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Bermuda Triangle – Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market

"The Bermuda Triangle, also known as the Devil's Triangle or Hurricane Alley, is a loosely-defined region in the western part of the North Atlantic Ocean, where a number of aircraft and ships are said to have disappeared under mysterious circumstances. […] Popular culture has attributed various disappearances to the paranormal or activity by extraterrestrial beings."[1] *Admittedly, the new Directive on Copyright in the Digital Single Market ("DSM Directive")*[2] *is unlikely to swallow aircrafts and ships. However, it creates a peculiar triangle of obligations to license, filter and privilege user-generated content that may lead to the disappearance of the open, participative internet which EU citizens currently enjoy. Even though some may find it hard to explain this final outcome, the new legislation is not the work of extraterrestrial beings but the result of EU law and policy making. To avoid the loss of open, democratic avenues for online content creation, national lawmakers will have to find the right amalgam of licensing and filtering obligations on the one hand, and new use privileges that offer room for user-generated content without prior authorization on the other. The following analysis sheds light on these regulatory options and their impact on freedom of expression and information in the digital environment.*

Introduction

From the outset, the liability for user-generated content ("UGC") was one of the most controversial issues addressed in the EU copyright reform debate.[3] It is an issue that plays a

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[1] See *Wikipedia*, available at https://en.wikipedia.org/wiki/Bermuda_Triangle (last visited on 29 March 2019).

[2] The following discussion is based on the text adopted by the European Parliament, 26 March 2019, *Legislative Resolution on the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market* COM(2016)0593 – C8-0383/2016 – 2016/0280(COD), Document P8_TA-PROV(2019)0231.

[3] Cf. Martin R.F. Senftleben/Christina Angelopoulos/Giancarlo F. Frosio/Valentina Moscon/Miguel Peguera/Ole-Andreas Rognstad, "The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform", *European Intellectual Property Review* 40 (2018), 149; Christina Angelopoulos, "On Online Platforms and the Commission's New Proposal for a Directive on Copyright in the Digital Single Market", available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947800; Giancarlo F. Frosio, "From Horizontal to Vertical: An Intermediary Liability Earthquake in Europe", *Oxford Journal of Intellectual Property and Practice* 12 (2017), 565-575; Giancarlo F. Frosio, "Reforming Intermediary Liability in the Platform Economy: A European Digital Single Market Strategy", *Northwestern University Law Review* 112 (2017), 19; R.M. Hilty/V. Moscon V. (eds.), "Modernisation of the EU Copyright Rules – Position Statement of the Max Planck Institute for Innovation and Competition", *Max Planck Institute for Innovation and Competition Research Paper* No. 17-12, Max Planck Institute for Innovation and Competition: Munich 2017; R.M. Hilty/V. Moscon, "Contributions by the Max Planck Institute for Innovation and Competition in Response to the Questions Raised by the Authorities of Belgium, the Czech Republic, Finland, Hungary, Ireland and the Netherlands to the Council Legal Service Regarding Article 13 and Recital 38 of the Proposal for a Directive on Copyright in the Digital Single Market", available at http://www.ip.mpg.de/; CREATe et al., "Open letter to Members of the European Parliament and the Council of the European Union", available at http://www.create.ac.uk/policy-responses/eu-copyright-reform/; E. Rosati, "Why a Reform of Hosting Providers' Safe Harbour is Unnecessary Under EU

crucial role for many online platforms and copyright holders. Moreover, the liability question shapes the online information infrastructure that is currently available in the EU. With the opportunity to upload photos, films, music and texts, the participative web 2.0 transformed formerly passive users into active contributors to an open, democratic exchange of views and ideas via online discussion and news fora, social media and content repositories.[4] A delicate question arising from this enhanced user involvement concerns copyright infringement. Under which conditions is an online platform liable for infringing content uploaded by its users? Departing from the safe harbour approach that had a major impact on the liability question in the past,[5] the text that resulted from the EU copyright reform – laid down in Article 17 of the DSM-Directive[6] – takes a strict, primary liability as a starting point:

> *Member States shall provide that an online content sharing service provider performs an act of communication to the public or an act of making available to the public when it gives the*

Copyright Law", *CREATe Working Paper* 2016/11 (August 2016), available at: https://ssrn.com/abstract=2830440; S. Stalla-Bourdillon/E. Rosati/M.C. Kettemann et al., "Open Letter to the European Commission – On the Importance of Preserving the Consistency and Integrity of the EU Acquis Relating to Content Monitoring within the Information Society", available at: https://ssrn.com/abstract=2850483.

[4] With regard to this remarkable development and its enormous economic potential, see the analysis conducted by the OECD, 12 April 2007, "Participative Web: User-Created Content", Doc. DSTI/ICCP/IE(2006)7/Final, available at https://www.oecd.org/sti/38393115.pdf. As to the debate on user-generated content and the need for the reconciliation of divergent interests in this area, see Edward Lee, "Warming Up to User-Generated Content", *University of Illinois Law Review* 2008, 1459 (1506-1513); J.-P. Triaille/S. Dusollier/S. Depreeuw/J.B. Hubin/F. Coppens/A. de Francquen, Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society, Study prepared by De Wolf & Partners in collaboration with the Centre de Recherche Information, Droit et Société (CRIDS), University of Namur, on behalf of the European Commission (DG Markt), Brussels: European Union 2013, 455-457; S.D. Jamar, "Crafting Copyright Law to Encourage and Protect User-Generated Content in the Internet Social Networking Context", *Widener Law Journal* 19 (2010), 843; Natali Helberger/Lucie Guibault e.a., *Legal Aspects of User Created Content*, Amsterdam: Institute for Information Law 2009; M.W.S. Wong, "Transformative User-Generated Content in Copyright Law: Infringing Derivative Works or Fair Use?", *Vanderbilt Journal of Entertainment and Technology Law* 11 (2009), 1075; B. Buckley, "SueTube: Web 2.0 and Copyright Infringement", *Columbia Journal of Law and the Arts* 31 (2008), 235; T.W. Bell, "The Specter of Copyism v. Blockheaded Authors: How User-Generated Content Affects Copyright Policy", *Vanderbilt Journal of Entertainment and Technology Law* 10 (2008), 841; S. Hechter, "User-Generated Content and the Future of Copyright: Part One – Investiture of Ownership", *Vanderbilt Journal of Entertainment and Technology Law* 10 (2008), 863; G. Lastowka, "User-Generated Content and Virtual Worlds", *Vanderbilt Journal of Entertainment and Technology Law* 10 (2008), 893.

[5] Article 17(3) DSMD, supra note 2. As to the prior status quo reached at EU level, see CJEU, 23 March 2010, cases C-236/08-238/08, Google France and Google/Louis Vuitton et al., para. 57; CJEU, 12 July 2011, case C-324/09, L'Oréal/eBay, para. 101-105, where the Court drew a clear distinction between acts carried out by the platform user and the activities of the hosting platform itself. Cf. Stefan Kulk, *Internet Intermediaries and Copyright Law – Towards a Future-Proof EU Legal Framework*, Utrecht 2018; Christina Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis*, Alphen aan den Rijn: Kluwer Law International 2016; Martin Husovec, *Injunctions Against Intermediaries in the European Union – Accountable But Not Liable?*, Cambridge: Cambridge University Press 2017; Christina Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis*, Alphen aan den Rijn: Kluwer Law International 2016; Thomas Hoeren/ Silviya Yankova, "The Liability of Internet Intermediaries – The German Perspective", *International Review of Intellectual Property and Competition Law* 43 (2012), 501; Rita Matulionyte/Sylvie Nerisson, "The French Route to an ISP Safe Harbour, Compared to German and US Ways", *International Review of Intellectual Property and Competition Law* 42 (2011), 55; Miguel Peguera, "The DMCA Safe Harbour and Their European Counterparts: A Comparative Analysis of Some Common Problems", *Columbia Journal of Law and the Arts* 32 (2009), 481; Christiaan Alberdingk Thijm, "Wat is de zorgplicht van Hyves, XS4All en Marktplaats?", *Ars Aequi* 2008, 573; Matthias Leistner, "Von "Grundig-Reporter(n) zu Paperboy(s)" Entwicklungsperspektiven der Verantwortlichkeit im Urheberrecht", *Gewerblicher Rechtsschutz und Urheberrecht* 2006, 801.

[6] See supra, note 2.

> *public access to copyright protected works or other protected subject matter uploaded by its users.*[7]

However, Article 17 adds an important nuance by offering two escape routes: UGC platforms can either obtain an authorization from copyright holders to offer user-uploaded content on their platforms (licensing) or take measures to prevent the availability of infringing content from the outset (filtering).[8] A closer look at these ways out of the dilemma reveals that both options are likely to pose substantial difficulties in practice and make far-reaching inroads into the freedom of expression and information which the current configuration of platform liability allows.[9] Against this background, it is of particular importance that Article 17 also underlines the need to safeguard copyright limitations that serve the purposes of quotation, criticism and review, or caricature, parody and pastiche.[10] This explicit recognition of the need to preserve breathing space for legitimate forms of UGC provides an important signpost for national implementation strategies. To reduce the corrosive effect of the licensing and filtering package, national legislators can opt for the further development of use privileges for UGC that serve the listed purposes ranging from quotation to pastiche. To survey the arsenal of legislative tools, it is important to discuss all three mechanisms that establish the Bermuda triangle of the DSM Directive: licensing, filtering and privileging UGC.

Licensing UGC

To fully understand the scope of the rights clearance obligation that follows from the licensing approach, it is necessary to consider the instructions given in Article 17(2) DSMD:

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

An online content platform seeking to obtain a license for UGC is thus confronted with an enormous licensing task. Even though it is unforeseeable which content users will upload, the license should ideally encompass the whole spectrum of potential posts. While this dimension of the licensing obligation may be good news for users (whose activities would fall within the scope of the license and, therefore, no longer amount to infringement), it creates a rights clearance task which platform providers can hardly ever accomplish.[11]

Collecting societies seem natural partners in the development of the required umbrella solution. However, they would have to offer an all-embracing licensing deal covering not only protected content of their members but also content of non-members. Otherwise, the licensing exercise makes little sense. It would fail to cover all types of user uploads, as envisaged in

[7] Article 17(1) DSMD, supra note 2.
[8] Article 17(1) DSMD, supra note 2.
[9] Cf. Martin R.F. Senftleben, "Breathing Space for Cloud-Based Business Models – Exploring the Matrix of Copyright Limitations, Safe Harbours and Injunctions", *Journal of Intellectual Property, Information Technology and E-Commerce Law* 4 (2013), 87 (94-95).
[10] Article 17(5) DSMD, supra note 2.
[11] Cf. Martin R.F. Senftleben, "Content Censorship and Council Carelessness – Why the Parliament Must Safeguard the Open, Participative Web 2.0", *Tijdschrift voor Auteurs-, Media- & Informatierecht* 2018, 139 (141-142).

Article 17(2) DSMD. Rightly understood, the DSM Directive thus poses particular challenges to both platform providers and copyright holders alike.

Availability of Umbrella Licenses

Considering experiences with licensing packages offered by collecting societies, it seems safe to assume that this umbrella solution is currently unavailable in many EU Member States. It remains to be seen whether the implementation of the DSM Directive, including harmonized rules on extended collective licensing,[12] paves the way for broader and more flexible licensing solutions. Even if a platform finds a collecting society willing to enter into a UGC agreement with the umbrella effect contemplated in Article 17(2), however, a core problem of licenses for Europe remains: the collecting society landscape is highly fragmented. The UGC deal available in one Member State may remain limited to the territory of that Member State. Pan-European licenses are the exception, not the rule. If a collecting society offers Pan-European licenses for digital use, these licenses will be confined to the specific repertoire, in respect of which the collecting society has a cross-border entitlement.[13] A Pan-European license for UGC – covering the wide variety of works that may be uploaded by users – seems beyond reach.

Erosion of the Participative Web 2.0

Unless EU-wide licensing options are broadened substantially, UGC licensing is thus unlikely to preserve the current participative web 2.0. As long as licensing deals cover only a limited spectrum of repertoire, EU citizens will no longer enjoy the freedom of uploading remixes and mash-ups of all kinds of pre-existing material. Instead, they will only be able to upload content that falls within the scope of the licensing agreement which the UGC platform managed to conclude with copyright holders and collecting societies. As a corollary, UGC platforms will no longer offer the content diversity that is currently available. In the absence of umbrella licenses covering all kinds of UGC (and all Member States), the platforms will have to limit the content spectrum to licensed material and territories. As a result, they will resemble TV channels – showing only content for which a rights clearance was possible.

Hence, the licensing approach entails the risk of a substantial loss of freedom of expression and information. It will most probably curtail the possibility of EU citizens to participate actively in the creation of online content. Which film copyright owner will grant a license for user-generated mash-ups and remixes from day one of the launch in cinemas? Which copyright owner will grant a license for all kinds of mash-ups and remixes, including critical statements and biting lampoons?

[12] Article 12 DSMD, supra note 2. As to the discussion of extended licensing solutions in the area of orphan works, see Stef van Gompel, "Unlocking the Potential of Pre-Existing Content: How to Address the Issue of Orphan Works in Europe?", *International Review of Intellectual Property and Competition Law* 38 (2007), 669.

[13] For a detailed analysis of current EU rights clearance challenges in the digital environment, see Sebastian Felix Schwemer, *Licensing and Access to Content in the European Union – Regulation Between Copyright and Competition Law*, Cambridge: Cambridge University Press (forthcoming). As to previous cases triggered by the rights clearance infrastructure in the EU, see European Commission, "Summary of Commission Decision of 16 July 2008 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/C-2/38.698 — CISAC)", *OJ* 2008 C 323, 12; European Commission, 18 May 2005, "Commission Recommendation on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services (2005/737/EC)", *OJ* 2005 L 276, 54. Cf. Kamiel Koelman, "Op naar de Euro-Buma(s): de Aanbeveling van de Europese Commissie over grensoverschrijdend collectief rechtenbeheer", *Tijdschrift voor auteurs-, media- en informatierecht* 2005, 191-196.

The licensing approach will also curtail the possibility of EU citizens to learn of views and expressions of others. UGC portals relying on licensing deals will find it difficult to provide access to the wide variety of content that is uploaded by users with diverse social, cultural and ethnical backgrounds. Instead, they will only display licensed content. When it is considered that platforms following the licensing approach are not unlikely to focus on mainstream works and the biggest language groups to maximize the return on investment in rights clearance, it becomes obvious that the degree of UGC impoverishment must not be underestimated. In the light of the EU's cultural diversity, the problem has a broader dimension: UGC impoverishment entails the risk of neglecting minority groups, minority views and niche audiences.

Moreover, it cannot be ruled out that big players in the UGC platform arena – with establishments across the EU – will have less difficulty to obtain licenses in different Member States with different languages and different rules on license agreements. The licensing option may thus bestow upon big players a competitive advantage that leads to further market concentration. The risk of less diversity in the field of UGC is thus twofold. It concerns not only the diversity of content but also the spectrum of service providers. On balance, the licensing scenario is unsatisfactory – from the perspective of both public and private interests.

Filtering UGC

As an alternative, Article 17 DSMD offers UGC platforms the prospect of a reduction of the liability risk in exchange for content filtering. If a UGC platform – despite best efforts[14] – has not received a license, it can avoid liability for unauthorized acts of communication to the public or making available to the public when it manages to demonstrate that it:

> *made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information,...*[15]

Although the provision contains neutral terms to describe this alternative scenario, there can be little doubt in which way the "unavailability of specific works and other subject matter" can be achieved. As today's internet users upload a myriad of literary and artistic works every day,[16] the employment of automated filtering tools to ensure that unauthorized protected content does not populate UGC platforms seems inescapable. This approach entails a remarkable transformation of the function of copyright law. It becomes a central basis for content censorship in the online world. Instead of serving as an engine of content creation and dissemination,[17] copyright law degenerates into a censorship and filtering instrument. As Niva

[14] Article 17(4)(a) DSMD, supra note 2.
[15] Article 17(4)(b) DSMD, supra note 2.
[16] For example, statistics relating to the online platform YouTube report over one billion users uploading 300 hours of video content every minute. Cf. https://www.youtube.com/intl/en-GB/yt/about/press/ and https://www.statisticbrain.com/youtube-statistics/.
[17] As to this goal of the copyright system, see U.S. Supreme Court, Harper & Row v. Nation Enterprises, 471 US 539 (1985), III B, characterizing copyright as an "engine of free expression." For a detailed analysis of the interplay between copyright protection and freedom of expression, see Christophe Geiger/Elena Izyumenko, "Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression", *International Review of Intellectual Property and Competition Law* 45 (2014), 316; Christophe Geiger, "'Constitutionalising' Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union", *International Review of Intellectual Property and Competition Law* 37 (2006),

Elkin-Koren pointed out, algorithmic copyright enforcement tilts the balance in copyright law. It changes the default position:

> *if copyrighted materials were once available unless proven to be infringing, today materials that are detected by algorithms are removed from public circulation unless explicitly authorized by the right holder.*[18]

Encroachment Upon Fundamental Rights

EU primary law, in particular the Charter of Fundamental Rights of the European Union (CFR), sets direct limits to measures which EU legislators may impose on information society service providers, including providers of UGC platforms. The Court of Justice of the EU (CJEU) has stated explicitly that in transposing EU directives and implementing transposing measures, "Member States must […] take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order."[19]

The application of filtering technology to a social media platform hosting UGC occupied centre stage in *Sabam/Netlog*. The case concerned Netlog's social networking platform, which offered every subscriber the opportunity to acquire a globally available "profile" space that could be filled with photos, texts, video clips etc.[20] Claiming that users make unauthorized use of music and films belonging to its repertoire, the collecting society Sabam sought to obtain an injunction obliging Netlog to install a system for filtering the information uploaded to Netlog's servers. As a preventive measure and at Netlog's expense, this system would apply indiscriminately to all users for an unlimited period and would have been capable of identifying electronic files containing music and films from the Sabam repertoire. In case of a match, the system would prevent relevant files from being made available to the public.[21]

Hence, the *Sabam/Netlog* case offered the CJEU the chance to provide guidance on a filtering system that may become a standard measure under Article 17(4)(b) DSMD. However, the CJEU did not arrive at the conclusion that such a filtering system could be deemed permissible. Instead, the Court saw a serious infringement of fundamental rights. It took as a starting point the explicit recognition of intellectual property as a fundamental right in Article 17(2) CFR. At the same time, the Court recognized that intellectual property must be balanced against the protection of other fundamental rights and freedoms.[22]

Weighing the right to intellectual property asserted by Sabam against Netlog's freedom to conduct a business, which is guaranteed under Article 16 CFR, the Court observed that the filtering system would involve monitoring all or most of the information on Netlog's server in

371; Alain Strowel/F. Tulkens/Dirk Voorhoof (eds.), *Droit d'auteur et liberté d'expression*, Brussels: Editions Larcier 2006; P. Bernt Hugenholtz, "Copyright and Freedom of Expression in Europe", in: Niva Elkin-Koren/Neil Weinstock Netanel (eds.), *The Commodification of Information*, The Hague/London/Boston: Kluwer 2002, 239; Sandro Macciacchini, *Urheberrecht und Meinungsfreiheit*, Bern: Stämpfli 2000; Yochai Benkler, "Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain", *New York University Law Review* 74 (1999), 355; Neil Weinstock Netanel, "Copyright and a Democratic Civil Society", *Yale Law Journal* 106 (1996), 283.

[18] Niva Elkin-Koren, "Fair Use by Design", *UCLA Law Review* 64 (2017), 1082 (1093).

[19] CJEU, case C-275/06, Productores de Música de España (Promusicae)/Telefónica de España SAU, para. 68.

[20] CJEU, 16 February 2012, case C-360/10, Sabam/Netlog, para. 16-18.

[21] CJEU, ibid., para. 26 and 36-37.

[22] CJEU, ibid., para. 41-44.

the interests of copyright holders, would have no limitation in time, would be directed at all future infringements and would be intended to protect not only existing but also future works.[23] Given these features, the CJEU concluded that the filtering system would encroach upon Netlog's freedom to conduct a business:

> *Accordingly, such an injunction would result in a serious infringement of the freedom of the hosting service provider to conduct its business since it would require that hosting service provider to install a complicated, costly, permanent computer system at its own expense, which would also be contrary to the conditions laid down in Article 3(1) of Directive 2004/48, which requires that measures to ensure the respect of intellectual-property rights should not be unnecessarily complicated or costly (see, by analogy, Scarlet Extended, paragraph 48).*[24]

The CJEU also found that the filtering system would violate the fundamental rights of Netlog's users, namely their right to the protection of their personal data and their freedom to receive or impart information, as safeguarded by Articles 8 and 11 CFR respectively.[25] The Court recalled that the use of protected material in online communications may be lawful under statutory limitations of copyright in the Member States, and that some works may have already entered the public domain, or been made available for free by the authors concerned.[26] Given this corrosive effect on fundamental rights, the Court concluded:

> *Consequently, it must be held that, in adopting the injunction requiring the hosting service provider to install the contested filtering system, the national court concerned would not be respecting the requirement that a fair balance be struck between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other (see, by analogy, Scarlet Extended, paragraph 53).*[27]

In the light of this case law, it can hardly be concluded that the filtering obligation that can be deduced from Article 17(4)(b) DSMD is unproblematic from the perspective of the fundamental rights and freedoms guaranteed under Articles 8, 11 and 16 CFR. By contrast, it is likely to encroach upon these fundamental rights. Admittedly, *Sabam/Netlog* concerned a general monitoring obligation with regard to all types of content which users may upload. Against this background, the drafters of Article 17(4)(b) DSMD seem to make an attempt to escape the verdict of an infringement of fundamental rights by establishing an obligation to filter "specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information." Article 17(8) DSMD confirms that a general monitoring obligation is not intended.

However, the success of this strategy is doubtful. It would come as a surprise if the content industry made a specific selection of works when sending copyright information to UGC platform providers in line with Article 17(4)(b) DSMD. It seems more realistic to assume that platform providers will receive long lists of all works which copyright holders have in their repertoire. Adding up all "specific works and other subject matter" included in right holder notifications, it may become apparent that Article 17(4)(b) *de facto* culminates in a

[23] CJEU, ibid., para. 45.
[24] CJEU, ibid., para. 46-47.
[25] CJEU, ibid., para. 48-50.
[26] CJEU, ibid., para. 50.
[27] CJEU, ibid., para. 51.

comprehensive filtering obligation that corresponds with the filtering measures which the CJEU prohibited in *Sabam/Netlog*.

Reliance on Industry Cooperation

Given this risk, it is surprising that Article 17 DSMD relies on industry cooperation to avoid excessive content censorship. In modern Western societies, the internet constitutes the primary medium for accessing, sharing and exchanging information. Nonetheless, Article 17 leaves the question unanswered in which way the legislator seeks to prevent excessive content filtering. Article 17(4)(b) DSMD refers to "high industry standards of professional diligence." As to the practical outcome of this diligent cooperation, however, it is to be considered that decisions following from industry roundtables will be aligned with efficiency considerations. Industry decisions can be expected to be rational in the sense that they seek to achieve content filtering at minimal costs.

Hence, there is no guarantee that industry cooperation in the field of UGC will lead to the adoption of the most sophisticated filtering systems with the highest potential to avoid unjustified content removals of mash-ups and remixes that fall under a limitation of copyright protection or contain public domain material. A test of proportionality is unlikely to occupy centre stage unless the least intrusive measure also constitutes the least costly measure. While Article 17(5) DSMD provides guidelines for the assessment of the proportionality of filtering obligations, the relevant factors focus on "the type, the audience and the size of the service." "the type of works or other subject matter" and "the availability of suitable and effective means and their cost for service providers."[28] Hence, cost and efficiency factors occupy centre stage. It is conceivable that these factors encourage the adoption of cheap and unsophisticated filtering tools that lead to excessive content blocking. A UGC platform seeking to minimize the risk of liability is likely to succumb to the temptation of overblocking.[29] Filtering more than necessary is less risky than filtering only clear-cut cases of infringement. In addition, Article 17 DSMD does not contain a strong incentive or strict obligation to prevent overblocking.

The public interest in safeguarding the fundamental rights of internet users only comes to the fore in Article 17(7) DSMD. This provision obliges Member States to ensure that users "are able to rely on" copyright limitations for the purposes of "quotation, criticism, review" and "caricature, parody or pastiche." However, the scope of this obligation and the consequences of insufficient support for relevant copyright limitations remain unclear. The expression "are able to rely on" need not be understood in the sense of a hard obligation to ban filter systems that are incapable of distinguishing between a permissible parody and an infringing copy.

[28] Article 17(5) DSMD, supra note 2.

[29] Cf. Maayan Perel/Niva Elkin-Koren, "Accountability in Algorithmic Copyright Enforcement", *Stanford Technology Law Review* 19 (2016), 473 (490-491). For empirical studies pointing towards overblocking, see Sharon Bar-Ziv/Niva Elkin-Koren, "Behind the Scenes of Online Copyright Enforcement: Empirical Evidence on Notice & Takedown", *Connecticut Law Review* 50 (2017), 3 (37): "Overall, the N&TD regime has become fertile ground for illegitimate censorship and removal of potentially legitimate materials"; Jennifer M. Urban/Joe Karaganis/Brianna L. Schofield, "Notice and Takedown in Everyday Practice", *UC Berkeley Public Law and Legal Theory Research Paper Series*, Version 2, March 2017, available at https://ssrn.com/abstract=2755628, 2: "About 30% of takedown requests were potentially problematic. In one in twentyfive cases, targeted content did not match the identified infringed work, suggesting that 4.5 million requests in the entire six-month data set were fundamentally flawed. Another 19% of the requests raised questions about whether they had sufficiently identified the allegedly infringed work or the allegedly infringing material."

Instead, Article 17(9) DSMD provides for an "effective and expeditious complaint and redress mechanism" for users who are confronted with unjustified content blocking. Complaints shall be processed "without undue delay."

This recipe, however, raises more questions than it solves. Article 17(9) DSMD states that the content industry must "duly justify the reasons for their requests" vis-à-vis content blocking and removal. In the light of this substantiation of the filtering request, the UGC platform will have to take a final decision on the status of the upload at issue. The underlying legal assessment, however, is likely to be cautious and defensive. As the platform provider runs the risk of liability for infringement, a generous interpretation of copyright limitations serving freedom of expression seems unlikely, even though a broad application of the right of quotation and the parody exemption would be in line with CJEU jurisprudence.[30]

The elastic timeframe also gives rise to concerns. The standard of "without undue delay" differs markedly from an obligation to let blocked content reappear "promptly." As it may take quite a while until a decision on the infringing nature of content is taken, the complaint and redress mechanism may appear unattractive to users from the outset. A high degree of efficiency and reliability is crucial to the success of the measure as a counterbalance in the quest for proportionate filtering. Evidence from the application of the counternotice system in the U.S.[31] shows quite clearly that users are unlikely to file complaints in the first place.[32] If users have to wait relatively long for a final result, it is foreseeable that the complaint and redress is incapable of safeguarding freedom of expression. In the context of UGC, it is often crucial to react quickly to current news and film, book and music releases. If the complaint and redress mechanism finally yields the insight that a lawful content remix or mash-up has been blocked, the decisive moment for the affected quotation or parody may already have passed.[33]

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[30] See CJEU, 1 December 2011, case C-145/10, Painer, para. 132, and CJEU, 3 September 2014, case C-201/13, Deckmyn, para. 26, where the Court emphasized the need to achieve a "fair balance" between, in particular, "the rights and interests of authors on the one hand, and the rights of users of protected subject-matter on the other." As to the international obligation to ensure a broad scope of the right of quotation, see Tanya Aplin/Lionel Bently, "Displacing the Dominance of the Three-Step Test: The Role of Global, Mandatory Fair Use", in: Wee Loon Ng/Haochen Sun/Shyam Balganesh (eds.), *Comparative Aspects of Limitations and Exceptions in Copyright Law*, Cambridge: Cambridge University Press 2018 (forthcoming), available at https://ssrn.com/abstract=3119056; Lionel Bently/Tanya Aplin, "Whatever Became of Global Mandatory Fair Use? A Case Study in Dysfunctional Pluralism", in: Susy Frankel (ed.), *Is Intellectual Property Pluralism Functional?*, Cheltenham: Edward Elgar 2018 (forthcoming), available at https://ssrn.com/abstract=3119041.

[31] As to this feature of the notice-and-takedown system in US copyright law, see Miquel Peguera, "The DMCA Safe Harbour and Their European Counterparts: A Comparative Analysis of Some Common Problems", *Columbia Journal of Law and the Arts* 32 (2009), 481, available at http://ssrn.com/abstract=1468433.

[32] See the study conducted by Jennifer M. Urban/Laura Quilter, "Efficient Process or "Chilling Effects"? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act", *Santa Clara Computer and High Technology Law Journal* 22 (2006), 621, showing, among other things, that 30% of DMCA takedown notices were legally dubious, and that 57% of DMCA notices were filed against competitors. While the DMCA offers the opportunity to file counter-notices and rebut unjustified takedown requests, Urban and Quilter find that instances in which this mechanism is used are relatively rare. However, cf. also the critical comments on the methodology used for the study and a potential self-selection bias arising from the way in which the analyzed notices have been collected by F.W. Mostert/M.B. Schwimmer, "Notice and Takedown for Trademarks", *Trademark Reporter* 101 (2011), 249 (259-260).

[33] Apart from the time aspect, complaint systems may also be implemented in a way that discourages widespread use. Cf. Perel/Elkin-Koren, supra note 29, 507-508 and 514. In addition, the question arises whether users filing complaints are exposed to copyright infringement claims in case the user-generated quotation, parody or pastiche at issue (which the user believes to be legitimate) finally proves to amount to copyright infringement. Cf. Elkin-Koren, supra note 18, 1092.

Moreover, user complaints will remain confined to specific instances of unjustified content blocking. They do not offer the chance of challenging the legitimacy of the adopted filtering scheme as such. Traces of a global mechanism for asking whether the industry has established a reasonable system of content control can be found in Article 17(10) DSMD. This provision concerns the organization of stakeholder dialogues for the discussion of best practices in the field of content filtering. Given the aforementioned crucial importance of an open internet to an open society, this soft and toothless solution is surprising. Inevitably, it begs the question why the outcome of industry cooperation in the area of content censorship – the calibration of filtering mechanisms resulting from negotiations between the platform industry and the content industry – is not subject to thorough scrutiny by the courts.[34] Arguably, the impact on fundamental rights and freedoms even necessitates this stricter control. As the licensing option, the alternative filtering scenario is thus unsatisfactory – from the perspective of both public and private interests.

Privileging UGC

In the light of the described problems arising from licensing and filtering, it is of particular importance to also consider measures that could enhance breathing space for UGC without a licensing and filtering obligation. As to the practical implementation of this solution – the introduction of a new UGC privilege – EU copyright law offers the option of further developing limitations which, according to Article 17(5) DSMD, should prevail over filtering mechanisms: limitations for the purposes of quotation, criticism and review, as well as limitations for parody, caricature and pastiche. These copyright limitations feature in the catalogue of permissible use privileges laid down in Article 5 of the 2001 Information Society Directive (ISD).[35] EU Member States have traditionally refrained from exhausting the full potential of this flexibility in the EU copyright *acquis*.[36] The time has come to abandon this cautious approach: Article 5 ISD offers underexplored avenues for the development of UGC privileges that must not be overlooked in the process of implementing the DSM Directive.

Underexplored Flexibilities

Admittedly, the CJEU adhered to the traditional dogma of a strict interpretation of copyright limitations in *Infopaq*. The Court pointed out that, according to established case law,

> *the provisions of a directive which derogate from a general principle established by that directive must be interpreted strictly […]. This holds true for the exemption provided for in Article 5(1) of Directive 2001/29, which is a derogation from the general principle established*

[34] Cf. Elkin-Koren, supra note 18, 1098-1099, who points out that legal oversight is indispensable to safeguard legitimate forms of content remix and reuse that are based on copyright limitations: "Legal oversight should scrutinize whether the algorithmic implementation of fair use analysis is reasonable. Rather than making substantive determinations on a case-by-case basis, the courts will be called to examine the validity of relying on a particular algorithm for considering fair use." See also Perel/Elkin-Koren, supra note 29, 530-531, for a more detailed discussion of the need to enhance the accountability of filter technology use through regulation.

[35] Article 5(3)(d) and (k) of 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 (*OJ* 2001 L 167, 10).

[36] P. Bernt Hugenholtz/Martin R.F. Senftleben, *Fair Use in Europe. In Search of Flexibilities*, Amsterdam: Institute for Information Law/VU Centre for Law and Governance 2011, 29-30. For a discussion of new UGC use privileges under the umbrella of EU copyright law, see Triaille/Dusollier/Depreeuw et al., supra note 4, 522-527 and 531-534.

> *by that directive, namely the requirement of authorisation from the rightholder for any reproduction of a protected work.*[37]

In *Football Association Premier League*, however, this decision did not hinder the Court from emphasizing with regard to the same exemption – transient copying in the sense of Article 5(1) ISD – the need to guarantee the proper functioning of the limitation and ensure an interpretation that takes due account of the exception's objective and purpose. The Court explained that, in spite of the required strict interpretation, the effectiveness of the limitation had to be safeguarded.[38] On the basis of these considerations, the Court concluded that the transient copying at issue in *Football Association Premier League*, performed within the memory of a satellite decoder and on a television screen, was compatible with the three-step test of Article 5(5) ISD.[39]

For the purposes of the present inquiry, it is of particular interest that in *Painer*, the Court confirmed this line of argument with regard to the right of quotation laid down in Article 5(3)(d) ISD. The Court underlined the need for an interpretation of the conditions set forth in Article 5(3)(d) that enables the effectiveness of the quotation right and safeguards its purpose.[40] More specifically, it clarified that Article 5(3)(d) was

> *intended to strike a fair balance between the right of freedom of expression of users of a work or other protected subject-matter and the reproduction right conferred on authors.*[41]

In its further decision in *Deckmyn*, the CJEU followed the same path with regard to the parody exemption in Article 5(3)(k) ISD. As in *Painer*, the Court bypassed the dogma of a strict interpretation and underlined the need to ensure the effectiveness of the parody exemption[42] as a means to balance copyright protection against freedom of expression.[43]

In the light of this jurisprudence, EU Member States may thus provide considerable breathing space for copyright limitations that support transformative use. As the decisions of the CJEU demonstrate, the fundamental guarantee of freedom of expression plays a crucial role in this context.[44] Relying on Article 11 CFR and Article 10 of the European Convention on Human Rights (ECHR), the CJEU interpreted the quotation right and the parody exemption less strictly than limitations without a comparably strong freedom of speech underpinning. In both the *Painer* and the *Deckmyn* decision, the Court emphasized the need to achieve a "fair balance" between, in particular, "the rights and interests of authors on the one hand, and the rights of users of protected subject-matter on the other."[45] The Court thus referred to quotations and parodies as user "rights" rather than mere user "interests."

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[37] CJEU, 16 July 2009, case C-5/08, Infopaq International/Danske Dagblades Forening, para. 56-57.
[38] CJEU, 4 October 2011, cases C-403/08 and C-429/08, Football Association Premier League/QC Leisure, para. 162-163.
[39] CJEU, ibid., para. 181.
[40] CJEU, 1 December 2011, case C-145/10, Painer, para. 132-133.
[41] CJEU, ibid., para. 134.
[42] CJEU, 3 September 2014, case C-201/13, Deckmyn, para. 22-23.
[43] CJEU, ibid., para. 25-27.
[44] For a discussion of the status quo reached in balancing copyright protection against freedom of expression, see Christophe Geiger/Elena Izyumenko, "Freedom of Expression as an External Limitation to Copyright Law in the EU: The Advocate General of the CJEU Shows the Way", European Intellectual Property Review 41 (2019), 131 (133-136).
[45] CJEU, 1 December 2011, case C-145/10, Painer, para. 132; CJEU, 3 September 2014, case C-201/13, Deckmyn, para. 26.

As long as UGC is the result of creative efforts that add value to underlying source material,[46] user-generated remixes and mash-ups of pre-existing content can be qualified as a specific form of transformative use falling under Article 11 CFR and Article 10 ECHR. The CJEU's line of reasoning stemming from quotation and parody cases is thus also relevant to UGC: as a copyright rule that seeks to strike a balance between copyright protection and freedom of expression, an exemption of UGC creation and dissemination must not be interpreted strictly.

Payment of Equitable Remuneration

Admittedly, the degree of transformative effort in UGC cases is not always comparable with the degree of transformation in quotation and parody cases. Instead of modifying or making a critical comment on the expression of source material, a user-generated remix or mash-up may simply combine pre-existing works with the user's own creation. The remix or mash-up character of UGC need not preclude the invocation of the right of quotation. As Lionel Bently and Tanya Aplin have shown, it is incompatible with the international quotation standard laid down in Article 10(1) of the Berne Convention to limit the scope of the quotation right by adding requirements, such as shortness, non-modification, incorporation, referencing back or distinctness. Instead, the ordinary meaning which the term has across the entire spectrum of work categories should serve as a basis for tracing the conceptual contours of "quotation."[47]

Nonetheless, it is conceivable that UGC includes a protected work without "quoting" it. If pre-existing content is simply added to enrich UGC (background music for a funny animal video can serve as an example), it may be difficult to qualify the use as a permissible quotation. This result, however, can serve as a starting point for the development of a UGC privilege that goes beyond the right of quotation and the exemption of parody. The lower degree of creative input does not pose an insuperable obstacle. By contrast, it is possible to counterbalance the lower degree of creative investment in the transformation of source material by ensuring the payment of equitable remuneration. Using the terminology of the three-step test of Article 5(5) ISD, it may be said that, to the extent that the prejudice caused to the copyright owner seems unreasonable because of limited creative input, the payment of equitable remuneration reduces this unreasonable prejudice to a permissible, reasonable level.[48]

This solution is in line with the objectives underlying Article 17 DSMD. At the core of the provision lies the aim to ensure a fair remuneration for the online distribution of UGC

[46] OECD, 12 April 2007, "Participative Web: User-Created Content", Doc. DSTI/ICCP/IE(2006)7/Final, available at https://www.oecd.org/sti/38393115.pdf, 8.

[47] Tanya Aplin/Lionel Bently, "Displacing the Dominance of the Three-Step Test: The Role of Global, Mandatory Fair Use", in: Wee Loon Ng/Haochen Sun/Shyam Balganesh (eds.), *Comparative Aspects of Limitations and Exceptions in Copyright Law*, Cambridge: Cambridge University Press 2018 (forthcoming), available at https://ssrn.com/abstract=3119056, 6-8; Lionel Bently/Tanya Aplin, "Whatever Became of Global Mandatory Fair Use? A Case Study in Dysfunctional Pluralism", in: Susy Frankel (ed.), *Is Intellectual Property Pluralism Functional?*, Cheltenham: Edward Elgar 2018 (forthcoming), available at https://ssrn.com/abstract=3119041, 18-21.

[48] For a more detailed discussion of this alternative solution and its feasibility in the light of the three-step test, see Martin R.F. Senftleben, 'User-Generated Content – Towards a New Use Privilege in EU Copyright Law', in: T. Aplin (ed.), *Research Handbook on IP and Digital Technologies*, Cheltenham: Edward Elgar 2018 (forthcoming), available at https://ssrn.com/abstract=3325017, 17-19; Triaille/Dusollier/Depreeuw et al., supra note 4, 531-534. See also the discussion of three-step test compliance of a UGC exemption by P.K. Yu, "Can the Canadian UGC Exception Be Transplanted Abroad?", *Intellectual Property Journal* 26 (2014), 175 (195-196).

including copyrighted third party content. This fair remuneration need not flow from licensing and filtering agreements between platform providers and copyright owners. Instead, national lawmakers can broaden copyright limitations for UGC and provide for the payment of equitable remuneration. Taking the regulation of private copying as a reference point,[49] a UGC exemption in EU copyright law could be configured as follows: users could remain free to create and upload content mash-ups and remixes even if they do not fall within the scope of the right of quotation and the exemption of parody. Providers of UGC platforms, however, would be obliged to pay equitable remuneration for the dissemination of UGC that falls within the scope of the new, broadened UGC privilege.[50]

In comparison with the described problems arising from licensing and filtering obligations, this reliance on a remunerated UGC privilege has the advantage of creating a continuous revenue stream for authors and performers. While licensing and filtering agreements between copyright owners and platform providers may predominantly benefit the content industry, the repartitioning scheme of collecting societies receiving UGC levy payments could ensure that authors and performers obtain a substantial part of the UGC remuneration, even if they have transferred their copyright and neighbouring rights to exploiters of their works and performances.[51] The value gap problem could thus be solved in a way that benefits not only the creative industry but also individual creators of content.

This solution, however, requires a distinction between "ordinary" parody and quotation cases, and other forms of UGC. Insofar as UGC falls within the scope of the traditional right of quotation or the traditional parody exemption, no payment of equitable remuneration is necessary. Because of the creative effort involved, these use privileges have a strong freedom of expression underpinning and do not require the payment of remuneration. Accordingly,

[49] As to the conceptual contours of the private copying levy system in the EU, see CJEU, 21 October 2010, case C-467/08, Padawan/SGAE, para. 49; CJEU, 27 June 2013, joined cases C-457/11 to C-460/11, VG Wort, para. 76-77; CJEU, 27 June 2013, joined cases C-457/11 to C-460/11, VG Wort, para. 76-77; CJEU, 11 July 2013, case C-521/11, Amazon/Austro-Mechana, para. 24; CJEU, 10 April 2014, case C-435/12, ACI Adam, para. 52; CJEU, 5 March 2015, case C-463/12, Copydan Båndkopi/Nokia, para. 23. As to the use of private copying regimes as a reference point for generating a robust revenue stream, see Christophe Geiger, "Freedom of Artistic Creativity and Copyright Law: A Compatible Combination?", *UC Irvine Law Review* 8 (2018), 413 (450-451).

[50] Cf. Matthias Leistner, "Copyright law on the internet in need of reform: hyperlinks, online platforms and aggregators", *Journal of Intellectual Property Law & Practice* 12, No. 2 (2017), 146-149; Matthias Leistner/Axel Metzger, "Wie sich das Problem illegaler Musiknutzung lösen lässt", *Frankfurter Allgemeine Zeitung*, 4 January 2017, available at: http://www.faz.net/aktuell/feuilleton/medien/gema-youtube-wie-sich-urheberrechts-streit-schlichten-liesse-14601949-p2.html; Reto M. Hilty/Martin R.F. Senftleben, "Rückschnitt durch Differenzierung? – Wege zur Reduktion dysfunktionaler Effekte des Urheberrechts auf Kreativ- und Angebotsmärkte", in: T. Dreier/R.M. Hilty (eds.), *Vom Magnettonband zu Social Media – Festschrift 50 Jahre Urheberrechtsgesetz (UrhG)*, Munich: C.H. Beck 2015, 317 (327-328).

[51] In the context of repartitioning schemes of collecting societies, the individual creator has a relatively strong position. As to national case law explicitly stating that a remuneration right leads to an improvement of the income situation of the individual creator (and may be preferable over an exclusive right to prohibit use for this reason), see German Federal Court of Justice, 11 July 2002, case I ZR 255/00, "Elektronischer Pressespiegel", 14-15. For a discussion of the individual creator's entitlement to income from the payment of equitable remuneration, see Guido Westkamp, "The 'Three-Step Test' and Copyright Limitations in Europe: European Copyright Law Between Approximation and National Decision Making", *Journal of the Copyright Society of the U.S.A.* 56 (2008), 1 (55-59); João P. Quintais, *Copyright in the Age of Online Access – Alternative Compensation Systems in EU Law*, Alphen aan den Rijn: Kluwer Law International 2017, 335-336, 340-341, 347-349 and 356-357; European Copyright Society, *Opinion on Reprobel*, available at https://europeancopyrightsociety.org/opinion-on-reprobel/.

Article 5(3)(d) ISD and Article 5(3)(k) ISD permit the adoption of these user rights[52] without providing for the payment of remuneration.[53] If, by contrast, UGC falls outside the scope of the right of quotation and the parody exemption because of insufficient creative, transformative input, the broadening of existing use privileges is necessary and the payment of equitable remuneration is advisable.[54]

Pastiche

In *Deckmyn*, the CJEU provided guidelines for the further development of use privileges in the field of transformative use that can be put to good use in the context of UGC. The Court held that the meaning of the parody concept in Article 5(3)(k) ISD had to be determined by considering its usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is part.[55] On this basis, the Court arrived at the conclusion that "the essential characteristics of parody are, first, to evoke an existing work while being noticeably different from it, and, secondly, to constitute an expression of humour or mockery."[56] Emphasizing the need to reconcile freedom of expression with copyright protection,[57] the Court rejected more restrictive conditions which had evolved under Belgian copyright law, namely the condition that a parody display an original character of its own, be reasonably attributable to a person other than the author of the original work, and relate to the original work itself or mention the source of the parodied work.[58]

EU Member States seeking to devise a new use privilege for UGC creation and dissemination would thus have to find a concept in the list of permissible copyright limitations in Article 5(3) ISD and the list of filter-proof limitations in Article 17(5) DSMD, the usual meaning of which can be understood to cover user-generated remixes and mash-ups. Considering the need to strike a "fair balance"[59] between copyright protection and freedom of expression, this quest for an appropriate reference point need not be based on the most restrictive reading of the terms used in Article 5(3) ISD. By contrast, Member States can rely on all facets of a word's usual meaning in everyday language.[60] Following this approach, Article 5(3)(k) ISD is of

[52] CJEU, 1 December 2011, case C-145/10, Eva Maria Painer/Standard VerlagsGmbH, para. 132; CJEU, 3 September 2014, case C-201/13, Deckmyn and Vrijheidsfonds VZW/Vandersteen, para. 26.
[53] For an overview of national implementation practices confirming the absence of an obligation to pay equitable remuneration in quotation and parody cases, see Triaille/Dusollier/Depreeuw et al., supra note 4, 465-472 and 476-481.
[54] Admittedly, this solution leads to the dilemma that a creative form of use is subjected to the obligation to pay equitable remuneration. Traditionally, this has not been the case. Cf. Hilty/Senftleben, supra note 50, 328-329. However, see the broader concept of a general use privilege for creative reuse (not limited to UGC) developed by Geiger, supra note 49, 443-454; Christophe Geiger, "Statutory Licenses as Enabler of Creative Uses", in: Kung-Chung Liu/Reto M. Hilty (eds.), Remuneration of Copyright Owners – Regulatory Challenges of New Business Models, Berlin: Springer 2017, 305 (308-318), Christophe Geiger, "Promoting Creativity through Copyright Limitations, Reflections on the Concept of Exclusivity in Copyright Law", *Vanderbilt Journal of Entertainment and Technology Law* 12 (2010), 515 (541-544), who proposes a remunerated statutory limitation for commercial creative uses, administrated by an independent regulation authority which could solve ex post disputes between original and derivative creators on the price to be paid for the transformative use via mediation.
[55] CJEU, 3 September 2014, case C-201/13, Deckmyn and Vrijheidsfonds VZW/Vandersteen, para. 19.
[56] CJEU, ibid., para. 20.
[57] CJEU, ibid., para. 25-27.
[58] CJEU, ibid., para. 21.
[59] CJEU, ibid., para. 27.
[60] Emily Hudson, "The pastiche exception in copyright law: a case of mashed-up drafting?", *Intellectual Property Quarterly* 2017, 346 (362-364).

particular interest. The provision allows Member States to set limits to the right of reproduction and the right of communication to the public. Its scope is not confined to use in the context of "parody." Article 5(3)(k) ISD also permits the exemption of use for the purpose of creating a "pastiche" – a purpose that is also listed in Article 17(5) DSMD.

The Merriam-Webster English Dictionary defines "pastiche" as "a literary, artistic, musical, or architectural work that imitates the style of previous work."[61] It also refers to a "musical, literary, or artistic composition made up of selections from different works."[62] Similarly, the Collins English Dictionary describes a "pastiche" as "a work of art that imitates the style of another artist or period" and "a work of art that mixes styles, materials, etc."[63] The aspect of mixing pre-existing materials and using portions of different works is of particular importance to the UGC debate. In many cases, the remix of pre-existing works in UGC leads to a new creation that "mixes styles, materials etc." and, in fact, is "made up of selections from different works." Hence, the usual meaning of "pastiche" encompasses forms of UGC that mix different source materials and combine selected parts of pre-existing works.

Existing EU copyright law, thus, already contains a concept that can serve as a basis for the introduction of a copyright limitation for UGC.[64] Until now, EU Member States have not made effective use of this option to regulate UGC at the national level. Instead of clearly articulating the intention to create a UGC copyright limitation when permitting pastiches, they simply included the word "pastiche" in their national legislation without explaining its relevance to UGC creation and dissemination. Article 18b of the Dutch Copyright Act, for example, exempts the reproduction and communication to the public of protected works "in the framework of a caricature, parody or pastiche" without placing the pastiche element of this copyright limitation in the context of UGC and providing guidelines for its application.[65] As a result, the exemption of pastiche can hardly be expected to support amateur creators embarking on the remix of pre-existing material. To remedy this shortcoming, EU Member States should take a fresh look at the concept of "pastiche" when implementing the DSM Directive. They should seize the opportunity to supplement their national portfolio of copyright limitations with a pastiche exemption and clarify that this use privilege is intended to cover UGC.[66]

[61] Merriam-Webster English Dictionary, available at https://www.merriam-webster.com/dictionary/pastiche.
[62] Merriam-Webster English Dictionary, ibid.
[63] Collins English Dictionary, available at https://www.collinsdictionary.com/dictionary/english/pastiche.
[64] Cf. the detailed analysis conducted by Hudson, supra note 60, 348-352, which confirms that the elastic, flexible meaning of the term "pastiche" is capable of encompassing "the utilisation or assemblage of pre-existing works in new works" (at 363). In the same sense Florian Pötzlberger, "Pastiche 2.0: Remixing im Lichte des Unionsrechts", *Gewerblicher Rechtsschutz und Urheberrecht* 2018, 675 (681). See also Quintais, supra note 51, 235, who points out that the concept of "pastiche" can be understood to go beyond a mere imitation of style. In line with the results of the study tabled by Triaille/Dusollier/Depreeuw et al., supra note 4, 534-541, Quintais, ibid., 237, nonetheless expresses a preference for legislative reform.
[65] For a discussion of the objectives underlying the adoption of this copyright limitations in the Netherlands, see Martin R.F. Senftleben, "Quotations, Parody and Fair Use", in: P.B. Hugenholtz/A.A. Quaedvlieg/D.J.G. Visser (eds.), *A Century of Dutch Copyright Law – Auteurswet 1912-2012*, Amstelveen: deLex 2012, 359 (365). See also the official government document explaining the implementation of the Information Society Directive, Tweede Kamer 2001-2002, 28 482, Nr. 3 (Memorie van Toelichting), 53. As to similar experiences in the UK, see Hudson, supra note 60, 351-352.
[66] As to guidelines for a sufficiently flexible application of the pastiche exemption in the light of the underlying guarantee of free expression, see Hudson, supra note 60, 362-364.

In national systems which already provide for the exemption of pastiches, the courts could play a crucial role as well. Accepting the pastiche provision as a valid defence against infringement arguments in UGC cases, they can pave the way for the recognition of the pastiche privilege as a copyright limitation covering user-generated remixes of protected works. The courts also have a crucial role to play in the creation of corresponding revenue streams. In fact, a court-made obligation to pay equitable remuneration is not an anomaly in the European copyright tradition. In a 1999 case concerning the Technical Information Library Hanover, the German Federal Court of Justice, for example, permitted the library's practice of copying and dispatching scientific articles on request by single persons and industrial undertakings even though this practice came close to a publisher's activities.[67] To ensure the payment of equitable remuneration, the Court deduced a payment obligation from the three-step test in international copyright law and permitted the continuation of the service on the condition that equitable remuneration be paid.[68]

Under harmonized EU copyright law, the CJEU adopted a similar approach. In *Technische Universität Darmstadt*, the Court recognized an "ancillary right"[69] of libraries to digitize books in their holdings for the purpose of making these digital copies available via dedicated reading terminals on the library premises. To counterbalance the creation of this broad use privilege, the Court deemed it necessary – in light of the three-step test – to insist on the payment of equitable remuneration. Discussing compliance of German legislation with this requirement, the Court was satisfied that the conditions of the three-step test were satisfied because German libraries had to pay adequate remuneration for the act of making works available on dedicated terminals after digitization.[70]

Hence, it is not unusual for courts in the EU to establish an obligation to pay equitable remuneration with regard to use privileges that have a broad scope. The courts derive the obligation to pay equitable remuneration from the three-step test in international and EU copyright law. Considering this practice, there can be little doubt that judges in EU Member States that already provide for an exemption of pastiches, could supplement this use privilege with an obligation to pay equitable remuneration when it comes to user-generated pastiches that do not reflect sufficient creative effort to fall within the province of "quotation" or "parody", and are disseminated via online platforms.

Reverse Filtering Logic

This solution has the advantage that it offers room for the evolution of UGC platforms focusing on content remixes and mash-ups that fall within the scope of the described broadened pastiche exemption or traditional copyright limitations for the purposes of quotation or parody. If a platform provider manages to confine the content on its platform to forms of UGC that fall under one of these use privileges, no licensing obligation arises because Article 17(5) DSMD provides that the new rules on licensing and filtering must not interfere with "quotation, criticism and review" and "parody, caricature and pastiche." Hence, it becomes possible to preserve spaces for open internet communication within the scope of relevant copyright limitations. The broadening of the pastiche exemption also offers business

[67] German Federal Court of Justice, 25 February 1999, case I ZR 118/96, "TIB Hannover", *Juristenzeitung* 1999, 1000.
[68] German Federal Court of Justice, ibid., 1005-1007.
[69] CJEU, 11 September 2014, case C-117/13, Technische Universität Darmstadt, para. 48.
[70] CJEU, ibid., para. 48.

opportunities for platform entrepreneurs who are willing to focus on new online forums for permissible UGC instead of the filtering of prohibited UGC.

This focus leads to a markedly different approach to the assessment of content. Instead of focusing on traces of protected third party content in UGC, it is decisive whether the user has added sufficient own material to arrive at a permissible pastiche. Hence, the broadening of use privileges for UGC offers impulses for the development of content identification systems that seek to find creative input that renders the upload permissible instead of focusing on third party content that makes the upload problematic.[71] It remains to be seen whether (and how) this reverse filtering logic can be implemented in practice.[72] It is conceivable, for instance, that users upload not only their final pastiche but also a file containing exclusively the self-created material which they mingled with protected third party content. In case of separable input (the funny animal video on the one hand, the added background music on the other), this allows the inclusion of the user creation as a separate content item in the identification system. In this way, the system could be made "aware" that UGC contains different types of creative input.[73] Accordingly, it could factor this "insight" into the equation when calculating the ratio of own content to third party content. In addition, the potential of artificial intelligence and self-learning algorithms must not be underestimated. Filtering machines may be able to learn from decisions on content permissibility taken by humans. As a result, algorithmic content screening could become more sophisticated. It may lead to content identification systems that are capable of deciding easy cases and flagging difficult cases which could then be subject to human review.[74]

To calculate the right amount of equitable remuneration, an assessment would have to be made of the extent to which platform content is a permissible pastiche (and requires the payment of equitable remuneration) and the extent to which it constitutes a permissible quotation or parody (and does not require the payment of remuneration) or an uploader's own creation without takings from pre-existing works (again not requiring the payment of remuneration). While a distinction between these scenarios adds some complexity, it need not pose an insurmountable hurdle. In practice, the assessment of the percentage of certain forms of content in the overall offer is not unusual. In the case of radio stations, for instance, it has become a standard practice to determine the percentage of music use during a given period and calculate the fee on this basis.

As to the amount of equitable remuneration for pastiches, it is important to realize that the decision concerns not only the determination of an appropriate fee but also the creation of an appropriate incentive scheme. Lawmakers seeking to encourage investment in filter technology that follows the described reverse logic – identifying creative user input that renders the upload permissible instead of focusing on third party content that makes the upload problematic – would have to establish pastiche remuneration fees that are significantly

[71] Cf. Elkin-Koren, supra note 18, 1093-1096.
[72] For critical comments on the ability of automated systems to distinguish between an infringing copy and a permissible quotation, parody or pastiche, see Mark A. Lemley, "Rationalizing Internet Safe Harbors", *Journal on Telecommunications and High Technology Law* 6 (2007), 101 (110-111); Dan L. Burk/Julie E. Cohen, "Fair Use Infrastructure for Rights Management Systems", *Harvard Journal of Law and Technology* 15 (2001), 41 (56).
[73] As to the creation of digital reference files in content identification systems, see Perel/Elkin-Koren, supra note 29, 513-514; Lauren G. Gallo, "The (Im)possibility of "Standard Technical Measures" for UGC Websites", *Columbia Journal of Law and the Arts* 34 (2011), 283 (296).
[74] Elkin-Koren, supra note 18, 1096-1098.

lower than regular license fees. Otherwise, it will be cheaper for the platform industry to subscribe to the traditional filtering model and block content whenever an upload contains traces of protected works of third parties. Moreover, it is to be considered in the light of freedom of expression that the creative effort invested in a user-generated pastiche justifies a lower fee when compared with a verbatim copy lacking any creative user input.

Conclusion

The strict liability of UGC platforms for infringing content places a heavy burden on platform providers. The two options which Article 17 DSMD offers to alleviate this burden – the licensing approach and the filtering approach – are problematic. The licensing approach imposes the task of clearing rights for the wide variety of UGC in the highly fragmented collective licensing framework in EU Member States. It entails the risk of online platforms resembling (mainstream) TV channels. The filtering approach raises the spectre of content censorship following the maxims of cost and efficiency considerations of the content and platform industry. In the absence of robust democratic control, it is likely to lead to excessive content blocking.

In comparison with these licensing and filtering scenarios, the development of a broader use privilege for UGC has the advantage of avoiding an encroachment upon fundamental rights and safeguarding breathing space for open, participative online communication. If it is combined with an obligation to pay equitable remuneration for pastiches that do not fulfil quotation or parody standards, it also has the advantage of generating a revenue stream that benefits not only the creative industry but also individual creators.

Implementing the DSM Directive, national lawmakers should thus consider all facets of the Bermuda triangle: licensing, filtering and privileging UGC. A broadened copyright limitation infrastructure that supports UGC also provides important impulses for the development of filtering technology that follows a reverse logic. Instead of seeking to find protected third party content that renders UGC impermissible, a limitation-based filtering system focuses on creative user input that may justify its online dissemination despite the inclusion of third party material. The importance of this alternative perspective can hardly be underestimated in the light of freedom of expression and information.