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Proposal for a Directive on Copyright in the
Digital Single Market: Article 13's Impact on
Freedom of Expression



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Preface

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A. Introduction

This paper will discuss the European Commission Proposal for a Directive on Copyright in the Digital Single Market (“DSM Proposal”), first put forth as a draft on September 14, 2016,¹ and most recently having been approved by the European Parliament on March 26, 2019 after undergoing amendments.² It will discuss in particular Article 13 and its potential impact on freedom of expression in the online environment.³ Article 13 introduces direct liability for online content-sharing service providers, indicating that a service provider “perform[s] an act of communication to the public” in the context of the Proposed Directive when it gives the public “access to copyright-protected works or other protected subject matter uploaded by its users.”⁴ The initial proposal imposes an obligation on service providers that “store and give access to large amounts of works and other subject-matter uploaded by their users” to make agreements with rightholders to license the use of copyrighted content and prevent the availability of the content on their platform, using appropriate measures “such as the use of content recognition technologies.”⁵ Many leading copyright legal scholars and thousands of protesters, both online and in the streets, fear that the widespread and obligatory use of content recognition technology by service providers would unjustifiably infringe on internet users’ ability to share and upload information in the EU.⁶ Content filters are not currently fine-tuned enough filter out fair uses of protected material by users,⁷ and their obligatory use in compliance with the Directive and in order to avoid claims of direct liability for transmission of protected works uploaded by the users could impact the exercise of the EU Internet user’s right to freedom of expression and information under Article 11 of the Charter of Fundamental Rights (“Charter”).⁸

This paper will consider the DSM Proposal in light of the principle of proportionality test as developed by the Court of Justice (“the Court”), discussing whether the DSM Proposal is suitable, necessary, and reasonable in order to accomplish the legitimate aim of protecting rightholders exclusive rights and right to fair remuneration, without infringing on other funda-

¹ *European Commission*, Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, COM(2016) 593 final (DSM Proposal).

² *European Parliament*, 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 of April 2, 2019, PE-CONS 51/19 (DSM Directive).

³ In the draft approved by the European Parliament on March 26, 2019, this Article has been changed to Article 17. However, for the sake of clarity, this article will be referred to as Article 13 when discussing the initial proposal of September 14, 2016, in keeping with the literature, and as Article 17 when referring to the amended version approved on March 26, and released on April 2, 2019.

⁴ DSM Proposal (fn 1), Art. 13; DSM Directive (fn 2), Art. 17.

⁵ DSM Proposal (fn 1), Art. 13(1).

⁶ *Frosio*, *Cardozo Arts & Ent. L.J.* 36/2018; *Senftleben et al.*, *EIPR* 2018, p.149, 149-163; *Solomon*, *HLR* 2018, p. 237, 237-268; *Meaker*, Inside the giant German protest trying to bring down Article 13, <https://www.wired.co.uk/article/article-13-protests> (last accessed on Apr. 25, 2019).

⁷ See *infra*, Section D: “The suitability of content filters to close the ‘value gap’”.

⁸ Charter of Fundamental Rights of the European Union, 2012/C O.J. 326/02 (Charter), Art. 11.

mental rights in a disproportionate manner. It will first look at the established framework of liability for information society providers and their current obligations regarding identifying and removing unauthorized posting of protected content. Then it will discuss the development of the DSM Proposal, exploring the need for a reform of copyright protection in the EU, and the aims of the Proposal, particularly regarding a perceived ‘value gap’ between the authors of works and the content-sharing providers which, it is argued, profit from users sharing these protected works on their platforms. It will then discuss the suitability of the proposed content filters to the stated goals, and whether other, perhaps better, solutions have been seriously considered. It will then discuss the amendments made by the European Parliament and ultimately conclude that the amendments do little to ease the issues and impact on freedom of expression on the Internet.

B. The Intermediary liability regime: from Berne Convention to Information Society Directive

Internet safe harbors, exempting online service providers from direct liability for any infringing content on their websites, originated with the World Intellectual Property Organization (“WIPO”) Copyright Treaty in 1996 and were codified into EU law through the Information Society Directive⁹ and the e-Commerce Directive.¹⁰ Global copyright protection first emerged with the Berne Convention in 1886, which introduced the concept that copyright exists the moment a work is fixed in a signatory country, and should be protected without any requirements of formal registration.¹¹ The rights protected by the Berne Convention include authors’ exclusive right to authorize “communication to the public” of their works.¹² Despite its important role in the development of copyright harmonization, the Berne Convention could not account for copyright as the world moved into the digital age, which led to the development of the WIPO Copyright Treaty.¹³ Article 8 of the WIPO treaty helps define authors rights with regard to transmission of their works on the internet, giving authors the exclusive right to authorize communications to the public, including when the public is able to “access these works from a place and at a time individually chosen by them.”¹⁴ The agreed statement concerning Article 8 of the WIPO Treaty notes that “the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the

⁹ Council Directive (EC) 2001/29 of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167/10, (InfoSoc Directive).

¹⁰ Council Directive (EC) 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178/1 (e-Commerce Directive).

¹¹ Berne Convention for the Protection of Literary and Artistic Works, as amended on September 28, 1979, WIPOLex TRT/BERNE/001 (Berne Convention), Art. 5(2).

¹² *Ibid.*, Art. 11(1)(ii), Art. 11bis(1)(ii), Art. 11ter(1)(ii), Art. 14(1)(ii).

¹³ WIPO Copyright Treaty of December 20, 1996, WIPOLex TRT/WCT/001 (WIPO Treaty), Preamble.

¹⁴ *Ibid.*, Art. 8.

meaning of this Treaty or the Berne Convention.”¹⁵ This language was copied into the Information Society Directive (“InfoSoc”) of 2001 which was intended to harmonize the right of communication to the public and harmonize protection for acts of “on-demand transmission of copyright works.”¹⁶ The precise scope and definition of “communication to the public” as defined in Article 3(1) of InfoSoc, continues to be crucial to the establishment and exercise of the rights of copyright holders, and is interpreted frequently by the Court of Justice in order to establish whether an infringement of the copyright holder’s exclusive right of authorization of a communication to the public has occurred.¹⁷ The InfoSoc Directive expanded rightholders rights over the control of the transmission of their works, providing a two-fold exclusive right of authorizing and prohibiting any communications to the public of their works.¹⁸

The e-Commerce Directive of 2000 developed the EU regime of intermediary liability, establishing the fundamental principle that intermediary service providers should not be directly liable for the transmission of protected works through their services when they are unaware of the illegal activity and act quickly to remove the offending material when they are made aware of it.¹⁹ This is the so-called ‘notice and takedown’ framework.²⁰ The other side of this principle is a prohibition on Member States from establishing any obligations for online providers to perform general monitoring of all information and content on their networks in order to identify illegal activities.²¹ The e-Commerce Directive also obliges Member States “to provide online intermediaries, including both access and hosting providers, with exemptions to liability for wrongful activities committed by their users.”²² These exemptions were created in order to encourage and foster the development of the internet by leaving online service providers free of concerns over liability and act as a safeguard against requirements for online providers to implement online filtering and to police the content that they host.²³ There were proposals to hold intermediaries fully liable for the actions of their users but these failed to be enacted, and the exemptions did end up being put into place.²⁴ The resulting safe harbor regime has been incredibly important for Europe’s emerging Internet market.²⁵

¹⁵ Ibid., Agreed statement concerning Article 8.

¹⁶ InfoSoc Directive, (fn 9), Art. 3(1), Recitals 23, 25, 27.

¹⁷ ECJ, Judgment of 8 September 2016, Case C-160/15, *GS Media BV*, ECLI:EU:C:2016:644, para. 25; ECJ, Judgment of 26 April 2017, Case C-527/15, *Stichting Brein (Filmspeler)*, ECLI:EU:C:2017:300, para. 23; ECJ, Judgment of 14 June 2017, Case C-610/15, *Stichting Brein (Ziggo)*, ECLI:EU:C:2017:456, para. 19; ECJ, Judgment of 7 August 2018, Case C-161/17, *Land Nordrhein-Westfalen*, ECLI:EU:C:2018:634, para. 13.

¹⁸ InfoSoc Directive, (fn 9), Art. 3(1).

¹⁹ E-Commerce Directive, (fn 10), Arts. 12-15.

²⁰ *European Commission*, Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, COM(2016) 301 final, Part 1/3 (Impact Assessment), p. 147; *Urban*, PLRP 2017, p. 1, 1; *Senftleben et al.*, (fn 6), p. 2; *Husovec*, EC Proposes Stay-down and Expanded Obligation to License UGC Services, <http://www.husovec.eu/2016/09/ec-proposes-stay-down-expanded.html> (last accessed on Apr. 13, 2019).

²¹ *Frosio*, (fn 6), p. 332; e-Commerce Directive, (fn 10), Art 15.

²² *Frosio*, (fn 6), p. 332.

²³ Ibid., p. 333, 332.

²⁴ Ibid., p. 333.

²⁵ *European Commission*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy

C. Legitimate aim of the Proposal for a Directive

I. Development of the Directive

Globally, in recent years there has been pressure on national governments to put in place stronger protections of intellectual property and to prevent digital piracy,²⁶ and the EU is not immune to this, facing pressure particularly from rightholders.²⁷ In 2015, the Commission released the Digital Single Market Strategy (“DSM Strategy”) which set the establishment of a functioning Digital Single Market as a key priority of the Commission.²⁸ This included, among other things, a need for a “fit for purpose regulatory environment” to govern the roles of online platforms and intermediaries.²⁹ It acknowledged the important role that the principle of exempting intermediary service providers from liability for the content on their services has played in the development of online ventures in Europe, while also indicating that issues with the current framework remain.³⁰ In particular that the removal of illegal content is “slow and complicated” with lawful material frequently being removed, the differences between national systems impede efforts to combat online crime, lack of clarity regarding intermediaries’ liability creates legal uncertainty for online service providers, and the presence of a supposed ‘value gap’ between online platforms and the authors of the content hosted on these platforms offers too little protection for the remuneration of authors.³¹ These issues necessitate harmonization of copyright rules to “safeguard fair remuneration of creators” and clarify the roles of intermediary providers regarding actions to prevent and remove protected content more effectively.³² For these purposes, the DSM Strategy indicated the possibility of enhancing protection from the illegal transmission of content by requiring greater responsibility from online intermediary providers via a “duty of care.”³³

The DSM Strategy was followed by a public consultation on online intermediaries and platforms, which garnered responses from both platforms and rightholders regarding whether the current regulatory framework was fit for purpose for the current online environment and sought opinions on the introduction of voluntary measures by online platforms to combat the

for Europe, COM(2015) 192 final (DSM Strategy), p. 12.

²⁶ *Breindl et al.*, P&I 2013, p. 27, 27.

²⁷ *N.N.*, IFPI Global music report 2016 (IFPI Report), <http://www.ifpi.org/downloads/GMR2016.pdf>, p. 24 (last accessed on Apr. 13, 2019).

²⁸ DSM Strategy, (fn 25), p. 3.

²⁹ *Ibid.*, p. 11.

³⁰ *Ibid.*, p. 7, 12; *European Commission*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Tackling Illegal Content Online, Towards an enhanced responsibility of online platforms, COM(2017) 555 final (Communication on Enhanced Responsibility), sect. 2.

³¹ DSM Strategy, (fn 25), p. 7, 12; Communication on Enhanced Responsibility, (fn 30), sect. 2.

³² DSM Strategy, (fn 25), p. 7, 12; Communication on an Enhanced Responsibility, (fn 30), sect. 2.

³³ *Frosio*, (fn 6), p. 333; DSM Strategy, (fn 25), p. 12.

spread of illegal content online.³⁴ Online platforms responding to the survey indicated worries that introducing voluntary cooperation measures to fight large-scale commercial copyright infringements would prevent them from being covered by the liability exemption of the e-Commerce Directive.³⁵ Although the e-Commerce Directive encourages the development of cooperation mechanisms, intermediary providers are still hesitant to implement these with rightholders as it is uncertain whether doing so would constitute an intervention that then makes them no longer neutral parties that fall under safe harbor safeguards.³⁶ On the other hand, rightholders complained about the use of their content by online platforms either without authorization or through ‘unfair’ licensing agreements, creating a ‘value gap’ between platforms and rightholders.³⁷ The conclusion from these consultations was that there was “broad support for the existing principles of the e-Commerce Directive” and therefore the Commission would aim to “maintain the existing intermediary liability regime” and in the next copyright reforms, aim for a “fairer allocation of value” while clarifying the scope of liability for online platforms.³⁸ The Proposal is therefore an update to the copyright framework as a part of a larger package of copyright reform, drawing from the DSM Strategy and consultations with stakeholders, with Article 13 aimed at closing the ‘value gap’ by ensuring revenue from protected works is allocated more fairly and clarifying the liability of online intermediaries and platforms. Article 13 imposes an obligation on online service providers that store and allow access to copyright protected content to conclude licensing agreements for the use of the content with rightholders, to prevent protected works from being made available on their services, and indicates the use of content recognition technologies in an appropriate and proportionate manner to achieve these goals.³⁹ This would, presumably, allow rightholders to claim more of the value created by the sharing of their content online and reinforce their exclusive right to authorize or prohibit the communications of their works, as protected by the InfoSoc Directive. Rightholders in response to the released proposal for the directive lauded the Commission’s efforts to reduce the value gap, believing that this measure would correct a large distortion in the market.⁴⁰

³⁴ *European Commission*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Online Platforms and the Digital Single Market Opportunities and Challenges for Europe, COM(2016) 288 final (Communication on OP & DSM), p. 8.

³⁵ *Ibid.*, p. 9.

³⁶ *Rosati*, CWP 2016/11, p. 1, 3.

³⁷ Communication on OP & DSM, (fn 34), p. 8.

³⁸ *Ibid.*, p. 9.

³⁹ DSM Proposal, (fn 1), Art 13(1).

⁴⁰ *Ashcroft*, PRS for Music Chief Executive Responds to EU Copyright Reform Plans, <https://www.prsformusic.com/press/2016/prs-for-music-chief-executive-responds-to-eu-copyright-reform> (last accessed on Apr. 21, 2019).

II. The existence of a ‘value gap’

The ‘value gap’ is a supposed unequal distribution of value created by online content distribution between content-sharing platforms, like YouTube, and rightholders.⁴¹ According to rightholders, particularly in the music industry, the online distribution market for protected works has become distorted, with platforms gaining more revenue from the sharing of works than the authors of the works themselves.⁴² This allegedly has the effect of hindering “growth, innovation, competition, and consumer choice,” and putting rightholders in an unbalanced negotiation position with online platforms, which can simply refuse to negotiate a license and continue to use the notice and takedown framework.⁴³ Under the safe harbor regime, instead of online sharing platforms being required to license material from rightholders which their users may upload, thus paying them for the sharing of their content on the platform, platforms can simply make agreements to remove offending material when notified by rightholders, or voluntarily implement technology to identify material such as YouTube’s Content ID.⁴⁴ The platforms then pay less for the content than, for example, music streaming services that have to license the music before allowing access, which results in a gap between the value added to the platform by the content and the revenue returned to the rightholders.⁴⁵ Rightholders also claim that notice and takedown is ineffective, and does not adequately protect artists, but rather favors the development of large online platforms.⁴⁶

The current framework around the concept of a ‘communication to the public’ does not allow for passive hosting platforms to be held directly liable for the unauthorized transmission of protected works by their users.⁴⁷ However, rightholders claim that the liability exemptions established by the e-Commerce Directive are too broad, and were not intended to apply to companies that “actively engage in the distribution of music online.”⁴⁸ The legal uncertainty around the licensing obligations of online platforms and whether or not they perform an active role in the transmission of works by making a communication to the public thus allows platforms to avoid licensing content and tips the balance of the market towards intermediaries, creating the value gap between authors and platforms.⁴⁹ The Commission notes these concerns from rightholders as a guiding reason behind the development of a new framework for intermediary liability, stating that the issues rightholders face in getting proper remunera-

⁴¹ *European Commission*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market, COM(2016) 592 final (DSM Communication), p. 7; *Frosio*, (fn 6), p. 337-338.

⁴² IFPI Report, (fn 27), p. 22.

⁴³ *Ibid.*, p. 23; *Husovec*, (fn 20).

⁴⁴ *Frosio*, (fn 6), p. 338.

⁴⁵ *Husovec*, (fn 20).

⁴⁶ IFPI report, (fn 27), p. 23.

⁴⁷ *Rosati*, (fn 36), p. 7.

⁴⁸ IFPI report, (fn 27), p. 23.

⁴⁹ *Rosati*, (fn 36), p. 1-2.

tion “undermine the objective that the Digital Single Market delivers a fair return on investment for all.”⁵⁰ In other words, due to liability exemptions, the prohibition of general monitoring obligations, and the ineffective notice and takedown framework, rightholders claim that they cannot claim the value created by the exchange of their content on content-sharing platforms like YouTube.⁵¹

However, there is little empirical evidence to support the existence of a ‘value gap,’ nor to support the claim that these online platforms actually “actively engage” in the distribution of protected content. The value gap was a concept primarily discussed in music industry documents before a global music report published after the Commission released the Communication *Towards a modern, more European copyright framework*.⁵² The global music report praised the Commission for acknowledging the “growing concern” regarding the sharing of value between rightholders and online platforms.⁵³ Rightholders are attempting to claim that, given the difficulty of going after individual users and the ubiquity of online sharing, intermediary services should pay for their users at the same price which services selling music do.⁵⁴ Yet if the sharing of protected content was such a large part of the revenue and activity on the online platform, platforms would likely not see notice and takedown as preferable to making licensing agreements with rightholders beforehand.⁵⁵ The Commission itself noted that there was little quantitative evidence to support the value gap, saying in the Impact Assessment on copyright modernization that:

“economic impacts [meaning the value gap] are mostly assessed from a qualitative point of view, considering how the different policy options would affect the negotiations between those creating or investing in the creation of content and those distributing such content online. The limited availability of data in this area . . . did not allow to elaborate a quantitative analysis of the impacts of the different policy options.”⁵⁶

Article 13 and any impact it might have on freedom of expression could be justified by the aim of rebalancing the distribution of value between rightholders and platforms, yet the only ‘evidence’ to suggest that this gap exists comes solely from the music and entertainment industry.⁵⁷ A report on the effects of piracy on the digital market, commissioned by the European Commission and unreleased until an MEP filed a document request, even found that there was no significant statistical evidence of online piracy having a negative impact on

⁵⁰ DSM Communication, (fn 41), p. 7

⁵¹ *Frosio*, (fn 6), p. 338.

⁵² *Husovec*, (fn 20).

⁵³ *European Commission*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Towards a modern, more European copyright framework*, COM(2015) 626 final, p. 9; IFPI report, (fn 27), p. 22.

⁵⁴ *Husovec*, (fn 20).

⁵⁵ *Ibid.*

⁵⁶ Impact Assessment, (fn 20), p. 136.

⁵⁷ *Frosio*, (fn 6), p. 361.

legal sales.⁵⁸ It seems that there is absolutely no evidence that online copyright infringement has an enormous impact on the revenues earned by creators of content, nor evidence on how effective harsher enforcement measures would be in curtailing infringements.⁵⁹ Studies show that copyright reforms which are made considering only large rightholders will result in a policy that is ignorant of the impact on and issues facing individual users.⁶⁰ Nevertheless, the European Commission proposed introducing Article 13, a measure to close a value gap of which there is no solid evidence, based solely on complaints from rightholders and responding to concerted lobbying by the music and entertainment industry,⁶¹ and not properly accounting for the impact on smaller users.

D. The suitability of content filters to close the ‘value gap’

Assuming that there is in fact, a value gap, and therefore Article 13 is backed by a legitimate aim, the question remains: is content filtering a suitable solution to the goal of ensuring the fair remuneration of authors for the online sharing of their content? This question first considers the effectiveness of content filters to find and remove protected content online. Although access service providers are frequently asked to block access to sites containing illegal content distribution,⁶² as the Court noted in *Scarlet Extended*, such a system which requires active monitoring of content transmitted through an intermediary would impact fundamental rights in a manner which does not fairly balance the right to property and the freedom of expression.⁶³ In *Scarlet Extended*, SABAM, a management company responsible for concluding licensing agreements on the behalf of music artists, applied for an injunction against Scarlet Extended SA, an internet access service provider (ISP), which would require them to block their customers from using Scarlet Extended’s services to share protected works in SABAM’s repertoire without authorization.⁶⁴ The Court concluded that due to the imprecise nature of content filtering, such a system could infringe on freedom of information in that it “might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications.”⁶⁵

⁵⁸ The report was published after MEP Julia Reda lodged a Freedom of Information request, nearly two years after the report was completed; *Martin van der Ende et al.*, Estimating displacement rates of copyrighted content in the EU, Final Report, https://juliareda.eu/wp-content/uploads/2017/09/displacement_study.pdf, p. 7 (last accessed on Apr. 22, 2019); *Frosio*, (fn 6), p. 362; *Houldsworth*, Unpublished EU study casts doubt on displacement of sales by online infringement, but the reality is nuanced, <https://www.lexology.com/library/detail.aspx?g=4f2b794e-5f2c-4408-8bd6-c3c766365e60> (last accessed on Apr 22, 2019).

⁵⁹ *Frosio*, (fn 6), p. 362.

⁶⁰ *Urban*, (fn 20), p. 113.

⁶¹ IFPI report, (fn 27) p. 24.

⁶² *Frosio*, IPR 2016, p. 1, 11.

⁶³ ECJ, Judgment of 24 November 2011, Case C-70/10, *Scarlet Extended SA*, ECLI:EU:C:2011:771, para. 53.

⁶⁴ *Ibid.*, para. 15, 16, 20.

⁶⁵ *Ibid.*, para. 52.

Indeed, this is the case with respect to YouTube’s Content ID system, a system which uses digital fingerprinting to identify infringing material.⁶⁶ Automated content filters are not able to sufficiently distinguish fair use and uses under an exception or limitation from infringing content, and this leads to user-generated content with even a partial match to a protected work being flagged as infringing and removed.⁶⁷ Particularly with works in the public domain, content recognition filters may not be able to identify adequately whether the use of this material is infringing.⁶⁸ Additionally, there is the issue of the volume of content flagged as infringing under a filtering system.⁶⁹ It is simply not feasible for human review to be carried out on all material which is flagged, for example, with regards to Internet service providers (“ISPs”), as it is too inefficient and would require far too many resources, in terms of hours devoted and people needed for the task.⁷⁰ This means that user-generated content which should be considered non-infringing is automatically removed, and users often don’t fight the removal of their content because to do so would involve going up against a large multimedia corporation.⁷¹

Second, this question asks whether content filtering would result in more value being directed towards the authors of the content. Contrary to the claims of rightholders, there is evidence which indicates that digital innovation, including the rise of online platforms, actually adds value for rightholders, rather than diminishing the value they’re able to claim.⁷² Online piracy can be also seen as an indicator of deficiencies in the current model of content distribution, which has forced the market to innovate in order to respond to the needs of users.⁷³ In fact, legal scholar Giancarlo Frosio argues that:

“in the case of illegal online streaming, piracy emerges because content is too pricey or wholly unavailable due to distribution restrictions imposed by content licensing. Therefore, piracy becomes the symptom of a market inefficiency that should be cured by meeting users’ demands rather than heavy-handed enforcement approaches and over-expanding intermediary liability.”⁷⁴

However, when the Proposal was drafted, the Commission never considered any evidence as to the positive effects on the market of online platforms and digitalization, nor the effectiveness of the current regime.⁷⁵ Studies on notice and takedown suggest that, particularly in

⁶⁶ *Solomon*, (fn 6), p. 238.

⁶⁷ *Ibid.*, p. 257; *Frosio*, (fn 6), p. 358.

⁶⁸ *Frosio*, (fn 6), p. 358.

⁶⁹ *Solomon*, (fn 6), p. 257-8.

⁷⁰ *Ibid.*, p. 257-8.

⁷¹ *Ibid.*, p. 257.

⁷² *Frosio*, (fn 6), p. 363.

⁷³ *Ibid.*, p. 364.

⁷⁴ *Frosio*, (fn 62), p. 11.

⁷⁵ *Frosio*, (fn 6), p. 363.

comparison to lawsuits, the regime is an “efficient method of enforcement.”⁷⁶ Thus, with the effectiveness of content filtering not proven, and with evidence which suggests that online platforms add value rather than take it away from rightholders, Article 13 may not be suitable for the purposes of directing value back to rightholders. Imposing content filters could, in fact, decrease the value that rightholders currently gain from their content.

E. The necessariness of imposing content filters as compared to other solutions to close the value gap

The question then becomes whether Article 13 is necessary in order to accomplish the goal of ensuring fair remuneration of authors, and if there were other possible measures which could accomplish the goal just as well. When the Proposal was being drafted, there was no “independent empirical evidence” considered as to the effectiveness of the current regime.⁷⁷ By not considering the positive effects of online platforms on the market and the ways in which piracy has forced the digital market to innovate in the impact statement, the Commission is attempting to enact a reform without a full picture of its effects, ignoring other possible measures and potentially adopting a measure which does more harm than good.⁷⁸ Advocate General Maduro in *Google France v. Louis Vuitton* in fact indicated that the current intermediary liability regime is better suited to internet intermediary providers, with liability based on negligence (i.e. failure to remove infringing content expeditiously) rather than the direct liability that Article 13 promises.⁷⁹ An appropriate balance between the right to intellectual property and the right to freedom of expression and information is best maintained through the current regime, as the replacement of knowledge and takedown with filtering and monitoring obligations will have a ‘chilling effect’ on freedom of expression.⁸⁰

An alternate proposal to direct more revenue back to creators suggests that instead of blocking and prevention, copyright reform could introduce an obligation for online platforms to conclude monetization agreements with creators, giving the revenues from advertisements on the content to creators on the basis of the content’s popularity.⁸¹ Instead of blocking the content or requiring one-time licensing, creators would gain more compensation from the work the more widespread the uses and uploads.⁸² Rather than restricting the market and

⁷⁶ *Urban*, (fn 20), p. 114.

⁷⁷ *Frosio*, (fn 6), p. 363.

⁷⁸ *Ibid.*, p. 364.

⁷⁹ This statement was made in reference to trademarks, but can be applied *mutatis mutandis* to copyright as well; ECJ, Joined cases C-236/08 to C-238/08, *Google France*, Opinion of AG Maduro, ECLI:EU:C:2009:569, para. 123; *Frosio*, (fn 6), p. 358.

⁸⁰ *Frosio*, (fn 6), p. 358.

⁸¹ *Ibid.*, p. 367.

⁸² *Ibid.*, p. 367.

adhering to old models of authorizing the communications to the public of their works, EU copyright reform could embrace the ubiquity and ease of sharing to even more fairly compensate creators without impacting the freedom of internet users.

Considering, then, that the effectiveness of the current regime was not examined with independent, empirical evidence, nor was the alternate proposal of monetization agreements considered, this suggests that Article 13 is not the only solution to protecting the revenue streams of content creators, nor even is it even best possible option to bring copyright law into the digital age.

F. The balance of the right to intellectual property against freedom of expression

The Court's jurisprudence has continually defined and bolstered the exclusive rights of copyright holders over their works and the profit obtained therefrom.⁸³ However, despite the important and worthy goal of ensuring fair remuneration for content creators,⁸⁴ nothing in the Court's jurisprudence suggests that the right to intellectual property and the right to profit from protected works should be upheld above the freedom of expression in all cases. In *Scarlet Extended*, the Court held that there is "nothing whatsoever in the wording of that provision or in the Court's case-law to suggest that [the right to property] is inviolable and must for that reason be absolutely protected."⁸⁵ In fact, the Court considers the internet to play an important role in the dissemination of information and the fundamental right of freedom of expression and information.⁸⁶

I. Content filters would constitute general monitoring obligations, contrary to Article 15 of the e-Commerce Directive

The use of content filters as indicated in the DSM Proposal would run counter to Article 15 of the e-Commerce Directive, constituting a general monitoring obligation. The e-Commerce Directive prohibits general monitoring obligations, but allows for Member States to impose

⁸³ In *SGAE*, the Court held that the provision of broadcast television on TVs in hotel rooms constituted a communication to a new public; in *Ziggo* the Court held that that even when all protected content is shared by users, the operators of the platform by managing the website intervene, with "full knowledge of the consequences of their conduct, to provide access to protected works" thus constituting a new communication to the public; in *Land Nordrhein-Westfalen*, the Court held that posting a freely available photo on a different website is a new communication; ECJ, judgment of 7 December 2006, *SGAE*, C-306/05, EU:C:2006:764, para. 54; ECJ, *Ziggo*, (fn 17), para. 26, 47; ECJ, *Land Nordrhein-Westfalen*, (fn 17), para. 47.

⁸⁴ *Senftleben et al.*, (fn 6), p. 151.

⁸⁵ ECJ, *Scarlet Extended SA*, (fn 63), para. 43.

⁸⁶ ECJ, *GS Media*, (fn 17), para. 45.

monitoring obligations “in a specific case.”⁸⁷ However, the obligations to prevent protected works from being uploaded without licensing demanded by the Proposal would necessitate general monitoring; illegal content cannot be prevented without first monitoring all content uploaded by users on online platforms.⁸⁸ Even though the monitoring is for a specific purpose, to protect intellectual property, this cannot be seen as an allowed monitoring obligation for a “specific case” as Recital 47 of the e-Commerce Directive allows.⁸⁹ All information uploaded on the platforms, for all users, would have to be actively monitored in order to find and identify any infringing material.⁹⁰ The Court’s case law indicates that monitoring is considered specific only in cases where it deals with a specific, repeatedly infringing user, or is with regard to a specific piece of content, the infringement of which has already been established.⁹¹ Article 13 would mandate general monitoring, as the use of content filters is not limited to specific content or areas, but rather, includes all uploads and information shared by users of the service.

Contrary to the current intermediary liability regime, where knowledge of illegal material then entails an obligation to remove it expeditiously, monitoring obligations would “create a legal presumption of knowledge on platforms” such that whether the online platforms are actually aware of the existence of unlawful material on their platform they will be presumed to know and to have employed measures of prevention which were ultimately not effective.⁹² Presumably, this is to promote the proactive conclusion of licensing agreements with rightholders, however, in order to ensure all protected material uploaded to an online platform is under an authorized use, online platforms would have to negotiate licensing agreements with every possible author of a work which might end up on the platform. Even if the reference to the use of content filters in order to prevent future uploads of unauthorized content was removed, the imposition of direct liability and an obligation to prevent material from being uploaded illegally would essentially enforce a continuing duty to monitor, or online platforms would open themselves up to a high risk of many successful copyright infringement lawsuits against them.

The DSM Proposal runs counter to CJEU jurisprudence on filtering and monitoring obligations, which has been quite clear in enforcing the e-Commerce Directive’s prohibition on

⁸⁷ *Frosio*, (fn 6), p. 349; E-Commerce Directive, (fn 10), Article 15, Recital 47.

⁸⁸ The Court noted in *Netlog* that “it is common ground that implementation of that filtering system would require . . . active observation of files stored by users with the hosting service provider and would involve almost all of the information thus stored and all of the service users of that provider . . . [i]n the light of the foregoing, it must be held that the injunction imposed on the hosting service provider requiring it to install the contested filtering system would oblige it 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”; ECJ, Judgment of 16 February 2012, Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) (Netlog)*, ECLI:EU:C:2012:85, para. 36-38; *Frosio*, (fn 6), p. 348.

⁸⁹ *Senftleben et al.*, (fn 6), p. 151-2.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Frosio*, (fn 6), p. 352.

the imposition of general monitoring obligations.⁹³ In the *SABAM* cases, the Court held that adopting an injunction imposing a filtering system that would process all of the information hosted by an ISP or hosting service provider in order to identify copyright infringement would not strike a fair balance between the right to property and other fundamental rights, including the freedom to receive and impart information.⁹⁴ In *Netlog*, the Court ruled on the appropriateness of the same kind of measures which the Proposal would introduce, and it plainly ruled that imposing such a filtering measure would be incompatible with fundamental rights, including freedom of expression.⁹⁵ Netlog was a social networking platform similar to Facebook, which allowed users to communicate with friends, fill out a personal profile and share videos, photos, messages and other material.⁹⁶ SABAM, a management company for musical artists responsible for concluding licensing agreements on the behalf of the artists, filed for an injunction against the social network to oblige it to stop publishing works in SABAM's repertoire, claiming that Netlog was making protected works available without concluding a licensing agreement.⁹⁷ Netlog argued that imposing this type of injunction obliging Netlog to cease making available protected works uploaded by their users would constitute a measure which required general monitoring of the content of the network in order to filter through, identify and prevent the availability of works to which SABAM held the licensing rights by blocking the exchange of the material.⁹⁸ The Court agreed with this, and noted that such a measure requiring the social network to use a filtering system to prevent and block the availability of works licensed to the artists protected by SABAM,

“could potentially undermine freedom of information, since that system might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications. Indeed, it is not contested that the reply to the question whether a transmission is lawful also depends on the application of statutory exceptions to copyright which vary from one Member State to another. In addition, in some Member States certain works fall within the public domain or may be posted online free of charge by the authors concerned.”⁹⁹

In this way, general filtering and monitoring obligations might infringe on the right to freedom of expression in the Charter of Fundamental Rights.¹⁰⁰

The Proposal is also inconsistent with the Union's *acquis communautaire* with regard to the balance between fundamental rights and existing copyright principles. Notably, the e-

⁹³ ECJ, *Scarlet Extended*, (fn 63), para. 53; ECJ, *Netlog*, (fn 88), para. 51.

⁹⁴ ECJ, *Netlog*, (fn 88), para. 51; ECJ, *Scarlet Extended*, (fn 63), para. 53; *Frosio*, (fn 6), para. 356.

⁹⁵ ECJ, *Netlog*, (fn 88), para. 48.

⁹⁶ *Ibid.*, para. 16; *Senftleben et al.*, (fn 6), p. 159.

⁹⁷ ECJ, *Netlog*, (fn 88), para. 15, 21.

⁹⁸ *Ibid.*, para. 23.

⁹⁹ *Ibid.*, para. 50; see also, ECJ, *Scarlet Extended*, (fn 63), para. 52.

¹⁰⁰ *Frosio*, (fn 6), p. 355-356.

Commerce Directive obliges hosting services to respect freedom of expression when deciding on the removal of infringing content.¹⁰¹ This imposes a duty to use care and consideration, weighing the fundamental rights involved, before content is removed or access is disabled.¹⁰² Notice and takedown therefore has a built-in safety mechanism protecting freedom of expression, as it forces the material to be carefully considered before being removed.¹⁰³ Thus, automated filters simply cannot be in compliance with this obligation, making providers hosting providers non-compliant with the e-Commerce Directive when implementing the content filters required by the Proposal.¹⁰⁴ This would make the notice and takedown framework that is fundamental to the functioning of the e-Commerce Directive basically irrelevant, while maintaining that the e-Commerce Directive is still technically in force.¹⁰⁵

II. The DSM Proposal expands the definition of communication to the public

The Court's case law indicates that it interprets the definition of communication to the public as laid out in Article 3(1) of InfoSoc in light of the purposes of the directive, which is a broad level of protection for authors and ensuring they are able to claim fair remuneration for the communication of their works.¹⁰⁶ The role that an internet user plays in making the work available to the public or to a 'new public' is crucial to determine whether it is a communication to the public, namely whether the user pursues a profit in providing access to the work.¹⁰⁷ When they pursue a profit in posting or sharing access to a work, there is a presumption that they have checked to ensure that the work is legally published on the initial website, and such a user then knows or should have known that the consequences of their actions would be to illegally share protected works.¹⁰⁸

Based on the results of the impact assessment on copyright modernization discussed previously, the Commission concluded that while there was necessary reform, the existing intermediary liability regime would be maintained.¹⁰⁹ However, the DSM Proposal departs from the safe harbor regime by imposing direct liability on online platforms, stating in Recital 38 that,

“[w]here information society service providers store and provide access to the public to copyright protected works or other subject-matter uploaded by their users, thereby go-

¹⁰¹ E-Commerce Directive, (fn 10), Recital 46.

¹⁰² *Frosio*, (fn 6), p. 358.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*, p. 357.

¹⁰⁵ *Ibid.*, p. 353.

¹⁰⁶ ECJ, *SGAE*, (fn 83), para. 36; ECJ, *GS Media*, (fn 17), para. 29-30; ECJ, *Ziggo*, (fn 17), para. 21-22; InfoSoc Directive, (fn 9), Recitals 9-10.

¹⁰⁷ ECJ, *Ziggo*, (fn 17), para. 25-26; ECJ, *Filmspeler*, (fn 17), para. 49.

¹⁰⁸ ECJ, *Filmspeler*, (fn 17), para. 49; ECJ, *Ziggo*, (fn 17), para. 25-26.

¹⁰⁹ Communication OP & DSM, (fn 34), p. 9.

ing beyond the mere provision of physical facilities and performing an act of communication to the public, they are obliged to conclude licensing agreements with rightholders, unless they are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC of the European Parliament and of the Council.”¹¹⁰

The scope of communication to the public is thereby expanded to include that when online service providers store and provide access to user-uploaded protected works, they are automatically not merely providing a physical facility for making a communication, and this act of hosting the content constitutes an act of communication to the public.¹¹¹ This is similar to what the Court held in *Ziggo*, where even when the exchange of copyright protected material is conducted solely by the users through such a website, the operators of that website, by creating and managing an online sharing platform which makes the exchange of this material easier “intervene, with full knowledge of the consequences of their conduct, to provide access to protected works.”¹¹² However, it should be noted that the content-sharing platform referred to in the above-reference case was one which was used exclusively for exchanging “torrent” files, meaning it was a platform set up for the sole purpose of exchanging copyrighted material without the authorization of the rightholders, where the managers of the platform could not have been unaware of the illegal activity, rather than a hosting platform like Facebook, Reddit or YouTube where the main function is not facilitating online piracy.¹¹³ It remains to be seen whether the Court would rule that online content-sharing services whose main purposes is not to facilitate online piracy also make a communication to the public simply by managing and providing a platform that makes the exchange of such material easier.

III. Chilling effects on users’ ability to make use of copyright exceptions and limitations

Content filtering is an imprecise tool, one which is currently unable to distinguish protected content used under an exception or limitation of exclusive rights from infringing content, such as public domain works, as the Court noted above.¹¹⁴ Therefore lawful content is often flagged and removed by the automated systems, along with unlawful content.¹¹⁵ The imprecise nature of the technology leading to a lot of lawful material being flagged and removed could cause ‘chilling effects’ where users don’t want to upload content for fear of being nailed

¹¹⁰ DSM Proposal, (fn 1), Recital 38.

¹¹¹ *Ibid.*, Recital 38; *Husovec*, (fn 20).

¹¹² ECJ, *Ziggo*, (fn 17), para. 36, 38-39

¹¹³ *Ibid.*, para. 12, 36, 38.

¹¹⁴ See *supra*, Section D: “The suitability of content filters to close the ‘value gap’”; ECJ, *Netlog*, (fn 88), para. 50.

¹¹⁵ ECJ, *Netlog*, (fn 88), para. 50; see also, ECJ, *Scarlet Extended*, (fn 63), para. 52.

with a copyright infringement notice.¹¹⁶ With the way that YouTube, for example, deals with repeated copyright infringers, this could lead to small video content creators using material under an exception or limitation,¹¹⁷ but having their videos flagged for copyright infringements, leading to their videos being removed or their accounts terminated and thus severely impacting their ability to share information on the internet. Content filtering systems, by virtue of the amount of ‘false positives’ in flagging infringing content, hinder the ability of individual users to make use of exceptions like the right to use copyright protected works parody and quotation.¹¹⁸ The vast amount of content which would be required to be filtered would impose an unreasonable burden on online platforms by sheer virtue of the vast volume of content which is uploaded onto online platforms every single day. The Court noted in *Netlog* that such an imposition would be an unreasonable infringement on the online platform’s freedom to conduct a business under Article 16 of the Charter, given the long duration of the application of such measures, their application to current and future infringements, and their application to protect works which are not yet in existence, as well as the costly and complicated nature of the filtering system.¹¹⁹

IV. Favoring of mass media holders over small content creators and individual users

The InfoSoc Directive, the current reigning law on copyright in the EU, was drafted and came into force long before the advent of many of these content sharing platforms, meaning that the law is governing means of creation which did not exist at the time the Directive came into force.¹²⁰ As such, copyright law lags behind in accounting for the new ways that content is created and shared,¹²¹ leaning more in favor of mass media rightholders, rather than the small content creators that account for much of the material shared and viewed on these platforms.¹²² Filtering measures like YouTube’s Content ID not only falsely identify content as infringing, failing to allow users to make use of exceptions under copyright law, they also deprive them of the fair remuneration from their own content.¹²³ When Content ID flags a

¹¹⁶ *Frosio*, (fn 6), p. 357.

¹¹⁷ YouTube’s Terms of Services state in Section 8(B) that “YouTube will terminate user access to the Website if a user has been determined to be a repeat infringer. A repeat infringer is a user who has been notified of infringing activity more than twice.”; *YouTube*, Terms of Service, <https://www.youtube.com/static?template=terms> (last accessed on Apr. 25, 2019).

¹¹⁸ *Senftleben et al.*, (fn 6), p. 149.

¹¹⁹ ECJ, *Netlog*, (fn 88), para. 45-6; see also, ECJ, *Scarlet Extended*, (fn 63), para. 48-49.

¹²⁰ YouTube, for example, was founded in 2006 and the InfoSoc Directive was adopted in 2001.

¹²¹ *Solomon*, (fn 6), p. 237.

¹²² *Ibid.*, p. 238; this was in reference to the application of the Digital Millennium Copyright Act (“DMCA”) in the US, however, given that the DMCA and the InfoSoc Directive were both created to implement obligations stemming from the WIPO Copyright Treaty, and have not been updated since, as well as the fact that lobbying for the Directive was coming primarily from the music industry and mass media companies, the idea can be applied *mutatis mutandis* to the situation in the EU as well.

¹²³ *Solomon*, (fn 6), p. 259.

video as using protected content without a license the rightholder can request YouTube to monetize the video instead of blocking it, and direct the ad revenue back to the rightholder and YouTube, to the exclusion of the content creator, irrespective of whether or not they've monetized the video themselves.¹²⁴ However, this can happen regardless of the amount of infringing content in a video.¹²⁵ This means that, for example, if a content creator makes use of a small clip of music in a video otherwise shot and edited by them, a successful infringement claim would take away all of the profits they might have made from that video, regardless of the amount of infringing material as compared to original work.¹²⁶ The uploader is therefore deprived of their right to their intellectual property in favor of the mass media company.¹²⁷ This unfair balance, favoring the mass media companies, has a chilling effect by scaring small users away from uploading and creating content because of the threat of a lawsuit for copyright infringement.¹²⁸ The ability of internet users to make use of exceptions and limitations to the right of communication would thereby be impacted by the DSM Proposal, consequently impacting their right to freedom of expression and information.¹²⁹

G. The Amended Proposal changes little with regards to the impact on freedom of expression

After widespread protests from Internet users across Europe on March 23rd, particularly in Germany, and strong opposition from online platforms,¹³⁰ the European Parliament approved a new draft of the Directive on March 26, 2019, which amended the text of Article 13 (now Article 17) considerably, making the application of the article more explicit. Many hoped that the widespread advocacy would inspire European lawmakers to reconsider the Directive,¹³¹ yet these amendments do little more than offer appeasement to an irate public, while still maintaining the core principles of the article, and having the potential to seriously impact freedom of expression and information on the internet. Julia Reda, a Pirate Party MEP and one of the most vocal opponents of Article 13, called the passing of the DSM Directive through the European Parliament a “dark day for internet freedom.”¹³² The amended article still considers online platforms to be making a communication to the public by giving

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*, p. 238-9.

¹²⁹ *Frosio*, (fn 6), p. 356-7.

¹³⁰ *Meaker*, (fn 6).

¹³¹ *Ibid.*

¹³² *Hopping, Clare/Jones, Connor/Connors, Siobhan*, What is Article 13 and Article 11?,

<https://www.itpro.co.uk/policy-legislation/32552/what-is-article-13-and-article-11> (last accessed on Apr. 26, 2019).

access to protected works uploaded by their users and therefore imposes an obligation to conclude licensing agreements.¹³³ The European Parliament has removed the mention of content recognition technology, but the Article retains the imposition of direct liability,¹³⁴ and a requirement to prevent protected material from being uploaded without authorization, applying to current and future works.¹³⁵ Despite the fact that the amended article prohibits Member States from imposing general monitoring obligations,¹³⁶ the imposition of direct liability and requirement to prevent the availability of protected works effectively means that online platforms will have no choice but to institute general monitoring to diminish their liability for copyright infringements.

The amended text now more clearly specifies which online platforms are covered under this Directive. The Directive applies to “online content-sharing service providers” which are defined as online providers that:

“as part of their normal use, are designed to give access to the public to copyright-protected content or other subject matter uploaded by their users. The definition of an online content-sharing service provider laid down in this Directive should target only online services that play an important role on the online content market by competing with other online content services, such as online audio and video streaming services, for the same audiences...with the purpose of obtaining profit therefrom, either directly or indirectly, by organising it and promoting it in order to attract a larger audience, including by categorising it and using targeted promotion within it.”¹³⁷

Recital 62 goes on to explicitly exclude scientific and education sharing platforms, online encyclopedias, online marketplaces, digital personal storage sites and open source software platforms.¹³⁸ An important thing to note is that the end of this recital then says that the liability exemption provided for in this Directive should not apply to online platforms whose main purpose is facilitating piracy.¹³⁹ This distinction between platforms whose main purpose is facilitating online piracy, and platforms which “play an important role” in the digital market and compete with online streaming services clearly indicates that this Directive is aimed at regulating platforms like YouTube which supposedly compete with paid streaming services like Hulu or Netflix for the ‘same audiences.’

Article 17(1) changes the liability of online platforms from the current intermediary liability regime, saying that:

¹³³ DSM Directive, (fn 2), Article 17(1).

¹³⁴ *Ibid.*, Article 17(4).

¹³⁵ *Ibid.*, Article 17(4).

¹³⁶ *Ibid.*, Article 17(8).

¹³⁷ *Ibid.*, Recital 62.

¹³⁸ *Ibid.*, Recital 62.

¹³⁹ *Ibid.*, Recital 62.

“an online content-sharing service provider performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users.

An online content-sharing service provider shall therefore obtain an authorisation from the rightholders ... in order to communicate to the public or make available to the public works or other subject matter.”¹⁴⁰

This Article therefore still makes online platforms directly liable just as the proposed Article 13 does, indicating that through infringing user uploads, the platform makes a communication to the public by giving the public access to these uploads, and maintains the obligation for online platforms to conclude licensing agreements with rightholders. Article 17(3) then goes on to explicitly say that the limitation on liability established in Article 14(1) of the e-Commerce Directive does not apply for communications to the public by online platforms, as defined by this Directive. This means that the requirement for “actual knowledge of illegal activity”¹⁴¹ in order to establish liability is removed for online content-sharing platforms. Thus, online content-sharing platforms are liable for any copyright infringing material their users upload if there is no licensing agreement concluded between the platform and the rightholder or the user and the rightholder, regardless of whether they have knowledge of it.

Article 17(4) goes on to establish a limited liability exemption for unauthorized communications of works, as long as the platform (1) “made best efforts” to conclude an agreement or acquire authorization,¹⁴² (2) made “best efforts to ensure the unavailability” of works that the rightholders have provided sufficient information about,¹⁴³ and (3) removed content “expeditiously” upon a substantiated notice from the rightholders and made best efforts to prevent that specific content from being uploaded in the future.¹⁴⁴

H. Conclusion

In conclusion, the DSM Directive will still impose direct liability on online content-sharing platforms. While this no longer explicitly requires content filtering, the obligations imposed by the Directive, namely preventing the availability of protected works, will essentially force platforms to adopt general monitoring measures. The use of content filters is not advanced enough and finely tuned to be able to pick out uses under exceptions and limitations,

¹⁴⁰ Ibid., Article 17(1).

¹⁴¹ E-Commerce Directive, (fn 10), Article 14(1).

¹⁴² DSM Directive, (fn 2), Article 17(4)(a).

¹⁴³ Ibid., Article 17(4)(b).

¹⁴⁴ Ibid., Article 17(4)(c).

and thus will lead to lawful material being flagged as infringing. This could have an extremely detrimental effect on freedom of expression on the internet, creating a chilling effect, and keeping smaller content creators out of the market. It is worth mentioning that the Article does emphasize that in the implementation of the Directive, fundamental rights such as the freedom of expression should be respected, particularly with regards to uses for parody, pastiche and quotation in Article 17(7), however, the ways in which Article 17 is structured, and the proven risks to freedom of expression as discussed in this paper indicate that the DSM Directive will still have a detrimental impact on freedom of expression, if it is executed in this form by Member States.

Bibliography

Ashcroft, Robert, PRS for Music Chief Executive responds to EU copyright reform, PRS for Music, 14 Sep 2016, <https://www.prsformusic.com/press/2016/prs-for-music-chief-executive-responds-to-eu-copyright-reform> (last accessed on 26/04/2019)

Breindl, Yana/Briatte, François, Digital Protest Skills and Online Activism Against Copyright Reform in France and the European Union, in: *Policy & Internet*, Vol. 5, Issue 1, 2013, p. 27–55.

Frosio, Giancarlo, Digital piracy debunked: a short note on digital threats and intermediary liability, in: *Internet Policy Review*, Vol. 5, Issue 1, 2016, p. 1-22.

Frosio, Giancarlo, To Filter, or Not to Filter? That is the Question in EU Copyright Reform, in: *Cardozo Arts & Entertainment*, Vol. 36, Issue 2, 2018, p. 331-368.

Hopping, Clare/Jones, Connor/Connors, Siobhan, What is Article 13 and Article 11?, IT PRO, 16 Apr 2019, <https://www.itpro.co.uk/policy-legislation/32552/what-is-article-13-and-article-11> (last accessed on 26/04/2019).

Houldsworth, Adam, Unpublished EU study casts doubt on displacement of sales by online infringement, but the reality is nuanced, *World Trademark Review*, 28 Sep 2017, <https://www.lexology.com/library/detail.aspx?g=4f2b794e-5f2c-4408-8bd6-c3c766365e60> (last accessed on 26/04/2019).

Husovec, Martin, EC Proposes Stay-down & Expanded Obligation to License UGC Services, Hut'ko's Technology Law Blog, 1 Sep 2016, <http://www.husovec.eu/2016/09/ec-proposes-stay-down-expanded.html> (last accessed on 26/04/2019).

N.N., IFPI Global Music Report 2016, Ifpi.org, 2016, <https://www.ifpi.org/downloads/GMR2016.pdf> (last accessed on 26/04/2019).

Meaker, Morgan, Inside the giant German protest trying to bring down Article 13, Wired UK, 26 Mar 2019, <https://www.wired.co.uk/article/article-13-protests> (last accessed on 26/04/2019).

Rosati, Eleonora, Why a Reform of Hosting Providers' Safe Harbour is Unnecessary Under EU Copyright Law, in: CREATE Working Paper, 2016/11, p. 1-22.

Senftleben, Martin/Angelopoulos, Christina/Frosio, Giancarlo/Moscon, Valentina/Peguera, Miquel/Rognstad, Ole Andreas, The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform, in: European Intellectual Property Review, Vol. 40, Issue 3, 2018, pp. 149-163.

Solomon, Leron, Fair Users or Content Abusers? The Automatic Flagging of Non-Infringing Videos by Content ID on YouTube, in: Hofstra Law Review, Vol. 44, Issue 1, 2018, p. 237-268.

Urban, Jennifer/Karaganis, Joe/Schofield, Brianna, Notice and Takedown in Everyday Practice, in: UC Berkeley Public Law Research Paper No. 2755628, 2017, p 1-170.

van der Ende, Martin/Poort, Joost/Haffner, Robert/de Bas, Patrick/Yagafarova, Anastasia/Rohlfs, Sophie/van Til, Harry, Estimating displacement rates of copyrighted content in the EU, European Commission, May 2015, https://juliareda.eu/wp-content/uploads/2017/09/displacement_study.pdf (last accessed on 26/04/2019).