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# The New Copyright in the Digital Single Market Directive: A Critical Look

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## 1. INTRODUCTION

On 17 May 2019 the official version of the new Directive on copyright and related rights in the Digital Single Market was published (**DSM Directive**).<sup>1</sup> This marks the end of a controversial legislative process at EU level. It also marks the beginning of what will surely be a contentious process of national implementation, which has already seen a Member State file an action for annulment under Article 263 TFEU.<sup>2</sup>

This article provides an overview and critical examination of the new Directive. It argues that what started as a legislative instrument to promote the digital single market turned into an industry policy tool, shaped more by effective lobbying than evidence and expertise. The result is a flawed piece of legislation. Despite some positive aspects, the DSM Directive includes multiple problematic provisions. On balance, it denotes a normative preference for private ordering over public choice in EU copyright law, without adequate safeguards for users. It is also a complex text with multiple ambiguities, which will likely fail not promote the desired harmonization and legal certainty in this area.

The article proceeds as follows. After this introduction, Part 2 briefly discusses the legislative process that led to the adoption of the DSM Directive. Part 3 is the heart of the article: it describes and critically assesses the main provisions of the directive. Part 4 offers some concluding remarks.

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<sup>1</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market (**DSM Directive**). For an earlier overview of the directive, see T Shapiro & S. Hansson, “The DSM Copyright Directive - EU copyright will indeed never be the same”, E.I.P.R. 2019, 41(7), 404-414.

<sup>2</sup> The Polish government has filed an action for annulment under Art. 263 TFEU, focusing on the most problematic aspects of Article 17, discussed below. See Case C-401/19 - Poland v Parliament and Council (Action brought on 24 May 2019). See also Tomasz Targosz, “Poland’s Challenge to the DSM Directive – and the Battle Rages On...” (10 June 2019), *Kluwer Copyright Blog*, <http://copyrightblog.kluweriplaw.com/2019/06/10/polands-challenge-to-the-dsm-directive-and-the-battle-rages-on/>. [Accessed 14 October 2019]

## 2. THE ROAD TO THE DIRECTIVE

The story of the DSM Directive can be traced back to the Public Consultation on the Review of EU Copyright Rules, held between December 2013 and March 2014.<sup>3</sup> The consultation covered a broad range of issues on the application of EU copyright rules in the digital environment, including territoriality, the definition of online rights and exceptions, fair remuneration, and even the possibility of a single EU copyright title. The consultation produced thousands of responses, summarized by the Commission in a report published in July 2014.<sup>4</sup> This report was followed by a leaked Commission “white paper” in June 2014<sup>5</sup> and the Communication “Towards a modern, more European copyright framework” in December 2015, which explicitly stated the intention to regulate content-sharing platforms.<sup>6</sup>

The proposal for a directive was published in September 2016 by the Commission.<sup>7</sup> The process followed the ordinary legislative procedure, which places the European Parliament and the Council of the European Union on equal footing, meaning that a separate process for assessing the proposal took place within each institution. At the Council, there was an agreement on 25 May 2018 on an amended version of the proposal, which set forth the Council’s position and provided the basis for its negotiating mandate.<sup>8</sup> At the EU Parliament, five Committees were involved in the discussions, ending with the JURI (Legal Affairs) Committee, which voted on a compromise version on 20 June 2018.<sup>9</sup> After some resistance,<sup>10</sup> the text eventually made it to the stage of trilogue negotiations, concluded on 13 February 2019. The surviving compromise text was approved by the EU Parliament on 26 March.<sup>11</sup> It was then approved by the Council on 15/17 April by a qualified majority.<sup>12</sup> Six countries voted against, issuing statements that either criticize the legislative text or lay out some interpretative guidelines on the most controversial issues.<sup>13</sup>

The legislative process was mired in controversy and heavily lobbied from all sides. The brunt of the criticism of the Directive focused on the new press publishers’ right (then Article 11, now 15)

<sup>3</sup> Commission, “Public Consultation on the Review of EU Copyright Rules” (2013) (On file with the author).

<sup>4</sup> Commission, “Report on the responses to the Public Consultation on the Review of the EU Copyright Rules”, Directorate General Internal Market and Services, Directorate D – Intellectual property, D1 – Copyright (July 2014) (On file with the author).

<sup>5</sup> Commission, White Paper, “A Copyright Policy for Creativity and Innovation the European Union” (2014), <https://www.dropbox.com/s/0xcjferav01tqlb/White%20Paper%20%28internal%20draft%29%20%281%29.PDF> [Accessed 14 October 2019].

<sup>6</sup> Commission, “Towards a modern, more European copyright framework”, COM(2015) 626 final (9.12.2015), p. 10.

<sup>7</sup> Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM/2016/0593.

<sup>8</sup> Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market – Agreed negotiating mandate, ST 9134 2018 INIT.

<sup>9</sup> EDRI, ‘Press release: MEPs ignore expert advice and vote for mass internet censorship’ (20 June 2018) <https://edri.org/press-release-meeps-ignore-expert-advice-and-vote-for-mass-internet-censorship/> [Accessed 14 October 2019].

<sup>10</sup> *European Parliament News*, ‘Parliament to review copyright rules in September’ (5 June 2018) <http://www.europarl.europa.eu/news/en/press-room/20180628IPR06809/parliament-to-review-copyright-rules-in-september> [Accessed 14 October 2019].

<sup>11</sup> CREATE, ‘Copyright Directive approved at plenary vote’ (26 March 2019) <https://www.create.ac.uk/copyright-directive-approved-at-plenary-vote> [Accessed 14 October 2019].

<sup>12</sup> Commission, “Copyright reform clears final hurdle: Commission welcomes approval of modernised rules fit for digital age” (15 April 2019) <[http://europa.eu/rapid/press-release\\_IP-19-2151\\_en.htm](http://europa.eu/rapid/press-release_IP-19-2151_en.htm) [Accessed 14 October 2019].

<sup>13</sup> See Draft Directive of the European Parliament and of the Council on copyright and related rights in the Digital Single Market amending Directives 96/9/EC and 2001/29/EC (first reading) – adoption of the legislative act – statements (2019). For an excellent timeline of the legislative process, see CREATE, ‘EU Copyright Reform’ (26 March 2019) at <https://www.create.ac.uk/policy-responses/eu-copyright-reform/> [Accessed 14 October 2019].

and the so-called value gap or “upload filter” provision (then Article 13, now 17). This criticism included civil society protests<sup>14</sup> reminiscent of the ACTA debate, opposition by digital rights NGOs<sup>15</sup> and Internet luminaries,<sup>16</sup> and multiple expert statements<sup>17</sup> by research institutes and academics. On balance, however, the lobbying by rights holders’ representatives – especially publishers, the recording industry and (*music*) collecting societies – appears to have been the most intense and effective, often outweighing empirical research in support of opposite views.<sup>18</sup>

An argument can be made that the final version of the Directive is an improvement over the Commission’s original proposal.<sup>19</sup> Unfortunately, that is a low bar to clear, especially regarding the most problematic provisions. The remainder of this article provides an overview and critical examination of the rules in the DSM Directive.

### 3. THE DSM DIRECTIVE UNDER A CRITICAL LENS

The CDSM Directive is one of the longest in the copyright *acquis*, with 86 recitals and 32 articles. It is divided into five titles: general provisions (I), measures to adapt exceptions and limitations to the digital and cross-border environment (II), measures to improve licensing practices and ensure wider access to content (III), measures to achieve a well-functioning marketplace for copyright (IV), and final provisions (V). The table below summarises the Directive’s structure. The remainder of this section looks at each title of the Directive in turn, with a focus on the substantive provisions contained in Titles II through IV.

Table 1 Structure DSM Directive

TITLE	CHAPTER	ARTICLES	RECITALS (INDICATIVE)
I. General provisions	-	1, 2	1–4
II. Measures to adapt exceptions and limitations to the digital and cross-border environment	-	3 to 7	5–29

<sup>14</sup> Julia Reda, “EU copyright reform: Our fight was not in vain” (18 April 2019), <https://juliareda.eu/2019/04/not-in-vain/> [Accessed 9 July 2019].

<sup>15</sup> Liberties, “Article 13 Open letter – Monitoring and Filtering of Internet Content is Unacceptable” (16 October 2017) <https://www.liberties.eu/en/news/delete-article-thirteen-open-letter/13194> [Accessed 9 July 2019].

<sup>16</sup> Danny O’Brien & Jeremy Malcolm, “70+ Internet Luminaries Ring the Alarm on EU Copyright Filtering Proposal” (12 June 2018), EFF, <https://www.eff.org/deeplinks/2018/06/internet-luminaries-ring-alarm-eu-copyright-filtering-proposal> [Accessed 14 October 2019].

<sup>17</sup> CREATE, “The Copyright Directive: Articles 11 and 13 must go – Statement from European Academics in advance of the Plenary Vote on 26 March 2019” (24 March 2019) <https://tinyurl.com/yxmudrdg> [Accessed 14 October 2019]. (Disclosure: I have signed and coordinated a number of these statements).

<sup>18</sup> See Corporate Europe Observatory, “Copyright Directive: how competing big business lobbies drowned out critical voices” (10 December 2018) <<https://corporateeurope.org/en/2018/12/copyright-directive-how-competing-big-business-lobbies-drowned-out-critical-voices>> [Accessed 14 October 2019] On this topic, see also Martin Kretschmer, “European copyright reform: Is it possible?” (7 May 2019), republica 2019, <https://www.youtube.com/watch?v=ZyujNlpxu9k> [Accessed 14 October 2019], and Benjamin Farrand, “Towards a modern, more European copyright framework”, or, how to rebrand the same old approach? E.I.P.R. 2019, 41(2), 65–69.

<sup>19</sup> Reda, *EU copyright reform* (2019).

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

### 3.1. General Provisions

Title I clarifies the subject matter and scope of this legal instrument. The Directive seeks to further harmonise EU copyright law with a particular focus on “digital and cross-border uses of protected content”.<sup>20</sup> It keeps intact existing rules in the copyright *acquis*, with some exceptions. These are set forth in Article 24, which introduces amendments to the Database Directive and the InfoSoc Directive.<sup>21</sup>

Title I also contains the definitions, including those of research organisation, text and data mining (**TDM**), cultural heritage institution, press publication, information society service, and online content-sharing service provider.<sup>22</sup>

### 3.2. Adapting Exceptions and Limitations to the Digital and Cross-Border Environment

Title II of the DSM Directive introduces a set of measures to adapt exceptions and limitations to the digital and cross-border environment. These measures build on the already fragmented landscape in the EU copyright *acquis*, mostly contained in the InfoSoc Directive. For that reason, the pre-existing legal framework is explained first below (3.2.1), before diving into the new provisions (3.2.2).

#### 3.2.1. Baseline: The Pre-Existing Legal Framework<sup>23</sup>

At the outset, it is important to note that there is significant discussion on the meaning of the terms “exceptions” and “limitations”, which the EU legislature adopts as a compromise between different legal traditions in the title and body of Article 5 InfoSoc Directive.<sup>24</sup> As explained

<sup>20</sup> Art. 1 DSM Directive.

<sup>21</sup> Directive 96/9 on the legal protection of databases [1996] OJ L77/20 (**Database Directive**); Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L166/10 (**InfoSoc Directive**).

<sup>22</sup> Art. 2 DSM Directive.

<sup>23</sup> This subsection relies on João Pedro Quintais, *Copyright in the Age of Online Access: Alternative Compensation Systems in EU Law* (Alphen aan den Rijn: Kluwer Law International, 2017), pp. 191-197.

<sup>24</sup> *Id.*, pp. 191-192.

elsewhere, there are strong normative arguments to prefer the term “limitations”.<sup>25</sup> Still, in this article, both terms are used interchangeably.

Article 5 InfoSoc Directive contains the primary regulation for limitations at EU level. It applies to all copyright subject matter, except software and databases.<sup>26</sup> Its first paragraph contains the directive’s sole mandatory limitation, applying to transient or incidental copies, the purpose of which is to facilitate the activities of internet service providers or certain lawful uses.<sup>27</sup> Articles 5(2)–(4) contain an exhaustive list of twenty optional limitations, applying to the otherwise exclusive rights of reproduction, communication to the public, and distribution.<sup>28</sup> Where Member States choose to implement these, some are conditional upon the grant of fair compensation, whereas for the others Member States *may* demand compensation in their national laws.<sup>29</sup>

Elsewhere in the *acquis*, the Rental Directive contains a list of optional limitations to related rights and allows Member States to apply in respect thereto limitations identical to those applicable to authors.<sup>30</sup> Despite the overlap between the lists in both instruments, it is commonly accepted that Article 5 InfoSoc Directive also regulates related rights.<sup>31</sup> Outside the framework of the InfoSoc Directive, the Software and Database Directives include a number of optional and mandatory limitations<sup>32</sup>, the Orphan Works Directive includes a mandatory limitation for certain uses of orphan works (potentially subject to fair compensation)<sup>33</sup>, and the Marrakesh Treaty Directive contains a mandatory limitation for certain uses of accessible format copies to the benefit of persons who are blind, visually impaired or otherwise print-disabled (with limited possibilities for the application of compensation schemes).<sup>34</sup>

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<sup>25</sup> *Id.*

<sup>26</sup> See Art. 1(2)(a) and (e) and Rec. 50 InfoSoc Directive.

<sup>27</sup> Bernt Hugenholtz, Mireille van Eechoud, Stef van Gompel et al., “The Recasting of Copyright & Related Rights for the Knowledge Economy (Executive Summary of final report)” (2006) [https://www.ivir.nl/publicaties/download/IViR\\_Recast\\_Final\\_Report\\_2006.pdf](https://www.ivir.nl/publicaties/download/IViR_Recast_Final_Report_2006.pdf), pp. 68-69 [Accessed 9 July 2019].

<sup>28</sup> On the exhaustive nature of the list in Art. 5, see Recital 32 InfoSoc Directive. The list contains five optional limitations for reproduction in Art. 5(2), fifteen optional limitations for reproduction and/or public communication in Art. 5(3), and the possibility to extend the previous limitations (applying to reproduction) to the right of distribution in Art. 5(4). N.B. Art. 5(3)(o) contains a deviation from the exhaustive nature of the list by including a “grandfathering clause” for pre-existing analogue uses of minor importance (*de minimis*).

<sup>29</sup> See Recital 36 InfoSoc Directive. The exceptions subject to fair compensation are those in Art. 5(2)(a), (b) and (e) InfoSoc Directive.

<sup>30</sup> See Art. 10(1) and (2) 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 (codified version) (**Rental Directive**).

<sup>31</sup> Stefan Bechtold, “Information Society Directive”. In Thomas Dreier and Bernt Hugenholtz, “Concise European Copyright Law” (Kluwer Law International, 2016), p. 470; Marie-Christine Janssens, “The issue of exceptions: reshaping the keys to the gates in the territory of literary, musical and artistic creation”. In Estelle Derclaye, *Research Handbook on the Future of EU Copyright* (Edward Elgar, 2009), pp. 317–348.

<sup>32</sup> See, respectively: Art. 5(1), (2) and (3), and Art. 6 Software Directive; Art. 6(1) and 2(d) Database Directive. N.B. Art. 9 Database Directive does not allow analogous application of copyright limitations to the *sui generis* database right.

<sup>33</sup> See Art. 6 Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works (**Orphan Works Directive**).

<sup>34</sup> See Art. 3 Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (**Marrakesh Treaty Directive**). See also Regulation (EU) 2017/1563 of the European Parliament and of the Council of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled, especially Arts 3 and 4.

The relationship of limitations to contract law is generally unregulated by the InfoSoc Directive. Despite that, most commentators accept that the instrument allows contractual disposition of the limitations in Article 5(2)–(4). This understanding relies on Article 9 being without prejudice to provisions concerning contract law, and recital 45 admitting contracts on fair compensation.<sup>35</sup> From this perspective, the InfoSoc Directive indicates a predominance of private ordering over public policy.<sup>36</sup>

However, contractual disposition may be prohibited in certain cases. These result from the definition of limitations as imperative in national law<sup>37</sup>, and the application of imperative provisions protecting end-users, such as consumer protection rules on adhesion contracts.<sup>38</sup> Following a different approach, the Software and Database Directives afford absolute status to some of their limitations by explicitly prohibiting their contractual override and qualifying potential derogation clauses as “null and void”.<sup>39</sup> Similarly, the Marrakesh Treaty Directive does not allow for the contractual override of the limitation it provides for.<sup>40</sup>

Finally, the InfoSoc Directive contains a complex regulation of the relationship between exceptions and technological protection measures (TPMs).<sup>41</sup> Article 6 InfoSoc Directive instructs Member States to provide adequate legal protection against the circumvention of effective TPMs, i.e. devices or components aimed at restricting unauthorised access to or use of works. The legal regime of TPMs includes protection against circumvention and preparatory acts.<sup>42</sup>

There’s an inherent tension between the exceptions and TPMs. While the first strive to ensure access to, and dissemination of, works, TPMs increase protection of exclusivity and restrict that access and dissemination, sometimes protecting out-of-copyright content. Article 6(4) InfoSoc Directive regulates that tension through a formulation that mostly allows TPMs to override limitations.<sup>43</sup>

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<sup>35</sup> Bechtold, *Information Society Directive* (2016), p. 470–471; Janssens, *The issue of exceptions* (2009), p. 341–342; Silke von Lewinski and Michel Walter, “European Copyright Law”, (Oxford University Press 2010), pp. 1022–1023, 1062. In addition, this interpretation is systematically consistent with Art. 6(4), fourth subparagraph of the directive, which allows contractual override of limitations where works are made available online with TPMs and on agreed contractual terms. *But see* Lucie Guibault, “Relationship between copyright and contract law”. In Estelle Derclaye (Ed.), *Research Handbook on the Future of EU Copyright* (Edward Elgar 2009), p. 529–530, describing scholarship that holds an opposite view, relying on the letter of recital 45 InfoSoc Directive.

<sup>36</sup> Thomas Dreier, “Thoughts on revising the limitations on copyright under Directive 2001/29”, (2016) 11 J.I.P.L.P., p. 142–144.

<sup>37</sup> See Guibault, *Relationship between copyright and contract law* (2009), p. 537–541; Jean-Paul Triaille, Severine Dusollier, Sari Depreuw, Jean-Benoît Hubin., Francois Coppens, and Amelie Franquien, “Study on the application of Directive 2001/29/EC on copyright and related rights in the information society” <http://doi.org/10.2780/90141> (2013), p. 225 [Accessed 9 July 2019].

<sup>38</sup> Bechtold, *Information Society Directive* (2016), pp. 470–471; Guibault, *Relationship between copyright and contract law* (2009), pp. 534–536; von Lewinski & Walter, *European Copyright Law* (2010), pp. 1022–1023, 1062.

<sup>39</sup> Art. 9 InfoSoc Directive; Arts 5(2)–(3) 6, and 8 Software Directive; and Arts 6(1), 8 and Art. 15 Database Directive.

<sup>40</sup> See Art. 5(5) Marrakesh Treaty Directive,

<sup>41</sup> For a detailed explanation, see Quintais, *Copyright in the Age of Online Access* (2017), pp. 194–197.

<sup>42</sup> Art. 6(1)–(3) InfoSoc Directive. “Access controls” are measures for protection of a work, such as encryption, scrambling or other transformation. “Use controls” refer to mechanisms that prevent, for example, the making of copies of works. On the meaning of “effective” TPMs, see Case C-355/12, ECLI:EU:C:2014:25, *Nintendo and others v. PC Box Srl, 9Net Srl*, at [27]–[28].

<sup>43</sup> Janssens, *The issue of exceptions* (2009), p. 334.

This provision entrusts rights holders (not legislators) with the role of providing the beneficiaries of certain exceptions with the means of exercising the exception through “voluntary measures”. If rights holders do not provide voluntary measures, Member States can step in to ensure exercise of the exceptions and impose “appropriate” (i.e., mandatory) measures.<sup>44</sup> Voluntary and mandatory measures are only required if the beneficiary has “legal access” to the work and to the extent necessary to exercise the exception.<sup>45</sup> The application of either type of measure does not prejudice the legal protection of TPMs.<sup>46</sup>

The benefit of voluntary or mandatory measures is only available to certain exceptions in Article 5 InfoSoc Directive.<sup>47</sup> Member States cannot impose any measures of this type in relation to the remaining exceptions, which can be fully overridden by the application of TPMs.<sup>48</sup>

The little space available for limitations to apply where TPMs are used is further reduced by a special rule on licensed interactive on-demand services. The rule prohibits Member States from implementing any measures limiting the effect of TPMs if the work in question is made available online for interactive on-demand transmission on agreed contractual terms. This includes rights holders making available works online (under Article 3 InfoSoc Directive) for streaming or downloading on-demand. Thus, in such a “technology plus contract” scenario, all exceptions can be set aside.<sup>49</sup> As we shall see, this special rule does not apply to the new exceptions in the DSM Directive.<sup>50</sup>

### 3.2.2. *The New Exceptions and Limitations*

Title II of the new Directive sets forth a number of new exceptions and limitations that Member States must provide. In a welcome departure from the legacy *acquis* described above, these are defined as *mandatory* exceptions, which for the most part cannot be overridden by contract. Their basic regime is as follows.

Articles 3 and 4 contain TDM-related exceptions. TDM is defined as “any automated analytical technique aimed at analysing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations.”<sup>51</sup>

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<sup>44</sup> Recitals 51–52 InfoSoc Directive.

<sup>45</sup> Art. 6(4), first subparagraph, InfoSoc Directive.

<sup>46</sup> Art. 6(4), third subparagraph, InfoSoc Directive. N.B. such legal protection is limited to the prevention of acts not authorised by the rights holder with respect for the principle of proportionality. See Case C-355/12, ECLI:EU:C:2014:25, *Nintendo and others v. PC Box Srl, 9Net Srl*, at [29]–[31].

<sup>47</sup> These are the exceptions in Art. 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) and (3)(e) InfoSoc Directive. N.B. the regime also applies by analogy to limitations in the Rental and Database Directives. See Art. 6(4), fifth subparagraph, InfoSoc Directive.

<sup>48</sup> On the specific regime applicable to the private copying limitation in Art. 5(2)(b), see Art. 6(4), second subparagraph, and Recitals 39, 52 InfoSoc Directive. See also Quintais, *Copyright in the Age of Online Access* (2017), pp. 196, 219.

<sup>49</sup> Art. 6(4), fourth subparagraph, and recital 53 InfoSoc Directive, excluding from the scope of the provision non-interactive Internet transmissions. See also Joost Poort and João Pedro Quintais, “The Levy Runs Dry: A Legal and Economic Analysis of EU Private Copying Levies” (2013) 4 J.I.P.I.T.E.C. 205 para 1, p. 209.

<sup>50</sup> N.B. the rule also does not apply to the limitation provided for in the Marrakesh Treaty Directive, according to Art. 3(4) thereof (“The first, third and fifth subparagraphs of Article 6(4) of Directive 2001/29/EC shall apply to the exception provided for in paragraph 1 of this Article”).

<sup>51</sup> Art. 2 DSM Directive.



Article 3 provides an exception for acts of TDM for the *purposes of scientific research* – covering both natural and human sciences<sup>52</sup> – by research organisations and cultural heritage institutions, regarding works/subject matter to which they have lawful access<sup>53</sup>, and subject to a number of additional conditions. This will have to be articulated with the optional exception covering uses for scientific research purposes in Article 5(3)(a) InfoSoc Directive, which applies to certain TDM activities.<sup>54</sup>

Article 4 sets forth an exception for reproductions and extractions of lawfully accessed works/subject matter for the *purposes of TDM*. This is meant to add legal certainty for those acts that may not meet the conditions of the temporary and transient copy exception in Article 5(1) InfoSoc Directive.<sup>55</sup> The new exception is subject to reservation by rights holders, including through “machine-readable means in the case of content made publicly available online”, for instance through the use of metadata and terms and conditions of a website or a service.<sup>56</sup> Such reservation shall not affect the application of the TDM exception for scientific purposes in Article 3.

Unfortunately, as noted by multiple researchers during the legislative process, both TDM exceptions are narrow in scope and suffer from limitations that may exclude many important applications in this domain.<sup>57</sup>

Article 5 contains an exception for the use of works/subject matter in digital and cross-border teaching activities.<sup>58</sup> The provision is meant to add legal certainty for digital teaching activities as compared to existing exceptions in the InfoSoc and Database Directives.<sup>59</sup> But its scope is quite limited. It covers only use for the sole purpose of illustration for teaching by educational establishments<sup>60</sup>, to the extent justified by the non-commercial purpose (of the particular teaching activity) to be achieved. This excludes educational uses by other types of institutions, like libraries and museums, as well as purely commercial educational services. The exception is subject to further conditions. In particular, the use must take place under the responsibility of an educational

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<sup>52</sup> Recital 12 DSM Directive.

<sup>53</sup> Recital 14 DSM Directive (“Lawful access should be understood as covering access to content based on an open access policy or through contractual arrangements between rightholders and research organisations or cultural heritage institutions, such as subscriptions, or through other lawful means... Lawful access should also cover access to content that is freely available online”).

<sup>54</sup> Recital 10 DSM Directive.

<sup>55</sup> Recital 18 DSM Directive.

<sup>56</sup> *Id.*

<sup>57</sup> See Rossana Ducato and Alain Strowel, “Limitations to Text and Data Mining and Consumer Empowerment. Making the Case for a Right to Machine Legibility” (19 March 2019), *Kluwer Copyright Blog*, <http://copyrightblog.kluweriplaw.com/2019/03/19/limitations-to-text-and-data-mining-and-consumer-empowerment-making-the-case-for-a-right-to-machine-legibility/> [Accessed 14 October 2019]; Pamela Samuelson, “The EU’s Controversial Digital Single Market Directive – Part II: Why the Proposed Mandatory Text- and Data-Mining Exception Is Too Restrictive” (12 July 2018) *Kluwer Copyright Blog*, <http://copyrightblog.kluweriplaw.com/2018/07/12/eus-controversial-digital-single-market-directive-part-ii-proposed-mandatory-text-data-mining-exception-restrictive/> [Accessed 14 October 2019]; Christophe Geiger, Giancarlo Frosio and Oleksandr Bulayenko, “The Exception for Text and Data Mining (TDM) in the Proposed Directive on Copyright in the Digital Single Market - Legal Aspects”, Centre for International Intellectual Property Studies (CEIPI) Research Paper No. 2018-02.

<sup>58</sup> For an analysis of this provision, see Bernd Justin Jütte, “The New Copyright Directive: Digital and Cross-border Teaching Exception (Article 5)” (21 June 2019), *Kluwer Copyright Blog*, <http://copyrightblog.kluweriplaw.com/2019/06/21/the-new-copyright-directive-digital-and-cross-border-teaching-exception-article-5/> [Accessed 14 October 2019].

<sup>59</sup> Recital 19 DSM Directive. See also Arts 5(3)(a) InfoSoc Directive and 6(2)(b) Database Directive.

<sup>60</sup> The term is not defined in the Directive but Recital 20 clarifies that it must be “recognised by a Member State” and that it includes all levels of education.

establishment, either on its premises, at other venues, or through a secure electronic environment. It must also be “accompanied by the indication of the source, including the author's name, unless this turns out to be impossible”.<sup>61</sup>

For uses covered by this exception that take place through secure electronic environments a *country of origin* rule applies. According to this, the use shall be deemed to occur solely in the Member State of establishment of the educational establishment.<sup>62</sup> This rule should facilitate cross-border teaching activities on international education establishments, as well as distance learning programs.<sup>63</sup>

Finally, Article 5 allows Member States to *exclude its application* altogether as regards specific uses or types of works/subject matter if there are suitable licences on the market, i.e. covering at least the same uses as those allowed under the exception.<sup>64</sup> This possibility of exclusion is criticisable *inter alia* because it assumes such a provision is justified solely by a market failure rationale. This neglects the obvious public interest dimension and fundamental rights underpinning of the exception, which argue against such “licensing override”.<sup>65</sup> Finally, to the extent the exception applies, Member States may subject it to the payment of fair compensation.<sup>66</sup>

Article 6 sets forth an exception for acts of reproduction of certain works made by cultural heritage institutions for purposes of – and to the extent necessary for – *preservation*. This includes acts by third parties acting on the behalf and under the responsibility of the beneficiary institution.<sup>67</sup> It does not include any copies or other copyright-relevant activities for different purposes, which require authorisation of the rights holder, unless the act is permitted by different exceptions.<sup>68</sup> Some activities of digitisation or dissemination of out-of-commerce works by these institutions are facilitated by the new regime in Articles 8 to 11, discussed below.<sup>69</sup>

Apart from Article 4, these mandatory exceptions cannot be overridden by contract.<sup>70</sup> They are however subject to two provisions in the InfoSoc Directive that will narrow their scope.<sup>71</sup> First, the three-step test in Article 5(5)<sup>72</sup>, which the CJEU generally interprets strictly, despite the test’s inherent flexibility, noted by multiple scholars.<sup>73</sup> Second, part of the complex provisions in Article

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<sup>61</sup> According to Arts 5(1)(a) and (b), these include the conditions that the use takes place (in general terms) under the responsibility of an educational establishment (either on its premises, at other venues, or through a secure electronic environment), and that it “is accompanied by the indication of the source, including the author's name, unless this turns out to be impossible”.

<sup>62</sup> Art. 5(3) DSM Directive.

<sup>63</sup> Jütte, *The New Copyright Directive: Digital and Cross-border Teaching Exception (Article 5)* (2019).

<sup>64</sup> Recitals 22–23 DSM Directive, clarifying that these licensing schemes may be implemented through collective rights management.

<sup>65</sup> See Teresa Nobre, ‘The education exception was gutted during the Trilogues’ (27 February 2019) COMMUNIA, <https://www.communia-association.org/2019/02/27/education-exception-gutted-trilogues/> [Accessed 14 October 2019].

<sup>66</sup> Art. 5(4) and Recital 24 DSM Directive.

<sup>67</sup> Recital 28 DSM Directive.

<sup>68</sup> Recital 27 DSM Directive.

<sup>69</sup> Recital 30 DSM Directive.

<sup>70</sup> Art. 7(1) DSM Directive.

<sup>71</sup> Article 7(2) DSM Directive.

<sup>72</sup> Recital 6 DSM Directive.

<sup>73</sup> Arguing for flexible interpretations of the test, see Christophe Geiger, Reto Hilty, Jonathan Griffiths, Uma Suthersanen, “Declaration A Balanced Interpretation Of The ‘Three-Step Test’ In Copyright Law” (2010) 1 J.I.P.L.T.E.C. (2) 2621; Daniel Gervais and Martin Senfleben, “The Three-Step-Test Revisited: How to Use the Test’s Flexibility in National Copyright Law” (2013) 29 Am. Univ. Int’l L. R., 3, pp. 581-626; João Pedro Quintais,

6(4) InfoSoc Directive (explained at 3.2.1 above), namely the first, third and fifth subparagraphs.<sup>74</sup> In this way, the policy approach on the relationship between TPMs and exceptions is partially grandfathered into the DSM Directive, with one important exception. The special rule on licensed interactive on demand services does not apply to the new exceptions. In other words, the exceptions in Articles 3 to 6 cannot be automatically set aside for content made available online for interactive on-demand transmission on agreed contractual terms. Considering the mandatory nature of these exceptions and their already narrow scope, this carve-out is to be welcomed.<sup>75</sup> Still, from a normative perspective that favours public policy over private ordering, it would have been preferable to reinforce the mandatory nature of the exceptions by setting aside the possibility of TPM protection for the uses they cover.

The regime of the new exceptions in Articles 3 to 7 DSM Directive is summarised in the following table

**Table 2 Title II Exceptions DSM Directive**

<b>PROVISION</b> →	<b>ARTICLE 3</b>	<b>ARTICLE 4</b>	<b>ARTICLE 5</b>	<b>ARTICLE 6</b>
<b>SCOPE &amp; CONDITIONS</b> ↓				
<b>Acts</b>	Text and data mining	Reproductions and extractions	Use in digital and cross-border teaching activities	Making copies of works/ subject matter that are permanently in the collections of cultural heritage institutions
<b>Rights</b>	Database Dir.: 5(a) and 7(1) InfoSoc Dir.: 2 DSM Dir.: 15(1)	Database Dir.: 5(a) and 7(1) InfoSoc Dir.: 2 Software Dir.: 4(1)(a) and (b) DSM Dir.: 15(1)	Database Dir.: 5(a), (b), (d) and (e), and 7(1) InfoSoc Dir.: 2 and 3 Software Dir.: 4(1) DSM Dir.: 15(1)	Database Dir.: 5(a) and 7(1) InfoSoc Dir.: 2 Software Dir.: 4(1)(a) DSM Dir.: 15(1)
<b>Purpose of use</b>	Scientific research	Text and data mining	Illustration for teaching	Preservation
<b>Beneficiaries</b>	Research organisations; Cultural heritage institutions	All (unrestricted)	Educational establishments (non-commercial purpose of the underlying teaching activity)	Cultural heritage institutions
<b>Lawful access</b>	Yes	Yes	No ( <i>but see Other Conditions</i> )	Yes (copied work must be in permanent collection)
<b>Other conditions for beneficiary</b>	Works must be stored with “appropriate level of security”	-	Use must be under the responsibility or in venue, premise, secure electronic environment of educational establishment; indication of source	Copies must be only “to the extent necessary” for preservation
<b>Contractual Derogation</b>	No	Yes	No ( <i>but see Other Reservations</i> )	No

‘Rethinking Normal Exploitation: Enabling Online Limitations in EU Copyright Law’ (2018) AMI – Tijdschrift voor auteurs-, media- en informatierecht 2017/6.

<sup>74</sup> See also Recital 7 DSM Directive.

<sup>75</sup> *But see* Shapiro & Hansson, *The DSM Copyright Directive* (2019), considering this a “represents a step backwards” from the InfoSoc Directive.

<b>PROVISION</b> →	<b>ARTICLE 3</b>	<b>ARTICLE 4</b>	<b>ARTICLE 5</b>	<b>ARTICLE 6</b>
<b>SCOPE &amp; CONDITIONS</b> ↓				
<b>Other Reservations or Exclusions</b>	No	Yes: via “machine-readable means in the case of content made publicly available online”	Partial or total exclusion if suitable licenses available (licensing override / carve-out)	No
<b>Other Conditions</b>	Three-step test; Partial TPM protection under 6(4) InfoSoc Dir.	Three-step test; Partial TPM protection under 6(4) InfoSoc Dir.	Three-step test; Possible fair compensation; Partial TPM protection under 6(4) InfoSoc Dir.	Three-step test; Partial TPM protection under 6(4) InfoSoc Dir.
<b>Connection to other exceptions in <i>acquis</i></b>	<u>InfoSoc Dir.</u> : 5(3)(a)	<u>InfoSoc Dir.</u> : Art. 5(1)	<u>InfoSoc Dir.</u> : 5(3)(a) <u>Database Dir.</u> : 6(2)(b)	<u>InfoSoc Dir.</u> : 5(2)(c)

In sum, despite the positive aspects, the above regime has significant shortcomings: the narrow scope of the new exceptions, the possibilities for contractual derogation, and the partial grandfathering of TPM rules. This regime will probably not lead to simplification and harmonisation of the system of exceptions in EU copyright law, as it continues to allow significant cherry-picking by Member States.<sup>76</sup> Rather, the combination of its fragmented rules with the optional (and partially overlapping) catalogue of Article 5 InfoSoc Directive adds significant complexity to the *acquis*. In that sense, Title II feels like a missed opportunity to strengthen, harmonize and clarify copyright exceptions at EU level.

### 3.3. Improving Licensing Practices and Wider Access to Content

Title III of the DSM Directive consists of four chapters on collective management of out-of-commerce works, collective licensing with extended effect, access to and availability of audiovisual works on video-on-demand platforms, and works of visual art in the public domain.

#### 3.3.1. *Collective management of out-of-commerce works*

The first chapter sets out rules for the collective management of out-of-commerce (**OOO**) works/subject matter in the permanent collections of cultural heritage institutions on the basis of non-exclusive licences for non-commercial purposes.<sup>77</sup>

It further provides for a *fall-back exception* for these institutions to make available such works/subject matter, for non-commercial purposes, subject to certain conditions and exclusions.<sup>78</sup> The exception is a fall-back since it only applies to the extent the conditions for

<sup>76</sup> Discussing the problems brought about by the possibility of different national implementations of the optional exceptions in Art. 5 InfoSoc Directive, see Lucie Guibault, “Why Cherry-Picking Never Leads to Harmonisation: The Case of the Limitations on Copyright under Directive 2001/29/EC” (2010) 1 J.I.P.I.T.E.C. (2) 2603.

<sup>77</sup> Art. 8 DSM Directive.

<sup>78</sup> See Art. 8(2) DSM Directive. The exception covers the rights provided in the following provisions: Art. 5(a), (b), (d) and (e), and Art. 7(1) Database Directive; Arts 2 and 3 InfoSoc Directive; Art. 4(1) Software Directive; Art. 15(1) DSM Directive. The conditions for the exception are that “(a) the name of the author or any other identifiable

collective management of OOC works are not met, e.g. because the relevant collective rights management organisation (**CMO**) is not sufficiently representative.<sup>79</sup> In somewhat of a legal innovation at EU level, rights holders are allowed to opt out – in general or in specific cases – not only from collective management *but also* from the exception.<sup>80</sup>

Where a licence is granted pursuant to this scheme, the OOC works may be used by cultural heritage institutions in any Member State. However, if the use in question is privileged by the exception, it is deemed to occur solely in the country of establishment of the beneficiary institution.<sup>81</sup>

Finally, this chapter contains provisions on publicity measures in connection with this scheme, including an online portal to be established and managed by the EUIPO<sup>82</sup>, and the promotion of a sector-specific stakeholder dialogue.<sup>83</sup>

### 3.3.2. *Collective licensing with an extended effect*

The second chapter of Title III contains one provision – Article 12 – on measures to facilitate collective licensing with an extended effect.<sup>84</sup> These measures include three possible “licensing mechanisms”. The first is extended collective licensing (**ECL**) proper. Under this regime, a CMO enters into a licensing agreement for the exploitation of works and such agreement is extended to apply to rights of non-represented rights holders. The second mechanism is where the CMO has a *legal mandate* to represent rights holders who have not authorized the organisation to do so. The third mechanism refers to a situation the representation powers result from a legal *presumption*.<sup>85</sup>

Prior to the DSM Directive, it was possible to find specific references to ECL in some directives. For instance, the Satellite and Cable Directive contains the outline of such a regime between CMOs and broadcasting organisations for the exclusive right of communication to the public by satellite concerning a given category of works.<sup>86</sup> Furthermore, recitals in the InfoSoc, Orphan Works, and CRM Directives all clarify that these directives are without prejudice to the arrangements in Member States concerning the management of rights, such as ECL.<sup>87</sup> These arrangements exist in the Nordic countries, where ECL originates from, as well as in limited form in a few other Member States.<sup>88</sup>

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rightholder is indicated, unless this turns out to be impossible; and (b) such works or other subject matter are made available on non-commercial websites.” *See also* Recital 40 DSM Directive, regarding the definition of non-commercial purposes.

<sup>79</sup> Art. 8(3) and Recital 32 DSM Directive.

<sup>80</sup> Art. 8(4) and Recital 35 DSM Directive.

<sup>81</sup> Art. 9 DSM Directive.

<sup>82</sup> Art. 10 DSM Directive.

<sup>83</sup> Art. 11 DSM Directive. *See also* Recitals 41–42 DSM Directive.

<sup>84</sup> For an analysis of Art. 12, *see* Johan Axham, “The New Copyright Directive: Collective licensing as a way to strike a fair balance between creator and user interests in copyright legislation (Article 12)” (25 June 2019), *Kluwer Copyright Blog*, <http://copyrightblog.kluweriplaw.com/2019/06/25/the-new-copyright-directive-collective-licensing-as-a-way-to-strike-a-fair-balance-between-creator-and-user-interests-in-copyright-legislation-article-12/> [Accessed 14 October 2019]. For a characterization of ECL, *see* Quintais, *Copyright in the Age of Online Access* (2017), p. 106-113.

<sup>85</sup> Art. 12(1)(b) DSM Directive.

<sup>86</sup> Art. 3(2)–(4) Satellite and Cable Directive.

<sup>87</sup> *See* Recitals 18 InfoSoc Directive, 24 Orphan Works Directive, and 12 CRM Directive.

<sup>88</sup> Art. 12(1)(a) and Recital 44 DSM Directive.

Article 12 is the first general provision in the EU *acquis* on collective licensing with extended effect, whether ECL, legal mandate or presumption. As a general rule, this type of collective licensing can only: (i) be managed by a CMO<sup>89</sup>, (ii) within well-defined areas of use, (iii) where direct individual licensing is “typically onerous and impractical” (i.e. a market failure scenario), and (iv) in a way that “safeguards the legitimate interests” of rights holders.<sup>90</sup> Although these conditions bear some resemblance to the three-step test, the directive does not qualify this type of collective licensing as an exception or limitation.<sup>91</sup>

Article 12(3) further subjects the application of collective licensing with extended effect to a number of safeguards: sufficient representation, equal treatment, opt-out, and information obligations vis-à-vis rights holders.<sup>92</sup> The *opt-out* safeguard means that right holders who have not authorized the CMO granting the license may at any time easily and effectively exclude their works or other subject matter from the licensing mechanism.

As argued elsewhere in relation to ECL, mechanisms of collective licensing with extended effect should not be qualified as copyright exceptions or limitations.<sup>93</sup> This is especially true where specific safeguards – such as *opt-out* – are put in place that push the mechanism towards the voluntary end of the collective licensing spectrum.<sup>94</sup> In this line, even without taking a position on the matter, the DSM Directive clearly demarcates the mechanisms in Article 12 from *mandatory* collective management of rights.<sup>95</sup>

One aspect that remains unclear is the interface between the new regime and pre-existing ECLs in national law. On this, Article 12(4) states that the new regime “does not affect the application of collective licensing mechanisms with an extended effect in accordance with other provisions of Union law”. This would appear to grandfather existing national regimes or “arrangements” compatible with the pre-DSM Directive *acquis*.<sup>96</sup> As a result, such national ECLs would survive without being subject to the new requirements imposed in Article 12. It remains to be seen if that will be the case.<sup>97</sup>

Finally, the regime of Article 12 has been discussed as a viable option to operationalise the licensing requirements for content-sharing platforms in Article 17, discussed below (at 3.4.2).<sup>98</sup> It is beyond

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<sup>89</sup> That is an organization that meets the definition of CMO in the Art. 3(a) CRM Directive. See Recital 49 DSM Directive.

<sup>90</sup> Art. 12(2) and Recitals 45-47 DSM Directive.

<sup>91</sup> N.B. that Art. 12(4) states that the new regime does not affect pre-existing ECL regimes “including provisions that allow exceptions or limitations.”

<sup>92</sup> Recital 48 DSM Directive provides further guidance on these safeguards.

<sup>93</sup> I have argued elsewhere that such a qualification should not attach to ECL with opt-out. See *Quintais, Copyright in the Age of Online Access* (2017), pp. 110–111 (and references cited therein). See also *Johan Axhann and Lucie Guibault, “Cross-Border Extended Collective Licensing: A Solution to Online Dissemination of Europe’s Cultural Heritage”* (8 February, 2012), Amsterdam Law School Research Paper No. 2012-22. Available at SSRN: <https://ssrn.com/abstract=2001347>; and *Johan Axhann, “Exceptions, limitations and collective management of rights as vehicles for access to information. In Access To Information And Knowledge : 21st Century Challenges in Intellectual Property and Knowledge Governance”* (Cheltenham: Edward Elgar, 2013), pp. 164–186.

<sup>94</sup> See, in this respect, *Quintais, Copyright in the Age of Online Access* (2017).

<sup>95</sup> See Art. 12(4) and Recital 46 DSM Directive.

<sup>96</sup> See also Recital 46 DSM Directive.

<sup>97</sup> See *Axhann, The New Copyright Directive: Collective licensing* (2019).

<sup>98</sup> See *infra* at 3.4.2. For earlier references to this option, see e.g. IFLA, “Bad Maths in the European Copyright Reform, or How 9A Doesn’t Fit into 13” (20 March 2019) *Library Policy and Advocacy Blog*,

the scope of this article to discuss this possibility outside the following brief remarks. Although ECL is a promising and balanced avenue to tackle the licensing requirements in Article 17 – generally superior to direct individual licencing – it is not without its shortcomings. First, Article 12 provides a merely territorial licensing solution to a problem that would require a pan-European approach. Second, the requirements and safeguards for the application of Article 12 are demanding and might be difficult to meet in many Member States. This is particularly true for the representativeness requirement, which will not be met in many territories for the myriad types of works accessible in different types of content-sharing platforms. Third, and related, few Member States have ECL mechanisms in place, which means that it will take significant time to implement them in a meaningful way. Until then, it will be difficult that collective licensing with an extended effect is available as a pan-EU licensing solution for the acts covered by Article 17.

### 3.3.3. *Access to and availability of audiovisual works on video-on-demand platforms*

The third chapter is comprised solely of Article 13. This provision is aimed at facilitating the conclusion of agreements for the purpose of making available audiovisual works, in particular European works, on video-on-demand platforms. Difficulties in licensing arise for instance due to refusals to license and windows of exploitation.<sup>99</sup> To overcome these challenges, Member States shall establish or designate an “impartial body” of mediators to assist parties facing difficulties in negotiating the necessary licences, by providing “professional, impartial and external advice”.<sup>100</sup> This is a voluntary negotiation mechanism for the parties, who retain contractual freedom.<sup>101</sup>

### 3.3.4. *Works of visual art in the public domain*

The fourth chapter contains a single but important provision, introduced during the legislative process. Article 14 states that any materials resulting from reproductions of *works of visual art* for which the term of protection has expired are not protected by copyright or related rights, i.e. they are in the public domain.<sup>102</sup>

As Recital 53 clarifies, this provision is mostly aimed at enabling the circulation of “faithful reproductions” of these types of work. However, this only applies insofar as the materials resulting from the reproductions at issue are not per se original in the sense that they are “the author’s own intellectual creation”. In other words, a verbatim copy of public domain material does not meet the originality standard.

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<https://blogs.ifla.org/lpa/2019/03/20/bad-maths-how-13-doesnt-fit-into-9a/> [Accessed 9 July 2019], and *Axhamm, The New Copyright Directive: Collective licensing* (2019).

<sup>99</sup> Recital 51 DSM Directive.

<sup>100</sup> Recital 52 DSM Directive.

<sup>101</sup> *Id.*

<sup>102</sup> For analysis, see: *Alexandra Giannopoulou, “The New Copyright Directive: Article 14 or when the Public Domain Enters the New Copyright Directive”* (27 June 2019) *Kluwer Copyright Blog*, <http://copyrightblog.kluweriplam.com/2019/06/27/the-new-copyright-directive-article-14-or-when-the-public-domain-enters-the-new-copyright-directive/> [Accessed 14 October 2019]; *Paul Keller, “Implementing the Copyright Directive: Protecting the Public Domain with Article 14”* (25 June 2019) *Communia*, <https://www.communia-association.org/2019/06/25/implementing-copyright-directive-protecting-public-domain-article-14/> [Accessed 14 October 2019].

An important aspect of this provision is that it advances the legislative codification (and alignment with CJEU case law) of the originality standard.<sup>103</sup> The standard is now recognised in relation to materials resulting from acts of reproduction of works of visual art, whereas before that occurred only in connection to software, databases and photographs. But perhaps most importantly, this is the first instance where a rule in the copyright *acquis* mentions the public domain.

### 3.4. Achieving a Well-Functioning Marketplace for Copyright

Title IV contains the most controversial provisions of the Directive, namely the new right for press publishers and the new liability regime for user-upload platforms.

#### 3.4.1. Press Publishers' Right

The first chapter on *rights in publications* has two provisions: Articles 15 and 16. Article 15 sets forth the new related right for press publishers, labelled by some critics during the legislative process as the “link tax” provision.<sup>104</sup>

The justification for the new right, as stated in Recitals 54 and 55, can be summarized as follows. The re-use of press publications is a core part of the business model of certain information society providers, like online news aggregators and media monitoring services. Publishers have difficulty in licensing their rights to these providers. As a result, they cannot recoup their investment, namely their organisational and financial contribution to producing press publications. This investment is essential to “ensure the sustainability of the publishing industry and thereby foster the availability of reliable information”. To protect their investment and to facilitate licensing and enforcement against information society providers, a new right is needed. But how does this right look?

The new related right benefits press publishers (potentially including news publishers or news agencies) established in an EU Member State.<sup>105</sup> It covers the online reproduction and making available of press publications<sup>106</sup> by information society providers. The right is defined with reference to Articles 2 and 3(2) InfoSoc Directive, and subject to the exceptions in Article 5 thereof.<sup>107</sup> However, it also has specific exclusions or carve-outs. In particular, it does not cover private or non-commercial uses of press publications by individual users, acts of hyperlinking, or the use of individual words and “very short extracts of a press publication”. These excluded acts remain subject to pre-existing rules in the *acquis*.<sup>108</sup> Recital 58 justifies the exclusions on the basis that such acts do not impinge upon the investment protection rationale of the new right, but pushes (*in fine*) for a strict interpretation of the notion of “very short extracts”.

The press publishers' right is recognised *in addition* to existing rights in respect of works/subject matter by other rights holders incorporated in press publications. The new right cannot be invoked against them and does not affect their independent exploitation. It lasts for two years after publication, counted as from 1 January of the year following publication (and only for press

<sup>103</sup> Eleonora Rosati, “DSM Directive Series #3: How far does Article 14 go?” (9 April 2019) IPKat, <http://ipkitten.blogspot.com/2019/04/dsm-directive-series-3-how-far-does.html> [Accessed 14 October 2019].

<sup>104</sup> See, e.g., Julia Reda, “Extra copyright for news sites (Link tax)” (2017) <https://juliareda.eu/eu-copyright-reform/extra-copyright-for-news-sites/> [Accessed 14 October 2019].

<sup>105</sup> Art. 15(1) and Recital 55 DSM Directive.

<sup>106</sup> Defined in Art. 2(4) DSM Directive. See also Recital 56 DSM Directive.

<sup>107</sup> Art. 15(1) and (3) DSM Directive. See also Recital 57 DSM Directive.

<sup>108</sup> Recital 55 DSM Directive.



publications first published after 6 June 2019). An important characteristic of the regime is that it entitles authors of works incorporated in press publications to an “appropriate share of revenues” received by press publishers. How that share is defined and actualised will be a particular point of interest moving forward.

Will this new right achieve its objectives? Probably not. As multiple studies have argued, and failed experiences in Germany and Spain have shown, it is highly unlikely that the right will lead to positive outcomes.<sup>109</sup> Rather, as many academics (including myself) have warned “considering current high levels of market concentration on online advertising markets and in media, a publishers’ right may well backfire: further strengthening the power of media conglomerates and of global platforms to the detriment of smaller players.”<sup>110</sup>

The second provision in this chapter is Article 16. This introduces a claim for fair compensation for publishers. It applies to publishers in general, not just of press publications, but also of books, scientific publications and music publications.<sup>111</sup> The provision is a legislative response to the *Reprobel* judgment, which had denied publishers a right of fair compensation under the reprography and private copying exceptions.<sup>112</sup> The new provision explicitly *allows* Member States to recognise for publishers a claim to a share of fair compensation due to authors in the context of an exception or limitation. The claim is triggered in cases where authors have transferred or licensed to publishers a right to a work the use of which gives rise to such fair compensation.

### 3.4.2. *Liability of User-Upload Platforms and “Upload Filters”*<sup>113</sup>

The second chapter of Title IV contains the much-debated Article 17 (former Article 13).<sup>114</sup> At the outset, it should be noted that this provision is part of a broader policy push in the EU towards increased responsibility of online platforms, which comes largely at the expense of the prohibition of general monitoring obligations (Article 15 E-Commerce Directive) and individuals’ freedom to

<sup>109</sup> CREATE, “Article 11 Research” (2017) <https://www.create.ac.uk/policy-responses/eu-copyright-reform/article-11-research/> [Accessed 9 July 2019]. For an in-depth analysis, see Lionel Bently, Martin Kretschmer, Tobias Dudenbostel, Maria del Carmen Clatrava Moreno and Alfred Radauer, ‘Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive’ (10 September 2017) European Parliament, Study for the JURI committee, Brussels [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL\\_STU\(2017\)596810\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU(2017)596810_EN.pdf) [Accessed 14 October 2019].

<sup>110</sup> IViR, “Academics Against Press Publishers’ Right” (24 April 2018), <https://www.ivir.nl/academics-against-press-publishers-right/> [Accessed 14 October 2019].

<sup>111</sup> See Recital 60 DSM Directive.

<sup>112</sup> Case C-572/13, ECLI:EU:C:2015:750, *Hewlett-Packard Belgium SPRL v. Reprobel SCRL*, at [47].

<sup>113</sup> The section on Art. 17 DSM Directive borrows from Christina Angelopoulos and João Pedro Quintais, “Fixing Copyright Reform: A Better Solution to Online Infringement”, 10 (2019) JIPITEC 222, 214-239.

<sup>114</sup> For analysis of this provision during the legislative process, see, e.g., Christina Angelopoulos, *On Online Platforms and the Commission’s New Proposal for a Directive on Copyright in the Digital Single Market* (2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2947800](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947800); Martin Senftleben, Christina Angelopoulos, Giancarlo Frosio et al., “The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform” (2018) 40 E.I.P.R. 3, pp. 149-163.

engage with content online.<sup>115</sup> This push, already patent in the 2017 Communication<sup>116</sup> and 2018 Recommendation<sup>117</sup> on “Tackling Illegal Content Online”, has now materialised in Article 17 DSM Directive, is very much a part of the proposal<sup>118</sup> for a Regulation preventing the dissemination of terrorist content online (currently at the trilogue stage)<sup>119</sup>, and will presumably be a central part of the upcoming review of the E-Commerce Directive.

Article 17 is aimed at tackling the so-called value gap: “the alleged mismatch between the value that online sharing platforms extract from creative content and the revenue returned to the copyright-holders”.<sup>120</sup> It regulates “online content-sharing service providers” (**OCSSPs**). These are defined in Article 2(6) as platforms with a profit-making purpose that store and give the public access to a large amount of works/subject matter uploaded by their users, which they organise and promote. This includes well-known platforms like YouTube, Facebook or Vimeo, as well as any type of user-upload platform that fits this broad definition and is not expressly excluded in the provision’s non-exhaustive list of carve-outs, namely: electronic communication services, providers of business-to-business cloud services and cloud services, online marketplaces, not-for-profit online encyclopaedias, not-for-profit educational and scientific repositories, and open source software developing and sharing platforms.<sup>121</sup>

Contrary to what is stated in Recital 64, the provision does not clarify existing law. Instead, it changes it by stating that OCSSPs carry out acts of communication to the public when they give access to works/subject matter uploaded by their users.<sup>122</sup> As a result, these platforms become directly liable for their users’ uploads. They are also expressly excluded in paragraph (3) from the hosting safe harbour for *copyright relevant acts*, previously available to many of them under Article 14(1) E-Commerce Directive.<sup>123</sup> Arguably, this makes Article 17 *lex specialis* to the E-Commerce

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<sup>115</sup> Aleksandra Kuczerawy, “To Monitor or Not to Monitor? The Uncertain Future of Article 15 of the E-Commerce Directive” (29 May 2019), *Balkinization*, <https://balkin.blogspot.com/2019/05/to-monitor-or-not-to-monitor-uncertain.html> [Accessed 14 October 2019]; Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (**E-Commerce Directive**).

<sup>116</sup> Commission, “Tackling Illegal Content Online Towards an enhanced responsibility of online platforms”, COM/2017/0555.

<sup>117</sup> Commission, Recommendation of 1.3.2018 on measures to effectively tackle illegal content online, C/2018/1177.

<sup>118</sup> Proposal for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online, COM/2018/640.

<sup>119</sup> *Legislative train schedule area of justice and fundamental rights, preventing the dissemination of terrorist content online* (September 2018), <http://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-preventing-the-dissemination-of-terrorist-content-online> [Accessed 14 October 2019].

<sup>120</sup> Angelopoulos & Quintais, *Fixing Copyright Reform* (2019). See also Annemarie Bridy, “EU Copyright Reform: Grappling With the Google Effect” (2019) *Vanderbilt J. Entertainment & Tech. L.*, (Forthcoming). <https://ssrn.com/abstract=3412249> (with a “critique the ‘value gap’ as a policy rationale for altering the scope of generally applicable copyright safe harbors”), and Niva Elkin-Koren, Yifat Nahmias, and Maayan Perel (Filmar), “Is It Time to Abolish Safe Harbor? When Rhetoric Clouds Policy Goals” (2019) *Stanford Law & Policy Review*, (Forthcoming), <https://ssrn.com/abstract=3344213>.

<sup>121</sup> Recital 62 DSM Directive provides further guidance on how to interpret the definition. The same recital mentions piracy websites in ambiguous language, which appears allow Member States to exclude these not from the scope of the OCSSP definition but rather from the special liability regime in Art. 17(4).

<sup>122</sup> Art. 17(1) DSM Directive. On the complex CJEU case-law on communication to the public, see João Pedro Quintais, “Untangling the hyperlinking web: In search of the online right of communication to the public”, (2018) 21 *J. World Intell. Prop.* 5-6, pp. 385-420.

<sup>123</sup> Art. 17(3) DSM Directive. On the intersection between the DSM and E-Commerce Directives, see Miquel Peguera, “The New Copyright Directive: Online Content-Sharing Service Providers lose eCommerce Directive immunity and are forced to monitor content uploaded by users (Article 17)” (26 September 2019), *Kluwer Copyright Blog*, <http://copyrightblog.kluweriplaw.com/2019/09/26/the-new-copyright-directive-online-content-sharing-service->

Directive. (It is also, in my view, *lex specialis* to Article 3 InfoSoc Directive insofar as it introduces a special right of communication to the public.<sup>124</sup>)

Such platforms then have two possibilities to avoid direct liability. First and foremost, they may obtain an authorisation to communicate/make available the content uploaded by users. The provision exemplifies with (direct) licensing from the copyright holder but leaves open other modalities of authorisation.<sup>125</sup> These will at least include voluntary or extended collective licences (on which, see the previously discussed Article 12).<sup>126</sup> If an authorisation is obtained, the same will extend to the “non-commercial” uploading acts of users of OCSSPs.<sup>127</sup>

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

This design will therefore lead many OCSSPs to rely on the second possibility, which allows them to avoid liability if they meet a number of cumulative conditions, stated in Article 17(4), supported *inter alia* by an ambiguous Recital 66. They must demonstrate that they have: (i) made best efforts to obtain an authorisation; (ii) made best efforts to ensure the unavailability of specific works for which the right holders have provided them with the relevant and necessary information; and (iii) acted expeditiously, subsequent to notice from right holders, to take down infringing content and made best efforts to prevent its future upload. Condition (ii) appears to impose what critics label an upload filtering obligation<sup>128</sup>, whereas condition (iii) introduces both a notice-and-takedown mechanism (similar to that of Article 14 E-Commerce Directive) and a notice-and-stay-down (or re-upload filtering) obligation.<sup>129</sup>

This special liability regime would merit an independent article, but the following remarks are justified here. During the legislative process, many commentators argued that the preventive obligations introduced here would not only be incompatible with existing directives, but also with

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[providers-lose-e-commerce-directive-immunity-and-are-forced-to-monitor-content-uploaded-by-users-article-17/](#).

[Accessed 14 October 2019]

<sup>124</sup> This discussion is however outside the scope of the present article. On this topic and its potential implications for the implementation of Article 17 DSM Directive, see Martin Husovec and João Pedro Quintais, “How to license Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms” (October 1, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3463011](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3463011).

<sup>125</sup> Art. 17(1), second paragraph, DSM Directive: “An online content-sharing service provider shall therefore obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, for instance by concluding a licensing agreement...” (emphasis added). N.B. Art. 17(8), second paragraph, refers to “licensing agreements... concluded between service providers and rightholders”.

<sup>126</sup> The use of the word “granted” in Art. 17(4) DSM Directive is an indicator that the authorization cannot result from mandatory collective management or statutory licenses, both of which would in any case probably require a legal mandate. *See also* Recital 61, last sentence, on contractual freedom.

<sup>127</sup> Art. 17(2) DSM Directive.

<sup>128</sup> On the use of the term, *see* Julia Reda, “Article 13 in conjunction with Recitals 38 and 39 of the proposed EU copyright reform/expansion”, <https://juliareda.eu/eu-copyright-reform/censorship-machines/> [Accessed 14 October 2019].

<sup>129</sup> For an analysis of these preventive obligations *see* Martin Husovec, “How Europe Wants to Redefine Global Online Copyright Enforcement” (2019). In: Tatiana Eleni Synodinou (ed.), *Pluralism or Universalism in International Copyright Law* (Kluwer law, Forthcoming), <http://dx.doi.org/10.2139/ssrn.3372230>.

the Charter of Fundamental Rights of the EU, as interpreted by the CJEU.<sup>130</sup> In fact, for platforms to avoid liability and meet the conditions above they will probably have to deploy automatic content recognition technologies that examine all uploaded content. Despite the directive explicitly rejecting this outcome in Article 17(8), it is hard to see how these obligations will not lead to the adoption of (re-)upload filters and, ultimately, result in general monitoring.<sup>131</sup>

Article 17 tries to avoid some of its negative effects in different ways. First, in Article 17(5), by fleshing out a number of non-exhaustive factors, such as the type, audience and size of the service. These factors, together with the principle of proportionality, must be considered when assessing whether an OCSSP has complied with the obligations in paragraph (4).<sup>132</sup> Only time will tell how these factors will be implemented into national law and interpreted by courts. Arguably, a serious consideration of the principle of proportionality in this context could go a long way in ensuring an application of this provision that is compatible with fundamental rights and avoids general monitoring.

Second, in Article 17(6), by excluding some of these obligations in regards to certain OCSSPs, namely if they are less than 3 years old, have an annual turnover below EUR 10 million, or do not exceed an average number of 5 million monthly unique visitors.<sup>133</sup> The first condition alone, stating that the exclusions only apply to platforms under 3 years old, is likely to make this special regime little more than window-dressing.

Third, in Article 17(7), by including mitigation measures that would allow users to benefit from exceptions and limitations, in particular by creating a special regime for certain mandatory exceptions: quotation, criticism, review, caricature, parody or pastiche. I will not address in this article the legal nature of these exceptions, which I believe to be akin to user rights. Here, it bears noting that, among its various limitations, existing content recognition technologies are incapable of accommodating dynamic and context-specific exceptions.<sup>134</sup> The likely result is that many otherwise lawful uses will be blocked, contrary to the requirements of the Directive.<sup>135</sup> It is

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<sup>130</sup> See: Sophie Stalla-Bourdillon, Eleonora Rosati, Karmen Turk et al., “A Brief Exegesis of the Proposed Copyright Directive” (24 November 2016), <https://ssrn.com/abstract=2875296>; Senftleben et al. (2018), *The Recommendation on Measures to Safeguard Fundamental Rights* (2018); Angelopoulos, *On Online Platforms* (2017).

<sup>131</sup> That the provision will lead to filters has in fact been conceded by some EU officials and national governments, see: Mike Masnick, ‘EU Commissioner Gunther Oettinger Admits: Sites Need Filters To Comply With Article 13’, (3 April 2019) *Techdirt* <https://www.techdirt.com/articles/20190329/15501341902/eu-commissioner-gunther-oettinger-admits-sites-need-filters-to-comply-with-article-13.shtml>; Mike Masnick, “After Insisting That EU Copyright Directive Didn't Require Filters, France Immediately Starts Promoting Filters” (28 March 2019) *Techdirt* <https://www.techdirt.com/articles/20190327/17141241885/after-insisting-that-eu-copyright-directive-didnt-require-filters-france-immediately-starts-promoting-filters.shtml> [All accessed 14 October 2019].

<sup>132</sup> Art. 17(5) DSM Directive.

<sup>133</sup> Art. 17(6) DSM Directive. These thresholds are taken from other legislative instruments, namely Art. 16(2) CRM Directive and Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (Text with EEA relevance) (notified under document number C(2003) 1422) (OJ L 124, 20.5.2003, p. 36).

<sup>134</sup> Annemarie Bridy, “Faith in Filters and the Fate of Safe Harbors” (22 May 2019) *Balkinization* <https://balkin.blogspot.com/2019/05/faith-in-filters-and-fate-of-safe.html?m=1> [Accessed 14 October 2019]; Evan Engstrom and Nick Feamster, “The Limits of Filtering: A Look at the Functionality & Shortcomings of Content Detection Tools” (March 2017), *Engine*, <https://tinyurl.com/y4cm7yet> [Accessed 14 October 2019].

<sup>135</sup> See Martin Senftleben, “Bermuda Triangle – Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market” *E.I.P.R.* 2019, 41(8), 480-490. These requirements result not only from Art. 17(7) DSM Directive, second paragraph (“Member States shall ensure that users in each Member State are able to rely on any of the following existing exceptions or limitations”) but also from Art. 17(9) DSM Directive, third paragraph (“This Directive shall in no way affect legitimate uses, such as uses under exceptions or limitations provided for in Union law...”).

furthermore unlikely that these concerns will be properly addressed by the required complaint and redress mechanisms for users mandated in Article 17(9), as such mechanisms are typically ineffective<sup>136</sup>, or by any of the rules described above.

Fourth, the provision states that the obligations it triggers will not lead to identification of users or the processing of personal data, except in accordance with the ePrivacy Directive and the GDPR.<sup>137</sup> Still, serious concerns have been voiced to the contrary.<sup>138</sup>

Finally, in a nod to the complexity of the regulatory framework Article 17 entails, the Commission is tasked with organising stakeholder dialogues to ensure uniform application of the obligation of cooperation between OCSSPs and rights holders and to establish best practices with regard to the appropriate industry standards of professional diligence. Certainly, the wording of the provision leaves some margin of discretion for interpretation. If properly exploited by the Commission and national legislators, that margin could be used to avoid some of the negative effects of this provision. In any case, Article 17 will surely keep Luxembourg judges and EU copyright academics busy for years to come.<sup>139</sup>

### 3.4.3. *The real “value gap”: Exploitation Contracts for Creators*

The final chapter of Title IV addresses *fair remuneration in exploitation contracts of authors and performers* (jointly: creators), with the exception of authors of computer programs. One could say it tackles the real value gap in the world of copyright.<sup>140</sup>

First, Article 18 sets out a *principle of appropriate and proportionate remuneration* for creators that license their works/subject matter. Recital 73 clarifies that a lump sum payment can constitute proportionate remuneration “but it should not be the rule”. The provision leaves Member States discretion on which mechanism to choose when implementing the principle, subject to conformity with EU law.

<sup>136</sup> See Jennifer Urban, Joe Karaganis, and Brianna Schofield, Notice and Takedown: Online Service Provider and Rightsholder Accounts of Everyday Practice (November 1, 2017). 64 J. Copyright Soc’y 371, Summer 2017, <https://ssrn.com/abstract=3126401> [Accessed 14 October 2019].

<sup>137</sup> See also: Art 28 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (**ePrivacy Directive**); Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation or **GDPR**).

<sup>138</sup> See e.g. Giovanni Buttarelli, “Comments of the European Data Protection Supervisor on Article 13 of the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market” (3 July 2018), [https://edps.europa.eu/data-protection/our-work/publications/comments/edps-comments-proposal-directive-copyright\\_en](https://edps.europa.eu/data-protection/our-work/publications/comments/edps-comments-proposal-directive-copyright_en); Florian Mueller, “Germany’s Federal Data Protection Commissioner: EU copyright reform poses risks to data protection”, FOSSPATENTS, <http://www.fosspatents.com/2019/02/germanys-federal-data-protection.html#translation>; Malte Engeler, “Copyright Directive: Does the best effort principle comply with GDPR?”, (23 march 2019), <https://www.telemedicus.info/article/3402-Copyright-Directive-Does-the-best-effort-principle-comply-with-GDPR.html> [All accessed 14 October 2019].

<sup>139</sup> For an exploration of different interpretation options for Art. 17 DSM Directive, see *The European Copyright Roundtable, How to Implement Article 17 DSMD?*, <https://www.youtube.com/channel/UC1IOA6-H9MTCJJBPvTn4LLw> [Accessed 14 October 2019].

<sup>140</sup> For an analysis of this topic, see Ananay Aguilar, “The New Copyright Directive: Fair remuneration in exploitation contracts of authors and performers – Part 1, Articles 18 and 19” (15 July 2019) *Kluwer Copyright Blog*, <http://copyrightblog.kluweriplaw.com/2019/07/15/the-new-copyright-directive-fair-remuneration-in-exploitation-contracts-of-authors-and-performers-part-1-articles-18-and-19/> [Accessed 14 October 2019].

Second, Article 19 lays down a *transparency obligation*. According to this, creators must receive on a regular basis – taking into account the specificities of each sector – detailed information on the exploitation of their works/performances from their licensors or transferors. This includes information on modes of exploitation, revenues generated and remuneration due. Subject to certain conditions, additional information may be requested from sub-licensees. The transparency obligation can be limited in cases where it is deemed disproportionate. In some cases, it can be set aside if the creator’s contribution to the overall work/performance is “not significant”. Furthermore, Member States may decide that transparency rules in *collective bargaining agreements* apply instead, provided they meet the criteria set forth in this article. Finally, CMOs and “independent management entities” are not subject to this transparency obligation if they are already subject to a similar obligation under Article 18 CRM Directive and national laws implementing it.<sup>141</sup>

Third, Article 20 entitles creators to a *contract adjustment mechanism*. They can claim “additional, appropriate and fair remuneration” from their counterparty (or its successors in title) if their initially agreed remuneration turns out to be disproportionately low as compared to the revenues generated by the subsequent exploitation of the works/performances by the contractual counterpart.<sup>142</sup> Importantly, the mechanism does not apply to agreements concluded by CMOs or “independent management entities”, as these are subject to national rules implementing the CRM Directive.<sup>143</sup>

Fourth, according to Article 21, disputes concerning the transparency obligation and the contract adjustment mechanism may be submitted to a *voluntary alternative dispute resolution procedure*, which may be initiated by a CMO at the request of a creator it represents.<sup>144</sup>

Fifth, creators have a *right of revocation* under Article 22.<sup>145</sup> They may revoke in whole or in part an exclusive licence or transfer on the grounds of lack of exploitation of their work/subject matter, unless such lack is due to circumstances that the creator “can reasonably be expected to remedy”. The right of revocation can only be exercised within a “reasonable period” after the conclusion of the relevant contract, and the creator may opt for termination of exclusivity instead of revocation. The article identifies a number of factors national laws should consider if they set out *specific provisions for the revocation mechanisms*, including sector specificities, the relative importance of individual contributions in collective or joint works, as well as legitimate interests of other affected creators. In this context, Member States may even decide to exclude the application of the revocation mechanism altogether to works/subject matter that usually contain contributions from a plurality of creators.

Finally, any *contractual provision* that prevents compliance with Articles 19 to 21 – transparency obligation, contractual adjustment mechanism, alternative dispute resolution – is *unenforceable* vis-à-vis creators.<sup>146</sup> That is to say, these are mandatory provisions that cannot be derogated by contract, whether between creators and their contractual counterparts, or those counterparts and

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<sup>141</sup> See also Recital 77 DSM Directive (*in fine*). Art. 18 CRM Directive deals with “Information provided to rightholders on the management of their rights”.

<sup>142</sup> Recital 78 DSM Directive provides some guidance on how to assess this.

<sup>143</sup> *Id.*, last sentence.

<sup>144</sup> See Recital 79 DSM Directive.

<sup>145</sup> See Recital 80 DSM Directive.

<sup>146</sup> Art. 23 DSM Directive

third parties (e.g. in non-disclosure agreements, as noted in Recital 81).<sup>147</sup> Conversely, it appears that contractual derogation from the right of revocation is possible. Still, Member States may choose to allow such a derogation to be enforceable only if based on a collective bargaining agreement.<sup>148</sup>

### 3.5. Final Provisions

Title V contains the final provisions. These include amendments to the Database and InfoSoc Directives as regards safeguarding the application of the new mandatory exceptions in the DSM Directive, as well as a provision on the relationship with exceptions in other directives.<sup>149</sup> As regards application in time, the Directive will apply to works/subject matter protected by national law as from 7 June 2021, but without prejudice to acts concluded or rights acquired before that date.<sup>150</sup> In addition, exploitation agreements with creators are only subject to the *transparency obligation* in Article 17 as from 7 June 2022.<sup>151</sup> Also, the processing of personal data carried out under the provisions of this directive must comply with the rules in the ePrivacy Directive and the GDPR.<sup>152</sup> As noted, it is not always clear how that will be possible, at least in the context of the preventive obligations in Article 17.

The DSM Directive must be transposed into national law by 7 June 2021.<sup>153</sup> The Commission must carry out its review of the directive no sooner than 7 June 2026. However, by 7 June 2024, it must carry out an impact assessment of the liability regime in Article 17 in relation to OCSSPs with an annual turnover below EUR 10 million and whose services have been available for less than three years. Depending on the conclusions of the assessment, the Commission must “take action”.

## 4. CONCLUSION

The policy aims behind the DSM Directive were to modernize EU copyright law and make it future-proof, promote harmonization and legal certainty, and facilitate cross-border access to protected content. Somewhere along the way, the Directive became a tool for industrial policy, focused on protecting the interests of incumbent rights holders.<sup>154</sup> The political compromise that led to the final text was shaped more by effective lobbying than sound empirical evidence and expert advice. The end result is an imperfect piece of legislation, with some positive aspects and plenty of worrisome ones.

On the positive side of the ledger we find the new mandatory exceptions, the possibility of a fall-back exception for the use of OOCs by cultural heritage institutions, the framework provision for collective licensing with extended effect, the explicit recognition of the public domain, and certain rules on fair remuneration for creators. The jury is still out on the possible recognition of user rights for certain activities in online platforms in Article 17(7), which will depend on national implementations and the interpretative winds of the CJEU.

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<sup>147</sup> Recital 81 DSM Directive.

<sup>148</sup> Art. 22(5) DSM Directive.

<sup>149</sup> See, respectively, Arts 24 and 25 DSM Directive.

<sup>150</sup> Art. 26 DSM Directive.

<sup>151</sup> Art. 27 DSM Directive.

<sup>152</sup> Art. 28 DSM Directive.

<sup>153</sup> Art. 29 DSM Directive.

<sup>154</sup> *Kretschmer, European Copyright Reform: is it possible? (2019)*.

Still, there are a number of worrisome aspects in the new Directive. First, the new exceptions are narrow in scope, subject to derogation in some instances, and partly grandfather the existing TPM regime. They are also highly modular and complex. Second, the new press publishers' right lacks solid empirical or normative justification. It will likely not solve the problems it targets and risks furthering market concentration on online advertising markets and in media, to the detriment of smaller players. In addition, there is reason to fear that the new fair compensation claim for publishers will *de facto* reduce the equivalent fair compensation received by authors. Third, the new liability rules for OCSSPs set aside the existing hosting safe-harbour, impose direct liability on these providers, and push them towards privatized algorithmic enforcement through the adoption of filtering measures. Among the problems this regime creates is the undeniable risk it poses to freedom of expression online.

These problematic aspects betray more fundamental flaws in the DSM Directive. From a normative perspective, this instrument promotes an EU copyright law that favours private ordering over public policy. This is patent in the Directive's obsession with licensing. Illustrations include the possibility that the TDM exception is subject to contractual derogation (Article 4), the subjection of the educational exception to a licensing carve-out (Article 5), the fact that the regime for the use of OOC works presents licensing has a primary option (Articles 8–11), the creation of a new right for press publishers with the goal of forcing platforms into licensing deals (Article 15), and a liability regime for OCSSPs with the explicit objective of imposing a licensing obligation for the content they make accessible (Article 17).<sup>155</sup> In pursuing this licensing vision, the EU legislator exhibits a sort of institutional amnesia to the not so distant "Licenses for Europe" debacle.<sup>156</sup> This amnesia came at the cost of more public policy prone legislative options that could foster access to content and fair remuneration to creators, promote technological development, and better safeguard fundamental rights.

From the legal-technical standpoint, it is difficult not to read the Directive as falling short of its stated objectives of harmonization and legal certainty. This is either by design, as the text sometimes leaves significant margin of discretion to national lawmakers, or due the complexities and ambiguities in the text, many of which highlighted above. National legislators that do not opt for quasi-verbatim translations of the EU text, and choose instead to explore the margin of discretion available to them, will have their work cut out. However, despite their best efforts, it is likely that many of the issues raised in this article will ultimately make their way to the CJEU. It may take a few years, but preliminary references are coming.

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<sup>155</sup> Making a similar point, see Pam Samuelson, "Legally Speaking: Europe's Controversial Digital Copyright Directive Finalized", Communications of the ACM, Vol. \_\_, 2009 (Forthcoming) (on file with the author).

<sup>156</sup> EDRi, "Failure of 'Licenses for Europe'" (20 Nov 2013), <https://edri.org/failure-of-licenses-for-europe/> [Accessed 14 October 2019].