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Too Small to Matter? On the Copyright Directive's Bias in Favour of Big Right-Holders

Martin Husovec and João Pedro Quintais

1. Introduction

Copyright law is about recognising the author's material and non-material interests and setting the incentives for creativity correctly. The legislative changes in this area increasingly look as if simple linearity governs the world: what we take away from some, we automatically give away in equal part to others. The idea of redistribution is noticeable in recent legislative developments. Art 17 of the Copyright in the Digital Single Market Directive (DSM Directive)¹ is the latest policy intervention to prove this point. According to its logic, imposing stricter liability on some online gatekeepers will automatically improve the position and revenues for all right-holders. This chapter explores the flaws in such an approach by highlighting how the excessive focus of Art 17 on big right-holders neglects and harms smaller creators.

EU copyright law often uses a technical term, 'right-holders', to refer to a wide range of players with legal entitlements in the copyright ecosystem: authors, performers, phonogram producers, film producers, broadcasting organisations, and (most recently) press publishers. Obviously, not all right-holders are created equal and their legal entitlements do not flow from identical normative justifications.² We argue in this chapter that even the use of this seemingly neutral term can, due to the design of underlying legal solutions, lead to stark inequality between right-holders. Our broader goal is to demonstrate that maximising enforcement by means of Art 17 of the DSM Directive does not simply maximise the position of every right-holder at the expense of platforms but does so disproportionately for big right-holders.³ Besides, we show that blind use of the 'right-holder' and 'user' distinction harms the very creators that the provision is supposed to protect.

According to Art 17 of the DSM Directive, services such as YouTube should primarily license the content which their users might upload on the service. Since such licenses are not always realistic or available, in the remaining circumstances, providers⁴ have to impose

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 and amending Directives 96/9/EC and 2001/29/EC (DSM Directive) [2019] OJ L130 (hereafter DSM Directive).

² For different justifications, see P Bernt Hugenholtz, 'Neighbouring Rights are Obsolete' (2019) 50 International Review of Intellectual Property and Competition Law 1006.

³ For the purposes of this chapter, we consider all 'common suspects' of a potential licensing obligation under Art 17 DSM Directive to qualify as what we term 'big right-holders'. This is because they are large enough to be presumptively representative for a particular type of content on a service. They will also often take the role of 'trusted flaggers' in their interaction with large-scaler service providers targeted by Art 17. See (n 26).

⁴ For the sake of readability, we use the terms 'provider' and 'platform' interchangeably in this chapter.

preventive measures (such as filters) or, at very least, prevent the reappearance of content which they are notified about, as long as certain conditions are met. This latter system, dubbed *notice and staydown*, thus requires proactive automated tools to be used to avoid the reappearance of the same content where it is not licensed.⁵

Because no model can simply mandate licensing without abandoning exclusivity, Art 17 oscillates between copyright enforcement and licensing. Like a parent of squabbling toddlers, it tries to appease both children at the time. This is not an easy task, especially because it fails to account for the significant differences between the interests of various groups of right-holders, including the variations in their organisation on the market and the very organisation of their markets. The legislator's hope, therefore, is to create a tool which can accommodate all these scenarios, without giving preference to one. However, as we show, this legal design has consequences. Art 17, if implemented as laid down in the DSM Directive, contains an inherent bias towards large right-holders, whose interests are often antagonistic to those of small creators.

The chapter proceeds as follows. After this introduction, Section 2 shows how the enforcement landscape has changed from private ordering operating on top of the legal framework to the legislative cementing of such schemes in the DSM Directive. We outline why the legislative adoption of this type of private ordering leads to the favouring of one group of right-holders in the Directive's design. Section 3 then explores the biases embedded in Art 17's licensing mechanism. We demonstrate how they favour big right-holders and harm smaller creators. Section 4 looks into similar biases in Art 17's preventive duties. We conclude that, despite the existence of some safeguards, the biases in the rules on licensing and preventive duties, together with the incentives they place on service provider's platforms, favour big right-holders and harm smaller online user-creators. In Section 5, we assess whether different sets of rights of smaller online user-creators in the new regime can compensate for this lack of balance. In our view, without further action from national legislators, they will not. Section 6 then argues that only a careful implementation of the DSM Directive at the national level can effectively avoid violating the EU's principle of equal treatment. We contend that if national governments do not proactively address unequal treatment of small creators (eg through collective licensing solutions), their national implementations might violate EU law. Section 7 concludes.

2. From Private Ordering to Governmental Favouring

Until recently, online copyright enforcement was a job for two groups—right-holders and providers of online services. While right-holders had to find and notify infringing content, providers had to assess their notifications and take the content down where necessary.⁶ In

⁵ Art 17(4)(b) and (c) DSM Directive (n 1).

⁶ This regime results from the combined application of rules on direct liability for copyright infringement (in the InfoSoc Directive), with partially harmonised rules on liability exemptions for intermediaries (in the E-Commerce Directive), with rules on injunctions against intermediaries for illegal content placed on their platforms by users (in the InfoSoc and Enforcement Directives). See 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 (Information Society Directive, InfoSoc Directive) [2001] OJ L167 (hereafter InfoSoc 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 (E-Commerce Directive) [2000] OJ L171 (hereafter E-Commerce Directive); Directive 2004/48/EC of the European Parliament and of the

the shadow of this legal framework, the firms and right-holders often implemented additional private ordering enforcement solutions. These solutions were beneficial for society as a whole and for each group. From a societal perspective, they meant that providers increased their accountability for their users' content; with size, they assumed more responsibility. From the perspective of right-holders and providers, such agreements were very useful, as they traded benefits and inconveniences between private actors.⁷ They were also often mutually beneficial since each side gained something in the process.

For instance, when YouTube launched its Content ID system,⁸ its benefit was to minimise the cost of processing notifications and keep some videos on the services in exchange for the advertising profit. The right-holders would obtain imperfect personalised pre-screening of all videos by YouTube, and a share of the profits from videos which they decided to keep on the service through a 'monetisation' option. As the data shows,⁹ most of the videos subject to flagging or notifications ended up being monetised. While the system constituted an improvement for both sides, that does not mean that the arrangement equally benefited other affected parties.

Maximising the welfare of two sides of an agreement does not necessarily lead to maximising the welfare of everyone involved. As a case in point, creators who were active on the service discovered that their advertising revenue was sometimes claimed by other right-holders. Although these right-holders' claims were sometimes legitimate, in other cases they might have misrepresented their rights, for instance where the use of their materials in the uploaded content was permitted by an exception or limitation.¹⁰ The fact that any decision-making was vested with the right-holder using the Content ID system meant that any impression of actual disputes between parties was just that—an impression. According to its rules, YouTube would not intervene.¹¹ The creators on the platform are invited to dispute the actions of their opponents, while these opponents remain arbiters of the dispute. Another factor to take into consideration are copyright strikes policies. According to these, a copyright owner submits a valid legal takedown request regarding third party uploaded materials using their protected content. As a result, such content is taken down to 'comply with copyright law', amounting to a 'strike' against the uploading user. A certain number of strikes, for instance three in YouTube's Content ID system, might cost uploading users their

Council of 29 April 2004 on the enforcement of intellectual property rights (Enforcement Directive) [2004] OJ L157 (hereafter Enforcement Directive).

⁷ Martin Husovec, 'Accountable, Not Liable: Injunctions Against Intermediaries' (2016) TILEC Discussion Paper No 2016-012, 59 ff.

⁸ See for the discussion of the Content ID systems: Henning Grosse Ruse-Khan, 'Automated Copyright Enforcement Online: From Blocking to Monetization of User-Generated Content' in Niklas Bruun and others (eds), *Transition and Coherence in Intellectual Property Law* (Cambridge University Press 2021) (forthcoming) cited from the pre-print available at <<https://ssrn.com/abstract=3565071>> accessed 14 October 2020 (hereafter Grosse Ruse-Khan, 'Automated Copyright Enforcement'); Matthew Sag, 'Internet Safe Harbors and the Transformation of Copyright Law' (2017) 93(2) *Notre Dame Law Review* 518.

⁹ See Robert Kyncl, 'Why creators should care about European copyright rules' (*YouTube*, 4 September 2018) <<https://blog.youtube/news-and-events/why-creators-should-care-about-european>> accessed 14 October 2020 (claiming the number to be over 90 per cent).

¹⁰ Grosse Ruse-Khan, 'Automated Copyright Enforcement' (n 8) 5.

¹¹ See Google, YouTube Help, Policy, Safety and Copyright, 'Dispute a Content ID Claim' <<https://support.google.com/youtube/answer/2797454?hl=en-GB>> accessed 16 October 2020.

entire virtual alter egos and associated following.¹² As a result, copyright strikes policies meant that any creators on the platforms were afraid of picking too many fights.¹³

Despite all these flaws, the EU legislature decided to cement this voluntary scheme into the law. The move ignored the above problems but also the wider context. Providers like YouTube often wanted to vertically integrate from a general user-generated content website to a specialised music streaming website. They frequently regarded these tools and systems, which kept right-holders somewhat happy, as a competitive advantage on the market. The exorbitant cost of developing the tools could be indirectly passed on competitors by setting a benchmark. When smaller companies like SoundCloud faced the same right-holders, they would receive demands to use similar tools and systems to those of bigger players. Irrespective of the initial intentions, the legislative endorsement of these private ordering schemes would be likely to increase the expected level of protection across the industry, to the benefit of those who possessed such tools.

Art 17 of the DSM Directive crystallises systems like Content ID. In fact, companies like YouTube are probably best positioned to internalise the law. Others will have to develop their own tools or hope that market providers will make available affordable solutions.¹⁴ In either case, competitors who have never used such technologies will need to match the level previously achieved by big players, which translates into a competitive disadvantage for smaller providers.¹⁵ Because the law had to be made operational in the context of direct liability schemes, which ended up being the preferred legislative option, it also had to make concessions to proportionality; otherwise, it risked imposing absolute liability for third party content on the targeted providers. As a direct consequence of this concession, we argue, the law threw a group of right-holders—small right-holders—under the proverbial bus.

The DSM Directive changes the previous cooperative reactive model into a more proactive model, under which right-holders have a more limited role. They need to issue notifications once, provide some relevant information, and then watch to have their rights enforced for them by user-upload platforms, which are now termed ‘online-content sharing service providers’ (OCSSPs).¹⁶ If they wish, right-holders can license their content to OCSSPs, by which they also authorise some forms of predominantly non-commercial exploitation by users, who are actually the source of the uploaded material.¹⁷ In general terms, the law undoubtedly improved the bargaining position of right-holders vis-à-vis providers. However, at the same time, the law gives preferential treatment to big right-holders. The

¹² *ibid.* As a penalty for receiving three copyright strikes, YouTube’s copyright strikes policy sets out the following: possible termination of a user’s account, along with any associated channels; removal of all videos uploaded to a user’s account; prohibition of creating new channels.

¹³ See Google, YouTube Help, Policy, Safety and Copyright, ‘Copyright Strike Basics’ <<https://support.google.com/youtube/answer/2814000>> accessed 16 October 2020.

¹⁴ A third option would be for such big players to license their tools and systems to smaller providers, which would open up a new licensing market for them. But that appears unlikely for obvious reasons.

¹⁵ See generally on the topic Thomas Spoerri, ‘On Upload-Filters and other Competitive Advantages for Big Tech Companies under Article 17 of the Directive on Copyright in the Digital Single Market’ 10 (2019) *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 173, para 1.

¹⁶ Art 2(6) DSM Directive (n 1).

¹⁷ Art 17(2) DSM Directive (n 1) states that the authorisation obtained by OCSSPs ‘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’. For simplicity, in this chapter, we refer to this authorisation extension to users as applying to their ‘non-commercial’ acts.

consequence is that, although small right-holders have gained something, Art 17 puts them at a comparative disadvantage by comparison with large right-holders.

3. Licensing at the Expense of Small Creators?

3.1 Why Licensing Works Better for Big Players

The basic idea of Art 17 of the DSM Directive is that it encourages parties to arrange a licence for online exploitation. Since licensing everything that any user might potentially upload upfront is hardly possible, the law limits it only to a ‘best efforts’ obligation in Art 17(4) (a). This essentially translates into an obligation on OCSSPs to proactively negotiate with common suspects, given the content associated with the service.¹⁸

For instance, the European Copyright Society (ECS) suggests the following calibration of the ‘best efforts’ obligation, to be carried out on a case-by-case basis. For obvious materials, OCSSPs must contact the publicly known right-holders and ‘offer serious negotiations on licensing terms’; for ‘non-obvious protected materials or right-holders’, OCSSP could ‘remain passive’ until they receive notice from right-holders (including collective rights management organisations or CMOs), upon which they must ‘react immediately’.¹⁹ Publicly known right-holders for obvious protected material would surely include commercially successful sound recordings and films owned by music majors, big film studios, or streaming giants. But, as we move down the obviousness ladder, the assessment gets trickier. In this respect, the ECS adds, ‘if the rights are held by small or medium-sized companies or by individual authors without a collective representation, “best efforts” should not require extensive monitoring and search activities’; a reactive approach should suffice.²⁰

However, the idea of common suspects clearly favours one type of right-holder; namely, those which are better organised, and larger in scale. This ‘best efforts’ obligation, therefore, encourages OCSSPs to deal proactively with the players that have the most resources. Unless smaller right-holders are organised in CMOs, and these are allowed to negotiate, they are disadvantaged compared to bigger players.

To be sure, OCSSPs still have to negotiate and license if smaller right-holders approach them. However, the bargaining position of fragmented small players, and the resource asymmetry, might render fairness illusory in these negotiations, especially when compared to the big players. Such is the result of a law that envisages licensing for everything, but cannot achieve that goal without making allowances for reality.

In our view, unless a national law explicitly recognises or encourages solutions for collective licensing, for example, by promoting collective rights management, the mechanism in Art 17(4) will put smaller right-holders at disadvantage. The problem is, however, that large right-holders, which are better off in a system where they can individually negotiate,

¹⁸ For a detailed analysis of the duties of OCSSPs under Art 17(1) and (4)(a)—see Martin R F Senftleben and Axel Metzger, ‘Comment of the European Copyright Society on Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market Into National Law’ (*European Copyright Society*, 27 April 2020) 4–6 <<https://europeancopyrightsocietydotorg.files.wordpress.com/2020/04/ecs-comment-Art-17-cdsm.pdf>> accessed 14 October 2020 (hereafter ECS, ‘Comment’).

¹⁹ ECS, ‘Comment’ (n 18) 6.

²⁰ *ibid.*

would oppose such collective management solutions, even if they were legally viable.²¹ Therefore, by definition, the interests of small and large right-holders are in opposition when it comes to licensing.

Small right-holders will favour collective solutions because transaction costs, asymmetry of resources, and market power will lower any potential benefits of Art 17. On the other hand, these are exactly the reasons why large right-holders will disproportionality benefit from individual licensing. For the latter, more rights revenue can be extracted from OCSSPs, without the need to take potential collective deals and restructuring of business practices into account.

Therefore, this is an aspect where Member States policy choices at the level of implementation are consequential. In our view, the text of Art 17 does not pre-empt national rules that favour collective versus individual licensing. This leaves Member States to choose which licensing models to incentivise as a matter of policy and, as a result, which group of right-holders to favour or protect. If the Member States do nothing to correct the Directive's bias, it is the big right-holders that will be favoured.

3.2 How Licensing Limits Small Creators

Another understandable feature, which has the effect of putting smaller right-holders at a disadvantage, is the provision in Art 17(2) which extends any licence granted to an OCSSP to its users, provided they act on a predominantly non-commercial basis.²² If users, such as operators of YouTube channels, are permitted to act 'on a commercial basis' or 'to generate significant revenues' from uploads, their activities fall outside the scope of Art 17(2) and are regulated solely by Art 3 of the InfoSoc Directive. This means that they need to arrange an additional licence, separate from the one obtained by OCSSPs. While these providers can make money in the context of Art 17, the user-creators cannot.

This leads to a strange situation for online user-creators. Member States wishing to shield users from liability would want to facilitate licensing. However, such licensing will be of use to creators only as long as they do not earn significant income through the OCSSP. For instance, receiving advertising income in relation to the use of an uploaded work would almost certainly 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 or, at very least, create a clear separate track for such users on their services, subject to different rules. This adds a layer of complexity to the operation of providers, especially those with more limited resources. This legal design, therefore, imposes a barrier on OCSSPs' growth and on their users' ability to generate revenue from their activities on the platform.

Going beyond the non-commercial regime for users requires separate licensing of such uses in addition to the authorisation obtained by OCSSPs. Obviously, since the materials uploaded by users involve third party content, it is natural that they have to pay for the licence to use it. However, in such cases, they will be paying twice. They pay first to the OCSSP,

²¹ On legal constraints and possible avenues for collective licensing under Art 17 of the DSM Directive, see Martin Husovec and João Pedro Quintais, 'How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms under the Copyright in the Digital Single Market Directive' (2021) GRUR International, ikaa200 <<https://doi.org/10.1093/grurint/ikaa200>>.

²² See explanation in (n 17).

indirectly, for the use of the service. They pay a second time directly to right-holders for the commercial licensing of the content used in their uploads.

In both cases, legal uncertainty would worsen their situation. To know whether non-commercial exploitation is allowed on the service, creators need to know the repertoire of works and subject matter covered by the OCSSP authorisation under Art 17. If, accidentally, the third party content included in the user's non-commercial upload is not covered by the platform's licenced repertoire, then, while the OCSSP can be exempted from liability, the creator-uploader might not be.

To be more precise, in the absence of such additional authorisation, the upload by the users would be a copyright infringement. Unlike non-commercial uses, commercial uses would have to be cleared in regular licensing arrangements, subject to the constraints of the InfoSoc Directive. In this light, in seeking to identify who is in charge, there are two possible interpretations. The first is that the primarily responsible party is the user who engages in the for-profit exploitation. OCSSPs are covered by an authorisation under Art 17(1) which absolves them of their own 'unauthorised acts of communication to the public'. Following that logic, OCSSPs do not have to police such infringements—they must only remove the infringing content if notified by right-holders under Art 17(4)(c). The second interpretation is that the primarily liable party is the user who engages in for-profit exploitation, but OCSSPs are jointly liable. The reason is that their failure to prevent such infringements under Art 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 under Art 17(4)(a). We think both interpretations are equally plausible.

3.3 Why Exceptions Are of Limited Use

Some copyright-protected material on OCSSPs is covered by exceptions and limitations.²³ The most typical cases are those where uploaded material qualifies as a quotation; criticism; review; a use for caricature, parody, or pastiche; or amounts to the incidental inclusion of a work or other subject matter. Under the InfoSoc Directive, such acts were covered by optional exceptions that most (but not all) Member States transposed into their national laws.²⁴ As we discuss below, Art 17(7) of the DSM Directive elevated the legal status of these exceptions (apart from incidental inclusion) to user rights or freedoms.²⁵ The upshot is that, although these types of uses might trigger exclusive rights, they do not require authorisation or payment to right-holders. While the situation is clear in theory, it is challenging to work out how it will play out in practice.

For small user-creators, the problem can be described as follows. They upload materials to an OCSSP containing third party content covered by an exception. The platform's content filtering software flags the upload as matching in part the 'the relevant and necessary

²³ For the sake of readability, we use hereafter the term 'exceptions' to mean both exceptions and limitations, without taking a position on the legal nature and normative underpinnings of the terminology.

²⁴ Art 5(3)(d), (i), and (k) InfoSoc Directive (n 6).

²⁵ João Quintais and others, 'Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations From European Academics' (2019) 10(3) *Journal of Intellectual Property, Information Technology and E-Commerce Law* (hereafter Quintais and others, 'Safeguarding User Freedoms').

information' provided by a big right-holder, who may have the privileged status of 'trusted flagger'.²⁶ The OCSSP provides the right-holder with the possibility to monetise this content through advertisement, which s/he does.²⁷ The revenue is typically divided between right-holder and platform; the smaller uploader user-creator might receive a part or be left out entirely.²⁸

In legal terms, if the use of the pre-existing material is covered by an exception, only the user-creator—and not the big right-holder—is entitled to monetise the uploaded materials and receive remuneration from advertising revenues. However, Art 17 changes the entire risk-structure by forcing the platform to bear the risk of any mistake in the legal assessment of the uploaded materials. It is therefore unlikely that OCSSPs will side with their user-creators. Instead, they are likely to prioritise the right-holders who can credibly cause them legal trouble. These will be the bigger right-holders. While this was the case also under the previous framework, the liability risk under the new regime is much higher, as the default position is that the provider bears direct liability for what has been uploaded to the service.

There are different avenues to address this issue. For example, national law could stipulate that remuneration for royalty-free uses constitutes unjust enrichment that requires compensation. It could also recognise other creative mechanisms by which the burden of compensation is put on the OCSSPs in order to improve the effectiveness of such reimbursement. Yet another option is to prescribe that notifiers that wrongly claim copyright ownership could lose a trusted flagger or similar status. The point is that, without such corrective measures, the balance of incentives operating on OCSSPs under Art 17 tilts towards big right-holders to the detriment of small user-creators.

4. Filtering at the Expense of User-Creators?

Content filtering, as one type of enforcement automation, is the unpronounced objective of the Art 17 of the DSM Directive. It is meant to serve as the baseline policy to which OCSSPs are subject unless there is licensing. At its core, it is a pressure tool to incentivise platforms to license their users' content where possible.

4.1 Why Filtering Cannot Go Away

The more licensing is achieved in the context of Art 17, the less filtering and blocking there will be. However, no matter how much Member States try to facilitate licensing, it will not

²⁶ For a definition of 'trusted flagger', see European Commission, Commission Recommendation of 1 March 2018 on measures to effectively tackle illegal content online C(2018) 1177 final, Art 4(g) ('trusted flagger' means an individual or entity which is considered by a hosting service provider to have particular expertise and responsibilities for the purposes of tackling illegal content online). See also European Commission, Communication on Tackling Illegal Content Online—Towards an enhanced responsibility of online platforms COM(2017) 555 final, 8–9.

²⁷ In YouTube, this possibility is available through a Content ID claim to a video uploader by another user. See Google, YouTube Help, Policy, Safety and Copyright, 'Monetisation during Content ID disputes' <https://support.google.com/youtube/answer/7000961?hl=en-GB&ref_topic=9282678> accessed 16 October 2020.

²⁸ See Google, YouTube Help, Policy, Safety and Copyright, 'Monetisation during Content ID disputes' 'How Content ID works' <<https://support.google.com/youtube/answer/2797370>> accessed 16 October 2020.

be feasible in a non-negligible number of cases. Arguably, filtering and takedown will have a much more significant impact on smaller creators for at least two reasons:

- (a) as less professionalised creators, they are more likely to rely on exceptions in their work and less likely to hold individual (cross-)licences for their online exploitation of other people's work going beyond these exceptions; they are also more likely to have fewer resources in case of disputes.
- (b) as potential licensors themselves, their works are less likely to be licensed to OCSSPs due to the 'best efforts' obligation and thus to be available to others for non-commercial reuse.²⁹ As such, works of large right-holders are likely to remain much more available for subsequent non-commercial re-use by other creators across different OCSSPs.

Firstly, as noted, when creators acting as users on OCSSPs engage in acts (uploading) on a commercial basis, they require an additional licence for such activity. This licence can be obtained by the user-creator itself or by the OCSSP.³⁰ Absent such a licence or the benefit of an exception, user-creators are acting as infringers. This means that OCSSPs will have to remove the uploaded content in the context of their notice-and-takedown or notice-and-staydown obligations.³¹ Hence, OCSSPs are never relieved from policing the non-commercial activity on their platforms, unless they obtain additional licences from right-holders covering also commercial uploads. However, right-holders are less likely to give licences allowing commercial exploitation by users. To be sure, national laws implementing Art 17 could facilitate such licences, for instance through rules that incentivise collective licensing that also covers commercial exploitation by users on OCSSPs. One less controversial possibility could be to subject such acts to collective licensing with extended effect under the terms of Art 12 of the DSM Directive.³² Unless solutions of these type are adopted, the licensing of commercial uses will fall entirely on individual user-creators, who are disadvantaged in this respect due to their size and lack of pre-existing cross-licensing or vertical integration.

Secondly, the copyright-protected repertoire of the aforementioned common suspects—big well-known right-holders—is unavoidable when operating certain typified or mainstream platforms. This is due to the popularity and cross-border appeal of that content to users. As a result, the availability of such content for non-commercial re-use by other creators will be much higher than that of smaller creators. This means not only that large right-holders will benefit from better licensing arrangements with OCSSPs, but also from a broader diffusion and re-use of their works by others, namely the users of OCSSPs. Since such re-use by third party users, if commercially successful, will anyway require additional

²⁹ In this respect, see in Section 3.1 our discussion of the ECS suggestions on 'obvious protected materials' and 'publicly known right-holders'. See ECS, 'Comment' (n 18) 6.

³⁰ To be clear, if the authorisation for a commercial upload by the user is obtained by the OCSSP, such licence is a separate and additional authorisation than that obtained by the OCSSP as regards the predominantly non-commercial user uploads mentioned in Art 17(2) DSM Directive.

³¹ Art 17(4)(c) DSM Directive (n 1).

³² On this possibility, see Martin Husovec and João Quintais, 'How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms' (2019) Social Science Research Network, Working Paper <<https://papers.ssrn.com/abstract=3463011>> accessed 8 April 2020.

licensing, the initial licensing advantage of big right-holders is likely to be compounded further.

4.2 Can Safeguards against Over-Blocking Reduce the Problem?

The DSM Directive mandates a number of safeguards against over-blocking. Some safeguards concern the legal framework and its interpretation. However, many of them are formulated as obligations on the outcome of behaviour of private parties (such as avoidance of over-blocking) or at best as specific mechanisms to be imposed on them (such as redress mechanisms). Despite the unprecedented length of the safeguards recognised in Art 17(9), their real-world effectiveness will depend largely on the nature of their implementation by Member States at national level, and on their internalisation by OCSSPs. EU law therefore sets the goals for these safeguards but only establishes their contours to a very limited extent. Their essential operational details are left to domestic laws, which must discipline the potential harm resulting from the actions of private parties.

Art 17(9) includes the following components or safeguards. First, any request by right-holders for the removal of specific protected content from a provider must be justified.³³ Second, OCSSPs should create some unspecified 'effective and expeditious complaint and redress mechanisms', which should work 'without undue delay' and whose 'decisions to disable access to or remove uploaded content' are subject to human review.³⁴ Third, the Member States should create out-of-court redress mechanisms, which are independent of the judicial redress.³⁵

The first safeguard applies to the initial request by right-holders to proactively remove protected content. Art 17(4)(b) of the DSM Directive triggers an obligation on OCSSPs that does not foresee input from right-holders beyond the legal requirement to provide 'relevant and necessary information'.³⁶

The second safeguard requires that OCSSPs implement complaint and redress mechanisms for users in the event of disputes over the disabling of access to, or the removal of, uploaded content.³⁷ One, if not the main, justification for putting in place such an 'effective' system is to support the use of the mandatory exceptions in paragraph (7) and ensure the uniform protection of users across the EU.³⁸ However, the disputes that are also likely to arise concern users' commercial or non-commercial use of the platforms, as crossing that 'commerciality' line can make users' acts infringing.³⁹

³³ Art 17(9), second subparagraph DSM Directive (n 1). Importantly, in our view, the obligations to provide 'relevant and necessary information' or 'sufficiently substantiated notice' as a requirement for the measures in Art 17(4)(b) and (c) DSM Directive *do not qualify as safeguards*.

³⁴ Art 17(9) DSM Directive (n 1).

³⁵ Art 17(9) DSM Directive (n 1).

³⁶ Unless, obviously Art 17(4)(b) DSM Directive and its reference to 'relevant information' is interpreted as continuous identification of the *objected content*, which would arguably go against the spirit of the DSM Directive.

³⁷ Art 17(9) first subparagraph DSM Directive (n 1).

³⁸ Recital 70 first subparagraph, last sentence DSM Directive (n 1). Importantly, stating that paragraph (9) *supports* the use of exceptions in paragraph (7) does not mean that a Member State may satisfy its obligations under paragraph (7) merely by recognising the safeguard in paragraph (9). Clearly, that is not the case. See Quintais and others, 'Safeguarding User Freedoms' (n 25).

³⁹ See above Section 3.2.

These mechanisms entail obligations for right-holders and OCSSPs. On the one hand, right-holders that request the disabling or removal of content they own, must ‘duly justify’ their requests.⁴⁰ 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 (ie include a ‘human in the loop’).

In addition, the third safeguard requires that 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 or benefit of an exception.⁴¹ The manoeuvring space for 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.⁴²

This set-up means that prior to applying content filtering measures under Art 17(4)(b), there are no explicit safeguards for users, apart from the reference to the proportionality of the measures to be implemented by an OCSSP. But since the providers are not sanctioned for not respecting the proportionality of preventive duties in any clear way, this design is hardly a safeguard against over-blocking on its own. In this respect, it has to be kept in mind that over-compliance can be more economically advantageous to OCSSPs than a judicious and balanced application of safeguards. In essence, over-compliance through over-blocking saves costs for providers. It is, therefore, safe to say that *ex ante* safeguards for preventive measures are largely missing from the legal design of Art 17.

Two other safeguards against over-blocking—internal redress and external out-of-court settlement—both function as *ex post* safeguards, in the sense that they deal with the situation after the content has already been blocked or removed. The design of both measures is left to Member States and internalised by OCSSPs. First, the internal complaint and redress mechanism must be set up and run by the providers. Second, although the external out-of-court settlement must be created and maintained by Member States, it is unclear who should bear the cost. The Directive is silent on this point. According to the European Commission’s Targeted Consultation, it should be providers or the states who bear the costs of participating in it, while users should bear no additional costs.⁴³ Furthermore, the obligation to introduce a redress mechanism has few and somewhat vague requirements: the mechanism must be effective, expeditious, and involve human review. But it is not clear how the Member States should ensure that non-state actors internalise these safeguards. Neither sanctions nor public oversight are foreseen in EU law, and there is no reference to a need for such measures in national law. In theory, OCSSPs can simply claim that human

⁴⁰ Art 17(9) second subparagraph DSM Directive (n 1).

⁴¹ Art 17(9) second subparagraph DSM Directive (n 1) 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’.

⁴² See for a particular design of such mechanism, which was tested empirically—Lenka Fiala and Martin Husovec, ‘Using Experimental Evidence to Design Optimal Notice and Takedown Process’ (2018) TILEC Discussion Paper No 2018–028 <<https://ssrn.com/abstract=3218286>> accessed 14 October 2020.

⁴³ See European Commission, ‘Targeted consultation addressed to the participants to the stakeholder dialogue on Article 17 of the Directive on Copyright in the Digital Single Market’ (10 September 2020) <<https://ec.europa.eu/digital-single-market/en/news/directive-copyright-digital-single-market-commission-seeks-views-participants-stakeholder>> 17 (‘... (‘... out-of- court dispute settlement mechanism can be an existing one but with relevant expertise to handle copyright disputes. It should also be easy to use and with no cost for users.’)

review of notifications takes place and that the process is fast and fair, even if that is not the case. In other words, Art 17 provides little in the way of tools to assess OCSSPs' compliance with these safeguards in practice. Despite good intentions, given that these safeguards are for the most part addressed to private profit-maximising firms, they are far from providing tight control over expected (or at least potential) abuse of power by OCSSPs and big right-holders. In this light, national legislators and courts have their work cut out for them.

5. Rights of Online Creators: Do They Compensate the Imbalance?

We have shown that the DSM Directive's architecture is biased towards big right-holders. We have also outlined how such imbalance could be partly tackled by national interventions at the implementation stage. In this section, we explore the extent to which the new user rights or freedoms included in the Directive have the potential to counterbalance these biases.

5.1 Do User-Creators Have Affirmative Rights?

Art 17(7) of the DSM Directive states that preventive measures should not prevent the availability of content uploaded by users if such upload is not copyright infringing, including in cases where such uploads are covered by an exception. This should be read in combination with the statement in Art 17(9) to the effect that the Directive 'shall in no way affect legitimate uses, such as uses under exceptions or limitations provided for in Union law'. In fact, preventive obligations must be implemented without prejudice to the application of exceptions, 'in particular those that guarantee the freedom of expression of users'.⁴⁴

It is possible to identify different categories of uploaded material that do not infringe copyright and related rights: (a) material in the public domain; (b) material subject to an express or implied licence; (c) material covered by exception, either in Art 17(7) of the DSM Directive, or in Art 5 of the InfoSoc Directive, assuming the specific provision was implemented by the national law (such as incidental use exception).⁴⁵

Art 17(7) of the DSM Directive includes a special regime for certain exceptions. According to this, '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. As noted, these were previously optional exceptions in the InfoSoc Directive.⁴⁶ Under that regime, the exceptions could be overridden by contract and the application of technological protection

⁴⁴ Recital 70 DSM Directive (n 1).

⁴⁵ In cases of conflict between exceptions in the DSM and InfoSoc Directives, the former overrides the latter due to the application of the principle *lex posterior specialis derogat legi priori generali*. A potential example of conflict is where a concept shared in both Directives and that the ECJ is yet to consider an 'autonomous concept of EU law', eg 'pastiche'—is given a narrower interpretation pursuant to Art 5 InfoSoc Directive than pursuant to Art 17(7) DSM Directive. For an exploration of the application of the concept of pastiche and the related exception in user-upload platforms, see Martin Sentleben, 'Bermuda Triangle—Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market' (2019) 41 European Intellectual Property Review 480.

⁴⁶ Arts 5(3)(d) and (k) InfoSoc Directive (n 6).

measures.⁴⁷ Such exceptions have not been implemented in all Member States and, where they have, the implementations differ.⁴⁸

The DSM Directive explicitly recognises that the exceptions at stake are particularly important to the striking of a balance under the EU Charter of Fundamental Rights between the right to (intellectual) property in Art 17(2) and two fundamental freedoms in particular: freedom of expression (Art 11) and freedom of the arts (Art 13).⁴⁹ They are particularly important in this context since they build on pre-existing normative concepts that function as legal enablers for the type of expressive—in some cases transformative—use of protected content by users in online platforms. This combination of factors, and in particular the fundamental rights basis of the provisions, allows the legislator to recognise a reinforced protection for these exceptions.

This reinforced nature is actualised through a change in legal qualification, as the exceptions become mandatory. This is clear from the text of the provision—‘shall ensure’—and from the Recitals, which state that such exceptions ‘should, therefore, be made mandatory in order to ensure that users receive uniform protection across the Union.’⁵⁰

In our view, expressed elsewhere, these exceptions become mandatory for the acts of uploading/making available in OCSSPs in all Member States of the EU.⁵¹ That is to say, Member States will have to implement them at least to allow the use of protected content at issue by users of OCSSPs, even if their national laws do not allow the same uses in different contexts online or offline.⁵² To the extent that the exceptions become mandatory, it is arguable that they are akin to user rights or freedoms. An important consequence is that they are qualitatively different from those under Art 5 of the InfoSoc Directive, which are not only optional but arguably subject to contractual derogation and explicitly subject to override by technological protection measures (TPMs) under Art 6 of the same Directive. As a result, this means they can no longer be subject to derogation by contract or TPMs, as that would defeat their purpose.⁵³ For example, the terms of service of an OCSSP cannot prohibit a user from re-using protected content where his/her upload qualifies as a parody. Likewise, it would also prevent the right-holder and OCSSP from having legal protection against circumvention of any access prohibition measure they impose over protected content re-used in such a way.⁵⁴ The extent to which such user rights or freedoms can be actualised by users against OCSSPs or right-holders will depend on national implementations of Art 17. In particular, it will depend on the tools and causes of action that are made available to users-creators to effectuate their rights in practice. Without legal or procedural clarifications in national law to the effect that these rights provide sufficient legal basis for users (or their representatives, such as consumer rights organisations) to bring an action against OCSSPs and right-holders, it is difficult to envisage the effectiveness of Art 17(7) beyond the in-platform complaint and redress mechanism and out-of-court settlement procedures.

⁴⁷ Recital 70 and Art 6(4) InfoSoc Directive (n 6).

⁴⁸ See Kennisland, ‘Copyright Exceptions’ <<https://copyrightexceptions.eu>> accessed 16 October 2020.

⁴⁹ Recital 70 first subparagraph DSM Directive (n 1).

⁵⁰ Recital 70 first subparagraph InfoSoc Directive (n 6).

⁵¹ Quintais and others, ‘Safeguarding User Freedoms’ (n 25).

⁵² Quintais and others, ‘Safeguarding User Freedoms’ (n 25).

⁵³ This is underscored also by Art 17(9) DSM Directive, 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 recognised in EU law.

⁵⁴ Naturally, preventive measures under Art 17(4)(b) and (c) of the DSM Directive are still allowed if their requirements are met. However, they should not qualify as TPMs under Art 6 InfoSoc Directive.

In the light of this legal qualification, at least two questions arise. First, does this imply that OCSSPs can no longer regulate the type of lawful content they carry? Second, do they have to accept all content covered by exceptions? This is the issue that we examine next.

5.2 What Information Are User-Creators Entitled to?

Art 17(8) of the DSM Directive states that OCSSPs must provide right-holders with two types of information. First, ‘adequate information’ on the functioning of the preventive and other measures in paragraphs (4)(b) and (c), that is content filtering, notice-and-takedown, and notice-and-staydown. Second, if there is a licensing agreement in place, ‘information on the use of content covered by the agreements.’⁵⁵ These obligations are not subject to qualifying factors, as mentioned, for example, in paragraphs (5) and (6).⁵⁶ Arguably, the principle of proportionality in paragraph (5) implies that information obligations should 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 of the Directive. 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.⁵⁷ Third, OCSSPs should ‘not be required to provide right-holders with detailed and individualised information for each work or other subject matter identified.’ The only exception to this arises where the OCSSP and the right-holder have a contractual arrangement that contains ‘more specific provisions on the information to be provided.’

All of these information obligations apply only vis-à-vis right-holders. The Member States have room to consider extending the benefit of these obligations to users and the public. In our view, they should. This would be one of the ways in which to satisfy and meaningfully extend (beyond the scope of the stakeholder dialogues) the obligation in Art 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’.

However, it should be remembered that user-creators are also right-holders. When users publish content which creatively re-arranges existing works or subject matter of others, such user-creators will often qualify as right-holders in their own right, irrespective of potential violations of pre-existing rights of third parties. Hence, the information obligations extend equally to user-creators active on OCSSPs. Therefore, active user-creators, such as YouTube creators, should be able to request information based on Art 17(8), in the same

⁵⁵ Art 17(8) DSM Directive (n 1).

⁵⁶ Art 17(5) DSM Directive (n 1) refers to a number of elements to be taken into account—in light of the principle of proportionality—when assessing whether an OCSSP complies with its obligations on best efforts to obtain an authorisation and to impose preventive measures. Art 17(6) contains a special regime for smaller and newer OCSSPs.

⁵⁷ The definition of ‘trade secret’ can be found in Art 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 (Trade Secrets Directive) [2016] OJ L157.

way as other right-holders. At the same time, such information is unlikely significantly to improve their situation.

6. Violation of the Principle of Equal Treatment?

Our analysis thus far has highlighted a bias in favour of big right-holders in the design of Art 17 of the DSM Directive. Given the history of this provision—being a tool of competitive advantage—this is hardly surprising. We have identified harms that smaller right-holders are likely to face. After examining the safeguards incorporated in the Directive, we have concluded that they cannot alone address these inequalities. Instead, we show that actual solutions to this unequal treatment, such as collective management of rights, are needed to recalibrate the law; but they require national governments proactively to seize the opportunity and address this problem at the stage of national implementation. In this section, we outline a possible consequence if they fail to do so. In short, they risk violating the principle of equal treatment.

6.1 What Is the Principle of Equal Treatment?

Art 20 of the EU Charter states that: ‘Everyone is equal before the law’. The provision on equal treatment is a principle that has been granted constitutional status within the concept of general principles of EU law.⁵⁸ As summarised by Elise Muir:⁵⁹

It demands that decision makers be capable of explaining the legitimacy, appropriateness, and necessity of specific distinguishing criteria and the negative impact of a decision on a certain category of actors or products. It is thus a tool for good governance.

Although the principle always appears in the specific context of certain policies, such as those pursuing social objectives (eg employment or migration law), its application is more universal. Its core interrogation has been summarised by the Court in its Aristotelian maxim—comparable situations shall be treated equally, unless there is an objective justification for giving one side an advantage over the other.⁶⁰

In the case-law of the European Court of Justice (ECJ), the principle of equal treatment has been used to question the validity of EU Directives. For instance, in *Arcelor Atlantique and Lorraine and Others*, the Court had to assess whether a greenhouse gas emission allowance trading scheme, applicable to the steel sector but not to the chemical and non-ferrous metal sectors, amounted to unequal treatment of the former the industry.⁶¹ After

⁵⁸ Elise Muir, ‘Pursuing Equality in the EU’ in Damian Chalmers and Anthony Arnall (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 2.

⁵⁹ *ibid.*

⁶⁰ Joined cases *Klöckner-Werke and Hoesch v High Authority* [1962] ECLI:EU:C:1962:30, 345; *Finsider v Commission* [1985] ECLI:EU:C:1985:7, para 8; *Connect Austria Gesellschaft für Telekommunikation GmbH v Telekom-Control-Kommission and Mobilkom Austria AG* [2003] ECI:EU:C:2003:297, para 115.

⁶¹ *Société Arcelor Atlantique et Lorraine and Others v Premier ministre, Ministre de l’Écologie et du Développement durable and Ministre de l’Économie, des Finances et de l’Industrie* [2008] ECLI:EU:C:2008:728 (hereafter *Arcelor Atlantique and Lorraine and Others*).

concluding that the industries were in a comparable situation, and that some industries were put at a disadvantage, it proceeded to assess whether a difference in treatment was justified. Such justification, according to the Court, must be ‘based on an objective and reasonable criterium’, ‘relate to a legally permitted aim pursued by the legislation’, and be ‘proportionate to the aim pursued by the treatment.’⁶² Moreover, the legislature has ‘to provide the Court with the necessary information for it to verify that those criteria do exist.’⁶³ Eventually, the Court concluded that scope limitations were justified by objective factors, and that the EU legislature did not overstep its discretion.

6.2 Equal Treatment in Copyright Law

The principle of equal treatment is known to copyright law. In *Copydan Båndkopi*, the Court had to assess a national law according to which media that were detachable from devices allowing digital reproduction (eg memory cards of mobile phones) were subject to a private copying levy, while components that could not be detached from such devices (eg internal memory of phones) were excluded from the levy.⁶⁴ The Court started by saying that:⁶⁵

It follows that the Member States cannot lay down detailed fair compensation rules which would discriminate, without any justification, between the different categories of economic operators marketing comparable goods covered by the private copying exception or between the different categories of users of protected subject matter.

After reviewing the situation, it left it to the Danish Court to assess whether detachable and non-detachable devices were comparable and whether the unequal treatment could be justified. However, the exercise had to be conducted by reference to the goal of compensating for the actual harm to the right-holders (noting that most lawful private copies were stored on external memory cards).

Moreover, as regards the question of reimbursements of levies to firms which distributed them to parties other than natural persons benefiting from the private copying exception, the Court noted that ‘the practical difficulties associated with the identification of the final users and the collection of the levy in issue [could not] justify’ the requirement of pre-registration with a CMO.⁶⁶ This, in the Court’s view, would lead to unequal treatment.

It follows from this case-law that national private copying levy schemes must be well calibrated to cover the actual harm to authors. If some sellers or devices are exempted, they cannot be exempted arbitrarily. The scope of the exemption must be objectively justifiable in the light of the actual harm caused by the private copying exception—the goal of the law at hand.

This conclusion is consistent with other judgments on private copying that have meaningfully considered the fundamental right to equal treatment. In *VG Wort*, for example, the Court allowed for the possibility that intermediaries in possession of relevant copying

⁶² *ibid* para 48.

⁶³ *ibid* para 49.

⁶⁴ *Copydan Båndkopi v Nokia Danmark A/S* [2015] ECLI:EU:C:2015:144 (hereafter *Copydan Båndkopi*)

⁶⁵ *ibid* para 33.

⁶⁶ *ibid* para 51.

equipment might be responsible for the levy in lieu of an end-user, due to the practical difficulties of charging the latter.⁶⁷ However, this possibility was subject to the conditions that (i) these intermediaries had the possibility of passing on the levy to end-users and (ii) that the overall amount owed as fair compensation for the harm could not be ‘substantially different from the amount fixed for a reproduction obtained by means of a single device’.⁶⁸ Only then would the right of equal treatment of the parties involved be respected.

Similar considerations were made by the Court in *Microsoft Mobile Sales International*.⁶⁹ This case is particularly interesting since it concerned a national law that did not lay down sufficiently objective and transparent rules to conclude agreement protocols leading to the payment of fair compensation and potential claims from exemptions. In essence, because the conclusion of those protocols was left to free bargaining between the competent Italian CMO and the debtors, there was ‘no guarantee that producers and importers in comparable situations will be treated equally, the terms of such agreements being the result of negotiation governed by private law’.⁷⁰ The suggestion here is that the right of equal treatment might in certain circumstances require legislative definition of objective and transparent criteria where private ordering (based on existing rules) cannot guarantee this.

6.3 Inequality of Art 17?

It can easily be seen how the above assessment might be relevant for schemes like Art 17 that disadvantage smaller creators.⁷¹ Its licensing provisions, unless implemented through collective licensing on the national level, result in a direct advantage to large right-holders who are proactively approached by OCSSPs. Such right-holders save time and resources. At the same time, the regime disadvantages small right-holders, who must find and contact all OCSSPs on their own. Unlike large right-holders, they must monitor the market, review use of their works by third parties, and approach each company separately. Although large right-holders might decide to do so as well, the defaults baked into the legal regime place a much higher burden on small right-holders. This bias goes beyond the simple fact that big right-holders are better positioned to internalise new rules. It effectively means that big right-holders have a particular service for free, while smaller ones have to pay for it. In addition, the enforcement mechanism embedded in the preventive measures of Art 17(4) (b) and (c) disadvantages (often small) amateur creators who are more likely to rely on exceptions for the creation of their content, rather than on commercial cross-licensing that is more often available to large right-holders.

Each of these disadvantages leads to worse treatment for smaller right-holders than large ones. As shown above, the objective justification for unequal treatment under Art 17 is the need to balance the licensing and enforcement components with rights of OCSSPs in

⁶⁷ *Verwertungsgesellschaft Wort (VG Wort) v Kyocera and Others and Canon Deutschland GmbH and Fujitsu Technology Solutions GmbH and Hewlett-Packard GmbH v Verwertungsgesellschaft Wort (VG Wort)* [2013] ECLI:EU:C:2013:426, especially paras 73–79 (hereafter *VG Wort*).

⁶⁸ *ibid* para 78.

⁶⁹ *Microsoft Mobile Sales International Oy and Others v Ministero per i beni e le attività culturali (MiBAC) and Others* [2016] ECLI:EU:C:2016:717, especially paras 44–50 (hereafter *Microsoft Mobile Sales International*).

⁷⁰ *ibid* para 49.

⁷¹ We leave aside a question here whether the EU act is already flawed for the very same reason—for this debate, see Martin Husovec, ‘Over-Blocking: Who is Responsible?’ (2020) Working paper (on file with authors).

particular and freedom of expression broadly. While this is clearly objectively sound, as the legislation might otherwise constitute a disproportionate interference, it does not reduce the doubts as to its own legality. As emphasised by the Court, the 'legislature's exercise of its discretion must not produce results that are manifestly less appropriate than those that would be produced by other measures that were also suitable for those objectives'.⁷²

Copydan Båndkopi rejected the unequal treatment of two categories of producers that was entirely arbitrary, given the goal of fair compensation in copyright law. Similarly, it would clearly violate the principle of equal treatment if the legislator were to enact an explicit rule according to which big actors are absolved of payment for some service while small actors are not. Unless there is a strong justification for such rule, the differentiation is not only socially unjust, but also legally arbitrary. Art 17 of the DSM does exactly that. The only difference is that it buries such discriminatory rule under layers of legal technicality.

Therefore, the effects of unequal treatment in this case go beyond the consequences of different initial allocations of wealth between various actors. It differs from a situation where a right-holder with better resources is simply better placed (eg due to scale or contacts) to absorb the rule and take advantage of it. Here the disadvantage is not caused by pre-existing resources, rather, it results from the law imposing the obligations unevenly on those who are less affluent.

From the standpoint of compensation, there is no reason why smaller right-holders should be worse off when negotiating their licences. While the difference in treatment might be justified by the goal of balancing the rights of authors with rights of others, the legislature is under an obligation to carry out such balancing in a way that does not arbitrarily put one group of right-holders at disadvantage. The argument here is simple: balancing of different rights cannot result in discrimination.

If there is a solution (eg collective licensing) that resolves or ameliorates the unequal treatment, how can the national governments justify not using it, and thereby perpetuate the unequal treatment of small right-holders? In our view, legislatures cannot justify a failure to consider these types of solution. If one or more alternative legal mechanism is available that can better balance competing rights and interests and not discriminate between different actors, then ignoring such a solution amounts to arbitrariness.

Finally, following the *Microsoft Mobile Sales International* decision, it is clear that Member States cannot hope for equality to be resolved by market players which implement the licensing arrangements. Total ignorance of an issue with reference to private contracts, according to the Court, gives 'no guarantee' that two groups in comparable situations will eventually be treated equally.

7. Conclusion

Art 17 shows how private ordering regimes can be cemented by legislators as horizontal regulatory solutions. It is also a powerful illustration of the dangers associated with this regulatory approach. Because the law had to be made operational in the context of direct liability schemes, it had to make concessions to proportionality; otherwise, it risked

⁷² *Arcelor Atlantique and Lorraine and Others* (n 61) para 59.

imposing absolute liability for third party content on OCSSPs. As a direct consequence of this concession, we argue, the law threw a group of right-holders—small creators—under the proverbial bus.

In our view, the licensing provisions in Art 17, unless implemented through collective licensing at the national level, result in a direct advantage to large right-holders. They will be proactively approached by OCSSPs to grant authorisations, which will save them time and resources. Conversely, smaller right-holders—in particular, user-creators—must monitor the market, review the use of their works by third parties, and approach each OCSSP separately. In addition, the enforcement mechanism embedded in Art 17 disadvantages (often small) amateur creators who are more likely to rely on exceptions for content creation, rather than the type of commercial cross-licensing most often available to large right-holders.

On a macro-level, Art 17 represents a policy experiment that is tainted with inequalities and other problems. These flaws were to be expected from a political compromise that borrows heavily and uncritically from private ordering schemes. Not long ago, these same schemes were deployed by platforms not only for legal compliance but as a means of gaining competitive advantage. Naturally, within the boundaries of the law, this was justified by the private nature of such schemes. But now these schemes operate as tools for competitive disadvantage as a matter of law, on the back of small right-holders. As an African proverb says, ‘when elephants fight, it is the grass that suffers’.