

Article 17 C-DSM Directive

A suitable tool for protecting
communicative freedoms on
online social media platforms?

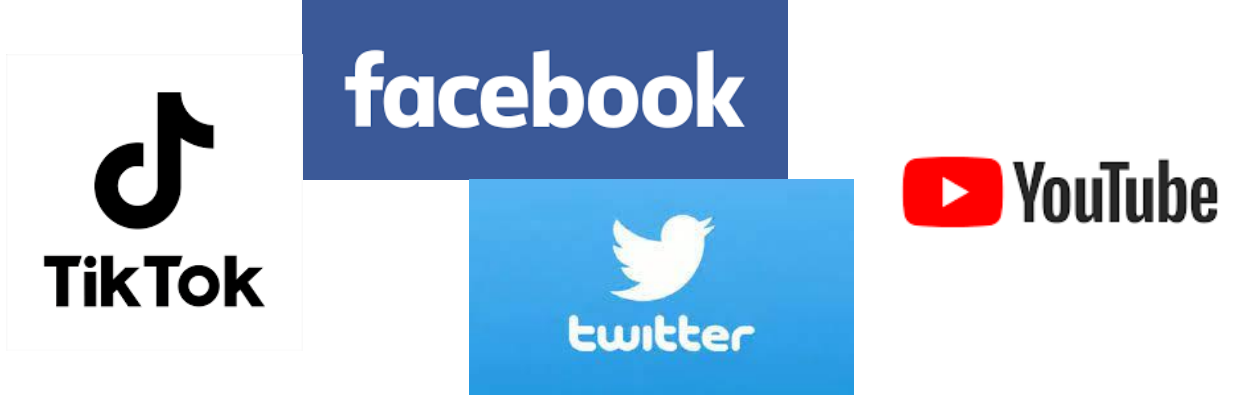
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Structure



- Why is it important to protect **users' communicative freedoms** on online social media platforms?
- Is **Article 17 of the C-DSM Directive (2019)** a suitable tool for protecting users' communicative freedoms on online social media platforms?
- Would the coming into force of the **Digital Services Act (DSA)** enable better protection of users' communicative freedoms on online social media platforms?

I.

Why is it important to protect **users'**
communicative freedoms on online social media
platforms?



Private ownership but **public function**

Digital spaces that provide infrastructure and tools to enable and facilitate **interaction, discourse and information exchange** by a geographically dispersed public.

- Openness to public
- High number of users (Facebook has 2.93 billion)
- Discourse on platforms has powerful capacity to influence and direct public opinion and will formation.



Essential infrastructures for democratic discourse & civic participation.

**#GoHome
Gota2022**



User-Generated-Content (UGC) & freedom of expression

Involves the re-use and re-interpretation (transformative use) of existing content in creative ways for purposes of commentary and critique and to create ‘new-meaning’, typically for non-commercial purposes.

E.g. Remix, mashups, memes (GIFs)

A powerful form of individual self-expression for critiquing power structures, deconstructing social myths and challenging dominating media messages in a creative way. (Conti, 2019, 346)

CJEU, Case C-401/19, Poland v Council [2022]

“User-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression” (para.46, citing ECtHR, 1 December 2015, *Cengiz and others v. Turkey*, § 52).



Enter copyright law



Example 1: Joker Obama

In 2009 a college student photoshopped a photograph of Obama taken from the 'Time' magazine cover, to make him look like the Joker.

The image was uploaded to Flickr and became a viral phenomenon sparking a widespread discussion on art, racism and the acceptable bounds of political commentary etc.

Flickr removed the image and deleted forum threads discussing the image **citing copyright infringement** of the original image.



Example 2: Buffy vs. Edward: Twilight remixed

“In this re-imagined narrative, Edward Cullen from the Twilight Series meets Buffy the Vampire Slayer. It's an example of **transformative storytelling** serving as a **pro-feminist visual critique** of Edward's character through Buffy's eyes. Some of the more sexist gender roles and patriarchal Hollywood themes embedded in the Twilight saga are exposed - in hilarious ways.”

In 2013 YouTube **removed this video citing infringement of Lionsgate's copyright**. But in the face of significant Internet protests, Lionsgate conceded fair use and the video was re-posted.



Copyright E&L for UGC

Copyright recognizes the importance of protecting **users' communicative freedoms** to engage with and to respond to creative and cultural content in ways that reasonably require the use of those works.

- **Canadian Copyright Act § 29.21**: Exception for user-generated non-commercial content.
- **US Copyright Act § 107**: “Fair Use” when purpose and character of use is ‘transformative’ [Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994)]

Article 5 of the EU Copyright in the Information Society Directive [2001] non-mandatory exceptions for:

- Article 5(3)(d) **quotations** for purposes such as criticism or review
- Article 5(3)(k) **use for the purpose of caricature, parody or pastiche**

} Remix
Meme
Mashup

Copyright E&L and freedom of expression

- ❖ CJEU in *Deckmyn* (C-201/13), *Funke Medien* (C-469/17), *Pelham* (C-476/17), *Spiegel Online* (C-516/17)
 - E&L to **quotation** and **parody** contribute to the exercise of users' freedom of expression (Article 11 CFR) and **freedom of the arts** (Article 13 CFR).
 - Status of “**user rights**” not mere user privileges [*Funke Medien*, para 70].
- ❖ AG Saugmandsgaard Øe's Opinion, 15 July 2021 in *Poland v Council* (C-401/19)
 - Quotation, criticism, review, parody, pastiche caricature accord users' right to freedom of expression (para 144).
 - A significant proportion of the content uploaded by users consist of users which may be covered by these E&L (para 145).

II.

Can **Article 17** adequately protect users' communicative freedoms?

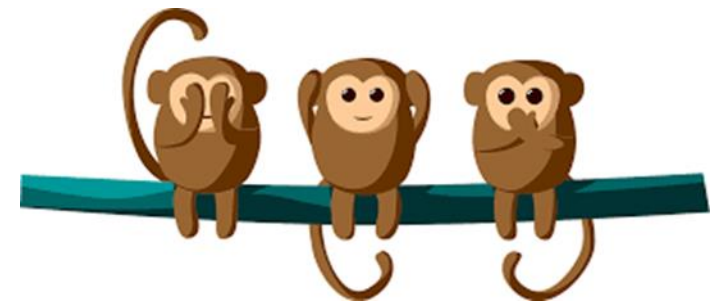
| CAN EUROPE MAKE IT?

The EU is killing our democratic spaces using copyright as a Trojan horse

DiEM25's position on Copyright Reform: democratize technology instead of allowing it to be used as a giant censorship machine in the interest of big business.

[Renata Avila](#)

How is **copyright enforced** on social media platforms?



Content moderation by platform owners (intermediaries):

Monitoring/filtering content posted by users to **remove/block copyright infringing content** and to **block/suspend accounts** of users who engage in infringing behavior.

- Grants platform owners the capacity to direct and influence public discourse:
- **Enabling function:** Shaping behavior and perceptions through norm-setting (what is infringing and non-infringing use).
- **Restricting function:** Inhibiting behavior or access through removal of content (suppression of speech) or user accounts (denial of access to participate in public discourse).



Platform owners as curators of online discourse & arbiters of users' communicative freedoms.

Article 17 of the C-DSM [2019]

Legal framework for determining liability of **online-content sharing service providers (OCSSPs)** for **copyright infringement arising from content uploaded by users**. [Sector-specific]

Article 2(6):
OCSSP is a provider of an information society service of which the main (one of the main) purposes is to **store and give the public access to a large amount of copyright-protected works** or other protected subject matter uploaded by its users, which it **organises and promotes for profit-making purposes**



Social media platforms come within framework of Article 17

Lex specialis to general intermediary liability framework under eCommerce Directive (soon DSA)

Policy rationale is **bridging the 'value gap'**: Alleged under compensation of copyright owners for copyright protected content shared by users over online content sharing platforms (heavily advocated by the music industry).



Economic Goal !!



How does it seek to achieve this goal?

1. **Co-opting OCSSPs as content distributors** who perform an act of communication to the public [Article 17(1)].
 - **Directly liable** for copyright infringements that are materially committed by users.
 - **Cannot rely on safe-harbour** in Article 14 eCommerce Directive [Article 17(3)].
 - To avoid liability must make **'best efforts' to obtain licenses** from rightholders for content uploaded by users. [Article 17(4)(a)].
2. Where licenses cannot be obtained, **co-ercing OCSSPs to act as Internet Police** to **prevent the sharing of copyright protected content** by imputing positive obligations to:
 - Make **'best efforts' to ensure unavailability** of specific works for which rightholders have provided relevant and necessary information [Article 17(4)(b)].
 - Act expeditiously upon receiving notice from rightholders to take-down infringing content and make **'best efforts' to prevent future upload** of that content [Article 17(4)(c)].



Preventive monitoring obligations (ex ante copyright enforcement through prior review)

Enhances risk of collateral censorship and chilling effects on speech

Incentivizes OCSSPs to block/remove even potentially infringing content.

- Cost-benefit analysis: less costly to remove questionable content than risk liability)

Incentivizes adoption of **automated content moderation (ACM)** with attendant risks of false positives.

- Recital 66: ‘Best efforts’ assessed in accordance with best industry practices and evolving state-of-the-art, including future developments (prevailing industry standard is ACM).
- Commission Guidelines: Fully-automated blocking must be limited to cases of manifestly infringing content BUT loophole for content ‘earmarked’ as causing ‘significant economic harm’.



But how about users' communicative freedoms?

Article 17(7): E&L for **quotation, criticism, review, parody, caricature and pastiche** are **mandatory** exceptions that Member States must implement (at least for online content sharing services).

But,

- × No explicit liability imposed on OCSSPs for wrongful suppression of uses of copyright protected content coming within these E&L.
 - Article 17(7): Content moderation “shall not prevent availability of content covered by E&L”; Article 17(9) “the Directive shall in no way affect legitimate uses under E&L”. But, what is the liability for non-compliance with this positive obligation?
- × No enforceable obligations/duties on OCSSPs to safeguard E&L.
 - At present, OCSSPs not bound by positive obligations to protect FoE (Possible exception: *Mittelbare Drittwirkung* in German law) to impute liability for failure to safeguard user freedoms to rely on E&L on the basis of violating FoE in the content moderation process.

Article 17(9): Complaint-and-redress mechanism **after take-down**.

- × ‘Ex post’ review mechanism: Does not prevent ‘chilling effects’.

III.

Will the **Digital Services Act (DSA)** be a game changer?



Suggests stronger protection of freedom of expression on platforms

Article 14 (1)

Providers of intermediary services shall include **information on any restrictions that they impose in relation to the use of their service** in respect of information provided by the recipients of the service, in their terms and conditions.

That information shall include information on any policies, procedures, measures and tools used for the purpose of content moderation, including algorithmic decision-making.

Article 14(4)

Providers of intermediary services shall act in a diligent, objective and proportionate manner in applying and **enforcing the restrictions** referred to in paragraph 1, with **due regard** to the rights and legitimate interests of all parties involved, **including the fundamental rights of the recipients of the service, such as the freedom of expression, freedom and pluralism of the media**, and other fundamental rights and freedoms as enshrined in the Charter.



Horizontal application of fundamental rights to intermediaries? Or ‘Paper Tiger’?

[Using Terms and Conditions to apply Fundamental Rights to Content Moderation Is Article 12 DSA a Paper Tiger? – Digital Legal Lab \(sectorplands.nl\)](#)

Will Article 14 DSA apply to copyright enforcement on online social media platforms?

Article 14 DSA is a ‘provision applicable to all providers of intermediary services.

- But, Article 17 C-DSM Directive is *lex specialis* for OCSSPs’ intermediary liability for copyright infringement.

Recital 11 DSA includes a specific clarification:

Regulation is without prejudice to Union law on copyright and related rights, *including*, Information Society Directive (2001), IP Enforcement Directive (2004) and C-DSM Directive (2019) which establish specific rules and procedures that should remain unaffected.

But, Recital 9 DSA:

Member States **should not adopt or maintain additional national requirements** relating to the matters falling within the scope of this Regulation, unless explicitly provided for in this Regulation, since this would affect the direct and uniform application of the fully harmonized rules applicable to providers of intermediary services.

Observations

- Social media platforms (OCSSPs) will be regulated by the DSA for matters other than copyright enforcement.
- Article 14 DSA will apply to social media platforms in relation to restrictions imposed on user-generated content other than copyright infringing content.
- Given the fact that the CJEU has clearly grounded copyright E&L in Article 17(7) within the freedom of expression and the stipulation in Articles 17(7) and Articles 17(9) that copyright enforcement “**shall not prevent availability of content covered by E&L**” Article 14 DSA obligation should be interpreted as *also* extending to copyright enforcement on social media platforms.