

Digital User Rights and Their Enforcement: What Is the Copyright Directive Asking For?

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I. Introduction

Time has passed since art 17 CDSMD¹ has been enacted in 2019. And times have been turbulent for the Directive. After first indications of the European Commission on plans for a new liability regime in the platform field, an extensive legislative procedure ensued.² This legislative procedure was accompanied by critical voices from all kinds of directions, namely rightholders, collecting societies, platform providers, users and user organizations and academics alike.³ In strong opposition to the Directive, the Republic of Poland turned to the Court of Justice of the European Union (“CJEU”) with an annulment action under art 263 Treaty on the Functioning of the European Union (“TFEU”) to evaluate art 17 CDSMD for its compatibility with rights protected by the Charter of Fundamental Rights of the European Union (“CFR”).⁴ In concreto, Poland asked for the annulment of art 17(4), point (b), and point (c), in fine, CDSMD or in the alternative of art 17 CDSMD in its entirety, arguing that the regulation requires online content-sharing service providers (“OCSSPs”) to carry out preventive monitoring of all the content which their users wish to upload.⁵ Such an obligation would violate the right of the user to freedom of expression and information under art 11 CFR.⁶ The CJEU dismissed the annulment action and declared art 17 CDSMD to be compatible with the fundamental rights, but not without noting that the obligations of OCSSPs under art 17 CDSMD are capable of affecting the fundamental rights of users of online services.⁷ It is only the “safeguards” contained in art 17 CDSMD that lead the provision to the path of legality.⁸ Irrespective of these findings, some EU Member States still refrain from implementing the Directive into their national law – with the Republic of Poland being

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¹ European Parliament and Council Directive (EU) 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130/92 (“CDSMD”).

² For an in-depth overview of the legislative procedure of the CDSMD see CREATE, ‘EU Copyright reform. Evidence on the Copyright in the Digital Single Market Directive’ <https://www.create.ac.uk/policy-responses/eu-copyright-reform/> accessed 14 January 2023.

³ See references listed by CREATE, ‘Copyright in the Digital Single Market Directive – Implementation. An EU Copyright Reform Resource’ <https://www.create.ac.uk/cdsm-implementation-resource-page/> accessed 14 January 2023. See also the petition on change.org under the title “Stop the censorship-machinery”, signed by over 5 million participants <https://www.change.org/p/european-parliament-stop-the-censorship-machinery-save-the-internet> accessed 14 January 2023.

⁴ C-401/19 *Poland/Parliament and Council* [2022] ECLI:EU:C:2022:297.

⁵ *ibid* paras 1, 24.

⁶ *ibid* paras 23 et seq.

⁷ *ibid* paras 39-58.

⁸ *ibid* para 98.

only one of them.⁹ In July 2021, the EU Commission opened infringement procedures against several Member States for failing to transpose art 17 CDSMD in part or in total under art 260(3) TFEU.¹⁰ As of 2022, those Member States received reasoned opinions, in which the EU once again signals urgency to comply with the EU Copyright Directive.¹¹

But why are Member States still so reluctant to implement art 17 CDSMD? A prime issue might be that up until today the question of how art 17 CDSMD must be implemented is not answered sufficiently. In the end, art 17 CDSMD is the fruit of long discussions, endless amendments and legislative weighing decisions. Regarding concrete instructions for Member States on how to transpose art 17 CDSMD, the Directive remains on surface level – well aware that every step towards a more detailed approach could lead to the violation of interests of the involved parties and thus to a non-compliance with fundamental rights.

One of the unresolved problems of art 17 CDSMD is the understanding of users' rights and their enforceability in the context of the Directive. Notwithstanding its significance for the debate on the reinforcement of platform regulation, only few have addressed this issue more thoroughly.¹² This is surprising, especially because art 17 CDSMD signals a shift in EU law, which Member States seemingly ignore. Not least because of the great importance of user interests for the general balancing in copyright law and the persistent legal uncertainty, the question must be raised: What is art 17 CDSMD asking for when it comes to digital user rights?

This paper approaches to answer this question in three steps: First, light is shed on the term “user rights” and the idea of an enforceable legal position of online users within the prior copyright regulation and the jurisprudence of the CJEU (I.). Second, the focus of the paper is on the establishment of user rights within art 17 CDSMD, picking up the threads of the CJEU (II.). Third, an examination of the difficulties to implement art 17 CDSMD in a way which does not impair the

⁹ The implementation stages of the Member States are documented by CREATE (n 3) and by Communia Association, ‘DSM Directive Implementation Tracker’ <https://www.notion.so/DSM-Directive-Implementation-Tracker-361cfae48e814440b353b32692bba879> accessed 14 January 2023.

¹⁰ Commission, ‘Copyright: Commission calls on Member States to comply with EU rules on copyright in the Digital Single Market’ (2021) https://ec.europa.eu/commission/presscorner/detail/en/MEX_21_3902 accessed 14 January 2023.

¹¹ Commission, ‘Copyright: Commission urges Member States to fully transpose EU copyright rules into national law’ (2022) https://ec.europa.eu/commission/presscorner/detail/EN/IP_22_2692 accessed 14 January 2023.

¹² The issue is raised briefly by the Advocate General (‘AG’) Saugmandsgaard Øe in the annulment action against art 17 CDSMD, C-401/19 *Poland/Parliament and Council* [2021] ECLI:EU:C:2021:613, Opinion of AG Saugmandsgaard Øe para 161. Further: Christophe Geiger and Bernd J Jütte, ‘Platform Liability Under Art. 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match’ [2021] GRUR Int 517, 528 et seq, 538-41; Sebastian Schwemer and Jens Schovsbo, ‘What is Left of User Rights: Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime’ in Paul Torremans (ed) *Intellectual Property Law and Human Rights* (Wolters Kluwer 2020) 569; Tatiana Eleni Synodinou, ‘Lawfulness for Users in European Copyright Law: Acquis and Perspectives’ (2019) 10 JIPITEC 20 para 63.

fundamental rights of users follows, offering a perspective on the German implementation act as one original example of a Member State implementation (III.).

II. Digital User Rights in European Copyright Law in the Pre-CDSM Era

1. The General Terminology of “User Rights”

The term “user rights” is not poor in its meanings and nowadays not alien to copyright law anymore. In a general sense, the term describes the interest of users of copyrighted works to exercise their fundamental rights to use and consume content and engage online without interference of others, e.g. through blocking or deleting user-generated content or restricting the access to content or to websites entirely.¹³ With focus on copyright specifically, the term “user right” is connected to the use of copyrighted works, when the use is permissible under copyright law as it falls within the scope of an exception or limitation.¹⁴

Neither of these interpretations does much more than to indicate that the law recognizes the user as a legal subject and provides a legal framework depicting their interests. However, there are also tendencies, particularly in connection with digital copyright law, that understand user rights quite literally as user *rights*.¹⁵ According to such an understanding, the term is associated with a subjective legal position of the user, which goes beyond its function as a privilege or defense against infringement claims of the copyright holder and establishes independent rights of the user.¹⁶ Acknowledging exceptions and limitations as rights of the user, the legislation must equip the user with effective legal tools to exercise those rights.¹⁷ Hence, while user rights can be divided into a substantive part, meaning the protection of exceptions and limitations as such, and a procedural

¹³ Specifically for online matters C-70/10 *Scarlet Extended* [2011] ECR 2011 I-11959 paras 45-52; C-682/18 and C-683/18 *YouTube and Cyando* [2021] ECLI:EU:C:2021:503 paras 64, 113.

¹⁴ see art 9(2) Berne Convention for the Protection of Literary and Artistic Works and art 5 European Parliament and Council Directive (EC) 2001/29 of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10 (‘Infosoc’).

¹⁵ Christophe Geiger, ‘Copyright as an access right: Securing cultural participation through the protection of creators’ interests’ in Rebecca Giblin and Kimberlee Weatherall (eds) *What if we could reimagine copyright?* (ANU Press 2017) 73, 94-97; Thomas Riis and Jens Schovsbo, ‘User’s Rights: reconstructing copyright policy on utilitarian grounds’ (2007) 29(1) EIPR 1; Synodinou (n 12) paras 62 et seq. To the origins of such an understanding see Niva Elkin-Koren, ‘Copyright in the Digital Ecosystem: A User-Rights Approach’ in Ruth Okediji (ed) *Copyright Law in an Age of Limitations and Exceptions* (CUP 2017) 132; Christophe Geiger and Elena Izyumenko, ‘The Constitutionalization of Intellectual Property Law in the EU and the Funke Medien, Pelham and Spiegel Online Decisions of the CJEU: Progress, but Still Some Way to Go!’ (2020) 51 ICC 282, 296.

¹⁶ Geiger (n 15) 94-97; Elkin-Koren (n 15) 156.

¹⁷ cf Pascale Chapdelaine, ‘The Ambiguous Nature of Copyright Users’ Rights’ (2013) 26 IPJ 1, 29, 32.

part, namely the enforceability of those rights,¹⁸ a legislative act aimed at the protection of user rights must consider both parts equally in order to provide a balanced and effective solution.¹⁹

A shifted understanding of copyright towards a more user-friendly approach and an awareness of the effects a strong copyright protection has on the creative use of works gained popularity with the increasing migration of communication processes into the online sphere.²⁰ Digital copyright operates under entirely different parameters than copyright in the analogue. The emergence of numerous new forms of communication on the Internet and the mass distribution of user-generated content were both driver and brake for user freedom on the Internet. The legislation, not only in the EU²¹ but also in the U.S.²², responded to the enormous increase of possibilities to infringe copyright via the Internet and the difficulties in prosecuting those infringements due to the mass of content, the anonymity of the Internet and the power imbalance between OCSSPs and rightholders, with a reinforcement of copyright law and platform liability. The reinforcement of copyright led OCSSPs to upgrade their content moderation strategies by introducing wide-scale filtering systems as means to control content on the platforms extensively.²³ As an unpleasant side effect, the filtering systems hold the risk to also block legitimate content, caused by their inability to differentiate properly between legal and illegal content.²⁴

The effect on the balancing of rightholders' interests with those of the users is evident. Due to changed technological circumstances, rightholders are no longer limited to report infringements that have already occurred. Instead, rightholders can restrict the access or use of their works with technological means.²⁵ Niva Elkin-Koren describes the development in the digital field as a shift in the "copyright default":

“The robustness of algorithmic filtering, removal, and blocking practices is effectively changing copyright default: copyrighted materials were once available unless proven infringing, while now

¹⁸ See distinction by Elena Izyumenko, 'The Freedom of Expression Contours of Copyright in the Digital Era: A European Perspective' (2016) 19 J World Intellect Prop 115, 118.

¹⁹ Thomas Riis and Jens Schovsbo, 'Towards a Legal Methodology of Digitalisation. The Example of Digital Copyright Law' in Matthias C Kettemann, Alexander Peukert and Indra Spiecker gen. Döhmman (eds) *The Law of Global Digitality* (Routledge 2022) 17, 35-37.

²⁰ Chapdelaine (n 17) 2 et seq; Giancarlo Frosio, 'Reforming the C-DSM Reform: A User-Based Copyright Theory for Commonplace Creativity' (2020) 51 ICC 709, 731-33.

²¹ cf InfoSoc and European Parliament and Council Directive (EC) 2000/31 of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L 178/1 ('ECD'). The CJEU significantly contributed to this development, C-160/15 *GS Media* [2016] ECLI:EU:C:2016:644; C-610/15 *The Pirate Bay* [2017] ECLI:EU:C:2017:456 paras 31, 35-39; *YouTube and Cyando* (n 13).

²² cf Digital Millennium Copyright Act ('DMCA'), s 512.

²³ eg Content-ID by YouTube or the Rights Manager of Facebook.

²⁴ See only the numbers of blocked content by Content-ID and counterclaims by users in the YouTube Copyright Transparency Report H1 2022, 10 et seq https://storage.googleapis.com/transparencyreport/report-downloads/pdf-report-22_2022-1-1_2022-6-30_en_v1.pdf accessed 14 January 2023. To the technological premises Geiger/Jütte (n 12) 533 et seq.

²⁵ cf Chapdelaine (n 17) 29.

materials detected by algorithms are unavailable unless explicitly authorized by the copyright owner.”²⁶

This development to the disadvantage of users of OCSSPs makes it mandatory to reevaluate the premises under which users can assert their rights under an exception or limitation of copyright.²⁷ This is especially important as the user plays a crucial role in achieving the objectives of copyright law.²⁸ Moreover, the ways of communicating and the creative outlet of users via the means of the Internet are a form of expression protected by art 11 CFR²⁹ and art 10 European Convention on Human Rights³⁰. Thus, it is imperative that users are able to exercise their rights and, in cases in which they are deprived of this possibility, can enforce the rights effectively in front of state courts.

2. “User Rights” in the InfoSoc Directive?

Under the InfoSoc Directive, user rights have generally been associated with the legitimate interests of individuals and the public to use copyrighted material for their own creative process or as a way of communicating with others which must be weighed against the interest of copyright holders.³¹ For this reason, art 5 InfoSoc lays down exceptions and limitations to the exploitation of copyright to which the author is in principle exclusively entitled to under artt 2–4 InfoSoc. The CJEU acknowledged the relevance of user interests in copyright law and constituted that these exceptions and limitations seek to achieve a fair balance between the rights of the rightholder and the right of the user.³² Thus, the user is not playing a merely passive role as infringer. Instead, the user is able to invoke own interests that are protected under the copyright system as well.

According to the wording of art 5 InfoSoc, the “exceptions and limitations” restrict the scope of protection of copyright,³³ and thus cannot be understood as mere justifications in favor of the act of exploitation of the user. Other than that, art 5 InfoSoc is silent on the issue of the scope of user rights and the enforceability of exceptions and limitations outside an infringement procedure filed by the rightholder. On the contrary, the exceptions and limitations are of merely facultative

²⁶ Elkin-Koren (n 15) 133.

²⁷ cf Chapdelaine (n 17) 29; Frosio (n 20) 738.

²⁸ Elkin-Koren (n 15) 132, 143 et seq, describing the user as being not a “parasite” but a participant in the promotion of “creation, dissemination, and use of cultural works” 132.

²⁹ *GS Media* (n 21) paras 31, 45; C-136/17 *GC* [2019] ECLI:EU:C:2019:773 para 66; *YouTube and Cyando* (n 13) paras 4, 65, 113; C-392/19 *VG Bild-Kunst* [2021] ECLI:EU:C:2021:181 para 49; *Poland/Parliament and Council* (n 4) paras 45, 47; Opinion of AG Saugmandsgaard Øe (n 12) paras 72, 103.

³⁰ *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) para 110; *Cengiz and Others v Turkey* App no 48226/10 and 14027/11 (ECtHR, 1 December 2015) para 52; *Vladimir Kharitonov v Russia* App no 10795/14 (ECtHR, 23 June 2020) para 33.

³¹ cf InfoSoc, recital 31.

³² C-467/08 *Padawan* [2010] ECR I-10102 para 43; C-145/10 *Painer* [2011] ECLI:EU:C:2011:798 para 132; C-201/13 *Deckmyn* [2014] ECLI:EU:C:2014:2132 para 26. See in regard of the balancing of rights in copyright also C-275/06 *Promusicae* [2008] ECLI:EU:C:2008:54 paras 62-68.

³³ Silke von Lewinski, ‘Article 5 Exceptions and limitations’ in Silke von Lewinski and Michel M Walter (eds), *European Copyright Law. A Commentary* (OUP 2010) para 11.5.11.

nature.³⁴ Therewith and in view of the harmonization efforts of the EU and the possibility of different Member State regulations,³⁵ the wording of art 5 InfoSoc rather argues against the assumption of subjective rights of the user.³⁶

Art 6(4) InfoSoc, in contrast, obliges Member States to take appropriate measures to ensure that rightholders make the means of benefiting from an exception or limitation available to the beneficiary, i.e. the user. The provision does not clarify what these measures may be, instead, the decision is left to the discretion of the Member States. Some Member States took the opportunity to provide the beneficiary of an exception or limitation with the right to file a legal complaint in front of a state court or stipulate other enforcement measurements such as administrative procedures.³⁷ However, the scope of art 6(4) InfoSoc is limited to technological measures carried out by rightholders, the use of filtering systems by an OCSSP is not encompassed by the provision.³⁸ Therefore, one cannot draw a conclusion from this for the general nature of user rights within the InfoSoc. Nevertheless, art 6(4) InfoSoc is exemplary for the new challenge the technological development brings to the realm of digital copyright.

3. Enforceability of “User Rights” Within the Jurisprudence of the CJEU

While the statutory law remains opaque, the CJEU felt compelled to indicate a link between the exceptions and limitations of art 5 InfoSoc and a “right” of their beneficiaries in a series of decisions in the 2010s.³⁹

The linchpin for all considerations on user rights in the jurisprudence of the CJEU is the decision in *UPC Telekabel*⁴⁰ from March 2014. The case revolves around an infringement procedure brought before court by two film production companies against the internet access provider UPC Telekabel Wien. In its decision, the CJEU stated that the internet access provider cannot be forced, in fact is even forbidden, to adopt measures to prevent copyright infringements or block access to

³⁴ cf InfoSoc, art 5(2), (3): “Member States may provide for exceptions and limitation [...]”.

³⁵ InfoSoc, recital 32; *Painer* (n 32) paras 101-03.

³⁶ Similarly, referring to a “change in legal qualification” due to the mandatory nature of exceptions and limitations within art 17 CDSMD in comparison to the InfoSoc, João Pedro Quintais et al, ‘Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics’ (2019) 10 JIPITEC 277 para 11.

³⁷ Silke von Lewinski, ‘Article 6 Obligations as to technological measures’ in von Lewinski/Walter (n 33) para 11.6.13. One example for an implementation providing beneficiaries of exceptions or limitations with the right to submit a claim is Germany, s 95b(1), (2) German Copyright Act (‘UrhG’).

³⁸ cf InfoSoc, recital 47: “Technological development will allow *rightholders* to make use of technological measures designed to prevent or restrict acts not authorised by the rightholders [...]” (emphasis added). The many weaknesses of the provision are portrayed by Lambrecht, ‘Free Speech by Design. Algorithmic protection of exceptions and limitations in the Copyright DSM directive’ (2020) 11 JIPITEC 68 paras 21 et seq.

³⁹ cf C-314/12 *UPC Telekabel* [2014] ECLI:EU:C:2014:192 para 57; C-177/13 *Eugen Ulmer* [2014] ECLI:EU:C:2014:2196 para 43; C-469/19 *Funko Medien NRW* [2019] ECLI:EU:C:2019:623 para 70; C-516/17 *Spiegel Online* [2019] ECLI:EU:C:2019:625 para 54.

⁴⁰ *UPC Telekabel* (n 39).

respective websites based on an injunction pursuant to art 8(3) InfoSoc if these measures impair the access to information of the users of the access provider.⁴¹ Not only that, the CJEU also points out that in order to safeguard the fundamental rights of the EU, “national procedural rules must provide a possibility for internet users to assert their rights before the court”.⁴² This necessitates the existence of a respective user right in the first place as otherwise the enforcement of such a right is not possible. Hence, to fulfill the requirement of the CJEU, users must have rights that allow them to take legal action in front of a court based on an independent legal claim. Reducing the user’s right against this background to a merely secondary interest, i.e. a defense in an infringement proceeding, would contradict the CJEU’s notion that user rights are not mere privileges, but enforceable rights equal to the rights of the rightholders. In literature, the passage of UPC Telekabel was therefore interpreted as constituting a locus standi of the user of copyrighted material in the online context.⁴³

In the subsequent decision in *Eugen Ulmer*⁴⁴, the CJEU interpreted the exceptions and limitations of art 5 InfoSoc as containing ancillary rights of the user if these are necessary for an unimpeded exercise of fundamental freedoms. The dispute arose between a German university and a publishing house. The publishing house took legal action based on the argument that even though the university may be allowed to make available a reproduction of a textbook on the terminals of their library under s 52b UrhG, it is prohibited to digitize the book beforehand.⁴⁵ The wording of the provision does not include a right to digitization. Instead, it is solely aimed at the right of making works and other subject-matter available to the public on dedicated terminals.⁴⁶ The CJEU found that such interpretation as submitted by the claimant would render the exception under art 5(3)(n) InfoSoc largely ineffective. For that reason, the Court acknowledged an ancillary right of the user, here the university, to digitize the works in question.⁴⁷ However, while the decision emphasizes the importance that users must be able to exercise exceptions and limitations within the framework of the InfoSoc, it remains unclear which procedural consequences follow from a presumed ancillary right of the user. In the underlying proceeding, the ancillary right of the university served as the usual defense against the assertion of infringement of the rightholder and was not asserted independently.

⁴¹ *ibid* para 56.

⁴² *ibid* para 57.

⁴³ Christina Angelopoulos, ‘CJEU in UPC Telekabel Wien: A totally legal court order...to do the impossible’ (2014) <http://copyrightblog.kluweriplaw.com/2014/04/03/upc-telekabel-wien/> accessed 14 January 2023; Martin Husovec, ‘CJEU Allowed Website Blocking Injunctions with Some Reservations’ (2014) 9(8) *JIPLP* 631, 633.

⁴⁴ *Eugen Ulmer* (n 39).

⁴⁵ *ibid* paras 10 et seqq.

⁴⁶ cf InfoSoc, art 5(3)(n); UrhG, s 52b.

⁴⁷ *Eugen Ulmer* (n 39) para 43.

Two other decisions of the CJEU are mentioned frequently in the context of user rights: *Funke Medien*⁴⁸ and *Spiegel Online*⁴⁹. In both decisions, the Court points out that even though art 5 InfoSoc is titled “Exceptions and limitations”, those exceptions and limitations “do themselves confer rights on the users of works or of other subject matter”.⁵⁰ Not few have interpreted these passages as the departure of the CJEU from a narrow understanding of exceptions and limitations as mere restrictions to the scope of copyright protection towards user *rights*.⁵¹ Yet, the Grand Chamber does not answer what consequences follow from such a conferral of rights on the user, i.e. whether exceptions and limitations are in fact enforceable.

The case *Funke Medien* deals with a legal action against the publication of military documents of the German government on the Internet portal of a newspaper.⁵² The case *Spiegel Online* concerns a publication of a manuscript of a politician on the website of the press company *Spiegel Online*.⁵³ Hence, both cases revolve around the typical constellation of infringement proceedings in copyright. The cited passages are voiced in the context of the question whether the publication of documents online still falls under an exception under German copyright by way of interpreting the respective exception extensively.⁵⁴ It is ambiguous whether the CJEU intended to grant the user an enforceable right, at least, it did not comment on a procedural scope of conferred user rights. Instead, with these passages, the Court could solely intend to emphasize the importance of the weighing of interests in copyright law when fundamental rights are at issue.

III. Digital User Rights in Article 17 CDSM Directive

1. Safeguards for Users Within Article 17 CDSM Directive

As outlined, the concept of user rights is not foreign to EU copyright law. Yet, a statutory codification of the idea that users must have ways to assert their own rights if the exercise of exceptions and limitations is impaired, is limited to technological measures taken by the rightholder pursuant to art 6(4) InfoSoc. The CJEU seems to encourage a wider understanding of exceptions and limitations not only as a defense but also as an independent right of the beneficiary.

⁴⁸ *Funke Medien* (n 39).

⁴⁹ *Spiegel Online* (n 39).

⁵⁰ *Funke Medien* (n 39) para 70; *Spiegel Online* (n 39) para 54.

⁵¹ Opinion of AG Saugmandsgaard Øe (n 12) para 161; European Copyright Society, ‘Comment on Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market Into National Law’ (2020) 11 JIPITEC 115 para 41; Geiger/Izyumenko (n 15) 286, 296-98.

⁵² *Funke Medien* (n 39) paras 9-11.

⁵³ *Spiegel Online* (n 39) paras 10-13.

⁵⁴ *Funke Medien* (n 39) paras 65-76; *Spiegel Online* (n 39) paras 50-59.

Nevertheless, enforceable user rights were not explicitly acknowledged, neither in EU law nor in the national copyright law of any Member State.⁵⁵

Art 17 CDSMD changes that for the EU. In its core, the Directive is aimed at reforming copyright law in the light of the digital developments of the past years and at the closure of gaps in the legal protection of copyright and the remuneration practices in the online sector.⁵⁶ At the same time, it cannot be denied that art 17 CDSMD is also aimed at protecting the users of OCSSPs and an unimpeded access to internet culture.⁵⁷

This surprises, as the main focus of copyright law is usually on the protection of rightholders.⁵⁸ The protection of users, on the other side, is usually not an objective of copyright provisions. However, the changes and developments in the digital world pave the way for rightholders to prevent access and use of copyrighted works via the means of technology.⁵⁹ The Directive exacerbates this development by obliging OCSSPs to best efforts in ensuring the unavailability of works and other subject matter for which the rightholders have provided the service provider with the relevant and necessary information, art 17(4)(b) CDSMD.⁶⁰ The obligation to block content only upon knowledge of the infringing content pursuant to art 14 ECD is no longer the standard for the liability of online platforms in copyright matters.⁶¹ Instead, under art 17(4)(b) CDSMD, the OCSSP must act *ex ante* to identify and block infringing content before its upload on the platform.⁶² As the CJEU confirmed, the *ex ante* blocking obligation coupled with the high amount of constantly uploaded content on the platforms require OCSSPs to use filtering technologies.⁶³

In spite of this reinforcement of obligatory blocking measures – or rather, because of it –, several passages of art 17 CDSMS are directed at the protection of the user against an overarching performance of duty by the OCSSP. According to art 17(2) CDSMD, authorizations obtained by the OCSSP also cover acts carried out by the user of the OCSSP. The ideal situation under

⁵⁵ von Lewinski (n 33) para 11.5.11; Pekka Savola, 'Website blocking in copyright injunctions: a further perspective' (2014) <http://the1709blog.blogspot.com/2014/03/website-blocking-in-copyright.html> accessed 14 January 2023.

⁵⁶ cf CDSMD, recitals 3, 61.

⁵⁷ See only CDSMD, recital 70: "Users should be allowed to upload and make available content generated by users for the specific purposes of striking a balance between fundamental rights laid down in the Charter of Fundamental Rights of the European Union [...]".

⁵⁸ Riis/Schovsbo (n 15) 1, referring to the Preamble of the Berne Convention which states: "The countries of the Union, being equally animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works". See also Julie E Cohen 'The Place of the User in Copyright Law' (2005) 74 *Fordham L Rev* 347, 347-48; Synodinou (n 12) para 3.

⁵⁹ See *supra* II.1.

⁶⁰ The obligation arises only in cases where the OCSSP did not obtain an authorization from the rightholder to communicate to the public or make available to the public the respective works or subject matter, art 17(1) CDSMD.

⁶¹ CDSMD, recital 65, art 17(3) subpara 1. The "knowledge" criterion still applies in cases in which the rightholder submits a sufficiently substantiated notice after the upload of content, art 17(4)(c) CDSMD.

⁶² *Poland/Parliament and Council* (n 4) para 53 „prevent such infringements from occurring"; Opinion of AG Saugmandsgaard Øe (n 12) paras 54, 56.

⁶³ *Poland/Parliament and Council* (n 4) para 54.

art 17 CDSMD would therefore be that the OCSSP is not even in the position to block user content as the OCSSP and the rightholder agreed on contractual terms for the use. Well aware that not all affairs will resolve so easily,⁶⁴ the Directive further regulates certain protection measures in cases in which the OCSSP is generally required to block content which matches with a reference fill. These protection measures include the duty of Member States to implement mandatory exceptions and limitations into their national law, namely quotation, criticism, review, caricature, parody and pastiche.⁶⁵ Pursuant to art 17(7) subpara 1 CDSMD, the availability of user-generated content falling within the scope of such an exception or limitation shall not be impeded by the cooperation between the OCSSP and the rightholder. Furthermore, the duties of the Directive shall not be understood as and applied in a way which leads to a general monitoring obligation, art 17(8) CDSMD.

Likewise, user protection is at the heart of art 17(9) CDSMD. The first part of art 17(9) CDSMD revolves around the duty of the OCSSP to provide effective and expeditious complaint and redress mechanisms in cases in which users consider their content to be unjustifiably blocked. Thereafter, Art 17(9) subpara 2 sentence 2 CDSMD provides for the possibility of out-of-court redress mechanisms, which enable an arbitral settlement of disputes. As art 17(9) subpara 2 sentences 3 and 4 clarifies, those out-of-court complaint and redress mechanisms are additional measures which accompany the possibility for the user to raise a claim in front of a state court.

In response to the annulment proceeding of the Republic of Poland, the CJEU attests art 17 CDSMD to contain sufficient safeguard mechanisms for the user in order to comply with the fundamental rights of the CFR.⁶⁶ The Grand Chamber specifically points out the wording of art 17(7) subpara 1 and art 17(9) subpara 3 CDSMD, according to which the OCSSP is under the obligation to avoid an impediment of lawful content uploaded by the user.⁶⁷ The Court refers to its jurisprudence, according to which the use of a filtering system that cannot distinguish between lawful and unlawful content cannot be an obligation under a legislative act of the EU as such an obligation would be incompatible with the fundamental rights of the users under art 11 CFR.⁶⁸ This may lead to cases in which the ex ante filtering obligation of art 17(4)(b) CDSMD does not apply, and instead, a notification of the rightholder is necessary before user content can be

⁶⁴ CDSMD, art 17(4): “If no authorisation is granted [...]”. See also Opinion of AG Saugmandsgaard Øe (n 12) para 86.

⁶⁵ CDSMD, recital 70, art 17(7) subpara 2.

⁶⁶ *Poland/Parliament and Council* (n 4) para 98.

⁶⁷ *ibid* paras 77-80.

⁶⁸ *ibid* para 86; C-360/10 *Netlog* [2012] ECLI:EU:C:2012:85 para 50.

blocked.⁶⁹ Above all that, art 17(9) CDSMD provides several procedural safeguards, which allow the user to challenge unjustified blocking measures by the OCSSP.⁷⁰

2. How Enforceable Do User Rights Have to Be?

The provisions of art 17 CDSMD are already novel with regard to the extent in which they put the user of OCSSPs at the forefront of protection, *almost* as an equal to the rightholder. While the CJEU confirms the compatibility of art 17 CDSMD with the CFR, it does not comment on the question of whether art 17 CDSMD finally adjudicates a subjective right to the user.⁷¹ This is rather disappointing as art 17 CDSMD itself hints in the direction of the existence of such a right.

The dimension of user rights as granted under art 17 CDSMD is depicted in the wording of several paragraphs within the provision.⁷² These are, in particular:

- “The cooperation between online content-sharing service providers and rightholders *shall not result* in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation.”⁷³
- “Member States *shall ensure* that users [...] are able to rely on any of the following existing exceptions or limitations when uploading and making available content [...]”⁷⁴
- “[...] users [shall] have *access* to a court or another relevant judicial authority *to assert the use of an exception or limitation to copyright and related rights.*”⁷⁵

The regulation contains prohibitions and imperatives for both the OCSSPs as well as the Member States, aimed at guaranteeing that users can make use of exceptions and limitations under all circumstances. Particularly in cases in which lawful user-generated content is blocked by a filtering system prior to the upload, the reliance on an exception or limitation as a mere defense is not practical anymore. This is because the claim of the rightholder is enforced automatically by the filtering system, irrespective of its merit and irrespective of a filed infringement procedure. The only requirement is a reference file of the copyrighted work in the filtering system. Thus, to achieve a balancing of interests in accordance with the principles of EU law, art 17 CDSMD must elevate the exceptions and limitations of art 17(7) to subjective user rights.⁷⁶ This objective is binding for

⁶⁹ *Poland/Parliament and Council* (n 4) para 91.

⁷⁰ *ibid* paras 93-95.

⁷¹ See *Poland/Parliament and Council* (n 4) para 95, in which the CJEU merely refers to the wording of art 17(9) CDSMD without elaborating on it further.

⁷² *European Copyright Society* (n 51) para 37; *Quintais et al* (n 36) para 11.

⁷³ CDSMD, art 17(7) subpara 1 (emphasis added).

⁷⁴ CDSMD, art 17(7) subpara 2 (emphasis added).

⁷⁵ CDSMD, art 17(9) subpara 1, last sentence (emphasis added).

⁷⁶ *European Copyright Society* (n 51) paras 36-42; *Quintais et al* (n 36) para 12; *Schwemer/Schovsbo* (n 12) 569, 572, 577; *Louisa Specht-Riemenschneider*, ‘Leitlinien zur nationalen Umsetzung des Art. 17 DSM-RL aus Verbrauchersicht’

Member States and OCSSPs alike. Member States are obligated by law to take user rights into account when implementing art 17 CDSMD.⁷⁷ OCSSPs must ensure not to undermine these rights when fulfilling their obligation under art 17(4) CDSMD, particularly in situations in which they resort to the use of filtering technologies.

As is indicated in the wording of art 17(9) subpara 1 CDSMD, the substantive scope of a user right must be paired with a procedural component. With the reference to the possibility of the user to assert the use of an exception or limitation in front of a court or other judicial authority, the Directive draws a noticeable parallel to the considerations of the CJEU in *UPC Telekabel*. To avoid the provision to turn out to be only hollow words, users must be equipped with enforceable rights, i.e., a *locus standi*, allowing them to take legal action against unjustified blocking.⁷⁸ Otherwise, to put it in the words of Louisa Specht-Riemenschneider and Franz Hofmann, the user is metaphorically speaking missing the key to the courtroom.⁷⁹ Thus, if users should be put in a position in which they are able to rely on an exception or limitation, as art 17 CDSMD stipulates, enforceable user rights are imperative. Yet, while the substantive scope of user rights as acknowledged within art 17 CDSMD is determinable, the EU legislator leaves a high range of discretion to Member States as to how to ensure the enforceability of those rights.⁸⁰

To fully comply with fundamental rights, art 17 CDSMD should be interpreted in a way that both the substantive as well as the procedural scope of user rights as indicated in artt 17(7), (9) CDSMD are effectively guaranteed. This includes a right of the user to demand the upload of content in cases in which the content has been unjustifiably blocked by a filtering system.⁸¹ If the user has suffered damages as a result of the blocking, the user may base their legal claim on these damages as well.⁸² Moreover, the recognition of user rights within art 17 CDSMD has an effect on the drafting of the terms of service of OCSSPs, and therewith on the contractual relationship between

(2020) 88 https://www.vzbv.de/sites/default/files/downloads/2020/06/23/2020-06-12-specht-final-art_17.pdf accessed 14 January 2023. Arguing the opposite: Eleonora Rosati, *Copyright in the Digital Single Market. Article-by-Article Commentary to the Provisions of Directive 2019/790* (OUP 2021) 346.

⁷⁷ CDSMD, recital 84; Commission, ‘Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market’ COM(2021) 288 final 22.

⁷⁸ Opinion of AG Saugmandsgaard Øe (n 12) para 161; Julia Reda, Joschka Selinger and Michael Servatius, ‘Article 17 of the Directive on Copyright in the Digital Single Market: a Fundamental Rights Assessment’ (2020) 9 https://freiheitsrechte.org/uploads/publications/Demokratie/Article17_Fundamental_Rights-Gesellschaft_fuer_Freiheitsrechte_2020_Projekt_Control_C.pdf accessed 14 January 2023; Specht-Riemenschneider (n 76) 88 et seq; Synodinou (n 12) para 63.

⁷⁹ Louisa Specht-Riemenschneider and Franz Hofmann, ‘Verantwortung von Online-Plattformen. Ein Plädoyer für funktionszentrierte Verkehrspflichten’ (2021) 99 https://www.vzbv.de/sites/default/files/downloads/2021/02/04/specht_hofmann_gutachten_plattformverantwortlichkeitdocx.pdf accessed 14 January 2023.

⁸⁰ Quintais et al (n 36) para 21; Schwemer/Schovsbo (n 12) 584, 588 et seq.

⁸¹ cf Geiger/Jütte (n 12) 539.

⁸² However, the user could face serious difficulties to prove monetary damages as pointed out by Reda/Selinger/Servatius (n 78) 23.

the OCSSP and the user. The clauses of the terms of service must respect the provisions of art 17 CDSMD and thus also take user rights into account.⁸³ According to art 17(9) subpara 4 CDSMD, OCSSPs are even expressly obliged to inform their users in the terms and conditions about the exceptions and limitations to copyright and related rights provided for in EU law.

Apart from that, it is questionable whether art 17 CDSMD also makes (enforceable) ex ante safeguards mandatory. As the CJEU indicated in its decision in the annulment proceeding against art 17 CDMSD, a mere ex post protection of the user e.g. through complaint and redress mechanisms and the possibility to take legal action in front of a state court, is insufficient when balancing the interest of the rightholders with those of the users.⁸⁴ Similar statements can be found in the guidelines of the EU Commission towards the implementation of art 17 CDSMD within the Member States and the opinion of AG Saugmandsgaard Øe in the annulment proceeding, both suggesting that an ex ante blocking of content via filtering systems should be limited to manifestly infringing uploads.⁸⁵

In the absence of such safeguard mechanisms, the onus to assert the legality of the content would be on the user.⁸⁶ This could cause negative effects on the right to freedom of expression online as several studies have shown that a cost-benefit analysis and a lack of knowledge deter many users from taking action if their content was unjustifiably blocked.⁸⁷ This is true for internal complaints procedures as well as court proceedings. Furthermore, time may be of the essence when it comes to user-generated content.⁸⁸ For an effective protection of user rights, it is therefore necessary that there are ex ante measures in place which counteract tendencies of OCSSPs to overblock. Otherwise, the duty of the OCSSP to avoid the unavailability of lawful user content would quickly prove ineffective in cases in which the OCSSP does not face consequences for exceeding its blocking obligations.

However, art 17 CDSMD remains silent on the issue which exact safeguards shall be implemented by Member States to ensure such an ex ante user protection.⁸⁹ Possible strategies could be to

⁸³ Opinion of AG Saugmandsgaard Øe (n 12) para 163.

⁸⁴ However, the CJEU remains ambiguous in this regard, cf *Poland/Parliament and Council* (n 4) paras 86, 90, 93. According to para 93, the procedural safeguards of art 17(9) CDSMD complement the safeguards aimed at preventing the blocking of lawful content.

⁸⁵ COM(2021) 288 final (n 77) 20-23; Opinion of AG Saugmandsgaard Øe (n 12) paras 167-193, 201.

⁸⁶ Opinion of AG Saugmandsgaard Øe (n 12) paras 169, 173, 187.

⁸⁷ Jonathon W Penney, 'Privacy and Legal Automation: The DMCA as a Case Study' (2019) 22 *STLR* 412, 451, stating that reasons for not challenging a copyright notice are costs, fear of legal consequences and a lack of knowledge; Dietmar Harhoff et al, 'Nutzung urheberrechtlich geschützter Inhalte im Internet durch deutsche Verbraucher. Ergebnisübersicht einer repräsentativen quantitativen Erhebung' (2019) 7 et seq https://www.ip.mpg.de/fileadmin/ipmpg/content/projekte/Nutzerverhalten_Kurzbericht.pdf accessed 14 January 2023, according to who 33% of British and 47% of German Internet users consider themselves unable to differentiate properly between lawful and unlawful content.

⁸⁸ Opinion of AG Saugmandsgaard Øe (n 12) para 188; European Copyright Society (n 51) para 54.

⁸⁹ Reda/Selinger/Servatius (n 78) 39 et seq.

implement binding standards for the design of filtering systems, to equip the user or a user organization respectively with a locus standi in cases in which a filtering system does not work properly, irrespective whether content of the user was already blocked, and to provide an obligation of the state to monitor and sanction OCSSPs in cases of non-compliance.⁹⁰ Whether and which of these possibilities meet the requirements of art 17 CDSMD for an effective user protection is not answered by the Directive. This is considered to be one of the major weaknesses of art 17 CDSMD.⁹¹

IV. Digital User Rights in the Member States' Implementations

1. The Responsibility of the Member States

It follows from art 17 CDSMD that users must be able to enforce their right to use a copyrighted work within the scope of exceptions and limitations both after a blocking occurred and prior to it. While an enforcement of users' rights after a blocking measure can be realized through the complaints procedure or a legal action in front of a court, art 17(9) CDSMD, ex ante safeguards are not specified in the Directive. Hence, it is now the Member States' responsibility to ensure ex post and ex ante protection of users within their national legislation. It is doubtful whether the legislator of the EU has done a good service to the Member States when defining specific results to be achieved while simultaneously be silent on how to reach those results.

As the CJEU clarifies, the Member States are obligated to respect the fundamental rights of the CFR when transposing art 17 CDSMD.⁹² As fundamental rights are at issue, Member States cannot absolve themselves from their responsibility by leaving the decision on the requirements of filtering systems entirely to the discretion of the OCSSPs.⁹³ Thus, for the drafting of respective provisions an orientation on the mere wording of the Directive does not suffice. Instead, implementation acts have to balance the affected fundamental rights in accordance with the principles of EU law.⁹⁴ Plus, authorities and courts have to adhere to an interpretation of the implementation acts that is in line with the fundamental rights as well.⁹⁵ The limit is the leeway of OCSSPs, which must be able to choose the specific measure depending on their individual means and capabilities. Otherwise, the implementation act would run afoul of the freedom of OCSSPs to conduct a business, art 16 CFR.⁹⁶

⁹⁰ See eg the suggestion to introduce an institutional intermediary, which could decide on user complaints and monitor that filtering systems do not operate to the detriment of the user, Geiger/Jütte (n 12) 540 et seq.

⁹¹ Jasmin Brieske and Alexander Peukert, 'Coming into Force, not Coming into Effect? The Impact of the German Implementation of Article 17 CDSM Directive on Selected Online Platforms' (2022) 2 WJDS 1, 19 et seq; Schwemer/Schovsbo (n 12) 588 et seq.

⁹² *Poland/Parliament and Council* (n 4) para 99.

⁹³ Opinion of AG Saugmandsgaard Øe (n 12) paras 210, 213.

⁹⁴ *Poland/Parliament and Council* (n 4) para 99; Lambrecht (n 38) para 33.

⁹⁵ *Poland/Parliament and Council* (n 4) para 99.

⁹⁶ *ibid* para 75.

Even though the transposition period for the CDSMD expired on June 7, 2021,⁹⁷ not all Member States have implemented art 17 CDSMD. Besides that, the implementation acts of Member States which already implemented art 17 CDSMD or, at the least, introduced first drafts, vary significantly.⁹⁸ Matthias Leistner describes the implementation strategies of Member States as twofold:⁹⁹ Most of the Member States follow a close orientation on the wording of the Directive. While this appears to be favorable on the surface as specified measures always run the risk to be found incompatible with EU law, a verbatim adoption cannot provide legal certainty as to how users' rights are to be protected in practice.¹⁰⁰ Seemingly, some Member States may even still deem the possibility of a complaints procedure to be sufficient under EU law.¹⁰¹ Germany and Austria, on the contrary, found more distinct solutions to implement art 17 CDSMD.

The recent enactment of the Digital Services Act ('DSA') brought new impulses to the debate. Some hope that the DSA will close the gaps left open by the CDSMD e.g. through transparency obligations and the introduction of Digital Services Coordinators.¹⁰² Indeed, the focus of the DSA on enforcement compliments art 17 CDSMD with an institutional framework.¹⁰³ Nevertheless, there are many unanswered questions regarding the DSA and its relation to the CDSMD.¹⁰⁴ Other than that, the DSA unsurprisingly does not offer guidelines for the Member States as to whether and what remedies the user has against the OCSSP in cases of blocking of lawful user-generated content and inadequate filtering systems.

2. Perspectives on the German Implementation

In the following, the example of Germany will be used to examine the potential of provisions aimed at a high level of users' protection. The German implementation act, i.e. the Act on the Copyright Liability of Online Content Sharing Service Providers ('OCSSP Act')¹⁰⁵, serves as an

⁹⁷ CDSMD, art 29(1).

⁹⁸ For a comparison of different Member States' implementations see Christina Angelopoulos, 'Article 15 & 17 of the Directive on Copyright in the Digital Single Market. Comparative National Implementation Report' (2022) <https://informationlabs.org/copyright/> accessed 14 January 2023.

⁹⁹ Matthias Leistner, 'The Implementation of Art. 17 DSM Directive in Germany – A Primer with Some Comparative Remarks' [2022] GRUR Int 909, 909 et seq.

¹⁰⁰ Leistner assumes that national implementations following the wording of the Directive will be tolerated as long as the OCSSPs choose measures to fulfill their duties of art 17 CDSMD that comply with the fundamental rights. In practice, this may lead OCSSPs to follow the solutions eg of Germany even if these are not reflected in other Member States' implementations, *ibid* 919.

¹⁰¹ eg Croatia, Denmark, France, Greece, Italy, Portugal and Spain according to a non-paper of these Member States, <https://www.euractiv.com/wp-content/uploads/sites/2/2021/02/France-et-al-Oct-2020-Joint-Non-Paper-Art-17-DCDSM-1.pdf> accessed 14 January 2023.

¹⁰² DSA, artt 15, 24, 49-55.

¹⁰³ Specht-Riemenschneider (n 76) 109.

¹⁰⁴ European Copyright Society, 'Comment on Copyright and the Digital Services Act Proposal' (2022) 53 ICC 358, 359-364.

¹⁰⁵ Implemented by art 3 Gesetz zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes vom 31.5.2021, Bundesgesetzblatt 2021 I, 1204 as independent legislative act outside the UrhG. The OCSSP Act is

interesting example especially because there is no basis for subjective user rights in German copyright law. It is therefore worth discussing whether the German implementation still insists on old dogmatics or, following the lead of art 17 CDSMD, adapts to the new requirements of digital copyright.

a) Ex Post Remedies of the User

According to the OCSSP Act, OCSSPs are obliged to either a qualified blocking, targeted at the prevention of upload of unauthorized content,¹⁰⁶ or a simple blocking, targeted at the termination of the communication to the public of works after a request by the rightholder.¹⁰⁷ To implement the safeguards of art 17(7)–(9) CDSMD, the OCSSP Act contains duties of the OCSSPs that are directed at the protection of the users both prior to a blocking measure and afterwards. For the ex post protection, s 7(3) OCSSP Act requires the OCSSP to inform the user immediately in cases in which the user's content is blocked. S 14 OCSSP Act provides the user with the right to initiate a complaints procedure. However, these are measures that are already in place on most platforms anyway.¹⁰⁸

The duty of art 17(9) subpara 1, last sentence CDSMD is implemented in a merely superficial way. According to s 13(4) OCSSP Act, the right to appeal remains unaffected. Unlike art 17(9) CDSMD, the provision does not mention a right of the user which can be asserted in front of a state court. The user is not even an explicit addressee of s 13(4), though also not excluded. Hence, it is unclear whether art 13(4) OCSSP Act is directed at the user at all.

Even though the reference to the possibility of court proceedings remains vague, scholars have discussed the question whether the OCSSP Act contains any remedies for the user. A legal claim could be based on s 7(2) 1st sentence OCSSP Act,¹⁰⁹ according to which the qualified blocking of content may not result in the unavailability of content uploaded by users if the use is authorized by law or does not infringe copyright. S 194(1) German Civil Code defines a legal claim as the right to demand that another person does or refrains from an act, in the case of online platforms e.g. the upload of content or respectively its blocking. However, s 7(2) 1st sentence OCSSP Act merely stipulates a result to be achieved. It does not require a specific action of the OCSSP.

available in English as working translation at https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/UrhDaG_ENG accessed 14 January 2023.

¹⁰⁶ OCSSP Act, s 7(1).

¹⁰⁷ OCSSP Act, s 8(1).

¹⁰⁸ Brieske/Peukert (n 91) 15.

¹⁰⁹ Franz Hofmann, 'Update für das Urheberrecht. Einführung in das Gesetz zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes' [2021] GRUR 895, 902; Marcus von Welser, 'Plattformhaftung nach dem Urheberrechts-Diensteanbieter-Gesetz (UrhDaG)' [2021] GRUR-Prax 463, 464.

The same applies to the provision of s 9(1) OCSSP Act. The provision reads: “[...] uses presumably authorised by law must be communicated to the public up until the conclusion of a complaints procedure.” Though the communication to the public may be understood as an act which can be requested by the user, s 9(1) OCSSP Act is only the gateway for the system of uses presumably authorized by law stipulated within Part 4 of the OCSSP Act. A legal claim cannot be deduced from this provision.¹¹⁰

So far, users in Germany were limited to demand the put-back of content after an unjustified blocking measure based on the contractual relationship between the OCSSP and the user.¹¹¹ In view of the fact that no written basis for such claim exists, and instead, the recognition of a contractual claim is subject to the discretion of the court on a case-by-case basis, there remains a legal uncertainty for the user taking legal action, which intensifies the already existing chilling effects.¹¹² Nevertheless, it seems that the German legislator leans on this established practice and because of this, shies away from a clear statement towards the enforceability of user rights.

b) Ex Ante Remedies of the User

Apart from ex post protection, the German OCSSP Act introduces a balanced system that protects the user from unjustified blocking provided that the user-generated content is presumed to be lawful. According to s 9(1) OCSSP Act, uses presumably authorized by law must be communicated to the public up until the conclusion of a complaints procedure. As s 7(2) 2nd sentence OCSSP Act clarifies, the system of uses presumably authorized by law applies in cases in which the OCSSP uses automated procedures to fulfill its duty of qualified blocking pursuant to s 7(1). Uses may only be presumed to be authorized if they contain less than half of a work or several works by third parties, combine the part or parts of a work with other content, and use the work of third parties only to a minor extent or are flagged as legally authorized, s 9(2) OCSSP Act.¹¹³ The possibility for users to flag their content as lawful deems the German OCSSP Act to be a particularly innovative solution for the transposition of art 17 CDSMD.¹¹⁴

In terms of a legal classification, the provisions for uses presumably authorized by law are requirements for the design of a filtering system. Hence, they are procedural rules aimed at protecting the user from unjustified blocking before the blocking occurred. Contrary to the regulation of art 17(4) CDSMD, s 9 OCSSP Act shifts the burden to take action to the

¹¹⁰ Contra: Axel Metzger and Timm Pravemann, ‘Der Entwurf des UrhDaG als Umsetzung von Art. 17 DSM-RL – Ein gesetzgebungstechnischer Drahtseilakt’ [2021] ZUM 288, 294.

¹¹¹ BGH GRUR 2016, 268 ECLI:DE:BGH:2015:261115UIZR174.14.0 para 57.

¹¹² Specht-Riemenschneider/Hofmann (n 79) 99 et seq.

¹¹³ While the three enumerated requirements (s 9(2) 1st sentence no 1-3) must be fulfilled cumulatively, minor uses and flagged uses are alternative to each other (s 9(2) 1st sentence no 3).

¹¹⁴ Leistner (n 99) 910.

rightholder.¹¹⁵ The provision thus contains an ex ante protection for the user, which effectively protects the user's interest by changing the technical prerequisites for filtering systems.

The question remains if the OCSSP Act provides any remedies if the OCSSP refrains from setting up its filtering system accordingly, enabling the system to identify minor uses and allow the flagging of content as a counteraction to the qualified blocking. Without such remedies, there might not be enough incentives for OCSSPs to adapt the filtering systems, as they must not fear any legal and monetary consequences in case of non-compliance.

Firstly, the OCSSP Act does not contain any provisions establishing an oversight practice for filtering systems coordinated by state authorities or other unbiased entities, entailing the possibility for sanctions.¹¹⁶ This is not surprising, considering that art 17 CDSMD does not contain such a requirement either.

Secondly, regarding a remedy of the user, the wording of s 11(1) OCSSP Act is interestingly more telling than the wording of s 7(2) and s 9(1) OCSSP Act. S 11(1) OCSSP Act stipulates that the service provider is *obliged* to not only inform the user about the blocking request and the possibility of legal permission pursuant to s 5 OCCSP Act, but also *to enable the user to flag the use* as legally permitted. If a provision obliges a party to a certain action or omission, the beneficiary of the provision usually has a claim on which basis the beneficiary can seek legal protection.¹¹⁷

Unfortunately, the German legislator refrained from a clear statement regarding a potential claim arising out of s 11 OCSSP Act. The preferable incentives and the wording of s 11 as well as the obligation of OCSSPs to organize their platforms in compliance with the interests of users protected by fundamental rights argue in favor of a claim.¹¹⁸ Users of a platform are already restricted in their rights when the upload of lawful content is only possible if the filtering system does not notice a match with a reference file. Under these circumstances, users would be regularly forced to prepare for a blocking and file a complaint if they wish to upload content. As AG Szpunar in his opinion to the case *Glawischnig-Piesczek*¹¹⁹ states, users must be able to “challenge, before a court, the implementing measure adopted by a host provider” that affects them.¹²⁰

¹¹⁵ *ibid* 915.

¹¹⁶ Brieske/Peukert (n 91) 19 et seq.

¹¹⁷ cf German Civil Code, s 194(1). Art 17 CDSMD, however, does not anticipate such a claim, Reda/Selinger/Servatius (n 78) 41.

¹¹⁸ cf *UPC Telekabel* (n 39) paras 55 et seq. Even though in *UPC Telekabel*, the claimant filed for an injunction, the finding of the CJEU is applicable to constellations of legislative obligations such as the blocking obligation under art 17(4)(b) CDSMD, Reda/Selinger/Servatius (n 78) 22 et seq.

¹¹⁹ C-18/18 *Glawischnig-Piesczek* [2019] ECLI:EU:C:2019:821.

¹²⁰ C-18/18 *Glawischnig-Piesczek* [2019] ECLI:EU:C:2019:458, Opinion of AG Szpunar para 65.

An argument against a remedy of the user is that s 11 OCSSP Act is based on a *presumption* of lawfulness. At the stage of automated filtering and until the conclusion of the complaints procedure, the lawfulness of the content is merely presumed, because either the content is flagged as lawful or the threshold of s 10 OCSSP Act is not met. The actual lawfulness of the content is only relevant on a secondary level. This does not render the right to upload lawful content to be less worthy of protection *but* the right to interact with a filtering system that complies with the requirements of ss 9–11 OCSSP Act.¹²¹

Additionally, the practical relevance of a remedy directed at the adaptation of the filtering system to take uses presumably authorized by law into account is doubtful. Users will not have enough insight into the filtering system to notice systematic errors in the functioning of the system and it is more likely that they – if at all – base a legal action on the upload of specific content. Aware of these chilling effects on the side of the individual user, s 18(6) OCSSP Act explicitly stipulates the possibility for registered users' associations to claim injunctive relief against the service provider. The remedy is limited to situations in which OCSSPs repeatedly and wrongly block authorized uses.

In the end, the German OCSSP Act marks a good beginning as it emphasizes the importance of user interests and provides ex post as well as ex ante protection mechanisms.¹²² Yet, it does not take a stance on the enforceability of user rights by establishing respective remedies for the user, neither after the blocking of content nor before. In addition, the OCSSP Act does not contain any public law sanctions such as state oversight or the possibility for administrative fines against the OCSSP. In consequence, the current regulatory framework creates a risk that the provisions directed at a user-friendly design of a filtering system run at idle as they are not accompanied by sufficient enforcement mechanisms.

V. Conclusion

Digital user rights, encompassing an enforceable legal position of the users of OCSSPs, have found their way into EU law. With art 17(9) subpara 1, last sentence CDSMD, the Copyright Directive codifies what the CJEU already deemed necessary in UPC Telekabel, namely the possibility for the user to assert the use of an exception or limitation in front of a court or another judicial authority. However, a clear guidance on how to implement such right into national law is missing.

¹²¹ cf Leistner (n 99) 918 who points out that “[s 9 OCSSP Act] is consequently *not* a regulation of the scope of copyright protection or a possible justification of certain uses in general, i.e. beyond the temporal and procedural limits of the specific liability regime for OCSSPs”.

¹²² And therefore serves as a model for other Member State implementations or for OCSSPs as an EU-wide compliance standard for their platforms, *ibid* 910.

Member States are now faced with the difficult task to transpose a stricter liability standard into their legal system while simultaneously find a balanced regulation, which does not hinder lawful behavior on online platforms. AG Saugmandsgaard Øe as well as the Commission provide at least some guidelines towards an effective user protection; albeit the CJEU did not confirm nor deny whether the suggested measures comply with the Directive and the principles of EU law. This poses a problem on Member States for whom the concept of enforceable user rights, i.e. the right to assert exceptions and limitations irrespective of an ongoing infringement proceeding, is novel.

The example of Germany shows that Member States are struggling with the contrariety of their own established copyright dogmatic and a new need for enforceable user safeguards. The German OCSSP Act ensures a high form of user protection through the introduction of uses presumably authorized by law, whose prerequisites are translatable into computer language. In addition, the user has the possibility to start a complaints procedure in cases in which the use does not classify as presumably authorized by law. Thus, users are equipped with rights under the OCSSP Act that shall ensure an unimpeded upload of their content. Nevertheless, the OCSSP Act lacks a provision directed at its own enforceability. As of now, the effectiveness of the OCSSP Act ultimately depends on the willingness of the platforms to comply with the rules.

It will take first decisions by the courts to assess whether enforceable user rights have found their way into German law (or in any other Member State law), or whether digital user rights continue to be a mere idea of EU legislation. However, changed conditions in copyright make it necessary for Member States to recognize users not as mere passive entities but legal subjects worthy of protection. The responsibility for the compliance with regulations directed at the protection of the user cannot be transferred to the OCSSPs; instead, Member States must proactively ensure that user safeguards are implemented in practice. Otherwise, there is a real risk of a divergence between legal standards and platform reality.