



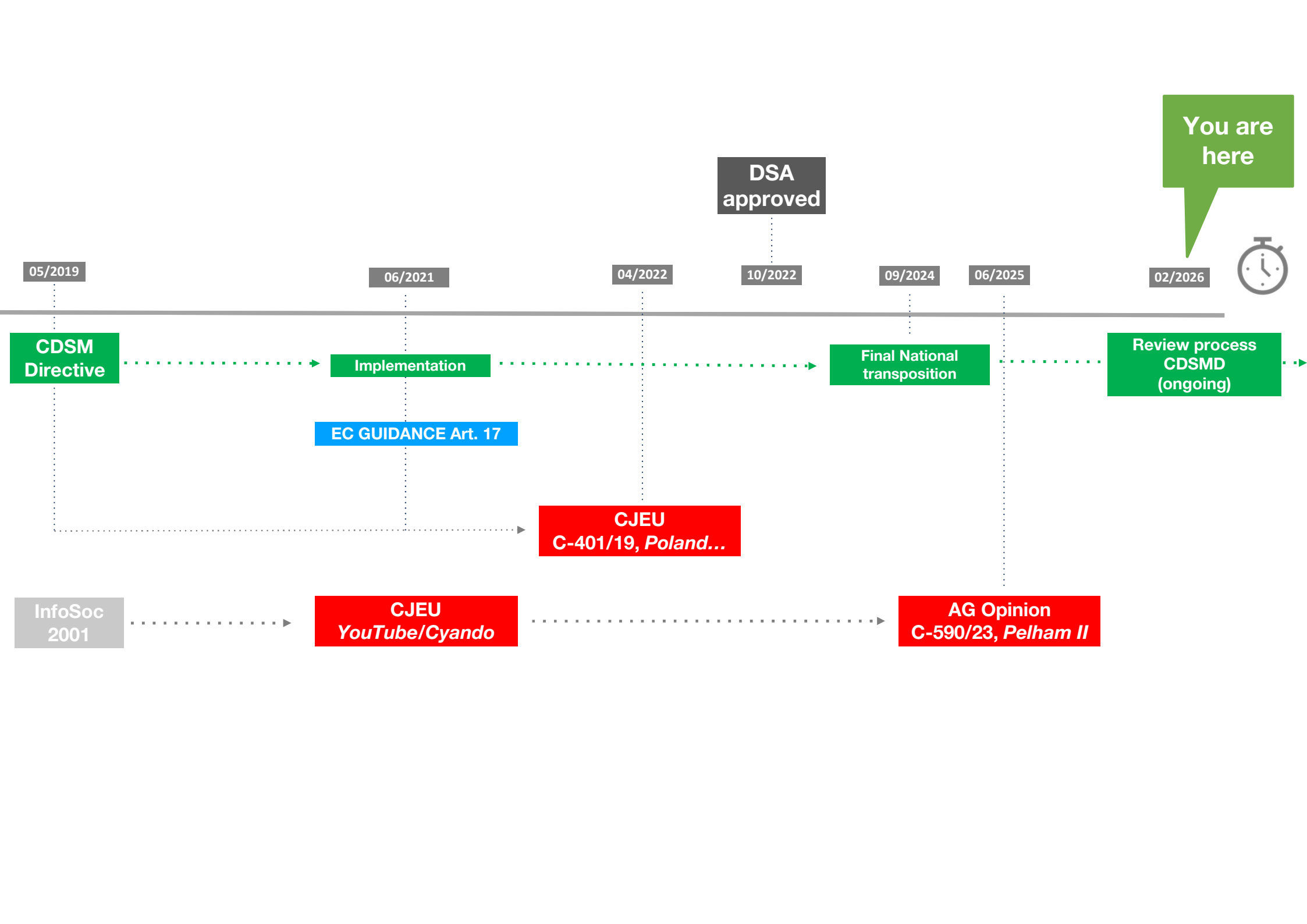
UNIVERSITY OF AMSTERDAM  
Institute for Information Law



# Online platforms and the pastiche exception(s)

**Vereniging voor Auteursrecht (VvA)**  
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# Pastiche concept spectrum

(cf. AG Opinion *Pelham II*)



## DE, EC ('catch-all clause')

- (i) Evokes existing work by **perceptibly reproducing** protected material.
- (ii) Is noticeably different, creating a distinct overall impression.
- (iii) Involves an artistic confrontation with the source material.
  - No further interaction with the source (e.g. criticism, dialogue, imitation, or homage) is required.

Covers (all?) online uses like remix, memes, GIFs, mashups

## AG ('overt stylistic imitation')

- (i) Evokes an existing work, artist, genre, or school by adopting a distinctive aesthetic.
- (ii) It is noticeably different from the source imitated (**≠ 'original'**).
- (iii) It is **intended to be recognisable as an imitation** (objective assessment – recognisable by viewer/listener familiar w/ source).
  - Purpose is irrelevant

Covers 'broad range of artworks' re: 'certain derivative expressions' → *some* but not all UGC

# Copyright Platform Regimes

Non-OCSSP

OCSSP

**DSA +**

- 3 InfoSoc (& 5 – E&Ls) + 14 e-Commerce / 6 DSA
- Default: no direct liability**  
Hosting safe-harbour + modular duties of care
- Content Moderation**  
Modular duties of care based on YT/Cyando + national law



- 17 CDSMD
- Default: direct liability**
- Content Moderation**  
Preventive measures (4-6) vs safeguards (7-10)

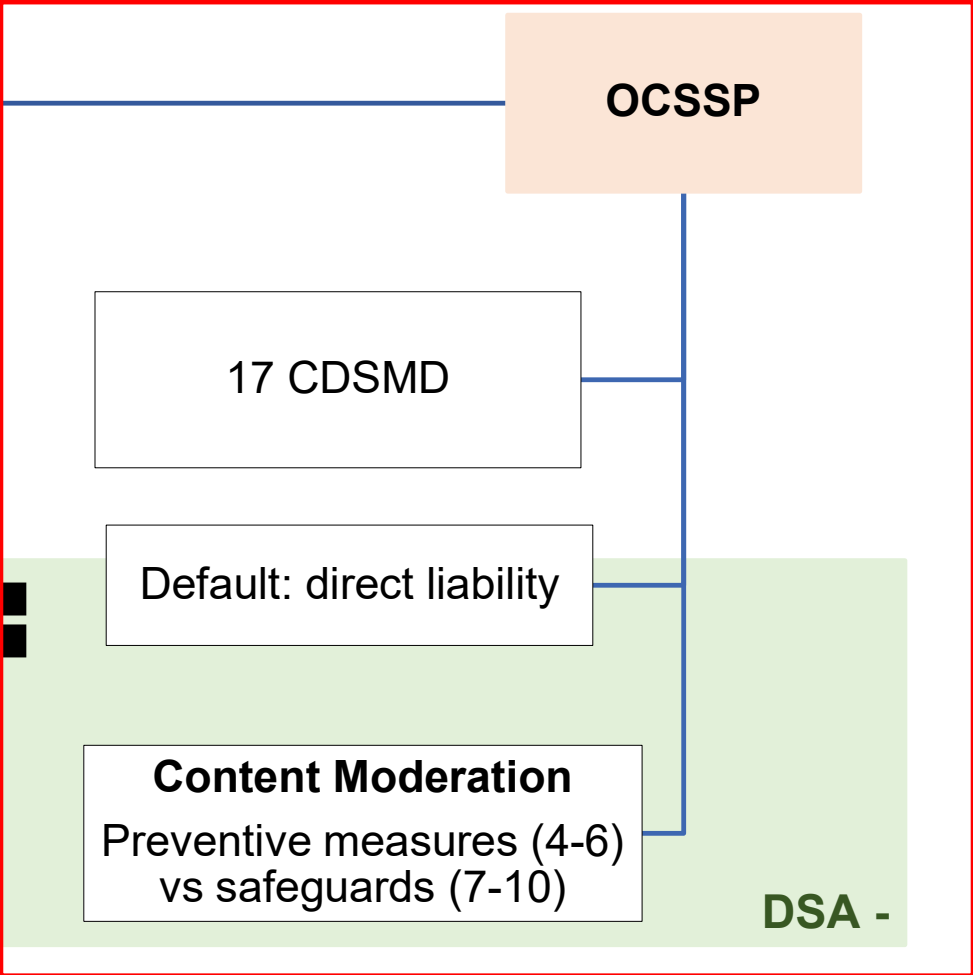
**DSA -**

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CDSM-pastiche

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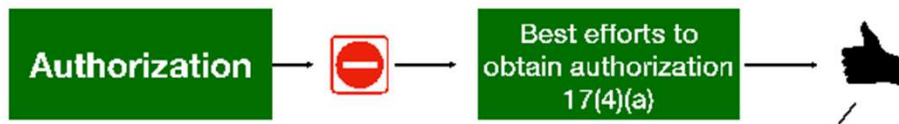
DSA +

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## The Article 17 regime in a nutshell

- **17(1)**: online content-sharing service provider (OCSSP, art. 2(6)) performs an act of communication to the public when it provides access to user-uploaded works & must obtain authorization
- **17(3)**: OCSSP cannot invoke the hosting safe harbour (Art. 14 ECD / Art. 6 DSA)
- **17(4)-(6)**: specific, conditional safe harbours
  - OCSSP made best efforts to obtain licence
  - OCSSP made best efforts to prevent (re)upload of notified content
    - NB: 17(6) contains mitigated regime for small & new OCSSPs – see [SWD\(2024\) 259 final, EC Assessment – limited evidence of practical application](#)
- **17(7)-(8)**: OCSSP-rightholder cooperation may not lead to blocking of uploads which are lawful (incl. exceptions & limitations), nor to general monitoring
- **17(9)**: effective user redress
- **17(10)**: European Commission guidance ([COM\(2021\) 288 final](#))


# **Article 17: Users' Safeguards**

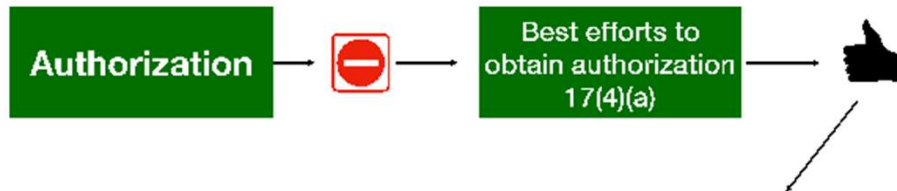


**Preventive Measures**  
17(4)(b-c)



**Preventive Measures**  
17(4)(b-c)

c) NTD Others?	 CRTs b) Filters c)NSD
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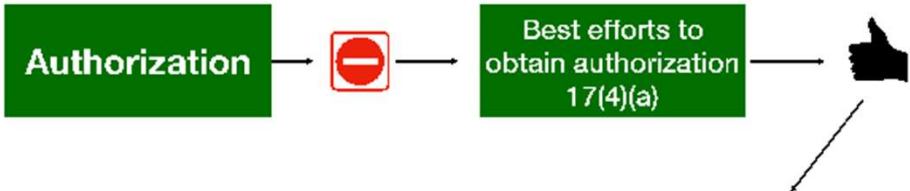
**Preventive Measures  
17(4)(b-c)**

c) NTD  
Others?

  
CRTs  
b) Filters  
c)NSD


**EC Guidance 2021 on (4) - b)**  
**Endorses Filters as main solution**

**CJEU, C-401/19, Poland...does the same, as least for OCSSPs of certain size and reach**



**Preventive Measures**  
17(4)(b-c)

NTD  
Others?



CRTs  
(Filters, NSD)

**VS**

# Safeguards

- User Rights & Freedoms**  
 17(7), (9)
  - covers most UGC
  - Mandatory
  - Unremunerated
  - No contractual or TPM override
  - Contextual & dynamic (x 27)

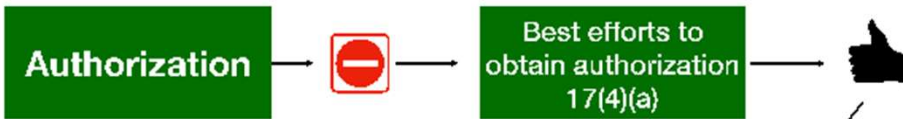
+

- Other E&Ls and lawful uses**  
 17(7), (9)

+

- Complaint & Redress**  
 (Procedural Safeguards)  
 17(9)

# Safeguards



Preventive Measures  
17(4)(b-c)

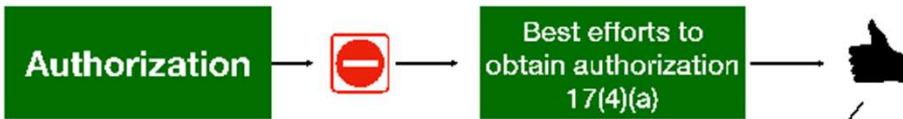
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## 17(7)

- Preventive measures must not result in the prevention of the availability of user-uploaded content that do not infringe ©, including content covered by E&L.
- **Mandatory (≠ art. 5(2) & (3) InfoSoc) + uncompensated user E&Ls at least on OCSSPs**
  - quotation, criticism, review
  - use for the purpose of caricature, parody or **pastiche**

# Safeguards



Preventive Measures  
17(4)(b-c)

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**C-401/19, Poland... : Article 17(7) provides “user rights”**

See also AG in *Pelham II*, para 72 (pastiche E&L confers ‘rights’ on users)

# National implementations Article 17

## 2 basic models (regulatory split)

- **(1) Most MS: “traditional”**, “copy-out” approach w/ minor changes
- **(2) DE: “innovative”** approach, w/ explicit ex ante safeguards vis-à-vis non-manifestly infringing content (see AG + CJEU in *Poland*; EC Guidance)

# The German UrhDaG – Act on the Copyright Liability of OCSSPs

- Implementation in separate legislative instrument (UrhDaG)
- *Lex specialis* to general Copyright Act
- Ex ante duties to block unlawful content intertwined w/ ex ante duties to avoid the unavailability of lawful user content + remuneration

## **Part 1**

### **General provisions**

[Section 1](#) [Communication to the public; liability of the service provider](#)

[Section 2](#) [Service providers](#)

[Section 3](#) [Services not covered](#)

## **Part 2**

### **Authorised uses**

[Section 4](#) [Obligation to acquire contractual rights of use; author's entitlement to direct remuneration](#)

[Section 5](#) [Uses authorised by law; remuneration of the author](#) 

[Section 6](#) [Extension of authorisations](#)

## **Part 3**

### **Unauthorised uses**

[Section 7](#) [Qualified blocking](#) **Filters**

[Section 8](#) [Simple blocking](#) **NTD**

## **Part 4**

### **Uses presumably authorised by law**

[Section 9](#) [Communication to the public of uses presumably authorised by law](#) 

[Section 10](#) [Minor uses](#)

[Section 11](#) [Flagging of uses authorised by law](#)

[Section 12](#) [Remuneration by service providers; liability](#)

## **Part 5**

### **Legal remedies**

[Section 13](#) [Legal remedies; protection against distortion; access to the courts](#)

[Section 14](#) [Internal complaints procedure](#)

[Section 15](#) [External complaints body](#)

[Section 16](#) [Alternative dispute resolution by private arbitration bodies](#)

[Section 17](#) [Alternative dispute resolution by an official arbitration body](#)

## **Part 6**

### **Final provisions**

[Section 18](#) [Measures against abuse](#)

[Section 19](#) [Rights to information](#)

[Section 20](#) [Person authorised to receive service in the Federal Republic of Germany](#)

[Section 21](#) [Application to related rights](#)

[Section 22](#) [Mandatory law](#)


## Section 5: Uses authorised by law; remuneration of the author



- CTP in an OCCSP is authorised, inter alia, for purposes of caricatures, parodies and **pastiches** in accordance with section 51a of the Copyright Act
  - NB: upload must be **non-commercial** / insignificant revenue (17(2) CDSMD; 6(1) UrhDaG)
- OCSSPs must pay authors “**appropriate remuneration**”, for caricature, parody and **pastiche uploads** (not for quotations)
  - Remuneration is unwaivable
  - Can only be assigned to a CMO
  - Can only be “asserted” by a CMO
- **CDSM-pastiche = remunerated E&L (≠ non-CDSM online pastiche + offline pastiche... → e.g. sampling? [Leistner 2022])**

## The German UrhDaG – Part 4: **Uses presumably authorised by law**

- Section 9: CTP of uses presumably authorised by law
- Section 10: Minor uses
- Section 11: Flagging of uses authorised by law
- Section 12: Remuneration by service providers; liability



Use of  
automated  
procedures  
by OCSSPs

## Section 9: CTP of uses presumably authorised by law

- **Time-limitation:** Upload must **stay up** until end of C&R procedure
  - ‘delayed takedown system for well-defined small-scale uses or certain UGC’ (Leistner 2022)
- **Rebuttable presumption of authorised uses** (cf. Sec. 5)
  - 1. contains less than 50% of work or several works by 3<sup>rd</sup> parties,
  - 2. combines the part or parts of a work referred to in no. 1 w/ other content, and
  - 3. uses the works of 3<sup>rd</sup> parties only to a minor extent (**sec. 10**) *or* is flagged as legally authorised (**sec. 11**)
- Obligation to immediately notify copyright holder
- NB
  - **Red button** for rebutting presumption for trustworthy © holders (sec 14(4))
  - Special rules for **images**: – can be used in their entirety if meeting conditions of point 3 (sec. 10 or sec. 11)

**De facto  
scope  
of online  
CDSM-  
pastiche?**

## Section 10: Minor uses

- Must not serve commercial purposes or only serve to generate insignificant income
- +
- Uses up to:
  - 15 seconds of a **cinematographic work** or **moving picture**,
  - 15 seconds of an **audio track**,
  - 160 characters of a **text**,
  - 125 kilobytes of a **photographic work, photograph** or **graphic**.

## Section 11: Flagging of uses authorised by law

- If upload is to be blocked automatically + does not qualify as minor use, then OCCSP must inform user of:
  - Blocking request
  - Need for upload to be authorised use cf. section 5
  - Enable user to flag use as authorised by law pursuant to section 5.

## Section 12: Remuneration by service providers; liability

- OCSSPs must pay authors “**appropriate remuneration**” for uses **presumably authorised by law, including pastiche** (→Sec 5 applies accordingly)
  - role for CMOs
  - **de facto merger of caricature, parody and pastiche concepts** (subject to remuneration)
  - **Complex interaction: already licensed UGC content vs remunerated presumed authorized pastiche in delayed blocking scenario (9-12) vs remunerated actually authorised pastiche (5)**
- OCSSP liability
  - Damages: None until end of C&R procedure; afterwards, only if culpable violations of C&R procedure
  - Claims for injunctive relief and removal remain unaffected.
- User liability: none in case of minor use until end of C&R procedure; yes for flagged use

# Exam questions

- **[DE] Delineation:** free quotation vs remunerated pastiche (+ caricature, parody)
- **[DE] Paradox:** General pastiche, including online non-OCSSP (commerciality OK, free) vs CDSM-pastiche (non-commerciality required, paid)
- **[EU] Remuneration:** Can a narrowly interpreted CDSMD-pastiche (*cf.* AG in *Pelham II*) be subject to remuneration obligations?
  - Recital 36 InfoSoc accepts possibility of MS introducing “fair compensation” for uncompensated optional E&Ls; CDSMD is silent on this
  - AG, para. 132: talks of ‘framed, compulsory licences or statutory remuneration’ ... but IMO in re: to a broader ‘artistic reuse’ exception
- **[EU] AI vs platforms:** If pastiche requires *intention* and the **provider** (i) has none and (ii) is not an OCSSP, then what is the legal basis for attributing primary liability to the provider?
  - Ask Professor Dirk Visser



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