

The Harmonized Law of Streaming in the EU – A Copyright and Related Rights Perspective

*Martin Senftleben**

1 Introduction

EU law does not contain a distinct set of rules seeking to regulate various types of streaming services. Instead, the harmonized rules governing streaming services follow from individual pieces of EU legislation – ranging from rules on online broadcasting to a specific liability regime for platforms allowing users to upload and share content – and decisions of the Court of Justice of the European Union ('CJEU'). The following analysis, first, provides an overview of the exclusive rights that must be taken into account in streaming scenarios. This discussion also addresses the exemption of temporary acts of copying that may cover the reception of streaming content by users (section 2). Rights clearance questions occupy centre stage in sections 3 (general services, such as Netflix) and 4 (platforms for user-generated content ('UGC'), such as YouTube). Section 5 raises the issue of content filtering obligations in the specific legal regime for on-demand streaming of content uploaded by users. Section 6 takes a closer look at copyright limitations that may become relevant in streaming cases, including private copying rules and the exemption of quotations, parodies and pastiches. Section 7 explains the remarkable extension of the concept of 'communication to the public' to the provision of streaming equipment for illegal content and infrastructures for illegal file-sharing. It also examines the legal framework for website blocking. In section 8, the results of the analysis will be summarized.

2 Exclusive Rights

EU copyright law does not contain a specific definition of 'streaming.' This silence, however, does not imply that streaming services fall outside the scope of the exclusive rights that have been harmonized at EU level. With regard to

* Ph.D.; Professor of Intellectual Property Law and Director, Institute for Information Law (IViR), University of Amsterdam; Of Counsel, Bird & Bird, The Hague, The Netherlands.

on-demand streaming services, such as Netflix and Spotify, the broad right of communication to the public that has been granted in Article 3(1) of the Directive 2001/29 on Copyright in the Information Society ('ISD'), is of particular relevance:¹

Member States shall provide authors with the exclusive right to 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.

In line with Article 8 of the WIPO Copyright Treaty,² Article 3(1) ISD clarifies that the right of communication to the public encompasses the on-demand dissemination of content, offering the audience flexibility as to the place and time of access. Article 3(2) ISD adds a specific making available right for performers, phonogram producers, film producers and broadcasting organizations. By virtue of Article 15(1) of the Directive 2019/790 on Copyright in the Digital Single Market ('DSM Directive' or 'DSMD'),³ press publishers can also invoke the making available right granted in Article 3(2) ISD. On-demand streaming services – offering content in such a way that members of the public are free to choose the place and time of access individually – thus, fall within the province of harmonized EU copyright and related rights law.

The specific regulation of online content-sharing service providers ('OCSSP')⁴ in Article 17 DSMD confirms this finding. According to Article 17(1) DSMD, an OCSSP performs an act of communication to the public or an act of making available to the public 'when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users'.⁵

¹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001, on the harmonisation of certain aspects of copyright and related rights in the information society, [2001] OJ L 167/10.

² Cf. Recital 15 ISD.

³ 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, [2019] OJ L 130/92.

⁴ See the definition in Article 2(6) DSMD.

⁵ Article 17(1) DSMD. For a more detailed discussion of the question whether this right of communication and making available to the public constitutes a new right that operates outside the framework of Article 3 ISD, see M. Husovec and J.P. Quintais, 'How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms under the Copyright in the Digital Single

Interestingly, streaming has explicitly been mentioned in this context. Recital 62 DSMD points out that the regulation of OCSSPS seeks to cover:

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.⁶

Further exclusive rights – and more complex regulations of linear modes of content dissemination – enter the picture when the analysis is extended to live streaming.⁷ In the landmark decision *Football Association Premier League* ('FAPL'), the CJEU dealt with territorial licenses which FAPL had granted in respect of broadcasting rights for live transmission of Premier League football matches.⁸ The broadcasting signals were sent, by satellite, to broadcasters with a license. These broadcasters compressed and encrypted the signal before finally transmitting it by satellite to subscribers, who received the signal using a satellite dish. To obtain access, the subscribers had to employ a decoding device, such as a decoder card, and decrypt and decompress the signal.⁹ As the case concerned satellite broadcasting, the Court discussed the transmission of

Market Directive' (2021) 70 *Gewerblicher Rechtsschutz und Urheberrecht – International* 325, 325–348. For the general qualification of on-demand streaming as a relevant act of 'making available to the public,' however, the relation between the exclusive rights granted in Article 17(1) DSMD and Article 3 ISD does not seem decisive.

6 Recital 62 DSMD. Cf. A. Metzger and M.R.F. Senftleben, 'Understanding Article 17 of the EU Directive on Copyright in the Digital Single Market – Central Features of the New Regulatory Approach to Online Content-Sharing Platforms' (2020) 67 *Journal of the Copyright Society of the U.S.A.* 279, 284–286.

7 For a more detailed discussion of differences in the regulation of live streaming and on-demand streaming, see M. Borghi, 'Chasing Copyright Infringement in the Streaming Landscape' (2011) 42 *International Review of Intellectual Property and Competition Law* 316, 316–343.

8 CJEU, 4 October 2011, joined cases C-403/08 and C-429/08, *Football Association Premier League*, ECLI:EU:C:2011:631, para. 31–32. For a discussion of the fundamental legal issues raised by the territorial restriction of the licenses in the internal market, see O.-A. Rognstad, 'Sporting Events as Intellectual Property and Free Movement of Services: The Implications of the *Premier League Case*' in M.R.F. Senftleben, J. Poort et al. (eds.), *Intellectual Property and Sports – Essays in Honour of Bernt Hugenholtz*, The Hague/London/New York: Kluwer Law International 2021, pp. 295–304.

9 CJEU, *Football Association Premier League*, para. 38.

Premier League broadcasting signals to the public in the light of Article 1(2)(a) and (b) of the Satellite Broadcasting Directive ('SBD').¹⁰

The close connection of Article 3(1) ISD with live streaming became obvious in *ITV Broadcasting* – a case that concerned an internet television broadcasting service permitting users to receive live streams of free-to-air television broadcasts.¹¹ In *ITV Broadcasting*, the CJEU confirmed the central role of the right of communication to the public granted in Article 3(1) ISD:

Given that the making of works available through the retransmission of a terrestrial television broadcast over the internet uses a specific technical means different from that of the original communication, that retransmission must be considered to be a 'communication' within the meaning of Article 3(1) of Directive 2001/29. Consequently, such a retransmission cannot be exempt from authorisation by the authors of the retransmitted works when these are communicated to the public.¹²

More specifically, the Court clarified that live streaming of broadcasting signals via internet constituted an intervention that had to be separated from the original transmission initiated by the broadcasting organization concerned. As live streaming did not merely aim at maintaining or improving the quality of the original transmission, it could not be considered a mere technical means falling outside the scope of the communication concept underlying Article 3(1) ISD.¹³ By contrast, each of the two transmissions – the original terrestrial broadcast and the live streaming of broadcast works over the internet – had to be authorized individually and separately because each of the two transmissions was made 'under specific technical conditions, using a different means of transmission for the protected works, and each is intended for a public'.¹⁴ Importantly, this means that in the case of live streaming of broadcasting signals, the requirement of a relevant public for assuming a communication to the public in the sense of Article 3(1) ISD is readily fulfilled. It is not necessary to

¹⁰ CJEU, *ibid.*, para. 57. See Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, [1993] OJ L 248/15.

¹¹ CJEU, 7 March 2013, case C607/11, *ITV Broadcasting*, ECLI:EU:C:2013:147, para. 8–9.

¹² CJEU, *ibid.*, para. 26.

¹³ CJEU, *ibid.*, para. 28–30.

¹⁴ CJEU, *ibid.*, para. 39.

demonstrate that the live stream reaches a 'new' public¹⁵ which was not taken into account by the right holder when authorizing the original broadcast.¹⁶

While *ITV Broadcasting* confirmed the central role of Article 3(1) ISD, it would be premature to jump to the conclusion that, in both streaming scenarios – on-demand streaming and live streaming – the analysis will always lead back to the right of communication to the public that has been harmonized at EU level. *ITV Broadcasting* concerned a copyright claim. In the area of copyright, Article 3(1) ISD recognizes a general right of communication to the public as well as the more specific right of on-demand making available to the public which, as explained above, covers situations where the public can freely choose the place and time of access. In the area of related rights, however, the harmonization at EU level is less complete. Article 3(2) ISD only awards performers, phonogram producers, film producers and broadcasting organizations the right of making available to the public – in the sense of a right covering interactive, on-demand transmissions of content giving the audience freedom to choose the place and time of access.¹⁷ Article 15(1) DSMD adds press publishers to the circle of beneficiaries. In contrast to copyright holders, however, these related right holders do not enjoy a harmonized general right of communication to the public.

The CJEU decision in *C More Entertainment* shed light on this harmonization gap.¹⁸ The case concerned an internet site with links enabling users to circumvent the paywall put in place by the pay-TV station C More Entertainment. In this way, internet users could obtain free access to live broadcasts of ice hockey matches which C More Entertainment had intended to make available

¹⁵ As to the requirement of a new public in broadcasting and cable retransmission cases, see CJEU, 13 October 2011, joined cases C-431/09 and C-432/09, *Airfield and Canal Digitaal*, ECLI:EU:C:2011:648, para. 72–77; CJEU, 4 October 2011, joined cases C-403/08 and C-429/08, *Football Association Premier League*, ECLI:EU:C:2011:631, para. 197; CJEU, 7 December 2006, case C-306/05, *SGAE/Rafael Hoteles*, ECLI:EU:C:2006:764, para. 40 and 42. As to the use of this criterion in hyperlinking cases, see CJEU, 13 February 2014, case C-466/12, *Svensson and Others*, ECLI:EU:C:2014:76, para. 24–27; CJEU, 8 September 2016, case C-160/15, *GS Media*, ECLI:EU:C:2016:644, para. 37 and 42–43; CJEU, 26 April 2017, case C-527/15, *Stichting Brein (Filmspeler)*, ECLI:EU:C:2017:300, para. 33 and 48; CJEU, 14 June 2017, C-610/15, ECLI:EU:C:2017:456, *Stichting Brein (The Pirate Bay)*, para. 28 and 45; P. Mezei, 'Enter the Matrix: The Effects of the CJEU's Case Law on Linking and Streaming Technologies' (2016) *Gewerblicher Rechtsschutz und Urheberrecht – International* 877, 877–900; S. Karapapa, 'The Requirement for a "New Public" in EU Copyright Law', (2017) 1 *European Law Review* 63, 63–81.

¹⁶ CJEU, 7 March 2013, case C-607/11, *ITV Broadcasting*, ECLI:EU:C:2013:147, para. 39.

¹⁷ Cf. CJEU, 26 March 2015, case C-279/13, *C More Entertainment*, ECLI:EU:C:2015:199, para. 26.

¹⁸ CJEU, *ibid.*, para. 31.

only against payment of a fee.¹⁹ In the absence of valid copyright claims, C More Entertainment could only assert related rights as a broadcasting organization.²⁰ To invoke protection under Article 3(2)(d) ISD, however, it would have been necessary to demonstrate that the unauthorized use fell within the category of interactive on-demand transmissions – with freedom of place and time for the public. The case, however, concerned live broadcasts. The links could thus be regarded as a specific form of live streaming, but not as a relevant form of on-demand streaming. The requirement of double flexibility – flexibility as to both place and time – was not satisfied.²¹

Considering this fact pattern and the lack of a regulatory response in Article 3(2) ISD, the Court had recourse to the stipulations in the Rental, Lending and Related Rights Directive ('RLRD').²² The title of Article 8 RLRD explicitly refers to '[b]roadcasting and communication to the public.' Nonetheless, a harmonized general right of communication to the public for broadcasting organizations is sought in vain. Article 8(3) RLRD only grants broadcasting organizations:

the exclusive right to authorise or prohibit the rebroadcasting of their broadcasts by wireless means, as well as the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.

Against this background, the Court lent weight to the fact that Recital 16 RLRD offers Member States the opportunity to provide for 'more far-reaching protection for owners of rights related to copyright than that required by the provisions laid down in this Directive in respect of broadcasting and communication to the public'.²³ According to the CJEU, this option implies that:

the Member States may grant broadcasting organisations an exclusive right to authorise or prohibit acts of communication to the public of their transmissions on conditions different from those laid down in Article 8(3) and in particular transmissions to which members of the

¹⁹ CJEU, *ibid.*, para. 10–12.

²⁰ CJEU, *ibid.*, para. 17.

²¹ CJEU, *ibid.*, para. 25–27.

²² Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, [2006] OJ L 376/28.

²³ CJEU, 26 March 2015, case C-279/13, *C More Entertainment*, ECLI:EU:C:2015:199, para. 33. Cf. Recital 16 RLRD.

public may obtain access from a place individually chosen by them, it still being understood that, as provided for in Article 12 of Directive 2006/115, such a right must not affect the protection of copyright in any way.²⁴

EU Member States are thus free to bestow upon broadcasting organizations a more general right of communication to the public, going beyond the specific rebroadcasting and public communication right in Article 8(3) RLRD.²⁵ In practice, this means that the impact of related rights on live streaming depends on potentially divergent approaches in EU Member States. The scope of related rights, such as the related rights of broadcasting organizations, may differ from one country to the other. The prejudicial questions underlying the CJEU decision in *C More Entertainment*, for instance, arose from the grant of a broader, more general right of communication to the public in Sweden – a right that was not restricted to acts of making works available on demand in the sense of Article 3(2) ISD.²⁶

In comparison with the interplay of harmonized rights of communication to the public at EU level and supplementary national solutions in the field of related rights, the legal landscape shaped by harmonized reproduction rules appears rather straightforward. For both copyright and related right holders, Article 2 ISD sets forth a general right of reproduction covering ‘direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part.’ As the explicit reference to ‘temporary’ acts of reproduction shows, streaming falls within the province of this exclusive right even if it does not involve more than transient, temporary copying of protected content. EU legislation has counterbalanced this broad grant of control over reproduction in Article 2 ISD by providing, in Article 5(1) ISD, for a mandatory exemption of temporary acts of reproduction:²⁷

which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:

- a. a transmission in a network between third parties by an intermediary,
or
- b. a lawful use

²⁴ CJEU, *ibid.*, para. 35.

²⁵ CJEU, *ibid.*, para. 36.

²⁶ CJEU, *ibid.*, para. 19.

²⁷ As to the underlying heated debate on transient, temporary acts of copying at the international level, see M.R.F. Senftleben, ‘Compliance of National TDM Rules with International Copyright Law – An Overrated Nonissue?’ (2022) 53 *International Review of Intellectual Property and Competition Law* 1477, 1484–1489.

of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

Dealing with temporary reproductions performed within the memory of a satellite decoder and on a television screen in *FAPL*,²⁸ the CJEU highlighted that, despite the continental-European tradition of interpreting copyright limitations strictly,²⁹ an interpretation was necessary that enabled the effectiveness of the copyright limitation, ensured the development and operation of new technologies,³⁰ and safeguarded ‘a fair balance between the rights and interests of right holders, on the one hand, and of users of protected works who wish to avail themselves of those new technologies, on the other’.³¹

Taking these general considerations as a starting point, the Court systematically removed obstacles and paved the way for a finding of compliance with Article 5(1) ISD. In the Court’s view, the mere reception of broadcasts – the picking up of broadcasts and their visual display – in private circles did not constitute a restricted act under EU or national legislation. In the context of Article 5(1) ISD, such reception had to be considered lawful. Accordingly, the temporary copying had the sole purpose of enabling a ‘lawful use’ within the

²⁸ CJEU, 4 October 2011, joined cases C-403/08 and C-429/08, *Football Association Premier League*, ECLI:EU:C:2011:631, para. 160.

²⁹ CJEU, *ibid.*, para. 162. As to differences between copyright’s legal traditions in this regard, see M.R.F. Senftleben, ‘Bridging the Differences Between Copyright’s Legal Traditions – the Emerging EC Fair Use Doctrine’ (2010) 57 *Journal of the Copyright Society of the U.S.A.* 521, 522–525.

³⁰ CJEU, *ibid.*, para. 163 and 179. With regard to the particular relevance of this statement in the context of text and data mining, see T. Margoni and M. Kretschmer, ‘A Deeper Look Into the EU Text and Data Mining Exceptions: Harmonisation, Data Ownership, and the Future of Technology’, *CREATe Working Paper 2021/7*, Glasgow: CREATe Centre 2021, pp. 18–19.

³¹ CJEU, *ibid.*, para. 164. As to the more recent recognition that copyright limitations in the EU acquis confer user rights on beneficiaries, see CJEU, 29 July 2019, case C-516/17, *Spiegel Online*, ECLI:EU:C:2019:625, para. 54; CJEU, 29 July 2019, case C-469/17, *Funke Medien NRW*, ECLI:EU:C:2019:623, para. 70. For a more detailed discussion of this point, see T. Aplin and L. Bently, *Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works*, Cambridge: Cambridge University Press 2020, pp. 75–84; C. Geiger and E. Izyumenko, ‘The Constitutionalization of Intellectual Property Law in the EU and the Funke Medien, Pelham and Spiegel Online Decisions of the CJEU: Progress, but Still Some Way to Go?’ (2020) 51 *International Review of Intellectual Property and Competition Law* 282, 292–298.

meaning of Article 5(1)(b) ISD.³² Addressing the further requirement of 'no independent economic significance,' the Court focused on the fact that the temporary acts of reproduction at issue – carried out within the memory of a satellite decoder and on television screen – formed an inseparable and non-autonomous part of the process allowing the reception of broadcasts. Users of the service did not have any influence on the process. They may even be unaware of reproductions taking place. On this basis, the Court concluded that the temporary copying was not 'capable of generating an additional economic advantage going beyond the advantage derived from mere reception of the broadcasts at issue.'³³

With these findings, the Court had surmounted all hurdles posed by Article 5(1) ISD itself. In addition, however, the issue of compliance with Article 5(5) ISD entered the picture: the 'three-step test' permitting reliance on copyright limitations in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of copyright holders.³⁴ In this regard, the Court simply stated that, in view of the considerations concerning lawful use and independent economic significance, the temporary copying at issue also satisfied all criteria following from the three-step test.³⁵ It thus deduced compliance with the three-step test from compliance with the individual conditions of a specific statutory copyright limitation, namely the exemption of temporary acts of reproduction in Article 5(1) ISD. Evidently, this circular line of reasoning *de facto* neutralizes the three-step test. If compliance with the individual requirements of a statutory copyright limitation automatically implies compatibility with the three-step test, the test no longer plays an independent role in the assessment. As inconsistent as this may appear in the light of the architecture of Article 5 ISD – adding the three-step test as an overarching control instrument in the

32 CJEU, 4 October 2011, joined cases C403/08 and C429/08, *Football Association Premier League*, ECLI:EU:C:2011:631, para. 171–172.

33 CJEU, *ibid.*, para. 176–178.

34 For a detailed discussion of these assessment criteria, see M.R.F. Senftleben, *Copyright, Limitations and the Three-Step Test – An Analysis of the Three-Step Test in International and EC Copyright Law*, The Hague/London/New York: Kluwer Law International 2004, pp. 133–244; C. Geiger, D. Gervais and M.R.F. Senftleben, 'The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law' (2014) 29 *American University International Law Review* 581, 581–626; C. Geiger, J. Griffiths and R.M. Hilty, 'Declaration on a Balanced Interpretation of the "Three-Step Test" in Copyright Law' (2008) 39 *International Review of Intellectual Property and Competition Law* 707.

35 CJEU, *ibid.*, para. 181.

fifth paragraph³⁶ – it allowed the CJEU to declare the temporary acts of reproduction permissible without any further scrutiny.³⁷

The question of relevant acts of reproduction at the receiving end also featured prominently in *Meltwater*. This case concerned the creation of temporary copies of an internet site on-screen and in the cache of a computer hard disk. More specifically, the CJEU had to determine whether online receipt of monitoring reports stemming from Meltwater's media monitoring service required a licence covering the reproduction right.³⁸ As in *FAPL*, the Court adopted a flexible approach seeking to create breathing space for new technologies, products and services. According to the Court, it was irrelevant that on-screen copies remained in existence for as long as the internet user kept the browser open and stayed on the website. As the copying was still limited to what was necessary for the proper functioning of the technological process for website viewing, the on-screen copies had to be qualified as 'transient' in the sense of Article 5(1) ISD.³⁹ The Court also established that the cached copies neither existed independently of, nor had a purpose independent of, the technological process at issue. For that reason, they had to be regarded as 'incidental'.⁴⁰ Interestingly, the Court embarked on a more detailed discussion of the additional compliance criteria following from the three-step test in Article 5(5) ISD. The final outcome, however, remained the same: in the Court's view, the on-screen copies and the cached copies satisfied all conditions of the three-step test. Hence, the temporary copying at issue did not amount to acts of reproduction requiring a license.⁴¹

In the light of this CJEU jurisprudence, it seems safe to assume that the exemption of temporary copying in Article 5(1) ISD covers the reception of streaming content – at least when the streaming service offers lawful access

³⁶ For a critique of this regulatory approach ('worst case scenario'), see M.R.F. Senftleben, 'The International Three-Step Test – A Model Provision for EC Fair Use Legislation' (2010) 1*Journal of Intellectual Property, Information Technology and E-Commerce Law* 67, 69–74.

³⁷ CJEU, *ibid.*, para. 181–182. The same approach can be observed in CJEU, 17 January 2012, case C-302/10, *Infopaq II*, ECLI:EU:C:2012:16, para. 56. For a more detailed discussion of potential circularity, see M.R.F. Senftleben, 'From Flexible Balancing Tool to Quasi-Constitutional Straitjacket – How the EU Cultivates the Constraining Function of the Three-Step Test', in J. Griffiths and T. Mylly (eds.), *Global Intellectual Property Protection and New Constitutionalism – Hedging Exclusive Rights*, Oxford: Oxford University Press 2021, pp. 94–95.

³⁸ CJEU, 5 June 2014, case C-360/13, *Public Relations Consultants Association ('Meltwater')*, ECLI:EU:C:2014:1195, para. 7–10.

³⁹ CJEU, *ibid.*, para. 45–46.

⁴⁰ CJEU, *ibid.*, para. 50.

⁴¹ CJEU, *ibid.*, para. 54–62.

to protected material. The equation is different when the streaming concerns illegal content. In such a case, the three-step test of Article 5(5) ISD is no longer a toothless tiger. The CJEU held in *Filmspeler* that a conflict with a normal exploitation arose from temporary acts of reproducing protected works on a multimedia player with add-ons that provided links to illegal streaming websites because ‘that practice would usually result in a diminution of lawful transactions relating to the protected works’.⁴² The Court thus focussed on whether the exemption of temporary acts of copying in Article 5(1) ISD was likely to kill demand for literary and artistic works by acting as a substitute.

However, as long as a streaming service does not provide access to illegal content and refrains from offering download options going beyond mere temporary copying, no rights clearance seems necessary with regard to transient copies made by users who receive streaming content. The central exclusive right to be taken into account in streaming cases is thus the right of communication to the public, including on-demand making available, that has been harmonized in EU copyright law.⁴³ In related rights cases, the harmonization covers the interactive right of making available.⁴⁴ A more general right of communication to the public for related right holders – with a broader scope than Article 8(3) RLRD – may follow from domestic legislation in EU Member States.⁴⁵

3 Rights Clearance for General Streaming Services

As both live streaming (right of communication to the public) and on-demand streaming (right of making available to the public) fall within the scope of the exclusive rights granted in European or national legislation, the provision of streaming services, in general, requires rights clearance in the EU to secure the necessary licenses and avoid an encroachment upon copyright and related rights.

The reliance of EU policymakers on the availability of licensing solutions across Member States can easily cause tensions in the relationship between copyright and related rights on the one hand, and freedom of expression and

⁴² CJEU, 26 April 2017, case C-527/15, *Stichting Brein (Filmspeler)*, ECLI:EU:C:2017:300, para. 70.

⁴³ Article 3(1) ISD. Cf. I. Stamatoudi, P. Torremans and S. Karapapa, ‘The Information Society Directive’, in Irini Stamatoudi and Paul Torremans (eds.), *EU Copyright Law – A Commentary*, 2nd ed., Cheltenham: Edward Elgar 2021, §11.18 to §11.20.

⁴⁴ Article 3(2) ISD.

⁴⁵ CJEU, 26 March 2015, case C279/13, *C More Entertainment*, ECLI:EU:C:2015:199, para. 36.

information on the other.⁴⁶ In the area of fully licensed streaming services, such as Spotify and Netflix, this tension remains in the background. Even in this field, however, the repertoire differences caused by limited licensing opportunities – and corresponding differences in information diversity – are striking. With regard to music, the consuming public has the habit of listening repeatedly to the same piece of music. The corresponding business model and licensing practice of music labels gives Spotify the opportunity to offer even the most recent music releases. Netflix, by contrast, must deal with the much more complex right holder and licensing framework in the film sector. Film studios develop individual exploitation cascades that may start with the launch of a new film in cinemas, on paid TV channels and via exclusive streaming services. Licenses for more general services, such as Netflix, may become available only at a later stage of the film distribution strategy.⁴⁷ This leads to a substantially lower diversity of current productions stemming from different sources and not only from the streaming service itself. Considering the audience habit of not watching the same film over and over again, delayed film availability on general services, such as Netflix, may also render the offer of third-party film productions (not produced by the streaming service itself) quite unattractive to subscribers.

Despite these licensing difficulties that may place constraints on the spectrum of available content on licensed streaming services, such as Netflix, the use of legal mechanisms to foster broad content availability across Member States, such as the country of origin principle and mandatory collective

46 For a more detailed analysis of the interplay between copyright protection and freedom of expression, see C. Geiger and E. Izyumenko, 'Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression' (2014) 45 *International Review of Intellectual Property and Competition Law* 316; C. Geiger, "Constitutionalising" Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union' (2006) 37 *International Review of Intellectual Property and Competition Law* 371; A. Strowel, F. Tulkens and D. Voorhoof (eds.), *Droit d'auteur et liberté d'expression*, Brussels: Editions Larcier 2006; P.B. Hugenholtz, 'Copyright and Freedom of Expression in Europe', in N. Elkin-Koren and N. Weinstock Netanel (eds.), *The Commodification of Information*, The Hague/London/Boston: Kluwer 2002, p. 239; S. Macciacchini, *Urheberrecht und Meinungsfreiheit*, Bern: Stämpfli 2000; Y. Benkler, 'Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain' (1999) 74 *New York University Law Review* 355; N. Weinstock Netanel, 'Copyright and a Democratic Civil Society' (1996) 106 *Yale Law Journal* 283.

47 M.R.F. Senftleben, 'Institutionalized Algorithmic Enforcement – The Pros and Cons of the EU Approach to Online Platform Liability' (2020) 14 *Florida International University Law Review* 14 299, 306–307.

licensing rules, is sparse in EU law. An exception to this rule – in the sense of a regulatory package that draws on the full panoply of legal tools – is the Online Broadcasting Directive ('OBD').⁴⁸ Under the heading 'ancillary online service,' this Directive deals specifically with online services 'consisting in the provision to the public, by or under the control and responsibility of a broadcasting organisation, of television or radio programmes simultaneously with or for a defined period of time after their broadcast by the broadcasting organisation, as well as of any material which is ancillary to such broadcast'.⁴⁹

By virtue of Article 3(1) OBD, the country of origin principle applies to simultaneous online streaming of broadcasts and related 'catch-up' services that offer, during a limited period of time, access for persons who have missed the initial broadcast. In practice, this means that acts of communication and making available to the public (as well as necessary reproductions) carried out for the provision of these ancillary online services are 'deemed to occur solely in the Member State in which the broadcasting organisation has its principal establishment'.⁵⁰ Accordingly, the rights clearance can also take place centrally in the relevant Member State. Online availability of the broadcast does not culminate in an obligation to clear rights in each and every EU country. The legislative process leading to this country of origin rule for broadcast streaming shows that the development of this practical solution was not easy. The initial Commission proposal contained the general rule that restricted acts carried out for ancillary online services 'shall, for the purposes of exercising copyright and related rights relevant for these acts, be deemed to occur solely in the Member State in which the broadcasting organisation has its principal establishment'.⁵¹ In the final version of the provision that became Article 3(1) OBD, the broad application of the country of origin principle remains confined to radio programmes. Television programmes are only covered when they consist of news or current affairs programmes, or own productions which the

⁴⁸ Directive 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, [2019] OJ L 130/82.

⁴⁹ Article 2(1) OBD.

⁵⁰ Article 3(1) OBD.

⁵¹ See Article 2(1) of European Commission, 14 September 2016, *Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes*, Document COM(2016) 594 final.

broadcasting organization has fully financed itself. Broadcasts of sport events and works included in sport events have explicitly been excluded.⁵²

Besides the option to extend the scope of the country of origin principle known from Article 1(2)(b) SBD, the Online Broadcasting Directive also sheds light on another legal tool that can alleviate the burden of rights clearance: mandatory collective licensing. With regard to the retransmission of radio and television programmes, Article 4(1) OBD stipulates that right holders (other than broadcasting organizations)⁵³ may exercise their 'right to grant or refuse the authorisation for a retransmission only through a collective management organisation.' The relevance of this collective licensing obligation to online streaming comes to the fore in Article 2(2)(b) OBD. This provision clarifies that, in the case of retransmission via the internet, the mandatory collective licensing rule only applies if the retransmission is carried out in a so-called 'managed environment.' According to Article 2(3) OBD, this means an environment with an electronic 'fence' around it: an environment 'in which an operator of a retransmission service provides a secure retransmission to authorised users.'⁵⁴

The policy considerations underlying this restriction of the rule to protected online environments can be found in Recital 14 OBD. The Recital reflects the objective of the EU legislator to offer the benefits accruing from mandatory collective licensing only with regard to retransmissions taking place within specific networks, in particular satellite, digital terrestrial, mobile or closed circuit IP-based networks. Evidently, comparable 'closed' networks can only be established on the internet when the operator employs technological protection measures. The restriction of the rule to closed online environments was also deemed necessary to contain the risk of signal piracy:

[i]n order to ensure that there are sufficient safeguards against the unauthorised use of works and other protected subject matter, which is particularly important in the case of services that are paid for, retransmission services which are offered through internet access services should be included in the scope of this Directive only where those retransmission

⁵² Article 3(1) OBD. As to the protection status of sports events, see L. Bently, 'The Football Game as a Copyright Work', in M.R.F. Senftleben, J. Poort et al. (eds.), *Intellectual Property and Sports – Essays in Honour of Bernt Hugenholtz*, The Hague/London/New York: Kluwer Law International 2021, pp. 310–318; T. Synodinou, 'Audiovisual Coverage of Sports Events and Copyright Law: Originality in the Details?', in Senftleben, Poort et al., *ibid.*, pp. 340–345.

⁵³ As to the exercise of retransmission rights of broadcasting organizations with regard to their own transmissions, see Article 5 OBD.

⁵⁴ Article 2(3) OBD.

services are provided in an environment in which only authorised users can access the retransmissions and the level of content security provided is comparable to the level of security for content transmitted over managed networks, such as cable or closed circuit IP-based networks, in which content that is retransmitted is encrypted. Those requirements should be feasible and adequate.⁵⁵

In sum, it can be concluded that the spectrum of EU rights clearance rules ranges from tailor-made country of origin solutions and mandatory collective licensing approaches in the field of broadcast streaming to full exposure to the basic rule that licenses must be obtained – with regard to each individual work and each individual Member State – from the right holder.

4 Licenses for User-Generated Content

In the DSM Directive, the general rule and obligation to obtain licenses for each individual content item and each individual Member State has been confirmed with regard to UGC platforms, such as YouTube.

Traditionally, Article 14(1) of the E-Commerce Directive ('ECD')⁵⁶ shielded UGC platforms from liability for copyright infringement by offering a 'safe harbour' for hosting: as long as the platform provider was not actively involved in the posting of content, he only was obliged to take immediate action and remove content when a right holder informed him in a sufficiently precise and substantiated manner about infringing content (notice-and-takedown).⁵⁷

55 Recital 14 OBD.

56 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, [2000] OJ L 178/1. See also Article 6 of Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), [2022] OJ L 277/1 ('DSA').

57 Article 14(1) ECD; Article 6 DSA. As to CJEU decisions dealing with this liability privilege, see CJEU, 23 March 2010, case C-236/08, *Google France and Google*, ECLI:EU:C:2010:359, para. 114–118; CJEU, 12 July 2011, case C-324/09, *L'Oréal/eBay*, ECLI:EU:C:2011:474, para. 120–122. For commentary, see C. Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis*, Alphen aan den Rijn: Kluwer Law International 2016; M. Husovec, *Injunctions Against Intermediaries in the European Union – Accountable But Not Liable?*, Cambridge: Cambridge University Press 2017; M. Peguera, 'The DMCA Safe Harbour and Their European Counterparts: A Comparative Analysis of Some Common Problems' (2009) 32 *Columbia Journal of Law and the Arts* 481.

The safe harbour system rested on the assumption that a general monitoring obligation would be too heavy a burden for platform providers. Without the safe harbour, the liability risk would thwart the creation of internet platforms depending on third party content and frustrate the development of e-commerce.⁵⁸

The DSM Directive, however, led to a climate change in the field of UGC platform liability. Its Article 17(1) leaves no doubt that an OCSSP performs an act of communication to the public or an act of making available to the public 'when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users'.⁵⁹ According to Article 17(3) DSMD, this implies that the traditional liability shield for hosting services is no longer available. Instead, OCSSPs are bound to 'obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, for instance by concluding a licensing agreement, in order to communicate to the public or make available to the public works or other subject matter'.⁶⁰

To better understand this switch to a licensing obligation, it is important to explore the so-called 'value gap' argument that played a central role in the legislative process leading to the adoption of the DSM Directive. The argument rests on the policy objective to ensure the payment of adequate remuneration for the online distribution of copyrighted content.⁶¹ In its 2015 Communication 'Towards a modern, more European copyright framework,' the European Commission had already expressed the view that the traditional safe harbour

⁵⁸ Article 15(1) ECD; Article 8 DSA. Cf. M.R.F. Senftleben and C. Angelopoulos, *The Odyssey of the Prohibition on General Monitoring Obligations on the Way to the Digital Services Act: Between Article 15 of the E-Commerce Directive and Article 17 of the Directive on Copyright in the Digital Single Market*, Amsterdam: Institute for Information Law/Cambridge: Centre for Intellectual Property and Information Law 2020, pp. 6–16.

⁵⁹ Article 17(1) DSMD. For a more detailed discussion of the question whether this right of communication and making available to the public constitutes a new right that operates outside the framework of Article 3 ISD, see M. Husovec and J.P. Quintais, 'How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms under the Copyright in the Digital Single Market Directive' (2021) 70 *Gewerblicher Rechtsschutz und Urheberrecht – International* 325, 325–348. For the general qualification of on-demand streaming as a relevant act of 'making available to the public,' however, the relation between the exclusive rights granted in Article 17(1) DSMD and Article 3 ISD does not seem decisive.

⁶⁰ Article 17(1) DSMD.

⁶¹ Cf. CJEU, 26 April 2022, case C-401/19, *Poland/Parliament and Council*, ECLI:EU:C:2022:297, para. 29.

for hosting allowed UGC platforms to generate income without sharing profits with producers of creative content.⁶² The value gap argument was born.

Following this line of reasoning, the Commission's proposal for new copyright legislation – the template for the later DSM Directive – sought to render the liability shield inapplicable when it came to copyrighted works.⁶³ The underlying strategy was simple: deprived of the safe harbour for hosting and exposed to direct liability for infringing user uploads, platform providers would have to embark on UGC licensing and filtering. With the erosion of the legal certainty resulting from the traditional liability privilege, a platform provider seeking to avoid liability risks would enter into agreements with right holders.

Accordingly, it no longer matters under Article 17(1) DSMD whether an OCSSP has knowledge of infringement, encourages infringing uploads or fails to promptly remove infringing content after receiving a notification. Instead, the platform provider is directly and primarily liable for infringing content that arrives at the platform. By clarifying that OCSSP activities amount to an act of communication to the public or making available to the public, Article 17(1) DSMD collapses the traditional distinction between primary liability of users who upload infringing content, and secondary liability of online platforms which encourage or contribute to infringing activities.

In this way, EU legislation seeks to incentivize rights clearance initiatives. To reduce the liability risk, the platform provider will have to obtain a license. OCSSPs are thus confronted with a considerable licensing task. Even though it is unforeseeable which content users will upload, the license should encompass the whole spectrum of potential posts. While this dimension of the licensing obligation may be good news for users (whose activities would fall within the scope of the license and, therefore, no longer amount to infringement),⁶⁴ it creates a rights clearance task which OCSSPs can hardly ever accomplish with regard to each conceivable user contribution.⁶⁵

Traditionally, collecting societies have a strong position in the EU. As they have far-reaching mandates to administer the rights of copyright owners, they seem natural partners in the development of umbrella licensing solutions for

62 European Commission, 9 December 2015, *Towards a modern, more European copyright framework*, Doc. COM(2015) 626 final, 9–10.

63 European Commission, 14 September 2016, *Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market (DSM Directive)*, Doc. COM (2016) 593 final, Article 13.

64 Article 17(2) DSMD.

65 Cf. M.R.F. Senftleben, 'Content Censorship and Council Carelessness – Why the Parliament Must Safeguard the Open, Participative Web 2.0' (2018) *Tijdschrift voor Auteurs-, Media- & Informatierecht* 139, 141–142.

OCSSPs. However, they would have to offer an all-embracing licensing deal covering not only protected content of their members but also content of non-members. Otherwise, the licensing exercise makes little sense. It would fail to cover all types of user uploads. Considering experiences with licensing packages offered by collecting societies in the past, it seems safe to assume that an umbrella solution with these proportions is currently unavailable in many EU Member States. It remains to be seen whether the implementation of the DSM Directive, including harmonized rules on extended collective licensing,⁶⁶ paves the way for broader and more flexible licensing solutions. Even if a platform finds a collecting society willing to enter into a UGC agreement with umbrella effect, a core problem remains: the collecting society landscape is highly fragmented in the EU. The UGC deal available in one Member State may remain limited to the territory of that Member State. Pan-European licenses are the exception, not the rule. If a collecting society offers pan-European licenses for digital use, these licenses will be confined to the specific repertoire, in respect of which the collecting society has a cross-border entitlement.⁶⁷

Problems also arise in the field of initiatives to obtain licenses directly from copyright holders. As already indicated above, the willingness to grant licenses covering a broad spectrum of musical works may be relatively high in the music industry. Existing general services, such as Spotify, demonstrate that far-reaching licenses, encompassing recent music releases, are available. In the film industry, however, the situation is markedly different. As explained above, the exploitation of film productions traditionally takes place in several stages.

66 Article 12 DSMD. As to the discussion of extended licensing solutions in the area of orphan works, see European Copyright Society, *Comment of the European Copyright Society on the Implementation of the Extended Collective Licensing Rules (Arts. 8 and 12) of the Directive (EU) 2019/790 on Copyright in the Digital Single Market*, European Copyright Society 2020, available at: www.europeancopyrightsociety.org; S. van Gompel, 'Unlocking the Potential of Pre-Existing Content: How to Address the Issue of Orphan Works in Europe?' (2007) 38 *International Review of Intellectual Property and Competition Law* 669.

67 For a detailed analysis of current EU rights clearance challenges in the digital environment, see S.F. Schwemer, *Licensing and Access to Content in the European Union – Regulation Between Copyright and Competition Law*, Cambridge: Cambridge University Press 2019. As to previous cases triggered by the rights clearance infrastructure in the EU, see European Commission, 'Summary of Commission Decision of 16 July 2008 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/C-2/38.698 – CISAC)', [2008] OJ C 323/12; European Commission, 18 May 2005, 'Commission Recommendation on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services (2005/737/EC)', [2005] OJ L 276/54. Cf. K. Koelman, 'Op naar de Euro-Buma(s): de Aanbeveling van de Europese Commissie over grensoverschrijdend collectief rechtenbeheer' (2005) *Tijdschrift voor auteurs-, media- en informatierecht*, 191–196.

The release in cinemas is the first step, followed by paid TV and exclusive streaming exploitation, linear broadcasting on regular TV channels, DVD sales and the distribution via general video-on-demand services. Film studios are unlikely to sacrifice this profitable exploitation cascade by permitting users to share audio-visual material from day one of the release in movie theatres. This would enable UGC platforms to enter into direct competition with the primary exploitation undertaken by the film studio itself. If, despite these concerns, there is willingness to conclude UGC licensing agreements, film studios will only accept agreements with limited use permissions that do not jeopardize their own opportunities to exploit the film in several stages and uphold the traditional exploitation cascade.⁶⁸

In the field of visual arts, initiatives to conclude licensing agreements with right holders may be doomed to fail from the outset because accurate metadata providing reliable ownership and contact information are missing in many cases.⁶⁹ While existing initiatives in the visual arts sector – in particular museums and other cultural heritage institutions digitizing works in their holdings – have substantially extended the data coverage of works of fine art, the situation in the field of photography and illustrations remains opaque.⁷⁰ Major visual arts libraries, such as Getty Images, may consistently add metadata to works in their catalogue and keep these data up-to-date. The costs of properly documenting works and attaching metadata, however, may be prohibitively high for smaller providers of photography and illustrations in the light of the low average value of individual creations.⁷¹ In comparison with right holder identification options in the music and film sector, the prospects

68 M.R.F. Senftleben, 'Institutionalized Algorithmic Enforcement – The Pros and Cons of the EU Approach to Online Platform Liability' (2020) 14 *Florida International University Law Review* 299, 305–308.

69 Cf. M.R.F. Senftleben, T. Margoni et al., 'Ensuring the Visibility and Accessibility of European Creative Content on the World Market: The Need for Copyright Data Improvement in the Light of New Technologies and the Opportunity Arising from Article 17 of the CDSM Directive' (2022) 13 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 67, 76; N. Gronau and M. Schaefer, 'Why Metadata Matters for the Future of Copyright' (2021) 43 *European Intellectual Property Review* 488, 488–494.

70 For a closer analysis of the particular situation and dynamics in the visual arts sector, see the report by T. Azzi and Y. El Hage, *Les métadonnées liées aux images fixes*, Paris: CSPLA 2021. See also J. Reda and P. Keller, 'A Proposal to Leverage Article 17 to Build a Public Repository of Public Domain and Openly Licensed Works', *Kluwer Copyright Blog*, 23 September 2021, available at: <http://copyrightblog.kluweriplaw.com/2021/09/23/a-proposal-to-leverage-article-17-to-build-a-public-repository-of-public-domain-and-openly-licensed-works/>.

71 Cf. R.A. Posner, 'Transaction Costs and Antitrust Concerns in the Licensing of Intellectual Property' (2005) 4 *John Marshall Review of Intellectual Property Law* 325.

for licensing solutions based on negotiations with individual right holders are thus rather dim in the area of visual arts.

The establishment of a well-functioning, pan-European licensing infrastructure for on-demand streaming services providing access to UGC, thus, requires substantial investments and willingness to abandon traditional, cautious licensing approaches in favour of more flexible umbrella solutions. Against this background, it is unclear whether Article 17(1) DSMD will function, as intended, as a propelling force for comprehensive UGC licensing across OCSSP platforms and Member State territories. It is remarkable that, despite the well-known difficulties with pan-European licenses,⁷² EU policymakers refrained from developing more practical solutions, such as the establishment of a central collecting society for UGC which could operate as a 'one-stop shop' with EU-wide competence to grant UGC licenses.

5 Content Filtering

Potential inroads into freedom of expression and information – caused by licensing restrictions and corresponding enforcement obligations – can be observed quite clearly in the field of UGC streaming. It is self-evident that the veto right of right holders that follows from an obligation to obtain individual use authorizations⁷³ can lead to an impoverishment of platform content and the imposition of constraints on users seeking to express themselves. As long as licensing deals cover only a limited spectrum of repertoire and include several restrictions on the modalities of authorized use, today's emancipated, active internet users⁷⁴ are prevented from enjoying the freedom of uploading remixes and mash-ups of all kinds of pre-existing material in the EU. A license-based approach leads to a situation where users can only upload content that falls within the scope of the licensing agreement which the UGC platform managed to conclude with copyright holders and collecting societies. As a corollary, UGC platforms cannot offer maximum content diversity. In the absence of umbrella licenses covering all kinds of UGC (and all EU Member States),

⁷² Cf. S.F. Schwemer, *Licensing and Access to Content in the European Union: Regulation between Copyright and Competition Law*, Cambridge: Cambridge University Press 2019, pp. 68–73.

⁷³ As to the freedom of right holders to refuse the grant of a license, see CJEU, 26 April 2022, case C-401/19, *Poland/Parliament and Council*, ECLI:EU:C:2022:297, para. 48.

⁷⁴ As to the value which users add to pre-existing source material in the context of remix activities, see OECD, 12 April 2007, 'Participative Web: User-Created Content', Document DSTI/ICCP/IE(2006)7/Final, available at <https://www.oecd.org/sti/3839315.pdf>.

UGC platforms must limit the spectrum of content and the extent of use (in terms of scope and reach of takings from protected works) to licensed material, permitted use modalities and covered territories.

To keep use of protected material within the boundaries of available licenses, UGC platforms must also take measures to prevent use of protected source material that falls outside the scope of available authorizations. As internet users upload a myriad of literary and artistic works every day,⁷⁵ UGC platforms are likely to rely on algorithmic filtering tools to ensure that content uploads do not overstep the limits of the use permissions they managed to obtain.⁷⁶ Viewed from this perspective, the necessity to secure licenses for UGC, inevitably, leads to algorithmic enforcement measures.⁷⁷ Upload filtering is necessary to police the borders of the use permissions received from copyright owners and collecting societies. The focus on licensing in the EU encourages the use of filtering tools. To ensure the congruence of user uploads with the use permissions given by copyright holders and collecting societies, UGC platforms resort to automated content filtering.

EU legislation in the area of UGC streaming clearly reflects this peculiar interplay between licensing and filtering. In line with the overarching regulatory design based on an obligation to obtain individual licenses,⁷⁸ Article 17(4)(a) DSMD confirms that OCSSPs can only escape liability for infringing user uploads if they have 'made best efforts to obtain an authorisation.' As an alternative to right holder authorizations, Article 17(4)(b) DSMD offers OCSSPs the prospect of a reduction of the liability risk in exchange for content filtering.⁷⁹ If a UGC platform – despite best efforts – has not received a license, it can still avoid liability for unauthorized acts of communication to the public or making available to the public when it manages to demonstrate that it '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

75 For example, statistics relating to the online platform YouTube report over one billion users uploading 300 hours of video content every minute. Cf. <https://www.youtube.com/intl/en-GB/yt/about/press/> and <https://www.statisticbrain.com/youtube-statistics/>.

76 CJEU, 26 April 2022, case C-401/19, *Poland/Parliament and Council*, ECLI:EU:C:2022:297, para. 53–54.

77 M.R.F. Senftleben, 'Institutionalized Algorithmic Enforcement – The Pros and Cons of the EU Approach to Online Platform Liability' (2020) 14 *Florida International University Law Review* 299, 307–308.

78 Article 17(1) and (2) DSMD.

79 Cf. CJEU, *Poland/Parliament and Council*, para. 54.

the rightholders have provided the service providers with the relevant and necessary information.⁸⁰

Although the provision contains neutral terms to describe this alternative scenario, there can be little doubt in which way the ‘unavailability of specific works and other subject matter’ can be achieved. Given the considerable volume of content uploads, the employment of automated filtering tools to ensure that unauthorized protected content does not populate UGC platforms seems inescapable.⁸¹ This approach entails a problematic transformation of the function of copyright law. It becomes a central basis for content censorship in the online world. Instead of serving as an engine of content creation and dissemination,⁸² copyright law degenerates into a censorship and filtering instrument. As Niva Elkin-Koren pointed out, algorithmic copyright enforcement tilts the balance in copyright law. It changes the default position: ‘if copyrighted materials were once available unless proven to be infringing, today materials that are detected by algorithms are removed from public circulation unless explicitly authorized by the right holder’.⁸³

EU primary law, in particular the Charter of Fundamental Rights of the European Union (‘CFR’),⁸⁴ however, sets direct limits to measures which EU legislators may impose on information society service providers, including providers of UGC streaming services. The CJEU has stated explicitly that in transposing EU directives and implementing transposing measures, Member States must take care to rely on an interpretation of EU legislation which allows ‘a fair balance to be struck between the various fundamental rights protected by the Community legal order’.⁸⁵ UGC is the result of creative efforts that add value to underlying source material.⁸⁶ User-generated remixes and mash-ups of third party content can be qualified as a specific form of transformative use falling under the guarantee of freedom of expression and information in Article 11

80 Article 17(4)(b) DSMD.

81 CJEU, *Poland/Parliament and Council*, para. 53–54.

82 As to this goal of the copyright system, see U.S. Supreme Court, *Harper & Row v. Nation Enterprises*, 471 US 539 (1985), III B, characterizing copyright as an ‘engine of free expression’.

83 N. Elkin-Koren, ‘Fair Use by Design’, (2017) 64 *UCLA Law Review* 1082, 1093.

84 Charter of Fundamental Rights of the European Union, [2000] OJ C 364.

85 CJEU, 29 January 2008, case C-275/06, *Productores de Música de España (Promusicae)/Telefónica de España SAU*, ECLI:EU:C:2008:54, para. 68. Cf. CJEU, 26 April 2022, case C-401/19, *Poland/Parliament and Council*, ECLI:EU:C:2022:297, para. 99.

86 OECD, 12 April 2007, ‘Participative Web: User-Created Content’, Doc. DSTI/ICCP/IE(2006)7/Final, available at <https://www.oecd.org/sti/3839315.pdf>.

CFR and Article 10 of the European Convention on Human Rights ('ECHR').⁸⁷ The application of filtering technology to a social media platform hosting UGC already occupied centre stage in *Sabam/Netlog*. The case concerned Netlog's social networking platform, which offered every subscriber the opportunity to acquire a globally available 'profile' space that could be filled with photos, texts, video clips etc.⁸⁸ Claiming that users make unauthorized use of music and films belonging to its repertoire, the collecting society Sabam sought to obtain an injunction obliging Netlog to install a system for filtering the information uploaded to Netlog's servers. As a preventive measure and at Netlog's expense, this system would apply indiscriminately to all users for an unlimited period and would have been capable of identifying electronic files containing music and films from the Sabam repertoire. In case of a match, the system would prevent relevant files from being made available to the public.⁸⁹

Given these underlying facts, the CJEU saw an infringement of fundamental rights. Weighing the right to intellectual property asserted by Sabam against Netlog's freedom to conduct a business, which is guaranteed under Article 16 CFR, the Court observed that the filtering system would involve monitoring all or most of the information on Netlog's server in the interests of copyright holders, would have no limitation in time, would be directed at all future infringements and would be intended to protect not only existing but also future works.⁹⁰ Against this background, the CJEU concluded that the filtering system would encroach upon Netlog's freedom to conduct a business.⁹¹ The CJEU

87 CJEU, 26 April 2022, case C-401/19, *Poland/Parliament and Council*, ECLI:EU:C:2022:297, para. 44–47; CJEU, 22 June 2021, joined cases C682/18 and C683/18, ECLI:EU:C:2021:503, *YouTube and Cyando*, para. 64, 65 and 113. Cf. M.R.F. Senftleben, 'User-Generated Content – Towards a New Use Privilege in EU Copyright Law', in T. Aplin (ed.), *Research Handbook on IP and Digital Technologies*, Cheltenham: Edward Elgar 2020, pp. 155–158; J.-P. Triaille, S. Dusollier et al., *Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society*, Study prepared by De Wolf & Partners in collaboration with the Centre de Recherche Information, Droit et Société (CRIDS), University of Namur, on behalf of the European Commission (DG Markt), Brussels: European Union 2013, pp. 522–534 and 457–510; S.D. Jamar, 'Crafting Copyright Law to Encourage and Protect User-Generated Content in the Internet Social Networking Context' (2010) 19 *Widener Law Journal* 843; N. Helberger, L. Guibault et al., *Legal Aspects of User Created Content*, Amsterdam: Institute for Information Law 2009; M.W.S. Wong, 'Transformative User-Generated Content in Copyright Law: Infringing Derivative Works or Fair Use?' (2009) 11 *Vanderbilt Journal of Entertainment and Technology Law* 1075; E. Lee, 'Warming Up to User-Generated Content' (2008) *University of Illinois Law Review* 1459.

88 CJEU, 16 February 2012, case C-360/10, *Sabam/Netlog*, ECLI:EU:C:2012:85, para. 16–18.

89 CJEU, *ibid.*, para. 26 and 36–37.

90 CJEU, *ibid.*, para. 45.

91 CJEU, *ibid.*, para. 46–47.

also found that the filtering system would violate the fundamental rights of Netlog's users, namely their right to the protection of their personal data and their freedom to receive or impart information, as safeguarded by Articles 8 and 11 CFR respectively.⁹² The Court recalled that the use of protected material in online communications may be lawful under statutory limitations of copyright in the Member States, and that some works may have already entered the public domain, or been made available for free by the authors concerned.⁹³

From this perspective, a statutory obligation to apply filtering technology in EU legislation itself⁹⁴ appears inconsistent and highly problematic⁹⁵ – at least as long as automated filtering processes are unable to distinguish reliably between infringing piracy and permitted parody.⁹⁶ Nonetheless, the CJEU hesitates to declare automated content filtering systems impermissible altogether. Dealing with liability questions surrounding UGC in general – and not the specific regulatory scheme in Article 17 DSMD – the CJEU explained in *YouTube and Cyando* that an on-demand streaming service for UGC is liable for infringing user uploads when it contributes, beyond merely making the UGC platform itself available, to giving access to such content to the public in breach of copyright.⁹⁷ A relevant contribution can be assumed not only in scenarios that concern inactivity despite specific knowledge of infringing content, but also in situations where the provider of a UGC streaming service:

despite the fact that it knows or ought to know, in a general sense, that users of its platform are making protected content available to the public

⁹² CJEU, *ibid.*, para. 48–51.

⁹³ CJEU, *ibid.*, para. 50.

⁹⁴ CJEU, 26 April 2022, case C-401/19, *Poland/Parliament and Council*, ECLI:EU:C:2022:297, para. 56.

⁹⁵ Cf. C. Geiger and B.J. Jütte, 'Platform liability under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match' (2021) 70 *Gewerblicher Rechtsschutz und Urheberrecht – International* 517; S.F. Schwemer and J. Schovsbo, 'What is Left of User Rights? – Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime', *Intellectual Property Law and Human Rights*, 4th ed., Alphen aan den Rijn: Wolters Kluwer 2020, pp. 569–589; M.R.F. Senftleben, 'The Original Sin – Content 'Moderation' (Censorship) in the EU' (2020) 69 *Gewerblicher Rechtsschutz und Urheberrecht – International*, 339–340; M.R.F. Senftleben, 'Bermuda Triangle: Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market' (2019) 41 *European Intellectual Property Review* 480, 483–484).

⁹⁶ CJEU, 26 April 2022, case C-401/19, *Poland/Parliament and Council*, ECLI:EU:C:2022:297, para. 86.

⁹⁷ CJEU, 22 June 2021, joined cases C682/18 and C683/18, *YouTube and Cyando*, ECLI:EU:C:2021:503, para. 102.

illegally via its platform, refrains from putting in place the appropriate technological measures that can be expected from a reasonably diligent operator in its situation in order to counter credibly and effectively copyright infringements on that platform.⁹⁸

Addressing the filtering obligations arising from Article 17(4)(b) and (c) DSMD, the CJEU held in *Poland/Parliament and Council* that the specific liability regime following from these provisions was not only appropriate but also appeared necessary to meet the need to protect intellectual property rights falling under the right to property recognized in Article 17(2) CFR.⁹⁹ The Court, thus, confirmed the legitimacy of content filtering systems in the light of the principle of proportionality. It was satisfied that the obligations imposed on OCSSPs in Article 17(4)(b) and (c) DSMD did not 'disproportionately restrict the right to freedom of expression and information of users of those services'.¹⁰⁰

For a content filtering system to meet the proportionality requirements formulated by the Court, however, it must meet several preconditions. First, the CJEU underlined that a filtering system could only be deemed permissible if it did not suppress lawful user uploads, such as uploads falling within the scope of a copyright limitation, concerning public domain material or consisting of own creations of the uploader:

[a] filtering system which might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications, would be incompatible with the right to freedom of expression and information, guaranteed in Article 11 of the Charter, and would not respect the fair balance between that right and the right to intellectual property.¹⁰¹

98 CJEU, *ibid.* para. 84, 94, 100 and 102.

99 CJEU, 26 April 2022, case C-401/19, *Poland/Parliament and Council*, ECLI:EU:C:2022:297, para. 83. For a more detailed discussion of the fundamental rights position following from Article 17(2) CFR, see D. Jongsma, *Creating EU Copyright Law – Striking a Fair Balance*, Helsinki: Hanken School of Economics 2019, pp. 163–168; J. Griffiths and L. McDonagh, 'Fundamental Rights and European IP Law – the Case of Art 17(2) of the EU Charter', in C. Geiger (ed.), *Constructing European Intellectual Property Achievements and New Perspectives*, Cheltenham: Edward Elgar 2013, p. 75; C. Geiger, 'Intellectual Property Shall be Protected! Article 17(2) of the Charter of Fundamental Rights of the European Union: A Mysterious Provision With an Unclear Scope' (2019) 31 *European Intellectual Property Review* 113.

100 CJEU, *ibid.*, para. 84.

101 CJEU, *ibid.*, para. 86.

The CJEU recalled in this respect that copyright limitations, such as the quotation right and the exemption of parodies, caricatures and pastiches,¹⁰² conferred 'rights on the users of works or of other protected subject matter'¹⁰³ and sought to ensure 'a fair balance between the fundamental rights of those users and of rightholders.'¹⁰⁴ Article 17(7) DSMD left no doubt that the adoption of these copyright limitations at the national level was mandatory, and that the user rights following from Article 17(7) DSMD had to survive the introduction of automated content filtering systems.¹⁰⁵ Each EU Member State was bound to ensure that users could upload and make available content generated by themselves for the specific purposes of quotation, criticism, review, caricature, parody or pastiche.¹⁰⁶ The Court also emphasized that Article 17(8) DSMD prohibited any general monitoring obligation. Therefore, providers of UGC streaming services could not be required to prevent the uploading and making available of content which, in order to be found unlawful, would require an independent content assessment in the light of information made available by right holders and relevant copyright limitations.¹⁰⁷ In particular, it could not be excluded that, in some cases, unauthorized content could only be banned upon notification of right holders.¹⁰⁸

¹⁰² Article 5(3)(d) and (k) ISD. Cf. CJEU, 1 December 2011, case C-145/10, *Painer*, ECLI:EU:C:2013:138, para. 132; CJEU, 3 September 2014, case C-201/13, *Deckmyn*, ECLI:EU:C:2014:2132, para. 26; CJEU, 29 July 2019, case C-516/17, *Spiegel Online*, ECLI:EU:C:2019:625, para. 54; CJEU, 29 July 2019, case C-469/17, *Funke Medien NRW*, ECLI:EU:C:2019:623, para. 70. For a more detailed discussion of the status of these copyright limitations, see T. Aplin and L. Bently, *Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works*, Cambridge: Cambridge University Press 2020, pp. 75–84; C. Geiger and E. Izumenko, 'The Constitutionalization of Intellectual Property Law in the EU and the Funke Medien, Pelham and Spiegel Online Decisions of the CJEU: Progress, but Still Some Way to Go!' (2020) 51 *International Review of Intellectual Property and Competition Law* 282, 292–298.

¹⁰³ CJEU, 26 April 2022, case C-401/19, *Poland/Parliament and Council*, ECLI:EU:C:2022:297, para. 87.

¹⁰⁴ CJEU, *ibid.*, para. 87.

¹⁰⁵ However, see also E. Rosati, *Copyright in the Digital Single Market*, Oxford: Oxford University Press 2021, pp. 346–347, who underlines the mandatory character of the copyright limitations in Article 17(7) DSMD but expresses doubts as to the practical consequences of their conceptualization as 'user rights.'

¹⁰⁶ CJEU, *ibid.*, para. 87.

¹⁰⁷ CJEU, *ibid.*, para. 90. Cf. CJEU, 3 October 2019, case C-18/18, *Glawischnig-Piesczek*, ECLI:EU:C:2019:821, para. 41–46.

¹⁰⁸ CJEU, 26 April 2022, case C-401/19, *Poland/Parliament and Council*, ECLI:EU:C:2022:297, para. 91.

Referring also to the complaint and redress mechanism set forth in Article 17(9) DSMD, the Court highlighted that, under those provisions, users had to be able to submit a complaint where they considered that uploaded content had wrongly been blocked or removed. Any complaint had to be processed without undue delay and be subject to human review.¹⁰⁹ Importantly, the Court characterized the procedural safeguards following from Article 17(9) DSMD as *additional* safeguards:

the first and second subparagraphs of Article 17(9) of Directive 2019/790 introduce several procedural safeguards, which are additional to those provided for in Article 17(7) and (8) of that directive, and which protect the right to freedom of expression and information of users of online content-sharing services in cases where, notwithstanding the safeguards laid down in those latter provisions, the providers of those services nonetheless erroneously or unjustifiably block lawful content.¹¹⁰

The decision in *Poland/Parliament and Council*, thus, shows that the obligation to introduce content filtering systems arising from Article 17(4)(b) and (c) DSMD is only compatible with Article 11 CFR and Article 10 ECHR on the condition that UGC streaming services provided by OCSSPs offer two safeguards cumulatively:

- in the first place, it follows from Article 17(7) and (8) DSMD that the UGC streaming service must have *ex ante* safeguards in place – in the sense of flagging options allowing users to ensure that permissible quotations, parodies etc. are not filtered out¹¹¹ and, instead, become directly available on the platform;
- in addition, it follows from Article 17(9) DSMD that, with regard to cases where the *ex ante* mechanism fails to ensure content availability, the UGC streaming service must have *ex post* safeguards in place – consisting of a well-functioning complaint and redress mechanism that allows users to bring the malfunctioning of the system to the attention of the platform and ensure the correction of unjustified content blocking.

¹⁰⁹ CJEU, *ibid.*, para. 94.

¹¹⁰ CJEU, *ibid.*, para. 93.

¹¹¹ For an example of national legislation providing for this option, see §§ 14(1), 11(1), no. 1 and 3, 9(1) en 5(1) of the German Copyright Service Provider Act (Urheberrechts-Diensteanbieter-Gesetz), *Bundesgesetzblatt* 2021, Part 1, no. 27, 1204 (1215). Cf. C. Angelopoulos, M.R.F. Senft-leben and P. ten Thije, 'De reikwijdte van artikel 17 DSM-richtlijn in het licht van het verbod op algemene toezichtverplichtingen: een Odyssee' (2021) *Tijdschrift voor auteursrecht* 120, 140–141.

On balance, the regulation of on-demand UGC streaming services following from the decision in *Poland/Parliament and Council* can be described as a double-edged sword. On the one hand, the CJEU refused to dismantle the doubtful edifice of licensing and filtering obligations in Article 17(1) and (4) DSMD. On the other hand, the CJEU insisted on the introduction of appropriate safeguards against disproportionate, excessive content blocking.

As a result, the status quo with regard to UGC streaming services is as follows: to police the borders of the licensing deals which OCSSPs manage to obtain, it is legitimate to deploy algorithmic content filtering tools even though these tools are likely to curtail the freedom of users to participate actively in the creation of online content. If a user-generated remix is not in line with the repertoire and use restrictions following from licensing agreements, the content upload is at risk of not passing the algorithmic filter. In combination with content filtering measures, the licensing approach, thus, implies the risk of curtailing the possibility for users to learn of views and expressions of others. As OCSSPs are bound to rely on use authorizations in accordance with Article 17(4)(a) DSMD, they will find it difficult to provide access to the wide variety of content that is uploaded by users with diverse social, cultural and ethnical backgrounds. In their licensing efforts, they may even be tempted to focus on mainstream works and the biggest language groups to maximize the return on investment in rights clearance.¹¹²

There is thus a risk of UGC impoverishment. The license-based approach limits the repertoire of protected source material that is readily available for remix and mash-up activities by users. If licensing initiatives of OCSSPs focus on mainstream works and big language groups, the license-based approach also entails a risk of neglecting minority groups, minority views and niche audiences. In the light of the cultural diversity in and across EU Member States, this is a serious problem. As a counterbalance, the CJEU has clarified in *Poland/Parliament and Council* that, in the absence of content coverage on the basis of licensing efforts, all types of content uploads must survive automated content filtering when they constitute lawful use, including use that can be qualified as a permissible quotation, criticism, review, caricature, parody or pastiche.¹¹³ The need to create breathing space for lawful content uploads follows from primary EU law, namely the guarantee of freedom of expression

¹¹² M.R.F. Senftleben, 'Bermuda Triangle: Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market' (2019) 41 *European Intellectual Property Review* 480, 482.

¹¹³ CJEU, 26 April 2022, case C-401/19, *Poland/Parliament and Council*, ECLI:EU:C:2022:297, para. 87.

and information.¹¹⁴ In practice, this means that OCSSPs must implement effective safeguards against excessive content blocking. More specifically, these safeguards must include flagging options that enable users to ensure content availability *ex ante*, and complaint and redress mechanisms that allow users to correct unjustified content blocking and ensure content availability *ex post*.

6 Copyright Limitations

The foregoing analysis has already shed light on several copyright limitations that play an important role in the regulation of streaming services in the EU. As explained in section 2, the impact of the right of reproduction granted in Article 2 ISD is limited from the outset because the reception of streaming content falls within the ambit of the exemption of temporary copying in Article 5(1) ISD as long as a streaming service does not offer access to illegal content and refrains from offering download options going beyond mere temporary, transient copying.

With regard to services including download options, a further limitation of the right of reproduction¹¹⁵ can result from national private copying regimes that exempt the making of copies for private study and enjoyment. In the EU catalogue of permissible copyright limitations, Article 5(2)(b) ISD provides that the development of national private use privileges is possible:

in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject matter concerned.

Depending on the configuration of national private use legislation, downloads made in connection with the use of streaming services may fall within the scope of the private copying exemption. To fulfil the requirement of fair compensation, many national copyright systems impose an obligation on manufacturers and importers of relevant blank media and copying devices – for example, smartphones in the case of streaming services – to pay copyright

¹¹⁴ Article 11 CFR; Article 10 ECHR.

¹¹⁵ Article 2 ISD.

levies to a collecting society.¹¹⁶ The manufacturers and importers are supposed to pass on these levy costs to end users (beneficiaries of the exemption of private copying) by adding these costs to the price of their products.¹¹⁷

This private copying solution, however, has its limits. In particular, the invocation of the private copying rule is only conceivable when the underlying streaming service offers access to legal sources. In *ACI Adam*, the CJEU made it clear that it was not possible to 'whitewash' downloads from an illegal file-sharing website by invoking the exemption of digital private copying in Article 5(2)(b) ISD.¹¹⁸ In this case, prejudicial questions had arisen from the Dutch regulation of private copying which, at the time, concerned the whole spectrum of literary and artistic works, was applicable to private users in general, and covered all kinds of sources, including unlawful sources, such as content offered on The Pirate Bay.¹¹⁹ Declaring this broad private copying rule impermissible, the Court found that a private use privilege that permitted the making of personal copies from an unlawful source 'would encourage the circulation of counterfeited or pirated works, thus inevitably reducing the volume of sales or of other lawful transactions relating to the protected works, with the result that a normal exploitation of those works would be adversely affected'.¹²⁰

With regard to copyright limitations covering the communication to the public of protected content, the discussion in the preceding section has shown that specific EU legislation in the area of UGC streaming addresses not only licensing and filtering obligations but also measures to preserve breathing space for transformative forms of UGC.¹²¹ Article 17(7) DSMD leaves little doubt

¹¹⁶ CJEU case law reflects this configuration of many national private copying systems in the EU. See CJEU, 27 June 2013, joined cases C457/11 to C460/11, *VG Wort and Others*, ECLI:EU:C:2013:426, para. 76–77; CJEU, 11 July 2013, case C-521/11, *Amazon/Astro-Mechana*, ECLI:EU:C:2013:515, para. 24; CJEU, 10 April 2014, case C435/12, *ACI Adam and Others*, ECLI:EU:C:2014:254, para. 52; CJEU, 5 March 2015, case C463/12, *Copydan Båndkopi/Nokia*, ECLI:EU:C:2015:144, para. 23.

¹¹⁷ CJEU, 21 October 2010, case C467/08, *Padawan/SGAE*, ECLI:EU:C:2010:620, para. 49; CJEU, 27 June 2013, joined cases C457/11 to C460/11, *VG Wort and Others*, ECLI:EU:C:2013:426, para. 76–77.

¹¹⁸ CJEU, 10 April 2014, case C435/12, *ACI Adam and Others*, ECLI:EU:C:2014:254, para. 38–41.

¹¹⁹ For a detailed analysis of the evolution of a broad private copying privilege in Dutch copyright law, see D.J.G. Visser, 'Private Copying', in P.B. Hugenholtz, A.A. Quaedvlieg and D.J.G. Visser (eds.), *A Century of Dutch Copyright Law – Auteurswet 1912–2012*, Amstelveen: deLex 2012, pp. 413–441.

¹²⁰ CJEU, 10 April 2014, case C435/12, *ACI Adam and Others*, ECLI:EU:C:2014:254, para. 39.

¹²¹ CJEU, *ibid.*, para. 87. Cf. M.R.F. Senftleben, 'Bermuda Triangle: Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market' (2019) 41 *European Intellectual Property Review* 480, 485–486. As to the transformative character of UGC, see J.P. Quintais, *Copyright in the Age of Online Access*

that the use of algorithmic enforcement measures must not submerge areas of freedom that support the creation and dissemination of transformative amateur productions that are uploaded to OCSSP platforms:

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

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

- a. quotation, criticism, review;
- b. use for the purpose of caricature, parody or pastiche.

Use of the formulation 'shall not result in the prevention' and 'shall ensure that users ... are able' give copyright limitations for 'quotation, criticism, review' and 'caricature, parody or pastiche' an elevated status. In Article 5(3)(d) and (k) ISD, these use privileges were only listed as limitation prototypes which EU Member States are free to introduce (or maintain) at the national level. The adoption of a quotation right¹²² and an exemption of caricature, parody or pastiche¹²³ remained optional. Article 17(7) DSMD, however, transforms these use privileges into mandatory breathing space for transformative UGC – at least in the specific context of algorithmic enforcement measures taken by platform providers.¹²⁴ This metamorphosis makes copyright limitations in this

¹²² *Alternative Compensation Systems in EU Law*, Alphen aan den Rijn: Kluwer Law International 2017, pp. 157–158; J.-P. Triaille, S. Dusollier et al., *Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society*, Study prepared by De Wolf & Partners in collaboration with the Centre de Recherche Information, Droit et Société (CRIDS), University of Namur, on behalf of the European Commission (DG Markt), Brussels: European Union 2013, pp. 522–527 and 531–534; P.B. Hugenholtz and M.R.F. Senftleben, *Fair Use in Europe. In Search of Flexibilities*, Amsterdam: Institute for Information Law/vu Centre for Law and Governance 2011, pp. 29–30.

¹²³ Article 5(3)(d) ISD.

¹²⁴ Article 5(3)(k) ISD.

¹²⁴ Cf. J.P. Quintais, G. Frosio et al., 'Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations From European Academics' (2020) 10 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 277.

category particularly robust: they 'shall' survive the application of automated filtering tools.¹²⁵

As already indicated in section 2, copyright limitations have traditionally been interpreted restrictively in the EU.¹²⁶ In line with the traditional approach in EU Member States, the CJEU adhered to the dogma of strict interpretation in *Infopaq*.¹²⁷ In *Painer*, however, the Court underlined the need for an interpretation of the quotation right following from Article 5(3)(d) ISD that enables its effectiveness and safeguards its purpose.¹²⁸ The Court clarified that Article 5(3)(d) ISD was 'intended to strike a fair balance between the right of freedom of expression of users of a work or other protected subject-matter and the reproduction right conferred on authors'.¹²⁹ In its further decision in *Deckmyn*, the CJEU followed the same path with regard to the parody exemption in Article 5(3)(k) ISD. As in *Painer*, the Court bypassed the dogma of strict interpretation and underlined the need to ensure the effectiveness of the parody exemption¹³⁰ as a means to balance copyright protection against freedom of expression.¹³¹

In the light of this jurisprudence, the reference to 'quotation, criticism, review' and 'caricature, parody or pastiche' in Article 17(7) DSMD is capable of providing reliable breathing space for UGC streaming activities – outside the predominant licensing approach described in section 3. As the decisions of the CJEU demonstrate, the fundamental guarantee of freedom of expression and information plays a crucial role in this context.¹³² Relying on Article 11 CFR and Article 10 ECHR, the CJEU interpreted the quotation right and the parody

¹²⁵ CJEU, 26 April 2022, case C-401/19, *Poland/Parliament and Council*, ECLI:EU:C:2022:297, para. 87.

¹²⁶ As to the underlying differences in the theoretical underpinning and practical configuration of copyright protection in common law and civil law jurisdictions, see M.R.F. Senftleben, 'Bridging the Differences Between Copyright's Legal Traditions – the Emerging EC Fair Use Doctrine' (2010) 57 *Journal of the Copyright Society of the U.S.A.* 521, 522–525. However, see also J.C. Ginsburg, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America', in B. Sherman and A. Strowel (eds.), *Of Authors and Origins*, Oxford: Clarendon Press 1994, p. 133, who points out that the antagonism between copyright's legal traditions must not be overestimated from a historical perspective.

¹²⁷ CJEU, 16 July 2009, case C-5/08, *Infopaq International*, ECLI:EU:C:2009:465, para. 56–57.

¹²⁸ CJEU, 1 December 2011, case C-145/10, *Painer*, ECLI:EU:C:2013:138, para. 132–133.

¹²⁹ CJEU, *ibid.*, para. 134.

¹³⁰ CJEU, 3 September 2014, case C-201/13, *Deckmyn*, ECLI:EU:C:2014:2132, para. 22–23.

¹³¹ CJEU, *ibid.*, para. 25–27.

¹³² For a discussion of the status quo reached in balancing copyright protection against freedom of expression, see C. Geiger and E. Izumenko, 'Freedom of Expression as an External Limitation to Copyright Law in the EU: The Advocate General of the CJEU Shows the Way' (2019) 41 *European Intellectual Property Review* 131, 133–136.

exemption less strictly than limitations without a comparably strong freedom of speech underpinning. In both the *Painer* and the *Deckmyn* decision, the Court emphasized the need to achieve a ‘fair balance’ between, in particular, ‘the rights and interests of authors on the one hand, and the rights of users of protected subject-matter on the other.’¹³³ The Court thus referred to quotations and parodies as user ‘rights’ rather than mere user ‘interests.’ As pointed out in section 4, it confirmed this position in *Poland/Parliament and Council*.¹³⁴

Arguably, the word ‘pastiche’ can be understood to encompass content medleys of users which go beyond the traditional concepts of ‘quotation’ and ‘parody.’ Based on the open-ended notion of ‘pastiche,’ national lawmakers can create considerable room for UGC streaming on the basis of the pastiche exemption in Article 5(3)(k) ISD and Article 17(7) DSMD. In *Deckmyn* and *Pelham*, the CJEU established the rule that the meaning of limitation concepts listed in Article 5(3) ISD had to be determined by considering the usual meaning of those concepts in everyday language, while also taking into account the legislative context in which they occur and the purposes of the rules of which they are part.¹³⁵ The Merriam-Webster English Dictionary defines ‘pastiche’ as ‘a literary, artistic, musical, or architectural work that imitates the style of previous work.’¹³⁶ It also refers to a ‘musical, literary, or artistic composition made up of selections from different works.’¹³⁷ Similarly, the Collins English Dictionary describes a ‘pastiche’ as ‘a work of art that imitates the style of another artist or period’ and ‘a work of art that mixes styles, materials, etc.’¹³⁸ The aspect of mixing pre-existing materials and using portions of different works is of particular importance to the UGC debate. In many cases, the remix of pre-existing works in UGC leads to a new creation that ‘mixes styles, materials etc.’ and, in fact, is ‘made up of selections from different works.’ Hence, the usual meaning of ‘pastiche’ encompasses forms of UGC that mix different source materials and combine selected parts of pre-existing works.

¹³³ CJEU, 1 December 2011, case C-145/10, *Painer*, ECLI:EU:C:2013:138, para. 132; CJEU, 3 September 2014, case C-201/13, *Deckmyn*, ECLI:EU:C:2014:2132, para. 26. See also CJEU, 29 July 2019, case C-476/17, *Pelham and Others*, ECLI:EU:C:2019:624, para. 32, 37 and 59.

¹³⁴ CJEU, 26 April 2022, case C-401/19, *Poland/Parliament and Council*, ECLI:EU:C:2022:297, para. 87.

¹³⁵ CJEU, 3 September 2014, case C-201/13, *Deckmyn*, ECLI:EU:C:2014:2132, para. 19; CJEU, 29 July 2019, case C-476/17, *Pelham and Others*, ECLI:EU:C:2019:624, para. 70.

¹³⁶ Merriam-Webster English Dictionary, available at <https://www.merriam-webster.com/dictionary/pastiche>.

¹³⁷ Merriam-Webster English Dictionary, *ibid*.

¹³⁸ Collins English Dictionary, available at <https://www.collinsdictionary.com/dictionary/english/pastiche>.

EU copyright law, thus, contains a concept that can serve as a basis for the introduction of a broad copyright limitation for UGC that goes beyond the traditional right of quotation and the traditional exemption of parody.¹³⁹ This limitation-based solution creates a habitat for UGC streaming platforms that refuse to follow the prevailing licensing and filtering logic described in section 4. Admittedly, the escape route of Article 17(7) DSMD does not entail a full immunity from filtering obligations. Even if a UGC platform provider decides to focus on permitted quotations, parodies and pastiches, it will still be necessary to introduce algorithmic enforcement measures to separate the wheat from the chaff. The platform provider will have to distinguish between permissible pastiche and prohibited piracy.

Nonetheless, the robust use privileges for UGC in Article 17(7) DSMD offer important impulses for the development of content identification systems that seek to find creative input that renders the upload permissible instead of focusing on third-party content that makes the upload problematic.¹⁴⁰ The exemption of quotations, parodies and pastiches paves the way for a markedly different approach to the assessment of content. Instead of focusing on traces of protected third-party content in UGC (and starting points for blocking content), it is decisive whether the user has added sufficient own creativity to arrive at a permissible form of UGC.

It remains to be seen whether (and how) this reverse filtering logic can be implemented in practice.¹⁴¹ It is conceivable, for instance, that users upload not only their final pastiche but also a file containing exclusively the

¹³⁹ For a more detailed analysis of this regulatory option, see M.R.F. Senftleben, 'User-Generated Content – Towards a New Use Privilege in EU Copyright Law', in T. Aplin (ed.), *Research Handbook on IP and Digital Technologies*, Cheltenham: Edward Elgar 2020, pp. 136–162. Cf. the analysis by E. Hudson, 'The Pastiche Exception in Copyright Law: A Case of Mashed-up Drafting?' (2017) *Intellectual Property Quarterly* 346, 348–352 and 362–364, which confirms that the elastic, flexible meaning of the term 'pastiche' is capable of encompassing 'the utilisation or assemblage of pre-existing works in new works' (at 363). In the same sense F. Pötzlberger, 'Pastiche 2.0: Remixing im Lichte des Unionssrechts' (2018) *Gewerblicher Rechtsschutz und Urheberrecht* 675, 681. As to the relationship between parody and pastiche, see S. Jacques, *The Parody Exception in Copyright Law*, Oxford: Oxford University Press 2019, p. 11.

¹⁴⁰ Cf. N. Elkin-Koren, 'Fair Use by Design' (2017) 64 *UCLA Law Review* 1082, 1093–1096.

¹⁴¹ For critical comments on the ability of automated systems to distinguish between an infringing copy and a permissible quotation, parody or pastiche, see the contribution of P.K. Yu, 'Can Algorithms Promote Fair Use?' (2020) 14 *Florida International University Law Review* 329, 329–363; M.A. Lemley, 'Rationalizing Internet Safe Harbors' (2007) 6 *Journal on Telecommunications and High Technology Law* 101, 110–111; D.L. Burk and J.E. Cohen, 'Fair Use Infrastructure for Rights Management Systems', (2001) 15 *Harvard Journal of Law and Technology* 41, 56.

self-created material which they mingled with protected third-party content. In case of separable input (a funny animal video on the one hand; third-party background music that has been added on the other), this allows the inclusion of the user creation as a separate content item in the identification system. In this way, the system could be made 'aware' that UGC contains different types of creative input.¹⁴² Accordingly, it could factor this 'insight' into the equation when calculating the ratio of own content to third party content. In addition, the potential of artificial intelligence and self-learning algorithms must not be underestimated. Filtering machines may be able to learn from decisions on content permissibility taken by humans. As a result, algorithmic content screening could become more sophisticated. It may lead to content identification systems that are capable of deciding easy cases and flagging difficult cases which could then be subject to human review.¹⁴³

7 Illegal Platforms and Website Blocking

With regard to streaming platforms that aim at facilitating the illegal uploading and sharing of protected content, the CJEU has provided clear regulatory guidelines in several decisions. In *YouTube and Cyando*, the Court summarized its approach by pointing out that the provider of a video-sharing platform on which users can illegally make protected content available to the public, performs a primary act of communication to the public and is directly liable for infringing user uploads:

where that operator participates in selecting protected content illegally communicated to the public, provides tools on its platform specifically intended for the illegal sharing of such content or knowingly promotes such sharing, which may be attested by the fact that that operator has adopted a financial model that encourages users of its platform illegally to communicate protected content to the public via that platform.¹⁴⁴

¹⁴² As to the creation of digital reference files in content identification systems, see M. Perel and N. Elkin-Koren, 'Accountability in Algorithmic Copyright Enforcement' (2016) 19 *Stanford Technology Law Review* 473, 513–514; L.G. Gallo, 'The (Im)possibility of "Standard Technical Measures" for UGC Websites' (2011) 34 *Columbia Journal of Law and the Arts* 283, 296.

¹⁴³ N. Elkin-Koren, 'Fair Use by Design' (2017) 64 *UCLA Law Review* 1082, 1096–1098.

¹⁴⁴ CJEU, 22 June 2021, joined cases C682/18 and C683/18, *YouTube and Cyando*, ECLI:EU:C:2021:503, para. 102.

The Court had paved the way for this broad application of the right of communication to the public – de facto collapsing the traditional distinction between primary liability of the user who uploads infringing content, and secondary, contributory liability of the platform – in the earlier decisions *Filmspeler* and *The Pirate Bay*. In *Filmspeler*, the Court dealt with the offer of multimedia players with pre-installed add-ons that specifically enabled purchasers to have access to protected works published illegally on streaming websites.¹⁴⁵ Instead of raising the question whether harmonized EU law provided a basis for assuming secondary, contributory liability to infringing content sharing, the CJEU held that the sale of such a multimedia player constituted a primary act of communication to the public in the sense of Article 3(1) ISD.¹⁴⁶ To support this remarkable extension of the concept of ‘communication to the public’ to the preparatory phase of offering and selling a multimedia player – a phase in which the purchaser has not yet set in motion the process of accessing illegal content – the Court focused on knowledge of infringing conduct and the aim to exploit illegal streaming content. The ‘Filmspeler’ multimedia player had been sold in full knowledge of the fact that the add-ons with pre-installed hyperlinks gave access to works published illegally on the internet. In fact, it had been stated specifically in the advertising for the device that the multimedia player made it possible to watch on TV, freely and easily, audio-visual material available on the internet without the consent of copyright holders. Hence, it was clear that the player had been supplied with a view to deriving profit from the online availability of illegal streaming content.¹⁴⁷

After the decision in *Filmspeler*, it was only a small step for the CJEU to clarify in *The Pirate Bay* that the provision of the file-sharing infrastructure for an illegal streaming website also constituted a primary act of communication to the public falling under Article 3(1) ISD.¹⁴⁸ In this case, the Court recognized explicitly that the illegal content had been placed online ‘not by the platform operators but by its users’.¹⁴⁹ Without the provision and management of a file-sharing platform by the operators of The Pirate Bay, however, the works could not be shared by the users or, at the very least, sharing them on the internet would prove to be more complex.¹⁵⁰ The Court also emphasized that the operators of The Pirate Bay – with full knowledge of the consequences

¹⁴⁵ CJEU, 26 April 2017, case C-527/15, *Stichting Brein (Filmspeler)*, ECLI:EU:C:2017:300, para. 41.

¹⁴⁶ CJEU, *ibid.*, para. 52.

¹⁴⁷ CJEU, *ibid.*, para. 50–51.

¹⁴⁸ CJEU, 14 June 2017, C-610/15, *Stichting Brein (The Pirate Bay)*, ECLI:EU:C:2017:456, para. 47.

¹⁴⁹ CJEU, *ibid.*, para. 36.

¹⁵⁰ CJEU, *ibid.*, para. 36.

of their conduct – provided access to protected works by indexing torrent files which allow users of the platform to locate those works and to share them within the context of a peer-to-peer network.¹⁵¹ There could be no dispute that the making available and management of an online sharing platform, such as The Pirate Bay, was carried out with the purpose of obtaining profit (considerable advertising revenues) from the illegal sharing of protected content.¹⁵²

In practice, the verdict of a primary violation of the right of communication to the public and the exposure to direct liability, however, has little value for right holders if the finding of infringement does not lead to the unavailability of the illegal file-sharing platform. The operators of illegal websites, such as The Pirate Bay, often remain unimpressed by infringement decisions and corresponding court orders seeking to close down the platform. The server hosting the illegal website may be outside the jurisdiction of the court.

In this situation, it is of particular importance that EU law affords right holders the opportunity to request that internet access providers offer support in the enforcement of copyright and related rights. Article 8(3) ISD provides that:

Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.¹⁵³

In *UPC Telekabel Wien*, the film producer Constantin Film sought a website blocking order against the Austrian internet service provider UPC because attempts to enforce copyright against the illegal downloading and streaming website 'kino.to' had remained fruitless. In this case, the CJEU gave Article 8(3) ISD a broad scope.¹⁵⁴ For invoking the provision, it was sufficient that UPC allowed customers access to works which a third party made available unlawfully. It was not necessary that kino.to itself was a UPC subscriber.¹⁵⁵ The CJEU also dismissed UPC's counterargument that blocking orders were disproportionate because users could circumvent blocking measures easily. Instead, it was sufficient that website blocking had limited effectiveness. The Court deemed a blocking order possible when it had the effect of making it difficult to achieve

¹⁵¹ CJEU, *ibid.*, para. 36 and 45.

¹⁵² CJEU, *ibid.*, para. 46.

¹⁵³ See also the corresponding provision in Article 11 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, [2004] OJ L195/16.

¹⁵⁴ CJEU, 27 March 2014, case C-314/12, *UPC Telekabel Wien*, ECLI:EU:C:2014:192, para. 11.

¹⁵⁵ CJEU, *ibid.*, para. 32.

access to illegal content and of seriously discouraging users from seeking access.¹⁵⁶

At the same time, the CJEU underlined that, in cases where blocking orders were sought, it was necessary to walk a fine line because website blocking could easily encroach upon fundamental rights and freedoms.¹⁵⁷ With regard to the freedom to conduct a business of internet service providers,¹⁵⁸ however, the Court was confident that appropriate solutions could be found. A blocking order could leave its addressee freedom to determine the specific measures to be taken in order to achieve the required result. Internet service providers, such as UPC, could then choose the measures that are best adapted to its resources and abilities and compatible with its other obligations.¹⁵⁹ It was important, however, that exoneration options were available at the national level, allowing the internet service provider to avoid liability by proving that he has taken all reasonable measures. As long as exoneration was possible, blocking orders were unlikely to require 'unbearable sacrifices' and erode the freedom to conduct a business.¹⁶⁰ Addressing, in addition, the freedom of expression and information of UPC customers, the CJEU developed a remarkable approach by stating that:

the measures adopted by the internet service provider must be strictly targeted, in the sense that they must serve to bring an end to a third party's infringement of copyright or of a related right but without thereby affecting internet users who are using the provider's services in order to lawfully access information. Failing that, the provider's interference in the freedom of information of those users would be unjustified in the light of the objective pursued.¹⁶¹

¹⁵⁶ CJEU, *ibid.*, para. 63.

¹⁵⁷ Cf. M.R.F. Senftleben and C. Angelopoulos, *The Odyssey of the Prohibition on General Monitoring Obligations on the Way to the Digital Services Act: Between Article 15 of the E-Commerce Directive and Article 17 of the Directive on Copyright in the Digital Single Market*, Amsterdam: Institute for Information Law/Cambridge: Centre for Intellectual Property and Information Law 2020, pp. 17–18 and 30–31; C. Geiger and E. Izumchenko, 'The Role of Human Rights in Copyright Enforcement Online: Elaborating a Legal Framework for Website Blocking' (2016) 32 *American University International Law Review* 43, 52–95.

¹⁵⁸ Article 16 CFR.

¹⁵⁹ CJEU, 27 March 2014, case C-314/12, *UPC Telekabel Wien*, ECLI:EU:C:2014:192, para. 52.

¹⁶⁰ CJEU, *ibid.*, para. 53.

¹⁶¹ CJEU, *ibid.*, para. 56.

On its merits, the CJEU, thus, placed internet service providers in the position of a guardian of fundamental rights. In the private relationship between UPC and its subscribers, the obligation to safeguard freedom of expression and information includes the obligation to get involved in legal proceedings. According to the Court, the national procedural rules of EU Member States must provide 'a possibility for internet users to assert their rights before the court once the implementing measures taken by the internet service provider are known.'¹⁶² Instead of defining necessary checks and balances itself, the CJEU, therefore, de facto 'outsourced' the task of safeguarding freedom of expression and information to internet service providers and active users instigating court procedures when blocking measures have excessive effects.

8 Conclusion

In the EU, streaming services fall within the scope of the right of communication to the public and the right of on-demand making available to the public which Article 3(1) ISD has fully harmonized in the area of copyright. With regard to related rights, the harmonization remains limited to the right of making available to the public in Article 3(2) ISD. National legislation in EU Member States, however, may provide for a broad right of communication to the public that goes beyond the status quo reached in EU related rights law. When a streaming service offers access to legal content and refrains from offering download options, the exemption of temporary copying in Article 5(1) ISD is likely to cover the reception of streaming content by users of the service. This is different, however, in cases where the streaming service concerns illegal content.

In the area of rights clearance, EU law relies on individual licensing agreements despite a fragmented collective licensing landscape and the absence of a comprehensive copyright data and metadata infrastructure that could facilitate the task of identifying content repertoires and right holders. In the field of online broadcasting and related linear and 'catch-up' streaming services, the country of origin principle and mandatory collective licensing rules can alleviate the burden of rights clearance. With regard to UGC streaming on online content sharing platforms, the individual licensing approach causes tensions with freedom of expression and information. These tensions are further intensified by the fact that Article 17(4) DSMD combines licensing obligations with

¹⁶² CJEU, *ibid.*, para. 57.

filtering obligations. Nonetheless, the CJEU refrained from declaring the filtering obligations arising from Article 17(4)(b) and (c) DSMD unconstitutional. In this context, it played a central role that copyright limitations supporting transformative UGC, in particular the exemption of quotations, parodies and pastiches in Article 17(7) DSMD, offer a safety valve against overbroad inroads into freedom of expression and information. In addition to these central user rights, streaming services with download functionality can give rise to the question whether users can invoke the exemption of private copying that is available in many EU Member States. In line with CJEU case law, the application of private copying rules seems possible as long as the streaming service provides access to legal source material.

To provide sufficient protection against illegal streaming services, the CJEU has extended the concept of 'communication to the public' beyond the act of disseminating protected content as such. Preparatory activities, such as the offer of streaming equipment focusing on illegal content and infrastructures for illegal file-sharing, constitute primary acts of communication to the public as well. Based on the verdict of primary infringement and direct liability in the case of illegal streaming and file-sharing platforms, right holders can seek website blocking orders against internet access providers on the basis of Article 8(3) ISD. For blocking orders to be deemed proportionate in the EU, it need not be demonstrated that blocking measures are fully effective in preventing access to illegal sites. However, it is indispensable to avoid violations of fundamental rights. In particular, internet service providers are under an obligation to develop a targeted blocking mechanism with sufficient focus on the illegal streaming service or file-sharing website at issue. The blocking order must not culminate in a more general erosion of the freedom of expression and information of users.