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Institutionalized Algorithmic Enforcement—The Pros and Cons of the EU Approach to UGC Platform Liability

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INSTITUTIONALIZED ALGORITHMIC ENFORCEMENT—THE PROS AND CONS OF THE EU APPROACH TO UGC PLATFORM LIABILITY

Martin Senftleben*

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Algorithmic copyright enforcement—the use of automated filtering tools to detect infringing content before it appears on the internet—has a deep impact on the freedom of users to upload and share information. Traditional liability shields for online platforms that host user-generated content (“UGC”) reflect a presumption of non-infringement: the content stemming from platform users is deemed permissible until the platform provider receives a sufficiently substantiated notification of infringement. Only then, the contested content must promptly be removed. The employment of upfront filtering tools changes this equation substantially. The moment the algorithmic enforcement system identifies traces of protected source material in a user upload, the content will be blocked automatically and never become visible for platform users. Instead of presuming that UGC does not amount to infringement unless copyright owners take action and provide proof, the default position of automated filtering systems is that every upload is suspicious and copyright owners are entitled to ex ante control over the sharing of information online.

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If platform providers voluntarily introduce algorithmic enforcement measures, this may be seen as a private decision following from the freedom of companies to run their businesses as they wish.¹ If, however, copyright legislation institutionalizes algorithmic enforcement and imposes a legal obligation on platform providers to employ automated filtering tools, the law itself transforms copyright into a censorship and filtering instrument. Instead of serving as an engine of content creation and dissemination,² copyright protection becomes a central basis for content control in the online world.³ Nonetheless, the new EU Directive on Copyright in the Digital Single Market (“DSM Directive” or “DSMD”)⁴ follows this path and mandates the employment of automated filtering tools to ensure that unauthorized copyrighted content does not populate UGC platforms.⁵

After a short exploration of the “value gap” debate underlying the new statutory filtering obligations in EU copyright law (next section 1), the following analysis will demonstrate that the new EU rules on UGC licensing and screening will inevitably lead to the adoption of algorithmic enforcement measures in practice. Without automated content control, UGC platforms will be unable to escape liability for infringing user uploads (section 2). To provide a complete picture, however, it is important to also shed light on counterbalances which may distinguish this new, institutionalized form of algorithmic enforcement from known content filtering tools that have evolved as voluntary measures in the private sector. The DSM Directive

¹ As to the constitutional recognition of the freedom to conduct a business, see Charter of Fundamental Rights of the European Union, art. 16, 2000 O.J. (C 364) 1. As to the recognition of this freedom in the context of platforms for UGC, see Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam) v. Netlog NV*, 2012 EUR-Lex CELEX LEXIS 62010CJ0360, ¶¶ 45–47, 51.

² As to this goal of the copyright system, see *Harper v. Nation Enter.*, 471 U.S. 539, 558 (1985) (characterizing copyright as an “engine of free expression”). For a detailed analysis of the interplay between copyright protection and freedom of expression, see P. Bernt Hugenholtz, *Copyright and Freedom of Expression in Europe*, in *THE COMMODIFICATION OF INFORMATION* 239 (Niva Elkin-Koren & Neil Weinstock Netanel eds., 2002); SANDRO MACCIACCHINI, *URHEBERRECHT UND MEINUNGSFREIHEIT* (2000); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); Christophe Geiger & Elena Izyumenko, *Copyright on the Human Rights’ Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression*, 45 INT’L REV. INTELL. PROP. & COMPETITION L. 316 (2014); Christophe Geiger, *‘Constitutionalising’ Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union*, 37 INT’L REV. INTELL. PROP. & COMPETITION LAW 371 (2006); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996); ALAIN STROWEL ET AL., *DROIT D’AUTEUR ET LIBERTÉ D’EXPRESSION* (2006).

³ Niva Elkin-Koren, *Fair Use by Design*, UCLA L. REV. 1082, 1093 (2017).

⁴ Directive 2019/790, of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130) 92 [hereinafter DSMD].

⁵ *Id.* at art. 17(4)(b).

underlines the necessity to safeguard user freedoms that support transformative, creative remixes and mash-ups of pre-existing content. This feature of the new legislation may offer important incentives to develop algorithmic tools that go beyond the mere identification of unauthorized takings from protected works. It has the potential to encourage content assessment mechanisms that factor the degree of transformative effort and user creativity into the equation. As a result, more balanced content filtering tools may emerge in the EU. Implementing the new EU rules in their domestic legislation,⁶ EU Member States can pave the way for the described reverse filtering logic that focuses on UGC elements that may justify user uploads despite the inclusion of protected third-party content (section 3). In sum, the new EU legislation not only escalates the use of algorithmic enforcement measures that already commenced in the private sector years ago. If rightly implemented, it may also add an important nuance to existing content identification tools and alleviate the problems arising from reliance on automated filtering mechanisms (concluding section 4).

I. VALUE GAP ARGUMENT

UGC is a core element of many internet platforms. With the opportunity to upload photos, films, music, and texts, formerly passive users become active contributors to (audio-)visual content portals, wikis, online marketplaces, discussion and news fora, social networking sites, virtual worlds, and academic paper repositories.⁷ Today's internet users upload a myriad of literary and artistic works every day.⁸ A delicate question arising from this user-involvement concerns copyright infringement. UGC may consist of self-created works and public domain material. However, it may also include unauthorized takings of third-party material that enjoys copyright protection. As UGC has become a mass phenomenon and a key factor in the evolution of the modern, participative web,⁹ this problem raises

⁶ EU Directives, such as the new DSM Directive, must be embedded in the national legal system of EU Member States within a given period of time. The deadline for domestic implementation of the DSM Directive is 7 June 2021. *See id.* at art. 29(1).

⁷ See the overview of UGC application that is provided in ORGANISATION FOR ECON. CO-OPERATION & DEV., PARTICIPATIVE WEB: USER-CREATED CONTENT (2007), available at <https://www.oecd.org/sti/38393115.pdf> [hereinafter OECD].

⁸ For example, statistics relating to the online platform YouTube report over one billion users uploading 300 hours of video content every minute. *Cf. Youtube for Press*, YOUTUBE, <https://www.youtube.com/intl/en-GB/yt/about/press/> (last visited Dec. 22, 2019); 37 *Mind Blowing Youtube Facts, Figures, and Statistics—2019*, MERCHDOPE (Sept. 29, 2019), <https://www.statisticbrain.com/youtube-statistics/>.

⁹ As to the use and discussion of this term, see OECD, *supra* note 7.

complex issues and requires the reconciliation of divergent interests: users, platform providers, and copyright holders are central stakeholders.¹⁰

In the legislative process leading to the adoption of the DSM Directive, the so-called “value gap” argument played a decisive role in the debate on UGC. The argument rests on the policy objective to ensure the payment of adequate remuneration for the online distribution of copyrighted content.¹¹ Traditionally, EU legislation in the field of e-commerce shielded UGC platforms from liability for copyright infringement by offering a “safe harbour” for hosting: as long as the platform provider was not actively involved in the posting of content, she only was obliged to take immediate action and remove content when a rights holder informed her in a sufficiently precise and substantiated manner about infringing content (notice-and-takedown).¹² The safe harbour system was based on the assumption that a general monitoring obligation would be too heavy a burden for platform providers. Without the safe harbour, the liability risk would thwart the creation of internet platforms depending on third-party content and frustrate the development of e-commerce.¹³ In its 2015 communication, “Towards a

¹⁰ As to the debate on user-generated content and the need for the reconciliation of divergent interests in this area, see Martin R.F. Senftleben, *Breathing Space for Cloud-Based Business Models: Exploring the Matrix of Copyright Limitations, Safe Harbours and Injunctions*, J. INTELL. PROP. INFO. TECH. & E-COMM. L. 87, 87–90 (2013); Tom W. Bell, *The Specter of Copyism v. Blockheaded Authors: How User-Generated Content Affects Copyright Policy*, VAND. J. ENT. & TECH. L. 841 (2008); Branwen Buckley, *SueTube: Web 2.0 and Copyright Infringement*, COLUM. J.L. & ARTS 235 (2008); Steven Hechter, *User-Generated Content and the Future of Copyright: Part One—Investiture of Ownership*, VAND. J. ENT. & TECH. L. 863 (2008); S.D. Jamar, *Crafting Copyright Law to Encourage and Protect User-Generated Content in the Internet Social Networking Context*, WIDENER L.J. 843 (2010); Mary W.S. Wong, *Transformative User-Generated Content in Copyright Law: Infringing Derivative Works or Fair Use?*, VAND. J. ENT. & TECH. L. 1075 (2009); Greg Lastowka, *User-Generated Content and Virtual Worlds*, 10 VAND. J. ENT. & TECH. L. 893 (2008); Edward Lee, *Warming Up to User-Generated Content*, UNIV. ILL. L. REV. 1459 (2008); Natali Helberger et al., *Legal Aspects of User Created Content* (University of Amsterdam, Nov. 14, 2009), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1499333.

¹¹ For an overview of the discussion on UGC prior to the current copyright reform proposals in the EU, see JEAN-PAUL TRIAILLE ET AL., *STUDY ON THE APPLICATION OF DIRECTIVE 2001/29/EC ON COPYRIGHT AND RELATED RIGHTS IN THE INFORMATION SOCIETY* (2013).

¹² 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, 2000 O.J. (L 178), art. 14(1) (hereinafter Directive on E-Commerce). Cf. Case C-236/08, *Google v. Google France*, 2010, par. 114–18; case C-324/09, *L’Oréal v. eBay*, 2011, par. 120–22. For commentary, see CHRISTINA ANGELOPOULOS, *EUROPEAN INTERMEDIARY LIABILITY IN COPYRIGHT: A TORT-BASED ANALYSIS* (2016); MARTIN HUSOVEC, *INJUNCTIONS AGAINST INTERMEDIARIES IN THE EUROPEAN UNION—ACCOUNTABLE BUT NOT LIABLE?* (Cambridge Univ. Press 2017); STEFAN KULK, *INTERNET INTERMEDIARIES AND COPYRIGHT LAW—TOWARDS A FUTURE-PROOF EU LEGAL FRAMEWORK* (Univ. Utrecht 2018); Miquel Peguera, *The DMCA Safe Harbour and Their European Counterparts: A Comparative Analysis of Some Common Problems*, COLUM. J.L. & ARTS 481 (2009); Senftleben, *supra* note 10, at 87–103;

¹³ Directive on E-Commerce, *supra* note 12, at art. 15(1).

Modern, More European Copyright Framework,” however, the European Commission held the view that the safe harbour for hosting allowed UGC platforms to generate income without sharing profits with producers of creative content.¹⁴ The value gap argument was born.

In line with this value gap argument, the Commission’s proposal for new copyright legislation—the template for the DSM Directive that has now entered into force—sought to render the liability shield inapplicable when it came to copyrighted works.¹⁵ The underlying strategy was simple: deprived of the safe harbour for hosting and exposed to direct liability for infringing user uploads, platform providers would have to embark on UGC licensing and filtering. With the erosion of the legal certainty resulting from the traditional liability privilege, a platform provider seeking to avoid liability risks would enter into agreements with copyright owners. The initial Commission proposal already contemplated that these agreements with right holders would bring filtering obligations in their wake. The Commission referred to the deployment of “effective content recognition technologies.”¹⁶ Algorithmic enforcement measures, thus, played a central role in the EU copyright reform agenda from the outset. The value gap argument and the intention to generate new revenue streams for copyright owners served as a vehicle to present content filtering obligations as a necessary evil that had to be accepted.

II. NEW LICENSING AND FILTERING OBLIGATIONS

Despite the early focus on algorithmic enforcement, an unequivocal filtering obligation is sought in vain in the legislative text that evolved from

¹⁴ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards a Modern, More European Copyright Framework*, at 9–10, COM (2015) 266 final (Dec. 9, 2015)

¹⁵ *Commission Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market*, art. 13, COM (2016) 593 final (Sept. 14, 2016) [hereinafter DSM Directive Proposal]. Prior to this formal proposal of copyright legislation seeking to neutralize the safe harbour for hosting, the French High Council for Literary and Artistic Property had published a research paper prepared by Professor Pierre Sirinelli, Josée-Anne Benazeraf, and Alexandra Bensamoun on 3 November 2015. The researchers had been asked to propose changes to current EU legislation “enabling the effective enforcement of copyright and related rights in the digital environment, particularly on platforms which disseminate protected content.” They arrived at the conclusion that a provision should be added to current EU copyright legislation making it clear that “information society service providers that give access to the public to copyright works and/or subject-matter, including through the use of automated tools, do not benefit from the limitation set out [in the safe harbour for hosting of the E-Commerce Directive 2000/31/EC].” See HIGH COUNCIL FOR LITERARY & ARTISTIC PROP. OF THE FRENCH MINISTRY OF CULTURE & COMM., MISSION TO LINK DIRECTIVES 2000/31 AND 2001/29 – REPORT AND PROPOSALS 11 (2015)

¹⁶ DSM Directive Proposal, *supra* note 15, at art. 13(1).

the EU copyright reform. Instead of openly embracing algorithmic copyright enforcement, the final provision—Article 17 DSMD—establishes a complex matrix of obligations to license and filter UGC. Providers of UGC platforms (“online content-sharing service providers” in the terminology of the new legislation)¹⁷ can either obtain an authorization from copyright holders to offer UGC on their platforms (license approach, following section II.A) or take measures to prevent the availability of infringing content from the outset (filtering approach, following section II.B).¹⁸ A closer look at these ways out of the dilemma reveals that both options will inevitably lead to the application of algorithmic enforcement measures and raise policy dilemmas in practice.

A. Indirect Algorithmic Enforcement Obligations

At the core of licensing obligations under the new EU copyright legislation lies the grant of a specific, exclusive right in Article 17(1) DSMD that leads to strict, primary liability of UGC platform providers for infringing content that is uploaded by users:

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 when it gives the public access to copyright protected works or other protected subject matter uploaded by its users.¹⁹

In EU copyright law, the “communication to the public” and the “making available to the public” are prohibited acts that require the authorization of the copyright owner.²⁰ By clarifying that the activities of UGC platform providers amount to communication to the public or making available to the public, the new legislation collapses the traditional distinction between primary liability of users who upload infringing content, and secondary liability of online platforms which encourage or contribute to infringing activities. Under Article 17(1) DSMD, it no longer matters whether the provider of a UGC platform had knowledge of infringement, encouraged infringing uploads or failed to promptly remove infringing content after receiving a notification. Instead, the platform provider is directly and primarily liable for infringing content that arrives at the

¹⁷ As to the scope of the concept of “online content-sharing services provider,” see DSMD, *supra* note 4, at art. 2(6).

¹⁸ *Id.* at art. 17(1).

¹⁹ *Id.*

²⁰ 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, art. 3, annex, 2001 O.J. (L 167) 1, 10.

platform.²¹ In this way, EU legislation incentivizes rights clearance initiatives. To reduce the liability risk, the platform provider will have to obtain a license.²² To fully understand the scope and reach of this licensing obligation, it is necessary to consider the instructions given in Article 17(2) DSMD:

Member States shall provide that when an authorisation has been obtained, including via a licensing agreement, by an online content sharing service provider, this authorisation shall also cover acts carried out by users of the services falling within Article 3 of Directive 2001/29/EC when they are not acting on a commercial basis or their activity does not generate significant revenues.

An online platform seeking to obtain a license for UGC is thus confronted with an enormous licensing task. Even though it is unforeseeable which content users will upload, the license should ideally encompass the whole spectrum of potential posts. This broad licensing obligation seems beneficial to users. In line with Article 17(2) DSMD, a UGC license can be expected to encompass their activities and minimize their exposure to infringement claims. Given the obligation to cover all kinds of non-commercial user uploads, however, the provision creates a rights clearance task which platform providers can hardly ever accomplish.²³

Traditionally, collecting societies have a strong position in the EU. As they have far-reaching mandates to administer the rights of copyright owners, they seem natural partners in the development of umbrella licensing solutions with the scope envisaged in Article 17(2) DSMD. However, they would have to offer an all-embracing licensing deal covering not only protected content of their members but also content of non-members. Otherwise, the licensing exercise makes little sense. It would fail to cover all types of user uploads. Considering experiences with licensing packages offered by collecting societies in the past, it seems safe to assume that an umbrella solution with these proportions is currently unavailable in many EU Member States. It remains to be seen whether the implementation of the DSM Directive,

²¹ DSMD, *supra* note 4, at art. 17(3), confirms this result by clarifying that the traditional liability shield for providers of UGC hosting services “shall not apply to the situations covered by this Article.”

²² *Id.* at art. 17(4)(a).

²³ Cf. Martin R.F. Senfileben, *Content Censorship and Council Carelessness—Why the Parliament Must Safeguard the Open, Participative Web 2.0*, TIJDSCHRIFT VOOR AUTEURS-, MEDIA- & INFORMATIERECHT 139, 141 (2018).

including harmonized rules on extended collective licensing,²⁴ paves the way for broader and more flexible licensing solutions. Even if a platform finds a collecting society willing to enter into a UGC agreement with the umbrella effect contemplated in Article 17(2), however, a core problem of licenses for Europe remains: the collecting society landscape is highly fragmented. The UGC deal available in one Member State may remain limited to the territory of that Member State. Pan-European licenses are the exception, not the rule. If a collecting society offers Pan-European licenses for digital use, these licenses will be confined to the specific repertoire, in respect of which the collecting society has a cross-border entitlement.²⁵

Problems also arise in the field of initiatives to obtain licenses directly from copyright holders. In the music industry, the willingness to grant licenses covering a broad spectrum of musical works may be relatively high. Existing services, such as Spotify, demonstrate that far-reaching licenses, encompassing recent music releases, are available. In the film industry, however, the situation is markedly different. The exploitation of film productions traditionally takes place in several stages. The release in cinemas is the first step, followed by pay TV exploitation, linear broadcasting on regular TV channels, and DVD sales and the distribution via general video-on-demand services. Film studios are unlikely to sacrifice this profitable exploitation cascade by permitting users to share audio-visual material from day one of the release in movie theatres. This would enable UGC platforms to enter into direct competition with the primary exploitation undertaken by the film studio itself. If, despite these concerns, there is willingness to conclude UGC licensing agreements, film studios will only accept agreements with limited use permissions that do not jeopardize their own opportunities to exploit the film in several stages and uphold the traditional exploitation cascade.

²⁴ DSMD, *supra* note 4, at art. 12. As to the discussion of extended licensing solutions in the area of orphan works, see Stef van Gompel, *Unlocking the Potential of Pre-Existing Content: How to Address the Issue of Orphan Works in Europe?*, 38 INT'L REV. INTELL. PROP. & COMPETITION L. 669 (2007).

²⁵ For a detailed analysis of current EU rights clearance challenges in the digital environment, see SEBASTIAN FELIX SCHWEMER, *LICENSING AND ACCESS TO CONTENT IN THE EUROPEAN UNION—REGULATION BETWEEN COPYRIGHT AND COMPETITION LAW* (Cambridge Univ. Press 2019). As to previous cases triggered by the rights clearance infrastructure in the EU, see Summary of Commission Decision 2008/C 323/08 of 16 July 2008 relating to a proceeding under Article 81 of the EC Treaty and Art. 53 of the EEA Agreement (Case COMP/C-2/38.698 — CISAC), 2008 O.J. (C 323) 1, 12; Commission Recommendation 2005/737 of 18 May 2005 on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services (2005/737/EC), 2005 O.J. (L 276) 1, 54. Cf. Kamiel Koelman, *Op naar de Euro-Buma(s): de Aanbeveling van de Europese Commissie over grensoverschrijdend collectief rechtenbeheer*, TIJDSCHRIFT VOOR AUTEURS-, MEDIA- EN INFORMATIERECHT, 191–96 (2005).

UGC licensing under Article 17(1) and (2) DSMD is thus unlikely to preserve the current participative web 2.0. As long as licensing deals cover only a limited spectrum of repertoire and include several restrictions on the modalities of authorized use, today's emancipated, active internet users will no longer enjoy the freedom of uploading remixes and mash-ups of all kinds of pre-existing material in the EU. Instead, they will only be able to upload content that falls within the scope of the licensing agreement, which the UGC platform managed to conclude with copyright holders and collecting societies. As a corollary, UGC platforms will no longer offer the content diversity that is currently available. In the absence of umbrella licenses covering all kinds of UGC (and all EU Member States), the platforms will have to limit the spectrum of content and the extent of use (in terms of scope and reach of takings from protected works) to licensed material, permitted use modalities, and covered territories.

Given these restrictions, the licensing approach, inevitably, leads to the introduction of filtering tools. As copyright holders and collecting societies are unlikely to offer all-embracing umbrella licenses, UGC platforms are likely to rely on algorithmic tools to ensure that content uploads do not overstep the limits of the use permissions they managed to obtain. Hence, licenses for UGC are a starting point for algorithmic enforcement measures. Upload filtering will be necessary to police the borders of the use permissions received from copyright owners and collecting societies. The licensing approach will lead to the use of filtering tools to ensure the congruence of user uploads with the use permissions given by copyright holders and collecting societies.

In accordance with the limits of licensing deals which UGC platforms manage to conclude, algorithmic enforcement measures will curtail the freedom of users to participate actively in the creation of online content. If a user-generated remix is not in line with the repertoire and use restrictions following from licensing deals, it will not pass the content filter. As a corollary, the licensing approach will curtail the possibility of users to learn of views and expressions of others. UGC portals relying on licensing deals will find it difficult to provide access to the wide variety of content that is uploaded by users with diverse social, cultural, and ethnical backgrounds. Platform providers following the licensing approach are likely to focus on mainstream works and the biggest language groups to maximize the return on investment in rights clearance. Hence, the risk of UGC impoverishment must not be underestimated. The focus on mainstream works and big language groups entails the risk of neglecting minority groups, minority views, and niche audiences. In light of the cultural diversity in and across EU Member States, this problem is serious.

Moreover, it cannot be ruled out that big players in the UGC platform arena—with various establishments across the EU—will have less difficulty to obtain licenses in different Member States with different languages and different rules on license agreements. The licensing option may thus give big players a competitive advantage that leads to further market concentration. The corrosive effect of licensing obligations in the field of UGC is thus twofold. It concerns the diversity of content and, at the same time, the spectrum of service providers. On balance, the licensing scenario and accompanying algorithmic enforcement measures are problematic from the perspective of both public and private interests.

B. Direct Algorithmic Enforcement Obligations

As an alternative, Article 17(4) DSMD offers UGC platforms the prospect of a reduction of the liability risk in exchange for content filtering. If a UGC platform—despite best efforts²⁶—has not received a license, it can avoid liability for unauthorized acts of communication to the public or making available to the public when it manages to demonstrate that it:

[M]ade, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information.²⁷

Although the provision contains neutral terms to describe this alternative scenario, there can be little doubt in which way the “unavailability of specific works and other subject matter” can be achieved: the use of automated filtering tools seems inescapable to ensure that unauthorized protected content does not populate UGC platforms. This filtering approach reflects the aforementioned remarkable transformation of copyright law into a censorship instrument. Inevitably, it raises the question whether the obligation to use filtering tools violates higher ranking, constitutional norms. Does EU copyright legislation encroach upon fundamental freedoms when institutionalizing algorithmic enforcement?

EU primary law, in particular the Charter of Fundamental Rights of the European Union (CFR), sets direct limits to inroads into user freedoms and measures which EU legislators may impose on information society service providers, including providers of UGC platforms. The Court of Justice of the

²⁶ DSMD, *supra* note 4, at art. 17(4)(a).

²⁷ *Id.* at art. 17(4)(b).

EU (CJEU) has stated explicitly that in transposing EU directives and implementing transposing measures,

Member States must . . . take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order.²⁸

Interestingly, the application of filtering technology to a social media platform hosting UGC already occupied center stage in *Sabam/Netlog*. The case concerned Netlog's social networking platform, which offered every subscriber the opportunity to acquire a globally available "profile" space that could be filled with photos, texts, video clips, etc.²⁹ Claiming that users make unauthorized use of music and films belonging to its repertoire, the collecting society Sabam sought to obtain an injunction obliging Netlog to install a system for filtering the information uploaded to Netlog's servers. As a preventive measure and at Netlog's expense, this system would have applied indiscriminately to all users for an unlimited period and would have been capable of identifying electronic files containing music and films from the Sabam repertoire. In the case of a match, the system would have prevented relevant files from being made available to the public.³⁰ Given these underlying facts, the *Sabam/Netlog* case offered the CJEU the chance to provide guidance on a filtering system that may become a standard measure under Article 17(4)(b) of the DSMD.

However, the CJEU did not arrive at the conclusion that such a filtering system could be deemed permissible. Instead, the Court saw a serious infringement of fundamental rights. It took as a starting point the explicit recognition of intellectual property as a fundamental right in Article 17(2) of the CFR. At the same time, the Court recognized that intellectual property must be balanced against the protection of other fundamental rights and freedoms.³¹ Weighing the right to intellectual property asserted by Sabam against Netlog's freedom to conduct a business, which is guaranteed under Article 16 of the CFR, the Court observed that the filtering system would involve monitoring all or most of the information on Netlog's server in the interests of copyright holders, would have no limitation in time, would be directed at all future infringements, and would be intended to protect not only

²⁸ Case C-275/06, *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, 2008 E.C.R. I-00271, ¶ 68.

²⁹ Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam) v. Netlog NV*, 2012 EUR-Lex CELEX LEXIS 62010CJ0360, ¶¶ 16–18 (Feb. 16, 2012).

³⁰ *Id.* ¶¶ 26, 36–37.

³¹ *Id.* ¶¶ 41–44.

existing but also future works.³² Against this background, the CJEU concluded that the filtering system would encroach upon Netlog's freedom to conduct a business:

Accordingly, such an injunction would result in a serious infringement of the freedom of the hosting service provider to conduct its business since it would require that hosting service provider to install a complicated, costly, permanent computer system at its own expense, which would also be contrary to the conditions laid down in Article 3(1) of Directive 2004/48, which requires that measures to ensure the respect of intellectual property rights should not be unnecessarily complicated or costly (see, by analogy, *Scarlet Extended*, paragraph 48).³³

The CJEU also found that the filtering system would violate the fundamental rights of Netlog's users, namely their right to the protection of their personal data and their freedom to receive or impart information, as safeguarded by Articles 8 and 11 of the CFR respectively.³⁴ The Court recalled that the use of protected material in online communications may be lawful under statutory limitations of copyright in the Member States, and that some works may have already entered the public domain or been made available for free by the authors concerned.³⁵ Given this corrosive effect on fundamental rights, the Court concluded:

Consequently, it must be held that, in adopting the injunction requiring the hosting service provider to install the contested filtering system, the national court concerned would not be respecting the requirement that a fair balance be struck between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other (see, by analogy, *Scarlet Extended*, paragraph 53).³⁶

In the light of this case law, it can hardly be concluded that the filtering obligation that can be deduced from Article 17(4)(b) of the DSMD is unproblematic. By contrast, it is likely to encroach upon the fundamental rights and freedoms guaranteed under Articles 8, 11, and 16 of the CFR.

³² *Id.* ¶ 45.

³³ *Id.* ¶¶ 46–47.

³⁴ *Id.* ¶¶ 48–50.

³⁵ *Id.* ¶ 50.

³⁶ *Id.* ¶ 51.

Admittedly, *Sabam/Netlog* concerned a general monitoring obligation targeting all types of content which users may upload. The drafters of Article 17(4)(b) of the DSMD seem to make an attempt to distinguish the institutionalization of algorithmic enforcement from this general monitoring obligation and escape the verdict of an infringement of fundamental rights by establishing an obligation to filter “specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information.”³⁷ The intention to obviate the impression of a general monitoring obligation also seems to lie at the core of Article 17(8) of the DSMD. This provision declares that UGC licensing and filtering “shall not lead to any general monitoring obligation.”³⁸

However, the success of this strategy is doubtful. It would come as a surprise if the content industry made a specific selection of works when sending copyright information to UGC platform providers in line with Article 17(4)(b) of the DSMD. It seems more realistic that platform providers will receive long lists of all works which copyright holders have in their repertoire. Adding up all “specific works and other subject matter”³⁹ included in right holder notifications, the conclusion may be inescapable that Article 17(4)(b) of the DSMD culminates in a filtering obligation that corresponds with the filtering measures which the CJEU prohibited in *Sabam/Netlog*.

Given this risk, it is surprising that Article 17 of the DSMD leaves the question unanswered in which way the legislator seeks to prevent excessive content filtering. Article 17(4)(b) of the DSMD refers to “high industry standards of professional diligence.” As to the practical outcome of this diligent cooperation, however, it is to be considered that decisions following from industry roundtables will be aligned with efficiency considerations. Industry decisions can be expected to be rational in the sense that they seek to achieve content filtering at minimal costs.

Hence, there is no guarantee that industry cooperation in the field of UGC will lead to the adoption of the most sophisticated filtering systems with the highest potential to avoid unjustified content removals of mash-ups and remixes. A test of proportionality is unlikely to occupy center stage unless the least intrusive measure also constitutes the least costly measure. While Article 17(5) of the DSMD provides guidelines for the assessment of the proportionality of filtering obligations, the relevant factors focus on “the type, the audience and the size of the service,” “the type of works or other subject matter,” and “the availability of suitable and effective means and their

³⁷ DSMD, *supra* note 4, at art. 17(4)(b).

³⁸ *Id.* at art. 17(8).

³⁹ *Id.* at art. 17(4)(b).

cost for service providers.”⁴⁰ Cost and efficiency factors are decisive. It is conceivable that these factors encourage the adoption of cheap and unsophisticated filtering tools that lead to excessive content blocking. A UGC platform seeking to minimize the risk of liability is likely to succumb to the temptation of overblocking.⁴¹ Filtering more than necessary is less risky than filtering only clear-cut cases of infringement. After all, the primary, direct liability for infringing user uploads, which follows from Article 17(1) of the DSMD, is hanging above the head of UGC platform providers like the sword of Damocles. In addition, incentives or obligations to prevent overblocking are sought in vain in Article 17 of the DSMD. As the indirect algorithmic enforcement obligations that will arise from the unavailability of umbrella licenses for UGC, the direct legal obligation of content filtering (that arises in the absence of licensing deals) raises serious concerns about an encroachment upon public and private interests.

III. SAFEGUARDS FOR TRANSFORMATIVE USE

However, the new EU legislation is not only about licensing and filtering, but also about measures to preserve breathing space for transformative forms of UGC.⁴² Article 17(7) of the DSMD underlines the need to safeguard copyright limitations for creative remix activities, in particular use for the purposes of “quotation, criticism and review,” and “caricature, parody and pastiche.”⁴³ As these use privileges enhance freedom of expression and information, they are important counterbalances (following section III.A).⁴⁴ If the exemption of UGC is based on these use privileges and

⁴⁰ *Id.* at art. 17(5).

⁴¹ Cf. Maayan Perel & Niva Elkin-Koren, *Accountability in Algorithmic Copyright Enforcement*, 19 STAN. TECH. L. REV. 473, 490–91 (2016). For empirical studies pointing towards overblocking, see Sharon Bar-Ziv & Niva Elkin-Koren, *Behind the Scenes of Online Copyright Enforcement: Empirical Evidence on Notice & Takedown*, 50 CONN. L. REV. 339, 377 (2018) (“Overall, the N&TD regime has become fertile ground for illegitimate censorship and removal of potentially legitimate materials.”); Jennifer M. Urban et al., *Notice and Takedown in Everyday Practice*, 2 (UC Berkeley Pub. Law & Legal Theory Research Paper Series, Paper No. 2755628, 2017), <https://ssrn.com/abstract=2755628> (“About 30% of takedown requests were potentially problematic. In one in twenty-five cases, targeted content did not match the identified infringed work, suggesting that 4.5 million requests in the entire six-month data set were fundamentally flawed. Another 19% of the requests raised questions about whether they had sufficiently identified the allegedly infringed work or the allegedly infringing material.”).

⁴² Martin Senftleben, *Bermuda Triangle—Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market*, 41 EUR. INTELL. PROP. REV. 480, 480–90 (2019).

⁴³ DSMD, *supra* note 4, at art. 17(7)(a)–(b).

⁴⁴ P. Bernt Hugenholtz & Martin R.F. Senftleben, *Fair Use in Europe: In Search of Flexibilities*, 29–30 (University of Amsterdam 2011), available at <http://ssrn.com/abstract=1959554>. For a discussion

combined with the payment of equitable remuneration, Article 17(7) of the DSMD can even generate new revenue streams that support the general policy objective of the new EU legislation to close the value gap (section III.B). To implement this new limitation infrastructure in their national laws, EU Member States can cultivate the concept of “pastiche” that is mentioned in Article 17(7) of the DSMD. Arguably, the word “pastiche” can be understood to encompass content medleys of users which go beyond the traditional concepts of “quotation” and “parody.” Based on the open-ended notion of “pastiche,” national lawmakers can thus create additional room for UGC (section III.C). Even though platform providers will still have to distinguish between permissible pastiche and prohibited piracy, the introduction of new use privileges for UGC is an important step in the right direction because it is a gateway to the development of algorithmic tools that follow a different filtering logic. Instead of focusing on traces of protected third-party content that may render user uploads impermissible, a filtering system looking for quotations, parodies, and pastiches focuses on creative user input that may justify the unauthorized upload (section III.D). Until algorithmic enforcement tools with this reverse filtering logic become widely available, complaint and redress mechanisms will play a crucial role for creative users in the EU (section III.E).

A. *Impact of Freedom of Expression*

Article 17(7) of the DSMD leaves little doubt that the use of algorithmic enforcement measures must not submerge areas of freedom for the creation and dissemination of transformative amateur productions that are uploaded to UGC platforms:

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

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

(a) quotation, criticism, review;

of new UGC use privileges under the umbrella of EU copyright law, see TRIAILLE ET AL., *supra* note 11, at 522–27, 531–34.

(b) use for the purpose of caricature, parody or pastiche.⁴⁵

The formulation “shall not result in the prevention” and “shall ensure that users . . . are able” give copyright limitations for “quotation, criticism, review” and “caricature, parody or pastiche” an elevated status. Use of the word “shall” clearly indicates a strict legal obligation. In Article 5(3)(d) and (k) of the Information Society Directive 2001/29/EC (ISD),⁴⁶ these use privileges were only listed as limitation prototypes which EU Member States are free to introduce (or maintain) at the national level. The adoption of a quotation right⁴⁷ and an exemption of caricature, parody, or pastiche⁴⁸ remained optional. Article 17(7) of the DSMD, however, transforms these use privileges into mandatory breathing space for transformative UGC—at least in the specific context of algorithmic enforcement measures taken by platform providers.⁴⁹ This metamorphosis makes copyright limitations in this category particularly robust: they “shall” survive the application of automated filtering tools.

Traditionally, copyright limitations have been interpreted restrictively in the EU.⁵⁰ In line with the traditional approach in EU Member States, the CJEU adhered to the dogma of strict interpretation in *Infopaq*.⁵¹ The copyright limitations for “quotation, criticism, review” and “caricature, parody or pastiche,” however, may still offer amateur creators effective arguments against excessive UGC filtering. In *Painer*, the CJEU underlined the need for an interpretation of the quotation right following from Article 5(3)(d) of the ISD that enables its effectiveness and safeguards its purpose.⁵² The Court clarified that Article 5(3)(d) of the ISD was “intended to strike a fair balance between the right of freedom of expression of users of a work or other protected subject-matter and the reproduction right conferred on

⁴⁵ DSMD, *supra* note 4, at art. 17(7).

⁴⁶ Council Directive 2001/29/EC, art. 5(3)(d), (k), 2001 O.J. (L 167) 10, 17 (EC).

⁴⁷ Council Directive 2001/29/EC, art. 5(3)(d), 2001 O.J. (L 167) 10, 17 (EC).

⁴⁸ Council Directive 2001/29/EC, art. 5(3)(k), 2001 O.J. (L 167) 10, 17 (EC).

⁴⁹ Cf. J. Quintais, et al., *Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations From European Academics 2* (University of Amsterdam – Institute for Information Law, Nov. 21, 2019), available at <https://ssrn.com/abstract=3484968>.

⁵⁰ As to the underlying differences in the theoretical underpinning and practical configuration of copyright protection in common law and civil law jurisdictions, see Martin R.F. Senftleben, *Bridging the Differences Between Copyright's Legal Traditions—the Emerging EC Fair Use Doctrine*, 57 J. COPYRIGHT SOC'Y U.S. 521, 522–25 (2010). But see J.C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, in OF AUTHORS AND ORIGINS, 131, 133 (B. Sherman & A. Strowel eds., Oxford: Clarendon Press 1994), who points out that the antagonism between copyright's legal traditions must not be overestimated from a historical perspective.

⁵¹ Case C-5/08, *Infopaq Int'l A/S v. Danske Dagblades Forening*, 2009 E.C.R. I-06569.

⁵² Case C-145/10, *Painer v. Standard VerlagsGmbH*, 2011 E.C.R. I-12533.

authors.”⁵³ In its further decision in *Deckmyn*, the CJEU followed the same path with regard to the parody exemption in Article 5(3)(k) of the ISD. As in *Painer*, the Court bypassed the dogma of strict interpretation and underlined the need to ensure the effectiveness of the parody exemption⁵⁴ as a means to balance copyright protection against freedom of expression.⁵⁵

In the light of this jurisprudence, the reference to “quotation, criticism, review” and “caricature, parody or pastiche” in Article 17(7) of the DSMD is capable of providing reliable breathing space for UGC evolving from the transformative use of protected pre-existing works. As the decisions of the CJEU demonstrate, the fundamental guarantee of freedom of expression plays a crucial role in this context.⁵⁶ Relying on Article 11 of the CFR and Article 10 of the European Convention on Human Rights (ECHR), the CJEU interpreted the quotation right and the parody exemption less strictly than limitations without a comparably strong freedom of speech underpinning.⁵⁷ In both the *Painer* and the *Deckmyn* decision, the Court emphasized the need to achieve a “fair balance” between, in particular, “the rights and interests of authors on the one hand, and the rights of users of protected subject-matter on the other.”⁵⁸ The Court thus referred to quotations and parodies as user “rights” rather than mere user “interests.”

As long as UGC is the result of creative efforts that add value to underlying source material,⁵⁹ user-generated remixes, and mash-ups of third-party content can be qualified as a specific form of transformative use falling under Article 11 of the CFR and Article 10 of the ECHR. Arguably, the CJEU’s line of reasoning stemming from quotation and parody cases is thus also relevant to other categories of creative UGC: as a copyright rule that seeks to strike a balance between copyright protection and freedom of expression, an exemption of UGC creation and dissemination must not be interpreted strictly.

⁵³ *Id.*

⁵⁴ Case C-201/13, *Deckmyn v. Vandersteen*, 2014 EUR-Lex CELEX LEXIS 2132 (Sept. 3, 2014).

⁵⁵ *Id.*

⁵⁶ For a discussion of the status quo reached in balancing copyright protection against freedom of expression, see

Christophe Geiger & Elena Izyumenko, *Freedom of Expression as an External Limitation to Copyright Law in the EU: The Advocate General of the CJEU Shows the Way*, 41 EUR. INTELL. PROP. REV. 131, 133–36 (2019).

⁵⁷ As to the influence of freedom of speech guarantees on copyright law in the EU, see MACCIACCHINI, *supra* note 2; Benkler, *supra* note 2; Geiger, *supra* note 2; Geiger & Izyumenko, *supra* note 2; Hugenholtz, *supra* note 2; Netanel, *supra* note 2; Strowel, *supra* note 2.

⁵⁸ Case C-145/10, *Painer v. VerlagsGmbH*, 2011 E.C.R. I-12533, ¶ 132; Case C-201/13, *Deckmyn v. Vandersteen*, 2014 EUR-Lex CELEX LEXIS 2132 (Sept. 3, 2014), ¶ 26; *see also* Case C-476/17, *Pelham GmbH v. Hütter*, 2019 EUR-Lex CELEX LEXIS 62017CA0476, ¶¶ 32, 37, 59 (July 29, 2019).

⁵⁹ OECD, *supra* note 7, at 8.

B. Payment of Equitable Remuneration

To further enhance the effectiveness of the copyright limitations listed in Article 17(7) of the DSM Directive, it is advisable to consider the policy dimension of the filtering debate in the EU. As explained above, the new algorithmic enforcement obligations flow from the desire to ensure the payment of adequate remuneration for the use of copyrighted source material in the context of UGC creation and dissemination. For courts hearing a case about excessive content filtering, this policy objective may be a reason to take a cautious approach to copyright limitations. Judges may feel that broad UGC privileges deprive copyright owners of the opportunity to prohibit UGC dissemination unless they are adequately paid for authorizing the use.

With regard to this concern about the loss of a new source of income, however, it is to be considered that copyright limitations need not be equated with use free of charge in an EU context. While the US fair use doctrine does not provide for the payment of equitable remuneration,⁶⁰ the inclusion of this feature is not incompatible in the EU. The payment of fair compensation constitutes an important aspect of the limitation system in the Information Society Directive and the copyright acts of many EU Member States.⁶¹ It is understood to enhance the breathing space for unauthorized use. When the permission of a specific form of unauthorized use seems desirable even though it has a deep impact on the position of the right owner, the payment of equitable remuneration constitutes an additional balancing tool that can be used to minimize the corrosive effect of the use privilege. The offer of remuneration reduces the harm flowing from a broad copyright limitation to an acceptable, reasonable level. The far-reaching exemption of digital private copying in the EU reflects the remarkable potential of lumpsum remuneration payments to create additional breathing space for use privileges.⁶² A

⁶⁰ See the conceptual contours of the fair use doctrine in the U.S. Copyright Act, 17 U.S.C. § 107 (1990).

⁶¹ In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter. When determining the form, detailed arrangements, and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question. Directive 2001/29, of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 35.

⁶² A remuneration-based solution of the private copying dilemma has been chosen in Article 5(2)(a) and (b) ISD. As to the problem of finding appropriate parameters for determining the right amount of remuneration, see Case C-467/08, *Editores v. Padawan*, 2010 E.C.R. I-10055, ¶ 49; Case C-457/11 to C-460/11, *VG Wort v. KYOCERA Document Solutions Deutschland*, 2013 EUR-Lex CELEX LEXIS 62011CA0457 ¶¶ 76–77 (June 27, 2013); Case C-521/11, *Amazon.com Int'l Sales Inc. v. Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH*, 2013 EUR-

remuneration mechanism can also substantially enhance the room to maneuver in the area of UGC. As it generates a revenue stream, it becomes possible to provide for a broad UGC privilege while, at the same time, ensuring the payment of remuneration and supporting the policy objective of the new EU legislation to close the value gap. In a nutshell, a remunerated copyright limitation for UGC creation and dissemination only deprives copyright owners of their right to categorically prohibit use. It need not deprive copyright owners of a new source of income.

The nature of UGC offers useful starting points for the introduction of remuneration systems without damaging the long-standing rule that quotations and parodies are free of charge.⁶³ The degree of transformative effort in UGC cases is not always comparable with the degree of transformation in quotation and parody scenarios. Instead of modifying or making a critical comment on protected third-party material, a user-generated remix or mash-up may simply combine pre-existing works with the user's own creation. This remix or mash-up character of UGC may preclude the successful invocation of the right of quotation. In *Pelham*, the CJEU held that an essential characteristic of a quotation was

the use, by a user other than the copyright holder, of a work or, more generally, of an extract from a work for the purposes of illustrating an assertion, of defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user, since the user of a protected work wishing to rely on the quotation exception must therefore have the intention of entering into 'dialogue' with that work⁶⁴

Lex CELEX LEXIS 62011CA0521 ¶ 24 (July 11, 2013); Case C-435/12, *Aci Adam BV v. Stichting de ThuisKopie*, 2014 EUR-Lex CELEX LEXIS 62012CA0435 ¶ 52 (Apr. 10, 2014); Case C-463/12, *Båndkopi v. Danmark*, 2015 E.C.R. 144, ¶ 23 (Mar. 5, 2015).

⁶³ Article 5(3)(d) and (k) ISD do not provide for the payment of remuneration. This corresponds with the legal traditions in EU Member States. Traditionally, the strong freedom of expression underpinning of the right of quotation and the exemption of parody—the high degree of creative effort added by the user—led to the permission of quotations and parodies without any financial compensation. Cf. TRIAILLE ET AL., *supra* note 11, at 465–72, 476–81; Reto M. Hilty & Martin R.F. Senfleben, *Rückschnitt durch Differenzierung?—Wege zur Reduktion dysfunktionaler Effekte des Urheberrechts auf Kreativ- und Angebotsmärkte*, in *VOM MAGNETTONBAND ZU SOCIAL MEDIA—FESTSCHRIFT 50 JAHRE URHEBERRECHTSGESETZ (URHG)* 317, 325–28 (Thomas Dreier & Reto Hilty eds., 2015); Martin R.F. Senfleben, *Quotations, Parody and Fair Use*, in *1912–2012: A CENTURY OF DUTCH COPYRIGHT LAW* 345, 351–54 (Bernt Hugenholtz et al. eds., 2012).

⁶⁴ Case C-476/17, *Pelham GmbH v. Hütter*, 2019 Eur-Lex CELEX LEXIS 62017CA0476, ¶ 71 (July 29, 2019). As to the background of this decision, see L. Bently et al., *Sound Sampling, a Permitted Use Under EU Copyright Law? Opinion of the European Copyright Society in Relation to the Pending Reference Before the CJEU in Case C-476/17, Pelham GmbH v. Hütter*, 50 INT'L REV. INTELL. PROP. & COMPETITION L. 467, 486–87 (2019).

As Lionel Bently and Tanya Aplin have shown, this approach to the right of quotation may be incompatible with the international quotation standard laid down in Article 10(1) of the Berne Convention where limiting preconditions for the invocation of the use privilege, such as shortness, non-modification, incorporation, referencing back or distinctness, are sought in vain. Bently and Aplin conclude that the ordinary meaning, which the term has across the entire spectrum of work categories and artistic practices, should serve as a basis for tracing the conceptual contours of “quotation.”⁶⁵ This approach does not support a restrictive dialogue requirement that may be deduced from the CJEU statement in *Pelham*.

Even if the CJEU embraced this more flexible notion of “quotation” and relaxed its *Pelham* conditions, however, UGC may still include a protected work without “quoting” it. If pre-existing content is simply added to enrich UGC (background music for a funny animal video can serve as an example), it will remain difficult to qualify the use as a permissible quotation. This result, however, can serve as a starting point for the development of a remunerated UGC privilege that goes beyond the right of quotation and the exemption of parody. The lower degree of creative input in the animal video example does not pose an insuperable obstacle. By contrast, it offers a starting point for efforts to establish a new revenue stream. The underlying logic is simple: the payment of equitable remuneration counterbalances the lower degree of creative investment in the transformation of source material. To the extent that the harm flowing from a broad UGC use privilege seems unreasonable because of limited creative input, the payment of equitable remuneration reduces this unreasonable prejudice to a permissible, reasonable level.⁶⁶ Taking the EU regulation of private copying as a reference point,⁶⁷ a corresponding UGC exemption in EU copyright law could be

⁶⁵ Tanya Aplin & Lionel Bently, *Displacing the Dominance of the Three-Step Test: The Role of Global, Mandatory Fair Use*, in *COMPARATIVE ASPECTS OF LIMITATIONS AND EXCEPTIONS IN COPYRIGHT LAW* (Wee Loon Ng et al. eds., forthcoming), available at <https://ssrn.com/abstract=3119056>; Lionel Bently & Tanya Aplin, *Whatever Became of Global Mandatory Fair Use? A Case Study in Dysfunctional Pluralism*, in *IS INTELLECTUAL PROPERTY PLURALISM FUNCTIONAL?* (Susy Frankel ed., forthcoming), available at <https://ssrn.com/abstract=3119041>.

⁶⁶ Cf. the overarching rule for the regulation of copyright limitations in the EU that is laid down in Article 5(5) of the ISD and modelled on the international three-step tests in Article 9(2) BC, Article 13 TRIPS and Article 10 of the WIPO Copyright Treaty. For a more detailed discussion of this solution in the light of the three-step test, see Martin R.F. Senftleben, *User-Generated Content—Towards a New Use Privilege in EU Copyright Law*, in *RESEARCH HANDBOOK ON IP AND DIGITAL TECHNOLOGIES* (T. Aplin ed., Cheltenham: Edward Elgar, forthcoming), available at <https://ssrn.com/abstract=3325017>; TRIAILLE ET AL., *supra* note 11, at 531–34. See also the discussion of three-step test compliance of a UGC exemption by Peter K. Yu, *Can the Canadian UGC Exception Be Transplanted Abroad?*, 26 *INTELL. PROP. J.* 175, 195–96 (2014).

⁶⁷ As to the conceptual contours of the private copying levy system in the EU, see Case C-463/12, *Båndkopi v. Danmark*, 2015 EUR-Lex CELEX LEXIS 62012CA0463 ¶ 23 (Mar. 5, 2015); Case C-

configured as follows: users could remain free to create and upload content mash-ups and remixes even if they do not fall within the scope of the right of quotation and the exemption of parody. Providers of UGC platforms, however, would be obliged to pay equitable remuneration for the dissemination of UGC that falls within the scope of the new, broadened UGC privilege.⁶⁸

In comparison with the described problems arising from licensing and filtering obligations, this reliance on a remunerated UGC privilege has the advantage of creating a continuous revenue stream for authors and performers. While licensing and filtering agreements between copyright owners and platform providers may predominantly benefit the content industry, the repartitioning scheme of collecting societies receiving UGC levy payments could ensure that authors and performers obtain a substantial part of the UGC remuneration, even if they have transferred their copyright and neighboring rights to exploiters of their works and performances.⁶⁹ The value gap problem could thus be solved in a way that benefits not only the creative industry but also individual creators of content.

As pointed out, this solution requires a distinction between “ordinary” parody and quotation cases and other forms of UGC. Insofar as UGC falls

435/12, *Aci Adam BV v. Stichting de ThuisKopie*, 2014 EUR-Lex CELEX LEXIS 62012CA0435 ¶ 52 (Apr. 10, 2014); Case C-521/11, *Amazon.com Int’l Sales Inc. v. Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH*, 2013 EUR-Lex CELEX LEXIS 62011CA0521 ¶ 24 (July 11, 2013); Case C-457/11 to C-460/11, *VG Wort v. KYOCERA Document Solutions Deutschland*, 2013 EUR-Lex CELEX LEXIS 62011CA0457 ¶ 76–77 (June 27, 2013); Case C-467/08, *Padawan SL v. Sociedad General de Autores y Editores*, 2010 EUR-Lex CELEX LEXIS 62008CA0467 ¶ 49 (Oct. 21, 2010). As to the use of private copying regimes as a reference point for generating a robust revenue stream, see Christophe Geiger, *Freedom of Artistic Creativity and Copyright Law: A Compatible Combination?*, 8 U.C. IRVINE L. REV. 413, 450–51 (2018).

⁶⁸ Cf. Matthias Leistner, *Copyright Law on the Internet in Need of Reform: Hyperlinks, Online Platforms and Aggregators*, 12 J. INTELL. PROP. L. & PRAC. 136, 146–49 (2017); Matthias Leistner & Axel Metzger, *Wie sich das Problem illegaler Musikknutzung lösen lässt*, FRANKFURTER ALLGEMEINE ZEITUNG (Jan. 4, 2017), <http://www.faz.net/aktuell/feuilleton/medien/gema-youtube-wie-sich-urheberrechts-streit-schlichten-liesse-14601949-p2.html>; Hilty & Senfleben, *supra* note 63, at 327–28.

⁶⁹ In the context of repartitioning schemes of collecting societies, the individual creator has a relatively strong position. As to national case law explicitly stating that a remuneration right leads to an improvement of the income situation of the individual creator (and may be preferable over an exclusive right to prohibit use for this reason), see BGH Jul. 11, 2002, I ZR 255/00, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&anz=1&pos=0&nr=13358&linked=pm&Blank=1>. For a discussion of the individual creator’s entitlement to income from the payment of equitable remuneration, see JOÃO P. QUINTAIS, COPYRIGHT IN THE AGE OF ONLINE ACCESS—ALTERNATIVE COMPENSATION SYSTEMS IN EU LAW 335–36, 340–41, 347–49, 356–57 (2017); Guido Westkamp, *The ‘Three-Step Test’ and Copyright Limitations in Europe: European Copyright Law Between Approximation and National Decision Making*, 56 J. COPYRIGHT SOC’Y U.S. 1, 55–59 (2008); EUR. COPYRIGHT SOC’Y, OPINION ON REPROBEL (2015), <https://europeancopyrightsociety.org/opinion-on-reprobel/>.

within the scope of the traditional right of quotation or the traditional parody exemption, no payment of equitable remuneration is necessary. Because of the creative effort involved, these use privileges have a strong freedom of expression underpinning and do not require the payment of remuneration. Accordingly, Article 5(3)(d) of the ISD and Article 5(3)(k) of the ISD permit the adoption of these user rights⁷⁰ without providing for the payment of remuneration.⁷¹ If, by contrast, UGC falls outside the scope of the right of quotation and the parody exemption because of insufficient transformative input to satisfy high quotation or parody standards, the broadening of existing use privileges is necessary, and the payment of equitable remuneration is advisable for the described reasons.⁷²

C. *Pastiche Exemption as a Statutory Basis*

In the absence of an open-ended fair use rule in the EU,⁷³ however, this plea for a new UGC privilege can only lead to practical results if an alternative statutory basis can be found in the existing canon of permissible use privileges in EU copyright law. EU Member States seeking to devise a new use privilege for UGC creation and dissemination must find a concept in the closed list of permissible copyright limitations in Article 5(3) of the ISD and the list of filter-proof limitations in Article 17(7) of the DSM, the usual meaning of which can be understood to cover user-generated remixes and mash-ups that go beyond traditional quotations and parodies. In *Deckmyn* and *Pelham*, the CJEU established the rule that the meaning of limitation concepts listed in Article 5(3) of the ISD had to be determined by considering the usual meaning of those concepts in everyday language, while also taking into account the legislative context in which they occur and the purposes of

⁷⁰ Case C-201/13, *Deckmyn v. Vandersteen*, 2014 EUR-Lex CELEX LEXIS 62013CA0201 ¶ 26 (Sept. 3, 2014); Case C-145/10, *Painer v. Standard VerlagsGmbH*, 2011 E.C.R. I-12533 ¶ 132.

⁷¹ Cf. TRIAILLE ET AL., *supra* note 11, at 465–72, 476–81.

⁷² Admittedly, this solution leads to the dilemma that a creative form of use is subjected to the obligation to pay equitable remuneration. Traditionally, this has not been the case. Cf. Hilty & Senfleben, *supra* note 63, 328–29. However, see the broader concept of a general use privilege for creative reuse (not limited to UGC) developed by Geiger, *supra* note 67, 443–54; Christophe Geiger, *Statutory Licenses as Enabler of Creative Uses*, in REMUNERATION OF COPYRIGHT OWNERS: REGULATORY CHALLENGES OF NEW BUSINESS MODELS 305, 308–18 (Kung-Chung Liu & Reto M. Hilty eds., 2017); Christophe Geiger, *Promoting Creativity Through Copyright Limitations, Reflections on the Concept of Exclusivity in Copyright Law*, 12 VAND. J. ENT. & TECH. L. 515, 541–44 (2010), who proposes a remunerated statutory limitation for commercial creative uses, administered by an independent regulation authority which could solve ex post disputes between original and derivative creators on the price to be paid for the transformative use via mediation.

⁷³ As to lessons which the EU could learn from the U.S. in this respect, see Martin R.F. Senfleben, *Comparative Approaches to Fair Use: An Important Impulse for Reforms in EU Copyright Law*, in METHODS AND PERSPECTIVES IN INTELLECTUAL PROPERTY 30, 30–67 (G.B. Dinwoodie ed., 2013).

the rules of which they are part.⁷⁴ Against this background, Article 5(3)(k) of the ISD is of particular interest. The provision allows Member States to set limits to the right of reproduction and the right of communication to the public. Its scope is not confined to use in the context of “parody.” Article 5(3)(k) of the ISD also permits the exemption of use for the purpose of creating a “pastiche”—a purpose that is also listed in Article 17(7) of the DSMD.

The Merriam-Webster English Dictionary defines “pastiche” as “a literary, artistic, musical, or architectural work that imitates the style of previous work.”⁷⁵ It also refers to a “musical, literary, or artistic composition made up of selections from different works.”⁷⁶ Similarly, the Collins English Dictionary describes a “pastiche” as “a work of art that imitates the style of another artist or period” and “a work of art that mixes styles, materials, etc.”⁷⁷ The aspect of mixing pre-existing materials and using portions of different works is of particular importance to the UGC debate. In many cases, the remix of pre-existing works in UGC leads to a new creation that “mixes styles, materials, etc.” and, in fact, is “made up of selections from different works.” Hence, the usual meaning of “pastiche” encompasses forms of UGC that mix different source materials and combine selected parts of pre-existing works.

Existing EU copyright law, thus, already contains a concept that can serve as a basis for the introduction of a new copyright limitation for UGC that goes beyond the traditional right of quotation and the traditional exemption of parody.⁷⁸ Until now, EU Member States have not made effective use of this option to regulate UGC at the national level. Instead of clearly articulating the intention to create a UGC copyright limitation when permitting pastiches, they simply included the word “pastiche” in their

⁷⁴ Case C-201/13, *Deckmyn and Vrijheidsfonds VZW/Vandersteen*, ¶ 19 2014 E.C.J.; Case C-476/17, *Pelham*, ¶ 70 2019 E.C.J.

⁷⁵ *Pastiche*, MERRIAM-WEBSTER ENGLISH DICTIONARY, <https://www.merriam-webster.com/dictionary/pastiche>.

⁷⁶ *Id.*

⁷⁷ *Pastiche*, COLLINS ENGLISH DICTIONARY, <https://www.collinsdictionary.com/dictionary/english/pastiche>.

⁷⁸ Cf. Emily Hudson, *The Pastiche Exception in Copyright Law: A Case of Mashed-Up Drafting?*, INTELL. PROP. Q., 346, 348–52, 362–64 (2017), which confirms that the elastic, flexible meaning of the term “pastiche” is capable of encompassing “the utilization or assemblage of pre-existing works in new works.” In the same sense, Florian Pötzlberger, *Pastiche 2.0: Remixing im Lichte des Unionsrechts*, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT 675, 681 (2018). See also QUINTAIS, *supra* note 69, at 235, who points out that the concept of “pastiche” can be understood to go beyond a mere imitation of style. In line with the results of the study tabled by TRIAILLE ET AL., *supra* note 11, 534–41. Quintais, nonetheless, expresses a preference for legislative reform. See QUINTAIS, *supra* note 69, at 237.

national legislation without explaining its relevance to UGC creation and dissemination. Article 18b of the Dutch Copyright Act, for example, exempts the reproduction and communication to the public of protected works “in the framework of a caricature, parody or pastiche” without placing the pastiche element of this copyright limitation in the context of UGC and providing guidelines for its application.⁷⁹ As a result, the exemption of pastiche can hardly be expected to support amateur creators embarking on the remix of pre-existing material. To remedy this shortcoming, EU Member States should take a fresh look at the concept of “pastiche” when implementing the DSM Directive. They should seize the opportunity to supplement their national portfolio of copyright limitations with a pastiche exemption and clarify in this context that this use privilege is intended to cover UGC.⁸⁰

In national systems which already provide for the exemption of pastiches, the courts can achieve this result as well. Accepting the pastiche provision as a valid defense against infringement arguments in UGC cases, they can pave the way for the recognition of the exemption of pastiches as a copyright limitation covering user-generated remixes of protected works. The courts also have a crucial role to play in the creation of corresponding revenue streams. In fact, a court-made obligation to pay equitable remuneration is not an anomaly in the European copyright tradition. In a 1999 case concerning the Technical Information Library Hanover, the German Federal Supreme Court, for example, permitted the library’s practice of copying and dispatching scientific articles on request by single persons and industrial undertakings even though this practice came close to a publisher’s activities.⁸¹ To ensure the payment of equitable remuneration, the Court deduced a payment obligation from the three-step test in international copyright law and permitted the continuation of the service on the condition that equitable remuneration be paid.⁸²

Under harmonized EU copyright law, the CJEU adopted a similar approach. In *Technische Universität Darmstadt*, the Court recognized an

⁷⁹ For a discussion of the objectives underlying the adoption of this copyright limitation in the Netherlands, see Martin R.F. Senfleben, *Quotations, Parody and Fair Use*, in A CENTURY OF DUTCH COPYRIGHT LAW—AUTEURSWET 1912–2012 359, 365 (P.B. Hugenholtz, A.A. Quaadvlieg, D.J.G. Visser eds., 2012). Also see the official government document explaining the implementation of the Information Society Directive, Tweede Kamer 2001–2002, 28 482, Nr. 3 (Memorie van Toelichting), 53. As to similar experiences in the UK, see Hudson, *supra* note 78, at 351–52.

⁸⁰ As to guidelines for a sufficiently flexible application of the pastiche exemption in the light of the underlying guarantee of free expression, see Hudson, *supra* note 78, at 362–64.

⁸¹ Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 25, 1999, case I ZR 118/96, TIB HANNOVER, *Juristenzeitung* 1999, 1000 (Ger.).

⁸² *Id.* at 1005–07.

“ancillary right”⁸³ of libraries to digitize books in their holdings for the purpose of making these digital copies available via dedicated reading terminals on the library premises. To counterbalance the creation of this broad use privilege, the Court deemed it necessary—in light of the three-step test in Article 5(5) of the ISD—to insist on the payment of equitable remuneration. Discussing compliance of German legislation with this requirement, the Court was satisfied that the conditions of the three-step test were met because German libraries had to pay adequate remuneration for the act of making works available on dedicated terminals after digitization.⁸⁴

Hence, it is not unusual for courts in the EU to establish an obligation to pay equitable remuneration with regard to use privileges that have a broad scope. The courts derive the obligation to pay equitable remuneration from the three-step test in international and EU copyright law.⁸⁵ Considering this practice, there can be little doubt that judges in EU Member States that already provide for an exemption of pastiches could supplement this use privilege with an obligation to pay equitable remuneration when it comes to user-generated pastiches that do not reflect sufficient creative effort to fall within the province of “quotation” or “parody” and are disseminated via online platforms. This solution has the advantage of providing room for the evolution of UGC platforms that focus on content remixes and mash-ups that fall within the scope of the described broadened pastiche exemption or traditional copyright limitations for the purposes of quotation or parody. Article 17(7) of the DSMD, thus, creates a habitat for UGC that is beyond the reach of the prevailing prohibition and licensing logic of the new EU legislation.

D. Reverse Filtering Logic

Admittedly, the escape route of Article 17(7) of the DSMD does not entail a full immunity from filtering obligations. Even if a UGC platform provider decides to focus on permitted quotations, parodies, and pastiches, it

⁸³ Case C-117/13, Technische Universität Darmstadt, ¶ 48, 2014 E.C.J.

⁸⁴ See *id.*

⁸⁵ See the Berne Convention for the Protection of Artistic and Literary Works, art. 9(2), Sept. 9, 1886, S. TREATY DOC. 99–27, 828 U.N.T.S. 222, Agreement on Trade-Related Aspects of Intellectual Property Rights art. 13, Apr. 15, 1994, and WIPO Copyright Treaty, art. 10, Dec. 20, 1996, S. Treaty Doc. 105–17, 2186 U.N.T.S. 121 at the International Level, and European Parliament & Council of the European Union, Directive 2001/29/EC, art. 5(5), 2001 O.J. (L 167), in EU copyright law. For commentary, see Christophe Geiger, Daniel Gervais & Martin Senftleben, *The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law*, 29 AM. U. INT’L L. REV. 581, 581–626 (2014); MARTIN SENFLEBEN, COPYRIGHT, LIMITATIONS AND THE THREE-STEP TEST: AN ANALYSIS OF THE THREE-STEP TEST IN INTERNATIONAL AND EC COPYRIGHT LAW (Kluwer Law International 2004).

will still be necessary to introduce algorithmic enforcement measures to separate the wheat from the chaff. The platform provider will have to distinguish between permissible pastiche and prohibited piracy. Nonetheless, the robust use privileges for UGC in Article 17(7) of the DSMD offer important impulses for the development of content identification systems that seek to find creative input that renders the upload permissible instead of focusing on third-party content that makes the upload problematic.⁸⁶ The exemption of quotations, parodies, and pastiches paves the way for a markedly different approach to the assessment of content. Instead of focusing on traces of protected third-party content in UGC (and starting points for blocking content), it is decisive whether the user has added sufficient own creativity to arrive at a permissible form of UGC.

It remains to be seen whether (and how) this reverse filtering logic can be implemented in practice.⁸⁷ It is conceivable, for instance, that users upload not only their final pastiche but also a file containing exclusively the self-created material which they mingled with protected third-party content. In case of separable input (the funny animal video on the one hand, the added background music on the other), this allows the inclusion of the user creation as a separate content item in the identification system. In this way, the system could be made “aware” that UGC contains different types of creative input.⁸⁸ Accordingly, it could factor this “insight” into the equation when calculating the ratio of own content to third-party content. In addition, the potential of artificial intelligence and self-learning algorithms must not be underestimated. Filtering machines may be able to learn from decisions on content permissibility taken by humans. As a result, algorithmic content screening could become more sophisticated. It may lead to content identification systems that are capable of deciding easy cases and flagging difficult cases which could then be subject to human review.⁸⁹

⁸⁶ Cf. Elkin-Koren, *supra* note 3, at 1093–96.

⁸⁷ For critical comments on the ability of automated systems to distinguish between an infringing copy and a permissible quotation, parody, or pastiche, see Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 HARV. J.L. & TECH., 41, 56 (2001); Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. ON TELECOMM. & HIGH TECH. L. 101, 110–11 (2007). See generally Yu, *supra* note 66.

⁸⁸ As to the creation of digital reference files in content identification systems, see Lauren G. Gallo, *The (Im)possibility of “Standard Technical Measures” for UGC Websites*, 34 COLUM. J.L. & ARTS, 283, 296 (2011); Perel & Elkin-Koren, *supra* note 41, at 513–14.

⁸⁹ Elkin-Koren, *supra* note 3, at 1096–98.

E. Guidelines for Calculating Pastiche Levies

The prospect of a reverse filtering logic following from robust use privileges for UGC offers useful reference points for calculating the right amount of equitable remuneration for pastiches reflecting user creativity that does not allow the invocation of the unremunerated exemption of quotations and parodies. In practice, filtering systems seeking to identify content elements that justify the unauthorized upload will only be attractive to platform providers if the costs involved are lower than the costs of implementing a conventional, prohibition-driven filtering system. After all, providers of UGC platforms are most often commercial, profit-oriented entities and not freedom of expression charities.

Hence, the decision on pastiche levies concerns not only the determination of an appropriate fee but also the creation of an appropriate incentive scheme.⁹⁰ Lawmakers seeking to encourage investment in filter technology that follows the described reverse logic—identifying creative user input that renders the upload permissible instead of focusing on third-party content that makes the upload problematic—would have to establish pastiche remuneration fees that are lower than regular license fees. Otherwise, it will be cheaper for the platform industry to subscribe to the traditional filtering model and block content whenever an upload contains traces of protected works of third parties. Moreover, it is to be considered in the light of freedom of expression that the creative effort invested in a user-generated pastiche justifies a lower fee when compared with a verbatim copy lacking any creative user input.

F. Procedural Safeguards

A final piece of the algorithmic enforcement puzzle concerns procedural safeguards against excessive content filtering. Until the described incentive scheme leads to the availability of sophisticated filtering systems capable of distinguishing between permissible pastiche and prohibited piracy, these procedural safeguards play a central role. Article 17(9) of the DSMD provides for an “effective and expeditious complaint and redress mechanism” for users who are confronted with unjustified content blocking.⁹¹ Complaints shall be processed “without undue delay.”⁹² The content industry must “duly

⁹⁰ For a more general discussion of incentives for the development of more balanced algorithmic enforcement tools, see Martin Husovec, *The Promises of Algorithmic Copyright Enforcement: Takedown or Staydown? Which Is Superior? And Why?*, 42 COLUM. J.L. & ARTS 53, 76–84 (2018).

⁹¹ DSMD, *supra* note 4.

⁹² *Id.*

justify the reasons for their requests”⁹³ vis-à-vis content blocking and removal. In the light of this substantiation of the filtering request, the UGC platform will have to take a final decision on the status of the upload at issue.

This procedural safeguard does not show much promise for the preservation of the quotation, parody, and pastiche habitat. As the platform provider runs the risk of liability for infringement, a generous interpretation of these copyright limitations serving freedom of expression seems unlikely, even though a broad application of the right of quotation and the parody exemption would be in line with CJEU jurisprudence.⁹⁴ The elastic timeframe also gives rise to concerns. The standard of “without undue delay”⁹⁵ differs markedly from an obligation to let blocked content reappear promptly. As it may take quite a while until a decision on the infringing nature of content is taken, the complaint-and-redress mechanism may appear unattractive to users from the outset.

A high degree of efficiency and reliability is thus crucial to the success of the measure. Evidence from the application of the counternotice system in the U.S.⁹⁶ shows quite clearly that users are unlikely to file complaints in the first place.⁹⁷ If users must wait a relatively long time for a final result, it is foreseeable that a complaint-and-redress system is incapable of safeguarding freedom of expression. In the context of UGC, it is often crucial to react quickly to current news and film, book, and music releases. If the complaint-and-redress mechanism finally yields the insight that a lawful content remix or mash-up has been blocked, the decisive moment for an affected quotation, parody, or pastiche may already have passed.⁹⁸

⁹³ *Id.*

⁹⁴ The court emphasized the need “to achieve a ‘fair balance’ between, in particular, the rights and interests of authors on the one hand, and the rights of users of protected subject-matter on the other.” Case C-201/13, *Deckmyn v. Vandersteen*, 2014 E.C.R. 62013CJ0201, ¶ 26; *see also* Case C-145/10, *Painer v. Standard VerlagsGmbH*, 2011 E.C.R. I-12533, ¶ 132.

⁹⁵ DSMD, *supra* note 4, at art. 17(9).

⁹⁶ As to this feature of the notice-and-takedown system in U.S. copyright law, *see Peguera, supra* note 12, at 481.

⁹⁷ *See* the study conducted by Jennifer M. Urban & Laura Quilter, *Efficient Process or “Chilling Effects”? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621 (2006), showing, among other things, that 30% of DMCA takedown notices were legally dubious, and that 57% of DMCA notices were filed against competitors. While the DMCA offers the opportunity to file counter-notices and rebut unjustified takedown requests, Urban and Quilter find that instances in which this mechanism is used are relatively rare. However, compare the critical comments on the methodology used for the study and a potential self-selection bias arising from the way in which the analyzed notices have been collected by Frederick W. Mostert & Martin B. Schwimmer, *Notice and Takedown for Trademarks*, 101 TRADEMARK REP., 249, 259–60 (2011).

⁹⁸ Apart from the time aspect, complaint systems may also be implemented in a way that discourages widespread use. *Cf.* Perel & Elkin-Koren, *supra* note 41, 507–08, 514. In addition, the question arises whether users filing complaints are exposed to copyright infringement claims in case the

Against this background, it is advisable to make the submission of a complaint against content filtering as simple as possible. If users must fill out a complicated form and add lengthy explanations to substantiate their request, Article 17(9) of the DSMD will remain a dead letter. To avoid this loss of an important safeguard against excessive algorithmic enforcement, the blocking of UGC should automatically lead to the opening of a dialogue box with a menu of standardized complaint options, such as “The content blocking is unjustified because my upload is a permissible pastiche,” “. . . my upload is a permissible parody,” “. . . is a permissible quotation,” et cetera.⁹⁹ The user should then be able to launch the complaint by simply clicking the box with the applicable argument supporting the review request.¹⁰⁰ Ideally, this click should lead to the appearance of the contested content on the platform. As copyright owners will seek to minimize the period of online availability of allegedly infringing content, this appearance ensures that they avoid delays in the review process and “duly justify the reasons for their requests.”¹⁰¹

Obviously, the crux of this regulatory model lies in the question of liability for the appearance of potentially infringing content until a final decision is taken on the status of the content at issue. As Article 17(9) of the DSMD also gives users access to impartial out-of-court settlement mechanisms and, if this does not help, access to the courts, the period of uncertainty about the status of the content may be quite long. If UGC platforms are liable for harm flowing from content availability during this period, they will eschew the introduction of the described regulatory model. To solve this dilemma, platforms must not be exposed to liability for content which, in the end, is found to infringe copyright. Therefore, a liability shield should be available at least when the platform provider can demonstrate that she has checked whether the user has not simply clicked one of the complaint buttons to deceive the system and make content available which, evidently, is mere piracy and remote from constituting a permissible quotation, parody, or pastiche.

IV. CONCLUSION

The institutionalization of algorithmic enforcement in the DSM Directive is worrisome. As the internet is the primary information medium in

user-generated quotation, parody or pastiche at issue (which the user believes to be legitimate) finally proves to amount to copyright infringement. *Cf.* Elkin-Koren, *supra* note 3, at 1092.

⁹⁹ *Cf.* Quintais et al., *supra* note 49, at 5.

¹⁰⁰ *Id.*

¹⁰¹ DSMD, *supra* note 4, at art. 17, ¶ 9.

Western societies, it is surprising that the EU officially accepts—and even mandates—the application of automated content filtering. In comparison with voluntary decisions of private companies to introduce content identification systems, the new EU legislation appears as the original sin of content censorship obligations in Western democracies. Nonetheless, the evaluation of this legal development need not be entirely negative. The institutionalization of algorithmic enforcement offers the chance of requiring not only the application of filtering tools but also the preservation of user freedoms. The new EU legislation need not culminate in the blocking of each and every item that contains traces of protected third-party content. Instead, it can pave the way for the development of sophisticated content evaluation systems that seek to identify quotations, parodies, and pastiches capable of justifying the unauthorized content upload.

While there is no obligation to align voluntary, private filtering systems with the public interest in breathing space for use privileges that support freedom of expression and information, the institutionalization of content filtering can make the preservation of relevant user freedoms a standard feature of algorithmic enforcement. However, this positive side effect of the institutionalization will only come to light if EU Member States are wise enough to implement the DSM Directive in a way that allows the permission logic underlying the exemption of quotations, parodies, and pastiches to prevail over the prohibition logic of conventional filtering systems. Viewed from this perspective, there is still hope that the new algorithmic enforcement obligations in the EU will not disfigure copyright law beyond all recognition.