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How to license Article 17?

Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms

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Abstract

How can the EU Member States license Article 17 of the new Directive on copyright and related rights in the Digital Single Market? This is the central question that this paper addresses. To answer it, we first analyse the *nature* of the right included in Article 17. We argue that the nature of the right has a number of serious consequences for its licensing. First, it determines whether the right is mandated by *public international law*, and hence what licensing modalities are allowed under the 1994 WTO TRIPS Agreement and 1996 WIPO treaties. Second, it clarifies what other conditions *European Union law* itself imposes on the newly established right and its implementation into national law. These restraints shape the margin of discretion of EU Member States. Third, it may imply changes to existing *licensing practices*, including the need for collective rights management organisations to obtain new mandates. Fourth, it influences how Member States can incorporate users' rights into the legal framework. We argue that Article 17 is a *special* or *sui generis right*. We identify how this right fits the existing international and EU law, and explain why the Member States have a *broad margin of discretion* when implementing the corresponding licensing regimes. Perhaps most importantly, and counter-intuitively, we show that the *legal* arguments against Article 17 licensing via modalities of statutory licensing and mandatory collective management schemes are weaker than one might initially think.

1. Introduction

On 17 May 2019 the official version of the new Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market was published (DSM Directive).¹ Article 17 (ex-Article 13) is arguably its most controversial provision. It aims to tackle the so-called value gap, i.e. the alleged imbalance between the value that online sharing platforms derive from copyright-protected content and the revenue returned to the rightholders.² Due to the potential impact of this provision on freedom of expression, the Polish government has already filed an action for annulment under Article 263 TFEU.³

¹ 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]. This provision is part of a broader policy push at EU level towards increased responsibility of online platforms. See: Commission, "Tackling Illegal Content Online Towards an enhanced responsibility of online platforms", COM/2017/0555; Commission, Recommendation of 1.3.2018 on measures to effectively tackle illegal content online, C/2018/1177; Proposal for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online, COM/2018/640

² C. Angelopoulos and J.P. Quintais, Fixing Copyright Reform: A Better Solution to Online Infringement, 10 (2019) JIPITEC 222, 214-239.

³ Case C-401/19 - Poland v Parliament and Council (Action brought on 24 May 2019). See also T. Targosz, 'Poland's Challenge to the DSM Directive – and the Battle Rages On...' (2018) available at <<http://copyrightblog.kluweriplaw.com/2019/06/10/polands-challenge-to-the-dsm-directive-and-the-battle-rages-on/>> (last visited on 4 July 2019).

This paper sets out several key interpretative arguments on the implementation of Article 17 of the DSM Directive. It examines the nature of the right of “communication to the public” in the provision, sketches the permissible licensing options, and maps implementation paths for Member States.

The paper proceeds as follows. Section 2 provides a brief overview of the mechanics of Article 17. Section 3 then examines the nature of the provision’s right of communication to the public, and Section 4 explores the potential authorisation mechanisms for it. Section 5 briefly examines Article 17’s rights and safeguards for users. Section 6 concludes, offering a list of implementation options.

2. Mechanics of Article 17: Brief Overview

Before delving into the core of the paper, it is important to understand why licensing is such a central component of Article 17 of the DSM Directive. For that purpose, the complex mechanics of the provision must be explained first.

2.1. Definition of Online Content-Sharing Service Provider (OCSSP)

Article 17 of the DSM Directive 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 or other subject matter uploaded by their users, which they organise and promote.⁴ Recital 62 provides further guidance on how to interpret the definition, in particular the importance of a relevant service’s substitution effects and of a case-by-case assessment of a provider’s profit-making purposes.

The definition of OCSSP clearly tries to subsume well-known platforms like YouTube or Vimeo. The *non-exhaustive* list of carve-outs contained in Article 2(6) is meant to further clarify the scope.⁵ Not all the examples of carve-outs therein would follow neatly from the application of the definition, and certainly some of them are the result of lobbying and political expediency. However, these carve-outs share one or both of the following main characteristics: (a) the main activity of these services is *not* giving access to protected content; and (b) the listed services are wholly or predominantly not for-profit.⁶

In addition, Recital 62 contains a reference to piracy websites in an ambiguous language, which opens the door to their potential consideration as carved-out from the legal definition of OCSSP. However, a closer reading suggests that the language in the Recital demands that national laws exclude piracy websites, where they qualify as OCSSPs, from making use of the specific liability exemption mechanism in Article 17(4).⁷

⁴ For simplicity sake we refer in this paper to copyright-protected works and other subject matter as “content” or “protected content”.

⁵ This list includes: 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.

⁶ This aligns with Recital 62 DSM Directive, which states that the definition “should not include services that have a main purpose other than that of enabling users to upload and share a large amount of copyright-protected content with the purpose of obtaining profit from that activity.”

⁷ Recital 62 DSM Directive states that “the liability exemption mechanism provided for in this Directive should not apply” to piracy websites. Examples of piracy websites would be The Pirate Bay or Popcorn Time. NB it remains unclear under the DSM Directive if piracy websites that do not host content but instead torrents, magnet links or simply provide link aggregation (like The Pirate Bay) meet the definition of OCSSP.

2.2. Direct liability for OCSSPs and exclusion from hosting safe-harbour

Despite political declarations in Recital 64 of the DSM Directive, Article 17 can hardly be said to clarify existing law. Legally speaking, it changes the law in at least two ways. First, it introduces a special liability mitigation mechanism which has no precedent in the history of copyright law, either in International Treaties, in the EU copyright *acquis* or, to the best of our knowledge, in any national law. Second, it goes beyond current case-law of the Court of Justice of the European Union (CJEU) by stating that OCSSPs, as a rule, carry out acts of “communication to the public” when they give access to content uploaded by their users. In Section 3, we analyse to what extent this right derives or goes beyond the pre-existing legal framework.⁸

Under the adopted definition of OCSSPs, the knowledge of third-party actions is largely irrelevant and the assessment of a provider’s legal status is of a more *objective nature*, focusing on service design and its effects on markets. The split with existing case-law is likely to become visible in the future when the CJEU will have to in parallel decide cases concerning service providers that are not covered by the definition, but whose activities must be assessed under Article 3 of the InfoSoc Directive.⁹ As a result of both changes, OCSSPs are directly liable for their users’ uploads, irrespective of their knowledge of the illegality of the act. OCSSPs are also expressly excluded from the hosting safe harbour in Article 14(1) of the E-Commerce Directive.¹⁰ However, given that the very definition of OCSSPs tries to allude to the “active” language that constitutes a precondition of the entire relevant section of the E-Commerce Directive,¹¹ the suspension of Article 14(1) might be only declaratory. This is because the definition of OCSSP effectively tries to avoid any overlap in application of two legal instruments.¹²

As will be shown, the outcome of these drafting choices is that Article 17 of the DSM Directive is not only *lex specialis* to the E-Commerce Directive, but also to Article 3 of the InfoSoc Directive, insofar as it introduces a special or sui generis right of communication to the public.¹³

2.3. The authorisation avenues for OCSSPs (and their extension to users)

Online service providers that qualify as OCSSPs are presented with two avenues or possibilities to avoid direct liability.

⁸ Article 17(1) DSM Directive. On the complex case law on communication to the public, see JP Quintais, ‘Untangling the Hyperlinking Web: In Search of the Online Right of Communication to the Public’ (2018) 21(5-6) J. World Intell. Prop. 385.

⁹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [InfoSoc Directive].

¹⁰ Article 17(3) DSM Directive. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’) [E-Commerce Directive].

¹¹ The consideration of the “active” role of an information society provider as a key role to disqualify it from the safe-harbours in Articles 12 to 15 E-Commerce Directive has been a staple of the CJEU’s case-law in the area of intermediary liability since *Google France* and *L’Oréal*. For a critical assessment, see M Husovec, *Injunctions Against Intermediaries in the European Union: Accountable, but not Liable?* (Cambridge University Press 2017) 43 ff., and J. van Hoboken, J.P. Quintais, J. Poort & N. van Eijck (2019). *Hosting intermediary services and illegal content online: An analysis of the scope of article 14 ECD in light of developments in the online service landscape – final report, Study prepared for the European Commission DG Communications Networks, Content & Technology*, pp. 31-37

¹² On the intersection between the DSM and E-Commerce Directives, see M. 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)*, Kluwer Copyright Blog (26 September 2019), <http://copyrightblog.kluweriplaw.com/2019/09/26/the-new-copyright-directive-online-content-sharing-service-providers-lose-ecommerce-directive-immunity-and-are-forced-to-monitor-content-uploaded-by-users-article-17/>.

¹³ The latter point is explored in Section 3 below.

The default possibility is for an OCSSP to obtain an authorisation to communicate to the public the content uploaded by their users. Article 17 of the DSM Directive exemplifies with (direct) licensing from the rightholder but leaves open other modalities of authorisation.¹⁴ In theory, next to direct licensing, additional options include different collective licensing mechanisms (voluntary, extended or mandatory), as well as statutory licensing (relying on remunerated exceptions or limitations).¹⁵

If an authorisation is obtained, the same will extend to the “non-commercial” uploading acts of users of OCSSPs.¹⁶ That is to say, an OCSSP’s license must cover their users acts of communication to the public under Article 3 of the InfoSoc Directive, subject to the condition that such users are not acting on a commercial basis and that their uploading activity does not generate significant revenues.¹⁷

2.4. The preventive obligations as a special liability exemption mechanism

OCSSPs that do not obtain an authorization in the terms above can only avoid liability if they comply with the conditions of the exemption mechanism in Article 17(4) of the DSM Directive. According to this, OCSSPs must demonstrate that they have: (a) made best efforts to obtain an authorisation; (b) 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 (c) acted expeditiously, subsequent to notice from right holders, to take down infringing content and made best efforts to prevent its future upload.

Since OCSSPs do not know what users might upload to their services, their obligation to license is limited by a notion of “best efforts to obtain an authorization”. This delimits the breadth and scope of the authorization at issue. It is easy to understand that obtaining an authorization from all potential rightholders in the world that use their services is impossible. This would mean clearing authorisations for millions of works of different types uploaded by users. To this point, Article 17(5) states that “best efforts” have to be “proportionate”, meaning that the concept should take into account the type and size of the service, the type of content it usually carries, and the costs of rights clearance given the existing licensing options on the market.

The Member States implementing Article 17 may influence what constitutes “best efforts to obtain authorization” in at least two ways. First, they can create or incentivize particular licensing modalities.¹⁸ These might, consequently, become more affordable or wide-spread. Second, Member States might create standards for rights clearance, for instance by establishing registries that are to be consulted by OCSSPs when providing their services. All these mechanisms would then contribute towards what is considered to be “best efforts” in a particular jurisdiction. However, unless these solutions are coordinated, fragmentation within the Digital Single Market is likely to occur.

OCSSPs can resort to prevention of infringements only in two situations: (a) when rightholders denied their consent; and (b) when obtaining a license was beyond the “best efforts” obligation. In these circumstances, OCSSPs can rely on the second authorisation avenue. This allows them to avoid liability if: (a) they maintain a reactive notice-and-takedown system¹⁹; *and* (b) when provided with

¹⁴ Article 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...”. NB Article 17(8), second paragraph, DSM Directive, refers to “licensing agreements... concluded between service providers and rightholders”.

¹⁵ These mechanisms are further explored in Section 4 below.

¹⁶ Article 17(2) DSM Directive.

¹⁷ This aspect and its implications are examined further in Section 3 below.

¹⁸ On which, see Section 4 below.

¹⁹ Pursuant to Article 17(4)(c) DSM Directive.

“relevant and necessary information”, they proactively carry out “best efforts to ensure the unavailability of specific works”.²⁰

Article 17(6) then excludes proactive obligations for certain OCSSPs, namely “new service providers with small turnover and audience”. Importantly, these new providers remain covered by Article 17, albeit subject to mitigated obligations.²¹ Although this special regime modulates the best efforts obligations for certain OCSSPs, it is not meant to affect the availability of remedies against them. In other words, smaller and newer OCSSPs are still subject to the same remedies as larger platforms, in particular injunctions under Article 8(3) of the InfoSoc Directive.²²

3. A New Right of Communication to the Public – What is it?

The central question that this paper addresses is that of the *nature* of the right in Article 17 of the DSM Directive. The answer to this question comes with a number of serious consequences. First, it determines whether the exclusive right is mandated by *public international law*, and hence what licensing modalities are allowed under the constraints of the 1996 WTO TRIPS Agreement, and the 1996 WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).²³ Second, it clarifies what other restraints *EU law* itself imposes on the newly established right and its implementation in national law. Third, it determines what this nature of Article 17 implies for existing *licensing practices*, including whether collective rights management organisations (CMOs) in the relevant area have to obtain new mandates from their members.

3.1. The nature of the Article 17 right: interpretative options

There are three basic options on how to interpret Article 17 of the DSM Directive, and its relationship to existing international and EU law. We term these options A), B) (including sub-options B1 and B2), and C).

- **Option A)**

Article 17 can be seen as a *carve-out from the international minimum standard* of right of communication to the public. This right is broadly prescribed at international level in Article 8 of the WCT. In this case, the liability mitigation mechanism in Article 17(4) would have to comply with the different international variants of the three-step test – namely those in Articles 10 of the WCT and 16 of the WPPT – and other signatories in the world would have to legislate equivalent rights covering

²⁰ Pursuant to Article 17(4)(b) (regarding ex-ante filtering) and (c) (regarding notice-and-stay-down) DSM Directive.

²¹ Article 17(6) and Recital 67 DSM Directive identify 2 *exclusion scenarios*, i.e. cases in which OCSSPs are exempted from *some* of the preventive obligations in paragraphs 4(b) and (c). In the first scenario, OCSSPs that are under 3 years old and have an annual turnover below EUR 10 Million are only subject to the notice-and-takedown obligation in paragraph 4(c). The second scenario applies to OCSSPs that meet the conditions of the first scenario and additionally have more than 5 million monthly unique visitors. These OCSSPs are then also subject to the notice-and-stay-down obligations in paragraph 4(c), meaning that they are only immune from the strictest preventive obligations in paragraph 4(b). N.B. some of the thresholds used to define the exclusion scenarios are taken from other legislative instruments, namely Article 16(2) of Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (Text with EEA relevance) [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).

²² Recital 66, first subparagraph, DSM Directive. For a detailed analysis of the legal regime of injunctions in Article 8(3) InfoSoc Directive, see M. Husovec, *Injunctions Against Intermediaries in the European Union: Accountable, but not Liable?* (Cambridge University Press 2017).

²³ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [TRIPS Agreement]; WIPO Copyright Treaty, Dec. 20, 1996, 2186 U.N.T.S. 121, 36 I.L.M. 65 [WCT]; WIPO Performances and Phonograms Treaty [WPPT].

OCSSPs.²⁴ As we will argue, this position is not sustainable because no other country in fact has such as broad exploitation right, and the liability mitigation mechanism at issue would probably not be complaint with the three-step tests in the WCT and WPPT.

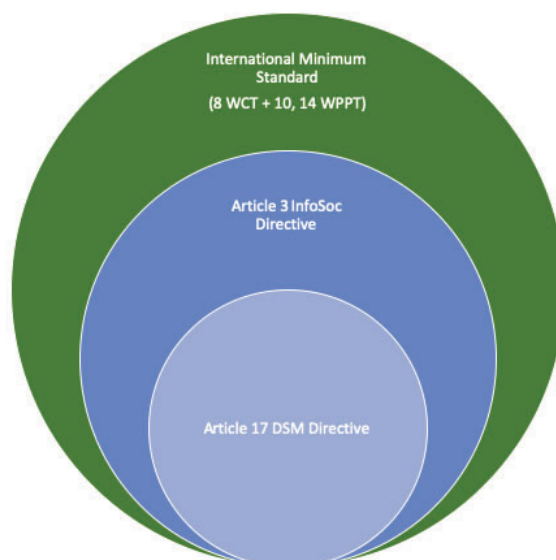


Figure 1. Option A

- **Option B)**

The second possibility is to view Article 17 as a *carve-out from the EU extension* of the right of communication to the public, which goes beyond the international minimum standard in Article 8 of the WCT and Articles 10 and 14 of WPPT. In this view, the EU has voluntarily broadened the scope of the right of communication to the public right as compared to the international minimum standard. This broadening is a result of the interpretative activity of the CJEU in its case-law on Article 3 of the InfoSoc Directive, in particular as it applies to online use of protected content. This means that OCSSPs would already be covered by such an extended right even without a legislative reform, and that Article 17 is merely a carve-out from this EU extension to the scope of the right.

A major legal consequence of this view is that the international three-step tests in the WCT, WPPT and TRIPS (“International three-step tests”) would arguably not apply to this provision.²⁵ However,

²⁴ On the three-step test in international law see, e.g., M. Senftleben, *Copyright, Limitations, and the Three-step Test* (Kluwer Law International 2014), and C. Geiger, D. Gervais, and M. Senftleben, *The Three-Step-Test Revisited: How to Use the Test’s Flexibility in National Copyright Law*, *American University International Law Review*, Vol. 29, No. 3 (2014), pp. 581-626.

²⁵ WCT and WPPT would not apply if the rights are not prescribed, as they speak of “to the rights granted to authors of literary and artistic works under this Treaty” (Article 10(1) WCT; similar Article 16(2) WPPT). TRIPS three-step test could apply only if it was to be construed extensively as also covering rights, which are not prescribed by TRIPS, or interlinked treaties. In DS160, *European Communities v United States* — Section 110(5) of US Copyright Act, WTO Panel notes (in the context of Berne-incorporated rights) that: “[i]n our view, neither the express wording nor the context of Article 13 or any other provision of the TRIPS Agreement supports the interpretation that the scope of application of Article 13 is limited to the exclusive rights newly introduced under the TRIPS Agreement.” (See para 6.80). It is open to debate if this would equally apply to non-TRIPS and non-Berne rights granted to copyright holders like those in the subsequent WCT/WPPT and Article 17 of the DSM Directive, especially since they could not have been foreseen at the time of negotiations (if the interpretation in our options B or C is followed). Under our B or C reading, even if WTO would accept applicability of Article 13 TRIPS, the case for broad margin of discretion when it comes to exceptions is extremely strong, unlike under option A).

the European version of the three-step test in Article 5(5) of the InfoSoc Directive could still apply, if it is considered that the new right in Article 17 of the DSM Directive is only a carve-out – not an extension – of the right in Article 3(1) of the InfoSoc Directive. We label this **Option B1**).

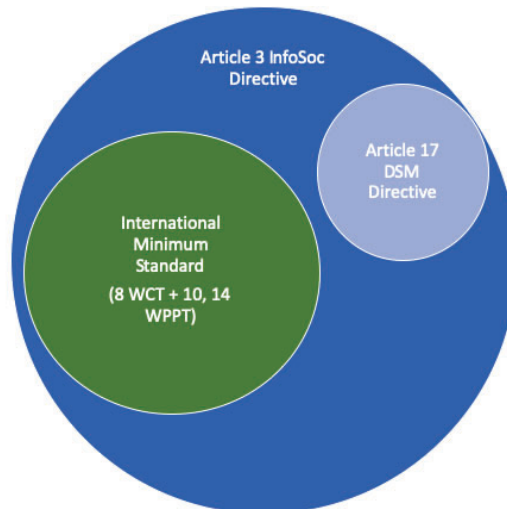


Figure 2. Option B1

That restriction can however be mitigated by considering Article 17 of the DSM Directive as *lex specialis* to Article 3 of the InfoSoc Directive. If that is the case, then the carve-out would not be subject to the three-step test in Article 5(5) of the InfoSoc Directive – we term this **Option B2**). The significant distinction here is that, under Option B1), the liability exemption mechanism in Article 17(4) of the DSM Directive would probably be subject to interpretation restraints of Article 5(5) of the InfoSoc Directive, whereas that would not occur under Option B2).

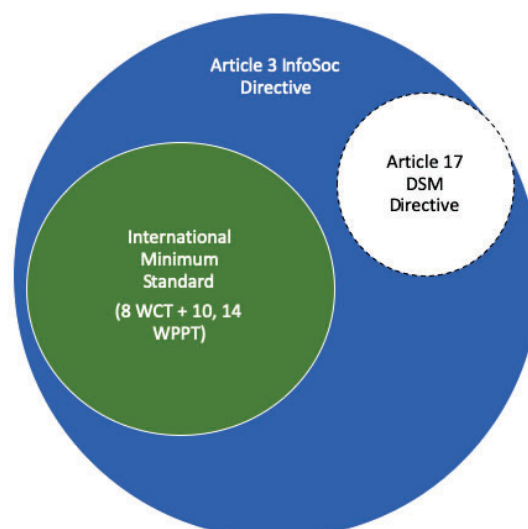


Figure 3. Option B2

- **Option C)**

The last possibility is to interpret Article 17 as an *extension on the EU extension*. That is to say, an extension of a right of communication to the public which is legislated on top of an already broadened European notion of the communication to the public in Article 3 of the InfoSoc Directive, by virtue of CJEU interpretation. In this case, international constraints do not matter. European constraints of Article 5(5) of the InfoSoc Directive should not matter either. The difference compared to the previous options is that Article 17 of the DSM Directive constitutes not only a form of European *sui generis* right (Option B), but also a *new* European *sui generis* right which right holders previously did not own.

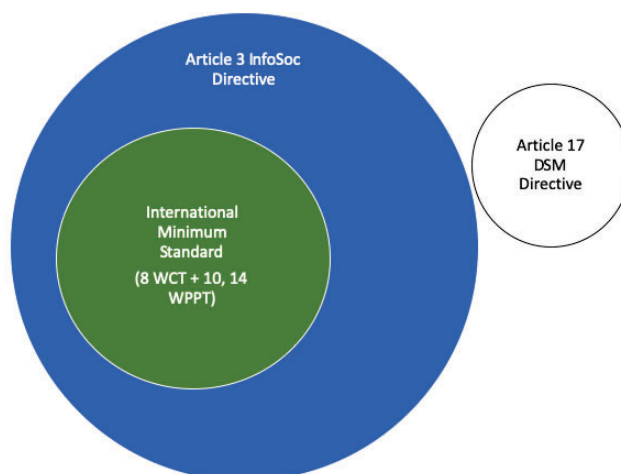


Figure 4. Option C

This difference has consequences for licensing practices, in the realm of contract law, and potentially also for mandates of CMOs. Table 1 below maps out the different interpretative options.

Table 1. Interpretative Options Article 17

	Option A Carve-out from the international minimum standard'	Option B Carve-out from the EU extension only	Option C Extension on the EU extension
Nature of a right	Article 17 as included in WIPO communication to the public right [CTP] (Art. 8 WCT; Arts. 10 , 14 WPPT) and InfoSoc CTP (Art. 3 InfoSoc Directive)	Article 17 as sui generis right within EU CTP (Art 3 InfoSoc Directive)	Article 17 as new EU sui generis right
Restraint	International and EU three-step tests (Art # WCT; Art. # WPPT; Art.	EU three-step test (Article 5(5) InfoSoc Directive)	No restraint

	5(5) InfoSoc Directive)			
Compatibility	Arguably incompatible	B1: Debatable ²⁶	B2: Compatible, if <i>lex specialis</i>	Compatible

In our view, the development of the CJEU case law concerning communication to the public over the years shows that the EU notion goes beyond the international minimum standard. This is particularly clear in the area of online exploitation, in which the CJEU started extending the right to spaces previously occupied by secondary liability scenarios that are traditionally non-harmonized, e.g. “mediated types” of use like hyperlinking.²⁷ This argument is further supported by the international comparison since, to our knowledge, no national law of a WCT Contracting party extends its right of communication to the public (or equivalent national provision) to such a broad set of players. Therefore, from the perspective of international law, Article 17 of the DSM Directive is hardly objectionable: it only abridges the rights of rightholders under EU law *beyond* the minimum international standards.

Moreover, unlike safe harbours of the E-Commerce Directive, such as its Article 14, which limited (non-harmonized) secondary liability doctrines complementing inter alia the catalogue of copyright exclusive rights in the *acquis*, Article 17 of the DSM Directive is construed as an exclusive right itself. If exploitation acts underlying Article 17 would be viewed as prescribed international minimum standards, subject to the International three-step tests – which in our view they are not – such a broad liability mitigation mechanism would very likely violate international obligations. Therefore, in order to defend conformity of Article 17 with international obligations, the provision should be in fact interpreted as going beyond existing minimum standards for exclusive rights set forth in international treaties.

Article 3 of the InfoSoc Directive was incorporated into EU law in order to implement international obligations under the WCT and WPPT.²⁸ This does not mean, however, that the resulting European doctrine on the right of communication to the public is to be equated with the minimum international standard, which it was historically set to implement. The CJEU arguably gave the right of communication to the public a life of its own. This distinctly “European” identity of the right tries to interpret it in a way which resolves many shortcomings of harmonization, e.g. missing accessory liability doctrines at Union level.²⁹ This approach is not unique to Article 3 of the InfoSoc Directive. It can be observed in other areas of the copyright *acquis* – like the notion of work and originality, and certain concepts included in exceptions and limitations (fair compensation, quotation and parody) – where the CJEU uses the doctrine of autonomous concepts of EU law and the principle of effectiveness to repurpose national implementations beyond international standards, with the objective of further harmonization of EU copyright law.³⁰ This European experimentation does not per se raise the international minimum standards of the interpreted provisions. It also does not bind other countries

²⁶ This depends on the impact that the three-step test in Article 5(5) InfoSoc Directive would have on Article 17 DSM Directive.

²⁷ J.P. Quintais & J. Poort (2019). The Decline of Online Piracy: How Markets – Not Enforcement – Drive Down Copyright Enforcement, *American University International Law Review*, Vol 34, pp. 807-76, [pinpoint].

²⁸ See Recital 15 InfoSoc Directive.

²⁹ For an in-depth analysis of accessory liability regimes in Europe in connection to the EU copyright *acquis*, see C Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis* (Kluwer Law International 2016).

³⁰ On the notion of work, see e.g.: C-5/08 – Infopaq International, 16 July 2019, ECLI:EU:C:2009:465, ___; Joined Cases C-403/08 and C-429/08 - Murphy/Premier League, 4 October 2011, ECLI:EU:C:2011:631, ___; C-145/10 - Painer, 1 December 2011, ECLI:EU:C:2011:798, ___; C-310/17 - Levola Hengelo, 13 November 2018, ECLI:EU:C:2018:899, ___.

to change their laws accordingly. A cursory view of national approaches³¹ implementing the same international obligations shows that the European solution stands isolated. The same can be said about the newly adopted right in Article 17 of the DSM Directive.³² We therefore conclude that option A) is not defensible. Options B and C are then left.

3.2. Why the Article 17 right is *sui generis*?

If the right is interpreted as a carve-out from the already existing EU extension on the right of communication to the public (option B), without being *lex specialis* to it (option B1), then it would be subject to Article 5(5) of the InfoSoc Directive. After all, Article 17 of the DSM Directive would be part of the exclusive right in Article 3 of the InfoSoc Directive, with all consequences arising therefrom, including the applicability of the three-step test to its sub-provisions, in particular Article 17(4)(b) and (c). This interpretation conflicts with the fact that Article 17 has its own set of provisions on exceptions and does not reiterate the conditions of the InfoSoc Directive (even invoking its own self-standing nature). The notion of special incorporated regime of Article 17 which would remain within InfoSoc Directive (B1) would run contrary to a textual, teleological and historical interpretation of the provision.

Therefore, as we will show, Article 17 should be construed as *sui generis right*. Whether it seen as a carve-out given existing case law (option B2), or extension of the right that goes beyond the interpretation of CJEU case-law (option C) remains to be seen in light of the outcome of the pending preliminary references before the CJEU.³³ In our view, the latter interpretation more accurately describes the case-law to date because the language of Article 17 shifts the enquiry from volition/knowledge considerations to an objective assessment of the relevant service's effects. Since the margin of discretion for Member States regarding national implementation largely *converges* in both options B2 and C, we focus primarily on the question of *sui generis* nature of the right in the subsequent analysis.

According to Recital 64 of the DSM Directive:

It is appropriate to clarify in this Directive that online content-sharing service providers perform an act of communication to the public or of making available to the public when they give the public access to copyright-protected works or other protected subject matter uploaded by their users. Consequently, online content-sharing service providers should obtain an authorisation, including via a licensing agreement, from the relevant rightholders. This does not affect the concept of communication to the public or of making available to the public elsewhere under Union law, nor does it affect the possible application of Article 3(1) and (2) of Directive 2001/29/EC to other service providers using copyright-protected content.

While the first sentence might suggest that “clarification” is of declaratory nature, Recital 64 immediately refutes this reading. It distinguishes “content-sharing service providers” from other exploitative acts known as “communication to the public” under existing EU law. It emphasizes that Article 17 “does not affect” these existing exploitation rights, and even repeats the same for Article 3 of the InfoSoc Directive under its “possible application” to “other services providers”. Article 17(1) itself then provides (our emphasis):

³¹ See, e.g., J.P. Quintais and J. Poort, *The Decline of Online Piracy...*; J.P. Quintais, *Global Online Piracy Study Legal Background Report*, Institute for Information Law (July 2018), <https://www.ivir.nl/nl/projects/global-online-piracy-study/>.

³² On the novelty of Article 17 DSM Directive at an international level, see, e.g., House of Commons Canada, *Statutory Review of the Copyright Act*, Report of the Standing Committee on Industry, Science and Technology (June 2019), <https://www.ourcommons.ca/Content/Committee/421/INDU/Reports/RP10537003/indurp16/indurp16-e.pdf>, pp. 20, 75-83. For commentary, see C. Craig, *Oh Canada! True Patriot Love (for Thy Copyright Act Review)*, Kluwer Copyright Blog (19 June 2019), <http://copyrightblog.kluweriplaw.com/2019/06/19/oh-canada-true-patriot-love-for-thy-copyright-act-review/>.

³³ Case C-682/18, *LF v Google*, Case C-683/18, *Elsevier v Cyando*, and C-500/19, *Puls 4 TV*, currently pending.

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

An online content-sharing service provider shall therefore obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, for instance by concluding a licensing agreement, in order to communicate to the public or make available to the public works or other subject matter.

The provision makes it clear that “communication to the public” by reference to Article 3 of the InfoSoc Directive only takes place for “the purposes of this directive”. The second sentence then clarifies that the *beneficiaries* of this right should be the same as beneficiaries of Article 3 InfoSoc right. If Article 17 was merely meant to clarify that providers falling under the definition perform the act of communication to the public within the meaning of Article 3 of the InfoSoc Directive, there would have been no reason to include the text “for the purposes of this directive” or repeat the same set of beneficiaries. On the contrary, such legal presumption should have then been applicable exactly to trigger Article 3 and the rest of the InfoSoc Directive. Instead, the legislator decided to highlight the particular nature of this right. Furthermore, unlike in Article 17(2) for users’ exploitation acts, it avoids any reference to the scope of the right in Article 3. The legislator felt compelled to outline, by a limited reference, the same set of beneficiaries, which further underlies its parallel nature.

Moreover, Article 17 can hardly constitute a mere declaratory clarification when it introduces an elaborate liability mitigation mechanism with no precedent in global copyright law, allowing the right to be used without authorisation under a range of circumstances. For regular exploitation rights, this is only possible with a corresponding exception and limitation, such as quotation, parody, or pastiche. By stipulating that this particular right does *not* have to be licensed if good faith OCSSPs meet an unspecified obligation or duty to seek the necessary authorisation, it introduces a limitation on the exclusivity, which is understandably absent in the InfoSoc Directive’s list.³⁴ The special status of Article 17 right is also underlined by the list of exceptions,³⁵ which apply to in a regime that again goes beyond the InfoSoc Directive. This creates a curious split when exploitative acts of users and providers that trigger Article 17, bring with itself a broader set of exceptions than a typical exploitation by non-OCSSPs. The same can be said about the more expansive safeguards.³⁶ This could be perhaps explained by the fact that Article 17 is meant to sit between passive hosting providers, on the one hand and classic on-demand streaming services, on the other hand. Article 17 is therefore a middle-ground between these two types of uses/non-use of protected content.

This reading is also supported by the official statement by the German government in the aftermath of the vote in the Council, which clearly assumes a broad margin of discretion for the national legislator in this respect.³⁷ Despite being a unilateral declaration, it retains some historical interpretative value.

3.3. Exploitation acts by OCSSPs and Users

Based on the above interpretation, public international law and EU law appear to pose no constraints on licensing of the new right. This would suggest the broadest possible room for the Member States

³⁴ Under internationally prescribed exploitation rights, such limitation would have to be reconciled with the International three-step test for it to be acceptable, if the right was subject to international minimum standards.

³⁵ See Article 17(7) DSM Directive.

³⁶ See Section 5 below.

³⁷ Draft DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (first reading), Joint statement by the Netherlands, Luxembourg, Poland, Italy and Finland (15 April 2019), <https://data.consilium.europa.eu/doc/document/ST-7986-2019-ADD-1-REV-2/en/pdf>. [Draft Directive Joint Statements April 2019]

when implementing the newly legislated right. However, this interpretation is only partially correct. It should not be forgotten that Article 17 of the DSM Directive only covers exploitative acts of a select set of platforms, and it only partly covers exploitative acts of *users* of those platforms. Users uploading content on platforms engage in acts of reproduction and communication to the public, in sense of Articles 2 and 3 of the InfoSoc Directive. Article 17 introduces only two special rules with respect to users' activities, namely: (a) a set of mandatory exceptions in paragraph (7): and (b) a conditional merging of exploitation acts of OCSSPs and non-commercial acts of users in paragraph (2) .

This has direct consequences for legal constraints. If the Article 17 right is outside of the InfoSoc Directive's framework, then Article 5 list does not apply to it. In fact, Article 5(5) of the InfoSoc Directive explicitly speaks of limitations introduced to the rights of reproduction and communication to the public within "the exceptions and limitations provided for in paragraphs [of that Directive]." Unless the reading under Option B1) is followed, which we have shown is contradicted by textual and systematic interpretation, this means that Article 17 does not have explicit limits on the scope of its exceptions. However, given the tango between users' and OCSSPs' exploitative acts, the limitations still indirectly follow from the InfoSoc Directive. But they are further overridden in cases of non-commercial acts of users by Article 17(2). The situations possible under Article 17 text are summarised in Table 2 as follows:

Table 2. Exploitation Scenarios Article 17

Scenarios	User's exploitation	Platform's Art 17 exploitation	Constraints
1	(1) IF covered by exceptions ³⁸ = free	(2) THEN free of licensing/preventive measures	User: Article 5 InfoSoc Directive and International Law (IL) OCSSP: Article 17(7) DSM
2	(2) THEN non-commercial use = free	(1) IF licensed [always commercial use]	User: IL OCSSP: none
3	(2) THEN <u>non-commercial</u> uses = infringement of Article 2 and 3 InfoSoc Directive, unless covered by exceptions ³⁹	(1) IF not-licensed = liability depends on meeting best efforts & preventive duties	User: Article 5 InfoSoc Directive and IL OCSSP: none
4	(2) THEN <u>commercial</u> use are always infringement of Article 2 and 3 InfoSoc Directive, unless covered by exceptions ⁴⁰	(1) IF licensed or not	User: Article 5 InfoSoc Directive and IL OCSSP: none

This breakdown of possibilities shows that national legislators have the broadest room for implementation for OCSSPs which allow their users to use the services only for non-commercial acts. By definition, an OCSSP is always assumed to act for-profit due to Article 2(6), which characterises

³⁸ There are two possibilities: Article 17(7), first sentence, refers to the exceptions as designed by national law, as permitted by Article 5 of the InfoSoc Directive; Article 17(7), second sentence, mandates a group of exceptions with reference/compared to those listed in Article 5 of the InfoSoc Directive.

³⁹ Article 17(7) DSM Directive.

⁴⁰ Article 17(7) DSM Directive.

its activities as “for profit-making purposes”. Otherwise, it is not covered by Article 17. The exploitative acts of OCSSPs and their users, however, are importantly connected.

According to Article 17(2) (our emphasis):

*Member States shall provide that, where an online content-sharing service provider obtains an authorisation, **for instance** by concluding a licensing agreement, that authorisation shall also cover acts carried out by users of the services falling within the scope of Article 3 of Directive 2001/29/EC when they are not acting on a commercial basis or where their activity does not generate significant revenues.*

Article 17(2) thus arguably merges exploitative acts of OCSSPs and users in non-commercial scenarios. Once there is a license, they cannot be split. Nevertheless, there are a number of other aspects to note about this provision. First, it does not limit the authorization mechanism to a contractual license. The provision directly speaks of “obtains an authorisation, for instance by concluding a licensing agreement”. This means that authorization might originate also from other sources, e.g. the statute’s authorization. Second, as was previously noted, for user’s exploitative acts, Article 17(2) directly refers back to the scope as established and limited by the InfoSoc Directive. Third, the same merging is being relied on in the context of exempted users, where by virtue of users’ permission, OCSSPs do not have to obtain a license for their own exploitation (see Scenario 1 in Table 2 above).

The merging of acts has an important consequence for the Member States. If Article 17 could be licensed in all the circumstances, e.g. under a statutory licensing scheme, Article 17(2) would partly override Article 5 of the InfoSoc, and as *lex specialis*, extend these existing licenses to users’ non-commercial acts of exploitation (see Figure 5).

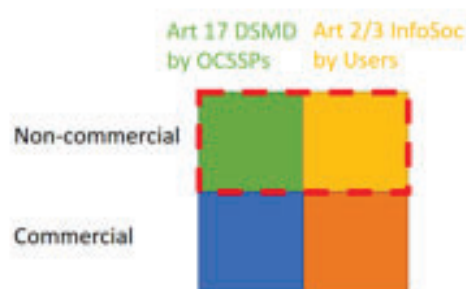


Figure 5. Article 17 DSM vs Article 3 InfoSoc: commercial / non-commercial scope

In fact, from the perspective of users, such scheme might be preferable. This is because under most other licensing mechanisms the legality of users’ uploads depends on the OCSSP’s license. In such cases, it will generally be difficult for users to ascertain the legal status of their non-commercial uploads that fall beyond the scope of existing exceptions and limitations. The consequence of this is particularly severe given that OCSSP’s can sometimes avoid licensing their acts under Article 17, thereby leaving users’ non-commercial activities unprotected. Unlike today, when such use was presumed to be unauthorized if going beyond exceptions, exposing users to such high level of uncertainty might be problematic. Member States can eliminate this drawback through the enactment of a statutory remuneration scheme that authorises all non-commercial activities by users, thus eliminating the risks that OCSSPs do not take – or right holders do not give – a license. To be sure, this scheme would

have to satisfy international obligations (for the sake of user's acts of non-commercial exploitation), such as the three-step test. However, we are confident that they would satisfy them.⁴¹

The lack of extension for *commercial uses* in Article 17(2) of the DSM Directive leads to paradoxical outcomes. If users are permitted to act "on a commercial basis" or "to generate significant revenues" from uploads to OCSSPs, their activities fall outside the scope of Article 17(2) and are regulated solely by Article 3 of the InfoSoc Directive. In this case, the user activities in question are subject to Article 5 of the InfoSoc Directive, which limits Member States' margin of discretion in this field.⁴² The reason is that Article 17(2) – which regulates the uploading act of users – does not limit the application of Article 5 of the InfoSoc Directive to the user acts it regulates. The available licensing mechanisms in such cases shrink.⁴³

This creates a strange situation for online users/creators. The Member States that wish to shield users from liability would opt for a statutory remuneration scheme for non-commercial uses taking place in OCSSPs. However, these will be of use to creators only as long as they do not earn significant income through the platform. For instance, receiving advertising income in relation to the use of an uploaded work would go beyond the non-commercial use threshold. OCSSPs willing to be covered by this regime would have to discourage profit-making by their creative users. This is a break on their growth and users' ability to make money from their work. Going beyond the non-commercial regime for users would require separate licensing of such uses *in addition* to OCSSPs' own use of the Article 17 right. The question is: *who* should be in charge of arranging it?

In the absence of such additional licensing, users would be engaging in infringements. Unlike non-commercial uses, commercial uses would have to be cleared in regular licensing arrangements, subject to the constraints of the InfoSoc Directive, as discussed in the following section. In this light, there are two possible interpretations of who is in charge. The first is that the primarily responsible party is the user who engages in for-profit exploitation. OCSSPs are covered by Article 17 licenses which absolve them of their own "unauthorised acts of communication to the public", and hence do not have to police such infringements. The second interpretation is that the primarily responsible party is the user who engages in for-profit exploitation, but OCSSPs are co-responsible because not avoiding such infringements under Article 17(4)(b) and (c) would subject them to their own liability, since they would have only satisfied their best efforts to obtain an authorisation obligation or duty under Article 17(4)(a).

From the above it follows that if we construe Article 17 right as always licensed in its entirety, irrespective of the nature of users' acts, OCSSPs would have little incentive to help users secure such additional for-profit licenses, or even absorb them directly. Even more, one could argue that their liability, under the general legal framework, is then pre-empted by Article 17 itself. Therefore, users' crossing of the non-commercial line would most likely trigger no duties on their side, with the exception of injunctions under Article 8(3) of the InfoSoc Directive. Of course, rightholders could avoid this by not blindly licensing their Article 17 right, irrespective of the nature of users' acts, by actually making such licenses dependent on their non-commercial nature.

⁴¹ In fact, a number of scholars in the past argued for similar solutions: C. Angelopoulos and J.P. Quintais, Fixing Copyright Reform: A Better Solution to Online Infringement, 10 (2019) JIPITEC 222; M. Leistner and A. Metzger, 'The EU Copyright Package: A Way Out of the Dilemma in Two Stages' (2017) 48 IIC 381; R. Hilty and A. Bauer, 'Use of Protected Content on Online Platforms' in R. Hilty and V. Moscon (eds), Modernisation of the EU Copyright Rules Position Statement of the Max Planck Institute for Innovation and Competition (Max Planck Institute for Innovation & Competition Research Paper No. 17-12, 18 September 2017) <<https://ssrn.com/abstract=3036787>>, 99-112.

⁴² The same is true for any acts of communication or making available to the public by service providers that do not qualify as OCSSPs.

⁴³ For an analysis of the admissibility of different authorization mechanisms that impose restriction on exclusivity in the context of International and EU law, see J.P. Quintais, Copyright in the Age of Online Access: Alternative Compensation Systems in EU Law (Kluwer Law International 2017).

The Member States could equally decide to create licensing schemes concerning Article 17, which are contingent upon the commercial/non-commercial nature of their users' exploitation. The merging of OCSSPs and users' exploitative acts is unavoidable also due to OCSSP's reliance on users' exceptions for their use, which are not subject to prior authorisation. In other words, they could split Article 17 licensing into pairs: (a) commercial exploitation by OCSSP and non-commercial exploitation by the user; and (b) commercial exploitation by OCSSP and commercial exploitation by the user. The latter scenarios would then incentivize licensing in the same way, and avoid some of the worrisome scenarios above. The benefit of such split is that it would also mitigate any objections against introduction of an obligation to license by means of statutory remuneration schemes for (a). So before we proceed to review authorization mechanisms available, let's first review the possible criticism against some of the points we made earlier.

3.4. Objections against changing the exclusive right nature of Article 17

It is arguable that some language in the DSM Directive favours an exclusive rights approach to Article 17 based on individual or collective licensing. This could be derived from: Article 17(1) stating that OCSSPs shall "obtain an authorisation from the rightholders"; the references to "granted" in Article 17(4); the notion that a "best efforts to obtain an authorisation" implies a possibility of rightholders to refuse a license; and the references to contractual freedom in the last sentence of Recital 61 (even considering that recitals are not dispositive).⁴⁴

These are meritorious objections. Despite that, as discussed above, we argue that Article 17(1) rather establishes who are the beneficiaries than emphasizes that licenses have to be consensual and never *ex lege*. Even if this provision denotes a preference for constructing the right as exclusive, that would not prevent the law from impose a set of exceptions and limitations thereto under interpretative options B2) and C) explained above at 3.1.

Hence even if it is accepted that Article 17 prescribes an exclusive right, this does not diminish the power of the conclusion that exceptions to it are unrestrained by the InfoSoc Directive's rules. Indeed, in these options, even the reference to "best efforts" does not preempt national legislators from prescribing *ex lege* which uses covered by Article 17 are permitted but remunerated. The clause simply assumes the legislator's choices were already made, in much the same way as it assumes certain choices with respect to other exceptions. No one would argue that those too are pre-empted by reference to "best efforts".

4. Authorisation Mechanisms for Content-Sharing Platforms

4.1. Starting points

Authorization is the first "avenue" offered to OCSSPs to avoid direct liability. What types of "authorization" are covered by Article 17? In theory, different types of are possible, most of them variations on the theme of licensing. When the DSM Directive was approved by a qualified majority Council in April 2019, six countries voted against. These countries issued a number of statements that either criticize the legislative text or lay out some interpretative guidelines for some of its controversial issues.⁴⁵ The Statement by the German Government is particularly important for our purposes, as it addressed possible authorisation mechanisms under Article 17. As noted in that statement, "in the

⁴⁴ Recital 61 states in the relevant part: "However, as contractual freedom should not be affected by those provisions, rightholders should not be obliged to give an authorisation or to conclude licensing agreements."

⁴⁵ Draft Directive Joint Statements April 2019 (n.____).

European compromise, licensing is the method chosen to achieve” the authorization goal under this provision.⁴⁶ It goes on to identify a number of possible legal mechanisms:

10. In order to resolve this issue – of how licences can, as far as possible, be concluded for all content on upload platforms – copyright law provides for many other mechanisms besides ‘traditional’ individual licensing (e.g. exceptions and limitations, possibly combined with remuneration rights; the option of converting exclusive rights into remuneration rights; the obligation to conclude contracts on reasonable terms; and the involvement of associations of creative artists such as collecting societies).

11. The Federal Government will examine all of these models. Should it appear that the implementation has led to a restriction of freedom of expression or should the guidelines set out above encounter obstacles in EU law, the Federal Government will work to ensure that the shortcomings identified in EU copyright law are corrected.

The options laid out by the German statement offer a catalogue of potential legal mechanisms to obtain the required authorisation under Article 17. Importantly, they include the option of turning the exclusive right into an exception or limitation, possibility subject to compensation, as well as the intriguing possibility of a standalone remuneration right.

The question of what types of authorisation mechanisms are possible depends on the legal qualification of the new right in Article 17, examined above.⁴⁷ To recap, we have identified three possible interpretative options regarding the nature of the Article 17 right:

- (a) It is a carve-out from the international minimum standard on communication and making available to the public in the WCT and WPPT;
- (b) It is a carve-out only from the EU extension on the international minimum standard, either as a sub-right of Article 3 of the InfoSoc Directive (Option B1) or as *lex specialis* (Option B2);
- (c) It is an extension on the EU extension, going beyond the current scope of Article 3 of the InfoSoc Directive.

Options A) and B) arguably mean that the new right is still included under the umbrella of Article 3 of the InfoSoc Directive, although in option B2) this is mitigated by a *lex specialis* status. Hence, only authorisation mechanisms under option A), and arguably option B1) should be subject to the same requirements as those applying to that InfoSoc Directive provision. If we follow options B2) (with *lex specialis* status) or C), then the outcome is significantly different, as national legislators would have a wider margin of discretion in implementing Article 17 of the DSM Directive and accompanying authorisation mechanisms. The menu of options advanced by the German statement clearly assumes that Article 17 is a special or sui generis right (in line with options B2) or C)), distinct from that of Article 3 of the InfoSoc Directive.

Using these considerations as a starting point, the remainder of this section runs through the available mechanisms to analyse options for the authorisation/licensing avenue when implementing Article 17 of the DSM Directive. Table 3 contains a simplified representation of the possibilities for OCSSPs and users across the interpretative options we have identified:

Table 3. Licensing Mechanisms and Interpretative Options

Licensing Mechanism	Option A	Option B	Option C
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⁴⁶ Id., Statement by Germany, para 10.

⁴⁷ See Section 3.

Direct licensing	OCSSP: YES Users: YES		
Voluntary collective licensing			
Collective licensing with extended effect	OCSSP: YES, subject to Article 12 DSM Directive Users: YES, subject to Article 12 DSM Directive		
Mandatory collective management	OCSSP: YES, subject to requirements of <i>Soulier</i> ⁴⁸ , the CRM Directive ⁴⁹ , and Article 12 DSM Directive (indirect) Users: subject to requirements of <i>Soulier</i> , the CRM Directive, and Article 12 DSM Directive (indirect)	B1 = A B2 = C	OCSSP: YES, subject to the requirements of the CRM Directive, and Article 12 DSM Directive (indirect; debatable) Users: YES, subject to requirements of <i>Soulier</i> (only commercial uses), the CRM Directive, and Article 12 DSM Directive (indirect)
Statutory licensing	OCSSP and Users: YES, subject to the international and EU three-step test (Articles 10 WCT, 16 WPPT, and 5(5) InfoSoc Directive.	B1=A B2=C	OCSSP: YES, but if managed by CMO see above. Users: YES, subject to Art. 5(5) InfoSocD; ⁵⁰ WCT&WPPT (commercial & non-commercial)
Hybrid licensing	Depends on the design		

At the outset, it is important to highlight two aspects that are transversal to much of the analysis below. The first refers to the *territorial* nature of right(s) to be authorized. Whichever authorization mechanism is used it shall apply on a country-by-country basis, unless it can leverage other legal provisions in the *acquis* that enable a pan-European effect. In the absence of a country-of-origin rule (as exists e.g. in the field of satellite broadcasting and ancillary online services of broadcasting organisations⁵¹), only the rules on multi-territorial licensing of musical works in the CRM Directive would enable such cross-border licensing. However, as we shall see, their usefulness in the present context is limited.

Second, since many of the authorisation mechanisms discussed rely on collective licensing, this begs the question of whether current CMOs have mandates that cover the specific right in Article 17 of the DSM Directive. This is by no means clear. Article 5(7) of the CRM Directive states that if a rights holder authorises a CMO to manage his rights, “he shall give consent specifically for each right or category

⁴⁸ Case C-301/15 - Soulier and Doke, 16 November 2016, ECLI:EU:C:2016:878.

⁴⁹ Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market [CRM Directive].

⁵⁰ However, Article 17 DSM Directive extends the list of possible exceptions with a situation when an exploitation by a non-commercial user are paid for by OCSSPs.

⁵¹ See: Article 1(2)(b) of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission; and Article 3 of Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC.

of rights or type of works and other subject-matter which he authorises the [CMO] to manage”, which “consent shall be evidenced in documentary form.”

If Article 17 of the DSM Directive is considered to be a new special or sui generis right (option C) and arguably B2)), then most CMOs would fail to meet this requirement, as they would need to obtain separate authorisations for such right. The situation is less clear if the right is considered under the concept of Article 3 of the InfoSoc Directive (option A) and B1). In that situation, if a CMO is already mandated to represent the Article 3 right, it could argue that its mandate already cover the Article 17 manifestation. It remains therefore open whether a CMO would be required to obtain a separate specific consent for administration of the Article 17 right, as required by Article 5(7) CRM Directive.

4.2. Direct license (to OCSSPs)

The default mechanism envisioned by Article 17 of the DSM Directive is the granting of a direct license of the exclusive right by the rightholder to the OCSSP. This is mentioned in paragraphs (1), (2) and (8). However, it is also clear that the provision leaves open the possibility of national laws recognising other types of authorisation. In this sense, Article 17(1), second subparagraph, mentions that OCSSPs must obtain the relevant authorisation “for instance by” concluding a licensing agreement.

Whether we are discussing the licensing of the exclusive right under Article 3 of the InfoSoc Directive or a new special or sui generis right does not appear to make a difference for this authorization mechanism. In either case the right in question would have to be specified in the license and – at least for authors and performers – be subject to appropriate and proportionate remuneration, pursuant to Article 18 of the DSM Directive.

OCSSPs should be able to make available content for which they have authorisation from their users. This refers to a contractual, non-contractual or statutory authorisation that applies to the initial user upload and covers by extension the subsequent act of making available by OCSSP.

Recital 69 (second part) addresses the situation where the user has an *explicit* authorization from the rightholder to upload and make available content on/to an OCSSP. This is for example the case where: (a) the user is the rightholder, his representative or commercial licensee with the required making available permission; (b) the work or subject matter is initially made available under an open access license that allows its subsequent making available to the public online, such as a Creative Commons license⁵²; or (c) the user’s upload is covered by statutory exceptions and limitations.

In these cases, the user authorization extends to the act of communication to the public by the OCSSP enabling the upload. Before Article 17, this was obvious. The OCSSP was (in most cases) qualified as an intermediary hosting service provider that did not communicate the protected content uploaded by their users to the public. With Article 17, because the OCSSP is now considered to be directly communicating to the public the work or subject matter, it is necessary to clarify that an explicit permission given to the user by a (third-party) rightholder, or a statutory authorisation resulting from an exception and limitation, extends its effect to the necessary communication to the public by the OCSSP.

In our view, these acts should in principle not be subject to the payment of remuneration or compensation by the OCSSP to rightholders, either as a part of a direct licensing agreement, or as part of a collective license. Still, we anticipate that it will be challenging to exclude such payments in practice, as it will not be easy to distinguish between previously authorised user uploads (unremunerated) and non-commercial user uploads covered by the authorisation obtained by the

⁵² See Creative Commons, About the Licenses, <https://creativecommons.org/licenses/>.

OCSSP (remunerated in principle). This is all the more so because Recital 69 further states that OCSSPs do not benefit from any legal presumption that their users have cleared all the relevant rights.

This dynamic plays out similarly when the initial upload is permitted by the operation of an exception or limitation – such as the mandatory exceptions in Article 17(7) of the DSM Directive – or an implied or implicit license.⁵³ In both cases the user authorisation would extend to the subsequent act by the OCSSP and should not be subject to additional remuneration or compensation.

4.3. Voluntary collective licensing, including multi-territorial licensing

In addition to direct licensing, the concept of authorisation under Article 17 of the DSM Directive surely includes voluntary forms of collective rights management. At EU level, CMOs offering voluntary collective licenses are subject to the rules of the Collective Rights Management (CRM) Directive. Those rules include a special regime for CMOs established in the Union managing authors' rights in musical works for online use on a multi-territorial basis. A "multi-territorial licence" (MTL) means a licence which covers the territory of more than one Member State.⁵⁴ General rules on collective licensing can be found in Article 16 of the CRM Directive. Particularly relevant is the fact that Article 16(2) applies to licenses between rights holders and start-up OCSSPs, i.e. those benefiting from the special regime in Article 17(6) of the DSM Directive.

There are two main issues with voluntary collective rights management models as viable authorization mechanisms for the uses covered by Article 17. The first relates to their (in)ability to provide pan-European licenses for such uses. The second relates to the representativeness of their catalogue, since they do not cover non-members.

There are two basic paths to obtain a pan-European voluntary collective license. The first is by obtaining a license from a CMO or an "independent management entity"⁵⁵ for the territory of the EU and for the catalogue they represent. The obvious issue here is that content uploaded by users that is outside that catalogue will remain unauthorised, thus making the OCSSP liable for communicating it to the public, unless it is established that the licenses it obtains are sufficient to meet the best efforts obligation under Article 17(4)(a) of the DSM Directive. Outside the online music sector, it is difficult to envisage this path as a workable solution. This is because most other content sectors do not have the same level of development of CMO structures across the territory of the EU, including the necessary representation agreements in place with CMOs in the EU and abroad.⁵⁶

The second path is to use the mechanism in Title III of the CRM Directive for MTL. The issue is that this mechanism applies only to online rights in *musical works*, meaning any of the rights of an author in a musical work provided for under Articles 2 and 3 of the InfoSoc Directive which, prior to the DSM

⁵³ There is no EU harmonization of the concept of implied license for copyright-protected content, despite some relevant mentions in the case-law. When interpreting the concept of communication to the public, the CJEU has stated in *Svensson and Soulier* that works freely available online can be linked to as a result of implied license or implicit consent. See: Case C-466/12 - *Svensson and Others*, 13 February 2014, ECLI:EU:C:2014:76, ## ; Case C-301/15 - *Soulier and Doke*, 16 November 2016, ECLI:EU:C:2016:878, ##. In *Spiegel Online*, the Court added that a work may be quoted by means of a hyperlink, if that work was previously legally made available to the public pursuant to inter alia a "non-contractual licence". See Case C-516/17 – *Spiegel Online*, 29 July 2019, ECLI:EU:C:2019:625, [95].)

⁵⁴ Article 3(m) CRM Directive.

⁵⁵ According to Article 3(b) CRM Directive an "independent management entity means any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which is: (i) neither owned nor controlled, directly or indirectly, wholly or in part, by rightholders; and (ii) organised on a for-profit basis."

⁵⁶ According to Article 3(m) CRM Directive a "representation agreement" means any agreement between CMOs whereby one CMO mandates another CMO to manage the rights it represents.

Directive, are required for the provision of an online service.⁵⁷ The mechanism does not apply otherwise, neither to the rights of related rights holders in phonograms nor to rights of any rights holders in other types of subject matter. The mechanism would also not apply to the right in Article 17 of the DSM Directive if we consider it to be a special or *sui generis* right (at least under what we term option C) above). The MTL mechanism is therefore of limited use to obtain a pan-European license in relation to Article 17. To sum up, as noted by Martin Senftleben, “a Pan-European license for UGC – covering a wide variety of works that may be uploaded by users – seems beyond reach.”⁵⁸

The second main issue with voluntary collective licensing relates to its inability to cover non-members. This is problematic to an extent. Obviously, it appears impossible to obtain a license from a CMO whose repertoire covers all content uploaded by users. There will always be uploaded content that is owned by rightholders that are not members of the licensor CMO(s). In sectors where it is possible to obtain a sufficiently representative collective license (catalogue-wise), the same might be sufficient to meet the “best efforts” requirement imposed on OCSSPs. The Member States could even create a legal fiction to this end when implementing Article 17(4)(a). In other cases, voluntary collective licensing will not be an adequate licensing mechanism in this field.

4.4. Collective licensing with extended effect: the Article 12 framework⁵⁹

One collective licensing mechanism that has received attention as a possible solution for types of use at issue here is that collective licensing with and *extended effect*.⁶⁰ The DSM Directive significantly harmonizes this collective licensing scheme in its Article 12,⁶¹ which envisages three different mechanisms that have the effect of extending the collective license to non-represented rights holders and their works in a certain territory: (a) extended collective licensing proper, (b) legal mandates; and (c) presumptions of representation.⁶²

Article 12 subjects collective licensing with and *extended effect* to a number of requirements: the licensing mechanism must be managed by a CMO, within well-defined areas of use, where direct licensing is too costly or impractical, and in a manner that “safeguards the legitimate interests” of rights holders.⁶³ The provision further sets out a number of safeguards that must be put in place for this mechanism to be valid: the CMO must be sufficiently representative; there must be equal treatment between represented and non-represented rights holders; non-represented rights holders must be able to opt-out of the system easily and effectively at any time; and CMOs have to comply with several information obligations towards rights holders.⁶⁴

⁵⁷ Article 3(n) CRM Directive.

⁵⁸ M. 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.

⁵⁹ Section taken and adapted from C Angelopoulos and JP Quintais, Fixing Copyright Reform: A Better Solution to Online Infringement, 10 (2019) JIPITEC 222, __, and JP Quintais, ‘The New Copyright in the Digital Single Market Directive: A Critical Look’ (24 July 2019) EIPR (forthcoming) <<http://dx.doi.org/10.2139/ssrn.3424770>>

⁶⁰ J.P. Quintais, ‘The New Copyright in the Digital Single Market Directive: A Critical Look’ (24 July 2019) EIPR (forthcoming) <<http://dx.doi.org/10.2139/ssrn.3424770>>.

⁶¹ Prior to the DSM Directive, it was possible to find specific references to extended collective licensing in Art. 3(2)–(4) Satellite and Cable Directive, as well as in Recitals 18 InfoSoc Directive, 24 Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, and 12 CRM Directive. In addition, several Member States contain provisions of this type in their national laws, especially the Nordic countries. See also Recital 44 DSM Directive.

⁶² Article 12(1)(b) DSM Directive.

⁶³ Article 12(2) and Recitals 45-47, and 49 DSM Directive. The definition of CMO is found in Art. 3(a) CRM Directive.

⁶⁴ Article 12(3) DSM Directive.

As argued elsewhere in relation to extended collective licensing proper, mechanisms of collective licensing with extended effect should not be qualified as exceptions or limitations.⁶⁵ 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.⁶⁶ 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.⁶⁷

In the context of the DSM Directive, the mechanism of Article 12 has been viewed as a possible option to obtain the necessary authorizations for OCSSPs required by Article 17. The mechanism is particularly promising as it addressed some of the shortcomings mentioned above in relation to voluntary collective licensing, namely the representation of non-members. However, despite its promise, there are some significant challenges associated with its application in the present context.⁶⁸

First, Article 12 does not create a framework for pan-European licensing, but only for *voluntary* territorial collective licenses. In this sense, the same criticism set forth in the previous section 4.3 applies here *mutatis mutandis*. Second, Article 12 sets out a number of requirements that will be challenging for CMOs in many Member States to meet in the short and medium-term, such as that of representativeness. Even for Member States where some CMOs in some fields meet the requirements (e.g. online music), other CMOs in other fields will not (e.g. visual arts). The result is the co-existence of extended collective licenses in some Member States (of part thereof) with a system of individual or limited voluntary collective licensing for platforms in other Member States, leading to a fragmented EU landscape.⁶⁹

4.5. Mandatory Collective Management

Mandatory collective management is the strictest form of collective rights management. It prevents rights holders from directly exploiting their works, imposing by operation of law the transfer or assignment of the *exercise* of rights to a CMO, which will act on their behalf.⁷⁰ This mechanism is distinguishable from that in Article 12 of the DSM Directive in that it applies automatically without the need to meet a representativeness requirement and without an opt-out safeguard. In theory, mandatory collective management can apply to the regulation of exclusive rights or rights of remuneration/fair compensation. In the first and most common case, also called sometimes “obligatory” collective management, the mechanism will operate in tandem with a statutory license where the rights holders have a *de facto* or *de iure* obligation to administer the right through a CMO.

⁶⁵ One of us has argued elsewhere before that such a qualification should not attach to ECL with opt-out. See J.P. Quintais, *Copyright in the Age of Online Access: Alternative Compensation Systems in EU Law* (Kluwer Law International 2017), 110–111 (and references cited therein); See also J. Axhamn and L. 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 J. Axhamn, “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.

⁶⁶ See, in this respect, J.P. Quintais, *Copyright in the Age of Online Access: Alternative Compensation Systems in EU Law* (Kluwer Law International 2017).

⁶⁷ See Article 12(4) and Recital 46 DSM Directive.

⁶⁸ J.P. Quintais, ‘The New Copyright in the Digital Single Market Directive: A Critical Look’ (24 July 2019) EIPR (forthcoming) <http://dx.doi.org/10.2139/ssrn.3424770>

⁶⁹ See, similarly, C. Angelopoulos and J.P. Quintais, *Fixing Copyright Reform: A Better Solution to Online Infringement*, 10 (2019) JIPITEC 222, 214-239, and J.P. Quintais, ‘The New Copyright in the Digital Single Market Directive: A Critical Look’ (24 July 2019) EIPR (forthcoming) <http://dx.doi.org/10.2139/ssrn.3424770>.

⁷⁰ J.P. Quintais, *Copyright in the Age of Online Access: Alternative Compensation Systems in EU Law* (Kluwer Law International 2017), p. 113.

In the second and rarer case, the law requires the collective administration of exclusive rights.⁷¹ Arguably, there are examples of both cases in the *acquis*.⁷²

A discussion of the legal nature of this mechanism, in particular its possible qualification as an exception or limitation to copyright, is beyond the scope of this paper.⁷³ In any case, in its *Soulier* judgment, the CJEU appears to have significantly restricted the margin of discretion of national laws to adopt this collective licensing mechanism for exclusive rights in the *InfoSoc Directive*.⁷⁴ If we consider the right in Article 17 of the DSM Directive to be placed under the umbrella of Article 3 of the InfoSoc Directive – as in options A) or B1) above – then there is little room for mandatory collective management of the right, especially in a post-*Soulier* world. In this scenario, the imposition of mandatory collective management will likely be considered as equivalent to the introduction of an exception and limitation to the respective right of communication to the public, subject to the three-step test in the terms described above. Given the current strict interpretation doctrine for exceptions and limitations followed by the CJEU, it would be unlikely that such a mechanism would pass that test.

The opposite is true if we consider Article 17 to be a special or sui generis right, as in options B2) and C) above. In that case, the national legislator does not appear to be constricted by the three-step test, and could theoretically enact national legislation in this direction. Because this is a collective rights management mechanism, it would be subject to the rules in the CRM Directive and (arguably) to some of the requirements and safeguards applicable to extended collective licensing in Article 12 of the CRM Directive, provided these respect the structural differences between types of collective licensing mechanisms. For instance, it would make sense to apply the equal treatment and publicity obligations, but not the requirements relating to representativeness or opt-out.

4.6. Statutory Licenses

The concept of statutory licenses refers to a legal mechanism that restricts the nature of an exclusive right by replacing it with a compensated or remunerated exception or limitation. In this case, that would mean transforming the Article 17 exclusive right, or part thereof, into an exception or limitation

As with mandatory collective management, however, this possibility seems difficult to contemplate should the right in Article 17 of the DSM Directive be subsumed in Article 3 of the InfoSoc Directive, as in options A) and B1) above. That would require passing the three-step test, which would prove difficult. If it is accepted that Article 17 prescribes a special or sui generis right, then we must also accept that national lawmakers have freedom to implement this provision through a compensated or remunerated exception.

As argued elsewhere, the choice of the remunerative concept that attaches to such right is not irrelevant.⁷⁵ Three options emerge for national lawmakers that adopt this authorisation mechanism: (a) equitable remuneration; (b) fair compensation; and (c) appropriate and proportionate remuneration.

⁷¹ Id.

⁷² See, e.g., the regimes applicable to: the exclusive right of cable retransmission (Articles 9-12 Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission); the equitable remuneration right for rental (Art. 5 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); and the artists' resale right (Art 6(2) Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art).

⁷³ See, on that point, JP Quintais, Copyright in the Age of Online Access: Alternative Compensation Systems in EU Law (Kluwer Law International 2017), 118-124.

⁷⁴ Id., 123-124.

⁷⁵ JP Quintais, Copyright in the Age of Online Access: Alternative Compensation Systems in EU Law (Kluwer Law International 2017)..

(a) Equitable Remuneration

Equitable remuneration rights are commonly tied to compulsory licences for uses or forms of exploitation of works not previously covered by an exclusive right.⁷⁶ In the EU *acquis*, there exists a right for an unwaivable and equitable remuneration for rental, an optional right of remuneration for public lending, and rights for a single equitable remuneration for broadcasting and communication to the public.⁷⁷ The CJEU interprets the concept of equitable remuneration as based on the “value of the use in trade” and following a logic of balance between competing interests.⁷⁸

(b) Fair Compensation

Since the InfoSoc Directive the concept of equitable remuneration has mostly been replaced by that of “fair compensation”. In the *acquis*, this applies to reprographic reproductions, private copying, reproductions of broadcasts by non-commercial social institutions, and for use of orphan works by specific organizations.⁷⁹ Fair compensation is based on the concept of harm, derived from Recital 36 of the InfoSoc Directive. It is an autonomous concept of EU law, which has been subject to interpretation by the CJEU in a number of judgments.⁸⁰

(c) Appropriate and proportionate remuneration

Finally, Article 18 of the DSM Directive sets out a principle of appropriate and proportionate remuneration for authors and performers that license their works/subject matter.⁸¹ The provision leaves Member States discretion on which mechanism to choose when implementing the principle, subject to conformity with EU law. In theory, since the acts of OCSSPs covered by the Article 17 right are commercial, it would not be inconsistent to apply the concept of appropriate and proportionate remuneration to the exception that replaces that right.

Whichever concept the Member States chose, two key aspects must be safeguarded. First, for this mechanism to benefit individual creators – authors and performers – it must be ensured that the underlying right of remuneration is unwaivable. Second, the calculation of such remuneration or compensation must exclude any acts covered by the mandatory exceptions in Article 17(7), other applicable uncompensated exceptions (e.g. incidental inclusion in Article 5(3)(i) of the InfoSoc Directive) as well as those uploads for which there is prior explicit or implicit authorisation.⁸²

Such a statutory license would naturally have to consider other aspects, as would indeed any type of collective license applied on a territorial basis that is meant to be mirrored in all Member States. These include the calculation of the remuneration in accordance with the remunerative concept chosen, the

⁷⁶ Examples at the international level are the equitable remuneration rights for the broadcasting of works and for “secondary uses” of phonograms. See Art. 11*bis* Berne Convention for the Protection of Literary and Artistic Works, July 14, 1967, 11850 U.N.T.S. 828, and Art. 12 Rome Convention.

⁷⁷ Arts 5, 6 and 8(2) Rental and Lending Rights Directive.

⁷⁸ See, on Art. 8(2) Rental Right Directive, Case C-245/00, *Sena* (6 February 2003) ECLI:EU:C:2003:68, [36]–[37]; Case C-192/04, *Lagardère Active Broadcast* (14 July 2005) ECLI:EU:C:2005:475, [50].

⁷⁹ See, respectively, Arts 5(2)(a), (b) and (e) InfoSoc Directive and Art. 6(5) Orphan Works Directive.

⁸⁰ For an overview of this case law, see e.g. A. Dias Pereira, ‘Levies in EU Copyright Law: an Overview of the CJEU’s Judgments on the Fair Compensation of Private Copying and Reprography’ (2017) 12(7) J. Intell. Prop. L. & Practice 591.

⁸¹ Recital 73 DSM Directive clarifies that a lump sum payment can constitute proportionate remuneration “but it should not be the rule”.

⁸² See above at ___.

collection and distribution of rights revenues (under the supervision of one or several CMOs), and other practicalities.⁸³

Whichever the remunerative concept use, there is one obvious advantage for national lawmakers in choosing statutory licensing as an authorisation mechanism. This mechanism provides the most effective means to enable the functioning of OCSSPs and safeguarding user rights. It limits the possibilities for deployment of the preventive measures in Article 17(4)(b) and (c) (which would not be available in any instance of “non-commercial” use), thereby ensuring or better enabling compliance with the ban on general monitoring in Article 17(8). This approach would mean that OCSSPs incur in less of a liability risk for providing their services, and would therefore have less of an incentive to geo-block certain Member States. In addition, they could make automation much more scalable, because the defining factor would not be case-by-case assessment of social relevance, but observable commercial and non-commercial character of use. If correctly deployed, such a mechanism could also secure a steady revenue stream for rights holders, especially authors and performers.

The obvious limitation of such approach is that it does encompass exploitative acts of users, which go beyond non-commercial activities. These would not be covered by a derivative license based on Article 17 of the DSM Directive and remain subject to contractual freedom. Naturally, the Member States might decide to facilitate such licensing too, however, by other means subject to the rules in the InfoSoc Directive.

4.7. Hybrid licensing: remuneration right with opt-out safeguard

Another potential option available to the Member States is to combine key components of the above licensing mechanisms. A particular interesting combination is to implement the right in Article 17 as a right to (appropriate and fair) remuneration, with an opt-out safeguard.

A precedent to this mechanism already exists in Article 8 of the DSM Directive for out-of-commerce works/subject matter in the permanent collections of cultural heritage institutions on the basis of non-exclusive licences for non-commercial purposes. The provision includes a *fall-back exception* for these institutions to make available such works/subject matter, for non-commercial purposes, subject to certain conditions and exclusions.⁸⁴ In a legal innovation, rights holders are allowed to opt out – in general or in specific cases – not only from collective management *but also* from the exception.⁸⁵

4.8 Impact of User’s exploitation on licensing schemes

Table 3, introduced in Section 4.1, summarizes how user’s exploitation acts are constrained when it comes to different licensing schemes discussed above. With exception of Article 17(2), which has impact for non-commercial uses of users, the regulatory scheme essentially falls back on the existing EU law and International law. The most important caveat was already discussed in Section 3.3, namely that the DSM Directive forces merging of exploitative acts under some circumstances for the uses covered by exceptions and non-commercial uses (if a license is taken by OCSSP).

5. Safeguarding user’s rights

⁸³ For a consideration of these aspects in the context in the context of a statutory licensing scheme for non-commercial use in EU copyright law, see JP Quintais, Copyright in the Age of Online Access: Alternative Compensation Systems in EU Law (Kluwer Law International 2017), ___.

⁸⁴ See Article 8(2) DSM Directive. The exception is a fall-back since it only applies to the extent the conditions for collective management of OOC works are not met, e.g. because the relevant CMO is not sufficiently representative. See also Article 8(3) and Recital 32 DSM Directive.

⁸⁵ Article 8(4) and Recital 35 DSM Directive.

The DSM Directive includes a number of safeguards. Since these are often intertwined with licensing mechanisms, we briefly point out the most important aspects in the following.

5.1. Mitigation Measures for Users

Article 17(7) includes mitigation measures in case the preventive obligations in paragraph (4) apply. The text includes a general and specific clause, which should be examined separately.

The general clause is contained in the first sub-paragraph. This states that the obligations in 4(b) and (c) should not prevent that content uploaded by users is available in an OCSSP if such upload is not copyright infringing, including the cases where such uploads are covered by an exception and limitation. This should be read in combination with the statement in Article 17(9) to the effect that the DSM Directive “shall in no way affect legitimate uses, such as uses under exceptions or limitations provided for in Union law”. In this respect, Recital 70 emphasizes the need for the preventive obligations to be implemented without prejudice to the application of exceptions, “in particular those that guarantee the freedom of expression of users”.

It is possible to envisage the following categories of uploaded material that does not infringe copyright and related rights: (a) the material is in the public domain; (b) the material is subject to an express or implied license; (c) the material is covered by exception or limitation (c1) based on Article 17(7), or (c2) based on Article 5 of the InfoSoc Directive, if implemented by the national law (e.g. incidental use exception). In the situations of conflict between Article 17(7) DSM Directive and Article 5 InfoSoc Directive, the former overrides the latter due to *lex posterior specialis derogat legi priori generali*.

Article 17(7) includes a special regime for certain exceptions or limitations. It states that “Member States shall ensure that users” of OCSSPs, when uploading or making available content, “are able to rely” on the following exceptions: (a) quotation, criticism, review; (b) use for the purpose of caricature, parody or pastiche. Previously, these were *optional* exceptions in Articles 5(3)(d) and (k) InfoSoc Directive. Under that regime, the exceptions could be overridden by contract and the application of technological protection measures.⁸⁶ They have not been implemented in all Member States and, where they have, the implementations differ.⁸⁷ The DSM Directive follows a different approach.

Recital 70 (first subparagraph) explicitly recognizes that the exceptions at stake are particularly important to strike a balance under the EU Charter of Fundamental Rights between intellectual property (Article 17(2)) and two fundamental freedoms in particular: freedom of expression (Article 11) and freedom of the arts (Article 13). The legislator thus recognizes a reinforced protection for these exceptions due to their fundamental rights basis. Moreover, there is a change in legal qualification, as the exceptions become *mandatory*. This is clear from the text of the provision – “shall ensure” – and from Recital 70 (first subparagraph), which states that such exceptions “should, therefore, be made mandatory in order to ensure that users receive uniform protection across the Union.” However, even this interpretation offers variants, which can influence licensing. Three possibilities emerge:

- (a) The exceptions become mandatory for all types of use they cover, both online and offline.
- (b) The exceptions become mandatory for the acts of uploading/making available in OCSSPs;
- (c) The exceptions become mandatory for the specific uses they cover only for those Member States that chose to implement the optional “mother” exceptions in the InfoSoc Directive.

In our view, reading (b) is the most logical. Both paragraph (7) and Recital 70 refer to online use in OCSSPs, making option (a) less viable. On the other hand, option (c) is hardly convincing. Although the provision talks about “existing” exceptions, opening the door to consider these applicable only if

⁸⁶ See Recital ___ and Article 6(4) InfoSoc Directive.

⁸⁷ See <https://copyrightexceptions.eu> .

Member States had previously implemented the optional version in the InfoSoc Directive, this would be contrary to the stated goal of harmonization, the stated purpose of the provision, and the explicit reference in Recital 70 (first subparagraph) to application “across the Union”.

To the extent the exceptions become mandatory, there is a good argument that they are akin to *user rights* or *freedoms*, as it is arguable that they can no longer be subject to derogation by contract or technological protection measures, as that would defeat their purpose. This is underscored also by Article 17(9), (fourth subparagraph), which states that OCSSPs shall inform their users in their terms and conditions that they can use works and other subject matter under exceptions or limitations to copyright recognized in EU law.

5.2. Information Obligations of OCSSPs

Article 17(8) states that OCSSPs must provide to *rightholders* two types of information. First, “adequate information” on the functioning of the preventive and other measures in paragraph (4)(b) and (c). Second, if there is a licensing agreement in place, “information on the use of content covered by the agreements”. These obligations are not subject to qualifying factors, as mentioned e.g. in paragraphs (5) and (6). Arguably, the principle of proportionality would imply that information obligations must differ depending on the size, age, revenue and audience of the platform. In other words, the information obligations should be adjusted along the same lines as the best efforts obligations in paragraph (4).

Further guidance on these obligations is provided in Recital 68. First, OCSSPs should provide “adequate information on the type of actions undertaken and the way in which they are undertaken”. Second, the information is “adequate” if it is “sufficiently specific to provide enough transparency to rightholders, without affecting business secrets” of OCSSPs. That is to say, the limit to the disclosure of specific information is its qualification as a trade secret.⁸⁸ Third, OCSSPs should “not be required to provide rightholders with detailed and individualised information for each work or other subject matter identified”. The only exception to this is where the OCSSP and the rightholder a contractual arrangement that contains “more specific provisions on the information to be provided”.

All of these information obligations apply only vis-à-vis rightholders. The Member States have room to consider extending these obligations to users and the public. This would be one of the ways how to satisfy and meaningfully extend the obligation in Article 17(10) *in fine* to provide “users’ organisations” with “access to adequate information from online content-sharing service providers on the functioning of their practices’ for ‘the purpose of the stakeholder dialogues”.

5.3. Redress Mechanisms and Licensing

OCSSPs must implement complaint and redress mechanisms for users in the event of disputes over the disabling of access to, or the removal of, uploaded content.⁸⁹ One if not the main justification for putting in place such an “effective” system is to support the use of the mandatory exceptions and limitations in paragraph (7) and ensure the uniform protection of users across the EU.⁹⁰ However, the disputes that are also likely arise concern user’s commercial or non-commercial use of the platforms (see Section 3.2), as crossing that “commerciality” line can make users’ acts infringing.

⁸⁸ The definition of “trade secret” can be found in Article 2(1) of Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

⁸⁹ Article 17(9), first subparagraph DSM Directive.

⁹⁰ See Recital 70, first subparagraph, last sentence DSM Directive.

These mechanisms entail obligations for rightholders and OCSSPs. On the one hand, copyright-holders that request the disabling or removal of content they own, must “duly justify” their requests.⁹¹ On the other hand, OCSSPs that administer such a mechanism must: (a) process submitted complaints “without undue delay”; and (b) subject decisions to disable or remove content to human review (i.e. include a “human in the loop”). In addition, Member States must make available impartial out-of-court dispute settlement mechanisms, which mechanisms must not hinder users’ ability to seek judicial redress, in particular with a view to assert the use/benefit of an exception.⁹² The manoeuvring space for the Member States is very broad here. The crucial question for these alternative dispute resolution schemes is how they will operate and who bears the costs.⁹³

6. Conclusion

After conceptualizing and reviewing different interpretative options, we conclude that Article of the 17 DSM Directive is a *special* or *sui generis right*, outside of the InfoSoc Directive framework. The new right goes beyond the minimum standard required by International law, operating in the layer of European experimentation. Whether this right is seen as a carve-out from the concept of communication to the public in Article 3 of the InfoSoc Directive as shaped by existing CJEU case law, or instead a wholly new right going beyond that case-law, will be ultimately determined in pending preliminary references.⁹⁴ However, at this point in time and on the basis of existing case-law, the latter option is the most convincing. While the categorisation we propose might seem theoretical, it has significant practical consequences, including for licensing agreements and representation mandates of CMOs. Most importantly, our review of the constraints imposed by EU and International law comes to the conclusion that Member States implementing Article 17 have a *broad margin of discretion* when designing the corresponding licensing regimes. One of our counter-intuitive conclusions is that traditionally strong *legal* arguments against the admissibility of authorisation schemes relying on statutory licensing and mandatory collective are weaker in relation to this new right. As a result, it is likely that Member States have greater leeway in national implementations.

⁹¹ Article 17(9), second subparagraph DSM Directive.

⁹² Article 17(9), second subparagraph, DSM Directive states that Member States shall ensure out-of-court redress mechanisms for settlement of disputes. This is therefore an obligation for Member States. These mechanisms shall: (a) enable disputes to be settled impartially; (b) not deprive the user of the legal protection afforded by national law, without prejudice to the rights of users to have recourse to efficient judicial remedies; (c) allow that “users have access to a court or another relevant judicial authority to assert the use of an exception or limitation”.

⁹³ See for a particular design of such mechanism, which was tested empirically: L. Fiala and M. Husovec, Using Experimental Evidence to Design Optimal Notice and Takedown Process (2018) TILEC Discussion Paper No. 2018-028, available at <<https://ssrn.com/abstract=3218286>>

⁹⁴ See supra n. 33.