	3	3	3	3
Users must not interfere with anti-copyright infringement features	1	1	1	2	2	2	2	2	2	2	2	2
Users must respect copyrights	8	9	9	13	13	13	13	13	13	13	13	13
Manual content removal												
The platform can restore content if copyright report is false or withdraw	0	0	0	1	1	1	1	1	1	1	1	1
The platform must not decide unilaterally what is a copyright infringement	2	2	2	1	1	1	1	1	1	1	1	1
The platform must remove or block access to content due to copyright infringement	4	2	2	4	4	4	4	4	4	4	4	4
Penalties												



The platform can deny refunds to users terminated due to copyright infringers	1	1	1	1	1	1	1	1	1	1	1
The platform can disable and suspend accounts who provide false information in copyright disputes	0	0	0	1	1	1	1	1	1	1	1
The platform must disable or suspend accounts due to copyright infringement	2	2	2	3	3	3	3	3	3	3	3
Users must indemnify the platform regarding copyright infringement	1	1	1	1	1	1	1	1	1	1	1
Users who falsely report copyright infringement risk suffering legal consequences	0	1	1	3	3	3	3	3	3	3	3
Transparency											
The platform must document notices of alleged copyright infringement	0	1	1	1	1	1	1	1	1	1	1

- **2020**

PornHub’s last wave of shifts came in 2020, and is shown in Table 32. Arguably, the most relevant shift concerned the introduction of an automated moderation system. While their system is not the focus of this report, it should be said that their documents suggest that PornHub outsourced to another company (Vobile) this functionality. Their T&Cs (namely, Terms of Service) offered only scant information on it, and asked users to contact Vobile themselves if they wanted to have their content protected via algorithmic fingerprinting. It is also worth mentioning Pornhub’s yet another amplification of the possibilities of penalties. Users (in particular, pornographic creators) who infringed copyrights could not receive money from the platform’s monetisation program (which apparently involved means other than algorithmic fingerprinting); the possibility of punishing those who submitted false information during copyright disputes also was established. Other additions include, e.g., the somewhat odd provision that forces users to communicate in English during disputes. Table 32 also makes clear the above-mentioned restrictiveness of PornHub’s copyright content moderation T&Cs for users. Their only two rights are those to report infringements of their copyright and appeal removal of their content.

Table 32. PornHub’s copyright content moderation rules, with the number of mentions to them, 2019-2020. Source: Authors.

	2019.2	2020.1	2020.2
Automated moderation	2		
The platform employs automated copyright content moderation	0	0	2
Copyright disputes			
The platform can require from users evidence of their copyright over content	0	1	1
The platform must notify parties during copyright disputes	2	2	2
Users can appeal copyright-related content removal	2	2	2
Users can report copyright infringement	4	4	2
Users must be legally entitled to report copyright infringement	3	3	3
Users must file a lawsuit against alleged copyright infringer	1	1	1
Users must provide accurate information in copyright disputes	7	8	8
Users must provide the required information in copyright disputes	3	2	2
Users must use English in copyright disputes	0	0	1
Users should try to solve copyright dispute independently	1	1	1
Infringement avoidance			
The platform can apply DRM technology	1	1	1
The platform must respect and protect copyright	3	2	2
Users must not interfere with anti-copyright infringement features	2	2	2



Users must respect copyrights	13	13	12
Manual content removal			
The platform can restore content if copyright report is false or withdraw	1	1	1
The platform must not decide unilaterally what is a copyright infringement	1	1	1
The platform must remove or block access to content due to copyright infringement	4	3	4
Penalties			
The platform can deny refunds to users terminated due to copyright infringers	1	1	1
The platform can disable and suspend accounts who provide false information in copyright disputes	1	1	1
The platform can punish users who submit false information during copyright disputes	0	0	1
The platform can withhold payments from users if they infringe copyrights	0	1	1
The platform must disable or suspend accounts due to copyright infringement	3	4	4
Users must indemnify the platform regarding copyright infringement	1	1	1
Users who falsely report copyright infringement risk suffering legal consequences	3	3	4
Transparency			
The platform must document notices of alleged copyright infringement	1	1	1

5.2.2.4 FanFiction

a) Overview

Despite being the oldest platform in our platform in our sample (they started operating in 2000), FanFiction is hardly the most complex. As Figure 22 suggests, for more than four years they apparently had no publicly-accessible document. In the next 15 years, their copyright content moderation framework changed only twice, and not dramatically. Number of kinds of public documents remained stably low throughout this period (only 2), and the number of rules and mentions to rules shifted only slightly. Figures of these three indicators are considerably lower than those of Pornhub, SoundCloud and Facebook.



Figure 22. Number of FanFiction's kinds of public documents, rules and mentions to rules related to copyright content moderation, 2000-2020. Source: Authors.



b) Evolution of FanFiction’s copyright content moderation rules, per their normative type

As Figure 23 suggests, FanFiction’s has been, since the publication of their first T&Cs, focussed on users’ obligations, whose proportion grew from 40% to 46% in 2009 and has since remained on the same level. In that year, the percentage of the platform’s obligations increased, and replaced procedures as the second most prevalent normative type. One difference from what we saw so far is that no further fragmentation of normative type appears to have occurred – in fact, there’s been a concentration around the platform’s and users’ obligations, which have made up more than 80% of the provisions since 2009.

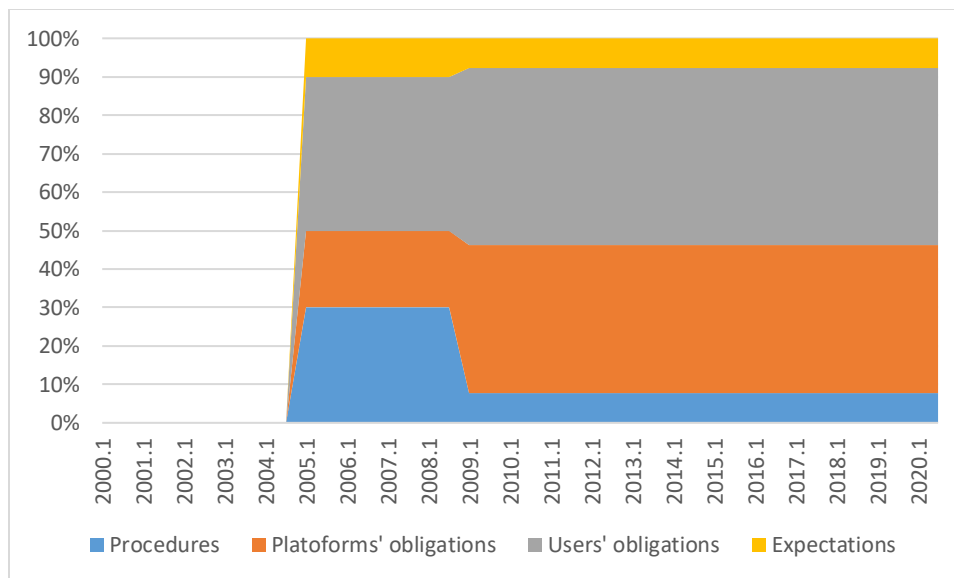


Figure 23. Proportions of FanFiction’s copyright content moderation rules, grouped according to their normative type, 2000-2020. Source: Authors.

This normative evolution is comparable to the discursive emphasis given by the platform to different normative types: (Figure 24) the proportion to mentions to users’ obligations, alone, has amounted to 64% of all mentions since 2009. Citations to platform’s obligations have also increased, and in 2020 represented around a quarter of all citations. Other normative types had little more than ten percent.

The platform’s copyright content moderation rules have always been quite restrictive to users. There is simply no explicit mention to any users’ right, not even their basic right to report the infringement of their copyright. This is not to say, of course, that FanFiction does not allow, in practice, such reporting (or other users’ rights, as that of appealing the removal of their content). They might well allow it. Yet, their decision to not make this aspect more visible is obviously relevant.

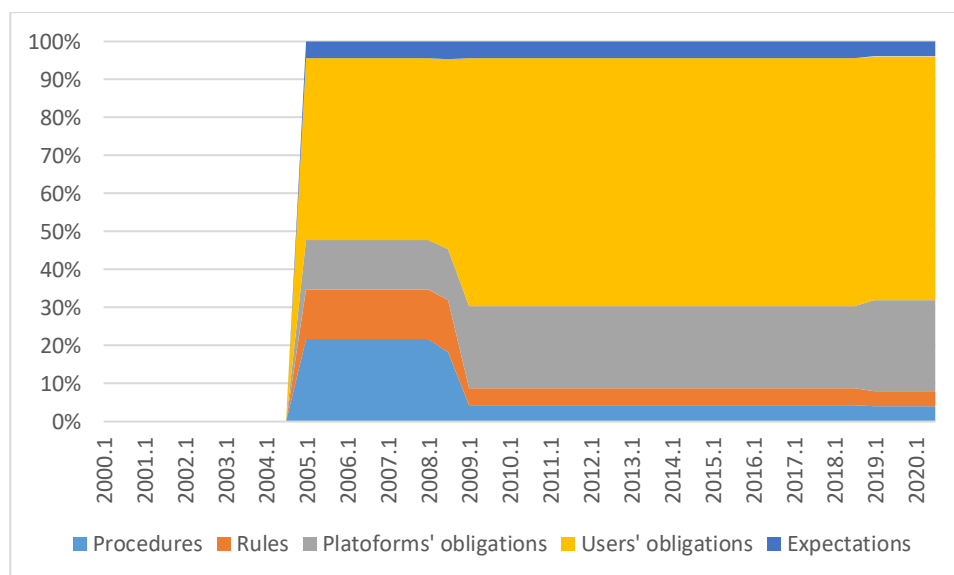


Figure 24. Proportions of mentions FanFiction’s copyright content moderation rules, grouped according to their normative type, 2020. Source: Authors.



c) Evolution of FanFiction’s copyright content moderation rules, per their subject

As to FanFiction’s copyright content moderation rules’ subjects, the platform is clearly concerned with copyright disputes (despite a drop in their proportion in 2009, from 50% to 34%); infringement avoidance and penalties, which increased in 2009 and remained representing a little less than a quarter of all rules, come in second and third places in terms of relative presence, respectively (see Figure 25). Again, no clear fragmentation appears to have happened.

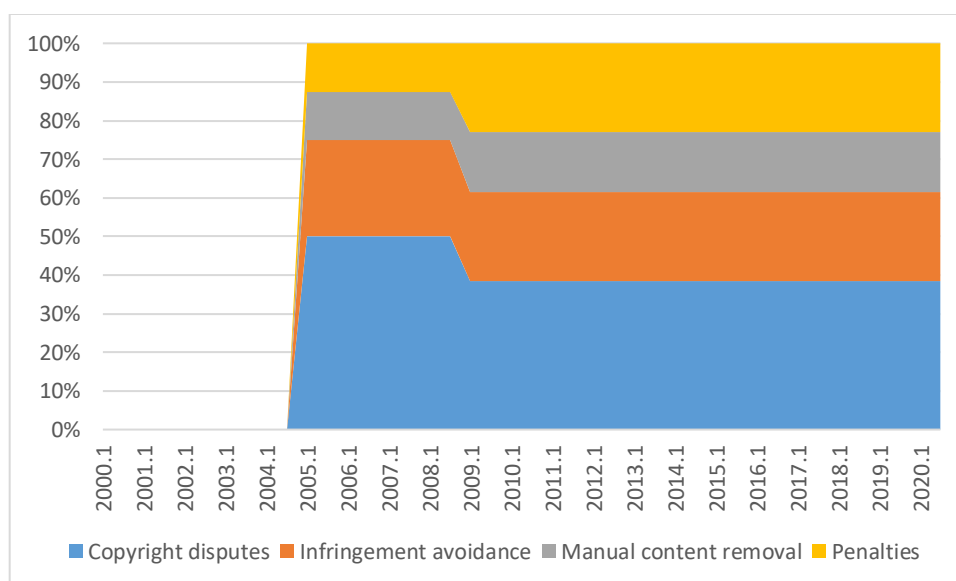


Figure 25. Proportions of FanFiction’s copyright content moderation rules, grouped according to their subject, 2000-2020. Source: Authors.

When we look at the percentage of mentions to these rules, as shown in Figure 26, the picture is different, and a bit more convoluted, as citations to infringement avoidance have been au pair with those to copyright dispute. This seems to be related with the service’s interest in the users’ obligations, as we explain in the next sections.

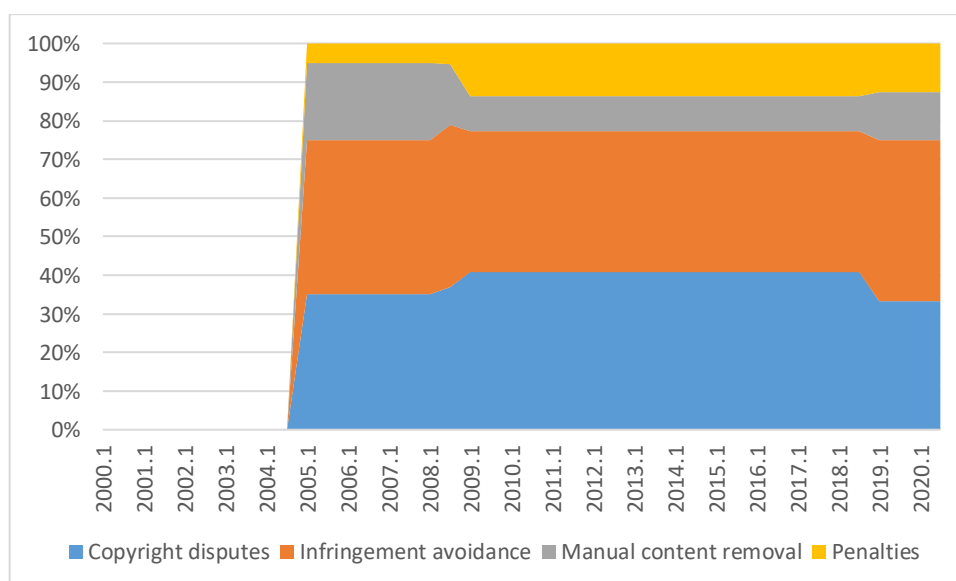


Figure 26. Proportions of mentions to FanFiction’s copyright content moderation rules, grouped according to their subject, 2000-2020. Source: Authors.

d) The normative periods of FanFiction



- 2000-2004

Other platforms started without a publicly-accessible document. But since in the case of FanFiction this situation lasted for more than four years, it seems fair to say that the absence of rules configures, in itself, this platform’s first normative period.

- 2004-2008

When FanFiction published their T&Cs, their copyright content moderation framework lasted for more than four years. Similar to PornHub, FanFiction’s first normative instalment contained basic DMCA rules (users’ obligations to provide complete and accurate information during disputes, for instance), in addition to the foundational users’ and the platform’s duty to respect others copyright (Table 33). At the same time, also as PornHub, other fundamental rules were missing: the very users’ rights to report copyright infringement and appeal content removals, or the platform’s obligation to remove infringing content and disable the account of infringers. These would only be partially added in the next shift, in 2009.

Table 33. FanFiction’s copyright content moderation rules, with the number of mentions to them, 2005-2008. Source: Authors.

	2004.2	2005.1								2008.2		
Copyright disputes												
Users must be legally entitled to report copyright infringement	0	1	1	1	1	1	1	1	1	1	1	1
Users must provide accurate information in copyright disputes	0	3	3	3	3	3	3	3	3	3	3	3
Users must provide the required information in copyright disputes	0	2	2	2	2	2	2	2	2	2	2	2
Users should report violation of others' copyright	0	1	1	1	1	1	1	1	1	1	1	1
Infringement avoidance												
The platform must respect and protect copyright	0	3	3	3	3	3	3	3	3	3	3	3
Users must respect copyrights	0	5	5	5	5	5	5	5	5	5	5	5
Manual content removal												
The platform employs human content moderation	0	4	4	4	4	4	4	4	4	4	4	3
Penalties												
Users who falsely report copyright infringement risk suffering legal consequences	0	1	1	1	1	1	1	1	1	1	1	1

- 2009-2020

The second (and last) normative period of FanFiction began in 2009, and lasted up to the end of the 2020, at least (Table 34). It saw the addition of two content removal rules (including the platform’s obligation of removing infringing content) and two penalties (of note, another platform’s duty: that of disabling infringers account) that, together, completed the platform’s nine core rules. As mentioned before, it is curious to notice that, despite having several rules on copyright dispute, for instance, the FanFiction documents we examined simply do not mention explicitly users’ right to report the violation of their copyright or appeal the removal of their content.

Table 34. FanFiction’s copyright content moderation rules, with the number of mentions to them, and the core rules highlighted in light orange, 2009-2020. Source: Authors.

	2008.2	2009.1																		2020.2
Copyright disputes																				
The platform must notify parties during copyright disputes	0	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Users must be legally entitled to report copyright infringement	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1



a) Overview

As with FanFiction, Diaspora seemingly had no publicly-accessible document for some years (2010 to 2012); and, after publishing their framework, no change seems to have occurred in neither their copyright content moderation rules nor the number of mentions to these rules; interestingly, the platform added in 2017 a Community Guidelines of sorts (see Figure 27). However, this new document did not discuss copyright content moderation at all.

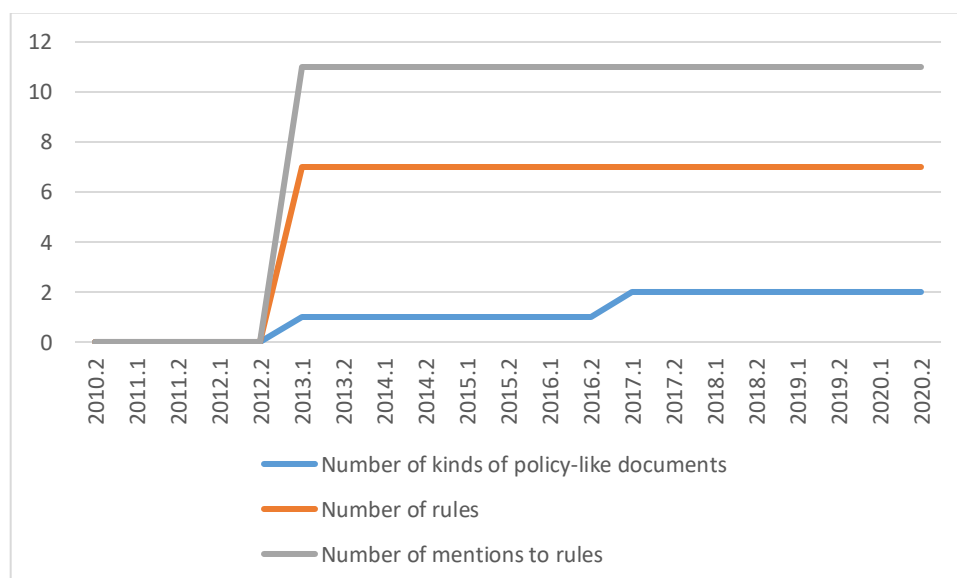


Figure 27. Number of Diaspora's kinds of public documents, rules and mentions to rules related to copyright content moderation, 2010-2020. Source: Authors.

b) Evolution of Diaspora's copyright content moderation rules, per their normative type

After the publication of their T&Cs, the proportions of the normative types in Diaspora's copyright content moderation rules did not undergo any change, as made clear in Figure 28. Their framework is a relatively simple one, with only three normative types, centred on the platform's obligations (over 45%), with users' obligations (29%) and rights (14%) taking up much of the rest. It is one of the few platforms in our sample that has no procedure in their framework. However, in terms of mentions (Figure 29), users' obligations have a much larger share (45%), easily surpassing that of the platform's obligations.

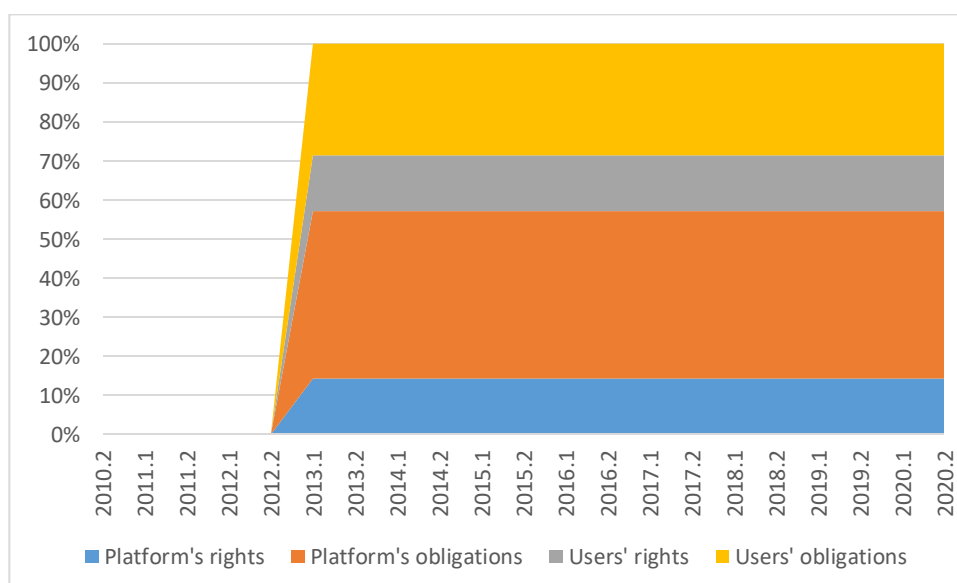


Figure 28. Proportions of Diaspora's copyright content moderation rules, grouped according to their normative type, 2010-2020. Source: Authors.



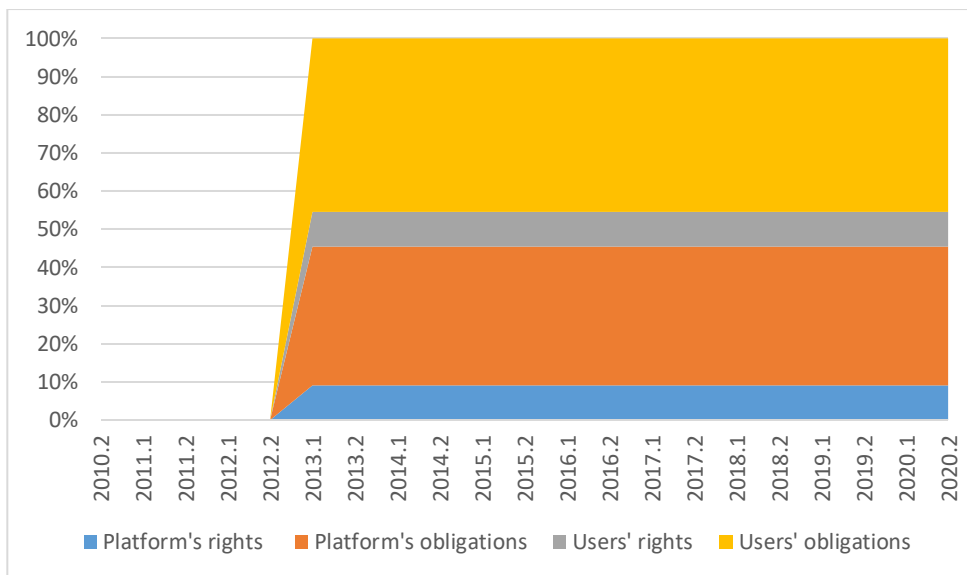


Figure 29. Proportions of mentions to Diaspora's copyright content moderation rules, grouped according to their normative type, 2010-2020. Source: Authors.

c) Evolution of Diaspora's copyright content moderation rules, per their subject

In terms of subjects, Diaspora's copyright content moderations rules have always been fragmented. Three areas have around 30% of the rules each (disputes, infringement avoidance and penalties); the others provision regard manual content removal, as Figure 30 shows. Again, when we consider only the proportions of mentions to these rules (Figure 31), the picture is not the same. Dispute and infringement avoidance provisions represent around 4 in 10 rules each, and citations to penalties are much less common (around 13%) than the said percentage of penalty-related rules.

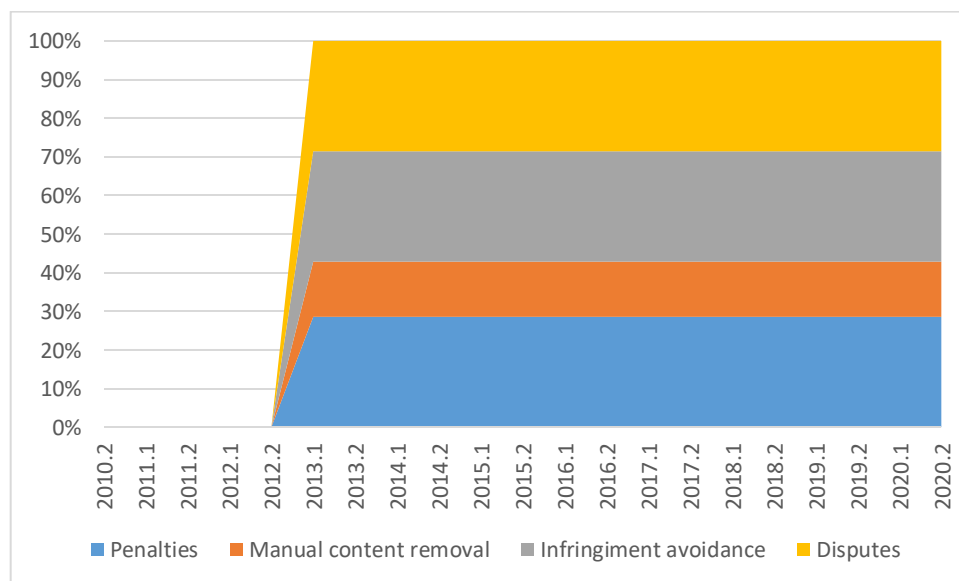


Figure 30. Proportions of Diaspora's copyright content moderation rules, grouped according to their subject, 2010-2020. Source: Authors



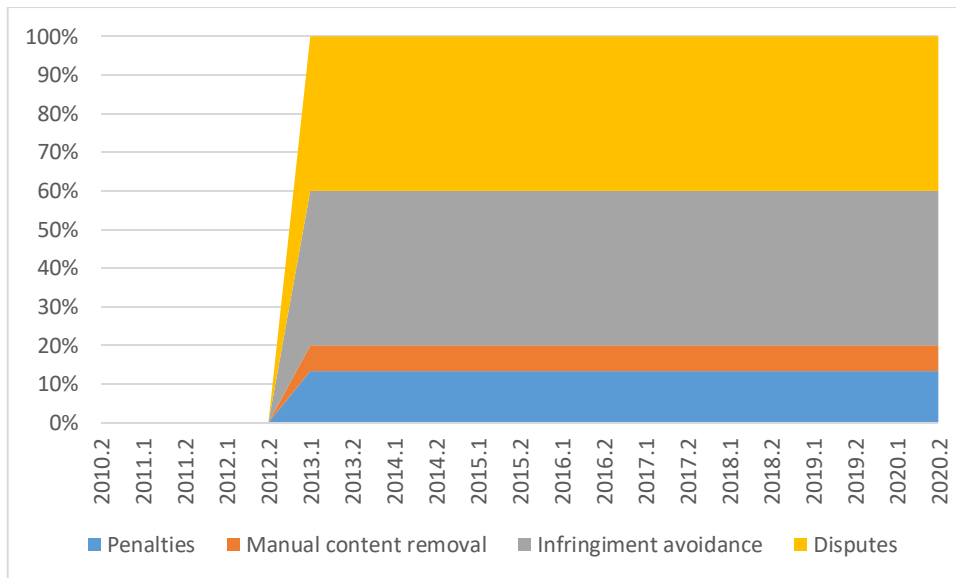


Figure 31. Proportions of mentions to Diaspora's copyright content moderation rules, grouped according to their subject, 2010-2020. Source: Authors.

d) The normative periods of Diaspora

- **2010-2012**

Given Diaspora's lack of any publicly-accessible documents in their first two years, we consider this to be their first normative period.

- **2012-2020**

Diaspora's copyright content moderation framework contains some key rules: users' right to report the violation of their own copyright (but not to appeal content removal decisions) and obligation to respect copyright, the platform's obligation to remove infringing content and disable account of repeat infringers (see Table 35). As with most platforms we studied, Diaspora's discursive emphasis is on users' duty to respect copyright: mentions to this rule alone make up more than a third of all mentions to all rules.

Table 35. Movement's copyright content moderation rules, with the number of mentions to them, 2010-2006. Source: Authors

	2012.2	2013.1	2013.2	2014.1	2014.2	2015.1	2015.2	2016.1	2016.2	2017.1	2017.2	2018.1	2018.2	2019.1	2019.2	2020.1	2020.2
Penalties																	
The platform can deny refunds to users terminated due to copyright infringers	0	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
The platform must disable or suspend accounts due to copyright infringement	0	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Manual content removal																	
The platform must remove or block access to content due to copyright infringement	0	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1



Infringement avoidance	0																
The platform must respect and protect copyright	0	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2
Users must respect copyrights	0	4	4	4	4	4	4	4	4	4	4	4	4	4	4	4	4
Disputes	0																
Users can report copyright infringement	0	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Users must be legally entitled to report copyright infringement	0	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1

5.2.2.6 DTube

a) Overview

Finally, DTube is the newest platform of the 15 we analysed. Created in 2019, the platform has undergone only one major change, in the second semester of that year. As Figure 32 shows, changes in terms of numbers of kinds of documents, rules and mentions to rules have evolved essentially in parallel. Absolute numbers of these three indicators are comparable to those of Diaspora.

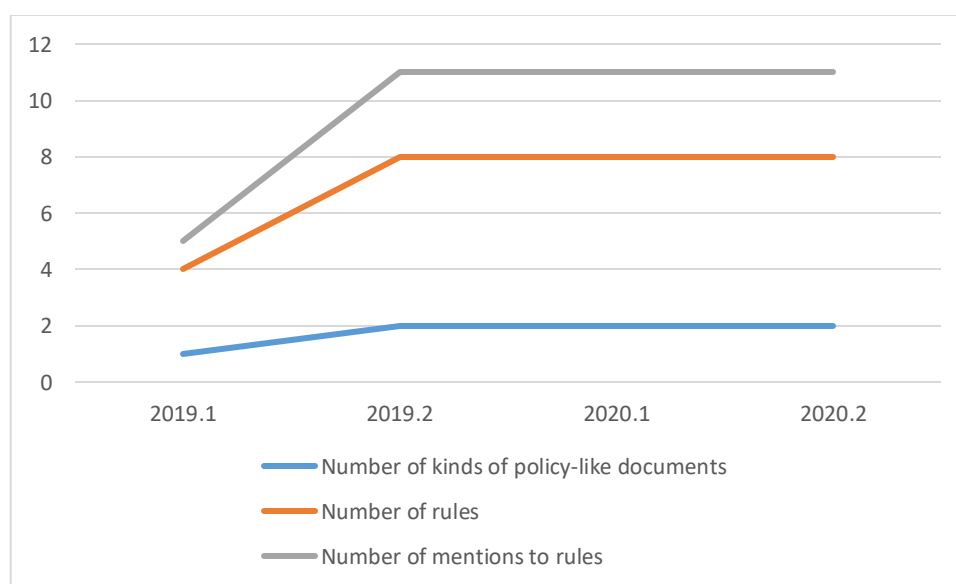


Figure 32. Number of DTube's kinds of public documents, rules and mentions to rules related to copyright content moderation, 2019-2020. Source: Authors.

b) Evolution of DTube's copyright content moderation rules, per their normative type

Initially, DTube's copyright content moderation frame was equally divided into four normative types: users' rights, expectation, the platform's obligations and procedures. Then, a change in 2019 created new users' obligations, whose proportion increased more than ten percentage points, leading to the decrease in the percentage of platform's obligations and expectation, whose number did not grow, as shown in Figure 33.



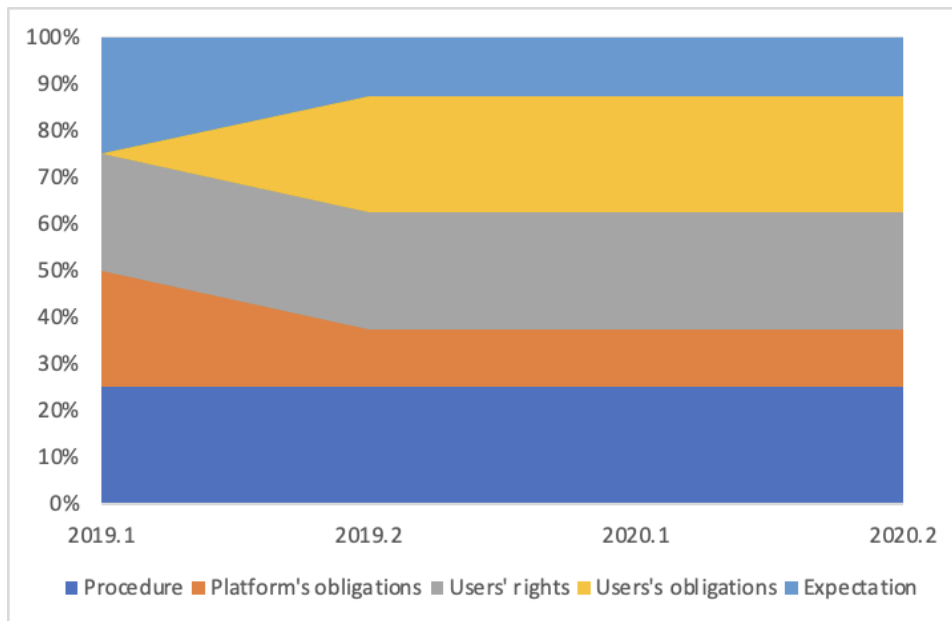


Figure 33. Proportions of DTube's copyright content moderation rules, grouped according to their normative type, 2019-2020. Source: Authors.

Figure 34 demonstrates that, yet again, the discursive development echoes without perfectly mirroring the normative ones. The 2019 shift caused an increase in the proportion of mentions to users' obligations (0% to 18%), surely, but this was not as intense as the one seen in the sheer number of rules of this kind.

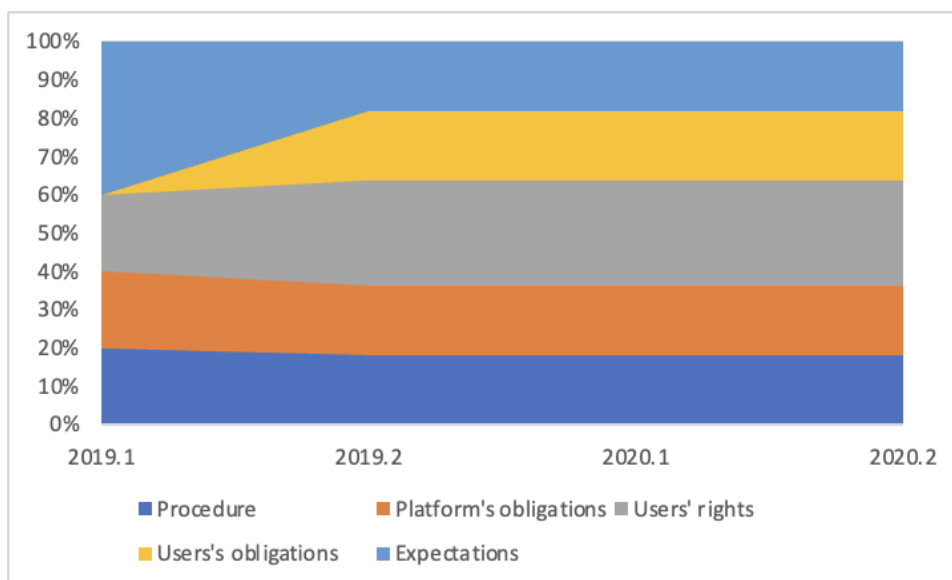


Figure 34. Proportions of mentions of DTube's copyright content moderation rules, grouped according to their normative type, 2019-2020. Source: Authors.

c) Evolution of DTube's copyright content moderation rules, per their subject

When examined through the lenses of the subject they regulate, DTube's copyright content moderation rules show much more movement. Figure 35 demonstrates that, in their first versions, the platform's T&Cs concerned mainly manual content removal and, to a lesser extent, infringement avoidance and monetisation (in their case, via a blockchain-based cryptocurrency that can be used to recompensate users for their posts). Then, in 2019, the service published some new rules, mostly focussing on copyright disputes, which then became the most regulated subject, in proportional terms. Numbers of mentions to rules point to essentially the same conclusion, as it can be seen in Figure 36.



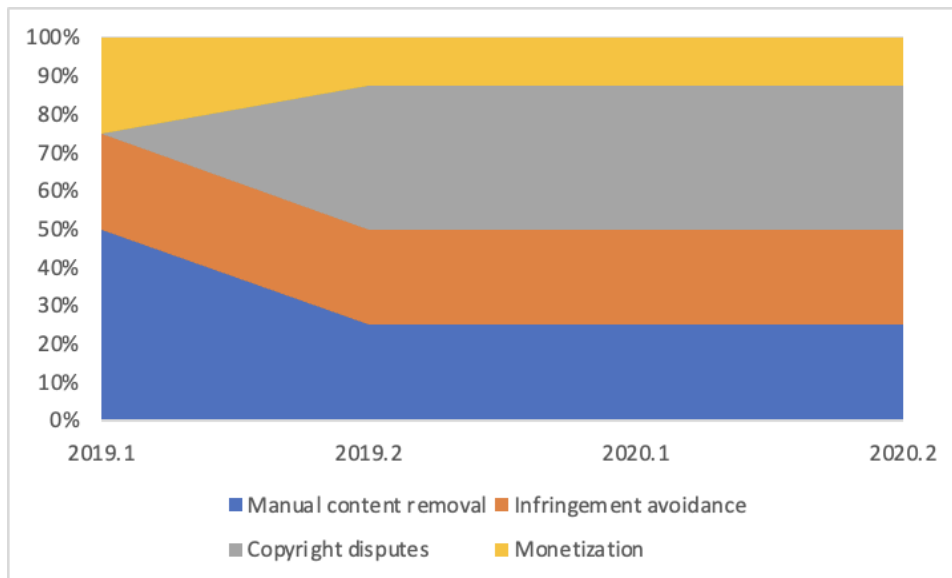


Figure 35. Proportions of DTube's copyright content moderation rules, grouped according to their subject, 2019-2020. Source: Authors.

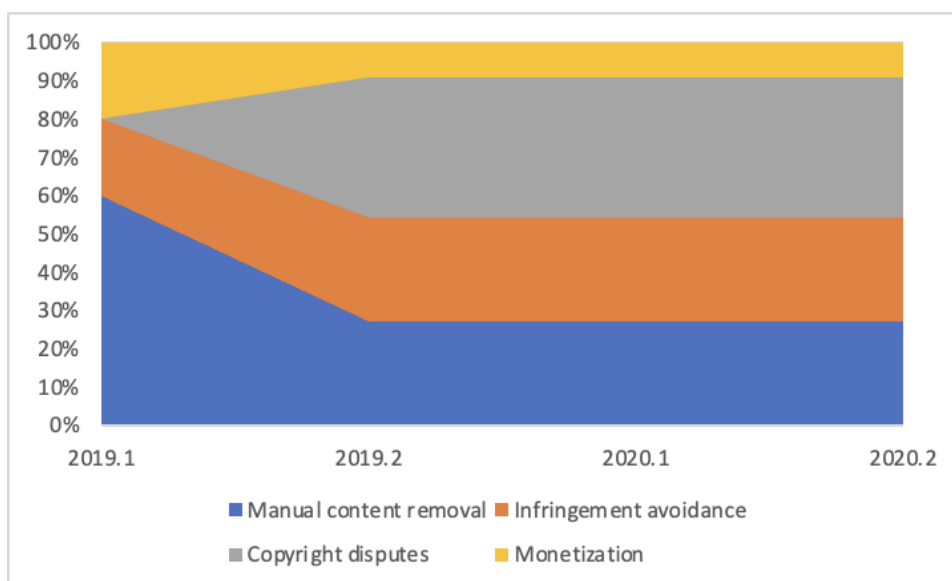


Figure 36. Proportions of mentions DTube's copyright content moderation rules, grouped according to their subject, 2019-2020. Source: Authors.

d) The normative periods of DTube

- 2019

DTube's first normative period had only four rules (see Table 36). While the platform could not, for legal reasons, ignore copyright regulation, it adopted a radically different approach to it. Instead of saying that they will govern copyright, DTube established as a procedure whereby they do not remove infringing content, and leave this task to users, in the form of an expectation – they should but are not obliged to do so. It also established since its creation a blockchain-based cryptocurrency whereby users can potentially monetise their content. It is also notable, as mentioned above, how this initial set of provisions did not contemplate copyright disputes whatsoever. In this sense, DTube was unique in our set of case studies. This would quickly change, though, as explained next.

Table 36. DTube's copyright content moderation rules, with the number of mentions to them, 2019. Source: Authors.

	2019.1
Manual content removal	
The platform does not remove or suspend copyright infringing content posted in it	1



Users should act as copyright content moderators	2
Infringement avoidance	
The platform must respect and protect copyright	1
Monetisation	
Users can earn cryptocurrency by posting their content	1

- **2019-2020**

Not long after being launched, DTube changed their framework. In a way, the shifts shown in Table 37 seem to suggest that the platform was attempting to make their framework more adequate to deal with typical copyright issues. Thus, one can see in this second instantiation three provisions that consider copyright disputes, such as users' right to report infringement, they duty to provide complete information, as well we the legal risks they suffer when lying during disputes.

Table 37. DTube's copyright content moderation rules, with the number of mentions to them, 2019-2020. Source: Authors.

	2019.1	2019.2	2020.1	2020.2
Manual content removal				
The platform does not remove or suspend copyright infringing content posted in it	1	1	1	1
Users should act as copyright content moderators	2	2	2	2
Infringement avoidance				
The platform must respect and protect copyright	1	2	2	2
Users must not interfere with anti-copyright infringement features	0	1	1	1
Copyright disputes				
Users can report copyright infringement	0	2	2	2
Users must provide the required information in copyright disputes	0	1	1	1
Users who falsely report copyright infringement risk suffering legal consequences	0	1	1	1
Monetisation				
Users can earn cryptocurrency by posting their content	1	1	1	1

5.2.3 How do platforms' automated copyright content moderation systems work?

The aim of this section is to provide an overview and analysis of the most important automated copyright content moderation systems, which are employed by social media platforms to automatically identify, block and monetise copyrighted content. After explaining which platforms of our sample employs this sort of system, we present an overview of the main existing systems (Content ID, Rights Manager and Audible Magic) in a comparative form. Then, Section 5.3 presents a detailed case study of Facebook's Rights Manager.

5.2.3.1 Usage of automated copyright content moderation

As Table 38 shows, most platforms 10 out of 15 platforms of our sample seemingly employ some kind of copyright content moderation system.

Table 38. List of the automated copyright content moderation systems employed by a selection of mainstream, alternative and specialised platforms. Source: Authors.

Platform	Automated Copyright Content Moderation System
	Mainstream



Facebook	Rights Manager + Audible Magic
Instagram	Rights Manager
Youtube	Content ID
SoundCloud	Audible Magic
Twitter	Unclear
Alternative	
Mastodon	None
Diaspora	None
Audius	None
DTube	None
Pixelfeld	None
Specialised	
Vimeo	Audible Magic
FanFiction	None
Twitch	Audible Magic
Dribble	None
PornHub	Vobile

While mainstream platforms all have developed some kind of system – Twitter has been testing algorithmic fingerprinting in live transmissions, and it is unclear whether they have used it in other instances – no alternative services have apparently done so. Amongst specialised platforms, those that focus on audio-visual content (Vimeo, Twitch and PornHub) have outsourced automated content moderation to external providers, namely content recognition companies Vobile and Audible Magic; FanFiction and Dribble, specialised in texts and images, respectively, do not seem to utilise automated copyright content moderation. Audible Magic seems a particularly powerful actor in the social media sector, as they also provide services to two mainstream platforms, SoundCloud and Facebook. In the case of Facebook, Audible Magic operates in tandem with the company own system, Rights Manager, also utilized by Instagram, which is owned by Facebook Inc. The only other platform to have created their own system is of course Google’s YouTube – Content ID.

The following sections discuss Rights Manager, Content ID and Audible Magic. Used to inspect posts of billions of users, these appear to be the three most important systems amongst the platforms in our sample and, arguably, of the social media platform market as a whole.

5.2.3.2 Overview of Rights Manager, Content ID and Audible Magic

Rights Manager has been developed by Facebook and was launched in April of 2016⁵²⁰. It can be used to manage copyrighted content across both Facebook and Instagram⁵²¹. Content ID has been developed by Google and was launched in October of 2007⁵²². In its original version, it was licensed by Audible Magic, which had been developing its system since it was founded in December of 1999⁵²³. Later, however, YouTube decided to develop their own solution.

⁵²⁰ Facebook Inc., ‘Introducing Rights Manager’ (*Facebook for Media*, 12 April 2016) <<https://www.facebook.com/formedia/blog/introducing-rights-manager>> accessed 4 September 2021.

⁵²¹ Facebook Inc., ‘Protect Your Instagram Content with Rights Manager’ (*Business Help Center*) <<https://www.facebook.com/login/>> accessed 4 September 2021.

⁵²² Google Inc., ‘History of Content Management’ <<https://www.sites.google.com/a/pressatgoogle.com/youtube5year/home/history-of-copyright>> accessed 4 September 2021.

⁵²³ Audible Magic Corporation, ‘History’ (*Audible Magic*) <<https://www.audiblemagic.com/company/history/>> accessed 4 September 2021.



When analysing the material, we found that the way in which these systems work can be most easily grasped when conceived of as four interrelated macro processes, namely: *application and content registration; identification and matching; automated actions; and disputes and conflicts*. We furthermore included a few categories about the underlying *business model* of these systems in the comparative analysis. The next sections explain these processes and categories in detail; Table 39 and Table 40 provide an overview of these systems' characteristics.



Table 39. Overview of Rights Manager, Content ID and Audible Magics application and identification procedures. Source: Authors

		Application & content registration			Identification & matching						
User eligibility criteria		Types of media	Content eligibility criteria	Degree of automation	Channels for content registration	Database size	Main ACR technology	Measured characteristics	Robustness	Point of matching	Reported accuracy
Rights Manager		Video & Images; Audio files with Audible Magic	1. Exclusive rights of content 2. Distinctiveness of content 3. Individual reference file	Not fully automated	Submissions by rightsholders & authorized third-party organisations	No information	Fingerprinting; use of AI unclear	One can infer that pixel-level data is used	No information	Point of upload	No information
Content ID		Audio & Video	1. Exclusive rights 2. Frequent upload on YouTube	Unclear	Submissions by rightsholders & authorized third-party organisations	> 75 million reference files (07/2021) > 9,000 partners (07/2021)	Fingerprinting; possibly AI	No information		Continuously	99,7% identification rate for audio files (2016)
Audible Magic		Audio & Video	1. Exclusive rights	Not fully automated	Submissions by rightsholders & authorized third-party organisations	> 100 million music tracks (02/2021) > 140.000 rightsholders (12/2019)	Fingerprinting; use of AI unclear	"Perceptual characteristics of the audio and video"	Audio: Rate, pitch, and tempo. Video: Quality degradation, frame rate changes, aspect ratio changes, tickers, graphic overlays	Point of upload	99,99 % identification rate; < 0.0001% false positives (2017)

Table 40. Overview of Rights Manager, Content ID and Audible Magics automated actions, disputes protocols and business models.
Source: Authors.

	Automated actions/Monetisation				Disputes & conflicts			Business model				
	Users' options	Possible specifications	Source of revenue	Application rejection dispute	Content registration dispute	Content registration dispute resolution	Match dispute	Appeal process for rejected match dispute	Launch date	Product	Primary customer	Other services offered
Rights Manager	"Block", "Collect Ad Earnings" (only FB videos), "Monitor", "Manual Review" "Takeover" and "Display ownership link"	Viewer location, temporal overlap, specific users	Advertisement	No formalized dispute process	Yes: The second uploader can start dispute within 7 days, the first uploader has 7 days to respond	First content uploader has the last call	Yes: The uploader has 7 days to file a dispute and the rights holder has 7 days to respond to the dispute.	Yes	April 2016	No	Content creators of Facebook/Instagram or other parties who protect content of content creators	None
Content ID	"Block", "Monetize", "Track" and "Route for review"	Viewer location, temporal overlap	Advertisement	No formalized dispute process	Yes: The second uploader has 30 days to respond	Unclear	Yes: The rights holder has 30 days to respond	Yes: The rights holder has 20 days to respond	October 2007	No	Large rights holders	None
Audible Magic	"Allow", "Block" and "Monetize"	Viewer location, temporal overlap, platform	Varies by platforms	No information	Yes: The second uploader can contact the help desk	"Audible Magic does not arbitrate any ownership disputes and any conflicts must be resolved between the two parties themselves."	Varies by platform	Varies by platform	December 1999	Yes	Rights holders & Social media platforms	Licensing for rights holders, Back office administration for platforms, ACR for music aggregators/distributors and social media teams

a) Application and content registration

The first macro process (*application and content registration*) covers the different ways in which users and content can be registered with the respective copyright content moderation system. It therefore encompasses the *user eligibility criteria* that a rightsholder has to meet in order to be granted access to the system; the *types*



of media which can be registered; the *content eligibility criteria*, i.e., the requirements that a piece of content has to fulfil in order to be eligible for protection via the automated system; the *degree* to which the application and registration process is *automated*; the different *channels* that exist for the registration and acquisition of content; and publicly available information about the *size of the underlying reference database*.

In terms of the user *eligibility criteria*, Audible Magic offers the most accessible out of the three examined systems, as it is open to “any qualified record label, music publisher, artist, movie or TV studio, big or small”⁵²⁴. Both Rights Manager and Content ID require applicants to own/control the rights over a certain quantity of content, although the exact threshold that an applicant must meet in order to access their systems remains unclear from the companies’ public documents.

The Help pages for Rights Manager only state that applicants need to “have multiple pieces of original content that you [they] want to protect”⁵²⁵, while the Content ID Help pages lays out that, in order to have her application approved, a user needs to control the rights over a “substantial body of original material”⁵²⁶. As an additional requirement, users of Rights Manager need to control a non-private Facebook page⁵²⁷. Facebook furthermore lists the respective user’s personal history of copyright infringements and violations as a user eligibility criterion⁵²⁸, although it is unclear how exactly these past misdoings factor into the decision. For Content ID, YouTube list the previous submission of “many”⁵²⁹ valid takedown requests, i.e. the “demonstrated need”⁵³⁰ of a rights holder as criteria, stating that “copyright owners must have previously submitted many valid takedown requests and have the resources to manage Content ID”⁵³¹.

All three of the analysed systems offer protection for video content. Both Content ID and Audible Magic furthermore offer the automatic detection of audio files. In the case of Rights Manager, Audible Magic’s technology is used for the identification of audio files⁵³². As the only one out of the observed systems, Rights Manager also offers an option to protect images⁵³³.

If a rightsholder is granted access to the system, the content which she wishes to protect has to fulfil certain criteria in order to be eligible for the protection. All three systems require users to confirm that they control the exclusive rights of the content that they are registering. The help pages for Rights Manager, furthermore list the *distinctiveness* of the content as a criterion, stating that “Your reference files must be sufficiently distinct from other reference files. It must be visually and audibly unlike other content”⁵³⁴. Facebook also prohibit compilations, mashups and countdown lists from being registered in Rights Manager, and requires users to provide individual reference files for each piece of content⁵³⁵. Content ID is the only one out of the three systems that links the eligibility of a piece of content for protection to the frequency of its copyright infringement on YouTube, stating that eligible content must be “frequently uploaded by the YouTube user community”⁵³⁶.

The exact degree to which the processes of application and content registration within the three systems are automated is not clear from the material that we analysed. In the case of Rights Manager and Audible Magic, however, human oversight is clearly involved in the application process. Facebook has stated that “rights holder requests for access are reviewed holistically (...) by a team of trained professionals”⁵³⁷; Audible Magic asks potential new users to use a contact form and to engage with a “sales executive”⁵³⁷; in the case of Content ID, it is unclear whether human oversight is involved.

⁵²⁴ Audible Magic Corporation, ‘Rightsholders Registration’ (*Audible Magic*) <<https://www.audiblemagic.com/rightsholders-registration/>> accessed 4 September 2021.

⁵²⁵ Facebook Inc., ‘Rights Manager Eligibility’ (*Business Help Center*, 5 February 2021) <<https://www.facebook.com/business/help/705604373650775>> accessed 2 August 2021.

⁵²⁶ Google Inc., ‘Using Content ID’ (*YouTube Help*) <<https://support.google.com/youtube/answer/3244015?hl=en>> accessed 4 September 2021.

⁵²⁷ Facebook Inc., ‘Rights Manager Eligibility’ (n 525).

⁵²⁸ Facebook Inc., ‘Rights Manager Eligibility’ (n 525).

⁵²⁹ Google Inc., ‘Overview of Copyright Management Tools’ (*YouTube Help*) <https://support.google.com/youtube/answer/9245819?hl=en&ref_topic=9282364#zippy=%2Ccontent-id> accessed 4 September 2021.

⁵³⁰ Google Inc., ‘Qualify for Content ID’ (*YouTube Help*) <<https://support.google.com/youtube/answer/1311402>> accessed 4 September 2021.

⁵³¹ Google Inc., ‘Overview of Copyright Management Tools’ (n 34).

⁵³² Facebook Inc., ‘Copyright Management Tools’ (*Facebook Business Help Center*) <<https://www.facebook.com/login/?next=https%3A%2F%2Fwww.facebook.com%2Fbusiness%2Fhelp%2F932705380468613%3Fid%3D237023724106807>> accessed 4 September 2021.

⁵³³ Facebook Inc., ‘Copyright Management Tools’ (n 532).

⁵³⁴ Facebook Inc., ‘Content Eligible for Reference Files’ (*Facebook Business Help Center*) <<https://www.facebook.com/business/help/389834765475043>> accessed 2 August 2021.

⁵³⁵ Facebook Inc., ‘Content Eligible for Reference Files’ (n 534).

⁵³⁶ Google Inc., ‘Using Content ID’ (n 526).

⁵³⁷ Facebook Inc., ‘Response to Questions about Rights Manager’.



All three systems acquire reference content through affirmative submissions by rights holders and through authorised third-party organisations. These organisations often offer rights holders to register their content with multiple automated copyright content moderation systems at the same time. The music distribution service “HAAWK” for instance, offers “full-service YouTube Content ID and Facebook/Instagram Rights Manager administration (...) for large rights holders that wish to optimize their claims and maximize their earnings”⁵³⁸. The company furthermore offers the “self-service rights management platform Identify”⁵³⁹, which is run by “a team of YouTube Certified Content ID specialists”⁵⁴⁰. The latter service presents itself as a pathway for smaller rights holders to get their content protected via YouTube’s Content ID system.

Audible Magic proactively recommends the use of “delivery agent partners”⁵⁴¹ to its clients, stating that “[w]orking with a delivery agent saves the content owner from needing in-house resources with the technical skills required to implement Audible Magic fingerprinting software or delivering media files and metadata”⁵⁴². This stands somewhat in contrast to Audible Magic’s claim that “[i]ndividual creators of copyright content and small companies have the same opportunity as large companies to register their content with Audible Magic”⁵⁴³ and that “[f]or even the smallest copyright entities or individuals, registration can be achieved free of charge through a simple drag-and-drop online process”⁵⁴⁴. The fact that the aforementioned third-party providers exist shows how complex these systems have become and that there seems to be a demand for specialists who can help users navigate them.

Both Content ID and Audible Magic have released figures about the size of their reference file database; Facebook has not published such information. As of July 2021, the Content ID database contained over 75 million reference files from more than 9,000 “partners using Content ID” As laid out above, these partners can be large rights holders or organisations that register content for other rights holders. Audible Magic announced in February 2021 that its database holds over 100 million music tracks from over 400,000 labels and characterised the database as “the largest business-to-business rights-managed catalogue available”⁵⁴⁵. The company has not released any information about the number of video files and the total number of reference files in its database.

b) Identification and matching

There is a range of existing technical solutions for the automatic identification of content such as hashing, watermarking, fingerprinting and AI-based or enhanced solutions⁵⁴⁶. All of the three analysed systems employ *fingerprinting* as the main technology for content recognition. Fingerprinting algorithms analyse media files and produce a set of data – the digital fingerprint – which makes a piece of content uniquely identifiable, just as human fingerprints uniquely identify people. The digital fingerprint is then compared against a database with reference fingerprints to check if there is a match. It is very likely – and in the case of Content ID even reported⁵⁴⁷ – that the three systems are using artificial intelligence (AI) to perform and optimise at least some their system’s tasks. However, the companies do not offer any public information about this.

It is largely unclear which exact characteristics the three systems’ fingerprinting algorithms are analysing within a media item to produce the fingerprints for images, and audio and video files. In the case of Rights Manager and Content ID, there is no public information about the variables which are being measured during the fingerprinting process. For Rights Manager, however, it can be inferred that pixel-level data is used for image fingerprinting because Facebook states that certain colour gradients are not eligible as reference files.

⁵³⁸ HAAWK Inc., ‘HAAWK: Full Service YouTube Content ID & Facebook Rights Manager’ (*HAAWK Rights Management*) <<https://www.haawk.com>> accessed 4 September 2021.

⁵³⁹ HAAWK Inc., ‘Identify: Self Service YouTube Content ID & Facebook Rights Manager’ (*HAAWK*) <<https://www.haawk.com>> accessed 4 September 2021.

⁵⁴⁰ HAAWK Inc., ‘Identify’ (*Identify*) <<https://www.identify.com>> accessed 4 September 2021.

⁵⁴¹ Audible Magic Corporation, ‘Using a Content Delivery Agent Partner’ (*Audible Magic Support*, September 2020) <<https://support.audiblemagic.com/hc/en-us/articles/203628004-Using-a-content-delivery-agent-partner>> accessed 4 September 2021.

⁵⁴² Audible Magic Corporation, ‘Using a Content Delivery Agent Partner’ (n 541).

⁵⁴³ Audible Magic Corporation, ‘Comment Regarding Section 512 Study United States Copyright Office’ 48 <<https://www.asktheeu.org/en/request/4465/response/14429/attach/5/Annex%201%20Gestdem%202017%204050%20v3.pdf>>.

⁵⁴⁴ Audible Magic Corporation, ‘Comment Regarding Section 512 Study United States Copyright Office’ (n 543) 48.

⁵⁴⁵ Audible Magic Corporation, ‘Audible Magic Surpasses 100 Million Tracks’ (*Audible Magic Press Releases*, 23 February 2021) <<https://www.audiblemagic.com/?p=6452>> accessed 4 September 2021.

⁵⁴⁶ European Union Intellectual Property Office., *Automated Content Recognition: Discussion Paper. Phase 1, Existing Technologies and Their Impact on IP*. (Publications Office 2020) 4 <<https://data.europa.eu/doi/10.2814/52085>> accessed 4 September 2021.

⁵⁴⁷ John Paul Titlow, ‘YouTube Is Using AI to Police Copyright—to the Tune of \$2 Billion in Payouts’ *Fast Company* (13 July 2016) <<https://www.fastcompany.com/4013603/youtube-is-using-ai-to-police-copyright-to-the-tune-of-2-billion-in-payouts>> accessed 4 September 2021.



Audible Magic has been open about the inner workings of its fingerprinting algorithms, laying out that it measures a number of “perceptual characteristics of the audio and video”⁵⁴⁸. A 2004 article about audio fingerprints, which was published by three of Audible Magic’s employees, revealed that acoustical features such as loudness, pitch, brightness, bandwidth and inharmonicity are measured as part of Audible Magic’s fingerprinting technology⁵⁴⁹. The 33 patents that the company currently holds similarly state that the acoustical features which are measured to produce audio fingerprints “may include loudness, pitch, bass, brightness, bandwidth, Mel-frequency coefficients (MFCCs)”⁵⁵⁰. There is no information about which characteristics Audible Magic analyses in video files.

The robustness of an automated copyright content moderation technology denotes its “capacity (...) to resist modification or degradation of the content to be recognised”⁵⁵¹. It also represents one of the central categories for the evaluation of algorithms in general. For both Rights Manager and Content ID, there is no public information about the robustness of their systems to content modification. Audible Magic, however, has said that its fingerprinting technology is designed to handle “manipulations in rate, pitch, and tempo”⁵⁵² as well as “video quality degradation, frame rate changes, aspect ratio changes, tickers and graphic overlays and more”⁵⁵³.

The point in time at which the matching between a piece of content and the reference file database occurs, represents another important comparative category. In the case of Rights Manager and Audible Magic, the matching occurs when a new file is being uploaded to the platform, i.e., at the “point of ingestion”⁵⁵⁴. Rights Manager’s help page makes it explicit that the system “isn’t retroactive” and “doesn’t detect videos that were posted before your reference files were uploaded”⁵⁵⁵. Content ID stands out in this regard because it does not only check content once at the point of upload but continuously while it is published on the platform. As research has shown, “Content ID matches can occur at any time. While many matches occur at time of upload, matches can be made when new content is added to the database or whenever the algorithm used by Content ID changes”⁵⁵⁶.

The *accuracy* of the analysed systems represents another central area of concern. It is generally used to describe “how the technology performs in terms of matching output and performing correct identifications or false negative/positive results”⁵⁵⁷. A false negative, here, means that a reference file in the database that should be identified does not get identified, while a false positive refers to the case in which a piece of content is erroneously matched with a reference file in the database. To our knowledge, Facebook has not reported any figures about the accuracy of Rights Manager. The most recent figure for Content ID is from 2016, when a YouTube spokesperson declared that the system is “99.7% precise for recordings on file”⁵⁵⁸ but it is unclear whether this figure refers to false positives or false negatives or is specific to a certain type of media. Audible Magic has been the most open about the accuracy of its system, reporting an identification rate of 99.9%, with less than 0.1 % false negatives and less than 0.0001 % false positives⁵⁵⁹.

⁵⁴⁸ ‘Technology’ (*Audible Magic Website*) <<https://www.audiblemagic.com/technology/>> accessed 4 September 2021.

⁵⁴⁹ Thom Blum, Douglas Keislar and Erling Wold, ‘Audio Fingerprints: Technology and Applications’ (Audio Engineering Society 2004) 2 <<https://www.aes.org/e-lib/browse.cfm?elib=12872>> accessed 4 September 2021.

⁵⁵⁰ Vance Ikezoye and others, ‘Temporal Fraction with Use of Content Identification’ 6.

⁵⁵¹ European Union Intellectual Property Office. (n 546) 6.

⁵⁵² Audible Magic Corporation, ‘Core Technology Data Sheet’ <https://www.audiblemagic.com/wp-content/uploads/2019/08/B_F_Core-Technology_012720.pdf>.

⁵⁵³ Audible Magic Corporation, ‘Core Technology Data Sheet’ (n 552).

⁵⁵⁴ Audible Magic Corporation, ‘Why Register Your Content with Audible Magic?’ (*Audible Magic Support*, March 2021) <<https://support.audiblemagic.com/hc/en-us/articles/201232220-Why-register-your-content-with-Audible-Magic->> accessed 4 September 2021.

⁵⁵⁵ Facebook Inc., ‘About Rights Manager’ (*Facebook*) <<https://www.facebook.com/login/?next=https%3A%2F%2Fwww.facebook.com%2Fbusiness%2Fhelp%2F2015218438745640%3Fid%3D237023724106807>> accessed 4 September 2021.

⁵⁵⁶ Katharine Trendacosta, ‘Unfiltered: How YouTube’s ContentID Discourages Fair Use and Dictates What We See Online’ (A publication of the Electronic Frontier Foundation 2020) 9 <<https://www.eff.org/files/2020/12/10/unfiltered.pdf>>.

⁵⁵⁷ European Union Intellectual Property Office. (n 546) 6.

⁵⁵⁸ Hannah Karp, ‘Industry Out of Harmony With YouTube on Tracking of Copyrighted Music’ *Wall Street Journal* (28 June 2016) <<https://www.wsj.com/articles/industry-out-of-harmony-with-youtube-on-tracking-of-copyrighted-music-1467106213>> accessed 4 September 2021.

⁵⁵⁹ Audible Magic Corporation, ‘Content Recognition Technology: Balancing the Needs of Online Platforms, Creators and Users’ (2017) 9 <<https://www.asktheeu.org/en/request/4465/response/14429/attach/5/Annex%20%20Gestdem%202017%204050%20v3.pdf>>.



c) Automated actions/Monetisation

All three systems enable rights holders to define *automated actions* that are carried out when a match between a piece of user-uploaded content and a reference file occurs. Within Rights Manager, these actions are referred to as “match actions”⁵⁶⁰, within Content ID as “match policies”⁵⁶¹ and within Audible Magic as “business rules”⁵⁶².

All three systems give users the option to “block” their copyrighted content from being viewed by the platforms’ users once it is detected. They furthermore all allow users to “monetise” the detected content, with the exception of Rights Manager for Instagram, in which no monetisation option seems to exist⁵⁶³. Monetisation means that a piece of content will remain published but a share of the revenue, which is generated through the placement of advertisements in connection with the respective content, will flow to the rightsholder. The exact share of this revenue is unclear from the companies’ public documents but seems to vary by case.

Rights Manager and Content ID additionally offer users the option to “monitor”⁵⁶⁴ / “track”⁵⁶⁵ a piece of video content. In both cases, this means that the video or image will stay public but statistics about its viewership are being shared with the rights holder⁵⁶⁶. These two systems also allow users to require a “manual review”⁵⁶⁷ before the automated action is carried out. The Right Manager, furthermore, gives users the option to place a promotional banner on matching user videos that links to a promotional destination of their choice”⁵⁶⁸.

Within all three systems, the above-mentioned automated actions can be specified with regard to specific parameters such as the user location and the duration of the detected piece of content. The specification for the user location allows rights holders, for instance, to block a piece of content for the users in one country or territory and monetise it in another⁵⁶⁹.to specify the minimum length or percentage of the overlap between an upload and a reference file that has to be reached in order for a match to be generated⁵⁷⁰. As the only system, the Rights Manager also gives user the option to authorise specific users and pages on Facebook and Instagram to post their content⁵⁷¹.

Since Audible Magic is the only system that operates on different platforms, it also gives users the option to specify the automated actions that can be performed in the platform on which the content is detected.⁵⁷²

d) Disputes and conflicts

There are different points in time at which the decisions that are made by the described systems can be seen as incorrect or problematic by its users - i.e., either the rights holders or content uploaders - and hence become subject to a dispute. The dispute processes which are covered here are all non-DMCA disputes.

The first type of dispute which can arise concerns the rejection of a user’s application to the system, i.e., an *application rejection dispute*. Neither Rights Manager nor Content ID appear to offer a formalized process for a

⁵⁶⁰ Facebook Inc., ‘Response to Questions about Rights Manager’ (n 537) 3.

⁵⁶¹ Google Inc., ‘Upload and Match Policies’ (*YouTube Help*) <<https://support.google.com/youtube/answer/107129>> accessed 4 September 2021.

⁵⁶² Audible Magic Corporation, ‘What Is a Business Rule?’ (*Audible Magic Support*, September 2020) <<https://support.audiblemagic.com/hc/en-us/articles/360051594854-What-is-a-Business-Rule->> accessed 4 September 2021.

⁵⁶³ Facebook Inc., ‘Match Rules for Instagram Content’ (*Facebook Business Help Center*) <<https://www.facebook.com/login/?next=https%3A%2F%2Fwww.facebook.com%2Fbusiness%2Fhelp%2F2207395956214446%3Fid%3D708699556338610https%253A%252F%252Fwww.facebook.com%252Fbusiness%252Fhelp%252F2207395956214446%253Fid%253D708699556338610>> accessed 4 September 2021.

⁵⁶⁴ Facebook Cooperation, ‘Match Rules in Rights Manager’ (*Facebook Business Help Center*) <<https://www.facebook.com/login/?next=https%3A%2F%2Fwww.facebook.com%2Fbusiness%2Fhelp%2F475548192814461%3Fid%3D708699556338610>> accessed 4 September 2021.

⁵⁶⁵ Google Inc., ‘What Are Policies?’ (*YouTube Help*) <<https://support.google.com/youtube/answer/107383>> accessed 4 September 2021.

⁵⁶⁶ Google Inc., ‘What Are Policies?’ (n 565); Facebook Cooperation (n 564).

⁵⁶⁷ Facebook Cooperation (n 564); Google Inc., ‘Route Claims for Manual Review’ (*YouTube Help*) <<https://support.google.com/youtube/answer/106966?hl=en>> accessed 4 September 2021.

⁵⁶⁸ Facebook Inc., ‘Response to Questions about Rights Manager’ (n 537) 4.

⁵⁶⁹ ‘How Content ID Works’ (*YouTube Help*) <<https://support.google.com/youtube/answer/2797370?hl=en#zippy=%2Cwhat-options-are-available-to-copyright-owners>> accessed 4 September 2021.

⁵⁷⁰ Google Inc., ‘Upload and Match Policies’ (n 561); Facebook Inc., ‘Customize Match Rules in Rights Manager’ (*Business Help Center*) <<https://www.facebook.com/business/help/2274387806175252>> accessed 2 August 2021; Audible Magic Corporation, ‘What Are Duration-Based Rules?’ (*Audible Magic Support*) <<https://support.audiblemagic.com/hc/en-us/articles/360045395174-What-are-duration-based-rules->> accessed 4 September 2021.

⁵⁷¹ Facebook Inc., ‘Response to Questions about Rights Manager’ (n 537) 3.

⁵⁷² Audible Magic Corporation, ‘What Can I Do with My Content after It’s Registered?’ (*Audible Magic Support*) <<https://support.audiblemagic.com/hc/en-us/articles/203786094-What-can-I-do-with-my-content-after-it-s-registered->> accessed 4 September 2021.



user to dispute the decision of being rejected access to the system. Facebook, however, has stated that rejected users can apply again after seven days and that “there is no limit on the number of times a rights holder may request access to Rights Manager”⁵⁷³. Since Audible Magic states that any type of rights holder will receive access to their system, this sort of rejection does seem to apply to their system.

The second type of dispute concerns conflicting ownership claims over a piece of content that has been registered with an automated content moderation technology – *content registration dispute*. Although the users of all systems have to confirm that they control the exclusive rights of a reference file, such ownership conflicts can arise.

Rights Manager offers a formalized and automated dispute process for this case, in which the second uploader has 7 days to file a dispute and the first uploader has 7 days to respond to it⁵⁷⁴. How the dispute is solved if the first uploader rejects the dispute is unclear. Facebook only says that “if the first publisher rejects the dispute and the second publisher feels that this is a mistake”⁵⁷⁵

YouTube’s Content ID also offers a formalized and automated process for conflicting ownership claims. Accepted users can request an “ownership transfer” from the content owner. After that, the first uploader has 30 days to accept or reject the transfer request⁵⁷⁶. What happens if the first uploader does not accept the request, is, again, unclear from the public information.

Audible Magic, on the other hand, does not offer a formalized and automated process for content registration disputes but asks users who realise that their content has already been registered with the system to contact their Helpdesk⁵⁷⁷. How exactly the process for resolving such conflicts unfolds is unclear from the public information. The company states that it would “properly investigate the issue”⁵⁷⁸ but also emphasizes that “Audible Magic does not arbitrate any ownership disputes and any conflicts must be resolved between the two parties themselves”⁵⁷⁹

The third type of dispute relates to the matches that occur in the automated moderation systems. Both Rights Manager and Content ID have built in *match dispute* processes for such cases. Since Audible Magic is not a platform itself, but instead offers a technological “solution” to different platforms, the exact implementation of a dispute process for matches that are generated through Audible Magic depends on the platform which is implementing the “solution”.

In the case of Rights Manager, the match dispute process gives the uploader seven days to file a dispute and claim that their content was erroneously matched; the rightsholder equally has 7 days to uphold the claim, release the claim or request a takedown of the video.⁵⁸⁰ After this, the user has another opportunity to appeal the decision. The final decision lays with the rights holders.⁵⁸¹

The match dispute process in Content ID is structured in an equal fashion, although it contains one more loop of back and forth and gives both parties more time to respond to the other side. Here, copyright owners have 30 days to respond after an uploader has submitted a dispute to a Content ID claim⁵⁸². The rights holder can then either release or reinstate the claim, submit a copyright takedown request (DMCA) or let the claim expire, in which case the claim will be released.⁵⁸³ If the copyright owner decides to hold onto the claim and the uploader still disagrees, she can file an appeal to the rejected dispute. Again, the rightsholder then has 30 days to either release the claim by actively agreeing with the appeal or by doing nothing, or to immediately request the takedown of a video under DMCA rules, or schedule a takedown request, which gives the uploader the chance

⁵⁷³ Facebook Inc., ‘Response to Questions about Rights Manager’ (n 537) 2.

⁵⁷⁴ Facebook Inc., ‘Address Ownership Conflicts in Rights Manager’ (*Business Help Center*) <<https://www.facebook.com/business/help/840557212788102>> accessed 2 August 2021.

⁵⁷⁵ Facebook Inc., ‘Address Ownership Conflicts in Rights Manager’ (n 574).

⁵⁷⁶ Google Inc., ‘Resolve Ownership Transfer Requests’ (*YouTube Help*) <<https://support.google.com/youtube/answer/7669195>> accessed 4 September 2021.

⁵⁷⁷ Audible Magic Corporation, ‘Content I Own the Rights to Is Being Blocked?’ (*Audible Magic Support*) <[https://support.audiblemagic.com/hc/en-us/articles/360051594954-Content-I-own-the-rights-to-is-being-blocked->](https://support.audiblemagic.com/hc/en-us/articles/360051594954-Content-I-own-the-rights-to-is-being-blocked-) accessed 4 September 2021.

⁵⁷⁸ Audible Magic Corporation, ‘Content I Own the Rights to Is Being Blocked?’ (n 577).

⁵⁷⁹ Audible Magic Corporation, ‘Content I Own the Rights to Is Being Blocked?’ (n 577).

⁵⁸⁰ Facebook Inc., ‘Resolve Usage Disputes in Rights Manager’ (*Business Help Center*) <<https://www.facebook.com/business/help/2523148971045474>> accessed 9 August 2021.

⁵⁸¹ Facebook Inc., ‘Resolve Usage Disputes in Rights Manager’ (n 580).

⁵⁸² Google Inc., ‘Dispute a Content ID Claim’ (*YouTube Help*) <<https://support.google.com/youtube/answer/2797454?hl=en>> accessed 4 September 2021.

⁵⁸³ Google Inc., ‘Dispute a Content ID Claim’ (n 582).



to cancel his appeal within 7 days and thereby avoid a copyright strike⁵⁸⁴. In any case, and analogously to Rights Manager, the user identified as the rights holder has the final word on the process.

e) Business model

In terms of the three systems' business models, Rights Manager and Content ID have so far not been offered as a product and seem to have been developed by Facebook and YouTube for their internal use only. Yet, automated copyright content moderation systems might financially benefit these companies enormously. For they can diminish the companies' legal exposure, incentivise rights-owners to maintain their content in the platform, and help attract creators that might be interested in monetising their content. The primary target group/customers for these systems, i.e., users of Rights Manager and Content ID are thus content creators on Facebook and YouTube.

Audible Magic stands out as the only service we examined that appears to sell its technology as a product. The company functions as an intermediary between rights holders and platforms and has sold its technology to a range of the most important platforms including Facebook, Vimeo and Soundcloud⁵⁸⁵, as we noticed before. Besides platforms, the company is also offering its system to other customer groups such as music aggregators and distributors, and social media teams who want to check their posts for copyright infringement.

Besides the actual content recognition technology, Audible Magic furthermore offers to conduct licensing and back-office operations such as processing royalty payments for rights holders and platforms. The service is hence looking to offer a "one-stop-shop solution for digital service providers and UGC hosting platforms looking to manage copyrighted content" which encompasses licensing, rights management, and royalty administration as well as industry-leading content identification services."⁵⁸⁶

5.3 Case study: Facebook Inc.'s Rights Manager

After providing an overview of the three main systems developed and employed by social media platforms to automatically identify, block and monetise copyright infringing content, we offer in this Section a detailed analysis of one of those systems – Rights Manager. As explained above, Rights Manager was launched in April 2016 by Facebook Inc.⁵⁸⁷ and has since been deployed on both Facebook and Instagram platforms. As Table 39 and Table 40 above suggest, Rights Manager is not radically different from Google's Content ID, and retains several common traits with Audible Magic's technology. At the same time, despite its enormous importance, it remains, at the time of the writing (August and September 2021), essentially unstudied. Hence, our decision to use it as a case study.

Our analysis looks into the four macro-processes outlined above: (i) *Application and content registration* (Who can access Rights Manager? What are the eligibility criteria? Which kind of content can be registered?); (ii) *Identification and matching* (How does Rights Manager find a match? What are the matching criteria?); (iii) *Automated actions* (Which actions can be specified to be carried out after a match occurs?); and (iv) *Disputes and conflicts* (How do conflicts of content ownership get resolved? Who has the last call in an ongoing dispute?). Each of these three macro processes consists of different sub-processes and can lead to different outcomes. This description aims not only to deepen and complement the information offered above but also to enable a consideration of the politics behind Rights Manager's main characteristics. By "politics" we mean the particular asymmetries between rights holders, regular users and platforms that stem from decisions on who can use Rights Manager, which content it protects, how the matching happens, and the possibility of dissenting and appealing.

⁵⁸⁴ Google Inc., 'Dispute a Content ID Claim' (n 582).

⁵⁸⁵ Audible Magic Corporation, 'Customers and Partners' (*Audible Magic*) <<https://www.audiblemagic.com/customers-partners/>> accessed 4 September 2021.

⁵⁸⁶ Audible Magic Corporation, 'Audible Magic's Acquisition of MediaNet's Business FAQ' (*Audible Magic Support*) <<https://support.audiblemagic.com/hc/en-us/articles/360061786813-Audible-Magic-s-Acquisition-of-MediaNet-s-Business-FAQ>> accessed 4 September 2021.

⁵⁸⁷ Facebook Inc., 'Introducing Rights Manager' (n 520).



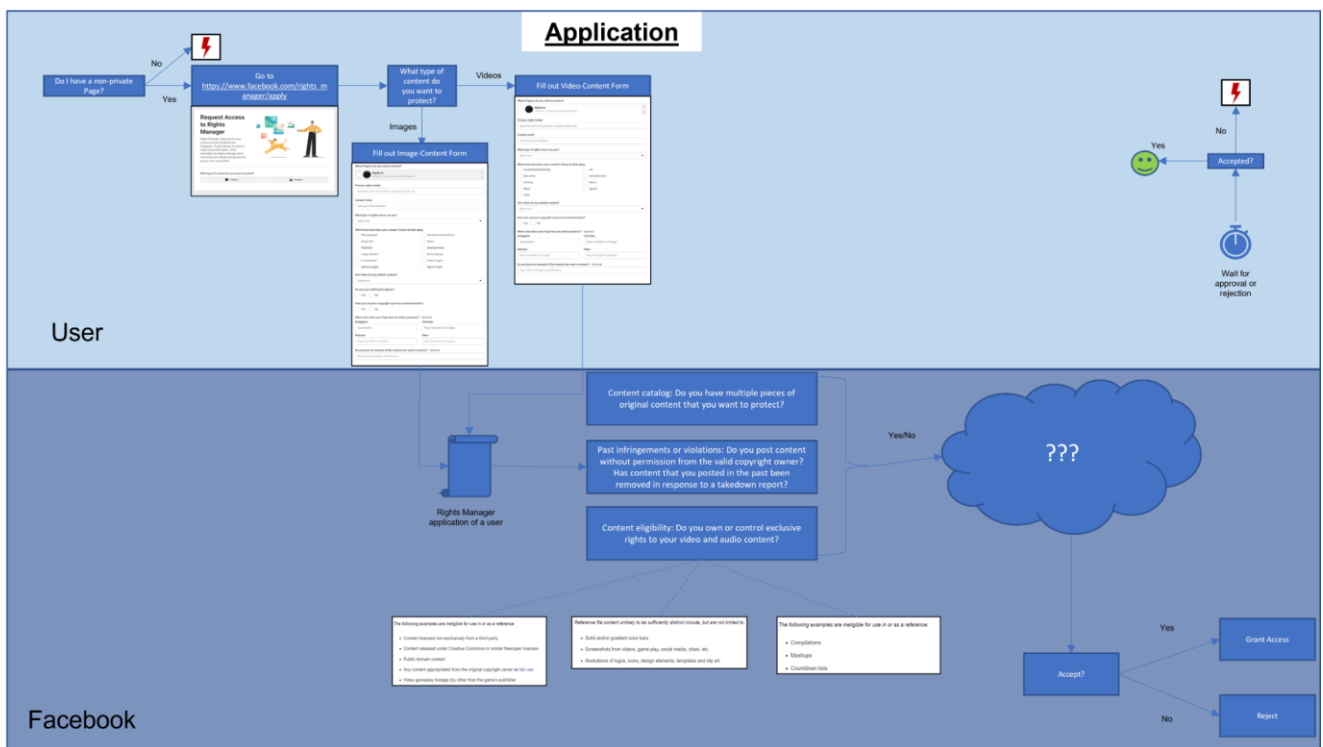


Figure 37. Diagram of Rights Manager's application process, as of September 2021. Source: Authors.

5.3.1 Application and content registration

As mentioned above, Rights Manager is not open to everyone. In order to be able to upload content to and benefit from the system, individuals and organisations must submit an application through which the company will allegedly “[...]verify that you [the applicant] have rights to enforce on Facebook and Instagram.”⁵⁸⁸ so as to grant access to Rights Manager. Figure 37 depicts our reconstruction of the Rights Manager application, which is composed of two main subprocesses: submission of application and decision on application.

5.3.1.1 Submission of application

In order to be able to access the application form, the applicant must, firstly, have a non-private page on Facebook. Without such a page, the application is materially impossible. Put another way, to be a user of Rights Manager one needs to be not a mere user of Facebook but a user who defines herself as “business”, “brand” or a “public figure” – the categories that Facebook itself establishes as applying to non-private pages⁵⁸⁹. All content that is uploaded to Rights Manager must be linked to this page.

If the applicant already controls a page, or once such a page is created, two application forms exist: 1) an application form for image content and 2) an application form for video content. There is no application form that includes both types of media and since the application form forces the users to choose between “video” and “image”, it is not clear if applications for both types of content get treated as two different applications or as only one. Both forms have some common and some content specific form fields (see Annex IV). While some categories seem necessary (“type of rights owner”, “type of content”) others are less obvious (e.g., “how often” the applicant publishes content and whether the application has “issued a copyright report on Facebook before”). No explanation is given as to why the latter information is required, and how Facebook uses it to arrive at a decision on the application. It is also notable that at no moment the applicant is required to provide any material evidence of their rights over the content she claims to be hers. The field “Do you have an example of the content you want to protect?”, for instance, is optional.

⁵⁸⁸ Facebook Inc., ‘Rights Manager Eligibility’ (n 525).

⁵⁸⁹ Facebook Inc., ‘Create a Facebook Page for Public Figures’ (*Facebook for Business*, 2021) <<https://en-gb.facebook.com/business/learn/lessons/create-facebook-page-public-figure>> accessed 2 August 2021.



5.3.1.2 Decision on application

After filling the form, the applicant must submit the application which Facebook says is judged according to three criteria:

- “Content eligibility: Do you own or control exclusive rights to your video and audio content?”
- Content catalog: Do you have multiple pieces of original content that you want to protect?
- Past infringements or violations: Do you post content without permission from the valid copyright owner? Has content that you posted in the past been removed in response to a takedown report?”⁵⁹⁰

A first observation regards the apparent disconnect between the information that the applicant is expected to submit when applying for Rights Manager and these criteria. It is unclear how Facebook can accurately answer these questions based only on the information provided in the application form that we have just described (see Annex IV). Information on content ownership and catalogue size is entirely self-reported – on which basis can Facebook decide they are not lying? The issue of past infringements, in turn, is nowhere to be found in the form. The only element of the form that touches on infringements seems to concern alleged infringements of the applicants’ own copyrights (“Have you issued a copyright report on Facebook before?”). The chasm between what is required during the application and what is allegedly taken into consideration when judging such an application suggests that Facebook might independently look for information, and the application form might not be as relevant as it initially appears to be.

Second, it is important to underscore how vague the explanation about these criteria is in the documents we analysed. Facebook’s own pages (including the business Help pages for the Rights Manager eligibility⁵⁹¹ and the Rights Manager’s Terms or Service⁵⁹²) do not present any further information regarding “content catalogue” and “past infringements or violations”, which leaves important questions unanswered. Examples: Does the expression “multiple pieces of original content” imply numerical thresholds that must be met by an applicant? If so, what are these thresholds? Do they vary depending on who the applicant is and the content she aims to protect? Does Facebook independently check whether the applicant has posted copyright infringing content? Do these infringing posts refer to Facebook and Instagram only – or do they encompass other platforms, such as YouTube?

In the case of “Content eligibility”, however, Facebook is a bit more specific. It provides three categories with examples of what constitutes eligible content. They are:

- Exclusive Rights: “When you use Rights Manager, you acknowledge that your organization owns or controls exclusive rights to the reference files you upload to Rights Manager for the applicable territories.”⁵⁹³

Examples of content which does not meet the exclusive rights criterion are non-exclusively licensed third-party content, open or free licensed content like those under a Creative commons license, video game footage which is not distributed by the publisher of the video game itself, as well as those in the public domain.

- Distinct reference content: “Your reference files must be sufficiently distinct from other reference files. It must be visually and audibly unlike other content.”⁵⁹⁴

Facebook provides some examples of not “sufficiently distinct” content: Solid or gradient colour bars, screenshots from videos, game play, social media or chats, illustrations of logos, icons, design elements, templates and clip art.

- Individual references: “You must provide individual references for each piece of intellectual property.”⁵⁹⁵

This restriction affects compilations, mashups and countdown lists. For these, the content uploader has to specify which pieces they hold (or not) copyright over. For instance, when submitting a compilation of ten video clips, of which the uploader created only two, eight must be excluded from Rights Manager protection. The same applies to the music of the video.

In order to better understand this first macro process, we also submitted a test application to Rights Manager Facebook’s response further highlighted the considerable opacity of the application procedures. Figure 38 below shows the rejection email we received, less than 12 hours after the application submission.

⁵⁹⁰ Facebook Inc., ‘Rights Manager Eligibility’ (n 525).

⁵⁹¹ Facebook Inc., ‘Rights Manager Eligibility’ (n 525).

⁵⁹² Facebook Inc., ‘Rights Manager Terms’ (11 November 2020) <https://www.facebook.com/copyrights_terms> accessed 2 August 2021.

⁵⁹³ Facebook Inc., ‘Content Eligible for Reference Files’ (n 534).

⁵⁹⁴ Facebook Inc., ‘Content Eligible for Reference Files’ (n 534).

⁵⁹⁵ Facebook Inc., ‘Content Eligible for Reference Files’ (n 534).



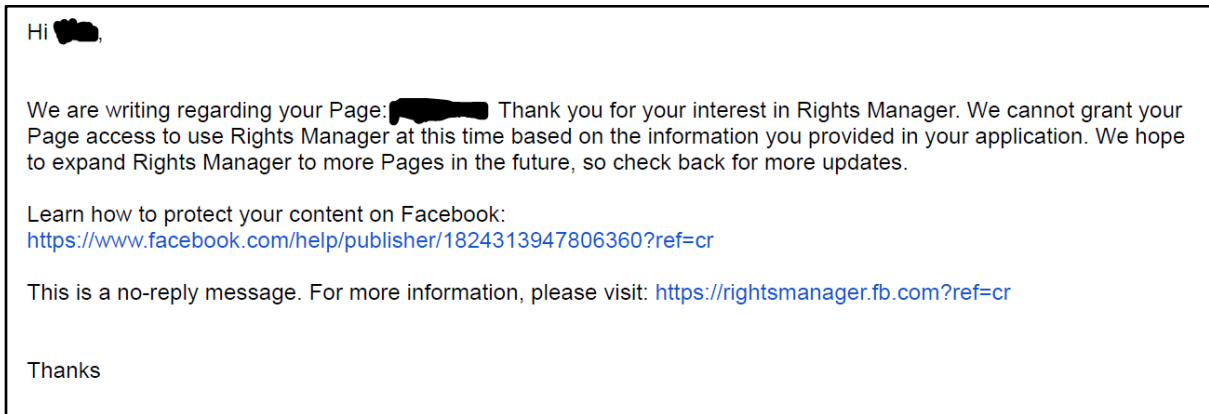


Figure 38. Screenshot of our application rejection e-mail from Rights Manager, with personal details redacted. Source: Authors

The non-reply message says that Facebook could not “grant access to use Rights Manager at this time based on the information you provided in your application” but raises the hopes that, “in the future”, Rights Manager could be expanded to “more Pages”. This terse and explanation can hardly explain the basis of the rejection: which “information” was taken into account (or was missing) is unclear. Also, if the application was rejected “at this time”, what would be needed to get accepted in the future? Meanwhile, the message seems to assign a central role to the applicant’s pages, about which Facebook might have much more information than that which was explicitly required in the forms. Furthermore, it is unclear how exactly the company arrives at these decisions. Given Facebook’s widespread reliance on automation and how relatively quickly the rejection was sent, it is also reasonable to suppose that algorithmic and perhaps machine learning systems are involved in the application decision. Facebook, however, has highlighted that “a team of trained professionals” is evaluating the application requests⁵⁹⁶.

5.3.2 Identification and matching

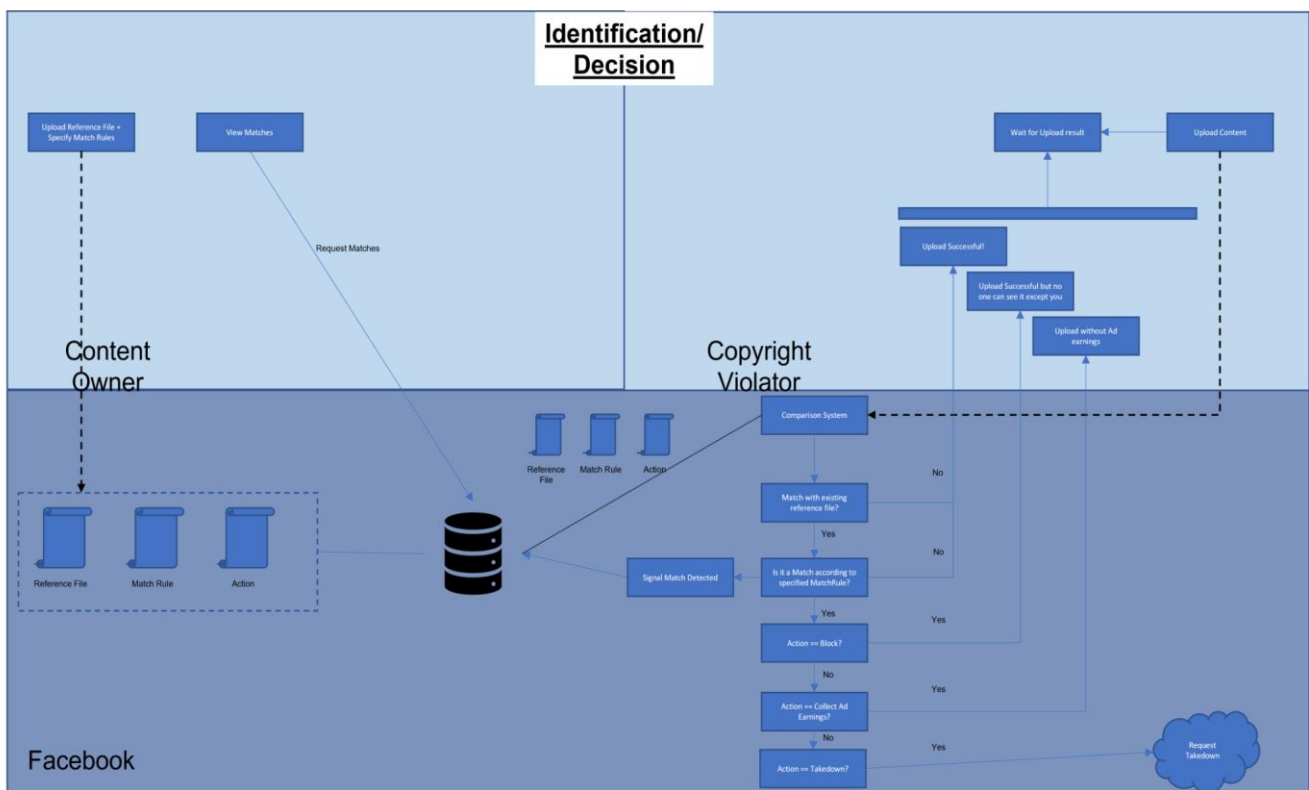


Figure 39. Diagram of Rights Manager’s copyright violation identification and action processes, as of September 2021. Source: Authors.

⁵⁹⁶. Facebook Inc., ‘Response to Questions about Rights Manager’ (n 537) 2.



In this section we describe the second macro-process mentioned above: how Rights Manager can be used to protect original content and how the relations between two parties (reference file uploader and content uploader) work. This macro-process is composed of four sub-processes (see Figure 39): reference file upload, specification of match rules, specification of actions; and the actual matching.

5.3.2.1 *Reference file upload*

Once applicants have access to Rights Manager, they can formally establish their ownership over content within the system by uploading what Facebook calls “a reference file”. The reference file is used by Rights Manager for the comparison with new content uploaded by other users. If the newly uploaded content is considered to be “sufficiently” similar to a reference file, it is marked as a *match*. Thus, in principle, the individual or organization who uploads a given content file as part of her reference file is, from the Rights Manager perspective, the owner of the content. (Disputes for reference file ownership and matches exist, though; they will be described in the next section.) A reference file must be eligible and can include images or videos. For videos, parts of the file can be excluded from the reference file. For example, an uploaded video with a length of five minutes might contain only three minutes of content that should be protected by Rights Manager. It is unclear whether there is a limit to the number of files that can be uploaded.

5.3.2.2 *Specification of match rules*

Once a reference file is successfully uploaded, users can specify what constitutes a match, under four general “dimensions” pre-established by Facebook: 1) “User dimension”; 2) “Geographical dimension”; 3) “Comparative dimension”; and 4) “Content dimension”⁵⁹⁷.

Let us unpack each of these “dimensions”. According to the user dimension, (1) a reference file uploader can authorise specific pages or accounts to use the content of the reference file. Further, geographical regions (2) can be included/excluded for viewers. Per the comparative dimension (3), reference file uploaders can specify the temporal overlap between the reference file and an uploaded content that will constitute a match, which in practice is a way of enabling copyright exceptions. For example, copyright owners might allow others to use parts of their video if their posts are not longer than 10 seconds. The content dimension (iv) only applies to videos and live videos. Here, a reference file uploader can specify whether they want to protect only the image or also the audio of their content. For example, if a user creates a video and adds background music from another artist, the user must exclude the audio when she uploads the video to Rights Manager since she does not hold the copyrights for the song but only for the video.

In sum, reference file owners can calibrate with some precision to what extent, where and who can use their content. Note that these rules do not only apply to public postings but also to private and/or restricted postings. Thus, the match rules enable copyright enforcement in areas where a user with no access rights to Rights Manager would not even notice copyright violations. Furthermore, the insights tool of Rights Manager enables precise calibration of too strict or too loose match rules (next to the effect of the applied actions).

5.3.2.3 *Matching*

Once the match rules and the automated actions, which are discussed below, are specified, Rights Manager system checks every new upload according to those parameters and automatically takes action. Users whose upload triggers a match with a reference file have the option to dispute the match. We will discuss the dispute processes in Section 5.3.4. Unfortunately, Facebook does not provide any information about the technical workings of the matching algorithm, data encoding or accuracy of the system.

5.3.3 Automated actions/Monetisation

The last step to achieve a Facebook-Instagram-wide copyright protection of a reference file regards the specification of automated actions in case a match occurs. Five different actions are possible, all predefined by Facebook on a user interface⁵⁹⁸: (1) “Collect Ad Earnings”, i.e., monetisation for video content: the matched content can stay public but the reference file owner will collect earnings from advertisements linked with the content, although very few details are given – e.g., the exact share of the earnings due to rights holders is unclear;

⁵⁹⁷ Facebook Inc., ‘Customize Match Rules in Rights Manager’ (n 570).

⁵⁹⁸ Facebook Inc., ‘Actions for Matching Content in Rights Manager’ (*Business Help Center*) <<https://www.facebook.com/business/help/1171020569731957>> accessed 2 August 2021.



(2) “Monitor”: a video or image stays public but the reference file owner receives information about how it is performing; (3) “Block”: This prevents other users from viewing the matched content; (4) “Manual Review”: Lists the matching content in a separate “tab” for 30 days so the rights holder can decide on further actions; (5) “Takedown”: Request a takedown of the matching content. The difference between “Takedown” and “Block” is that a blocked video can still be viewed by the administrator of the uploader page. A “Takedown”, on the other hand, is the deletion of the content from Facebook or Instagram – with the exception of the Rights Manager’s database, of course. Another option, which is explained in a different webpage than that of the first five possibilities, involves creating and displaying an “ownership link” on a matching video⁵⁹⁹. The “ownership link” which is displayed on a banner on the matched user video can link to a promotional destination of the rights holders’ choice ⁶⁰⁰. For example, a reference file owner can flag content for monitoring and at the same time collect the ad earnings.

5.3.4 Disputes and conflicts

The fourth and last macro-process involves situations in which an individual or organisation does not agree with a Rights Manager’s decision and then files a dispute. Two types of disputes, which are treated here as sub-processes, seem to exist: an upload dispute and a match dispute.

5.3.4.1 Content registration dispute

First, conflicts might happen at the moment of registering content, i.e., the reference file upload. This occurs when an upload is rejected because the uploaded file is too similar to an existing reference file. In this case, Facebook places the two parties in contact with each other. Figure 40 shows the dispute process for this scenario, which is embedded in Rights Manager.

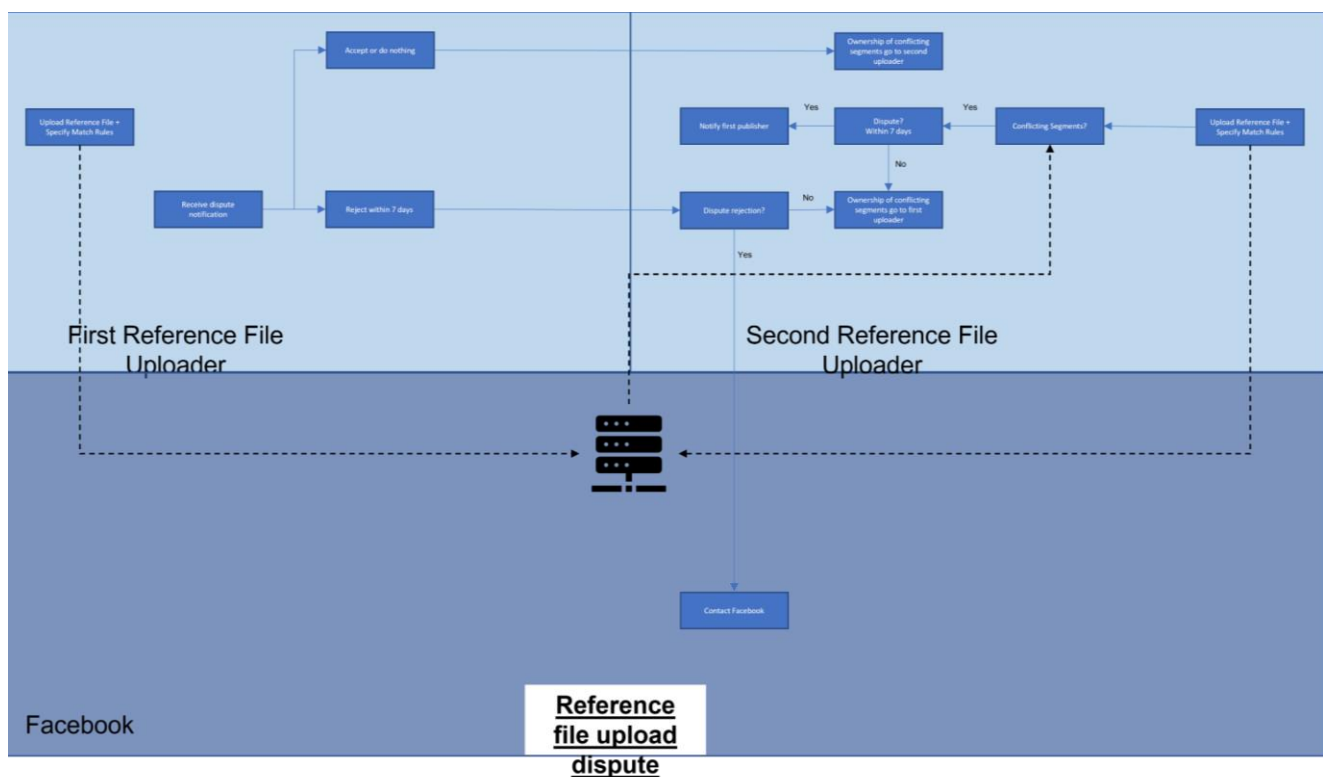


Figure 40. Diagram of Rights Manager’s dispute process between two reference file uploaders, as of September 2021. Source: Authors.

If a reference file upload is rejected on these grounds, the second uploader can start the dispute process within 7 days⁶⁰¹. The first reference file uploader has then the option to reject the dispute within 7 days, a unilateral decision that the second uploader does not appear to be able to appeal. During the dispute, the reference file of the second uploader will stay offline and will not be used to find matches on Facebook and Instagram. (It is unclear what happens with the eventual monetisation of the file during this dispute.) However, if the first

⁵⁹⁹ Facebook Inc., ‘Ownership Links in Rights Manager’ (Facebook Business Help Center) <<https://www.facebook.com/business/help/528858287471922>> accessed 2 August 2021.

⁶⁰⁰ Facebook Inc., ‘Response to Questions about Rights Manager’ (n 537).

⁶⁰¹ Facebook Inc., ‘Address Ownership Conflicts in Rights Manager’ (n 574).



reference file uploader does nothing within 7 days or accepts the dispute, the rights over the disputed content are assigned to the second reference file uploader. Again, no information is given on whether the first uploader can appeal this decision, e.g., in case the user accidentally missed the rejection deadline.

5.3.4.2 Match dispute

Second, the dispute might happen when a user uploads a piece of content to Facebook or Instagram and it is flagged as a match with an existing reference file. Since two pieces of content might be very similar but not a copyright violation, the content uploader has the option to dispute the match. Figure 41 depicts the process within Rights Manager/Facebook/Instagram to resolve those conflicts.

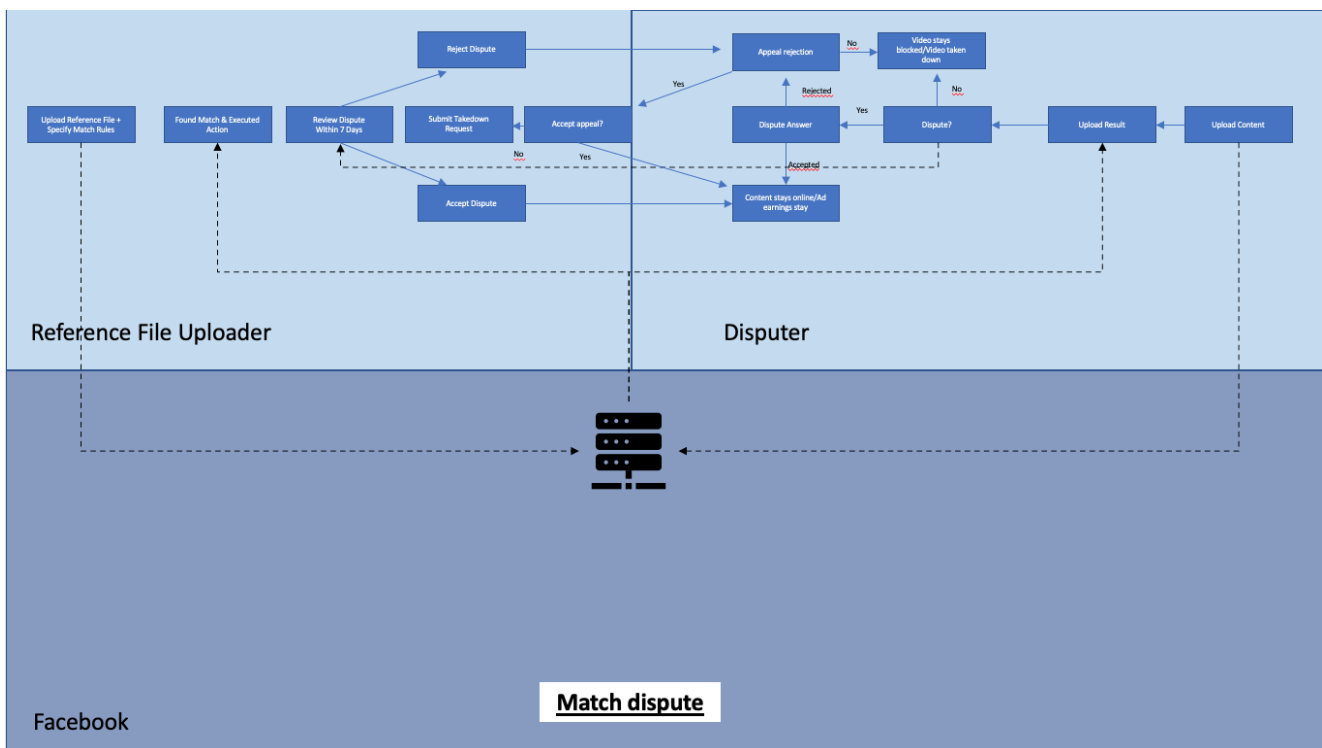


Figure 41. Diagram of Rights Manager’s process between reference file owner and content uploader. Source: Authors.

As with the content registration dispute, the match dispute has to be filed within 7 days by the content uploader. The reference file owner then has 7 days to reject the dispute in which case the automated action (Block, Monetise, etc.) stays⁶⁰². If the decision stays, the user can file an appeal in which case one has to “provide more information and justification” for the appeal⁶⁰³. In the final round, the rights holder has another chance to respond and can either release the claim or submit a takedown request⁶⁰⁴. The information about the appeals process was provided by Facebook directly to us but is not present in the publicly accessible documents about Rights Manager.

5.4 Discussion

Whilst the empirical findings presented are, by themselves, the main elements of the mapping exercise this Chapter set out to do, they also support two interrelated conclusions on how platforms’ copyright content moderation structures have emerged, changed and consolidated in the past 20 years. We name them *complexification & opacification* and *platformisation & concentration*. The rest of this section outlines these two dual processes, pointing out how different kinds of platforms experienced them.

⁶⁰² Facebook Inc., ‘Resolve Usage Disputes in Rights Manager’ (n 580).

⁶⁰³ Facebook Inc., ‘Response to Questions about Rights Manager’ (n 537) 6.

⁶⁰⁴ Facebook Inc., ‘Response to Questions about Rights Manager’ (n 537) 6.



5.4.1 Complexification and Opacification

First, *platforms' copyright content moderation structures became much more complex and opaquer over time*. This is perhaps the clearest conclusion of our analysis and can be observed from several analytical perspectives.

In terms of rules, complexification is everywhere. It is apparent in the steep increase in the number of kinds of documents, the progressive diversification in the normative types and subjects of rules, as well as the exponential growth of the very number of rules that platforms used to govern content in relation to copyright. These conclusions seem valid in both the normative and discursive senses – that is, mentions to rules also increased, often enormously so (e.g., SoundCloud's). Broadly speaking, a social media user in 2020 would have to navigate a considerably more intricate web of provisions, dispersed over many more documents and pages, than a user from the early 2000s, for instance. In the case of some platforms, such as Facebook and SoundCloud, complexification also includes the very pace of change and number of normative periods. And, yet, complexification of rules is, in some instances, still insufficient. Consider for instance how some platforms' framework still lacks a clear explanation of several aspects of copyright content moderation, such as how to appeal content removal decisions.

Whilst our analysis on automated copyright content moderation systems was not longitudinal, the appearance and eventual centrality of these systems point to a central moment in this complexification. Products such as Rights Manager, Content ID and Audible Magic's fingerprinting technologies contain their own form of complexity, which compounds that of rules. There is of course the technical sophistication of algorithmic fingerprinting, and of the auxiliary computational processes that it depends on (data collection, processing etc). But what our examination of these systems unveils is that their intricacy is also strongly associated with other macro processes which are hardly examined in the critical scholarship on these systems and cannot be reduced to fingerprinting itself. Consider the application process for Rights Manager, which involves a puzzling disconnect between the information required during submission and the (vague) eligibility criteria that supposedly informs a decision on access granting, as well as the apparently random ways in which users can or cannot appeal this system's rulings, for example.

Complexification is also useful to further problematize these systems. Often, they are simply called "copyright filters". This term might seem intuitive. However, singling out computational filtering procedures can be misleading, our analysis highlights. Those systems might in fact be defined as composed of various sorts of human and non-human resources (fingerprinting processes, data, rules, users' actions, interfaces), which are organized into multiple macro- and sub-processes, many of which do not appear to involve fingerprinting algorithms at all.

This is not to say complexification is not necessary – indeed, it is almost impossible to think of how a 2-billion-user platform like Facebook can function without a level of complexity that is naturally incomprehensible to individuals. What makes complexification troubling is its entanglement with opacification, which our research made quite clear. When copyright content moderation 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, or dispersed into several documents that the user might not even be aware of, it is expected that users might have a harder time finding, knowing and understanding these provisions. The pace of changes also present 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? It is worth noticing that opacity might also be produced when rules are lacking, or their wording is too vague or generic. We have found some evidence of the former possibility when discussing platforms' normative periods; the latter aspect would demand a much more thorough discursive analysis of platforms' T&Cs, what this Chapter did not carry out.

An acute lack of transparency is also a defining trait of automated content moderation systems, and this is true not only to algorithmic fingerprinting. Consider the application for the Rights Manager system, for instance. Users are not informed what, after all, means a "sufficiently" distinct content and how many pieces of content they might need to have in order to be eligible. Regarding the matching itself, it is not clear what thresholds of similarity lead to a match, what the accuracy of the system is and if the system can be tricked by adversely manipulating the speed and/or pixels of video and image files.

While some level of complexification can be observed in all platforms of our sample, this process unfolded differently in distinct services. The copyright content moderation structures of mainstream and audio-visual specialised services appear to have become much more complex over time than those of alternative services. The latter have fewer rules, which concern fewer subjects through fewer normative types, and are explained in a smaller number of documents. Yet even Diaspora, one of the simplest platforms of our sample, experienced some complexification, as the very decision to publish a set of copyright content moderation rules demonstrates. Tellingly, no platform's copyright content moderation we analysed became *less* complex over time. Meanwhile, alternative services do seem to be much less opaque: they have fewer rules and kinds of documents, and do not seem to use automated systems. This might appear encouraging – but it is also hardly replicable. Alternative



services' structures do not appear to be a viable model for larger services, with a whole different set of expectations and needs (e.g., content moderation at scale). Whether the same conclusion applies to blockchain-based monetisation systems, such as that of DTube, is unclear. This element, which this Chapter described only cursively, might demand much more scholarly attention.

Complexification and opacification indicate that platforms' structures of copyright content moderation go way beyond the relatively straight-forward notification-and-take-down procedure. The largest and arguably most important services are engaged in a multi-layered process which are based on dozens of ever-changing rules fragmented into shape-shifting documents, and often determined by automated systems whose workings and protocols are essentially hidden from users' view and shielded from their actions. In the smallest platforms, structures usually encompass mostly a set of some rules, which have however grown (or at the very least emerged) over the years.

5.4.2 Platformisation and Concentration

Second, *platforms' role in copyright content moderation became more important over time (platformisation), leading to a concentration of decision-making power and deepening inequalities between platforms/large rights holders and ordinary users/creators (what we call concentration)*. Platformisation and concentration are to some extent a by-product of complexification and opacification.

Generally, platformisation might be defined as “the penetration of the infrastructures, economic processes, and governmental frameworks of platforms in different economic sectors and spheres of life”⁶⁰⁵. This resonates with the empirical findings presented in this Chapter. Over time, platforms' copyright content moderation rules shifted power and responsibility to themselves; the emergence and widespread adoption of automated systems consolidated this process by enacting a normative framework that functions at the margins of – albeit not fully independently from – external legal frameworks. The structures of copyright content moderation, initially almost exclusively reliant on laws such as the DMCA, were progressively expanded towards and conflated with platform's logics, technologies and interests -- including that of serving large rights holders.

Consider the changes in rules we examined above. Typically, these provisions were initially characterized by a focus on users' self-regulation: they were expected to be sure that their actions would violate others' copyright (including platform's). Over time, however, platform-oriented rules, such as platform's obligations and rights, 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. This is particular true in relation to the two mainstream platforms we examined in depth (Facebook and SoundCloud) but is also visible in the case of PornHub (which saw an increase in the percentage of platform's rights) and FanFiction (whose proportion of platform's obligation experiences a considerable growth). In relation to alternative services, Diaspora's framework also focusses heavily on these obligations; DTube appears to be an exception, though, as most of their provisions concern users' rights and duties.

Platformisation does not mean that platforms have unambiguously embraced their controller role, which entail costly responsibilities and the possibility of accountability. In fact, platforms seem to have attempted not to attract much attention to their own new powers. Discursively, as we have shown in relation to Facebook and SoundCloud, for instance, the focus remained on users – their obligations and need to self-regulate. Moreover, these mainstream platforms tried, as much as possible, to remember users that they were expected to try to solve disputes on their own. The progressive restrictions imposed by these large platforms on the possibility of reporting copyright might also be understood as an attempt to relieve the administrative and legal burdens created by platformisation – without diminishing their powers in any real way.

Indeed, this power became more and more concentrated. The very fact that essentially all companies could expand the number of rules as they wished, following their own needs and logics, is evidence of that. But concentration means more than centralization of the control levers on the hands of platforms. It might be also described as the deepening of the chasm between ordinary users/creators *and* platforms/large rights holders.

Automated copyright content automated systems are key to cement these inequalities. This is obvious when one think of platform's ability to decide unilaterally the factors that underpin algorithmic fingerprinting – and, then, intentionally hide these factors from their publicly-available documents. But arguably as worrying as this are the high entry barriers instituted by platforms (in the case of Content ID and Rights Manager, for instance), which in practice prohibit ordinary users/creators to even enjoy these systems' (alleged) technical sophistication. That the first uploader can have the upper hand during disputes, as we noted in regard to Rights Manager, might make these barriers more harmful, as cultural industry actors might be much more attentive to copyright issues

⁶⁰⁵ Thomas Poell, David Nieborg and José van Dijck, 'Platformisation' (2019) 8 Internet Policy Review <<https://policyreview.info/concepts/platformisation>> accessed 18 February 2022.



than individual creators and ordinary people and, thus, more likely to upload disputable content to these systems. This is not to mention the diminished and poorly explained possibilities of disputing and appealing the decisions of these systems, which of course aggravate said unbalance.

Content upload restrictions are also a prominent evidence of power concentration in the context of copyright content moderation. In the case of Rights Manager, these restrictions appear at least partially linked with Facebook Inc.'s desire to keep the digital processes within their system simple and reduce possible disputes or unrightfully claimed copyrights of open intellectual property. However, in trying to avoid the submission of contents whose ownership is debatable, this sort of ex ante regulation precludes legitimate content from being protected. Logos, icons and design elements are not necessarily infringing. In fact, they constitute one of the best earning jobs on platforms such as Fiverr.⁶⁰⁶ The same arguably applies to video game-related content. Moreover, upload restrictions may end up artificially inflating any conclusion about how effective Rights Manager's fingerprinting is, even if this was not Facebook's intention. Inflated figures can have consequences to how the system is seen or not as legitimate by users, designers and policymakers. It is also unclear why Rights Manager only protects videos and images, and not, say, texts.

Final evidence of the disproportions between ordinary users/creators and platforms/large rights holders is the almost complete absence of copyright exception rules in the normative frameworks of the companies we analysed. The absence is so ample that it is actually hard to measure it, or to assess its evolution. Even alternative platforms, which in principle could be more open to doctrines such as fair use, appear to be silent about exceptions in their T&Cs.

5.5 Interim Conclusions

This Chapter mapped out the differing structures that mainstream, alternative and specialised social media platforms' employ to enact copyright content moderation. Zooming in on two prominent kinds of structures (the rules communicated in public documents and automated systems of enforcement) we showed that these structures make up normative, discursive and material frameworks that, complex and opaque, concentrate power in the hands of both platforms and large rights holders.

Lastly, let us tentatively note that legislation does not appear to be the determining factor in the evolution of platform's copyright content moderation structures. Surely, law is a necessary background element of the structures we studied, and as such have had almost certainly a continuous and diffuse effect on platforms' calculations, internal deliberation, decisions and actions. Yet the *distinct* trajectories of the platforms we studied were clearly not determined by the law alone. Not only because all platforms we analysed are roughly regulated by the *same* legislative frameworks but also because it seems hard to establish clear consistent causal links between the myriad shifts we identified and the legislative and case law developments in the area of copyright regulating these platforms over the past two decades. Our methodological choices do not allow us to answer conclusively what is, after all, associated with those differing developments. But size (very large platforms have much more complex copyright content moderation structures, and apparently have changed these structures much more often, than small ones) and main type of content (audio-visual platforms clearly put much more effort into their attempt to prevent copyright violations) seem to be at least as important as economic and governance models – one of the assumptions we had when we decided to include alternative platforms in our sample. The importance of those components is likely associated with the public and business pressures that having a very large number of users bring about, and the need to deal with large right holders in the movie and music industries, which have historically been particularly aggressive (and resourceful) in their attempts to enforce and defend their copyrights. As noted in Chapter 3, these elements are also key considerations in the legal assessment of the liability and copyright content moderation obligations of platforms in the context of EU copyright law (both in the context of CJEU case law on art. 3 InfoSoc Directive and in the scheme of art. 17 CDSM Directive), as well as in the broader context of platform regulation (e.g., as regards the asymmetric due diligence obligations in the DSA proposal).

⁶⁰⁶ fiverr.com, 'Freelancers on Fiverr Have Earned Over 2 Billion Dollars' (25 May 2021) <<https://investors.fiverr.com/press-releases/press-releases-details/2021/Freelancers-on-Fiverr-Have-Earned-Over-2-Billion-Dollars/default.aspx>> accessed 9 August 2021.



6. Conclusions

This 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 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 into public documents?
- SQR (5): Which copyright content moderation rules do different platforms employ to regulate copyright, and how have they changed over time?
- SQR (6): How do platforms' automated copyright content moderation systems work?
- SQR(7): How are the various elements of the regulatory framework and the online platforms' Terms and Conditions 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. The analysis clarifies our terminology, distinguishes between platforms governance and regulation, elucidates the concept of online platform that anchors our analysis, and positions our research in the context of regulation “of”, “by” and “on” platforms. In this respect, our legal analysis focuses on the regulation “of” platforms and our empirical analysis on a subset of the regulation “by” platforms, mainly their T&Cs. Regarding the latter, an effort is made to clarify the meaning of the structures of copyright content moderation that underpin our analysis. The chapter further advances a working definition of “copyright content moderation” as 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 T&Cs, 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. Finally, we outline a possible approach to define access to culture for purposes of content moderation, highlighting the descriptive and normative dimensions of the concept.

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. The chapter starts with an analysis of the baseline regime from which art. 17 CDSM Directive departs from, which we call the pre-existing *acquis*. EU law has been subject to a high level of harmonization stemming from many directives on copyright and related rights, the interpretation of which is determined by the case law of the CJEU. In particular, the legal status of copyright content moderation by online platforms under this regime is mostly set by the Court's interpretation of arts 3 and 8(3) InfoSoc Directive – on direct liability for communication to the public and injunction against intermediaries – and arts 14 and 15 e-Commerce Directive – on the hosting liability exemption and the prohibition on general monitoring obligations. We explain this case law and its implications for platform liability and content moderation obligations up to its most recent instalment in *YouTube and Cyando*, and how developments contributed to the proposal and approval of art. 17 CDSM Directive.

The heart of the analysis in this chapter is the complex legal regime of art. 17 CDSM Directive, which we carry out in light of existing scholarship, the Commission's Guidance, and the AG Opinion in Case C-401/19. Our analysis sets out in detail the different components of this hybrid regime, including the creation of a new legal category of “OCSSPs”, the imposition of direct liability on OCSSPs for content they host and provide access to, the merged authorization regime for acts of OCSSPs and their users, the *lex specialis* nature of art. 17 in relation to art. 3 InfoSoc and art. 14 e-Commerce Directive, the relationship between the general monitoring obligation in art. 15 e-Commerce and art. 17(8) CDSM Directive, the complex liability exemption mechanism comprised of best efforts obligations on OCSSPs (to obtain an authorization and to impose preventive and reactive measures) in art. 17(4), and the substantive and procedural safeguards in the form of user rights and in-/out-of-platform (complaint and) redress mechanisms in art. 17(7) and (9).

A crucial part of our analysis of platforms' liability and copyright content moderation obligations refers to the normative hierarchy of art. 17. In this respect, we highlight the primacy of user rights (as obligations of result)



over preventive measures (as obligations of best efforts) in the overall scheme of the provision. We further provide a critical analysis of how the Commission’s Guidance has attempted to address this hierarchy and strike the balance between the competing rights and interests of rightsholders, platforms and users, drawing from the arguments of AG Øe in his Opinion in C-401/19. In essence, we have serious doubts that the Guidance’s approach to automated content moderation for “manifestly infringing” content and “earmarked” content is consistent with previous case law, the fundamental right to freedom of expression and the prohibition on general monitoring.

Finally, we provide a detailed analysis of the interplay between art. 17 CDSM Directive and the potentially applicable provisions of the DSA proposal to OCSSPs. Departing from the observation that a platform may qualify as an OCSSPs under the CDSM Directive and an “online platform” (and VLOP) under the DSA, we conclude that the *lex specialis* nature of EU copyright law vis-à-vis the DSA does not preclude the application of multiple provisions in the DSA to OCSSPs, particularly the due diligence obligations for online platforms.

Another important conclusion from our analysis is the emergence of a bifurcated legal framework for online platforms engaging in copyright content moderation. On the one hand, OCSSPs are subject to the regime of art. 17 as regards liability and content moderation. On the other hand, non-OCSSP providers are subject to the pre-existing regime under the InfoSoc and e-Commerce Directives, as interpreted by the CJEU (most recently in *YouTube and Cyando*). Although the regimes have similarities – and can be approximated through the Court’s interpretative activity – they are structurally different. This divergence may lead to further fragmentation, on top of the fragmentation that is to be expected by the national implementations of the complex mechanisms in art. 17 CDSM Directive. To this we must add the application of the horizontal rules on content moderation liability and obligations arising from the DSA. In sum, the multi-level and multi-layered EU legal landscape on copyright content moderation that emerges from our mapping analysis is extremely complex.

Chapter 4 follows up on this analysis with the final analysis of the 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.⁶⁰⁷

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 regime in art. 17 CDSM Directive will therefore require the introduction of new mechanisms in the majority of the Member States, as suggested by the Commission in its Guidance.

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, which were regulated in a small number of Member States. Art. 17 will require the implementation of all of these elements, and hence 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 significantly. On the other hand, several Member States will need to make more significant changes related to end-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 require a conceptual change in the way copyright laws qualify end-users and their entitlements in many Member States.

Fourth, on the state-of-the art of the implementation of art. 17, the collected data evidences that its timely implementation was at stake in most of the Member States. (As of May 7, 2021, when the interim mapping report was finalized, and no more information were requested from national reporters, only the Netherlands and Hungary has implemented the said rule.) This was later confirmed by the fact that most Member States failed to implement art. 17 into their national laws by the implementation deadline of 7 June 2021, giving rise to the start of infringement proceedings by the Commission.⁶⁰⁸

⁶⁰⁷ See supra at 4.3.

⁶⁰⁸ European Commission, ‘Press Release: Copyright: Commission Calls on Member States to Comply with EU Rules on Copyright in the Digital Single Market’ (*European Commission - European Commission*, 26 July 2021) <https://ec.europa.eu/commission/presscorner/detail/en/MEX_21_3902> accessed 22 February 2022.



Chapter 5 mapped out the copyright content moderation structures adopted by 15 social media platforms over time, with a focus on their T&Cs (rules) and automated systems. This corresponds to the empirical research carried out in the context of Task T.6.1.3 (Private Regulations by Platforms: ToS, Community Guidelines). The chapter suggested that two dual processes seem to explain these structures' development:

The first is complexification/opacification. Our empirical work indicated that virtually all 15 platforms' T&Cs have become more intricate, in various ways and to different extents. Over time, more (kinds of) rules were invented or made public, and these rules were communicated in a progressively more diverse set of documents, which were changed or tweaked several times, producing sometimes a plethora of versions, often located in a dense web of URLs, the chapter showed. Importantly, we demonstrated that complexification can be radically distinct, depending on which platforms one considers. Very large ones, such as Facebook, experienced an almost continuous and drastic transformation; smaller ones, such as Diaspora, have barely changed. Yet, when a change occurred, it made those sets of rules more difficult to comprehend. Whilst our analysis did not take a longitudinal take on automated copyright content moderation systems, their emergence and eventual transformation into a central governance tool for various platforms is, in itself, an important element of broader complexification processes. These systems work at a hard to comprehend scale, through computational operations that are technically intricate, and under largely unjustified and seemingly arbitrary protocols on, e.g., how to appeal decisions. In other words, they are, as so many of the T&Cs we studied, remarkably opaque. The chapter pointed out that while in some cases some complexification might be impossible to avoid, opacification is by no means necessary or necessarily justifiable.

The second process is platformisation/concentration. By categorizing rules into what we termed "normative types", the chapter argued that various platforms in our sample altered their rules so as to give themselves more power over copyright content moderation, usually by increasing the number of their obligations and rights, which were, in turn, largely aligned with their own interests, logics and technologies. We suggested that this could be interpreted as particular example of the broader phenomenon of "platformisation". Nonetheless, the chapter argued that this transformation was by no means unidirectional. For platformisation enhances not only platforms' power but also their responsibilities over content moderation. It was curious to note, therefore, that while emboldening their normative legitimacy to control copyright, platforms did not necessarily alter their *discursive* focus on users-oriented rules. As with complexification, platformisation has been experienced differently by different platforms and deepened by the rise of automated copyright content moderation systems, which may severely impair ordinary users' ability to participate in and challenge removal decisions. That platformisation centralises power in the hands of platforms might be a truism – but the chapter also suggested that this process might also end up giving more power to large rightsholders, to the detriment of essentially all other users. Nowhere this was clearer than in our study of Facebook's Rights Manager, which does not appear to be accessible for small creators, for instance, a non-algorithmic bottleneck that has been rarely studied.



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InfoSoc Directive: Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJ L 167/10, 22.06.2001.

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Rental and Lending Rights Directive: Council Directive 92/100/EEC, of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, 1992 O.J. (L 346/61) as republished and amended by Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 (codified version), 2006 O.J. (L 376/28).

SatCab Directive: Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248/15, 6.10.1993.

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

EU Regulations

P2B Regulation: 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

EU Proposed Legislation

Proposed DSA: 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)

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



Annexes

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Annex I. Phase 1 Questionnaire National Legal Mapping

The Legal Status of Information Society Service Providers in the Pre- and Post-CDSM Directive Era

Preliminary information

The present questionnaire aims to collect data related to the legal status of some information society service providers in the implementation phase of Directive (EU) 2019/790 (CDSM Directive). The questionnaire runs in two main periods or phases.

The **phase one** questionnaire collects and analyses legal data from the period preceding the implementation deadline of the CDSM Directive. As such, it focuses on the status quo. The **phase two** questionnaire will be dedicated to the national implementations of Article 17 CDSM Directive, and the consequences of such implementation. 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 information society service providers that store or host copyright-protected content uploaded by the users or recipients of the service.

Article 17 CDSM Directive creates a new regime for a subset of hosting service providers, so-called online content-sharing service providers (OCSSP). These are defined in Article 2(6), with further guidance in recitals 62 and 63. While this concept is new to the copyright *acquis*, OCSSPs do not constitute a new category of service providers in a technological or business sense.

Various existing service providers fit the definition of OCSSP and their activities are currently regulated in different legal instruments, such as for our purposes: Directive 2000/31/EC (E-Commerce Directive); Directive 2001/29/EC (InfoSoc Directive); and the Directive 2004/48/EC (Enforcement Directive). These service providers are known under various names that sometimes correspond to (partially) overlapping legal concepts, e.g. "information society service providers", "hosting service providers", "intermediaries", or "platforms".

The present questionnaire therefore focuses on information society service providers that host copyright-protected content, with a particular emphasis on OCSSPs.

Whenever the questionnaire requests the provision of statutory texts, we kindly ask you to provide us the domestic language version and the official – if available – or unofficial English translation of the relevant norms.

Phase 1 Questionnaire: Pre-CDSM Directive Legal Landscape

Please respond with reference to the legal situation in your jurisdiction and applicable law by 22 January 2020.

I. Hosting service providers as *users* of copyright-protected content

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**⁶⁰⁹ uploaded by their users?
2. Are "good faith" hosting service providers⁶¹⁰ 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.
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?

⁶⁰⁹ We use the short-hand "protected content" to refer to works or other subject matter protected by copyright or related/neighborhood rights laws.

⁶¹⁰ 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 Oe 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.



- 3.1. If yes, could you please describe the model, including: legal basis, mechanism, scope of protected content and rights covered, beneficiaries, and sectoral variations.
- 3.2. Please indicate the leading cases which are dealing with direct liability of service providers.

II. Hosting service providers as *intermediaries* for access to copyright-protected content

4. Does your country allow rights holders to apply for an injunction against service providers for copyright infringing content upload by third-party users of the service?
 - 4.1. If yes, could you please cite the relevant legal requirements, provision(s) and leading case law?
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?
 - 5.1. If yes, could you please cite the relevant legal requirements, provision(s) and leading case law?
6. Does your country have any regime in place for the moderation of infringing content by hosting service providers?⁶¹¹
 - 6.1. If yes, describe whether the regime is statutory, co-regulatory, self-regulatory, and/or best practices-based?
 - 6.2. If yes, is such regime applicable to exclude the liability of platforms for storing and giving access to contents uploaded by their users?
 - 6.3. If yes, do the obligations for service providers result from a duty of care, or any other legal construct?
 - 6.4. If yes, does the existing regime include a complaint and redress (**C&R**) mechanisms? If so, please briefly explain these.
7. Did your country introduce any liability exemption or “safe harbour” provisions for the benefit of search engines or linking service providers?⁶¹²
 - 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?
 - 7.2. If yes, which right(s) are users infringing?⁶¹³

III. End-users

8. Are end-users directly liable under copyright law for uploading content to the services of information society service providers without authorisation?
 - 8.1. If yes, which right(s) are users infringing?⁶¹⁴
 - 8.2. If yes, could you please cite the relevant legal provision(s) and leading case law?
9. Did your Member State implement the limitations and exceptions (**L&Es**) on quotation, criticism, review & caricature, parody, and pastiche set forth in arts. 5(3)(d) and 5(3)(k) InfoSoc Directive?

⁶¹¹ 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.).

⁶¹² 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 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”.

⁶¹³ E.g. reproduction and/or communication/making available to the public.

⁶¹⁴ 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.



- 9.1. If yes, please briefly describe how they were implemented.
- 9.2. If yes, can these L&Es effectively cover end users' uploading activities in your country?
- 9.3. If yes, could you please cite leading case law on the application of these L&Es in an online environment?

10. In your country, are L&Es in treated as:

- 10.1. Defences against infringement claims? If yes, please explain.
- 10.2. Subjective or affirmative rights to use protected content? If yes, please explain.
- 10.3. Other? Please explain.

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?

- 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?
- 11.2. If yes, can you describe this mechanism?⁶¹⁵

IV. Preparation for the implementation of Article 17 CDSM Directive

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

- 12.1. If yes, could you please provide a full text of the draft/accepted document containing the draft implementation text of Art. 17?
- 12.2. If yes, could you briefly describe how such proposal diverges from the text of the Directive regarding
 - (a) The authorization by and liability of service providers;
 - (b) L&Es to the benefit of end-users;
 - (c) Compliance and overlap of new domestic copyright and existing e-commerce rules?

[Phase 1 Questionnaire ends here]

⁶¹⁵ E.g. counter-notice; human oversight; flagging; time limits for responses etc.



Annex II. Codebook Used in The Analysis of Platforms' T&Cs

High-level themes (kinds of documents)
Terms of Use
Community Guidelines
Copyright Policy
Help pages
Principles
Terms of Service (automated copyright content moderation systems)
Music Guidelines
Whitepaper
Intermediary themes (kinds of rules)
Normative types
Platform's obligations
Expectations
Platform's rights
Principles
Procedures
Users' obligations
Users' rights
Subjects
Automated content moderation
Copyrights disputes
Copyright exceptions
Infringement avoidance
Manual content removal
Monetisation
Penalties



Transparency

Low-level themes (copyright content moderation rules per se)

Users should consult a lawyer on copyright

Users should contact owner of violated copyrighted content

Users should contact the platform if contact with apps on copyright violation doesn't work

Users should contribute their content to public domain

Users should give due credit

Users should officially copyright their content

Users should provide references to original work

Users should react to content instead of violating copyright

Users should report repeat infringers of copyright

Users should report violation of others' copyright

Users should repost content instead of infringe copyright

Users should specify their role in the uploaded content

Users should think twice before appealing copyright infringement report

Users should think twice before claiming fair use

Users should think twice before posting risky content

Users should think twice before reporting copyright infringement

Users should think twice before using CC-licensed content

Users should try to solve copyright dispute independently

Users should use an agent to report violation in case they are concerned with their information being shared with infringer

The platform must assist with copyright violations by third parties

The platform must decide on fair use claims

The platform must disable or suspend accounts due to copyright infringement

The platform must document notices of alleged copyright infringement

The platform must have a fair copyright content moderation system

The platform must have an automated copyright content moderation system that respects copyright exceptions

The platform must keep content online during automated copyright content moderation disputes

The platform must not count restored content as a strike



- The platform must not decide unilaterally what is a copyright infringement
- The platform must not scan private videos via automated copyright content moderation
- The platform must not take copyright exceptions as a reason to restore video
- The platform must notify parties during copyright disputes
- The platform must publish a report on copyright content moderation
- The platform must remove or block access to content due to copyright infringement
- The platform must respect and protect copyright
- The platform must restore accounts after strikes removal by users
- The platform must restore content if report was false or withdrew
- The platform must visually mark content taken down due to copyright reports
- The platform can apply DRM technology
- The platform can block account functionalities of copyright infringers
- The platform can consider the nature of the copyright infringement when deciding on punishment
- The platform can decide unilaterally on copyright infringement
- The platform can deny refunds to users terminated due to copyright infringers
- The platform can disable access to automated copyright content moderation in case of misuse
- The platform can disable and suspend accounts who provide false information in copyright disputes
- The platform can limit the visibility of content automatically identified as infringing copyright
- The platform can modify and discontinue automated copyright content moderation system at any time
- The platform can monitor users' compliance with automated copyright content moderation system
- The platform can punish users who submit false information during copyright disputes
- The platform can require from users evidence of their copyright over content
- The platform can require more information during copyright disputes
- The platform can restore content if copyright report is false or withdraw
- The platform can withhold payments from users if they infringe copyrights
- The platform aspires to balance copyright and freedom of expression
- The platform aspires to protect intellectual rights
- The platform cannot remove a content from another website or app
- The platform does not employ DRM



The platform does not monetise copyrighted content

The platform does not remove or suspend copyright infringing content posted in it

The platform employs automated copyright content moderation

The platform employs human content moderation

The platform is not liable for copyright-related issues

The platform publicizes information about copyright disputes

Users who falsely report copyright infringement risk suffering legal consequences

Users who infringe others' copyrights risk suffering legal consequences

Users must act as copyright content moderators

Users must apply to get access to automated copyright content moderation system

Users must be legally entitled to report copyright infringement

Users must be liable for copyright infringement

Users must be solely responsible for enforcing their copyright

Users must become a registered DMCA agent

Users must file a lawsuit against alleged copyright infringer

Users must indemnify the platform regarding copyright infringement

Users must not interfere with anti-copyright infringement features

Users must not teach others how to violate copyright

Users must provide accurate information in copyright disputes

Users must provide the required information in copyright disputes

Users must respect copyrights

Users must use English in copyright disputes

User can apply DRM on their content

Users can appeal copyright-related content removal

Users can appeal copyright-related penalties to account

Users can avoid liability for content removed by platforms

Users can decide on fair use claims

Users can disable download of their content to avoid copyright infringement

Users can moderate copyrighted content directly



Users can post content under fair use

Users can post remixes

Users can report copyright infringement

Users can report fake profiles who reported copyright infringement

Users can repost content that was falsely reported

Users can stop using automated copyright content moderation system at any time

Users can use and assign CC license to their content

Users can use automated content moderation to monetise, block and track access to content

Users can withdraw copyright report



Annex III. List of questions about Rights Manager sent to Facebook

Questions about Rights Manager

Scope

1. Why does Rights Manager not protect audio files?
2. Why does Rights Manager not protect texts?

Eligibility

3. Does a user have to apply twice in order to have Rights Manager access for both image and videos?
4. How many “pieces of original content” does the applicant need to own / have the rights over in order to be eligible for the Rights Manager?
5. Do the eligibility criteria vary according to content format type (video/image)?
6. Do the eligibility criteria vary according to user type (individual vs. company)?
7. Do the eligibility criteria vary according to content category? (sports/entertainment/news)?
8. When judging whether an applicant has infringed/violated copyright in the past, does Facebook consider only the infringements/violations that happened within Facebook?
9. If Facebook considers infringements/violations that happened outside of Facebook, which databases/instances does it consult (e.g., judicial rulings)?
10. How exactly do past copyright infringements/violations factor into the decision process?

Decision about application

11. Is the decision about an application for the Rights Manager program fully automated?
12. If the decision about an application is partly or fully automated, which kind of algorithms are used?
13. If the decision about an application is partly or fully automated, which parameters do the algorithms use?
14. (*If applicable*) If the decision about an application is partly or fully automated, which data are used to train the algorithms?
15. If human actors participate in the decision about an application, who are these people? Are they Facebook employees or contractors?



16. If this decision about an application is semi-automated (meaning, if it involves both people and algorithms), what exactly is done by who in the process – _e.g., which steps are performed by humans, which steps are performed by algorithms?

17. Can the applicant appeal an eventual rejection to a Rights Manager application?

18. In case such an appeal exists, what are the requirements from the applicant – _what new document should the applicant submit, in how many days, etc,?

19. In case an appeal is impossible, does Facebook explain to the applicant the exact reason(s) of the rejection?

20. In case of a rejection, can an applicant apply again for access to the Rights Manager? If so, how many times?

Reference files database

21. Does Facebook check if the applicant is indeed the owner of the content she is claiming copyrights over?

22. Does Facebook use or process the Reference Files Content, or the collection of files uploaded as Reference Files, for any end *beyond* identifying and matching content of a particular Rights Manager user (for e.g., training algorithmic systems that are not primarily related to the Rights Manager system)?

23. In the “Rights Manager Terms”, it is said that “If Rights Manager surfaces a potential match in the applicable territory between your Reference File Content and content uploaded to a Facebook Product by a third party, and you elect to allow such content to remain on that Facebook Product (“Claimed Content”), you grant Facebook the authorisation and/or licence to the Claimed Content as described in the Facebook Terms” (our emphasis). In face of this provision, what does Facebook do with such “claimed content”? Can you please give examples (e.g., use it to train algorithmic systems that are not primarily related to the Rights Manager system)?

24. Does the Rights Manager’s reference file database only consist of affirmative submissions by rights holders or are the other channels through which Facebook is acquiring content for this database?24. Could you give us some information about the size of the database (number of video/image reference files, number of requests)?25. Can you please explain, in general terms, what variables are taken into account by Rights Manager algorithms during the process of reading, matching and eventually taking down a piece of content?

25. Could you give us some information about the size of the database (number of video/image reference files, number of requests)?

26. Can you please explain, in general terms, what variables are taken into account by Rights Manager algorithms during the process of reading, matching and eventually taking down a piece of content

27. What is the relative importance of these variables?

28. How does the Right Manager specify whether a given second of a video is an overlapping second of a reference file? Example: Imagine a video with a length of 20 seconds and a match rule of ≥ 20 seconds’ overlap. If a copyright infringer now speeds this video up to 15 seconds, the content is 100% overlapping but not 20 seconds.



29. What are the thresholds for the similarity between two files and how robust is it to modifications (which may be not human perceivable)? Example: imagine two videos but one video has one pixel difference/slightly different colour/different resolution

Matching process

30. What are the match rules for images?

31. How does the location (country) of the user who uploaded infringing content is taken into account by the Rights Manager during the process of reading, matching and eventually taking down a piece of content?

32. What is the accuracy of matches that are generated within the Rights Manager for images and videos?

33. Does Facebook employ artificial intelligence in the matching process? If yes, in which ways?

Monetisation

34. What is the criteria used to define who can access the “collect ad earnings” action? Or can all Rights Manager users access this form of monetisation?

35. What is the share of ad earnings that Facebook pays to copyright owners via Rights Manager?

36. Is the share of ad earnings the same for all Rights Manager users? If different shares apply to different users, which criteria does Facebook use to define who gets a larger / smaller share?

37. What sort of data about the monetised content or linked ad does the copyright owner have access to?

38. Can the rights owner blacklist or somehow choose advertisers associated with their content?

39. Are the data on which monetisation is based validated / checked by any third-party, external actor (e.g., a consultancy firm)?

Disputes

40. Does Facebook get somehow involved in a non-DMCA dispute to a Rights Manager match? E.g., by making a decision on the validity of an appeal.

41. If Facebook does get involved in a non-DMCA dispute, could you please detail how this involvement occurs? E.g., which criteria Facebook uses to define the validity of an appeal.

42. If Facebook does not get involved in a non-DMCA dispute, why is that so?

43. What criteria (*beyond* the completeness of the required documentation) does Facebook consider when making a decision on whether a DMCA counter-notification regarding a Right Manager match is valid?



44. In which way are copyright exceptions, and in particular fair use, taken into consideration by Facebook when deciding on whether a DMCA counter-notification regarding a Right Manager match is valid?
45. Is this decision on the validity of a DMCA counter-notification regarding a Right Manager match made exclusively by human actors or does it involve some form of algorithmic system?
46. If this decision on the validity of a DMCA counter-notification regarding a Rights Manager match involves humans, which people participate, and who are they (e.g., are they Facebook employees, contractors etc.)?
47. If this decision on the validity of a DMCA counter-notification regarding a Rights Manager match involves humans, do the people involved in it have formal legal training, typically?
48. If this decision on the validity of a DMCA counter-notification regarding a Rights Manager match involves humans, and these people *do not* have typically formal legal training, does Facebook provide them with any form of training? If so, can you please explain what this training consists in?
49. If this decision on the validity of a DMCA counter-notification regarding a Rights Manager match is semi-automated (meaning, if it involves both people and algorithms), can you please explain what exactly is done by who in the process – e.g., which steps are performed by humans, which steps are performed by algorithms?
50. If this decision on the validity of a DMCA counter-notification regarding a Rights Manager match is partly or fully algorithmic, what kind of algorithms are used?
51. (*If applicable*) If this decision on the validity of a DMCA counter-notification regarding a Rights Manager match is partly or fully algorithmic, what datasets are used to train the algorithms?
52. If this decision on the validity of a DMCA counter-notification regarding a Rights Manager match is partly or fully algorithmic, what parameters are used in the design of the algorithms?
53. If this decision on the validity of a DMCA counter-notification regarding a Rights Manager match is partly or fully algorithmic, does Facebook automate (or have tried to automate) the characterization of copyright exceptions, such as fair use?
54. If Facebook does (or have tried to) automate the characterization of copyright exceptions, such as fair use, how this automation is done or was attempted – what kinds of algorithms, parameters, and datasets are/were used, for instance?
55. If the DMCA counter-notification regarding a Rights Manager match is successful and no lawsuit is filed, is the reinstatement of the content automatic? Or are there instances in which Facebook unilaterally decides not to reinstate a piece of content?
56. (*If applicable*) What reasons might lead Facebook to not reinstate a piece of content, regardless of a successful DMCA counter-notification regarding a Rights Manager match and no lawsuit?
57. What happens after a second publisher disputes the rejection of a dispute for conflicts in a reference file upload? In the Help Center it is said that, when a dispute over a piece of content uploaded to Rights Manager is rejected, the user can “contact us” [Facebook]. What happens then? Is this a formal process of appeal? If so, what does this appeal encompass -- which necessary documentation is required, what are the steps of the process, etc.?



58. Can a user without access to the Rights Manager dispute an action taken by Facebook in the context of the Rights Manager?

59. After the rejection of a dispute by a reference file owner, what options does a content creator have?

60. Does Facebook use data associated with any dispute processes and decisions in the context of Rights Manager to train its own algorithmic systems? If so, how so? Which systems are trained?

Audible Magic

61. In which ways, exactly, does Facebook use Audible Magic technology in its attempt to protect copyrights?55. What is the relationship between Audible Magic's technology and Rights Manager?



Annex IV. Rights Manager's application form.

[Application Form Fields]

Which Page(s) do you want to protect? Users can choose from their managed non-private pages.

Primary rights holder

Name of person, company, brand who owns the rights to the content

Contact Email

What type of rights owner are you?

For video content, select from: Media company, Individual creator, Content aggregator, Legal representative of a content owner, Other

For image content, select from: Media company, Individual creator, Viral content aggregator, Image distributor, Legal representative of a content owner, Other

No additional description is necessary if "Other" is selected.

Which best describes your content? Select all that apply.

For video content, select all that apply from: Advertising/Marketing, Art, Education, Entertainment, Gaming, Music, News, Sports, Other

For image content, select all that apply from: Photographer, Illustrator/Visual Artist, Stock Site, News, Publisher, Entertainment, Image Archive, Artist Agency, E-Commerce, Public Figure, Sports League, Sports Team

How often do you publish content?

Select from: Daily, A few times a week, Weekly, Monthly, Less than once a month

For Image only: **Do you use a third-party agency?**

Yes/No

Have you issued a copyright report on Facebook before?

Yes/No

Where else does your Page have an online presence? (Optional)

Fields available for Instagram, YouTube, Website, Other



Do you have an example of the content you want to protect? (Optional)

Field for an URL.

