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ARTICLE

Copyright in the Age of Sharing: Platforms, Users, and the Law's Structural Paradox

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Abstract Social media runs on sharing; copyright runs on exclusion. When these operating systems collide, platforms rewrite the rules through click-through contracts, opaque algorithms, and sweeping licenses. This article traces that shift: from paparazzi lawsuits to embedding fights, from US "server test" chaos to the CJEU's move toward platform-as-publisher. It unpacks the DSM Directive's bargain – *ex ante* "best efforts" (filters, licensing, stay-down) versus hard-edged safeguards for lawful uses – and shows how over-blocking and private Terms of Service still tilt the field. The payoff is a practical blueprint: machine-readable signals for exceptions, auditable error targets, symmetric notice/counter-notice, non-override of users' rights, targeted injunctions, fairer collective licensing, and real EU-level harmonization. Bottom line: calibrate code, contracts, and courts so creativity thrives without turning platforms into copyright police.

Keywords Social media · Copyright · User-generated content · Platform liability · Article 17 DSM Directive

1 Introduction: Scroll, Share, Infringe?

The rise of social media has rendered copyright infringement not only easier but also more pervasive. At the core of this phenomenon lies the paradoxical ethos of social media platforms: they are designed to encourage users to share as much content as possible, while copyright law, conversely, exists to restrict unauthorized copying and dissemination. Platforms benefit enormously from this culture of sharing, since user engagement – measured in time spent online and the volume of interactions – directly translates into advertising revenue. To maximize these

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returns, social media platforms deliberately incentivize practices of redistributing third-party material, often without regard to the legal status of the works concerned.

This philosophy of sharing stands in sharp contrast to the logic of copyright, which in most jurisdictions prohibits the reproduction or communication of protected works without the authorization of the rightsholder.[1] Each act of posting, re-posting, or retweeting results in the making of a new copy, thereby implicating copyright law in a manner that is structurally at odds with the technological affordances of social platforms. The very features defining the architecture of social networking sites – the "share" buttons, the embedding functions, the capacity for instantaneous duplication – render copyright-protected content peculiarly vulnerable to unauthorized modification and communication.

Although users formally undertake, in the platforms' Terms of Service (ToS), to post only content they own or for which they have secured a license, platforms are perfectly aware that this commitment is widely disregarded. The result is that users, encouraged to engage in practices that are constitutive of the platforms' business model, remain legally exposed to the risk of infringement proceedings.[2] This exposure is further facilitated by the technological infrastructure available to rightsholders, who increasingly rely on specialized software companies capable of scanning online content, identifying potential copies, and issuing automated claims against social media account holders. The tension is therefore acute: on the one hand, the sharing culture that sustains the digital economy of social media; on the other, the integrity of copyright law as a regulatory regime. The ability of copyright to fulfil its normative purpose is thus profoundly challenged in the environment of social networking, where technological design and economic incentives systematically collide with the law's prohibitive framework.[3]

What exacerbates this difficulty is that users themselves are frequently uncertain about the legality of their online activity and tend to underestimate the risks involved. Surveys over the past two decades have consistently revealed a widespread misconception of what copyright entails, a tendency to normalize

[1] Collopy and Drye (2017); Edosomwan et al. (2011), p. 3; and Yeşiloğlu (2019), p. 164.

[2] Although platforms such as Instagram are unlikely for policy reasons to initiate infringement actions directly against their own users, the emerging case law demonstrates a growing exposure of those users to claims brought by third-party copyright holders. As Bosher and Yeşiloğlu (2019), p. 166, emphasize, this trend reflects the increasing vulnerability of individuals who share content on social media without authorization. At the same time, Bonadio and Rohatgi (2025), p. 209, caution that the practical risk of enforcement remains limited, since pursuing litigation against individual users is generally economically inefficient. In principle, any act of posting copyright-protected material without prior consent exposes the user to liability; yet, in practice, copyright owners rarely seek to enforce their rights against occasional social media uses, as the costs of legal action typically outweigh the potential damages recoverable.

[3] *See* Lucchi (2005), pp. 1111, 1126–1127, contending that intellectual property rights have not only influenced market structures but have also altered their original competitive processes, often exacerbating inefficiencies rather than resolving the trade-off between private incentives and social welfare. Copyright, in particular, appears ill-suited to reconcile its monopolistic rationale with the heterogeneity of cultural and creative goods, which embody varying degrees of artistic expression and therefore resist the imposition of a single property regime. This imbalance has been further intensified in the digital environment, where the original bargain between the public and the author has given way to an economic model centered on control over access and use, largely driven by the lobbying power and monopolistic aspirations of the cultural industries.

unlawful sharing as a socially acceptable practice, and a striking absence of moral concern regarding online infringement.[4] Particularly among younger demographics, copyright law is often perceived as outdated or skewed in favor of entrenched industry interests, while the act of file sharing or re-posting digital content is regarded as both harmless and beneficial. A large proportion of internet users remain unsure of what is legal or illegal online, with many acknowledging little confidence in distinguishing between the two. This enduring confusion contributes to a culture in which infringing practices are not only common but socially internalized, further undermining the deterrent function of copyright law in the digital environment.

This article sets out to make sense of the collision between copyright law and social media. It advances a clear map of the terrain and a normative yardstick for judging competing enforcement models. First, it diagnoses the structural paradox of social media's sharing-driven architecture against copyright's exclusionary logic, and illustrates the real-world stakes through emblematic disputes. It then shifts from the public regulation of platforms (DMCA safe harbors, the E-Commerce Directive/DSA) to private regulation by platforms (Terms of Service, automated filtering, monetization controls), arguing that contract and code now function as *de facto* platform law. Building on this, the article examines the CJEU's turn toward primary liability and unpacks Art. 17 of the Digital Single Market Directive. The conclusion draws these strands together, proposing concrete criteria for calibrating platform duties, safeguarding user expression, and aligning copyright's normative aims with the realities of a networked creative economy.

2 Copyright Battles from Paparazzi Photos to Embedding

The tension between the economic logic of sharing and the restrictive ethos of copyright has not remained abstract, but has materialized in a number of high-profile disputes, particularly in the United States. Celebrities, whose social media presence forms an integral part of their branding and revenue streams, have themselves become defendants in copyright claims arising from the unauthorized use of paparazzi photographs. The cases of Khloé Kardashian and Gigi Hadid are illustrative.[5] They reveal how even individuals whose own image constitutes their most valuable asset can find themselves accused of infringing the exclusive rights of photographers and agencies.

In 2017, Khloé Kardashian was sued in the US District Court for the Central District of California after posting on her Instagram profile a photograph of herself owned by Xposure Photos.[6] The image, taken by photographer Manuel Muñoz and licensed for limited use to *The Daily Mail*, bore a copyright notice and watermark when first published. When Kardashian shared the photograph on her social media account, the watermark had been removed, and no license had been obtained. The

[4] *See* the empirical studies cited in Bosher and Yeşiloğlu (2019), p. 169.

[5] For discussion, *see* Bosher (2020), pp. 123, 128.

[6] *Xposure Photos UK Ltd v. Khloe Kardashian et al*, 2:17-cv-03088.

complaint emphasized not only the unauthorized use but also the deliberate removal of copyright management information. As with many of these disputes, the matter did not proceed to trial but was instead resolved through a confidential settlement, underscoring the tendency of such cases to end outside the courtroom.

The following year, Gigi Hadid became embroiled in similar litigation brought by the photo agency Xclusive-Lee.[7] The agency alleged that Hadid had posted on Instagram an image of herself, taken in New York in October 2018, without permission and without attribution, and claimed that her account contained dozens of similar examples of unlicensed use. This was not her first encounter with copyright enforcement: in 2017 she had faced a claim after posting a paparazzi photograph, which she had altered by removing its watermark, an image that went on to receive over a million likes and was subsequently reproduced by other publications crediting Hadid rather than the photographer. That dispute, too, was settled. In the second case, however, Hadid sought to defend herself, advancing arguments ranging from fair use[8] to the notion of implied license,[9] on the basis that her posing for the camera constituted a creative contribution to the work. Ultimately, the claim was dismissed on procedural grounds. The substantive questions raised by Hadid's defense – including the possible recognition of co-authorship[10] – therefore remained unresolved.

[7] *X-clusive Lee, Inc v. Gigi Hadid*, 1:19-cv-00520.

[8] Hadid's reliance on fair use is perhaps the most intuitive of her defenses, yet it is also the weakest. The core of her argument – that reposting a paparazzi photograph of herself on Instagram was "transformative" and "non-commercial" – misconceives both the meaning of transformativeness and the economic realities of celebrity social media use. To qualify as transformative, a use must alter the expressive character or purpose of the original work, typically by adding commentary, criticism, parody, or some other form of new expression. Simply re-posting a photograph, even with minimal cropping, does not recontextualize the work but rather reproduces it for the same purpose for which it was originally created: the depiction of the celebrity subject. Nor does the claim of non-commerciality withstand scrutiny. In the influencer economy, every social media post by a celebrity serves to enhance personal branding and audience engagement. Courts are therefore unlikely to treat such uses as devoid of financial benefit. *See* Bosher (2020), p. 129.

[9] While Hadid sought to argue that her consent to being photographed, coupled with her active posing, created an implied license to use the resulting images, this contention collapses under scrutiny. As Xclusive observed, accepting such reasoning would entail that virtually any subject of a photograph – or more broadly, of any creative work – could assert a right to appropriate or reproduce it merely on the ground of having acquiesced to its production. The *reductio ad absurdum* of this argument is that the very act of smiling, nodding, or otherwise signaling assent to the author's creative process would suffice to erase the exclusivity of copyright, effectively "obliterating" the rights of authors in favor of their subjects. Far from strengthening the legal framework, the recognition of an implied license in circumstances such as these would undermine the predictability of copyright protection and destabilize the balance between creators and subjects that the law is designed to maintain.

[10] The claim of joint ownership advanced by Hadid is equally fragile. While she contended that posing might amount to a creative contribution sufficient for co-authorship, this argument distorts the threshold of originality in copyright law. Posing for a photograph, even with professional skill, cannot reasonably be equated with the kind of authorial control or creative design that characterizes joint authorship. The US Copyright Act requires not merely a contribution to the production of the work but a common intention that the contributions merge into an inseparable whole, a standard that cooperation between photographer and subject during a photoshoot does not ordinarily satisfy. Were Hadid's reasoning to prevail, virtually every subject of a professional photograph – whether a model, an athlete, or a politician – could assert joint authorship on the ground of their gestures or expressions. Such an expansive interpretation would destabilize established copyright doctrine by conflating the role of the subject with that of the author.

The uncertainties surrounding copyright enforcement in the context of social media are further exemplified by the disputes that have arisen in relation to framing and embedding techniques.[11] These technological practices allow content that has already been made publicly available online to be displayed on a third-party website without the creation of a new copy on the server of the party making use of the work. The legal question that follows is whether such use amounts to an infringing act of communication or display under copyright law, or whether the absence of a new copy and the pre-existing availability of the material exempts it from liability.

The Court of Justice of the European Union addressed this question directly in its 2014 decision in *BestWater International GmbH v. Mebes*.[12] In that case, competitors of BestWater embedded on their websites a promotional video produced by BestWater and made available on YouTube. The CJEU reaffirmed its line of reasoning that copyright infringement occurs only when a protected work is communicated to a new audience, that is, a public not already taken into account by the copyright holder when the work was initially made available. Because the video in question was already freely accessible on YouTube, embedding it did not amount to a communication to a new audience and was therefore not deemed to infringe copyright. The ruling effectively insulated certain forms of framing and embedding, provided that the original work had been placed online without restrictions and was available to all internet users.

In the United States, however, the jurisprudence on embedding remains unsettled and fractured. The Ninth Circuit, in its influential 2007 decision in *Perfect 10, Inc. v. Amazon.com, Inc.*, adopted what has come to be known as the "server test".[13] Under this test, liability for infringement of the display right arises only if the defendant stores a copy of the protected work on its own server. By contrast, if the work is merely embedded or linked to from another site, no infringing display is deemed to occur. This interpretation grants significant latitude to inter-platform sharing and the circulation of embedded content, and it has been invoked to shield internet service and social media platforms from liability so long as the allegedly infringing content is not hosted directly on their servers. The Ninth Circuit has confirmed the continuing vitality of this doctrine in more recent litigation, including the *Instagram* case.[14] The court emphasized that the rule was not confined in its application to particular categories of intermediaries such as search engines, but extended to internet service and social media platforms more generally.

At the same time, however, this position has not commanded uniform acceptance across US courts. While within the Ninth Circuit the server test is treated as settled law, other courts have explicitly declined to follow it. A striking example is the *Goldman* decision of the Southern District of New York,[15] in which the court rejected the Ninth Circuit's reasoning and held that the mere absence of a copy on

[11] *See* Bonadio and Rohatgi (2025), pp. 207–208.

[12] Case C-348/13, *BestWater International GmbH v. Mebes and Potsch*, 21 October 2014, ECLI:EU:C:2014:2315.

[13] *Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir., 2007).

[14] *Instagram, LLC*, No. 22-15293 (9th Cir., 2023).

[15] *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585 (S.D.N.Y. 2018).

the defendant's server could not be dispositive. In the court's view, the incorporation of copyrighted material into a new online context was sufficient to trigger the exclusive display right, irrespective of where the file was technically stored.

The divergence between these two approaches – the server test in the Ninth Circuit and the incorporation test adopted elsewhere – has generated considerable uncertainty in US copyright law. On the one hand, the server test has the effect of legitimizing much of the embedding activity that underpins the architecture of social media and online journalism; on the other, the incorporation test emphasizes the prerogatives of rightsholders and significantly narrows the scope for unlicensed use. This uncertainty has led platforms to recalibrate their policies. Instagram, for example, now allows users to disable the embedding of their posts by third parties.

3 Contracts, Clicks, and Control: The Privatized Law of Platforms

The difficulties of reconciling copyright with the architecture of social media ultimately lead to a broader and more pressing concern: the entrenchment of platforms' power to regulate online expression both through public oversight and their own private regulation. The consolidation of large-scale intermediaries has created a dual governance structure in which public and private forms of regulation interact, overlap, and sometimes collide.[16] On the one hand, there is regulation *of* platforms – embodied in legislative and co-regulatory instruments such as the Directive on Copyright in the Digital Single Market (DSM)[17] and the Digital Services Act (DSA).[18] On the other hand, there is regulation *by* platforms, a form of private order expressed through Terms of Service, Community Guidelines, and technological architectures of enforcement such as algorithmic filtering and moderation systems.

The distinction is not merely conceptual. Regulation *of* platforms reflects the effort of states and supranational institutions to shape the responsibilities and duties of intermediaries within a normative framework that balances copyright protection with fundamental rights. Regulation *by* platforms, on the other hand, represents the self-imposed rules and practices through which platforms govern the behavior of their users, structure the exploitation of copyright-protected content, and determine the modalities of access and availability of online expression. These internal normative regimes have turned into a form of "platform law", insofar as they dictate in practice the contours of users' freedoms and obligations in a digital environment dominated by private actors.

The consequences are profound. Through their Terms of Service and algorithmic systems, platforms shape not only the commercial exploitation of user-generated

[16] *See* Quintais et al. (2023), pp. 3–7.

[17] 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.

[18] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and Amending Directive 2000/31/EC (Digital Services Act).

content but also the scope of users' freedom of expression online. Since much of what users upload qualifies for copyright protection, the private governance of platforms over visibility and removal decisions directly affects this fundamental freedom. In effect, platforms exercise normative and even quasi-judicial powers: when faced with notices or filtering requests from rightsholders, they must balance conflicting interests, assess the likelihood of infringement, and reach decisions akin to those traditionally entrusted to courts. This privatized adjudication underscores the paradox of contemporary cyberspace: once imagined as a libertarian realm beyond regulation, it is now a domain subject to pervasive governance, administered both by states and the platforms themselves, with "code" operating as the architecture of control.[19]

At the core of this privatized adjudicatory power lies the contractual architecture of the platforms themselves. Terms of Service, often assimilated to the classic model of boilerplate agreements in offline contract law, are drafted unilaterally by platforms and presented to users on a take-it-or-leave-it basis. Users have no meaningful bargaining power; their sole choice is to accept or forego access to the platform altogether. In structural terms, these agreements function as contracts of adhesion, or what in the digital context are widely described as clickwrap agreements.[20] The user's assent is typically formalized through the mechanical act of clicking "I agree", thereby granting platforms extensive control over the conditions under which content may be uploaded and exploited. Contract law can operate as a delegation of law-making powers to private actors;[21] nowhere is this more evident than in the realm of online platforms.

This contractual asymmetry is compounded by the technological means of enforcement available to platforms. Unlike traditional offline boilerplate contracts, which depend on public authorities to ensure compliance, online platforms can unilaterally enforce their Terms of Service through their own algorithmic systems. Copyright-protected material can be removed instantly, without recourse to judicial intervention, by automated filters or moderation tools embedded within the platform's architecture. In this sense, "code" assumes the function of law: it not only expresses the rules but also executes them, thereby collapsing the normative and executive dimensions of regulation into a single technological infrastructure. This disintermediation of the public authority in both the protection and the

[19] Lessig (2006), p. 3.

[20] Clickwrap agreements emphasize the mechanical and formalistic nature of user consent in the digital environment. The essence of such agreements does not lie in any negotiation or substantive understanding of the contractual clauses, but rather in the ritualized act of clicking "I agree", which operates as a condition for access to the service. By situating the agreement between the installation of the software (or the initiation of an online service) and the possibility of proceeding further, this conception highlights the conditionality that characterizes these contracts: assent functions merely as the gateway to participation. While this mechanism ensures transactional efficiency by reducing costs and standardizing relationships across large user bases, it simultaneously reduces meaningful consent to a binary act performed under conditions of informational asymmetry and structural dependency. The user's "agreement" is thus little more than a procedural formality, masking the profound imbalance of power between platforms and their users. On this point, *see* Grierson (2003), pp. 309, 317. *See also* Chowdhury (2024), p. 7.

[21] Jaffe (1937), p. 201.

enforcement of rights reflects a profound shift in the allocation of regulatory power in cyberspace.

The legitimacy of this contractual regime is open to serious challenge. The non-negotiable, one-sided, and deliberately opaque nature of Terms of Service reflects the fact that these documents are drafted by corporations for their own benefit, with limited attention to the protection of the users who sustain the platforms' economic model. The opacity of these agreements raises pressing questions about the constitutionalization of private self-regulation, for they define the boundaries of permissible speech and copyright use online. At the same time, empirical research consistently shows that users rarely read the terms to which they agree, and even if they did, the often convoluted and legalistic drafting renders comprehension elusive.[22] Instagram, in particular, has been criticized for the ambiguity of its contractual language, which obscures the scope of the licenses users are compelled to grant. In practice, with a single click of the mouse, users contract away significant statutory rights over their creative works – an outcome that places a substantial portion of the copyright regime at risk.[23]

The paradox is therefore stark. Despite the burdensome and arguably unconscionable character of these agreements, users continue to embrace social media platforms. The popularity and network effects of platforms render abstention from participation virtually impossible for authors and creators.[24] Thus, while the Terms of Service operate as a vehicle for platforms to appropriate expansive rights over user-generated content, they do not deter users from engaging, since the alternative is cultural and economic marginalization in the digital public sphere.

4 The Illusion of Ownership: Platform Licensing and the Shift of Power Online

Within this paradoxical framework, the licensing regime embedded in the Terms of Service assumes particular significance. Ownership of the content formally remains with the user; platforms carefully assert that they do not "take" copyright in the material uploaded by their members.[25] Yet this affirmation is, in many respects, more formal than substantive. By accepting the contractual terms, users grant platforms extraordinarily broad and far-reaching licenses,[26] typically royalty-free,

[22] Wauters et al. (2014), p. 254.

[23] Bohannan (2008), p. 616.

[24] Janssens et al. (2022), p. 198.

[25] The widespread regulation of intellectual property rights through contractual mechanisms poses a systemic challenge to the integrity of the official intellectual property regime: Radin (2003–2004), pp. 173, 178. The proliferation of private contractual frameworks risks displacing the statutory balance carefully constructed by copyright law, substituting it with terms unilaterally imposed by powerful intermediaries. Such private ordering not only reshapes the allocation of rights and obligations between authors, users, and platforms but also threatens, in principle, to erode the normative coherence of intellectual property as a public regime grounded in legislation and adjudication.

[26] Alm (2014), p. 104; Tao (2017), p. 617.

worldwide, transferable, and sometimes perpetual.[27] These licenses cover the full range of rights recognized under copyright law – reproduction, adaptation, communication to the public, performance, and distribution – and they further extend to sublicensing, thereby permitting platforms to authorize third parties to exploit user content without notice, additional consent, or compensation. In effect, the license structure enables platforms to exercise almost all the prerogatives of a rightsholder, with the sole exception that the license is technically non-exclusive.

The scope of these contractual licenses is deliberately vague, often condensed into capacious formulations such as "use", which encompasses virtually any conceivable form of exploitation, from routine sharing and promotional activity to the increasingly controversial practices of datafication and the use of vast image repositories to train artificial intelligence systems. In this respect, the breadth of the license has profound consequences for creators who may simultaneously seek to exploit their works through exclusive licensing arrangements.[28] The act of posting an image on Instagram, for example, may itself amount to a breach of exclusivity vis-à-vis another contractual partner, given that the platform reserves the right to sublicense the same material to third parties.

The asymmetry between the treatment of user content and platform-owned content further exposes the structural imbalance. While platforms insist that users grant them vast rights over uploaded works, they simultaneously invoke strong intellectual property protections for their own materials. Instagram's Terms of Use, for instance, strictly prohibit the reproduction, modification, or repurposing of platform-owned content, thereby barring third-party application developers from creating ancillary tools such as reposting apps or follower-tracking utilities.[29] This double standard – expansive claims over user works, coupled with restrictive protection of platform assets – has fueled tension with independent developers and critics, who view the practice as evidence of platforms' monopolistic approach to digital creativity and innovation.

The question of enforceability remains equally problematic. Some commentators have argued that licenses of such breadth and vagueness may verge on unenforceable, given the indeterminacy of terms like "use" or "any purpose". Facebook's 2011 user policy, for example, purported to grant the company the right to use "any" intellectual property content uploaded by its members – a formulation so open-ended that critics noted it could extend even to licensing material to wholly inappropriate recipients.[30] TikTok's policy goes further still, providing for an

[27] *See* Bonadio and Rohatgi (2025), p. 209, noting that TikTok's user policy goes even further than those of other leading platforms by granting an unconditional and irrevocable license over user content, which extends not only to TikTok itself but also to third parties authorized by the platform. The breadth of this license is reinforced by its perpetual nature, in contrast to the policies of Instagram and Facebook, where the license is contractually framed to terminate once user content is deleted. This structural difference underscores the particularly onerous character of TikTok's licensing model, which deprives users of any possibility of regaining control over their works even after they have chosen to remove them from the platform.

[28] Bosher (2020), p. 125.

[29] Panzarino (2013).

[30] Hetcher (2008), pp. 829, 848.

unconditional, irrevocable, royalty-free, perpetual license over user content, which in practice strips authors of any meaningful control once the work is uploaded. Although such provisions are rarely tested in court, their presence in the contractual framework of the most widely used platforms demonstrates the extraordinary contractual leverage exercised by platforms in the governance of digital creativity.

Taken together, these practices illustrate how private regulation through Terms of Service reconfigures copyright law from within. By conditioning access to participation in the digital public sphere on the grant of broad licenses, platforms invert the traditional presumption of copyright ownership. The creator formally retains title, but the platform acquires the substance of the rights. What results is a contractual regime that not only undermines the economic autonomy of authors but also consolidates the power of platforms to govern and commodify the expressive culture of billions of users worldwide.

5 Safe Harbors and the Delicate Balance of Platform Liability

If platforms simultaneously empower and constrain users by reshaping copyright through private regulation, they also raise profound issues regarding their own liability for the infringements they enable. Yet affirming platform liability is not without risks. One of the most pressing concerns is that of overburdening intermediaries. To impose excessive monitoring or enforcement duties on social media providers risks shifting the burden of copyright protection away from rightsholders and onto private actors, thereby altering the structural balance envisioned by copyright law. Such a shift can stifle platforms' freedom to operate, restrict innovation, and create disincentives for the development of new technology. The fear is that platforms, faced with disproportionate liability risks, may adopt overly restrictive policies, curtail user expression, or withdraw entirely from certain markets.[31]

The European Union's jurisprudence reflects this tension. In its landmark decisions in *Scarlet Extended* and *Sabam*, the Court of Justice of the European Union considered the interplay between intermediary injunctions, Art. 15 of the E-Commerce Directive, and fundamental rights. While acknowledging that the protection of intellectual property is enshrined in Art. 17(2) of the EU Charter, the Court emphasized that enforcement obligations must be balanced against other fundamental rights, including the freedom to conduct a business protected by Art. 16 of the Charter.[32] These rulings underscore the need to avoid imposing open-ended or disproportionate duties on intermediaries, thereby recognizing that platform liability cannot be addressed in isolation from the broader constitutional framework within which digital services operate.

A further complication lies in the inherently multistate character of online copyright disputes. Copyright holders may initiate litigation in multiple

[31] Wang (2018), p. 199.

[32] Case C-70/10, *Scarlet Extended*, EU:C:2011:771, para 46. In the same sense, Case C-360/10, *Sabam*, EU:C:2012:85, para 44.

jurisdictions. A user accused of infringement may be sued in any number of different locations, such as the domicile of the copyright owner, the residence of the alleged infringer, or the place where the damage is said to have occurred. This territorial fragmentation illustrates one of the most confusing features of social networking regulation: law is national, but internet is global.[33] The risk of parallel proceedings and inconsistent judgments exacerbates the uncertainty faced by both users and platforms.

It is precisely in response to these dilemmas that the notion of "safe harbors" emerged, both in the United States and in the European Union, as a qualified immunity designed to balance the protection of rightsholders with the need to preserve the vitality of digital services.[34] Beginning in the late 1990s, lawmakers on both sides of the Atlantic sought to provide online intermediaries with a measure of certainty: platforms would not be held automatically liable for infringing acts committed by their users, provided that they complied with certain conditions of diligence and responsiveness.[35]

In the United States, this balance was struck by the Digital Millennium Copyright Act of 1998. Sec. 512 of the DMCA establishes a regime of safe harbors that shield platforms from secondary liability on condition that they adopt a notice-and-takedown procedure and respond expeditiously to complaints.[36] The DMCA regime has been hailed as a catalyst for the growth of internet platforms, yet it has also been criticized for encouraging over-removal and "collateral censorship", since providers often err on the side of caution in order to maintain their immunity. The asymmetry of incentives is evident: platforms face no penalty for taking down lawful content but risk losing the safe harbor if they fail to remove infringing material upon notice.

The European Union adopted a parallel approach with the 2000 E-Commerce Directive,[37] which harmonized minimum standards of intermediary liability across Member States. Articles 12 to 14 of the Directive exempted providers engaged in "mere conduit", "caching", or "hosting" from liability, provided that they played a passive role and, in the case of hosting, acted expeditiously upon acquiring actual knowledge of illegality.[38] This "hosting" exemption proved particularly significant for social media platforms.

[33] Bosher and Yeşiloğlu (2019), p. 173.

[34] *See* Riordan (2016); Angelopoulos (2016); Husovec (2017); Wilman (2020).

[35] The regime of safe harbors is not confined to the United States and the European Union, but has gradually been incorporated into the legal systems of a growing number of jurisdictions worldwide. Recent reforms in Hong Kong, for instance, have introduced a safe harbor framework for internet service providers in the field of copyright, including a notice-and-takedown mechanism. Similar developments can be traced to the influence of international trade agreements: Australia, for example, amended its Copyright Act in 2004 to introduce safe harbor provisions as part of its obligations under the free trade agreement with the United States, while Mexico undertook a substantial reform of its copyright legislation in 2020 following the entry into force of the United States–Mexico–Canada Agreement. In both cases, DMCA-style provisions were transplanted into national law, demonstrating the extent to which safe harbors have become a transnational legal model for regulating intermediary liability.

[36] Matthews et al. (2013), pp. 26, 27.

[37] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market.

Importantly, the E-Commerce Directive explicitly prohibited general monitoring obligations, a prohibition strongly reaffirmed by the CJEU in cases such as *Scarlet Extended* and *Sabam*.[39] Here, the Court struck down proposals that would have required intermediaries to engage in blanket, indefinite filtering of all user content, holding that such measures would disproportionately infringe both the freedom to conduct a business and users' rights to privacy and freedom of expression. This balance was codified in Art. 15 of the E-Commerce Directive – now replicated in Art. 8 of the DSA and Art. 17(8) of the DSM Directive – expressly barring Member States from imposing on intermediary service providers a general obligation to monitor the information they transmit or store, or to actively seek facts or circumstances indicating illegal activity.[40]

The CJEU has clarified that the prohibition applies only to indiscriminate monitoring obligations, while leaving open the possibility of imposing specific monitoring or filtering duties in individual cases.[41] It follows that EU law does not preclude intermediaries from being required to act in a targeted and proportionate manner when faced with particular infringements, nor does it prevent them from voluntarily adopting proactive measures to combat illegal content.[42] Indeed, the idea that service providers should be confined to a purely reactive stance – limited to responding to notices – appears increasingly unconvincing in light of technological developments and the scale of online infringements.[43] The legal framework thus draws a nuanced distinction: while general obligations of surveillance are incompatible with fundamental rights, specific obligations of care, or the voluntary deployment of preventive mechanisms by platforms themselves, are not only permissible but may in certain circumstances be expected.

6 From De-Indexing to Dynamic Blocking: The Expanding Reach of EU Injunctions

Nor does European law prevent rightsholders from obtaining injunctions directed against intermediaries, irrespective of the applicability of safe harbors or the establishment of liability on their part. Art. 8(3) of the InfoSoc Directive[44] requires Member States to ensure that copyright holders are in a position to seek injunctive relief against intermediaries whose services are used by third parties to infringe

[38] Basistrocci (2002–2003), p. 111.

[39] *See supra* note 32.

[40] Senftleben and Angelopoulos (2020).

[41] *Glawischnig-Piesczek*, C-18/18, EU:C:2019:821, para 34; *L'Oréal*, C-324/09, EU:C:2011:474, para 139; *Mc Fadden*, C-484/14, EU:C:2016:689, para 87.

[42] Elkin-Koren (2014), pp. 45–48.

[43] Wilman (2021), pp. 317, 324–325. *See also Cartier International AG & Ors v. British Sky Broadcasting Ltd & Ors* [2014] EWHC 3354 (Ch) (17 October 2014), at [251], where it is argued that "it is economically more efficient to require intermediaries to take action to prevent infringement occurring via their services than it is to require rightholders to take action directly against infringers".

[44] 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.

copyright or related rights. A parallel provision is found in the Enforcement Directive,[45] which extends the availability of injunctions to intellectual property rights beyond copyright and sets out general principles governing such measures. Under Art. 3 of that Directive, enforcement procedures must be fair, proportionate, effective, and dissuasive, while at the same time avoiding unnecessary complexity, costs, or delays, and ensuring that they do not create barriers to legitimate trade or invite abuse.

The rationale for involving intermediaries in the enforcement process is clear: in the digital environment, their services are often the most effective point of intervention for stopping ongoing infringements and preventing future ones. This economic logic, encapsulated in Recital 59 of the InfoSoc Directive, rests on the idea that intermediaries are typically best placed – and indeed the lowest-cost avoiders – to bring infringing activities to an end. For this reason, the availability of injunctions against platforms and access providers has expanded globally, sometimes under the influence of international trade agreements, much as has occurred with the spread of safe harbor provisions.

Over time, courts across Europe and beyond have experimented with different forms of intermediary injunctions.[46] These include de-indexing orders, requiring search engines to delist infringing websites from their results;[47] disclosure orders, obliging intermediaries to provide identifying information about suspected infringers; and, most prominently, website blocking orders, which restrict user access to sites engaged in systematic infringement. In the United Kingdom, for instance, Sec. 97A of the Copyright, Designs and Patents Act has been used since 2011 to support injunctions blocking access to hundreds of piracy and counterfeiting websites, often at the request of film studios, music producers, sports organizations, and publishers. The practice has since evolved to encompass "dynamic" injunctions, which extend automatically to new domains linked to the same infringing activity, as well as "live" injunctions, designed to disrupt unauthorized streaming servers in real time.

The CJEU has played a crucial role in shaping the conditions under which such remedies may be granted. Beginning with *L'Oréal v. eBay*, the Court has clarified that injunctions may not only aim to terminate existing infringements but may also legitimately be designed to prevent future ones.[48] At the same time, they must respect a balance of fundamental rights: alongside the protection of intellectual property under Art. 17(2) of the Charter, the freedom to conduct a business (Art. 16), the right to data protection (Art. 8), and the freedom of expression and information (Art. 11) must all be taken into account. Generalized or indefinite filtering obligations that would impose excessive costs on intermediaries or unduly

[45] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights.

[46] *See* Rosati (forthcoming).

[47] Delisting, however, does not directly target the infringing website itself, which remains online and accessible through other means; it merely reduces its visibility by making it harder for users to locate via search engines.

[48] *L'Oréal*, *supra* note 41, paras 131–134.

interfere with users' rights have consistently been struck down. Specific, targeted, and proportionate measures, however, remain permissible.

The CJEU has further recognized that intermediary injunctions may, under certain circumstances, extend beyond national borders. In *Glawischnig-Piesczek*, the Court held that domestic courts or competent authorities, when ruling on applications for injunctions based on unharmonized national rights, are not precluded by EU law from granting orders with extraterritorial reach.[49] Such orders may even require the worldwide removal of unlawful content.

7 Revisiting the Hosting Exemption: The CJEU's Shift from Accessory to Direct Liability

This framework of injunctions, designed to ensure that intermediaries could be compelled to assist in the enforcement of intellectual property rights, has not exhausted the questions surrounding platform liability. Parallel to the evolution of remedies, the Court of Justice has progressively refined the very conditions under which platforms might rely on the liability exemptions of the E-Commerce Directive. In particular, a line of jurisprudence emerged that placed increasing emphasis on the distinction between passive and active roles, a distinction that would become decisive in narrowing the availability of safe harbors and paving the way toward the recognition of circumstances in which platforms themselves might incur primary liability.

In landmark decisions such as *Google France* and *L'Oréal v. eBay*,[50] the CJEU clarified that platforms could not invoke the safe harbor where they exerted active control over content – for example, by optimizing its presentation, promoting it, or otherwise intervening in ways that demonstrated knowledge or influence. The availability of the safe harbors established under the E-Commerce Directive depended on the intermediary maintaining a passive role, such that it did not acquire knowledge of or exercise control over the infringing content. Where this condition was not satisfied, the exemption was deemed inapplicable, and liability could arise. In such cases, the liability of providers could be typically framed on a secondary or indirect basis, reflecting their facilitative role rather than direct infringement. However, this form of accessory liability was not harmonized at the Union level and thus remained subject to the discretion of individual Member States, producing a fragmented regulatory landscape within the internal market.[51]

Over time, however, the Court of Justice began to move beyond the dichotomy of passive versus active hosting and to recognize circumstances in which platform operators could themselves incur primary liability. This evolution culminated in the joined cases *YouTube* and *Cyando*,[52] where the Grand Chamber confronted the

[49] *Supra* note 41.

[50] *Google France and Google*, C-236/08 to C-238/08, EU:C:2010:159, para 114; *L'Oréal*, n 41 above, para 123; *SNB-REACT*, C-521/17, EU:C:2018:639, para 52.

[51] Rosati (forthcoming). *See also* Opinion of Advocate General Szpunar in *Louboutin*, C-148/21 and C-184/21, EU:C:2022:422, paras 78–79.

question of whether operators of large-scale platforms might, under certain conditions, be deemed to carry out acts of communication to the public within the meaning of Art. 3(1) of the InfoSoc Directive. The Court answered in the affirmative, holding that direct liability could attach where the operator's role was both indispensable and deliberate.

In assessing indispensability and deliberateness, the Court identified a series of factors that national courts must consider. These include whether the platform refrained from implementing appropriate technological measures that a diligent operator could reasonably be expected to deploy to counter infringement; whether it participated in the selection of infringing content; whether it provided tools designed to facilitate unlawful sharing; and whether it knowingly promoted such sharing, for instance through a financial model that incentivized the uploading of infringing material. By contrast, the Court clarified that mere abstract knowledge that unlawful content may be uploaded, or the mere fact of operating on a for-profit basis, does not suffice to establish direct liability. Yet the assessment shifts if a rightsholder has issued a specific notification and the platform fails to act expeditiously to remove or disable access to the content in question.

This reasoning marked a departure from earlier case law, which had largely confined intermediary liability to secondary forms and insisted on a strictly passive concept of hosting. By acknowledging that platforms may, through their deliberate design choices and business models, make an indispensable contribution to copyright infringement, the Court reshaped the liability landscape. The decision in *YouTube* and *Cyando* thus signaled a significant step towards recognizing primary liability for platforms, while at the same time preserving the possibility of exemption where reasonable and effective countermeasures are in place.

8 Calibrating Protection and Participation: The Promise and Perils of Art. 17 DSM

The jurisprudential shift marked by *YouTube* and *Cyando* did not occur in isolation but unfolded against a broader regulatory recalibration within the European Union. Even as the Court was refining the contours of liability under the E-Commerce Directive, policymakers were responding to mounting pressure from rightsholders and Member States to modernize the legal framework in light of the structural role played by large platforms in the circulation of creative works. This legislative effort culminated in the adoption of the Digital Single Market Directive in 2019 (DSM Directive), a measure that profoundly reshaped the balance between platforms and copyright owners. At the heart of this reform lies Art. 17, which introduced a bespoke liability regime for Online Content-Sharing Service Providers (OCSSPs). Unlike the general safe harbors of the E-Commerce Directive, Art. 17 presumes that

[52] Joined Cases C-682/18 and C-683/18, *YouTube and Cyando*, EU:C:2021:503.

OCSSPs engage in acts of communication to the public whenever they store and provide access to copyrighted content uploaded by their users, thereby subjecting them in principle to direct liability.

The decision to address platform liability and copyright enforcement through a directive has itself been the subject of criticism.[53] Directives, by their very nature, require transposition into national legal systems, leaving Member States with a margin of discretion that inevitably fragments the application of the rules. In the case of Art. 17, the complexity of the obligations imposed on platforms has only amplified this problem, producing diverging national implementations and legal uncertainty across the Union. This undermines the very purpose of harmonization, forcing both platforms and rightsholders to navigate a patchwork of domestic regimes that risk diluting the coherence of the internal market.

The unsatisfactory quality of legislation thus stems not only from the substance of Art. 17 but also from the choice of instrument. A directive is ill-suited to approximate national laws in an area as technologically dynamic and normatively sensitive as platform governance. The result is a familiar pattern in EU lawmaking: the painstaking negotiation of a compromise text at the European level, followed almost immediately by struggles over its interpretation and implementation at the national level, sometimes amounting to a partial undoing of the legislative effort itself. One cannot help but see in this process a game of legislative cat-and-mouse, where the hard-won consensus of Brussels is continuously re-negotiated in twenty-seven capitals.

This dynamic raises a broader institutional question. Can the Union genuinely claim to have a functioning single market for copyright-based services if the rules governing the dissemination of content online remain fractured along national lines? The multiplicity of legal frameworks not only complicates compliance for platforms but also threatens to erode the uniformity and predictability that are the hallmarks of an integrated market. For these reasons, the time may have come for a more ambitious, rational, and centralized approach to harmonization – one that moves beyond the limitations of directives and toward instruments capable of delivering genuine legal unity in the digital environment.

This recognition of fragmentation and the need for stronger harmonization is not merely an abstract institutional concern; it is precisely the backdrop against which Art. 17 DSM must be understood. The provision embodies the Union's attempt to operationalize that ambition of unity, yet it does so through a liability regime that is itself contentious. The architecture of Art. 17 DSM is premised on a delicate balancing act. On the one hand, the Directive is designed to curb the immense leverage exercised by OCSSPs over the circulation of copyrighted works, ensuring that rightsholders are adequately remunerated and that platforms cannot continue to profit from user-uploaded content without assuming corresponding responsibilities.[54] On the other hand, however, the regulatory framework carries with it the serious risk of tipping the scales too far, producing unintended consequences in the form of over-enforcement and the suppression of lawful expression.[55]

[53] *See* Rosati (2024), p. 621.

[54] De Gregorio (2021), p. 41.

At the core of this reform lies the ambition to close the so-called "value gap", a term that crystallized during the legislative debates and came to dominate the political discourse.[56] The expression captures the perceived imbalance between, on the one side, the significant revenues generated by user-generated content platforms through advertising and data-driven business models, and, on the other, the comparatively limited remuneration that flowed back to authors and rightsholders whose works provided much of the cultural and economic value of those platforms. Art. 17 was thus explicitly framed not as an attempt to impose blanket liability on OCSSPs for their ordinary activities, but as a corrective mechanism intended to recalibrate the distribution of value within the digital ecosystem.[57]

By reconfiguring the liability regime, the Directive sought to compel platforms to internalize the costs of copyright enforcement and to negotiate licensing arrangements with rightsholders on more equitable terms. The expectation was that such a system would generate a fairer share of revenues for creators, while at the same time maintaining the accessibility and participatory culture that defines the social media environment. Yet the very attempt to resolve the value gap introduces new tensions: the incentive structures created by Art. 17 may push platforms toward overly cautious enforcement practices, thereby constraining the expressive freedoms of users and, paradoxically, undermining the creative diversity that the digital public sphere is meant to foster.

The danger of overenforcement arises from the structural incentives embedded in the system. Platforms confronted with the possibility of liability for failing to remove infringing material have little reason to exercise restraint: it is far safer for them to err on the side of removal, even when the content in question may fall within one of copyright law's exceptions and limitations.[58] The asymmetry of risk is clear – failing to act exposes platforms to potential liability, while taking down lawful content carries no legal sanction. The predictable outcome is a systematic bias toward overblocking, in which parody, commentary, quotation, or other transformative uses are removed simply because they superficially resemble

[55] *See* Fischman-Afori (2023), p. 9, arguing that: "Because intermediaries are risk-averse, they have a tendency to respond positively to all takedown requests".

[56] *See*, *e.g.*, Quintais (2020), p. 28; Angelopoulos and Quintais (2019), p. 147.

[57] To complement the mechanisms introduced under Art. 17, the DSM Directive also addresses the broader concern of ensuring fair compensation for creators through Art. 18. This provision establishes a general principle of appropriate and proportionate remuneration for authors and performers who license or transfer their rights. While the Directive enshrines the principle itself, it deliberately leaves to the Member States the discretion to determine the specific mechanisms by which it is to be implemented, provided that such mechanisms comply with EU law. In theory, Art. 18 has the potential to play a significant role in narrowing the so-called value gap, particularly in the context of OCSSPs. By affirming that creators are entitled to fair remuneration, it could serve both to enhance the bargaining position of individual authors and performers and to prevent abusive remuneration practices by large platforms whose market power might otherwise allow them to impose unfavorable contractual terms. At the same time, the provision's open-ended nature generates considerable uncertainty. Without clear operational rules, it remains difficult to determine how the principle of fair remuneration can be effectively enforced in practice, especially in the online environment where licensing structures are often opaque and creators' negotiating power is limited.

[58] *See* Bar-Ziv and Elkin-Koren (2018), pp. 339, 379; Guler Guzel (2021); Erickson and Kretschmer (2018), p. 75; Spoerri (2019), p. 173.

unauthorized copies. The challenge is compounded by the reliance on automated filtering tools, which are ill-suited to capture the nuanced judgments required in applying copyright exceptions. Algorithms, however sophisticated, struggle to distinguish a parody from an infringing reproduction or to identify when creative re-use qualifies as fair dealing or falls within the scope of quotation rights.

The effects of this over-enforcement are not confined to individual cases of wrongful takedown. They reverberate throughout the creative ecosystem of social media, shaping both the process of creation and the substance of cultural production. Faced with opaque and unpredictable moderation rules, creators often preemptively alter or withhold content, engaging in forms of self-censorship designed to avoid algorithmic penalties or account suspensions.[59] Studies have shown that this anticipatory behavior can significantly influence artistic choices, discouraging experimentation and narrowing the range of expression that finds its way onto platforms. In this environment, users rely on informal strategies – "algorithmic gossip", folk theories about what content is likely to be flagged, and lessons drawn from personal or community experience – to navigate a regulatory regime that is both pervasive and opaque.[60]

Accordingly, the very mechanisms intended to safeguard copyright risk undermining the vibrancy of the digital public sphere. By incentivizing platforms to over-enforce and creators to self-censor, the Directive threatens to replace one imbalance – the under-enforcement of copyright online – with another, in which the freedom of expression of users and the diversity of cultural production are placed in jeopardy. The success of Art. 17 will therefore depend not only on its legal architecture but also on the ability of courts, regulators, and platforms to calibrate enforcement practices in a way that preserves the equilibrium between protection and participation.

9 In or Out? The Grey Zones of Art. 17's Platform Definition

Against this backdrop, it becomes necessary to move from the general critique of Art. 17 to a closer examination of its specific provisions. The Directive is structured in such a way that its very first paragraph sets the tone for the entire liability regime, marking a decisive departure from the framework that preceded it.

Article 17(1) provides that Online Content-Sharing Service Providers (OCSSPs) are deemed to engage in acts of communication to the public whenever they give access to works or other protected subject matter uploaded by their users. The consequence of this qualification is that platforms, rather than users alone, are treated as the primary actors in the dissemination of copyrighted content. As a result, OCSSPs become directly liable for the availability of infringing material on their services. This move represents a sharp break from the earlier safe harbor model: under paragraph (3), OCSSPs are expressly excluded from relying on the

[59] Dergacheva and Katzenbach (2023), p. 9; Quintais et al. (2024), p. 171.

[60] Bishop (2019), p. 2589; DeVito et al. (2017), p. 3163; Caplan and Gillespie (2020).

hosting exemption for copyright-relevant acts, previously available to them under Art. 14(1) of the E-Commerce Directive (now Art. 6 DSA).

Article 17 applies specifically to Online Content-Sharing Service Providers (OCSSPs), a category expressly defined in Art. 2(6) of the Directive. An OCSSP is described as a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organizes and promotes for profit-making purposes. This definition is deliberately constructed with cumulative conditions, ensuring that only services which combine large-scale user uploads, public accessibility, and commercial exploitation fall within its scope. At the same time, the Directive introduces a number of carve-outs designed to shield from this regime services that are either not primarily intended to provide access to copyright-protected content or are not operated on a for-profit basis.

Yet determining whether a particular service qualifies as an OCSSP is far from straightforward.[61] The delineation of the scope of Art. 17 depends crucially on this qualification, which in turn determines whether a platform remains subject to the pre-existing liability of the E-Commerce Directive (as updated by the DSA) or must comply with the bespoke obligations introduced by the DSM Directive. While it is evident that certain large-scale platforms with video-sharing features – such as YouTube, Facebook/Meta, or Instagram – fall squarely within the definition, and while others are clearly excluded by the express carve-outs of Art. 2(6), a significant grey area persists. This ambiguity is particularly acute for medium-sized and smaller platforms, whose business models often involve mixed purposes and whose scale does not lend itself to clear categorization.

The source of this uncertainty lies in the open-textured concepts embedded in the definition itself. Terms such as “main purpose”, “large amount”, and “profit-making purpose” require case-by-case interpretation and are susceptible to divergent application across Member States. National authorities and courts will inevitably exercise discretion in determining whether a given service crosses the definitional threshold, raising the prospect of fragmentation and legal uncertainty across the internal market. The result is a definitional framework that is both deliberately narrow and yet operationally indeterminate, leaving platforms, rightsholders, and users alike to navigate an uncertain regulatory terrain.

The application of Art. 17 is not limited to platforms incorporated within the European Union. The definition of OCSSPs is framed in functional rather than territorial terms, meaning that service providers established outside the Union may also fall within its scope. What matters is not the place of establishment but whether their services are directed at the European public. Mere technical accessibility from within the Union is not sufficient; rather, there must be evidence of “targeting” EU users.[62]

Although the Court of Justice has not yet addressed this issue in the specific context of the right of communication to the public, its jurisprudence in adjacent

61 *See* Quintais et al. (2024), p. 160.

62 Rosati (2021), p. 317.

areas – such as the right of distribution, the *sui generis* database right, and EU trademark law – indicates that targeting is a necessary element.[63] The determination of whether a service is targeted at EU users is ultimately contextual and fact-sensitive. Indicators may include the use of a language or currency commonly employed in a Member State, the presence of a national top-level domain, or the ability for EU residents to order products and services through the platform. Other factors, such as the availability of the provider's application in local app stores, the provision of advertising tailored to a European audience, or the handling of customer service in a national language, can also establish the requisite degree of targeting. In practice, this means that global platforms offering services to EU users, even if headquartered elsewhere, cannot avoid the obligations imposed by Art. 17 simply by virtue of their incorporation outside the EU.

10 The Normative Hierarchy of Art. 17: Best Efforts vs. Obligations of Result

To recalibrate the liability of OCSSPs, Art. 17 DSM lays down a liability exemption mechanism. This mechanism, set out in paragraph 4, does not operate as an absolute shield akin to the safe harbors of the E-Commerce Directive; rather, it is conditional, hinging on the ability of platforms to demonstrate compliance with a demanding set of "best efforts" obligations. These obligations are intended to ensure that platforms act proactively to prevent the unauthorized availability of copyright-protected works and to cooperate effectively with rightsholders in securing appropriate licenses.

At its core, the liability exemption requires OCSSPs to deploy preventive measures aimed at avoiding infringement before it occurs. This includes the adoption of *ex ante* filtering tools capable of identifying and blocking protected material at the point of upload, as well as reactive mechanisms such as notice-and-takedown and notice-and-stay-down procedures, designed to remove infringing content swiftly and to prevent its reappearance. The effect is to move beyond the reactive model of the E-Commerce Directive, where liability was avoided by acting only once notified, toward a more anticipatory approach that embeds copyright enforcement within the technical architecture of the platforms themselves.

The stay-down obligation is particularly significant, as it extends not only to content identical to that already found unlawful but also to content considered "equivalent". In this context, the CJEU has clarified that intermediaries may be required to ensure the removal and continued unavailability of such equivalent content across their platforms. By "equivalent", the Court refers to material that conveys a message essentially unchanged from the original unlawful content, and that falls within the parameters defined by the initial injunction. The scope of this obligation, however, is not unlimited: it excludes situations where the differences between the original and subsequent content would require the intermediary to carry out an independent legal assessment – for instance, evaluating whether the new

[63] *See Donner*, C- 5/ 11, EU:C:2012:370, paras 27–29; *Football Dataco*, C- 173/ 11, EU:C:2012:642, paras 42 and 45; *L'Oréal*, *supra* note 41, paras 61–64.

material constitutes a parody, quotation, or other lawful use under copyright exceptions.[64]

This reasoning was clarified in the Grand Chamber's decision in *Poland v. Parliament and Council* (C-401/19), where the Court examined the obligations imposed under Art. 17(4)(b) and (c) of the DSM Directive. It held that while OCSSPs must take effective measures to prevent the uploading and dissemination of infringing material, they cannot be required to engage in legal determinations about borderline cases or to resolve complex questions of copyright exceptions.[65] In practice, this means that stay-down obligations must remain limited to content that can be mechanically or automatically identified as equivalent, without requiring interpretive judgment by the platform. The result is a framework that attempts to reconcile the need for robust preventive enforcement with the imperative of safeguarding freedom of expression and ensuring that lawful uses of protected works are not inadvertently suppressed.

Yet, Art. 17(7) explicitly requires that cooperation between platforms and rightsholders shall not result in the prevention of the availability of works uploaded by users which do not infringe copyright, including where such works are covered by an exception. In this regard, the Directive safeguards specific instances of lawful use by guaranteeing that users across Member States must be able to rely on exceptions such as quotation, criticism, review, caricature, parody, and pastiche. Although the Directive does not expressly articulate the point, the mandatory character of the exceptions listed in Art. 17(7), combined with the obligation imposed on OCSSPs by Art. 17(9) to inform users in their terms and conditions of their right to rely on such exceptions, strongly supports the conclusion that contractual override is not permissible. In other words, neither the contractual framework between users and platforms nor that between rightsholders and platforms can lawfully deprive users of their ability to invoke these exceptions. Any contractual clause purporting to restrict or exclude reliance on quotation, parody, or other safeguarded uses would be unenforceable against the user.[66]

The standard of "best efforts" is inherently complex and open to interpretation. It has both a subjective and an objective dimension:[67] subjectively, it requires an assessment of the concrete measures undertaken by the platform in light of its specific size, resources, and role in the digital ecosystem; objectively, it calls for an evaluation against the prevailing professional standards within the industry. In other words, whether an OCSSP has discharged its obligations cannot be determined in the abstract, but must be measured *ex post* against what could reasonably be expected of a diligent operator in the same sector.

Several factors are relevant in this assessment. Article 17 itself points to industry best practices, the effectiveness of the measures adopted, and their proportionality in

[64] *Glawischnig-Piesczek*, n 41 above, paras 41-46. For commentary, *see* Krokida (2021), p. 313.

[65] *Poland*, C-401/19, EU:C:2022:297, para 90.

[66] Rosati (2021), p. 347. This interpretation ensures that the Directive's recognition of user rights is not rendered illusory by private agreements, and that the balance struck at the legislative level between copyright protection and freedom of expression cannot be contractually displaced.

[67] *Ibid*, at 330–331.

light of the platform's nature and scale. A large platform with extensive technical capabilities and a dominant role in content distribution will be held to a higher standard of diligence than a smaller operator with more limited resources. Similarly, compliance is not judged solely by the presence of technical tools but by their qualitative and quantitative effectiveness in curbing infringement. The proportionality principle acts as a moderating factor: measures must be effective but also balanced so as not to unduly restrict lawful uses or impose disproportionate burdens on service providers.

A measure that may qualify as "best effort" under Art. 17(4) is the proactive pursuit of licensing agreements. OCSSPs are expected to take meaningful steps to secure authorizations that would allow the lawful use of copyright-protected content on their platforms. This entails approaching and, where possible, concluding licensing agreements with collective management organizations, which often represent a wide repertoire of works and thereby provide an efficient mechanism for obtaining rights on a broad scale.[68] The legislative framework explicitly emphasizes that such licensing arrangements must be fair and balanced. Consequently, if a platform were to refuse to enter into an agreement that satisfies these conditions, it could not be regarded as having fulfilled its "best efforts" obligations under Art. 17(4)(a). In this way, the Directive frames licensing not as a peripheral option but as a core dimension of the due diligence required of OCSSPs, signaling a shift towards a more proactive and responsibility-driven model of platform governance in the copyright domain.

Among the "best efforts" obligations that define the liability exemption mechanism of Art. 17(4), a central role is inevitably played by automated detection technologies and algorithmic content moderation systems. Platforms such as YouTube already deploy highly sophisticated tools that operate at a scale beyond the capacity of human moderation. These tools not only facilitate the organization and monetization of online content but also function as self-executing rules, capable of determining, without human intervention, whether a particular work can be accessed, viewed, or exploited. In this sense, code substitutes for law: the algorithm itself embodies the norm, enforcing compliance in real time.

Yet this technological turn raises profound challenges. Algorithmic moderation creates a parallel problem of opacity and bias.[69] These systems are technically complex, operate at scale, and often reflect the biases embedded in the datasets on which they are trained. Errors or distortions in the training data can carry over into enforcement decisions, systematically disadvantaging certain kinds of expression. Moreover, the opacity of these processes makes them difficult to challenge: users are rarely given meaningful explanations for takedowns, appeal mechanisms are inconsistent, and procedural safeguards typical of formal justice are absent. What emerges, then, is not the calibrated justice of civil adjudication but a form of "rough justice", administered at speed by private infrastructures with little accountability.[70]

[68] *Ibid*, at 331; Leistner (2020), pp. 123, 149–150.

[69] Margoni et al. (2022a, b).

Automated filters are also blunt instruments: they struggle to assess contextual uses of copyright-protected works and to recognize when transformative uses – such as parody, quotation, pastiche, or commentary – fall within the scope of statutory exceptions and limitations. A machine-learning system may identify a sample or visual similarity, but it cannot easily determine whether that reuse is lawful.[71] The consequence is a pervasive risk of over-enforcement. From the perspective of platforms, the incentives are skewed: failing to remove infringing material exposes them to potential liability, while removing lawful content carries no sanction.[72] It is therefore rational for intermediaries to err on the side of caution, leading to the systematic suppression of material that is perfectly legal.

The CJEU itself addressed this tension in its landmark judgment in *Poland v. Parliament and Council*,[73] where it emphasized that, although Art. 17(4) imposes "best efforts" to remove infringing content, Art. 17(7) prescribes a result: platforms must not block or take down lawful material. One crucial feature of this provision is precisely that it establishes an obligation of result, in contrast with the "best efforts" standard of paragraph (4). Member States are therefore required to ensure that lawful uses, including those falling under copyright exceptions and limitations, remain available online notwithstanding the preventive enforcement measures mandated by the Directive.

The different normative character of the obligations – best efforts under Art. 17(4) and result under Art. 17(7) – points to a clear hierarchy, one that is underscored by the fundamental-rights foundation of paragraph (7). The protection of intellectual property cannot be elevated to an absolute value that trumps all other rights. Rather, freedom of expression and information, enshrined in Art. 11 of the Charter, takes precedence where automated filtering technologies are unable to distinguish between infringing and non-infringing uses. This normative hierarchy carries significant implications: it is not sufficient to rely on *ex post* complaint and redress mechanisms to remedy wrongful takedowns. Platforms must also implement *ex ante* safeguards capable of preventing over-blocking in the first place, particularly given that content moderation technologies often lack the ability to perform the contextual assessment required by Art. 17(7).[74] If automated tools cannot respect this safeguard, the Directive's delicate balance collapses, and the very enforcement mechanisms it mandates become incompatible with fundamental rights.

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70 Riis (2025).

71 Jacques (2019), p. 208.

72 *See* Riis (2025), p. 10, arguing that Art. 17(7) does not expressly establish a liability rule. This implies that, if a platform were to be held responsible for wrongfully removing content that does not infringe copyright, such liability would likely need to be grounded in national law.

73 *Supra* note 65, especially paras 78, 86 and 92.

74 *See* Quintais et al. (2023), p. 8; Quintais et al. (2020), p. 277; Lambrecht (2020), pp. 68, 79–82; Geiger and Jütte (2021), p. 517; Grosse Ruse-Khan et al. (2021), pp. 169–170. But *see* Rosati (2021), p. 346, contending that "the text of the Directive is such that it may be also acceptable for a Member State to only introduce a complaint and redress mechanism and not also a system of *ex ante* safeguards".

11 Procedural Safeguards under Art. 17(9): Embedding Justice in Platform Governance

A central complement to the preventive enforcement duties imposed on OCSSPs is the set of procedural safeguards enshrined in Art. 17(9) of the DSM Directive. Whereas the "best efforts" standard of paragraph (4) pulls platforms toward filtering and removal, paragraph (9) operates as a counterweight, embedding within the Directive a rudimentary architecture of procedural justice. Member States are required to ensure that users are provided with an effective and expeditious complaint and redress mechanism whenever access to their uploaded works is disabled or the works are removed. The provision is notable not merely for introducing a remedial avenue for aggrieved users, but also for affirming a broader principle: copyright enforcement in the digital environment cannot be entrusted exclusively to automated infrastructures or the unilateral discretion of rightsholders.

The mechanics of this safeguard are multi-layered. First, rightsholders who demand the removal or blocking of particular works must duly substantiate their requests. They are under an obligation to articulate the reasons why they believe the material in question infringes their rights, and to specify precisely which works are at issue. This requirement reflects the Court of Justice's reasoning in *L'Oréal v. eBay*, where the Court rejected the notion that vague or inadequately substantiated notices could trigger a provider's duty to act expeditiously.[75] Recital 66 of the DSM Directive makes this link explicit: the obligations of OCSSPs to remove or disable content do not arise where rightsholders fail to provide "the relevant and necessary information" regarding their works or fail to submit a proper notification. In such cases, the provider cannot be deemed in breach of its duties, since it lacks the factual basis required to act diligently.

Second, complaints submitted by users must be processed without undue delay, and, crucially, decisions to remove or block content must be subject to human review.[76] This requirement is designed to mitigate the inherent limitations of

[75] *L'Oréal*, *supra* note 41, para 122. The precise contours of what constitutes a "sufficiently substantiated" notice have been clarified, not by the DSM Directive itself, but by the subsequent Digital Services Act. Article 16(2) DSA codifies a set of minimum requirements: a notice must include an explanation of why the content is considered illegal, a clear indication of its exact electronic location (for example, a specific URL), the identity and contact details of the notifier, and a statement of good faith attesting to the accuracy of the claim. Although the DSA is formally distinct from the DSM Directive, the overlap is deliberate. Together, they articulate a coherent standard: only precise, justified, and traceable notifications may trigger the cascading obligations of content removal.

[76] Article 20(6) of the Digital Services Act further reinforces the human element of platform governance by requiring decisions on complaints submitted through the internal complaint-handling system to be taken under the supervision of "appropriately qualified staff" and not solely through automated means. This requirement signals an acknowledgment that effective and legitimate content moderation depends on the competence of human reviewers. Staff must not only be "appropriately qualified" in a formal sense, but should also receive adequate initial and ongoing training in the applicable legal framework and in international human rights standards. The rationale is straightforward: decisions concerning content removal, account suspension, or other restrictions directly implicate fundamental rights, particularly the freedom of expression and the right to information. Ensuring that these decisions are informed by legal expertise and human rights awareness is therefore indispensable to preserving the proportionality and fairness of platform governance. *See* Riis (2025), p. 12.

algorithmic enforcement. Automated systems excel at detecting matches but falter when confronted with the contextual nuances of exceptions such as parody, quotation, or criticism. Human intervention is thus mandated as a structural safeguard against the blind spots of technology.

Third, Art. 17(9) also obliges Member States to guarantee the availability of out-of-court redress mechanisms. These procedures must be impartial, accessible, and efficient, ensuring that disputes can be solved without depriving users of the possibility of judicial recourse. Far from being a substitute for litigation, such mechanisms operate in parallel, offering a quicker and potentially less costly path for users while preserving their right to assert claims before a court or judicial authority. The explicit reference to the ability of users to invoke exceptions – quotation, parody, pastiche, criticism, and review – underscores the Directive's commitment to protecting lawful uses. The point is not merely that users may defend themselves *ex post*, but that the very architecture of enforcement must anticipate and preserve their ability to rely on exceptions and limitations.

These transparency and redress obligations place OCSSPs under a further duty: to inform their users, in their terms and conditions, of the fact that Union law grants them the right to make use of copyrighted works under specified exceptions. This disclosure is not trivial. It transforms exceptions and limitations, traditionally seen as defenses raised in litigation, into rights of which users must be made aware *ex ante*. In effect, Art. 17(9) constitutionalizes transparency as a condition of lawful platform governance.

12 When Safeguards Stop at the Surface: The Contractual Blind Spot of EU Copyright Law

Yet, for all its detail on "best efforts", complaint mechanisms, and transparency obligations, the Directive remains conspicuously silent on the contractual architecture that underpins the relationship between platforms and their users.[77] Terms of Service remain the principal vehicle through which OCSSPs define the conditions of participation, the permissible scope of user expression, and the modalities of content exploitation. Beyond the specific moderation and information duties enumerated in Art. 17, platforms retain a wide margin of discretion in shaping the governance of copyright-protected content through these contractual instruments.

This asymmetry becomes most evident in the case of the new and rapidly expanding class of user-creators – most prominently, influencers – whose livelihoods depend almost entirely on large-scale OCSSPs.[78] For them, Art. 17 offers no recalibration of the contractual dynamics that govern their participation. Platforms retain a virtually unchecked authority to dictate the terms under which user-generated content may be uploaded, monetized, licensed, or withdrawn. More than that, they are free to alter those terms unilaterally, thereby shaping the economic prospects of creators with little or no accountability.

[77] Quintais et al. (2023), p. 22.

[78] *Ibid*, pp. 22–23. *See also* Goanta and Ranchordas (2020).

This authority manifests itself across a spectrum of practices that can, in a broad sense, be understood as forms of content moderation. Removal of videos, suspension or termination of accounts, demonetization, de-ranking in recommendation systems, and even opaque changes to algorithmic remuneration schemes – all fall within the discretionary domain of platform governance.[79] From the standpoint of copyright law, platforms are similarly unconstrained in determining the structure of their monetization programs: they alone decide which creators qualify, on what terms content can be exploited commercially, and how revenue flows are allocated. These decisions are not only inscribed in the contractual provisions of Terms of Service but are also operationalized through algorithmic systems that control visibility, access, and the economic viability of content.

What emerges is a deeply unbalanced relationship, one in which creators remain dependent on opaque contractual instruments and inscrutable technical infrastructures, while platforms face few, if any, effective legal checks under EU copyright law. The Directive's silence on this contractual dimension means that, even as it constructs elaborate mechanisms for redress against wrongful takedowns, it leaves untouched the more profound problem of structural dependence: the reality that platforms, by virtue of their unilateral power, can determine not only whether content remains online, but also whether creators can earn a living from it.

The result is that Terms of Service operate as a parallel regulatory system, one only partially constrained by statutory obligations. They delineate not just the boundaries of copyright enforcement, but the broader field of online expression and participation. As instruments of private governance, ToS thus magnify the asymmetry of power between platforms and users, enabling platforms to dictate the terms under which creative works circulate, are monetized, or are suppressed.

The Digital Services Act acknowledges this private regulation explicitly. Article 14 DSA allows platforms to determine and enforce their own ToS, but requires them to do so in a diligent, objective and proportionate manner, with due regard to users' fundamental rights. These constraints do not eliminate, however, the deeper structural imbalance created by unilateral ToS. Users, in other words, are granted a voice in challenging removals, but not in shaping the rules of the game.

13 Conclusion

The story this article has sought to trace is, at bottom, a story about mismatch. Social media's operating system is sharing; copyright's operating system is

[79] Under Art. 3(t) DSA, demonetization now appears to fall within the scope of "content moderation", thereby subjecting such measures to the same procedural and transparency rules that govern other restrictions, such as removals, de-ranking, or account suspensions. This clarification has the potential to improve the visibility of platform decisions that directly affect creators' livelihoods, including practices often referred to as "shadow banning", where content remains available but is rendered less visible or less profitable. However, the precise reach of these provisions remains uncertain. While the DSA clearly treats demonetization as a form of moderation in general terms, it is not yet established to what extent these rules will apply in the specific context of copyright-protected content on OCSSPs. In this domain, the interaction between the DSA framework and the specialized regime of Art. 17 DSM is far from settled. *See* Quintais et al. (2023), p. 11.

exclusion. When those two logics meet at scale, the result is a persistent governance problem – one that reproduces itself in the private legal systems that platforms write for themselves through Terms of Service and code. The law's traditional tools – property rules, injunctions, secondary liability – still matter, but they now operate inside an environment whose default setting is frictionless copying and whose incentives reward speed, reach, and engagement.

Private regulation has become public regulation by other means. Platforms' boilerplate licenses and automated moderation systems are not just contract terms or product features; they are the operative law for billions of users. They allocate speech, monetize creativity, and enforce (or over-enforce) copyright at machine speed, with scant due process. Art. 17 DSM takes this reality seriously, relocating responsibility from users to OCSSPs and demanding "best efforts" *ex ante*, while simultaneously constitutionalizing safeguards for lawful uses. But the instrument choice (a directive) and the indeterminacy of its key standards ("best efforts", "equivalent content", "large amount", "main purpose") risk reintroducing fragmentation and over-removal by design. The CJEU's insistence that Art. 17(7) is an obligation of result is a welcome counterweight, yet without operational specificity it can read like a promise the code cannot keep.

What, then, would a more durable equilibrium look like?

1. Design-compatible legality. If platforms are to carry primary responsibility, legality must be rendered in machine-readable, UX-manifest ways. That means standardized, auditable signaling for exceptions and limitations (quotation, parody, criticism), not just for ownership. Upload flows should embed context prompts and "explain your use" affordances tied to protected exceptions, with those signals binding the enforcement layer unless and until contradicted. In short: make lawful reuse legible to the machine that polices it.
2. From vague "best efforts" to verifiable duties. Replace open-textured aspirations with testable obligations calibrated by size and risk. At a minimum: (i) pre-deployment impact assessments for filtering tools that measure false positives for exception-covered uses; (ii) measurable error-rate targets and periodic third-party audits; (iii) mandatory human review before permanent removal where a user has signaled reliance on an exception; and (iv) transparent, time-bound complaint and appeal service-level agreements, with restoration by default if deadlines lapse.
3. Procedural symmetry. Notice-and-takedown cannot be a one-way ratchet. Rightsholders' notices should meet substantiation standards and carry consequences for abuse; users' counter-notices should trigger expedited reinstatement in the absence of a prompt judicial order. Where platforms profit from decisive speed in removal, they should shoulder symmetrical duties of diligence in restoration.
4. Contractual proportionality and non-override. Terms of Service should not launder outcomes that public law would reject. Platform licenses must be narrowed to what is necessary to run and promote the service, with clear exclusions for sublicensing that would conflict with users' exclusive deals.

Exceptions protected by Art. 17(7) DSM should be non-waivable by contract; any clause purporting to override them should be unenforceable.

5. Targeted, not general, enforcement. The European line against general monitoring remains sound. Courts should continue to favor precise, proportionate, and time-limited measures (including dynamic injunctions when justified) over blanket filtering mandates that externalize impossible judgments onto code. Where courts demand stay-down, "equivalence" must be constrained to mechanically identifiable matches, not context-dependent transformations.
6. Licensing that actually closes the value gap. Collective licenses – properly governed and audited – remain the most scalable path for high-volume uses, but they must be paired with granular opt-outs and transparent revenue shares. "Best efforts to license" should be evidenced by documented negotiations, industry benchmarks, and non-discriminatory terms for smaller rightsholders, not just bilateral deals with incumbents.
7. Institutional clarity and harmonization. If the Union wants uniform outcomes, it needs uniform instruments. Many of Art. 17 DSM's core concepts would benefit from delegated acts or guidelines with binding effect, or even a future move from directive to regulation for the platform-liability layer. Fragmentation is not a neutral cost; it is itself a design choice that privileges actors best equipped to arbitrage it.

None of this dissolves the foundational tension between a sharing architecture and an exclusionary right – nor should it. Copyright's normative purpose is not to smother circulation but to organize it so that creativity remains sustainable. Platforms' purpose is not to ignore the law but to intermediate expression at scale. The task for courts and lawmakers is to keep those purposes in productive friction rather than destructive collision: to insist on responsibility where platforms' design and incentives make infringement foreseeable and profitable, and to insist on freedom where users' lawful reuses give copyright its democratic legitimacy.

The path forward is therefore not maximalism – neither maximal enforcement nor maximal laissez-faire – but calibration: of duties to design choices and market power, of filtering to what code can reliably decide, reserving judgment calls for humans. The calibration of contracts to public norms rather than the other way around. And the calibration of remedies to protect not only rightsholders' assets but also the public's right to quote, parody, criticize, and build upon culture in the networked commons.

If we can hold that line – procedurally, technically, and institutionally – copyright can still do the job it was meant to do: channel private incentives toward public culture, even on platforms built for sharing at the speed of the scroll.

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