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Self-Regulating Platforms?

The Analysis of the Enforcement of End-user Rights in the Light of the Transposition of Article 17 of the CDSM Directive¹

Péter Mezei*, István Harkai**

* Associate Professor, University of Szeged, Faculty of Law and Political Sciences, Institute for Comparative Law and Legal Theory, e-mail: mezei.peter@szte.hu

** Assistant Professor, University of Szeged, Faculty of Law and Political Sciences, Institute for Comparative Law and Legal Theory, e-mail: harkai.istvan@juris.u-szeged.hu

Abstract: The deadline for the transposition of Directive (EU) 2019/790 (the CDSM Directive) into national law expired on 7 June 2021. Some EU Member States have failed to perform the transposition, and so they also failed to introduce the new obligations under Article 17 prescribing brand new requirements that online content-sharing service providers (OCSSPs) shall comply with. As a part of these rules, OCSSPs shall amend their end-user licence agreements (EULAs) to include terms on the enforcement of the mandatory limitations and exceptions (quotation, criticism, review, as well as use for the purpose of caricature, parody and pastiche) under Article 17(7) and the establishment of an effective complaints and redress mechanism regarding the removal of the user-generated content in line with Article 17(9). In the second phase of our ongoing EU-funded research project, we examined the extent to which specific OCSSPs have amended their EULAs to meet these EU obligations. Our empirical data show that, besides only little progress, new sources of conflict have emerged.

Keywords: CDSM Directive, copyright reform, online content-sharing service provider, end-user licence agreements, platform liability, complaints and redress mechanism

1. Introduction

The advent of the web 2.0 brought along the age of platforms. Today, information flows are dominated by websites that specialise in making available for the most part *user-generated* or *user-uploaded* content. The potential copyright liability of streaming service providers, social media platforms, online marketplaces, websites offering open source

¹ This article was completed within the frames of the H2020 reCreating Europe project. On the project itself see www.recreatingeu/

software or open-access content and online encyclopaedias has become one of the most prominent issues in legal literature and practice (Brieske & Peukert, 2022; Quintais, 2019a; Quintais, 2019b).²

Following the development of the Digital Single Market concept and the increasingly outdated nature of EU copyright law, reforming the EU copyright law has become necessary. Among other things, the CDSM Directive also sought to regulate the behaviour of OCSSPs.³ The new rules have created new challenges. Article 17 of the directive deserves special attention, not only from a dogmatic point of view (see Grad-Gyenge, 2020) but it must also be subjected to empirical tests. The aim of the present study is to examine the steps taken by some OCSSPs to ensure that their EULAs comply with the provisions of Article 17 and the extent to which they provide transparent information on their content moderation practices.

Against this background, the study is structured as follows. Section 2 briefly outlines the latest developments in the copyright regulatory environment for OCSSPs, including the case law of the Court of Justice of the European Union (CJEU) and Article 17 of the CDSM Directive. Section 3 briefly summarises the results of our empirical research conducted in 2021 on end-user licence agreements for platforms. This research has sought to map the practices of platforms in relation to end-user rights before the transposition deadline of the CDSM Directive. These are followed by the most important new findings of our research. Section 4 summarises the results of a limited, ‘second round’ empirical study conducted in terms of the practice of one Hungarian and eight international OCSSPs. We specifically looked at the extent to which these service providers have brought their EULAs into line with the requirements for the benefit of end-users under Article 17 of the CDSM Directive. In the concluding section, we make some observations that may help in the future monitoring of OCSSPs for compliance with copyright standards.

2. The age of platforms⁴

The Court of Justice of the European Union (CJEU) has a long history of jurisprudence on the intellectual property liability of intermediary service providers (platforms); however, only some of these decisions concern the world of copyrights directly. For the first time it was in the *Ziggo* case that the CJEU had to answer the question⁵ of whether The Pirate Bay, the *peer-to-peer* file-sharing service provider that had been sued across Europe, was directly liable for copyright infringements by individuals using their site. According

² For the proposal of the Directive (EU) 2019/790 and the explanatory memorandum see <https://bit.ly/3yModBf>. For Impact Assessment 1–3 see <https://bit.ly/3yKmQD0>; <https://bit.ly/3Vy0eYs>; <https://bit.ly/3T55qcz>

³ 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.

⁴ This concise summary draws heavily on our previous research, some of which was conducted with other colleagues (Mezei & Lábod, 2022; Mezei & Harkai, 2022; Harkai, 2021a).

⁵ Judgment of 14 June 2017 in Case no. C-610/15 *Stichting Brein v. Ziggo BV, XS4ALL Internet BV*, para 38 (see Ferge, 2017).

to the CJEU, The Pirate Bay itself was a direct infringer by actively supporting end-users' illegal behaviour. With its decision, the CJEU has effectively extended the direct liability regime of Article 3 of the InfoSoc Directive⁶ to activities, which had historically been considered indirect conduct (Mezei, 2012, pp. 112–131). The CJEU brought both fresh air and “strange vibrations” to EU copyright law with the idea of direct liability for intermediary service providers (Leistner, 2020, p. 132; Hofmann & Specht-Riemenschneider, 2021).⁷

The CJEU passed its decision in the joint cases of YouTube/Cyando⁸ regarding the copyright liability of “bona fide” intermediary service providers under the InfoSoc Directive (that is, the pre-CDSM legal regime) just a few days after the deadline for transposition of the CDSM Directive (Jütte, 2021). Here, the CJEU has established that YouTube (operated by Google/Alphabet) and Uploaded (operated by Cyando) are not directly liable for infringements committed by users of the platforms as long as they do not actively engage in such conduct; that they are entitled to the protection of the hosting service providers' limitation of liability if they do not actively assist end-users; and that they can only be subject to measures after they have been notified by rights holders of specific illegal content available through their systems (Angelopoulos, 2021).

This practice of the CJEU has given rise to a bifurcated solution in which the knowledge of the service provider and its actual involvement in the use of the content formed the basis of the legal qualification. It is into this environment that the complex balancing regime of the CDSM Directive has entered. Article 17, on the one hand, aims to ensure a high level of copyright protection by declaring the most important platforms of the web 2.0 era as copyright-relevant users; on the other hand, it tries to reduce the burden on these service providers within certain reasonable limits and to exempt them from potential copyright liability. Thirdly it establishes ‘user rights’ for the end-users of OCSSPs’ services. Let us briefly consider these three dimensions.

Firstly, under the CDSM Directive, OCSSPs⁹ qualify as users of (classically non-commercial, *user-generated*) content uploaded to their websites by end-users who do not generate significant revenues.¹⁰ The underlying justification (rather than a legal basis) for this classification was the *value gap* (or *transfer of value*) theory, as developed by music copyright owners – i.e. the difference between the revenues generated by OCSSPs and the amount of royalties paid to music rights holders, which is not exactly favourable to the copyright owners (Frosio, 2020). It follows from the new regulation that the lawful operation of service providers is subject to prior authorisation of uses. However, this legalisation is almost impossible in everyday life due to the mass nature of the content uploaded to sites such as YouTube or Facebook.

⁶ 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.

⁷ So much so, that the judgment – before further creative interpretations by the CJEU – made a legal literature proposal like the harmonisation of indirect copyright liability in the EU (see Leistner & Ohly, 2019).

⁸ Judgment of 22 June 2021 in joined cases C-682/18 and C-683/18 Frank Peterson v. Google LLC and Others and Elsevier, Inc. v. Cyando AG. For a detailed treatment of the YouTube/Cyando cases, see Harkai, 2021b.

⁹ Article 2(6) CDSM Directive. For the Hungarian definition of online content-sharing service providers, see Act LXXXVI of 1999 on Copyrights (hereinafter Copyright Act), Article 57/A.

¹⁰ Article 17(1) CDSM Directive; Article 57/B of the Copyright Act.

Secondly, exactly for that reason, the CDSM Directive provides an alternative way for service providers to be exempted from copyright liability if they apply content moderation to sort out illegal contents from their system. More precisely, OCSSPs shall ensure the unavailability of specific works and other subject matter uploaded to their websites *and* identified by copyright owners, and prevent the content from being made available again after filtering the contested content; *or* disable access to or remove the contested content from their websites expeditiously following subsequent notifications made by copyright owners regarding individual infringing uses.¹¹

Thirdly, there was (and still is) a real risk that end-users will be the collateral losers of the tension between copyright owners and platforms, because platforms will ‘filter first and ask questions later’ to avoid these new liabilities. Furthermore, automated (algorithmic) and generally excessive filtering practices can cause serious harm to freedom of expression, access to information and even to freedom of education and learning. The CDSM Directive has therefore also declared a number of guaranteed end-user rights, and hence quotation, criticism, review, and the use of works for the purposes of caricature, parody or pastiche have become mandatorily free (Stieper, 2020). Moreover, it has been established as a result-oriented obligation that the new cooperation between rights holders and platforms should not result in prior or *ex-ante* filtering of content freely uploaded, independently of the request for permission.¹² Platforms are also required to have effective complaint and redress mechanisms,¹³ and must inform their clients, *expressis verbis*, of their rights in the end-user licence agreements (see Quintais et al. 2022).¹⁴

3. Empirical research on the end-user licence agreements of platforms and end-user flexibility (Mezei & Harkai, 2022)

In 2021, we conducted an empirical research whereby we examined 17 content-sharing and other service providers¹⁵ in terms of the degree of flexibility they offer end-users in their EULAs for the use of content, and the internal rules and mechanisms they have in place to ensure a balance between different stakeholders (in particular in the area of dispute resolution).¹⁶ This study had three important findings.

First of all, it has been clearly demonstrated that end-users have spectacularly fewer rights for service-type accesses compared to the use of physical copies. Some of the

¹¹ Article 17(4) CDSM Directive; Article 57/E (2) of the Copyright Act.

¹² Article 17(7) first sentence CDSM Directive; Article 57/E (4) of the Copyright Act.

¹³ Article 17(9) first sentence CDSM Directive; Article 57/G of the Copyright Act.

¹⁴ Article 17(9) last sentence CDSM Directive; Article 57/H of the Copyright Act.

¹⁵ The comprehensive list of the analysed service providers is as follows: streaming websites with hosting service for end-user uploads (Soundcloud, Bandcamp, YouTube, Twitch, DailyMotion, Pornhub); streaming websites without hosting service for end-user uploads (Spotify, Netflix, Disney+); online marketplaces (Steam, Electronic Arts Origin, Amazon, Apple Media Service, Google Play); and social media (Twitter, Instagram, Facebook).

¹⁶ It should be emphasised that the majority of the services under review are provided by U.S. companies, but are global in their nature (cf. Nieborg & Poell, 2018, p. 4285). As these services are also directed to the territory of the Member States of the European Union, they are bound by both EU and national law. For a similar – albeit much narrower – analysis from the American legal literature, see in particular Mixon, 2021.

end-user flexibilities are excluded by the legislator itself or by judicial practice (for example, by rejecting digital exhaustion). We called this “regulatory lock-in” effect. This is further reinforced by the platforms, through their internal rules, imposing severe (often technological) restrictions on access; by remaining silent on limitations and exceptions akin to freedom of expression (moving this issue from the regulatory to the dispute resolution realm); and in many cases even keeping dispute resolution mechanisms, especially for end-user complaints, in the dark. An equally serious problem is that EULAs use spectacularly vague terminology. The words “sale” or “purchase” dominate, despite the fact that the prevailing practice is that the end-users cannot acquire ownership of a file, especially a *stream*. Ultimately, we have found that the “as is” nature of EULAs, namely that they cannot be modified by end-users (i.e. that they qualify as general terms and conditions) and their misleading language create an asymmetric situation in which end-user rights and expectations are not adequately enforced. On the other hand, platforms entrench their own legal position, often by obtaining unnecessarily broad rights from uploaders.

Secondly, it seems that social media sites offer the greatest flexibility to end-users, despite the fact that the basic model of these services is free and does not grant any ownership rights to its customers. Interestingly, subscription-based *streaming* providers are the least flexible, despite payment of subscription fees. Overall, we found that the potential presence of *user-generated* content increases the flexibility of the platform in direct proportion – we called this the “UGC effect”.

Thirdly, end-user expectations and the corresponding services are perhaps most affected by the huge competition that pervades the platform economy. The “streaming war” pervades both horizontal (service-type, e.g. Facebook vs. Twitter) and vertical (portfolio-based, e.g. Apple vs. Google) competition. This – in addition to the own business models of the actors – necessitated that platforms learn from each other, and sometimes overbid competitors’ offers. Interestingly, many end-user flexibilities owe their existence to this competition, especially in the areas of secondary access (access sharing, linking, offline use, etc.) and ancillary services (e.g. subtitling). We called this phenomenon the “business flexibility effect”.

4. New findings

In addition to the new liability regime for OCSSPs, Article 17 of the CDSM Directive also contains rules on user flexibilities. Article 17(7) provides that OCSSPs must not impede the availability of lawful end-user content, and users can invoke a number of exceptions when receiving and transmitting information using the platforms. Article 17(8) makes it clear that OCSSPs are not subject to a general monitoring obligation; that is, they are not required to monitor the lawfulness of end-user content in general terms or whether such content falls within the scope of the permitted exceptions. Article 17(9) obliges OCSSPs to put in place effective and expeditious complaint and redress mechanisms and to inform users in end-user licence agreements of the possibilities provided by exceptions and limitations under EU law (Schwemer & Schovsbo, 2020). The European Commission, in its Guidance on the implementation of Article 17, made the

liability regime conditional on the proper functioning of safeguards that also take into account the legitimate interests of end-users.¹⁷ Likewise, the CJEU's confirmed in its judgment in Case C-401/19 that the introduced regime offers a balanced mechanism to respect the interests of all stakeholders at hand.¹⁸

The platforms examined in the first phase of the research were narrowed down in the second phase. This was justified by the fact that the new liability regime of Article 17 is limited in Article 2(6) and recital 62 to OCSSPs, whose main activity is the hosting and provision of access to the public of a substantial amount of copyrighted-protected works or other protected subject matter uploaded by end-users, as well as the organisation and promotion of protected content in order to generate a profit. Below, we examine the terms and conditions of use of eight international and one Hungarian OCSSPs to see how they have met the requirements of the CDSM Directive. In addition, we will examine what mechanisms do they offer to address end-users complaints related to the moderation of uploaded contents.

4.1. Video sharing platforms

YouTube's EULA was last modified on 5 January 2022.¹⁹ According to the agreement, uploaded content may only contain another person's copyrighted work or other subject matter if that party has given their consent or if the user is otherwise entitled to do so (including through exceptions or limitations in copyright law or related rights under European Union law).²⁰ YouTube may use automated systems to analyse the lawfulness of uploaded content and to identify infringements and abuse. In case of uploading unlawful content, operators may remove all or a specified part of the content, and the end-user concerned will be notified of this decision. In terms of end-user guarantees, which are the focus of the study, the main text of the terms of use does not provide much further guidance, but the information sought can be found in YouTube Help.

The "Copyright Claim Basics" page informs the end-user of the substance and process of the notice and take down procedure. YouTube provides three ways to resolve a copyright claim. 1. The end-user may wait until the copyright claim expires (90 days). In case of a first claim, the end-user will need to complete the Copyright School. 2. The end-user can try to get in touch with the copyright owner and ask them to retract their claim of copyright infringement. In this respect, the terms of use, very succinctly, state that "each creator shall indicate on their channel how to contact them".²¹ A further point of reference for

¹⁷ Communication from the Commission to the European Parliament and the Council – Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market, Brussels, 4.6.2021, COM(2021) 288 final, 18–25.

¹⁸ Case C-401/19, Republic of Poland v. European Parliament and Council of the European Union, Judgment of the Court of Justice of the European Union, 26 April 2022, ECLI:EU:C:2022:297. We did not pay closer attention to this judgment in the present paper, since it was published after the ending of our second phase empirical research. In general, however, the findings of the CJEU do not alter the validity of our findings, indeed, they completely support the importance of the proper use implementation of end-user flexibilities under Article 17.

¹⁹ For more information see www.youtube.com/static?gl=GB&template=terms

²⁰ "Your content and activities – uploading content", *Ibid.*

²¹ Retraction of a claim of copyright infringement (<https://bit.ly/3MCdPS3>).

end-users seeking redress may be the requirement for contact details in removal requests.²² 3. End-users have the option to file a counter-notification if they believe that the video has been removed by mistake, for example because it qualifies as “fair use”.²³ YouTube will forward the counter-notification to the claimant, who will have 10 working days to respond. If the claimant (the initiator of the notice and take down procedure) still wishes to prevent the content from being restored, they must provide evidence to that effect.²⁴

It is particularly interesting to see what exactly YouTube means by the term “fair use”, which clearly refers to the *fair use* test, and which is the term used in the original English text. However, this is a scheme unknown in European, continental copyright law. In any case, YouTube explains the four steps (factors) of the *fair use* test in detail and even gives examples of how it can be applied in practice.²⁵

YouTube uses Content ID claims in addition to the notice and take down procedure and the end-user counter notification that may be provided in response. This is an automatic claim that is triggered when an uploaded video matches another video or part of another video. Blocking or maintaining the availability of the video with the addition of advertisements is essentially at the discretion of the copyright owner.²⁶ The end-user who uploaded a content subjected by a Content ID claim can leave the videos on the site, but they can also choose to remove it, in whole or in part, for that segment; and it may even happen that the advertising revenue will eventually have to be shared between the copyright owner and the end-user.²⁷ If the end-user disagrees with the Content ID claim, they may contest it, of which the copyright owner will be notified and will have 30 days to respond. The copyright owner can withdraw the claim, after which the system will automatically restore the content. If the claim is maintained by the copyright owner, the end-user may appeal against it. As a third option, the copyright owner can request the removal of the content or simply ignore the claim. If the end-user lodges an appeal, the copyright owner has an additional 30 days to respond, which is essentially the same procedure as the pre-appeal procedure.²⁸

From a copyright perspective, in particular with regard to the provisions of the CDSM Directive, YouTube has transposed the Directive’s provisions into its contractual practice, at most only in principle, which it seems to regard as governed by the *fair use* test rather than by the European system of limitations and exceptions. At least no specific reference to this was found when studying the terms of use of the service. In any case, the rules outlined above are not only not expeditious and flexible for end-users, but they also ignore continental copyright doctrine and envisage a typical American legal institution. In addition, YouTube continues to exclude primary liability for any infringing content uploaded by users that is clearly incompatible with the CDSM Directive regime.²⁹

²² Contact information in copyright takedown requests (<https://bit.ly/3VJGVDx>).

²³ Copyright Claim Basics. Resolution of copyright claim (<https://bit.ly/3ga6EV9>).

²⁴ Submission of a copyright counter notification (<https://support.google.com/youtube/answer/2807684>).

²⁵ Fair use on YouTube (<https://support.google.com/youtube/answer/9783148?hl=hu>).

²⁶ What is a Content ID claim? (<https://support.google.com/youtube/answer/6013276>).

²⁷ Monetizing eligible cover videos (<https://support.google.com/youtube/answer/3301938>).

²⁸ Disputing a Content ID claim (<https://support.google.com/youtube/answer/2797454#appeal>).

²⁹ Limitation of liability (www.youtube.com/static?gl=GB&template=terms).

YouTube was the first among OCSSPs to publish a transparency report on copyright infringements. The company's first report was published on 6 December 2021, covering the six months before the deadline for transposition of the CDSM Directive (January–June 2021).³⁰ YouTube uses three types of copyright protection mechanisms (Webform, Copyright Match and Content ID), of which Content ID is by far the most important. During the reporting period, 722.6 million notifications passed through this system – all initiated by 53.7% of the 9,115 potential customers (4,893 copyright owners).³¹ There were around 3.7 million objections made by content uploaders against the 722 million “complaints”. Once the objection has been lodged, the copyright owner may withdraw the complaint, maintain it, or take no further action and allow the complaint to lapse after 30 days. According to YouTube data, 2.2 million complaints against uploaded content have been dismissed and 1.47 million complaints have been upheld. In the latter case, the end-user can file an “appeal”, against which the copyright owner must take the dispute to the “official” removal procedure, which is governed by the U.S. Digital Millennium Copyright Act (DMCA). This official procedure was initiated in 38,864 cases. There were only 4,471 cases when uploaders filed counter claims against these removals.³² YouTube data are raw numbers – it is very difficult to read the reality from them. On the one hand, it does not answer the question of whether the contested uploads were in fact infringing or whether they were merely assumed to be infringing by the copyright owners. It is also not clear whether the low number of end-user objections, appeals and counter claims means “admission of infringement” or whether the average *YouTuber* has little knowledge of how to defend their own rights and may be frightened by the potential costs of the procedure (see Keller, 2021).

DailyMotion's service is very similar to YouTube's profile, and the fact that it is a platform based in France, an EU country, is a particular reason to examine its terms of use. Last modification date of the terms of use is 19 January 2022.³³ With regard to the lawfulness of the content uploaded, the operators exclude any direct liability and any obligation to monitor the content uploaded in general, including pre-filtering. The end-user uploading the content is solely responsible for the content.³⁴ If content has been deleted under a notice and take down procedure,³⁵ the end-user concerned may send a counter-notification to the copyright owner via the platform.³⁶ The terms of use available online do not contain any more detailed provisions than these, taking into account the provisions of the CDSM Directive, which is somewhat surprising given that the company providing the service is established in Europe.

In the terms of use of Twitch, which were last amended on 1 January 2021, the operators of Twitch, the market leader in the online streaming of video games, place all primary

³⁰ YouTube Copyright Transparency Report H1 2021 (<https://transparencyreport.google.com/report-downloads>).

³¹ Ibid. 5.

³² For all data see Ibid. 10–11.

³³ Section 9: Miscellaneous, Point 9.5 (<https://legal.dailymotion.com/en/terms-of-use>). This is also clear from the fact that French law is applicable to any disputes that citizens of the European Economic Area, the United Kingdom and Switzerland may have with operators.

³⁴ Section 5: Our Liability as a Hosting Service Provider, Ibid.

³⁵ Copyright – (I) Copyright Notification (<https://legal.dailymotion.com/en/copyright>).

³⁶ Copyright – (II) Copyright Counter Notification, Ibid.

liability on the end-user who uploads the infringing content.³⁷ The platform uses security measures to protect the uploaded content from unlawful acts of reproduction and distribution (communication to the public). In addition, operators do not assume any liability for infringements that might occur despite these measures.³⁸ As far as copyright infringements are concerned, the terms of use follow the DMCA rules, which allow copyright owners to mark infringing content for removal through a notice and take down procedure.³⁹ Interestingly, Twitch maintains a repertoire of licensed music that end-users can choose from to enhance their uploaded videos, but with the caveat that the music cannot be used for any other purpose and that operators can make any element of the repertoire unavailable at any time if the licence agreement for any of the sound recordings is terminated or expires.⁴⁰

For music and sound recordings, Twitch has additional, separate music guidelines (Music Guidelines). End-users cannot only choose from Twitch's music offerings, but can also upload content that includes otherwise licensed music.⁴¹ The terms of use acknowledge that there may be otherwise unlicensed music and sound recordings that are subject to the *fair use* test, including transformative uses or works in the public domain.⁴² Similarly to other service providers, Twitch also provides the option of restoring content removed under the notice and take down procedure, also by filing a counter-notification, if the end-user "believes that his or her actions comply with free use under US law".⁴³

Users of Videá – a company based in Hungary – are obliged to warrant⁴⁴ that they have the necessary copyright permissions to use the uploaded content and are responsible for any copyright infringement.⁴⁵ The operators of the platform exclude any liability for any damage caused as a result of the content of the uploaded videos.⁴⁶ The operators can remove all or part of the infringing content that violates the terms of use, but they are not obliged to know the actual content of the uploaded videos. If the copyright owners wish to contest the legality of a piece of content, they may do so within the framework of a notice and take down procedure, in the course of which the service provider's liability is adjusted by the terms of use to Articles 10 and 13 of the E-commerce Act.⁴⁷ Otherwise, Videá's end-user licence agreement does not contain any guarantees protecting end-users.

Pornhub, one of the world's largest adult content providers,⁴⁸ provides very detailed terms of use for the end-users visiting its platform. This fact was already evident in the

³⁷ User Content Representations and Warranties (www.twitch.tv/p/en/legal/terms-of-service/#8-user-content).

³⁸ Content is Uploaded at Your Own Risk, *Ibid*.

³⁹ Respecting Copyright, *Ibid*.

⁴⁰ Specific Terms for Soundtrack by Twitch, *Ibid*.

⁴¹ Sharing Music on Twitch (www.twitch.tv/p/en/legal/community-guidelines/music).

⁴² Uses Permitted by Law, *Ibid*.

⁴³ How to make a counter-notification (www.twitch.tv/p/hu-hu/legal/dmca-guidelines).

⁴⁴ Imprint (<https://videa.hu/impresszum>). The last update of the terms of use was performed on 31 May 2021.

⁴⁵ Copyrights (<https://videa.reblog.hu/cimke/%C3%81SZF>).

⁴⁶ Responsibility, *Ibid*.

⁴⁷ Act CVIII of 2001 on certain issues of electronic commerce services and information society services. Removal of videos (<https://videa.reblog.hu/cimke/%C3%81SZF>).

⁴⁸ This paper is dedicated solely to the copyright aspects of lawful adult contents, and will therefore completely omit the analysis of the socially reprehensible aspects of porn industry, e.g. child pornography or abuse of actors.

previous phase of the research. The terms of use have not been changed since then, with the last modification date being 5 May 2021. The end-user is entirely responsible for the legality of the content uploaded; the operator is not liable for it and uploads are not checked by the operator in general, but at most only randomly.⁴⁹ The operator reserves the right to remove content even without notice. The notice and take down procedure is ensured by Pornhub to copyright owners.⁵⁰ End-users may contest the legality of the removal in a counter-notification sent by the operator to the copyright owner.⁵¹ Pornhub has implemented an automated audio-visual content recognition system (*digital video fingerprints*) to help identify infringing content before it is made accessible.⁵²

4.2. Social media platforms

Facebook, the flagship of the Meta family of products, warns users in its terms of use that it employs advanced technical systems and supporting human resources around the world to prevent abuse and harmful behaviour, and may remove infringing content or make certain features inaccessible or disable the user account.⁵³ It uses automated systems to detect and remove abusive and dangerous activities.⁵⁴ Operators may remove or disable content that violates community standards, is unlawful (including intellectual property infringements), misleading, discriminatory or fraudulent, where this avoids or mitigates legal or regulatory impacts that negatively affect Facebook. The user will be informed of the fact of removal, but may request a repeated check of the content, but the latter option is not available if the user has seriously or repeatedly violated the terms of use, or if doing so would expose Facebook, or anyone else, to liability, or, inter alia, if it is prohibited for legal reasons.⁵⁵

Facebook has specific guidelines for content that includes music, stating that the uploader is responsible for the legality of the content posted, and emphasising that Facebook is not responsible for any conduct that could give rise to secondary liability; in other words, Facebook does not invite users to engage in infringing behaviour.⁵⁶ The Music Guidelines also state that any use for commercial purposes beyond the scope of private (personal) use is prohibited, in particular if the user has not obtained the appropriate licences. In addition, Facebook cannot be used to “create a music listening experience”⁵⁷ and infringing content can be removed or blocked.

Facebook’s Transparency Center publishes the number of content items removed from the platform, broken down by year. By June 2021, operators had received 147,000 copyright infringement notifications – 84.44% of the content concerned had been

⁴⁹ Limited, Conditional License to Use Our Intellectual Property (www.pornhub.com/information/terms).

⁵⁰ DMCA Reporting Claims of Copyright Infringement (www.pornhub.com/information/dmca).

⁵¹ Counter-Notification Procedures, Ibid.

⁵² Video Fingerprints, Ibid.

⁵³ Action against harmful behaviour, protecting and supporting the community (www.facebook.com/legal/terms).

⁵⁴ Using and developing advanced technologies to provide secure and functional services, Ibid.

⁵⁵ What can be shared and done in Meta products? Ibid.

⁵⁶ Music Guidelines (www.facebook.com/legal/music_guidelines).

⁵⁷ Ibid.

removed, which amounted to 519,000 pieces of content. Since the next platform analysed, Instagram, is also part of the Meta product family, the Transparency Center reports the above data for Instagram at the same time, so we quote them here. In June 2021, Instagram operators received 59,500 copyright infringement notifications, covering a total of 289,000 pieces of content – 88.41% of which were removed.⁵⁸ Facebook and Instagram operators filter content not only on a notification basis, but also proactively. In June 2021, 604,000 pieces of content were deleted or blocked on Facebook as a result of proactive filtering, 53.76% of which was copyright-infringing content. A total of 349,000 pieces of content were removed from Instagram as a result of the pre-filtering, 53.76% of which were related to copyright infringement.⁵⁹

Although the last modification of the terms of use reviewed here was on 20 December 2020, well before the transposition of the CDSM Directive in the Member States, there are still provisions to protect the interests of end-users against unjustified removals. For that purpose, operators use intellectual property operations teams (IP Operations Teams), which are tasked with removing only content that is truly infringing. End-users have the possibility to contest the claim with the copyright owner who reported the content. An interesting fact is that if the legality of the content is contested under the DMCA rules, the user can send a counter-notification.⁶⁰

The terms of use for Instagram, the other Meta product under review, were last updated on 4 January 2022. The posting of unlawful content is also prohibited here, which would result in the removal or blocking of content or information if it is “reasonably necessary” or if it would result in a legal sanction or regulatory impact negatively affecting the operators. The end-user will be informed of the removal.⁶¹ However, Instagram’s terms of use are silent on procedural safeguards (if any) for the benefit of end-users.

Twitter’s terms of use differ depending on⁶² whether the user lives inside the European Union, EFTA countries, the United Kingdom, or outside of these, including the United States.⁶³ As a general rule, here as well, end-users are responsible for the lawfulness of the content. Any liability of the platform is excluded by the terms of use.⁶⁴ The operators also do not undertake to monitor or otherwise control the lawfulness of the content posted. However, they reserve the right to remove content that violates legal regulations or community principles.⁶⁵ If the content is removed, the user who uploaded it will receive a copyright complaint, which they can contest in a counter-notice and ask the operators to restore the content. In addition, based on the information provided in

⁵⁸ Notice and Takedown (<https://transparency.fb.com/data/intellectual-property/notice-and-takedown/facebook>).

⁵⁹ Proactive Enforcement (<https://transparency.fb.com/data/intellectual-property/proactive-enforcement/facebook>).

⁶⁰ Supporting People whose Content is Reported (<https://transparency.fb.com/data/intellectual-property/protecting-intellectual-property-rights>).

⁶¹ Content Removal and Disabling or Terminating Your Account (<https://help.instagram.com/581066165581870>).

⁶² The terms of use were last amended on 19 August 2021, which is after the deadline for transposition of the CDSM Directive.

⁶³ Twitter Terms of Service – If you live outside the European Union, EFTA States, or the United Kingdom, including if you live in the United States; Twitter Terms of Service – If you live in the European Union, EFTA States, or the United Kingdom.

⁶⁴ Limitations of Liability (<https://twitter.com/en/tos#intlTerms>).

⁶⁵ Content on the Services, *Ibid.*

the DMCA notice, the end-user may contact the rights holder directly to request withdrawal of the notice. By issuing a counter-notice, the end-user also acknowledges the jurisdiction of the federal court of the United States in the event of a potential dispute. Operators shall forward the counter-notice that complies with the formal requirements to the rights holder. Twitter's EULA also stipulates that Twitter will not provide any further legal advice.⁶⁶

Twitter also uses the *automated copyright claiming* system for live broadcasts to help copyright owners identify unauthorised content. The uploader has the right to challenge the removal or blocking of the filtered videos, in which case Twitter may reinstate the broadcast as a replay. The legal basis for contesting the claim may be the existence of a licence or when the user believes that their use of the material is a *fair use*.⁶⁷ If the broadcast is reinstated but the rights holder still disputes it, it has the option to send a notice through the traditional channels and request the removal of the content, which can also be disputed by the end-user in the way described above.⁶⁸

5. Conclusions

At the time of finalising this manuscript, the deadline for transposition of the CDSM Directive had expired just over six months ago, yet implementation had not yet taken place in all Member States. This has created legal uncertainty for service providers, making it difficult to expect full compliance with the requirements of the CDSM Directive. Even so, a number of observations can be made about the analysed EULAs of the OCSSPs under review.

On the one hand, the analysis shows that the terms of use continue to focus basically on two aspects: the exclusion of primary liability of operators and an effective notice and takedown mechanism that protect the interests of rights holders. YouTube, DailyMotion, Twitch, Facebook and Twitter allow end-users to contest the blocking of content. YouTube, Twitch and Twitter also point out that if the use of the content is a *fair use*, it can be made accessible again on the platform. Only YouTube's contractual provisions contain some reference to limitations and exceptions in line with the EU copyright system and in deviation of the *fair use* test. In other words, the majority of the platforms examined contain guarantees that allow users to dispute the lawfulness of removal under U.S. copyright law, but neither the guarantees in Article 17 of the CDSM Directive are mentioned *expressis verbis*, nor is there any specific reference to general prior content filtering in the contractual terms.

This can be instructive for two reasons. On the one hand, OCSSPs seem to stick to the well-established limitation of liability clauses, shifting the responsibility to the end-user, thus weakening the viability of the new liability regime envisaged by the CDSM Directive. On the other hand, some platforms, such as YouTube, have automated systems

⁶⁶ Copyright Policy (<https://help.twitter.com/en/rules-and-policies/copyright-policy>).

⁶⁷ Fair Use Policy (<https://help.twitter.com/en/rules-and-policies/fair-use-policy>).

⁶⁸ Automated Copyright Claims for Live Video (<https://help.twitter.com/en/rules-and-policies/automated-claims-policy>).

that actively filter uploaded content, which they can remove at their own discretion without notifying the rights holders. In other words, the balance between the actors concerned by the operation of the platforms – operators, rights holders and end-users – continues to tip towards the first two stakeholders, while it is not clear how the platforms would protect freedom of expression, freedom of creative expression and freedom of access to information, which have been among the main watchwords for criticism of the provisions of Article 17.

The *status quo*, it seems, will remain despite the much-trumpeted new liability rules, although there is no doubt that transposition of the CDSM Directive is still ongoing in some Member States. Moreover, the fact that platforms with a North American background operate their contractual practices under the U.S. *copyright regime* rather than EU copyright law seems to help maintain the previous situation. This may raise further serious private international law issues for future researchers in this field.

References

- Angelopoulos, C. (2021, August 9). YouTube and Cyando, Injunctions against Intermediaries and General Monitoring Obligations: Any Movement? Kluwer Copyright Blog. Online: <https://bit.ly/3MHI3Dw>
- Brieske, J. & Peukert, A. (2022, January 20). Coming into Force, not Coming into Effect? The Impact of the German Implementation of Art. 17 CDSM Directive on Selected Online Platforms. Zenodo. Online: <https://doi.org/10.2139/ssrn.4016185>
- Ferge, Zs. (2017). Médialejátsszók és online megosztóplatformok, avagy hogyan értelmezte az Európai Bíróság a nyilvánossághoz közvetítés fogalmát a Stichting Brein, szerzői jogok jogosultjainak érdekeit védő alapítvány kontra Jack Frederik Willems, valamint a Ziggo BV és XS4ALL Internet BV-ügyben hozott ítéletében. Iparjogvédelmi és Szerzői Jogi Szemle, 12(5), 15–46. Online: <https://bit.ly/3gjmHAg>
- Frosio, G. (2020). Reforming the CDSM Reform: A User-Based Copyright Theory for Commonplace Creativity. International Review of Intellectual Property and Competition Law, 51(6), 715–716. Online: <https://doi.org/10.1007/s40319-020-00931-0>
- Grad-Gyenge, A. (2020). A szerzői jogi reform vágya: az egyszerűsítés ideája a bonyolítás művészetében. Gazdaság és Jog, 28(7–8), 1–5.
- Harkai, I. (2021a). Érvek a sajtókiadványok kiadóinak uniós védelme mellett és ellen. Európai Jog, 21(6), 17–22.
- Harkai, I. (2021b). Az Európai Unió Bíróságának döntése a YouTube és a Cyando egyesített ügyekben. Jogesetek Magyarázata, 12(4), 43–54.
- Harkai, I. & Mezei, P. (2022). Végfelhasználói flexibilitások és platformfelelősség a CDSM irányelv fényében. In B. Török (Ed.), Az internetes platformok kora – társadalmi hatások és szabályozási kihívások. Ludovika University Press. In press.
- Hofmann, F. & Specht-Riemenschneider, L. (2021). Verantwortung von Online-Plattformen – Ein Plädoyer für ein funktionszentriertes Verkehrspflichtenkonzept, Zeitschrift für Geistiges Eigentum/Intellectual Property Journal, 13(1), 48–113. Online: <https://doi.org/10.1628/zge-2021-0004>
- Jütte, B. J. (2021, June 23). Op-Ed: A Mild Sigh of Relief for Online Platforms but Uncertainty Looms after CJEU Judgment in YouTube/Cyando. EU Law Live. Online: <https://bit.ly/3EJTcBH>
- Keller, P. (2021, December 9). YouTube Copyright Transparency Report: Overblocking is Real. Kluwer Copyright Blog. Online: <https://bit.ly/3CFIoSv>

- Leistner, M. (2020). European Copyright Licensing and Infringement Under Art. 17 DSM Directive: Can We Make the New European System a Global Opportunity Instead of a Local Challenge? *Zeitschrift für Geistiges Eigentum/Intellectual Property Journal*, 12(2), 123–214. Online: <https://doi.org/10.1628/zge-2020-0008>
- Leistner, M. & Ohly, A. (2019). Direct and Indirect Copyright Infringement: Proposal for an Amendment of Directive 2001/29/EC (InfoSoc Directive). *Journal of Intellectual Property Law & Practice*, 14(3), 182–186. Online: <https://doi.org/10.1093/jiplp/jpy182>
- Mezei, P. (2012). A fájlcsere dilemma. A perek lassúak, az internet gyors. HVG-Orac.
- Mezei, P. & Lábodý, P. (2022). Több jogdíj, kevesebb vélemény? Irányváltás az online tartalomgyártó szolgáltatók szerzői jogi felelősségében. *Fundamentum*. In press.
- Mezei, P. & Harkai, I. (2022). End-User Flexibilities in Digital Copyright Law: An Empirical Analysis of End-User License Agreements. *Interactive Entertainment Law Review*, 5(1), 2–21. Online: <https://doi.org/10.2139/ssrn.3879740>
- Mixon, J. (2021). Netflix and Not-So-Chill: The Legality of Sharing Passwords for Netflix & Other Streaming Services. *Journal of the Patent & Trademark Office Society*, 101(3), 336–349.
- Nieborg, D. B. & Poell, T. (2018). The platformization of cultural production: Theorizing the contingent cultural commodity. *New Media & Society*, 20(11), 4275–4292. Online: <https://doi.org/10.1177/1461444818769694>
- Quintais, J. P. (2019a, June 7). The New Copyright Directive: A tour d’horizon – Part I. *Kluwer Copyright Blog*. Online: <https://bit.ly/3D1Vsmo>
- Quintais, J. P. (2019b, June 17). The New Copyright Directive: A tour d’horizon – Part II. *Kluwer Copyright Blog*. Online: <https://bit.ly/3s1Gg2A>
- Quintais, J. P., Mezei, P., Harkai, I., Vieira Magalhães, J., Katzenbach, C., Schwemer, S. F. & Riis, T. (2022). Copyright Content Moderation in the EU: An Interdisciplinary Mapping Analysis. *ReCreating Europe*. Online: <https://doi.org/10.2139/ssrn.4210278>
- Schwemer, S. F. & Schovsbo, J. (2020). What is Left of User Rights? Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime. In P. Torremans (Ed.), *Intellectual Property Law and Human Rights* (pp. 569–589). Wolters Kluwer. Online: <https://doi.org/10.31228/osf.io/g58ar>
- Stieper, M. (2020). Die Umsetzung von Art. 17 VII DSM-RL in deutsches Recht (Teil 1) – Brauchen wir eine Schranke für Karikaturen, Parodien und Pastiche? *Gewerblicher Rechtsschutz und Urheberrecht*, 69(7), 699–708.