

SCHOLARLY STUDIES

Liability of content sharing platform providers and other intermediary service providers for copyright infringement in the light of the Digital Services Act¹

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Abstract: *The internal copyright market of the European Union has been shaped by more than two decades of intense legislative activity. The most recent, decisive step in this process was the adoption of the so-called CDSM Directive, which also marked the end of the copyright reform process announced in 2010. The Directive is a mixed piece of legislation which has amended the copyright acquis on a number of points and opened new areas of harmonisation. Although the Directive has a horizontal scope, covering a wide range of copyright topics, it has only addressed a limited, but crucial, aspect of the operation of content sharing (platform) service providers. Research on this topic is in its infancy. Within the framework of the research programme, this paper examines - primarily from a copyright perspective - the question of how intermediary service providers, covered by the E-commerce Directive, the (partially) exempted service providers and the service providers covered by the CDSM Directive are affected by the DSA and what consequences this may have for the development and operation of copyright content providers, in particular with regard to the access to copyright content.*

Keywords: *liability, E-commerce, Digital Services Act, Copyright infringement, intermediary service providers*

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I. Introductory remarks

The internal copyright market of the European Union has been shaped by more than two decades of intense legislative activity. The most recent, decisive step in this process was the adoption of the so-called CDSM Directive, which also marked the end of the copyright reform process announced in 2010. The Directive is a mixed piece of legislation which has amended the copyright acquis on a number of points

¹ This topic was presented at The International Conference “Perspectives of Intellectual Property Law”, 1st edition, 25-26th October 2023, Bucharest (<https://iplaw.rsbl.ro/>), organised by the Faculty of Law, Bucharest University of Economic Studies and The Romanian Society of Business Law together with the the Romanian Center for Performers’ Rights Management Association, The State Office for Inventions and Trademarks.

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and opened new areas of harmonisation. Although the Directive has a horizontal scope, covering a wide range of copyright topics, it has only addressed a limited, but crucial, aspect of the operation of content sharing (platform) service providers.

The legislation in Article 17 of the CDSM Directive³ is of particular importance in tackling the so-called "value gap". It has arisen in the online markets, especially in the music and film industry, due to different legal liability rules for different online services and the resulting cost differences. The different online service providers had very different obligations towards copyright holders. Service providers realizing communication with the public were obliged to get license and pay royalties. Providers assessed as intermediary service providers, which were subject to the safe harbour rules of the E-Commerce Directive,⁴ were not obliged to apply for a licence and pay the related royalties.

In this framework, the ECJ was only able to interpret and create specific rules for certain active hosting providers and specific file-sharing providers, but was not able to eliminate the aforementioned difference.⁵ As a result, although the public could access a significant amount of protected content through both types of service, the rightholder could only expect to receive substantial revenue from the first type of service providers. The CDSM Directive has brought the rules applicable to certain hosting providers closer to those applicable to content providers, increasing the level of liability of these providers for the content that is communicated to the public through them.⁶

However, the Directive did not address at all the relationship of the activities of other intermediary service providers to the transmission of copyright content, an area

³ Directive 2019/790/EC of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the digital single market and amending Directives 96/9/EC and 2001/29/EC

⁴ 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 (hereinafter referred to as the "e-commerce Directive")

⁵ See judgment of 22 June 2021 in joined cases *C 682/18 (Youtube)* and *C 683/18 (Elsevier)*.

⁶ Another aspect of the copyright reform process has been the revision of copyright rules for television services. Among these, the Satcab2 Directive (Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules concerning the exercise of copyright and related rights applicable to certain online broadcasts and rebroadcasts of television and radio broadcasts by broadcasting organisations and amending Council Directive 93/83/EEC) used a very similar model for the adoption of direct injection rules. A similar model to that of the CDSM is also the scheme regulated here. What they have in common is that the behaviour of several actors is essential for digital (protected) content to be accessible. The first phase of direct injection, which never reaches the public, is made a licensable conduct and an act not previously considered (in itself) as use is included in the scope of licensable acts. Similarly, the person who actually makes the content available does not have actual knowledge of the lawfulness of the content made available through him. The similarity cannot be coincidental: such a shift in business models could lead to a systematic transformation of the legal regime.

where the nearly 20 years of legal development work by the European Court of Justice has essentially been left without explicit legislative expression. The deadline for Member States to transpose the Directive was 17 June 2021, which many Member States - including Hungary - met, but others failed to meet their harmonisation obligations by the deadline.⁷ It is true that even those Member States that have transposed have done so in a wide variety of ways. A clear change in the functioning of the market as a result of the transposition of the Directive is therefore still partly to come. In addition, harmonisation of operation may also appear to be affected by the fact that the regulation gives service providers sufficient room for manoeuvre to continue to shape their behaviour primarily in accordance with their commercial interests and less in the new way in which the Directive primarily dictates.⁸

The Regulation on Digital Services⁹ was adopted at a time when the deadline for transposition of the CDSM Directive had already expired, but most Member States had not yet transposed it. However, its entry into force is still pending, so it is possible that Member States that have delayed transposition of the CDSM Directive will do so before the Regulation enters into force. The DSA Regulation partially repeals the safe harbour provisions under the ELISA Directive, but does not significantly modify them, but merely transposes the existing rules on the liability of intermediary service providers to the regulation.¹⁰ However, it does contain a number of additional rules for them.¹¹ It also sets higher compliance criteria for some larger providers (so-called online giants and providers of the very popular online search engine). As a result, the DSA Regulation is expected to have a major impact on services involved in making copyright content available, which are not otherwise covered by the CDSM Directive, but will also affect the functioning of services which are covered by the new liability regime set up by the CDSM Directive.

Research on this topic is in its infancy: a comprehensive study on the combined interpretation of DSA and CDSM for content sharing service providers only has been carried out by João Pedro Quintais and Sebastian Felix Schwemer. Furthermore, the

⁷ By the transposition deadline, a minority of Member States had transposed the Directive, with four Member States still to do so at the time of writing this article and Denmark awaiting adoption.

⁸ See in more detail Péter Mezei - István Harkai: *Self-regulating platforms? An analysis of the enforcement of end-user rights in the light of the transposition of Article 17 of the CDSM Directive*. In *Medias Res* 11:1. pp. 5-17. (2022), István Harkai - Péter Mezei: *End-user flexibilities and platform responsibility in the light of the 17th edition of the CDSM Directive*. In Török, Bernát; Zödi, Zsolt (eds.): *The Age of Internet Platforms*. Ludovika University Press (2022) 424 p. pp. 109-127.

⁹ Regulation (EC) No 2022/2065 of the European Parliament and of the Council of 19 October 2022 on the single market for digital services and amending Directive 2000/31/EC (hereinafter "DSA")

¹⁰ Article 4-7

¹¹ Article 8-32

impact of DSA on copyright enforcement has been addressed by Eleonora Rosati.¹² The paucity of literature is understandable: it is already clear from the above that the CDSM has not yet been transposed in several Member States and the DSA is still not in force, so that there is no case law on the intersection of the two. The present paper is based on the conclusions of the Quintais - Schwemer study and the Rosati report, but it has broadened the scope of the analysis to include a wider range of service providers, extending it to the whole range of providers of intermediary services for copyright content, and has taken the final text of the DSA as a starting point, examining its full range of instruments with regard to the practices of intermediary service providers in relation to the intermediary of copyright content.

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Within the framework of the research programme, this paper examines - primarily from a copyright perspective - the question of how intermediary service providers covered by the E-commerce Directive, the (partially) exempted service providers and the service providers covered by the CDSM Directive are affected by the DSA and what consequences this may have for the development and operation of copyright content providers, in particular with regard to the access to copyright content.

II. Outline of the e-commerce case law relevant to copyright - where to start

II.1. Relevant judgments interpreting the right of communication to the public

The European Court of Justice has examined the relationship between the activities of e-commerce service providers and copyright in a number of cases. The first group of these cases concerned the question of which acts of an e-commerce service provider can be considered to constitute an act of communication to the public independently of the end-user's activity, i.e. in which cases the service provider is not subject to the safe harbour rules of Articles 12-14 of the E-commerce Directive.

Prominent among these was the Pirate Bay case, in which the Court ruled, in relation to the worldwide file-sharing platform, that by making available and operating the online sharing platform, the operator, with full knowledge of the consequences of its conduct, acts for profit in order to make available protected works by indexing and categorising torrent files on that platform, which enable users of those files to find and share those works on a peer-to-peer network. For this reason, it is itself an act of communication to the public.

¹² Eleonora Rosati: *The Digital Services Act and copyright enforcement: the case of Article 17 of the DSM Directive*. IRIS 2021-01. Article is a transcript of a presentation given at the webinar "Copyright and the Digital Services Act", 27 May 2021. <https://rm.coe.int/iris-special-2021-01en-dsa-package/1680a43e45>

¹³ Quintais, J., & Schwemer, S. (2022). *The Interplay between the Digital Services Act and Sector Regulation: How Special is Copyright?*, in *European Journal of Risk Regulation*, 13(2), 191-217. doi:10.1017/err.2022.1

In the *Mircom* case, the Court of Justice confirmed its decision that segments of a media file containing a protected work previously downloaded by a user of a peer-to-peer network from that user's terminal equipment and uploaded to such equipment of other users of that network constitute making available to the public, even though those segments themselves can only be used above a certain download rate. (Indeed, a user may be a user of the peer-to-peer network service and not the maintainer of the peer-to-peer platform.) This user, however, if the claim is proportionate and the communication rules allow, is subject to a duty of disclosure to the copyright holder, who is itself entitled to collect, or even to collect in case of infringement, e-mail, static and dynamic IP addresses.¹⁴

Finally, the European Court of Justice ruled in the YouTube case C-682/18 that the operator of a video-sharing or file-sharing platform allowing file-sharing by means of hosting and download links, on which users may unlawfully make protected content available to the public, does not carry out a "communication to the public" of that content within the meaning of that provision. However, that is subject to the condition that the platform does not, beyond merely making such content available, contribute to making such content available to the public in breach of copyright.

This is the case, in particular, where the operator has actual knowledge of the unlawful disclosure of protected content on its platform and does not immediately delete or disable access to it, or, in the absence of actual knowledge of a specific infringement, where the operator, although knowing or should have known that protected content is generally being unlawfully made available to the public through its platform by its users, does not implement appropriate technical measures, which would be expected of an operator exercising due diligence in that situation in order to take credible and effective action against copyright infringements on that platform, or where it participates in the selection of protected content unlawfully communicated to the public, provides on its platform means specifically for the unlawful distribution of such content or knowingly facilitates such distribution, as may be evidenced by the fact that the operator has adopted a business model which encourages users of its platform to unlawfully transmit protected content to the public. The decision in this case pointed in the direction of the new EU rules for content-sharing service providers that were finally introduced in the CDSM.¹⁵

II.2. Scope of judgments defining the limits for copyright enforcement

These services were all mixed services, which were difficult or impossible to classify as subcategories of information society services. It was a major step forward in the development of the law that the Court of Justice classified these activities as communication to the public for copyright purposes, without ruling out the possibility that the individuals who actually carried out the sharing of the content were also communicating to the public. In the absence of a question, the Court was

¹⁴ Judgment of 17 July 2021 in *Case C 597/19 Mircom International Content Management & Consulting (MICM) Limited v Telenet BVBA*.

¹⁵ Judgment of 22 June 2021 in joined cases *C 682/18 (Youtube)* and *C 683/18 (Elsevier)*.

unable to decide the question of the impact of the existence of the liability of the service provider on the liability of the persons who actually carried out the sharing. However, the development of judicial practice in this direction has opened up the possibility for rightholders to confront providers who generate revenue from content sharing with enforcement and not to focus on the end-users.

Another group of the copyright cases concerned the interpretation of enforcement remedies against service providers in cases where the safe harbour rules would otherwise have applied.

In a Belgian case,¹⁶ SABAM (the Belgian collective rights management organisation of composers) requested an injunction against Scarlet Extended SA, finding that copyright infringement was taking place through unauthorised file sharing via Scarlet's Internet service. SABAM has asked the national court to order Scarlet to cease its service activities contributing to the infringement and to do so by introducing a blocking and filtering method. In the case referred for a preliminary ruling, the European Court of Justice ultimately concluded that the national court's discretion did not extend to the imposition of filtering or blocking. These instruments cannot be interpreted as a way of imposing an obligation to stop an infringement, but as a new sanction; the national court's discretion in the specific case does not extend to a general provision with spill-over effects for all the operators concerned and for all the operators not concerned, which requires a national legislative measure; the national legislator may also only introduce online content filtering taking into account the principle of proportionality; filtering cannot cover all electronic communications; filtering and blocking cannot be used for general preventive purposes; filtering and blocking cannot be used at all where there is no infringement; filtering and blocking cannot be introduced solely at the expense of the ISP.

The essence of the Scarlet ruling was repeated by the Court in its decision in the Netlog case, in which SABAM also sued an internet service provider, in this case a hosting company operating a Facebook-like service.¹⁷ The Court of Justice went beyond its decision in the earlier case and held that a decision at national level cannot, even if it orders the setting up of a filtering system, be aimed at identifying on a permanent basis all the music, films, or other audiovisual works in SABAM's repertoire, even those which have not yet been created at the time of the decision but which will only be included in the management of the rights at a later date. Such a filtering system would unduly and disproportionately restrict the hosting provider's freedom to conduct a business, in addition to the undue restrictions on the fundamental freedoms mentioned above.

However, according to the decision in UPC Telekabel case (C-314/12), the access provider can be obliged to filter content on the basis of a prohibition order, if the

¹⁶ Judgment of 24 November 2011 in *Case C-70/10 Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*.

¹⁷ Judgment of 16 February 2012 in *Case C-360/10 Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV*.

specific way of filtering does not disproportionately restrict the fundamental right to conduct a business.¹⁸ It is the responsibility of the national court to make the balancing test. In the case at hand, the right-holder sought an order requiring the access provider to carry out filtering in respect of specific films. The UPC Telekabel case has by far overruled the previous two decisions in substance. They can now only be regarded as a legal history.

On the basis of all these cases, it can be said that the European Court of Justice has a long history of dealing with cases in which the liability of the intermediary service provider does not end with the removal of the content, but can be subject to additional sanctions. These have not been considered by the Court as disproportionate obligations in all circumstances, and indeed filtering has been considered as a minimum sanction. By adapting the sanction of cessation or prohibition of infringement to the technological environment, the Court ultimately allowed for the introduction of other, more specific consequences. However, it is very important that in this area, in the absence of legislation, the Court was ultimately unable to decide what could be a proportionate solution to restrict the rights of the persons concerned in specific cases, and had to leave this to the national regulators.

In a further group of enforcement cases, the Court dealt with the enforceability of a request for information.

In the *Promusicae* case, the Court ruled that the E-com Directive, the Infosoc Directive and the Data Protection Directive do not oblige Member States to impose an obligation to disclose personal data in the context of civil proceedings in order to ensure the effective protection of copyright. In other words, Member States may decide to create such an obligation on the basis of their own competences. The fact that Member States are not prevented by EU law from providing for an obligation to disclose personal data in the context of civil proceedings in national law has been confirmed by the LSG ruling since then.¹⁹

The Court then considered acceptable the (Swedish) national solution which allows an internet access provider to be obliged to provide the copyright holder or his successor in title with information about the subscriber whose address is allegedly used to commit the infringement. The Swedish national legislation allows the court seized to weigh the conflicting interests in the light of the circumstances of each case and with due regard to the requirements of the principle of proportionality.²⁰

In the aforementioned *Mircom* case C-597/19, the Court of Justice ruled that it is lawful to systematically record the IP addresses of users of file-sharing networks

¹⁸ Judgment of 27 March 2014 in *Case C-314/12 UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*.

¹⁹ Order of 19 February 2009 in *Case C-557/07 LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH v Tele2 Telecommunication GmbH*.

²⁰ Judgment of 19 April 2012 in *Case C-461/10 Bonnier Audio AB, Earbooks AB, Norstedts Förlagsgrupp AB, Piratförlaget AB, Storyside AB v Perfect Communication Sweden AB*.

whose internet connections have allegedly been used to carry out infringing activities and to communicate the name and postal address of the users to that right holder or to a third party in order to enable that right holder to bring a civil action, if this is justified, proportionate and not abusive and if the national rule on data protection in communications allows it.

Ultimately, the Court of Justice was therefore able to develop the rules of the E-commerce Directive in the context of the enforcement of claims for copyright infringement, taking into account the objectives of the relevant EU rules. However, by its very nature, the case-law could not provide general practical guidance which could be applied in general to the different situations.

III. The CDSM Directive - the changing responsibilities of content sharing service providers

III.1. Service providers covered by the Directive and new types of liability

The CDSM Directive has settled the theoretical debate and fulfilled the legal development that the CJEU has made on whether hosting providers involved in content sharing are acting as hosting providers within the meaning of the E-Commerce Directive and thus subject to the safe harbour rules, or whether they are rather "mere" e-commerce service providers and thus subject to the general liability rules.²¹

Article 17 of the CDSM Directive defines a content-sharing service provider as an information society service provider whose main or one of the main purposes is the storage, communication to the public, including making available to the public for download, and commercial assembly and promotion of a substantial amount of copyright works or related subject matter uploaded by a recipient of the service. The definition contains a number of elements which are left to the interpretation of the case law, but the main uncertainty may arise from the interpretation of the terms "substantial amount" and "main or one of the main purposes".²²

In any case, it can be concluded that the concept under the Directive and the liability regime applicable to these providers essentially requires a quantitative condition to be met: if the provider can prove that protected content is made available in the

²¹ Leistner, Matthias, *European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive Compared to Secondary Liability of Content Platforms in the U.S. – Can We Make the New European System a Global Opportunity Instead of a Local Challenge?* Zeitschrift für Geistiges Eigentum/Intellectual Property Journal (ZGE/IPJ), 2020, Issue 2, 123-214. o.; Eleonora Rosati: *The legal nature of Article 17 of the Copyright DSM Directive, the (lack of) freedom of Member States and why the German implementation proposal is not compatible with EU law*, Journal of Intellectual Property Law & Practice, Volume 15, Issue 11, November 2020, 874–878. o.; Quintais, João, *The New Copyright in the Digital Single Market Directive: A Critical Look*, in European Intellectual Property Review 2020/1.

²² The Hungarian legislator did not define this concept, but the French legislation quantified the significant quantity.

course of its activities but not in significant quantities, or that it does so but that it is not at all within the scope of its main purposes, its liability should continue to be assessed on the basis of the previous general rules on electronic commerce, as interpreted for the time being only by the CJEU. The activities of service providers falling outside this definition should therefore be judged currently under the E-commerce Directive and subsequently under the DSA rules.

It is also necessary to point out here that emerging operators (less than 3 years on the EU market) who already make protected content available to a significant extent and whose annual turnover is less than €10 million are covered by the CDSM Directive, but their liability under the new regime is limited. However, if at any time during this initial phase their average monthly number of visitors exceeds five million, they will be subject to the full liability regime. Of course, these providers will also only be covered if they make a significant amount of protected content available in the course of fulfilling at least one of their main purposes. Obviously, whether the duration of their presence in the market or the size of their revenues and the number of their users starts to increase, this will probably lead to an increase in the amount of content made available, but this will not affect the application of the rules to them. These providers are therefore also exempted from the general e-commerce regime for the purposes of determining their liability.

The CDSM Directive explicitly excludes certain types of service providers from its scope, in addition to those that do not share a significant amount of protected content, because their main purpose is not to allow users to upload and share large amounts of copyrighted content for the purpose of profiting from this activity. These include electronic communication services and business-to-business cloud services, as well as cloud services that allow users to upload content for their own use, such as hosting services, or online marketplaces whose main activity is online retailing, rather than providing access to copyrighted content. Furthermore, providers of services such as platforms for the development and sharing of open source computer programs, non-profit scientific or educational databases, and non-profit online encyclopaedias are excluded from the definition of online content-sharing service provider. Finally, in order to ensure a high level of copyright protection, it does not apply to service providers whose main purpose is to engage in or facilitate piracy. Their activities will be assessed under the general rules on electronic commerce.

Article 17(1) of the CDSM Directive has taken a significant step forward by stipulating that content sharing service providers shall make content available for on-demand use within the meaning of Directive 2001/29/EC. By making these service providers users, which typically/conceptually implies a knowing, intentional act, the basis for the limitation of liability has ultimately been removed. In this way, the application of the rules on limitation of liability applicable to intermediary service providers (including hosting providers) cannot be appropriate in their case. Under the provisions of the Directive, they are, from a copyright point of view, 'mere' users, like 'mere' e-commerce service providers, and have become 'active

gatekeepers'.²³ This reclassification places them alongside end-users, for whom there was no question that they were, certainly users in copyright terms. This change can also be interpreted as a definite reinforcement of the right of disposal of copyright holders, since it has been extended to cover a field of activity that can generate significant revenues for rightholders. This element of the CDSM Directive is a strong guarantee for the effective enforcement of the exclusive copyright.²⁴

The fact that content-sharing service providers are users implies that they must obtain permission from rightholders for the use they make. The explicit statement of the obligation to obtain authorisation follows from the exclusivity of copyright. Here again, however, the Directive adopts a specific solution and goes well beyond the established practice of the European courts: the authorisation obtained by the content-sharing service provider covers the end-user's non-commercial or revenue-generating activities, and if the end-user has obtained an authorisation (even for commercial purposes), his authorisation also 'covers' the closely related conduct of the content-sharing service provider. Although both actors are considered users, the one-stop-shop model for obtaining a licence is not unique in copyright law.²⁵ It may even be more efficient than licensing separately due to the imbalance in the actors' positions. Considering also that there is typically no independent revenue generation by the two actors, the introduction of one-stop licensing cannot in itself be considered as an unjustified restriction of the new licensing right. Moreover, if the end-users were not covered by the licence obtained by the content provider, this would mean that the activity of the content provider would be linked to an infringing upload, which would be impossible to assess without interpretative rules. (This solution is, moreover, unfortunately not explained in detail in the preamble to the Directive.) It is worth noting here that, in the case of intermediary service providers not covered by the CDSM Directive, the liability of the service provider and that of the recipients of their services remain entirely separate and distinct.

The granting of an exclusive right of authorisation not only entails a duty to exercise the utmost care in obtaining the authorisation, but also a direct, reduced, utmost care-based liability for any infringement resulting from the failure to obtain the authorisation, both on the part of the service provider and the end-user. Here again, however, the Directive introduces a complex new regime of exemption from liability for failure to obtain a licence for the content sharing service provider, while leaving the end-user liability regime (in principle) intact. It should be noted that the

²³ Giancarlo Frosio, Sinimal Mendis: *Monitoring and screening: European reform or global trend?* The Oxford Handbook of Online Intermediary Liability, Oxford University Press, 2020. p. 4.

²⁴ Gábor Faludi. § 57/A-E. In: Legeza Dénes, Gyertyánfy Péter (ed.): *Nagykommentár a szerzői jogról szóló 1999. évi LXXVI. törvényhez. Commentary to Act LXXVI of 1999 on Copyright*. 1 January 2023, 2023, „Jogtár” Format Edition (hereinafter: Commentary).

²⁵ If the end-user is making a commercial use, the licence obtained by the content provider does not cover the end-user's activity, in which case the end-user must obtain a separate licence.

conditions for exemption from liability are criteria for establishing imputability (conduct that would normally be expected in a given situation) in relation to content hosting service providers, although the Directive generally formulates them as conditions for excluding liability. In this way, a provider who meets the conditions laid down here will be exempt not only from civil liability, but also from criminal or any other liability, although this will, of course, always be examined in a procedure under the particular branch of law. (However, by the very nature of private liability, if the provider is exempted from it, his criminal liability will not be established.)

The first condition for exemption from liability is that the user must prove that he has made all reasonable efforts to obtain the authorisation. „Best efforts" should take into account the type of service, its audience and its size, the type of works or other performances concerned, the availability of appropriate and effective means and the costs to the service providers. It will be up to the courts to determine what these requirements ultimately mean. It is important to see, however, that the basis for liability is not objective, as it does not depend on whether a licence has been obtained, but on whether the user has done everything possible to obtain the licence. The point of imputation of liability, which in copyright law is not liability in the case of unlawful use, but an objective basis of responsibility, thus shifts from the rightholder (whether or not he has granted authorisation) to the user (whether or not he has exercised the utmost care that can normally be expected in the given situation). This (or more precisely a similar) liability construction has so far been known in the context of liability for copyright infringement only in the context of the claim for damages.

Under the second, subjunctive criterion for exemption from liability, the content sharing service provider must demonstrate that it has exercised the utmost care, according to high industry standards of professional diligence, to ensure that the specific works and other protected subject matter for which rightholders have provided the relevant and necessary information to service providers is unavailable. This in essence creates an obligation of prior screening for the service provider in the event that it is not possible to obtain authorisation for use from the rightholder. An important aspect of this condition is that the filtering is only imposed on the service provider if and to the extent that the data have been provided to him by the rightholders. This is the case even if they have not (yet) managed to obtain license. It also requires serious cooperation with rightholders at the precontractual stage. Put another way, even if the rightholder does not grant a licence, it is in his interest to provide the service provider with the necessary data for filtering, so that his works are not included in the service until the licence is granted. Ultimately, by restricting the possibilities offered by the exclusive right, this imposes an extra, new type of obligation on rightholders to protect their rights. Failure to cooperate with the service provider risks making it easier for the service provider to escape liability for infringement.

Finally, as a third condition for exemption from liability, you must, in all cases, upon receipt of a duly substantiated notification from the rightholders, take immediate

action to make the works or other subject matter of the notification inaccessible or remove them from your website and exercise the utmost care normally required in the circumstances to prevent their future uploading. At a minimum, this is necessary because content recognition systems are currently operating with severe limitations, and as such it cannot be excluded that significant amounts of infringing content may slip through them and be shared without legitimate permission.²⁶

III.2. Responsibility for the end user's activities

Recital 66 of the Directive justifies the unsustainability of objective liability for infringement and the introduction of the limitation of liability regime described above simply on the grounds that online content providers do not provide access to content uploaded by them but by their users. The CDSM Directive has been the subject of a so-called "CDSM case" before the European Court of Justice. In the Polish case, the Advocate General of the CJEU²⁷ found the retention of objective liability unacceptable for the following reasons: first, because users of content-sharing services make content available online without their service providers making a prior selection in this regard, and second, because these service providers are unlikely to be able to obtain the authorisation of all rightholders for all existing and future works and protected performances uploaded in this way, such objective liability would force these service providers to change their economic model entirely, and in this context even the interactive 'web 2. 0' model."²⁸

Both argumentation mixes the issue of the responsibility of the service provider for its own behaviour and the responsibility of the end-users for their behaviour. The liability of the content sharing service provider should be primarily for its own failure to act, which may be the failure to apply for a licence. However, the Directive goes further, since liability only arises if the provider cannot prove that it acted with the utmost care in concluding the contract, which in itself would place its liability on a subjective basis. Moreover, in order to obtain indemnity, he must also have performed the acts described above, since if he has not obtained a licence, he cannot make the acts of the end-users lawful by this way.

In relation to the end-user's activity, the liability of the "large" content sharing service provider has been strengthened to the extent that it no longer only has an obligation to remove infringing content if it becomes available on its service, but also a prior filtering obligation. This is designed to prevent end-users from uploading unauthorised content in an unauthorised situation, provided that the service provider has received sufficiently detailed information from the right holder concerned.

Importantly, these obligations will only come into play if the service provider ends up in a situation where it has not been able to obtain a licence for the use. However,

²⁶ Communication Point 2.

²⁷ Judgment of 26 April 2022 in *Case C 401/19 Republic of Poland v European Parliament and Council of the European Union*.

²⁸ Point 32.

prior screening requires the cooperation of the right holder, who provides the information necessary for the screening. However, it is clear that this is not in itself a sufficient tool for the rightholder, who may be happy that his content is not shared, but will lose the royalty for the licence not granted.

The disappearance of objective liability is compensated for by the service provider's obligation to protect itself technologically. From the user's point of view, it is understandable why this solution is practical, since if he does not obtain a licence from the rightholder, which - depending on national law - is not subject to any direct or indirect contractual obligation, except for collective management societies, he will essentially be (back) in the same position as the intermediary service provider: he will not be able to monitor the legality of the content uploaded one by one. However, the service provider will do its utmost to avoid this, as the Advocate General concluded in Case C 682/18. From the rightholder's point of view, however, the situation is far from favourable: ultimately, the failure to conclude a contract will leave him vulnerable to the technological solutions of the service provider. While the infringement does not occur (or only with a very small chance if the appropriate data is provided), the rightholder is not granted a licence and, consequently, is not paid any fees. Classical enforcement is reduced to the realm of fully conscious infringements.

The end-user is undoubtedly the big loser from not signing a contract. Indeed, if the service provider has not obtained the licence, the end-user's act remains unauthorised and thus liable for the sharing. The end-user's liability is absolute and is not limited either by case law or by the CDSM.

IV. The DSA liability rules and their relation to the liability rules of the CDSM Directive

The DSA takes the rules on intermediary service providers from the E-commerce Directive and maintains them with essentially unchanged wording. For this reason, the CDSM liability regime has the same relationship to the liability rules of the E-Commerce Directive and the liability rules of the DSA.

According to Article 2(6) of the CDSM, the definition of "online content-sharing service provider" should be underlined that its relationship with the e-commerce rules is clear: online content-sharing service providers are always information society service providers, i.e. they are not only subject to the CDSM but also to Directive 2000/31/EC (later DSA).

The CDSM also discusses the relationship of the new liability rules to the liability rules of the E-commerce Directive. The preamble to the CDSM (65) makes clear that service providers are exempted from the hosting provider liability under Article 14 of the eCommerce Directive, and only for the purposes covered by the Directive, i.e. the CDSM does not exempt content sharing service providers from all the e-commerce rules applicable to hosting providers, but only from their liability for copyright content. Thus, in respect of aspects outside the scope of the CDSM,

content hosting service providers will be subject to the E-commerce Directive and subsequently to the DSA, and the CDSM and the DSA will apply to them together.

Hosting services, are information society services which can thus fall under both the CDSM Directive and the DSA regulation. Undoubtedly, the DSA's definition of online platform is broader, but it is clear that the "storage and public dissemination of information at the request of the recipient of the service" occurs when an online content sharing service provider under the CDSM Directive stores and provides access to the public to a substantial amount of copyright works or other protected subject matter uploaded by its users. It follows from the wording that the concept of a service provider under the CDSM Directive is specific compared to the concept of a service provider under the DSA Directive.

It is legitimate to ask whether the DSA applies to all intermediary services. The DSA also explicitly refers to Article 2(3) that the Regulation is without prejudice to the application of Directive 2000/31/EC. It is another matter that at the moment of its entry into force, the liability rules of the E-commerce Directive will be repealed and transferred to the DSA. With regard to intermediary service providers, the DSA incorporates the liability provisions of the E-commerce Directive, which are not substantially changed.

In general, therefore, it can be concluded that intermediary service providers who have previously been sued in copyright cases do not change their copyright status, and, in essence, the narrow liability regime applicable to them does not change.

V. Relationship between CDSM and the eCommerce Directive/DSA in general, beyond the responsibility of content sharing service providers

First of all, it should be noted that the DSA also introduces a new concept in relation to the types of services already known, namely online platform. It is a hosting service that stores and publicly disseminates information at the request of the recipient of the service, unless this activity is a minor or exclusively complementary element of another service or a minor functionality of the main service which, for objective and technical reasons, cannot be used without the said other service, and the integration of such element or functionality into another service is not intended to avoid the applicability of the Regulation. Moreover, given the significant scale of storage and public dissemination of information at the request of the user in the case of content-sharing services, there can be no question that content-sharing services are also online platforms, i.e. the provisions of the DSA that apply to online platforms will apply to them, not only the rules that apply to hosting services.

In this context, the question to be examined is whether the additional provisions of the DSA on liability of service providers apply to content sharing service providers covered by the CDSM.

The question of what we mean by liability rules is very important. If the determination of whether use has taken place, the criteria for exemption from objective liability, the general prohibition of filtering, the provisions protecting

exceptions and limitations and the complaints procedure in the event of a dispute are also considered to be an intrinsic part of the liability regime, the DSA is not relevant in the regulation of these issues. This homogeneous (descriptive) approach is also reflected in the ECJ's decision in Case C-401/19, which examined the fundamental rights adequacy of Article 17 of the CDSM as a whole.²⁹ If, however, the liability regime is understood narrowly and the additional measures are no longer regarded as a liability-type rule, the relationship between the DSA and the CDSM needs to be clarified.

Article 17 of the CDSM Directive does not only contain rules on liability and exemption from liability. Article 17(7) deals with the protection of access to content lawfully made available, (8) with the obligation on service providers to inform rightholders of the content used and (9) with the complaints mechanism for uploaders. There is no equivalent to the standards in paragraphs 7 to 8 in the DSA, but a complaints mechanism is also provided for in the DSA.

The relationship between the CDSM Directive and the E-Commerce Directive is clear as set out above: the CDSM Directive only exempts service providers from the general rules in the context of Article 14(1) of the E-Commerce Directive. The additional standards referred to in the previous paragraph do not overlap with the rules of the E-Commerce Directive, and therefore no question of application arises.

However, the DSA contains much broader, more detailed rules, which also cover issues that appear in Article 17 of the CDSM. In addition, since the CDSM could not settle its relationship with the DSA, it is necessary to look to the DSA for a norm that can provide guidance on this issue. Unfortunately, however, apart from the provisions I have quoted above, the DSA does not provide any guidance as to how Article 17(7) to (9) of the CDSM should be applied from the date of entry into force of the DSA. Recital 12 of the DSA merely indicates that the application of the Regulation should be without prejudice to, *inter alia*, Directive (EU) 2019/790 of the European Parliament and of the Council, nor to national rules for the enforcement or implementation of those EU acts. This formula does not exclude the application of the rules of the DSA. If they would conflict with the provisions of the CDSM, the rules of the CDSM shall apply.

Chapter VI of the study analyses the regulatory elements that appear to be in the same regulatory field and examines which provision applies in which case. It also analyses the changes that are taking place with regard to intermediary service providers, which reflect the incorporation of or divergence from previous case law. Thus, this part of the study will address the application of the additional rules relevant to the sharing of copyright content from the moment the DSA enters into force.

²⁹ Point 21.

VI. Application of the other rules of the DSA to online content sharing service providers and other intermediary service providers, in particular with regard to copyright infringements

The DSA also contains a number of provisions that have relevance for the effectiveness of copyright services, the removal of infringing content and the prosecution of infringers. These provisions also follow, in whole or in part, the case law of the European Court of Justice on intermediary services discussed earlier.³⁰

In order for my overview to be considered complete, it is necessary to mention the changes in the regulation of other intermediary service providers. Although the CDSM has not introduced any new provisions in their cases, the DSA does refer to them and in particular to their liability. However, there are no significant changes as regards the liability of these service providers: the liability rules applicable to them in Articles 12 to 13 of the E-Commerce Directive are repealed (in addition, Article 14 on the liability of hosting service providers and Article 15 on the general obligation to monitor are also repealed). The other rules of the E-Commerce Directive remain in force. The rules in Articles 12 to 15, which are removed from the E-commerce Directive, are essentially transferred one by one to Articles 4 to 5 of the DSA. They are also covered by Articles 7 to 10 and Articles 11 to 15 of the DSA analysed below. Since the European Court of Justice's copyright jurisprudence has been based essentially on the rules on liability and monitoring and on the provision of data, the remainder of the analysis will focus on these issues.

In my view, the judicial practice that can be drawn from the cases discussed in Chapter II of the study is not reflected in the text of the Regulation. Nevertheless, the fact that the recital referred to explicitly confirms the validity of the case-law of the CJEU is in itself significant. An analysis of the text of the Regulation confirms that the case-law has been incorporated.

A prominent element of judicial practice has been the issue of the obligation of filtering and blocking for both access providers and hosting providers. This mainly required the interpretation of the general obligation (not) to monitor in the E-commerce Directive and the interpretation of a rule which does not prohibit reasonable filtering. Preamble (30) of the DSA assesses as an exception individual cases of monitoring and monitoring by national authorities in accordance with national and EU law. In this light, although the text itself coming from the E-commerce directive has not changed substantially, its interpretation in line with the preamble suggests that the actual scope of the monitoring regime is no longer derived from court decisions but from the Regulation itself. In addition, Article 7 of the DSA has been introduced as a supplementary provision, stipulating that service providers are not prohibited from voluntarily monitoring their traffic.

³⁰ Martin Husovec, *The DSA as a creator's charter?*, in *Journal of Intellectual Property Law & Practice*, Volume 18, Issue 2, February 2023, Pages 71-73, <https://doi.org/10.1093/jiplp/jpac116>

Article 9 introduced new rules for the decisions to act against illegal content. Of particular relevance here are decisions taken by public authorities (typically courts) in cases of copyright infringement. These rules do not exclude decisions taken in cases of copyright infringement. Moreover, these rules do not only apply to content-sharing platform providers but to all intermediary service providers and may also include, where appropriate, decisions containing a cross-border provision where the illegality of the content can be directly derived from EU law or where the issuing authority considers that the rights in question require a broader territorial scope in accordance with EU and international law, while taking into account the interests of the international community. This may be of particular importance in the future with regard to cross-border copyright infringements.

The obligation to provide information on the recipient of the service under Article 10 appears to be a substantial improvement on the previous rules. Until now, the rules on intermediary service providers have imposed a very limited obligation on them to disclose the details of their recipients in both civil and criminal matters. The relevant ECJ case-law, which was mainly developed on the basis of Directive 2004/48/EC, recognised the obligation to disclose personal data only at a very general level: it ultimately left it to the discretion of Member States and their courts to decide whether to oblige service providers to disclose data, with due consideration of a number of fundamental rights. Article 10 regulates this obligation to disclose much more broadly than the E-Commerce Directive did in Article 15(2) or the Enforcement Directive in Article 8.

Article 14 of the DSA contains general rules on the content of the standard contractual clauses of service providers. These requirements frame the provisions of Article 17 of the CDSM, which constitute "restrictions on the use of the service" under the DSA (such as all rules, procedures, measures, and tools used for content management, including algorithmic decision-making and human review, and information on the procedural rules of their internal complaint handling system). The notification and takedown mechanism in Article 17 of the CDSM, the fair use rules, the complaint handling mechanism, the rules for taking legitimate content into account and ultimately, in my view, the liability provisions, all qualify as such. In this way, the obligations under Article 14 also include notices of activities under Article 17 of the CDSM Directive, but the DSA does not modify their content.³¹

For both general business policy and enforcement practice, or even for copyright theory, very important information on the copyright practices of intermediary service providers will be available from the transparency reports under Article 15, which should cover all decisions taken against them, broken down by type of infringement, and notifications of infringing content. In my view, this latter category includes

³¹ Sunimal Mendis: *The Magic Bullet That Isn't! The Limited Efficacy of Article 14 DSA in Safeguarding Copyright Exceptions to Quotation and Parody on Social Media Platforms*. <https://verfassungsblog.de/no-magic-bullet/>

notifications submitted by copyright holders under Article 17(4) of the CDSM Directive. The rules on these are not affected by the DSA but are placed in a broader context.

In the second Part of the DSA, among the obligations applicable only to intermediary service providers, including platform providers, the rule on notification and action mechanisms in Articles 16-17 stands out. The CDSM only refers to the need for Member States to ensure that content-sharing service providers, upon receipt of a duly justified notification from rightholders, take immediate action to make the works or other protected subject matter notified inaccessible or remove them from their websites, and to act with due diligence to prevent their future uploading. A more detailed elaboration of this rule is essentially contained in Articles 16-17 of the DSA.

It is important to note, however, that the DSA's exclusion from its scope of the rules that underpin the scope of the copyright regime may cause problems, and thus could lead to an interpretation that these articles do not apply to copyright infringements. This would mean that service providers would have to maintain two regimes for reporting and acting on different types of infringement.

It should be mentioned here that Rosati in her article considers the notice-and-stay-down rule under the CDSM to be explicitly specific compared to the notice-and-action rules under the DSA, as the CDSM has different requirements in several respects (e.g. it does not require the URL to be provided in the notice), and therefore argues that the national rules transposing the CDSM will not necessarily change with the entry into force of the DSA.³² On the contrary, Quintais and Schwemert believe that the provisions of the DSA will preempt those of the CDSM. Given that the DSA explicitly provides that it does not affect copyright rules, one may therefore be inclined to conclude that Rosati's position on this point is correct.

Article 18 deals with the obligation to report suspected offences. This can be particularly relevant in cases where the service provider has not sought and obtained authorisation for use under Article 17 of the CDSM Directive, leaving both his use and that of his service recipient unauthorised. If the uploader commits a criminal offence in such a case, the service provider remains outside the scope of the offence (provided that it has taken all the necessary steps to be exempted from liability under Article 17 of the CDSM Directive), but also incurs a reporting obligation, provided of course that the act in question constitutes a criminal offence under national law. Although the service provider still has no general monitoring obligation, it may find itself in a much quicker and easier position to detect an infringement and become subject to a notification obligation when proceeding under the CDSM Directive's liability limitation rules.

The internal complaint handling mechanism and the out-of-court dispute settlement mechanism in Articles 20-21 are also provisions in the DSA that are reflected in the

³² Rosati p. 75.

CDSM and, as a consequence, in national laws. I agree with the conclusion of Rosati, Quintais and Schwemert that the provisions of the DSA are much more detailed and, as such, may replace the provisions of the CDSM Directive.³³ Here again, the question may arise as to whether, if the DSA enters into force, the provisions inserted in the national copyright laws in this respect can be maintained or whether it should be repealed. In my view, however, the DSA leaves open the question of which dispute settlement bodies may be approached. Therefore, it is left to the Member States to decide this question, and the national copyright laws could be further regulated in this respect.³⁴

There are no provisions in the CDSM regarding the rules on whistleblowers and measures and protection against abuse (Article 22 DSA). However, I share the view of Quintais and Schwemert³⁵ that it is both necessary and important to apply them to intermediaries of copyright content. In the copyright field, the criteria for trusted notifiers are most certainly met by registered collecting societies or other transparent rights management organisations.

With regard to measures and protection against abuse, the criteria set out in Article 22 create the possibility of excluding notorious infringers from using the service, which could be another very effective means of reducing copyright infringement. Such provisions are not included in the CDSM and can be applied without further ado.

On the basis of the above, it can be concluded that the new type of provisions in the DSA, which apply to all intermediary service providers and specifically to hosting providers, also frame and apply to copyright enforcement and are likely to increase the effectiveness of measures against infringements.

Conclusions

The legal regime for service providers involved in the distribution of copyright content has undergone significant changes in recent years. The legal framework, unchanged since 2000, was redefined first by the CDSM directive and then by the DSA regulation. In 2019, at the time of the adoption of the CDSM, the only new and stricter regulation that seemed to be more in the interests of rightholders was that of content sharing service providers. However, the entry into force of the DSA will make it more difficult for all intermediary service providers to escape liability for copyright infringement. Even if their liability cannot be established, they will in many respects be more seriously involved in the fight against copyright infringements. This is in no small part the result of European Court of Justice case law from the last 20 years, which has been partly incorporated into the new rules.

Unfortunately, for the time being, it seems that content sharing service providers will continue to pursue the model of avoiding authorisation, which is also the riskiest for

³³ Rosati, p. 77.

³⁴ Quintais – Schwemert, p. 32.

³⁵ Quintais – Schwemert, p. 32.

their subscribers: until the content is authorised by the rightholder, their sharing is infringing and the regime that the DSA sets up for illegal content will apply to them.

Although the DSA leaves the copyright acquis intact, its detailed analysis makes clear that many of its provisions will also apply to intermediary providers of copyright content (be they content sharing services, online platforms, or any other intermediary services), which may help to ensure a higher level of copyright protection in a developed online world.

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