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Article 17 of Digital Single Market and the threat to Freedom of Expression

Abstract: The aim of this paper is to analyse the Digital Single Market Directive implemented by the European Union, and how it will impact the position of authors, rightholders, User Generated Content platforms and content creators.

Article 17 has been subject to much controversy, this contention is related to the shift in intermediary liability and online platforms for copyright protected content hosted on their platforms by their users. This paper will attempt to give an overview of the copyright protection pre-DSMD, the policy rationale for the new Directive, analyse how platforms deal with copyright infringement, and what mechanisms they might employ under the new directive to deal with copyright infringement. And will also discuss whether this new legislative instrument undermines the crucial fundamental freedoms available under The Charter in the European Union.

1. Introduction

In April 2019, after months of legislative process Digital Single Market Directive 2019/970[1] ("DSMD") was adopted. Article 17 of this Directive is one of the most controversial ones, and has been subject to criticism from platforms, internet users and human rights advocates, as it provides the foundation for content filtering and makes intermediaries liable for their users' content. Therefore, it is crucial to examine Article 17 and consider the objectives of the Directive and to analyse if the objectives are met.

There had been increased calls to amend copyright and safe harbour regime due to the escalation of illegal content, hate speech, terrorist propaganda, copyright infringements and fake news. Right holders and governments pushed for a regime to censor controversial content online, a straightforward reason behind this is that platforms benefit from sharing content, and they therefore have the means to regulate it in an effective and efficient manner.

[1] Directive 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 [DSMD]

If platforms are made liable for what the users are uploading then they will take appropriate steps to hinder the spread of illegal content online.[2]

Adding to this reasoning there was a widespread threat of platforms becoming too powerful, these platforms pose a legitimate threat of overtaking print and traditional media as they have become our main source of news, entertainment, help us stay connected with people, express ourselves and also share our opinions with others. Some also fear that these giant platforms might get too powerful and start acting like a hegemony and have the potential to "grow so large and become so deeply entrenched in world economies that they could effectively make their own laws".[3] In Europe there was another aspect at play, anti-platform rhetoric was fuelled by nationalist sentiment against the "invading" foreigners as in the digital war, Europe found itself outgunned by four invading digital giants, Google, Amazon, Facebook and Apple which govern most of the business world.[4] Therefore the Governments and rightholders pushed for more regulations.

In 2015 the EU Commission unveiled an ambitious plan to modernise the so-called 'digital single market' through the Digital Single Market Strategy. In September 2018 members of the European Parliament voted in favour of the Copyright Directive.[5] However, Article 13 (now 17) which made filtering copyright protecting content mandatory was met with criticism from internet pioneers and users in Europe,[6] as content monitoring and filtering is prohibited under the E-Commerce Directive.[7] There is a legitimate concern about whether this would deprive the users of freedom of expression. (Poland has already challenged the copyright directive for the threat it poses to Freedom of Expression.)[8]

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[2] Niva Elkin-Koren, Yifat Nahmias, and Maayan Perel, "IS IT TIME TO ABOLISH SAFE HARBOR? WHEN RHETORIC CLOUDS POLICY GOALS," *SSRN*, February 28,https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3344213. [hereinafter When Rhetoric Clouds Policy 2019]

[3] Farhad Manjoo, Why the World Is Drawing Battle Lines Against American Tech Giants, New York Times (June 1, 2016), https://www.nytimes.com/2016/06/02/technology/why-the-world-is-drawing-battle-lines-against-american-tech-giants.html

[4] 1 Steve Denning, The Fight For Europe's Future: Digital Innovation Or Resistance, Forbes (May 20, 2018) https://www.forbes.com/sites/stevedenning/2018/05/20/the-fight-for-europes-future-digital-innovation-or-resistance/#565f33e748c0

[5]Julia Reda, "European Parliament Endorses Upload Filters and 'Link Tax,'" Julia Reda, 2018, https://juliareda.eu/2018/09/ep-endorses-upload-filters/.

[6] Danny O'Brien, "70+ Internet Luminaries Ring the Alarm on EU Copyright Filtering Proposal," Electronic Frontier Foundation, June 12, 2018, https://www.eff.org/deeplinks/2018/06/internet-luminaries-ring-alarm-eu-copyright-filtering-proposal.

[7]Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [E-Commerce Directive].

[8] Case-401/19 Poland v Parliament and Council

Under this new Directive, Member States will have to introduce a new regime regarding the internet intermediaries and safe harbours. This article will first discuss the current copyright landscape, the regulations under E-Commerce and Information Society Directive related to intermediaries, what 'communication to the public means' and how the CJEU case law has evolved with it. It will also try to address what effects this might have on the economy and smaller start ups as they would be burdened with using technical methods and legal strategies to ensure compatibility. It will also discuss the methods tech giants like Youtube use and what problems are faced by content creators due to them. Furthermore, there will be an analysis whether the new Directive is compatible with the existing EU laws. Has the EU in an attempt to make a policy that holds large corporations liable for hosting copyright-protected material undermined the essence of copyright law? What other Fundamental Rights are affected by it? And if there is an option to mitigate the risk.

2. Copyright Law in European Union

With the Internet becoming commonplace in the late nineties, lawmakers were posed with new challenges regarding law and regulations on the internet. Especially in the field of Intellectual property. There was an incentive to focus on the role of intermediaries to solve legal issues like IP rights protection and user privacy. An important question was posed as to who exactly is liable for infringing material that gets uploaded or stored on the systems hosted by intermediaries.

Online intermediaries play an important role and in the earlier days policy makers were hesitant to regulate them and hold them liable for the content uploaded by users as they would harm the online industry.[9] To shield platforms against hindering progress in online businesses and creativity and to protect the freedom of expression, legislatures adopted a framework that exempted sites from holding the hosting sites from legal liability. This shaped the development of the internet in Europe. [10]

2.1 E-Commerce Directive and Safe Harbours

[9] Nedim Malovic, "Presumed Innocent: Should the Law on Online Copyright Enforcement and ISP Liability Change?," *SSRN*, March 26, 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2941087. [Malovic]
[10] When Rhetoric Clouds Policy Goals, *supra* note 2

Over the years a number of directives at the EU level have worked on harmonizing the Intellectual Property Law, and also the remedies available to right holders against their rights being infringed over the internet. One of the most prominent Directive came in June 2000 and is called E-Commerce Directive. The aim of which was to benefit the internal market by creating a framework that would help electronic commerce and to promote legal certainty in the EU.The focus was especially on the liability issues, to improve the development of services across the EU and eliminate distortions of competition.[11]

What this directive tried to do was to create a balance between a competitive legal regime that promotes freedom of right to information. While defining ISP as 'any informative 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.' It also provided the scope of liability including the exceptions to it. ISPs can benefit from liability exceptions if they fall under the exemption categories mentioned in art 12-14 that is mere conduit caching and hosting, these are called the Safe Harbours.

Mere Conduit

Mere conduit is described in E-Commerce Directive ("ECD"),[12] as an information society service 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'. This means as long as the intermediary does not interfere or modify transmission it will not be liable.[13] This was decided in the *McFadden* case, a German chain gave the general public a free and unsecure WiFi service to draw potential clients to its shop. In 2010 a musical work belonging to Sony was made available for download through their network, a clear infringement of copyright by McFadden's user. The question in front of the Court was who exactly is responsible for the infringement, and will they be able to rely on one of the protections available under the ECD.

The Courts decided that McFadden was not liable because a provider will not be liable for the information that is transmitted by a third party receiving the provider's service if the following the provider of the service did not initiate the illicit transmission; it must not

[11] Nedim Malovic, *supra* note 9
[12] E-Commerce Directive, *supra* note 7, art. 12
[13] E-Commerce Directive, *supra* note 7, art. 12(2)

have selected the recipient of the illicit transmission; and it must neither have selected nor modified the information contained in the illicit transmission.[14]

Caching

Article 13 of ECD concerns "transmission[s] in a communication network of information provided by a recipient of the service" whereby the intermediary stores the information in an "automatic, intermediate and temporary" manner "for the sole purpose" of making the transmission to other recipients of the service more structured. This efficient use of server spaces and internet cables frees up space to other users. It grants immunity if there is no interference or modification by the intermediary. The purpose of this exception is to protect intermediaries in respect of materials that do not originate from them but are temporarily stored on their servers to ensure the availability of material and the stable functioning of the Internet.

Hosting

Article 14 of ECD is relevant where the service offered is the "storage of information provided by a recipient of the service". An intermediary is exempt from liability they did not have "actual knowledge of illegal activity or information". Similarly, the platform is protected from civil claims for damages as long they are not aware of facts and circumstances from which the illegal activity or information is apparent.[15] Article 14 sets a different threshold of knowledge for civil claims and other illegally shared content and to remain immune from liability the intermediary must act "expeditiously to remove or to disable access to the information" as soon as they obtain knowledge or awareness of copyright protected content on their account, which is also referred to as notice and take down.

The platforms are not entitled to immunity and might be accountable for copyright infringements if they fail to meet the requirements. This is why notice and take down[16] procedures are now the industry standard for implementing online copyright and are now incorporated in the framework of most of the online intermediaries. Therefore, both the rightholders and intermediaries are held responsible for monitoring and enforcement of copyrights. These existing rules of liability regarding safe harbours do not encourage

[14] Case C-484/14 McFadden v Sony (2015)
[15] E-Commerce Directive, *supra* note 7, art. 12 14 (1)(a)
[16] Castets-Renard, Céline, Algorithmic Content Moderation on Social Media in EU Law: Illusion of Perfect Enforcement (February 9, 2020). University of Illinois Journal of Law, Technology & Policy (JLTP), Forthcoming. Available at SSRN: https://ssrn.com/abstract=3535107 or http://dx.doi.org/10.2139/ssrn.3535107

platforms like YouTube to turn a blind eye to the violation of copyright. In particular in some jurisdictions where platforms are excluded from accountability for unethical good faith removal of content. If so, they encourage intermediaries to act with extreme care and to act with caution.[17]

Article 15 of the ECD, prohibits Member States from imposing general monitoring obligations on information transmitted and stored. Although Member States cannot oblige intermediaries to actively seek facts and circumstances surrounding an illegal activity, it does allow them to oblige to inform relevant competent authorities of the alleged illegal activity undertaken. Where such activity is detected, intermediaries must take prompt action to remove the illegal content. Online intermediaries are protected under the safe harbour provision only if they meet the requirements.

As E-Commerce was a directive and not a regulation, there were differences in the applications and outcomes across the different Member States.[18] This disparity in enforcing digital copyright laws was undermining the fight against the online Intellectual Property Law infringements. The EU Commission recognized, and as an attempt to mitigate this by further harmonizing and modernizing the digital market unveiled what is now called the Digital Single Market Directive.

2.2 Communication to the Public

It is important to look at the safe harbours provided by the E-Commerce Directive as they lay out the exemption from copyright infringement, however, they don't provide laws regarding when liability should be applied and what is the scope. To understand the scope of copyright law it is imperative to focus on InfoSoc Directive[19] which attempts to harmonise the exclusive rights available to copyright holders, among which the 'right to communication' and how it has evolved over the past few years plays an essential role in the intermediary liability.

[17]See Christina Angelopoulos, European Intermediary Liability in Copyright: A Tort Based Analysis, UNIVERSITY OF AMSTERDAM 141 (Apr. 22, 2016), https://perma.cc/ER2H73TX.

[18] European Commission, Memo 15/6262, Making EU copyright rules fit for the digital age – Questions & Answers,Brussels, 9 December 2015, available at http://europa.eu/rapid/press-release_MEMO-15-6262_en.htm.

[19] Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, Official Journal L 178, 17/ 07/2000, 01-16. [Infosoc Directive]

In Article 17 of the DSMD the wording includes that platforms which are making a 'communication to the public' will be liable for the content end users upload on their platform, and provides no definition for what communication to public means therefore it is important to see what this means and how it came about. Article 3[20] of the InfoSoc Directive provides authors/rightholders with the exclusive rights 'authorise or prohibit any communication to the public of their works by wire or wireless means, including the making available to the public of their works, in such a way that members of the public may access them from a place and at a time individually chosen by them.' Which, according to recital 23, should be understood in a broad sense, the aim of this directive was to provide a high level of protection for the authors so that their work does not get exploited.

The gradual change in what amounts to 'communication to the public' can be seen by case law, first formulation of this term was in Berne Convention, InfoSoc directive derived the wording of Article 3(1) from WCT[21], however it did not define it. The concept combines two elements (i) an act of communication (ii) which is directed at the public.[22] CJEU also highlights additional criteria which are interdependent, and may be applied on a case by case basis.

In the case of *Svensson*[23] Courts held that 'public' constituted an indeterminate or fairly large number of people and that the communication must be directed at a new public, which means the public right holder did not have in mind when it authorised communication to the public. In terms of 'act of communication' case law has a general consensus that the mere making available of a copyright protected work, and not its actual transmission, to the public where they can access the work is sufficient. However there needs to be a deliberate intervention by the user without which third parties would not have been able to access the work. In *SGAE v._Rafael Hotels*[24] European Court of Justice confirmed that even though merely supplying physical facilities did not not suffice, the distribution of a TV signal does amount to communicating to the public.

In the 2017 case of *Filmspeler*[25] CJEU had to decide if selling multimedia players in which he has installed add-ons containing hyperlinks to websites on which copyright-

[20] Infosoc Directive, supra 19, art. 3(1).
[21] World Intellectual Property Organization, Guide to copyright and related rights treaties administered by WIPO and glossary of copyright and related rights terms (2003), BC-11bis.1
[22] Giancarlo Frosio, "It's All Linked: How Communication to the Public Affects Internet Architecture," *Computer Law & Security Review* 37 (July 2020): 105410, https://doi.org/10.1016/j.clsr.2020.105410.
[23] C-466/12 Nils Svensson et al v Retriever Sverige AB (2014)
[24] C-306/05 SGAE v Rafael Hoteles (2006)
[25] C-527/15 Stichting Brein v Jack Frederik Wullems, also trading under the name Filmspeler (2017)

protected works are made directly accessible, amounts to ' communication of public.' The Courts held facilitating access to unlicensed content that would otherwise be difficult to locate would amount to communication to the public. In *GS Media*[26] case court added the profit making characteristic to communicating to the public, when hyperlinks are posted for profit making purposes it can be expected that the person who posted such a link carries out necessary checks to ensure that - is not illegally published on the website to which hyperlinks lead, therefore it amounts to communication to the public.

And in the *Pirate Bay*[27] CJEU not only clarified what accounts for an act of communication to the public but also who is responsible for it, it was held that the operators of The Pirate Bay by making their platform available and managing it, provide their users with access to copyright protected works. It also builds on the previous cases *GS Media* and *Filmspeler* that a profit making intent may be sufficient to trigger a rebuttable presumption that the operator had the knowledge of the kind of content that will be communicated through the platforms.[28]

These decisions contribute to the relentless expansion of the notion of communication to the public, which has led to a growing involvement of online intermediaries, platforms and other service providers in Internet content regulation and sanitization. And the change in the internet architecture, which contributed to the copyright DSMD, where we see a shift from platforms having secondary liability to primary liability (it has been argued that introducing a knowledge requirement within the primary liability, the CJEU has blurred the distinction between strict liability tort and constructive knowledge)[29] as providing a platform for users to upload infringing content now makes them liable.

3. The Value Gap

Generally intellectual property rights are understood as means to incentivise creation which in turn benefits society. As initially there is a high cost of creating and publishing expressive works, if no legal protection is provided then, that might demotivate people and

[26] C-160/15 GS Media BV v Sanoma Media Netherlands BV and Others (2016)
[27] C-610/15 Stichting Brein v Ziggo BV and XS4All Internet BV (2017)
[28] Eleonora Rosati, "The CJEU Pirate Bay Judgment and Its Impact on the Liability of Online Platforms," July 21, 2017, https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3006591
[29] *id.*

decrease the supply of creative works which will have an adverse impact on social welfare. To ensure that does not happen, exclusive copyright laws are put in place.[30]

The policy rationale for Article 17 comes from the value gap campaign, used by the music industry.[31] Value gap is the alleged imbalance between what the right holders get reimbursed for their content, and what the platforms that host this copyright protected content make in revenue. Before this Directive, there were no liabilIty exemptions, no monetising obligations, and due to the 'notice and take down' regime right holders were unable to monetise the copyright protected content on platforms like Dailymotion, Youtube and Vimeo, where a majority of the content is uploaded by users, and often contains copyright protected. This created the rhetoric that there is a misuse of safe harbours which is diminishing the artists right to create, the artists are under remunerated. However this is at odd with the evidence as streaming platforms have actually increased profits for several years.[32]

In her article EU Copyright Grappling with Google Effects, Bridy explains how this rationale is flawed. She states that the music industry based their narrative on a comparison of Spotify and YouTube, how the revenues are distorted as they have different business models and face different legal issues.[33] YouTube allows for user generated content to be uploaded to the platform, Spotify on the other hand is a closed distribution programme which controls and decides the content it makes available to the users.[34] Spotify is an on demand digital music streaming service providing a variety of artists to listen to from all over the world, and while YouTube can be used to listen to music, it offers educational tutorials, family videos, lectures and parody songs.

The value gap argument is lacking in empirical evidence as the European Copyright Society in their opinion wrote, "we are disappointed to see that proposals are not grounded in any scientific (economic) evidence."[35] In the Global Music Report 2018: Annual State of Industry which is a publication of IFPI showed that 2017 was the third consecutive year in which the global music industry grew after 15 years of decline.[36]

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[30] When Rhetoric Clouds Policy Goals, *supra* note 2
[31] IFPI, 'Rewarding creativity - fixing the value gap' http://www.ifpi.org/value_gap.php
[32] When Rhetoric Clouds Policy Goals, *supra* note 2
[33] Bridy, Annemarie, EU Copyright Reform: Grappling With the Google Effect (June 30, 2019). Vanderbilt Journal of Entertainment & Technology Law, Forthcoming. Available at SSRN: https://ssrn.com/abstract=3412249 or http://dx.doi.org/10.2139/ssrn.3412249 [A.Bridy}
[34] *id.*
[35] European Copyright Society, "General Opinion on the EU Copyright Reform Package," January 24, 2017, https://nexa.polito.it/nexacenterfiles/ecs-opinion-on-eu-copyright-reform-def.pdf.
[36] IFPI Global Report, *supra* note 31

In terms of the gap between the revenue generated by a platform like YouTube and the right holders income, there is an underlying assumption that all revenue generated should go to the rightholder, as they are the original creators. However, this overlooks the overall creativity that the platforms allows people to exercise, and the added value of that in the music industry. Before YouTube, aspiring artists dreamed of getting a record deal, without which they would not be able to share their talent, this gave the recording labels a leverage over the artists. However, the internet has changed the landscape of this, with platforms like YouTube, artists are able to create and share even with relatively low budgets. Not only that they are able to figure out the target audience.[37] YouTube has given a platform to many famous singers that launched their careers by uploading their videos.[38]

The music industry was able to convince the Commission there was a need to fix the value gap despite the false equivalence at the heart of the value gap campaign, the European Commission was persuaded that YouTube's entitlement to the protection of the E-Commerce Directive safe harbour had not been beneficial to "a fair sharing of value" for use of recorded music on the platform. To address this problem and to redistribute the wealth from platform to rightholers Article 17 of the Digital Single Market Strategy was introduced.

4. The Digital Single Media Strategy

Significant part of the copyright framework dates back to 2001, when platforms like Facebook YouTube Instagram did not exist.[39] These platforms came a little later, and now are a livelihood for some people. They have launched careers helping people get famous or be discovered from social media to mainstream media, and to make money by becoming vloggers or bloggers. Therefore, the aim of the Digital Single Market is to modernise the copyright framework and to create an internal market for digital content and services. The aim is to facilitate research and education, improve dissemination of European cultures and positively impact cultural diversity.[40]

In 2015 a public consultation was held to carry out a comprehensive assessment of the role of online platforms and how to best address the issues regarding copyright infringement,

[37] A Bridy , *supra* note 33
[38] See https://www.teenvogue.com/story/best-artists-discovered-on-youtube
[39] Facebook was founded in 2004, YouTube in 2005 and Instagram in 2010
[40]European Union, "Modernisation of the EU Copyright Rules," European Commission, September 14, 2016, https://ec.europa.eu/digital-single-market/en/modernisation-eu-copyright-rules.

hate speech and terrorism related content.[41] There was a stark difference in the approaches raised by the people participating, in terms of liability under E-Commerce Directive, the users content uploaders and intermediaries considered it fit-for-purpose, and on the other hand the right holders and their association were not satisfied with the effectiveness of this regime and identified the loopholes in it.

Therefore, in the subsequent Communication, 'Online platforms and digital single market, opportunities and challenges for Europe',[42] the Commission officially sets forth their problem driven approach on supporting further development of online platforms in Europe. The Commission also highlighted the importance of having a robust regulatory framework, in which the platforms are able to provide access to information and content, but also take more responsibility for that content.

The focus of the new directive is on these three main objectives that there needs to be (i) more cross border access for citizens to copyright-protected content online (ii) creating right conditions for digital networks and services to flourish (iii) fair rules of the game for better functioning copyright marketplace, which stimulates creation of high quality content, and maximising growth potential of digital economy.[43]. The aim is to allow for wider online access to works by trying to reduce the differences between copyright national laws. The Commission emphasised the importance of online platforms and the powerful position they have, which they claimed could potentially impact other players in the marketplace. Stemming from this power is the need to guarantee that users (especially minors) are protected from hate speech and the harmful content online.[44]

With this new Directive, the Commission tries to reinforce the position of the rights holders. As one of its most important features is that it gives an opportunity to the content creators, authors and right holders to negotiate with Online Content Sharing Services Provider ("OCSSP") on how their work is shared and used on the platform, to get better remuneration for their content and be able to exercise better control on it. This new obligation concerns for most part platforms that financially profit from hosting copyright protected

[41] See European Commission, 'Public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy' (24 September 2015), https://ec.europa.eu/growth/content/public-consultation-regulatory-environment-platforms-online-intermediaries-data-and-cloud-0_en.

[42] See European Commission, 'Online platforms and the Digital Single Market — Opportunities and Challenges for Europe' (25 May 2016)

[43] *Id.*

[44] Montagnani, Maria Lillà, A New Liability Regime for Illegal Content in the Digital Single Market Strategy (June 3, 2019). Available at SSRN: https://ssrn.com/abstract=3398160 or http://dx.doi.org/10.2139/ssrn.3398160

content on their platform, often without the consent of the right holders. To set this right, the new directive assigns an active role on OCCSP to enforce and prevent copyright infringements. By introducing an obligation on OCCSP to obtain licenses or get authorisation from right holders to seek for the content they make available to the public on their platform.[45]

Where any unauthorised content is posted in the platform they will be held liable for it, as the 'safe harbour' protection of Article 14 of E-Commerce[46] directive no longer applies.[47] Although the provision which made content monitoring mandatory was removed from the approved version of DSMD there is still an obligation on online platforms to prevent uploads of unauthorised content, which seems unlikely without implementing a filtering mechanism.

4.1 Scope of Article 17

After public outcry and much criticism of Article 17 of the new Directive, the updated version did not have the requirement to filter content that may be copyright protected. Article 2(6) of the Directive[48] read together with the Recital 61-63 defines 'Online Content Sharing Service Providers' as a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes.

Article 17 has an effect on platforms which allow their users to share the content with other users, this includes YouTube, Dailymotion and Vimeo as they host User Generated Content. The main purpose of these sites is to 'store and give access to the public of copyright protected content' secondly, that content should be uploaded by 'users'. Thirdly, it is important to note that the wording contains that online platforms play an active role in 'profit making purposes' which excludes it from the liability limitation under Article 14 of the E-Commerce Directive. In doing so DSMD asserts the ruling in L'oreal v eBay.[49] Platforms that store or enable their users to upload copyrighted content for other reasons,

[45] DSMD, *supra* note 1, at art.17(1)
[46] E-Commerce directive, *supra* note 7 , art.14
[47] DSMD,supra note 1, at art.17(3)
[48] DSMD, *supra* 1, rectial 62
[49] C-324/09 L'Oréal SA v eBay International AG (2011).

such as non-profit uses or online marketplaces (which only offer retail and not access to copyrighted content) are excluded from the definition of OCSSP provided by DSMD.

There are some vague terms used in the directive that may cause uncertainty as to which platforms are included under the OCSSP, in the definition itself 'large amount of copyright-protected content' as well as in recitals 62 reads that "should target only services that play an important role." Leaving it up to the interpreters to decide what constitutes as large amounts and what is an important role.[50]

Article 17 also states that OCSSP is any service that performs an "act of communication to the public" and is therefore liable for their content. Article 17 of the Directive explicitly asserts that when an online content-sharing service provider performs an act of 'communication to the public' or an act of 'making available to the public' under the conditions laid down in this Directive, the limitation of liability established in Article 14 does not apply. These safe-harbours no longer apply to platforms and they must license all copyright protected content being shared on its service to avoid liability for copyright infringement.

On platforms that uploads user generated content the damages for copyright infringements can be hefty, for example in 2007 YouTube, which was a relatively new platform, was sued by *Viacom*[51] for uploading copyright protected to content to the site for statutory damages over 1 billion. Internet giants like YouTube and Facebook can afford to pay a huge amount in damages but for small startups this will have a detrimental effect. In recent times there are a lot of new startups that are introduced on the social media landscape, they encourage creativity and diversity and bring people together from all over the globe. If they do not have safe harbour to fall upon they would go obsolete.

Best effort and Small Businesses

There is a mechanism provided in Article 17 which can provide platforms some reprieve if they comply with the conditions set out in the new directive which are that if a platform can demonstrate that they

(a) made best efforts to obtain an authorisation

[50] Karina Grisse, "After the Storm—Examining the Final Version of Article 17 of the New Directive (EU) 2019/790," *Journal of Intellectual Property Law & Practice* 14, no. 11 (October 16, 2019): 887–99, https://doi.org/10.1093/jiplp/jpz122.

[51] Viacom International Inc. v. Youtube, Inc. No. 07 Civ.2103 (2010).

(b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the right holders have provided the service providers with the relevant and necessary information; and in any event and
(c) acted expeditiously, upon receiving a sufficiently substantiated notice from the right holders, to disable access to, or right holders, to take down infringing content and made best efforts to prevent its future upload.[52]

To decide whether an OCSSP has satisfied the 'best efforts' requirement, Article 17 lists factors to be taken into account, including the type, audience, and the size of the service and the type of content the service hosts. [53] This means that OCSSP can avoid the liability of posting unlicensed content if they act expeditiously in taking it down and keeping it off the platform. The 'effort to prevent future uploads' shifts the focus from the 'notice and take down' regime to 'notice and stay down.'[54] In order for the 'staydown' element to work a platform would require a filter that can detect and refrain the content from being uploaded again.

Small or new businesses have been given some reprieve. For an OCSSP which has been active for less than three years and has an annual turnover of less than 10 million euros, is not subject to the same liability.[55] They only have to comply with the requirement of acting expeditiously upon receiving substantiated notification, to disable access to copyrighted material or to remove it from the website. They do not have to make sure that the content stays off of the website and is not uploaded again. However, where the average monthly visitors exceed more than five million they also need to demonstrate that they made efforts to prevent further uploads of notified work.

The question regarding this exception is if it's too narrow? Whether the three year period is enough for a platform to make a significant impact? And are the five million monthly visitors a number too low?

Pastiche Satire And Comedy

In order to tackle the challenges to freedom of speech that will occur due to automated enforcement of Article 17, it provides that preventive measures "shall not result in

[52] DSMD,*supra* note 1, at art.17 (4)
[53] DSMD, *supra* note 1, at art.17 (5)
[54] A Birdie, *supra* note 33
[55] DSMD, *supra* note 1, at art.17 (6)

the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright."[56]

There was a lot of controversy regarding the 'death of meme culture' when Article 17 came about,[57] as websites would be forced to filter out copyright content. Memes and gifs (a very important part of social media) are user generated images of most copyright work. However that is not the case, they fall under the exceptions to copyright. People may use copyright protected works for quotation, review, criticism and for the use and purpose of pastiche, parody and caricature in the content they are generating. In practical terms this may not be very straightforward, as whatever technical measure is used to filter out copyright protected material to prevent it from being uploaded will not be able to decipher the context in which they were used.

4.2 Avoiding liability under Article 17 of Digital Single Market Strategy

There are two mechanisms by which online platforms may avoid copyright infringement liability, one is that they should seek to obtain a license from the right holders to cover their user's actions. If they fail to get an authorisation/license from the right holders they will be liable for their users sharing copyright protected content on their platform. And the other is to filter the content that is being uploaded to the platform, and make sure the copyright protected content is automatically deterred from the platforms.

4.2.1 Licensing

Licensing and getting authorisation for content has its obstacles, platforms that host user generated and uploaded content and everyday new content is uploaded by thousands of users, and the copyright protected material can range from songs, movie clips, books to video games. It would require the intermediaries/online platforms to anticipate everything that the users might upload and acquire licenses from numerous rightholders. For start-ups and small platforms it would be very expensive to obtain licenses to host content on their site. Recital 61 also states "right holders should not be obliged to give an authorisation to conclude

[56] DSMD, *supra* note 1, at art.17(7)

[57] Bashar, A. I. (2018, December 24). Death of Meme Culture in EU. Retrieved from https://www.thedailystar.net/law-our-rights/law-watch/news/death-meme-culture-eu-1678282.

licensing agreements,"[58] however an online content sharing service provider that communicates to the public *must* obtain a license, this could lead to an imbalance between both the parties.

A platform seeking a license for User Generated Content is faced with a complicated licensing task, as the platforms are available in most parts of the world to an enormous participatory audience it's unforeseeable what content would get uploaded, ideally the license should encompass the whole spectrum. Umbrella Licensing is unavailable in most European Union Member states, even if a platform is able to find a collective society willing to enter licence for User Generated Content with umbrella effect put forward in Article 17 (2) of the Directive, it will still face a very fundamental problem of lack of harmonisation. The collective society landscape is significantly fragmented and a UGC deal available in one Member State might be limited to that region.[59]

Another option is a compulsory licensing scheme, which seems like an efficient method to regulate copyright protected works. These can be granted by the government or government bodies, who can oblige right holders to license their works to copyright protected works to platforms who want to use it. As these would be regulated by the government it would reduce the risk of monopoly prices and deadweight loss while increasing consumer surplus. However, this will lead to a higher administrative cost.[60]

4.2.2 Filtering

The CJEU in its previous judgements has made it clear **t**hat proactive monitoring and filtering are against EU law. In the final version of DSMD there is no reference to effective technologies to guarantee removal of copyright protected content. These references to technical measures that first appeared have been replaced with vague terms like 'best efforts' and 'relevant and necessary information'. These terms can be open to interpretation, and although there is no general monitoring obligation it does not prohibit OCCSP from voluntarily engaging in general monitoring to avoid liability under Article 17.

[58] DSMD, *supra* 1, recital 62
[59] Martin Senftleben, "Bermuda Triangle – Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market," *SSRN Electronic Journal*, 2019, https://doi.org/10.2139/ssrn.3367219.
[60] Giancarlo Frosio, "Reforming the C-DSM Reform: A User-Based Copyright Theory for Commonplace Creativity," *SSRN Electronic Journal*, 2019, https://doi.org/10.2139/ssrn.3482523.

Another problem with filtering is that it would require content monitoring, which is prohibited in Article 15 of E-Commerce Directive. Article 17 has tried to find a caveat by using the term 'specific works' that need to be monitored, however that is not possible without general monitoring. This would therefore lead to conflict between the two directives, as preventing future uploads of copyright protected work would lead to general monitoring of all content that is uploaded to that platform.

Manually filtering and blocking content to remove copyright protected works would place a logistical and financial burden on the platform and it is likely to adopt automated filtering and blocking tools. These automated filtering tools might undermine the freedom of expression, as algorithmic methods can not replace human judgement.[61]

At the moment, YouTube uses Content ID which is a digital fingerprinting system developed by Google that helps to identify and manage copyrighted content. It has spent almost $100 million on it, it is an ongoing cost. Platforms that are just starting out, or are smaller may not be able to afford the cost of the technology and human resources involved in content filtering. Google does not license ContentID for third party use.

ContentID provides the right holders with two major benefits over the previous notice and takedown method: it continuously monitors uploads for copyright protected works which makes things easier for the right holders as they no longer have to send notices in bulk, and it also enables them to authorise and monetise user infringement instead of blocking it. This has led to a new stream of revenue for right holders which was not available in notice and take down approach ContentID makes it easier to block claim filter monetise and track user infringements instead of only blocking it.[62]

The other option for content filtering is Audible Magic which is less expensive than Content ID and is used by Facebook, Tumblr and Vimeo. Their webpage now offers 'solution' to complying with Article 17[63] However ACR technologies have their shortcomings, it can give false positives, and especially in hip hop music where they use a lot of looping to sample with, it can hinder creativity.[64]

6. Copyright Infringement and YouTube

[61] i*d*

[62] Annemarie Bridy, "The Price of Closing the 'Value Gap': How the Music Industry Hacked EU Copyright Reform," *SSRN*, July 1, 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3412249.

[63] See Audible Website: https://www.audiblemagic.com/article-17/

[64] Toni Lester & Dessislava Pachamanova, The Dilemma of False Positives: Making Content ID Algorithms More Conducive to Fostering Innovative Fair Use in Music Creation, 24 UCLA ENT. L. REV. 51, 53 (2017).

Since the conversation is about how Article 17 is going to be implemented, especially filtering, it is important to look at how YouTube currently deals with the copyright infringements, and the problems it faces. It is one of the main targets of the new copyright law.

Under their Copyright Policy, YouTube is required to expeditiously remove the copyright protected content upon gaining knowledge and awareness, and they are also required to terminate access to repeat offenders.[65] The DMCA Safe Harbour protection applies to YouTube as long as it fulfils the prerequisites laid down by it. That is first, they will put in place a mechanism to terminate user accounts that consistently infringe copyright. Second, they must comply and not interfere with 'normal technical measures,' which are characterised as measures that copyright owners use to identify or protect copyrighted works.[66]

YouTube has two mechanisms in place to deal with copyright infringements. One is ContentID, which is a software designed by Google. Rightholders can issue claims of ownership against any videos uploaded by users on youtube that contain those movies, video games and songs. This can be done manually or automatically, in order to do this automatically the copyright holders can send their audios/videos to youtube to be stored in databases as "reference files". When a user uploads a video, it is scanned for material that matches the reference files. The copyright holder has an option to decide what they want to do with the content that matches, they could Block the whole video from being viewed, monetise the video by running ads against it; in some cases sharing revenue with the uploader or track the video's viewership statistics.[67]

As of May 2019 more than 500 hours of content is uploaded on YouTube every minute.[68] A lot of these videos are sources of income for the creators, for some it's their primary source of income.[69] YouTube claims only 1% of the claims are disputed, which are well over 4 million videos. And although many of these claims are legitimate, there are also instances where ContentID erroneously flags that is allowed under fair use. Undisputed claims do not mean they were rightfully claimed, the creator may choose not to dispute it. This gives the big corporations an advantage over the creators as youtube does not provide

[65] DMCA,supra note 26, 512(i)(1)(A)
[66] Id.
[67] See How Content ID works - YouTube Help
[68] "YouTube: Hours of Video Uploaded Every Minute 2019 | Statista," Statista (Statista, 2019), https://www.statista.com/statistics/259477/hours-of-video-uploaded-to-youtube-every-minute/.
[69] Hunter Merck, "Being A YouTuber Can Be A Real Job," The Odyssey Online (The Odyssey Online, June 14, 2016), https://www.theodysseyonline.com/why-being-youtuber-is-real-business-venture.

sufficient remedies for false claims. Furthermore, if the creator disputes the claims and it turns out to not be a false claim they get a copy strike.

Copyright strike is the more punitive method that YouTube employs to deal with copyright infringements. When the copyright holder files a legitimate formal request for YouTube to take down the infringing video from the user, the account gets copyright strike. And the content is taken down to comply with copyright law. This acts as a warning for the user. After 3 copyright strikes, the users account, along with any associated channels with it is subjected to termination.[70]

Although it does comply with the purpose of DMCA there is a lot of room for people to abuse copystrike,[71] since filing for it is fairly easy. There are no limitations on the number of copyright strikes and therefore can be used as a form of extortion. There is no one to mediate the situation, as YouTube does not act as the referee nor does it have a system in place to help prevent people from abusing the copyright system. This shows that being one of the biggest platforms creators are already facing too many copyright claims and discourages them from creating content. With Article 17 being implemented throughout Europe, YouTube believes this can spell new problems for YouTube, and might lead to blocking some content in Europe.[72]

7. Article 17 and the Fundamental Rights

The Charter of Fundamental Rights of the European Union[73]protects freedom of expression, that includes the freedom to receive and impart information, as well as protecting intellectual property rights. When these fundamental rights conflict with copyright law, policy makers and judges attempt to balance them. Although Article 17 will aid the rightholders to better protect their work, it does pose potential risk to Article 7 which is the right to respect of private life, Article 8 which is the right to protection of private data, Article 11 right to freedom of expression and information and Article 16 right to conduct business of the Charter.

[70] See Copyright strike basics - YouTube Help
[71]Tom Gerken, "YouTube's Copyright Claim System Abused by Extorters," BBC News, February 14, 2019, https://www.bbc.com/news/technology-47227937.
[72] See Updates on Article 17 (formerly Article 13) - YouTube Help
[73] Charter of Fundamental Rights of the European Union 2012 OJ (C 326) 391. [CFREU]

In the case of *Sabam v. Netlog*[74] CJEU recognised that content filtering requirements suppresses the expressive rights of the users. These content recognition technologies are not advanced enough to take into account context, that can lead to over blocking of content. They might filter out content which would be lawful under the exceptions like parody reviews or satire or existing consent. This would be a breach of article 52 (1) of the Charter Of Fundamental Rights which states that limitations on exercise of freedom of rights should only be made if they are necessary and genuinely meet objectives of general interest recognised by the Union on the need to protect the rights and freedoms of others.

Content Recognition Systems are based on algorithms and can detect similarities based on the databases provided, and would either flag the content or remove it. There is no human review to it, the system only flags the copyright matches with it's database and can not analyse if it falls within a limitation or an exception. This is evident by youtube copyright claims where lawful material was flagged by ContentID, professor Lessig uploaded a video of his lecture which was taken down,[75] a white noise video was hit by 5 copyright claims,[76] NASA's Mars Rover landing from missions official youtube channel,[77] and Beethoven's old recordings on youtube were flagged for copyright infringement.[78]

As discussed previously, there is no effective framework in place to deal with these false claims on YouTube, and for content creators this can cost them their livelihood. This impedes innovation and creativity. For right holders the issues regarding limitations of ContentID and Audible Magic are not a huge concern, as overclaiming is good for their revenue. It's a lucrative business.[79]

A problem that may arise due to filtering is that it may lead to preemptive blocking as this might be easier for OCCSPs to handle, this again poses the problem of fair use vs overly cautious platforms that might defeat the very purpose of copyright protection.[80] Article 17 (2) states that the license obtained by OCCSP 'shall also cover acts carried out by users of the

[74] C-360/10 Sabam v. Netlog (2012)
[75] Michael B Farell, "Online Lecture Prompts Legal Fight on Copyright - The Boston Globe," BostonGlobe.com, 2013, Online lecture prompts legal fight on copyright.
[76] Chris Baraniuk, "White Noise Video on YouTube Hit by Five Copyright Claims," *BBC News*, January 5, 2018, https://www.bbc.com/news/technology-42580523.
[77] Bird Aine Parnell, "Copyright Bot Boots NASA Rover Vid off YouTube," Theregister.co.uk, 2012, https://www.theregister.co.uk/2012/08/07/nasa_dmca_takedown/.
[78] Ulrich Kaiser, "Google: Sorry Professor, Old Beethoven Recordings on YouTube Are Copyrighted," Ars Technica (Ars Technica, September 3, 2018),https://arstechnica.com/tech-policy/2018/09/how-contentid-knocked-down-decades-old-recordings-of-beethoven/.
[79] A Bridy, *supra* note 33
[80] Garstka Krzysztof, Guiding the Blind Bloodhounds: How to Mitigate the Risks art. 17 of Directive 2019/790 Poses to the Freedom of Expression (October 18, 2019). Forthcoming chapter in Intellectual Property and Human Rights (4th ed), Paul Torremans (ed), Wolters Kluwer Law & Business. Available at SSRN: https://ssrn.com/abstract=3471791

services falling within the scope of Article 3 of Directive 2001/29/EC when they are not acting on a commercial basis or where their activity does not generate significant revenues. This can be interpreted as discouraging people from making too much revenue, if their content is good they will attract more people on the platform and on their content, which will generate more money for them, therefore they should avoid making good content.[81] This is the opposite of why Copyright laws were put in place, that was to encourage people to create more art, and be creative. No definition is given as to what 'commercial basis' means or 'significant revenues' mean, these gaps should therefore be filled by each Member State, which might lead to the problem that different definitions might be applied and the rules applicable will not be harmonised throughout Europe.[82]

Another concern regarding the filtering and monitoring obligations is that it can also impinge on the service users' right to protection of personal data.[83] In *Netlog* case the ECJ concluded that requiring installation of the contested filtering system would involve the identification, systematic analysis and processing of information connected with the profiles created on the social network by its users. The information connected with those profiles is protected personal data because, in principle, it allows those users to be identified.[84]

Any measure which is bound to influence the accessibility of the Internet is the responsibility of the State under Article 10 ECHR.19 Within the framework of this Article – and in accordance with Article 11 of the EU Charter – the website blocking cases must be examined by the court. They will have to look at the (1) manner of the site usage and (2) the effects of blocking on legitimate communication, but also (3) at the public interest in disabled information and (4) whether the alternatives to accessing such information were available. Under certain circumstances, it will further be pertinent to consider (5) the Article 10 implications for not only Internet users, but also the intermediaries concerned.[85]

7.1 Right To Conduct Business

[81] *id.*
[82] Curto, Natalia, EU Directive on Copyright in the Digital Single Market and ISP Liability: What's Next at International Level? (August 7, 2019). Available at SSRN: https://ssrn.com/abstract=3434061 or http://dx.doi.org/10.2139/ssrn.3434061
[83] CFREU, *supra* note 73, art. 8
[84] Giancarlo Frosio, "To Filter or Not to Filter? That Is the Question in EU Copyright Reform," Ssrn.com, 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3058680.
[85] Geiger, Christophe and Frosio, Giancarlo and Izyumenko, Elena, Intermediary Liability and Fundamental Rights (July 15, 2019). in: Giancarlo Frosio (ed.), The Oxford Handbook of Intermediary Liability Online (OUP, 2020), p. 138; Centre for International Intellectual Property Studies (CEIPI) Research Paper n°2019-06. Available at SSRN: https://ssrn.com/abstract=3411633 or http://dx.doi.org/10.2139/ssrn.3411633

The right to conduct business is recognised as a fundamental right.[86] When licensing obligation and filtering will apply to an OCSSP, they will be faced with the cost and burden of it. In an open letter to Members of the Parliament, a coalition of 240 Europe-based online businesses urged the Members to reject Article 17 (then 13).[87] They implored that the financial and operational burdens of implementing the filtering system was high, and that the restrictions and inaccuracy of available technology, and lack of protection for small and medium sized enterprises is a threat to online businesses. They wrote that DSMD "failed to strike a fair balance between creators and other parts of society."[88]

In its previous judgement of *Netlog*, the Court decided that installing a monitoring filter would result in a serious infringement of freedom to conduct business, and that. The CJEU assumed that monitoring all the electronic communications made, directed to all future infringements of existing and yet to create works 'would result in a serious infringement of the freedom of the hosting service provider to conduct its business.'[89] Platform's freedom of business would be disproportionately affected since an obligation to adopt filtering technologies would require them to install a complicated, costly and permanent system at its own expense. Further it will be contrary to Article 3 of Enforcement Directive which states that "procedures and remedies necessary to ensure the enforcement of the intellectual property rights (…) shall not be unnecessarily complicated or costly [and] shall be applied in such a manner as to avoid the creation of barriers to legitimate trade."[90]

Therefore it will be more burdensome for middle range online businesses, who do not have the capital that tech giants like YouTube and Facebook have, and they are neither within the exceptions granted to small businesses. As the new obligations imposed to online intermediaries increase barriers to innovation by making it more expensive for platforms to enter and compete in the market.

7.2 Mitigating the Risk of Article 17

[86] CFREU, supra note , art. 16
[87] Jos Poortvliet, ed., "240 EU Businesses Sign Open Letter against Copyright Directive Art. 11 & 13 – Nextcloud," Nextcloud, March 19, 2019, https://nextcloud.com/blog/130-eu-businesses-sign-open-letter-against-copyright-directive-art-11-13/.
[88] *id*
[89] Sabam, *supra* 74
[90] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights

There are certain steps that could help mitigate the damage the new Directive might have. The Drafters were well aware of the risks the Directive could impose on freedom of expression. In Article 17.(7) they stated that regimes proposed in Article 17(4) shall not result in prevention of availability of work that do not copyright, even where the subject is covered by exceptions and limitations.

Overblocking is a threat to freedom of expression,[91] and this arises due to algorithms filtering out content which may not be subject to copyright protection, or which might be public domain. One way to tackle this problem is to set a mechanism where human beings can assess whether the content flagged by the filtering system falls under the exceptions, that is it review parody or a meme. The amount of human capital needed to deal with all flagged content would be too costly and perhaps disproportionate, this could be helped by categorizing which type of content would be flagged for human assessment.[92]

There are also provisions about appealing Article 17 (9) also states that Member States should put in place a complaint and redress mechanism to effectively and expeditiously deal with users in the event there is a dispute over disabling access or removal of work or subject matter that they uploaded. The provision also states that rightholders should justify their reasons for removal of work. Furthermore, appeals should be processed without undue delay and the decision subject to human review. Therefore, a system will be put in place by Member States that will deal with copyright infringements, and will balance the freedom of expression of the users and the rights of the artists.

Another important way to mitigate the risk is by educating people about what they can post, instead of focusing on what they can not post. This was also recognised by the DSMD in Article 17 (9) where it states that the OCSSP "shall inform their users in their terms and conditions that they can use works and other subject matter under exceptions and limitations…" Garstka Krzysztof suggests websites proactively informing the users of what they can post by displaying the information on the site instead of just in the 'terms and conditions' which people do not read often.

In his Research paper, Giancarlo Frosio stresses that licensing, rather than filtering should guide copyright reform online. He suggests compulsory licensing schemes. Which can be granted by governments and obliges right holders to licence with the copyright protected asset to third parties willing to use. If by implementing a method due to which the costs of licensing could be lowered it would be helpful for businesses, especially start-ups.

[91] Garstka Krzysztof, *supra* 80
[92] *id*.

8. Conclusion

The policy aim behind the DSMD was to modernise the European Copyright law, to promote harmony and legal certainty. Member States have some time to implement it, and to make sure that it is doing so they are able to balance the provisions of Digital Single Market Strategy with the Fundamental Rights.

It is important to keep in mind that when the EU enforces new rules or changes, it is likely to have a significant impact on all platforms and concerned multinational corporations in the world. Europe has a population of approximately 500 million people, in order to not lose this audience the corporations and platforms will comply with EU regulations so it does not harm their business. Article 17 is going to make an impact on all platforms, currently most of these giant platforms are governed by US centric laws and are not subject to censorship.[93]

The aim of redistributing resources from large (mainly) US platforms to creators for the use of their work in the platform economy is undeniably well-intentioned. Nonetheless, the positive effect that Article 17 DSMD can have on EU rightsholders comes at a price, which is to be paid mainly by small and mid-sized EU platforms and artists blocking their legitimately used works due to over-blocking. This could diminish the rivalry between US tech companies in the European Union, leading to increased market concentration among EU platforms.

Although the policy rationale behind Article 17 was flawed,[94] the DSMD is a step in the right direction. The landscape of the internet has changed at an exponential speed over the past 20 years and the regulatory framework governing the internet in Europe was outdated, and left platforms unchecked which gave them too much power. Online platforms are in a profitable position, it makes sense to hold them accountable for the content that is allowed on their platforms. As platforms would like to retain their profit and their position in the market, they will make sure that they avoid liability.

This can also be an opportunity to address the shortcomings of the current available filtering systems and ACR technologies. As more platforms will be obliged to take measures

[93] When Rhetoric Clouds Policy, *supra* 2

[94] Bridy, Annemarie, The Price of Closing the 'Value Gap': How the Music Industry Hacked EU Copyright Reform (June 30, 2019,) *supra* note 31. And Elkin-Koren, Niva and Nahmias, Yifat and Perel (Filmar), Maayan, Is It Time to Abolish Safe Harbor? When Rhetoric Clouds Policy Goals (February 28, 2019) *supra* note 2.

to prevent copyright infringement on their platforms there will be more research and development in this area, which would lead to improved technology at a lesser cost, making it easier for small businesses to afford content filtering technologies.

The aim of the copyright law should not be to exclude or limit content as that undermines the very core concept that underpins the copyright law and discourages people from creating. Instead the focus should be on how to monetise that content,[95] so that the right holders get their due. This is especially important for content creators on platforms like YouTube. Copyright law is of utmost importance to preserve the integrity of artistic cultural and educational works, therefore it is important to have the legal framework updated that is better equipped to face the challenges of the ever changing landscape of digital and social media. At times Article 17 may limit some fundamental freedoms and there will also be times when the vice versa will be true, there will always be trade offs.

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[95]Giancarlo Frosio, *supra* 84

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