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# The Role of Intermediary Liability in Balancing Copyright Law in the Digital World

## Abstract

Through the rapid shift from the analogue to the digital age, access to all information is only one click away, independent of place and time. On the one hand, online platforms serve as a bridge between authors and the public by showcasing their creative minds in a less affordable way. On the other hand, it is also an intermediary for enabling users to share and circulate illegal content. Then, who will be responsible for this unlawful content?

Considering that a platform has millions of subscribers, mainly anonym users, the copyright owner cannot find the direct infringer when a copyrighted work is shared without the authorization of the copyright holder by a third party on the platform of the intermediary. It seems more manageable for the right holder to assert the infringement claims against the intermediaries despite the fact that they are not absolute infringers. Therefore, there have been some responsibilities to online intermediaries, and the basis of the liability of intermediaries is covered under the directives of the European Union (EU). Besides, a rights clash arises from exercising fundamental rights and rights provided under copyright law. This is because there are three sides to this game, and each side has the expectation of protection for their rights. For instance, intermediaries can conduct their businesses and play an important role in individuals' freedom of expression and access to information. There are also intellectual property rights of creative work owners given high protection. A fair balance between such actors of copyright law during the implementation of these responsibilities must be ensured to protect fundamental rights. This paper discusses whether the legal framework of the EU on the liability of online intermediaries is a sufficient tool to assure a fair balance. In doing so, there will be an examination of EU policies and CJEU case law on intermediary responsibilities.

## 1. Introduction

Law aims to meet the requirements of societies to ensure that people can have a regular life in hectic conditions. This aim is also considered when the protection of intellectual creations is guaranteed in copyright law. The protection started with books as copyrighted works with the invention of the printing press.[2] The publication of books is known as one of the motives, called material side, for copyright protection along with the other three factors, which are the personal side (author's request of protection for their artistic work), consumption side, which reflects the public interest in the copies of a work and the legislative side which represents the regulatory character of copyright law as a balancing factor between the rights of the copyright holder and the society's interest.[3]

The principles of copyright protection have developed due to the evolution of technology and social life. Today, thanks to web 2.0, the evolved version of the internet[4], creative works

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[2] Peter Mezei, 'The Role of Technology and Consumers' Needs in the Evolution of Copyright Law' in Peter Mezei and Dora Hajdú and Luis Javier Capote-Perez, *Introduction to Digital Copyright Law* (3rd edn, Iurisperitus Kiadó 2018), 23

[3] Ibid 24

[4] 'Web 2.0', Oxford Advanced Learner's Dictionary (OUP 2023) <https://www.oxfordlearnersdictionaries.com/definition/english/web-2-0?q=Web+2.0> accessed 27 November 2022

accessible as attached to a material medium are now reachable in a digital format at any time, wherever there is an internet connection. In sum, the internet has changed the form of dissemination and communication to the public of creative work. For instance, in the very early 2000s, we were recording our favourite songs on a cassette to listen to them over again, but now, there are music streaming platforms such as Spotify offering subscriptions and allowing people to reach various kinds of copyrighted music, with some technological restrictions to prevent the work being distributed without rightsholder's authorisation.[5] With this service, we can make our playlist and listen to it on multiple devices simultaneously.

Moreover, the internet has given many opportunities to people who have creative ideas. They can create content, which is called user-generated content (UGC), upload it to those platforms, and reach out to other users. The fact that complete information and subject can be shared on the internet brings some problems. While providing all information flow online, intermediaries made their platforms suitable for users' illegal uploads of copyrighted work. Furthermore, politically, and racially motivated hate speech by hiding those unlawful acts behind the freedom of speech has also become widespread. These issues lead to violation of human rights as defined under constitutional law and rights under criminal and copyright law of nations. The problem is the technological sophistication of how information useful or harmful to society is disseminated. This is because the current policies to be applied in resolving disputes arising from such developments are always one step behind.[6] It needs help to keep up with the sudden shift. Besides those drawbacks, the lawmaker's high protection granted to the authors raises a concern; for instance, when injunction claims are evaluated by the Court of Justice of the European Union (CJEU), the fair balance between the interested parties' rights has not been achieved.[7] Accordingly, there are concerns over the incompatibility of the statutory liability of online intermediaries with the EU Charter of Fundamental Rights (EU Charter)[8]. Any protection granted to the owner of creative work under copyright law restricts the freedom of other interested parties. However, copyright law also safeguards cultural interests and ensures a consistent source of cultural elements in the public interest.[9] This means that the nature of copyright law covers the balance between the rights holder and other interested actors.

In this paper, before specifying the liability of online intermediaries, we will first examine who they are regarding the statutes and in which cases they can be exempted from liability referencing the CJEU interpretation, i.e., safe harbours. While reviewing the liability regime, there is an analysis of deficiencies in applying the existing rules to disputes and which fundamental rights are violated in the digital environment. Finally, considering the opinions of academics and CJEU decisions on the fair balance issue, there is a discussion on what kind of adjustments would be positive in solving legal uncertainty in the future. we will also point out the measures that online intermediaries must take to be exempted from liability creating proportionality concerns.

## 2. How to Define Online Intermediaries in European Copyright Law

[5] Stefan Bechtold, 'Digital Rights Management in the United States and Europe' (2004) 52 The American Journal of Comparative Law 325 https://doi.org/10.2307/4144454 accessed 27 November 2022

[6] Lyria Bennett Moses, 'Recurring Dilemmas: The Law's Race to Keep up with Technological Change', (2007) UNSW Law Research Paper No. 2007-21, 9 https://ssrn.com/abstract=979861 or http://dx.doi.org/10.2139/ssrn.979861 accessed 27 November 2022

[7] Case C-360/10, Belgische Vereiniging van Auteuers, Componistern en Uitgevers CVBA (SABAM) v Netlog NV, judgment of 16 February 2012, ECLI:EU: C:2012:85, para. 45-47

[8] Charter of Fundamental Rights of the European Union OJ 2012/C 326/02

[9] Peter Mezei, 'Copyright Exhaustion: Law and Policy in the United States and the European Union', Cambridge University Press (2018), p. 7

There has yet to be an exact definition of online intermediaries as statutory or scholarly. Jaani Riordan explains the reason for this by emphasizing that the concepts of online intermediaries change with the constant technological shift.[10] A precise definition would be unrealistic and superfluous without knowledge of future advances.[11]

Even though it seems wrong to seek a precise legal definition for intermediaries regarding academia, it is evident that making inferences about what they do is useful. According to the Organisation for Economic Co-operation and Development (OECD), intermediaries are, literally tacitly exist between two or more people.[12] These intermediaries cannot take the initiative to disseminate content, goods, or service, even though they help a user to make these activities happen.[13] By the description of OECD, online intermediaries act as a bridge for individuals in the virtual environment. In addition, through technological infrastructure that they own or have invested in, intermediaries enable users to create content, i.e., YouTube, or make the content, products, and services available, such as internet access and service providers. These may change in the future, and new activities may be added to intermediaries' services. For instance, Directive 2019/790 on copyright and related rights in the Digital Single Market (CDSM Directive)[14] was initially intended to define the scope and regulate the behavior of online content-sharing service providers (OCSSP)[15] whose social and technological function is different from other intermediaries. Examples may vary according to the functions of the platforms codified in the directives and determined with case law.

When starting to write this article, Europe's expected upgrade for the liability regime of online intermediaries, the brand-new Digital Services Act (DSA)[16], existed as a proposal. On the 19th of September, DSA entered into force. Therefore, it is inevitable to mention the DSA and how it contributes to European copyright law in this paper. It became effective as a regulation that revises the responsibilities regarding the services of intermediaries in Directive 2000/31/EC (E-Commerce Directive)[17]. The European Commission came up with DSA, which is anticipated to be a ground regulation for online intermediaries and platforms. As promised, there are definitions in Article 3, which covers information society services in this very new European regulation. However, it should be noted that this regulation does not modify the application of the E-Commerce Directive. [18] In this sub-section, we will mention the E-Commerce Directive, the reference point of case laws, and other directives that mention intermediaries, including DSA's update. One of the motivations for implementing the DSA is to prevent legal problems arising from the complex structure of online intermediaries, whose responsibilities were regulated in the 2000s directives, and to bring European law in synchronization with these changes.[19] Again, the case law of CJEU also is a relevant element for making a fair taxonomy for online intermediaries.

However, it is challenging for CJEU since it has an interstitial law-making mechanism that there is no legislative definition for online intermediaries and requests of an intermediary

[10] Jaani Riordan, 'The Liability of Internet Intermediaries' (PhD Thesis, University of Oxford 2013) 41 https://ora.ox.ac.uk/objects/uuid:a593f15c-583f-4acf-a743-62ff0eca7bfe accessed 11 December 2022

[11] Ibid

[12] OECD, 'The Economic and Social Role of Internet Intermediaries' (April 2010) 9 https://www.oecd.org/digital/ieconomy/44949023.pdf accessed 6 December 2022

[13] Ibid

[14] Directive 2019/790 on copyright and related rights in the Digital Single Market [2019] OJ L 130/92

[15] CDSM Directive art. 17 (2) (6)

[16] Regulation (EU) 2022/2065 on a Single Market for Digital Services [2022] OJ L 277/1

[17] Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L 178/1

[18] DSA art. 2 (3)

[19] European Commission, 'Digital Services Act: ensuring a safe and accountable online environment' <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en#documents> accessed 11 December 2022

statute for defendants who offer services online before the court.[20] As a consequence, platforms that provide services online, such as an online marketplace (i.e., eBay), a social network, and an operator of an open wireless network, are considered online intermediaries.[21]

All these controversial issues aside, providing a legislative definition for online intermediaries would narrow their ability and mould them into a period of directives, which is the last thing that is desirable for such intermediaries, who always show changes in concept parallel to technological advances.

Online intermediaries' activities, causes, and responsibilities are essential in intellectual property and human rights law. Due to their importance in copyright law, their categorization based on their functions and capacities requires more attention than finding a definition for the online intermediary.

### 2.1. Legislative Classification of Online Intermediaries

The lack of a definition of online intermediaries should not mean that they are not regulated under the legal provisions.[22] Several descriptions have been made based on the services they provide on the internet. Therefore, it is better to discuss them by their functions as classified in the legislation. The EU copyright system has three directives and regulations with the newly effectuated DSA for online intermediaries. DSA consists of arrangements, including a definition for information society services; however, E-Commerce and CDSM Directive provide rules for specific intermediary services.[23] In addition, although Directive 2001/29/EC (InfoSoc Directive)[24] makes an ordinary inference about intermediaries, it gives us a more expansive interpretation of online intermediaries than others.

If we look at the InfoSoc Directive in detail, it gives a clue about who the intermediaries of the digital world are. This directive does not give us a technical definition but addresses online intermediaries. In recital 59, intermediaries are referred to as those "who carry a third party's infringement of a protected work or other subject matter in a network."[25] This directive relates to them only as intermediaries who convey the infringing material of the third party on the internet. This attribute is comprehensive. When the associated disputes came before the CJEU, questions were referred to the court regarding who should be considered an online intermediary according to the provision of the InfoSoc Directive. In the case of UPC Telekabel[26], where the enforcement of a blocking injunction against an internet service provider (ISP), if considered an intermediary, was requested, the CJEU ruled out that the ISP should be recognized as an intermediary in light of Article 8 (3) of the InfoSoc Directive.[27] CJEU interpreted this related article broadly and gave the definition by stating, "any person who carries a third party's infringement of a protected work or other subject matter in a network"[28]. It must be said that case law plays a vital role in determining who can be considered an online intermediary. This

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[20] Graeme Dinwoodie, 'Who are Online Intermediaries' in Giancarlo Frosio (ed.) *'Oxford Handbook of Online Intermediary Liability'* (2020; online edn, Oxford Academic, 7 May 2020) 39 <https://doi.org/10.1093/oxfordhb/9780198837138.013.2> accessed 23 October 2022

[21] Ibid

[22] Graeme Dinwoodie, 'Who are Online Intermediaries' in Giancarlo Frosio (ed.) 39

[23] Folkert Wilman, 'The Digital Services Act (DSA): An Overview' (2022) 2 <https://ssrn.com/abstract=4304586> accessed 2 January 2023

[24] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10

[25] InfoSoc Directive recital 59 and art. 8 (3)

[26] Case C-314/12, UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH, Wega Filmproduktionsgesellschaft mbH, judgment of 27 March 2014, ECLI:EU:C:2014:192

[27] Ibid para.30

[28] Ibid

is because case law is relevant for determining the legal framework. In another judgment, CJEU put the context of Article 8 (3) of the InfoSoc Directive first and decided accordingly that online social networking platforms are intermediaries since the wording in the Directive must be interpreted broadly.[29] As the CJEU rulings demonstrate, while the InfoSoc Directive gives us a general interpretation of online intermediaries, compared to the E-Commerce Directive, it is a limited guide for determining who they are.[30]

Analysing the E-Commerce Directive, we can observe that it regulates the identity of certain online intermediaries. According to the Directive, online intermediaries consist of three subjects; mere conduit operators, caching providers, and hosting service providers.[31] Their common feature is that they are technical intermediaries. Although there is no definition for these intermediaries, their activities on the internet can identify them with the help of the context in the E-Commerce Directive. Intermediaries referred to in this directive are exempted from liability if they fulfil certain conditions determined in the Articles between 12-15. Referred articles comprise the limitation of obligations, so-called safe harbours. Safe harbours under the E-Commerce Directive are adopted from the United States Digital Millennium Copyright Act (DMCA).[32] The term online intermediary is not used in the Directive; instead, "Liability of intermediary services"[33] is preferred. The definition of the providers of these services is stated as "any natural or legal person providing an information society service" in Article 2 (1) (b) of the E-Commerce Directive.[34] This letter of the law is quite broad. In the following paragraph, there is a narrower definition for established service providers[35] who preclude some information society service providers, such as broadcasts, by only mentioning presence services. Furthermore, based on this definition, persons who do not have a profit-making purpose are not accepted as established service providers. In other words, service providers that will benefit from the safe harbour regime under this directive must operate their services with a commercial purpose and a necessary technological infrastructure.[36]

It is vital to say that E-Commerce Directive indicates an exemption plan for intermediary service providers from liability.[37] However, this may be possible only if concerned intermediaries provide specific services and fulfil the conditions specified in this Directive. The first one of these services is a mere conduit service as specified in Article 12 of the E-Commerce Directive. In the provision of Article 12(1), as stated, "Where an information society service is provided that errors prior to the placing of the order; consists of the transmission in a communication network of information provided by a recipient of the service"[38], its activity is in a passive mode by acting as a data carrier. Nevertheless, it also has an active role under the same provision.[39] This is to help people to access the internet. This service under the E-Commerce Directive involves temporary data storage while enabling information flow from one party to another.[40] This also means that they do not create content.

[29] Case C-360/10, Belgische Vereiniging van Auteuers, Componistern en Uitgevers CVBA (SABAM) v Netlog NV, judgment of 16 February 2012, ECLI:EU:C:2012:85, para. 27-28
[30] Riordan (2013) 44
[31] E-Commerce Directive, art 12-15
[32] Graeme Dinwoodie, 'Who are Online Intermediaries' in Giancarlo Frosio (ed.) 42
[33] E-Commerce Directive Section 4
[34] E-Commerce Directive art. 2 (1) (b)
[35] E-Commerce Directive art. 2 (1) (c)
[36] Ibid
[37] Pablo Baistrocchi, 'Liability of Intermediary Service Providers in the EU Directive on Electronic Commerce' (2003) 19 Santa Clara High Technology Law Journal 111, 118 <https://digitalcommons.law.scu.edu/chtlj/vol19/iss1/3> accessed 29 December 2022
[38] E-Commerce Directive art. 12 (1)
[39] Ibid
[40] Baistrocchi (2003) 119

In the following article, there is another safe harbour regime for caching services.[41] The caching does not involve any aspect of permanence but instead temporary storage.[42] Article 14 of the E-Commerce Directive also provides an escape of liability for hosting service providers in certain conditions. From the scope of this article, it can be drawn that such activity is storing information provided by the recipient of the service. The result is that hosting service providers are not seen by consumers and work as technical operators who financially collaborate with the website operator or producer of the material stored on a website.[43] To benefit from safe harbour immunity regulated under this Directive, it is vital to determine who the intermediary service provider is. Within the scope of Recital 42 of the E-Commerce Directive, the service provider that will benefit from the liability exemption must play a passive role in the flow of infringing material.[44] In light of the information from the Recital, a highly controversial judgment was given by the CJEU on a case, Google France v. Louis Vuitton[45], for determining an internet service provider that may fall within the scope of Article 14. In Google France v. Louis Vuitton case, Article 14 and Recital 42 of the E-Commerce Directive were interpreted together. Accordingly, for an internet service provider to be qualified as a hosting service provider within the scope of Article 14, this ISP should not be able to play an active role regarding the content it provides hosting.[46] Based on the judgments of CJEU, whether an intermediary should be considered within the provision of the E-Commerce Directive depends on which elements the court takes as a starting point. In other words, for the specific intermediary service providers included in this directive, a taxonomy is made by observing their technical functions and the amount of control over the content the third party delivers.

Regarding the CDSM Directive, the types of intermediaries are defined, and their responsibilities are regulated differently. The intermediaries mentioned in the CDSM Directive are only online content-sharing service providers (OCSSPs). E-Commerce Directive's safe harbours do not apply to the OCSSPs.[47] CDSM Directive but has set obligations specifically for these intermediaries. These are also considered information society service providers. Their primary purpose is to make a profit as a platform for sharing and producing copyrighted works and many similar activities considering the CDSM Directive.[48] This sharing through their platforms can be any information, images, or audio-visual content referred to as UGC. A platform or a website that commercially operates the flow of UGC among many people can be defined as OCSSP.[49] Nonetheless, based on the wording of Recital 62, it can be concluded that CDSM Directive does not cover the activities of not-for-profit organisations and business-to-business cloud services, i.e., only private use or services where copies of intellectual property

[41] E-Commerce Directive art. 13
[42] Baistrocchi (2003) 120
[43] Béatrice Martinet Farano, 'Internet Intermediaries' Liability for Copyright and Trademark Infringement: Reconciling the EU and U.S. Approaches', TTLF Working Paper No. 14, p 72 http://www.law.stanford.edu/organizations/programs-and-centers/ transatlantic-technology-law-forum/ttlfs-working-paper-series accessed 2 January 2023
[44] E-Commerce Directive recital 42
[45] Case C-236/08 and C-237/08 and C-238/08, Google France SARL, Google Inc. v Louis Vuitton Malletier SA (C-236/08), Google France SARL v Viaticum SA, Luteciel SARL (C-237/08), and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL, Pierre-Alexis Thonet, Bruno Raboin, Tiger SARL (C-238/08), judgment of 23 March 2010, ECLI:EU:C:2010:159
[46] Ibid para. 120
[47] CDSM Directive art. 17 (3)
[48] Graeme Dinwoodie, 'Who are Online Intermediaries' in Giancarlo Frosio (ed.) 55
[49] Victor Castro Rosa, 'How Article 17 of the Digital Single Market Directive Should be Implemented: A Personal View' in Tatiana-Eleni Synodinou, Philippe Jougleux, Christiana Markou, Thalia Prastitou-Merdi (ed.) *'EU Internet Law in the Digital Single Market'* (2021; online edn, Springer, Cham.) 55 https://doi.org/10.1007/978-3-030-69583-5_3 accessed 26 November 2022

works are not reproduced or provided for profit.[50] Therefore, the scope of the directive gives an obvious hint as regards who is excluded from the liability regime of CDSM.

Initially, the CDSM Directive was seen as a solution to address complaints about legal uncertainty and inadequacy of legislation in the digital sphere.[51] However, when it is put into practice, it restricts the fundamental rights of other actors of copyright law. Therefore, there was a need for a comprehensive new regulation for the services provided by intermediaries on the internet that would keep pace with the technology. This is now expected to be achieved with DSA. While the DSA adds new rules for information society services, it provides a more detailed provision for the specific online intermediaries that benefit from the E-Commerce's safe harbour regime. Comparing DSA with E-Commerce, the 2000s Directive gives an extended scope and does not just cover intermediary services but, in general, information society services.[52] DSA has categorised the intermediary services included in information society services in Article 3.[53] The DSA defined mere conduit, caching, and hosting services within this layer.[54] While defining illegal content, the DSA recognised online platforms as hosting service providers.[55] Moreover, the regulation has also included online search engines in the category of intermediary services.[56] Before the DSA came into force, the CJEU and the Member States had a categorisation problem for intermediaries. With the new regulation, a definition and taxonomy have been prepared for almost all online intermediaries operating their services online.

## 3. Liability Regime for Online Intermediaries in European Union Law

Where there is an unlawful use of the author's right on the internet by a third party through the services of online intermediaries, the author may invoke the liability of either the infringer or the owner of the platform on which the right is infringed. However, the effective and practical way is to apply it to the online intermediary. It is difficult to determine the identity of third parties who make the work available online via the services of online intermediaries, so international and national legislation aims to regulate users' online behaviours by imposing responsibilities on intermediaries. Although online intermediaries do not directly commit an unlawful act, they carry the illegal conduct. According to this outcome, they must be secondarily liable for the indirect involvement of infringing activity. However, it is highly controversial whether their responsibilities are secondary or not. To be liable for an act in the first degree, the person must directly commit the wrongful act. There should be a direct violation by the wrongdoer. Furthermore, the primary liability is harmonised in EU law. Thus, there is no controversy on specifying the primary liability from an action.

There is no provision in the EU copyright law when defining secondary liability as a type of liability. Article 8 (3) of the InfoSoc Directive and Article 11 of the Directive 2004/48/EC (Enforcement Directive)[57] only emphasize that intermediaries are liable for the acts of third parties carried out through their services. There is no evident context which indicates that online intermediaries are primary or secondary infringers. Eventually, court decisions will be

[50] CDSM Directive Recital 42
[51] European Commission, Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM (2016) 2016/0280, 3
[52] Wilman (2022) 2
[53] DSA art. 3 (1) (g)
[54] DSA art. 3 (1) (g) (i), (ii), (iii)
[55] DSA art. 3 (1) (h) (i)
[56] DSA art. 3 (1) (h) (ii)
[57] Directive 2004/48/EC on the enforcement of intellectual property rights [2004] OJ L 195/16

a guide for finding answers. For instance, Advocate General (AG) Jääskinen[58], who gave his opinion on the CJEU's judgment in L'Oréal SA v. eBay[59], made some conclusions on whether eBay, an online marketplace, should be considered primarily liable for the illegal advertisement and sale of perfumes on its marketplace by a seller who has a profile on eBay. In AG Jääskinen's opinion, secondary liability is regulated in the law of the Member States, even though it is not harmonised with EU law.[60] He emphasises that there is no such regulation for trademark law based on the wording of the directives on the liability of intermediaries.[61] He then stated that there is no court decision on the primary liability of eBay or similar intermediaries.[62] This means that he recognised secondary liability for online intermediaries.

When the liability regimes in the directives are analysed, it is not what the intermediaries can be directly liable for but how they can escape liability if they fulfil certain conditions imposed by the legislation. In other words, according to Jaani Riordan's observations, European law has set limits on the first- and second-degree liabilities that may be imposed on intermediaries.[63] The liability regime in the Directives includes safe harbours, a limit for prevention from duties to monitor third party's activity, and limits to guard the fundamental rights and injunctions.[64] When examining DSA's and directives' liability regimes, we will discuss the limits of each directive and regulation obtained for liability of online intermediaries' services.

## 3.1. Analysis of Substance

### 3.1.1. E-Commerce

#### 3.1.1.1. E-Commerce Directive

As mentioned in the section on legislative classification, the common characteristic of the intermediaries mentioned in this Directive is that they are technical intermediaries. On the other hand, online content-sharing service providers are not those who provide technical facilities to users but only those who provide the content made available to users and are not regulated in this Directive.

In the E-Commerce Directive, exemption from liability for three specific online intermediary services is regulated under Articles 12, 13, and 14. Therefore, for ISPs to be subject to the special liability regime under the E-Commerce Directive, they must qualify as an intermediary service provider, perform an activity covered by the exemption regime and comply with the specially regulated conditions of the relevant service provider. According to the provision of Article 12, when an online intermediary acts as a mere conduit, it should not involve the transmission of information, should not select the receiver, and should not modify the information contained in the transmission.[65] To benefit the safe harbour immunity of caching services, the information should not be modified; the provider conforms with the

[58] Case C-324/09, L'Oréal SA, Lancôme parfums et beauté & Cie, Laboratoire Garnier & Cie, L'Oréal (UK) Limited v eBay International AG, eBay Europe SARL, eBay (UK) Limited, Opinion of Advocate General Jääskinen, delivered on 9 December 2010, ECLI:EU:C:2010:757

[59] Case C-324/09, L'Oréal SA, Lancôme parfums et beauté & Cie, Laboratoire Garnier & Cie, L'Oréal (UK) Limited v eBay International AG, eBay Europe SARL, eBay (UK) Limited, judgment of 9 December 2010, ECLI:EU:C:2011:474

[60] Case C-324/09, Opinion of Advocate General Jääskinen, para. 55

[61] Ibid

[62] Ibid para. 58

[63] Riordan (2013) 126

[64] Ibid

[65] E-Commerce Directive art. 12 (1) (a), (b), (c)

provisions on access to information and the regulations according to the updates in the data; the provider must expeditiously remove or disable access to the information.[66]

The most discussed and controversial service provider whose service is hosting must also take precautions to meet the conditions of the safe harbour as referred to in Article 14 (1) of the E-Commerce Directive. Their exemption from liability is more controversial compared with others.[67] Indeed, to benefit from the immunity regime, they must have passive functions in circling all kinds of information, whether legal or illegal. Although there is an algorithm to check the contents uploaded by users, controlling all the data stored in their system is not easy.[68] Therefore, they have features that require them to be more active as they facilitate the permanent storage of information. Thus, there is not any automatic storage considering their technical features, but voluntary storage. This feature of hosting service providers sparked controversy before the court. According to the decision of the CJEU in the L'Oréal SA v. eBay case, for an intermediary service to be accepted within the safe harbour regime, the intermediary must be in a passive role.[69] Otherwise, the hosting service provider cannot benefit from the safe harbour. Moreover, E-Commerce Directive's safe harbour regime exempts them from becoming liable if they hold some conditions regulated in Article 14 (1) of the E-Commerce Directive. These conditions are, firstly, not having actual knowledge about illegal content or information.[70] If they have such knowledge, the legislator wants them to take prompt action.[71] Otherwise, they will be liable for the third party's illegal activity. The approach for obtaining the essential knowledge is not harmonised under EU directives, and this issue is left to the Member States to decide.[72] Besides regulations for exemption from DMCA, there is also a mechanism called notice and takedown (NTD) for hosting service providers.[73] It is a technique through which a private entity directly requests that an internet intermediary remove or block access to information in response to a violation of their rights.[74] The intermediary must determine if such a complaint is legitimate and that the content is infringing or illegal.[75]

Furthermore, the general monitoring obligation is not imposed by the Member States if the intermediary services offer one of the services covered by the Articles as mentioned above, which incentivizes intermediaries to transmit or store information.[76] In short, Article 15 excludes intermediaries providing only mere conduit, caching, and hosting services regulated under the E-Commerce Directive from the general monitoring obligations.

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[66] E-Commerce Directive art. 13 (1) (a), (b), (c), (d), (e)

[67] Sevra Güler Güzel, 'Article 17 of the DSM Directive and the Fundamental Rights: Shaping the Future of the Internet' (2021) 12 (1) EJLT Int., 8 <https://ejlt.org/index.php/ejlt/article/view/817> accessed 22 September 2022

[68] Ibid

[69] Case C-324/09 para. 118

[70] E-Commerce Directive art. 14 (1) (a)

[71] E-Commerce Directive art. 14 (1) (b)

[72] Kristofer Erickson and Martin Kretschmer, 'Empirical Approaches to Intermediary Liability' in Giancarlo Frosio (ed.) 'Oxford Handbook of Online Intermediary Liability' (2020; online edn, Oxford Academic, 7 May 2020) 106 <https://doi.org/10.1093/oxfordhb/9780198837138.013.2> accessed 23 October 2022

[73] § 512 of the US Digital Copyright Act

[74] Aleksandra Kuczerawy, 'From Notice and Takedown to Notice and Stay Down: Risks and Safeguards for Freedom of Expression' in Giancarlo Frosio (ed.) 'Oxford Handbook of Online Intermediary Liability' (2020; online edn, Oxford Academic, 7 May 2020) 528 <https://doi.org/10.1093/oxfordhb/9780198837138.013.2> accessed 23 October 2022

[75] Ibid

[76] Bart van der Sloot, 'Welcome to the Jungle: The Liability of the Internet Intermediaries for Privacy Violations in Europe' 6 (2015) JIPITEC para. 7 http://www.jipitec.eu/issues/jipitec-6-3-2015/4318 accessed 21 September 2022

#### 3.1.1.2. Digital Services Act

DSA has nearly the same provision for mere conduits, caching, and hosting service providers. Along with that, there are also clauses for other online intermediaries. There are four layers of intermediary services in its structure. At the bottom are all the intermediaries, moving upwards to hosting service providers, online platforms, and finally to large platforms. In other words, the point to be considered here is that the distinction between online intermediaries should be made according to their size, not based on their functions.[77] The provisions of the E-Commerce Directive for safe harbours are replaced by Articles 3, 4, 5, and 7 of the newest DSA regulation. This will lead to the provision of DSA being interpreted when there is a dispute before the CJEU.[78] DSA also regulated the exemption from general monitoring like E-Commerce Directive, which also means their liability regime is conditional. Moreover, the hosting provider can have the notices on time, diligently, non-arbitrary, and objectively thanks to the notice and action mechanism of DSA.[79] It can be said that the DSA has been drafted under the influence of concrete cases before the CJEU. According to Recital 17, in cases without liability exemption, the liability is not automatic, and the legislator can analyse the liability concerns separately.[80] There is also an essential requirement that, to rely on the liability exemption, hosting service providers are required to play a neutral role in storing and transmitting the data and information of users.[81]

Furthermore, DSA includes new platforms when regulating online intermediaries' activities and liability regimes. It is called a business-to-customer online marketplace.[82] As it was highly debated while eBay's statute was discussed whether it could be classified and could benefit from the safe harbour regime under E-Commerce Directive due to its active role on the internet. In summary, after existing directives for more than 20 years and a directive only for OCSSPs, it is obvious that the DSA regulation will bring a positive change. It is a plus point that the DSA recognizes the importance of fair balance, which the CJEU has considered, and that the functions of intermediaries are distinguishable.

### 3.1.2. Copyright Law

#### 3.1.2.1. InfoSoc Directive

Under this directive, no immunity regime is provided for online intermediaries to escape liability. Regarding online intermediary services, the rules on granting injunctions are set out in Article 8(3) and Recital 59.[83] According to the provisions, Member States provide a condition whereby authors can enforce an injunction against intermediaries who facilitate the dissemination of infringing material. In addition, it is necessary to mention the provision of European copyright law on communication to the public, which also affects online intermediaries and is an essential step in the liability regime. One of the most important reasons for this is the use of this provision by the CJEU as a guide in determining whether online intermediaries are liable for the acts of third parties. The concept is adopted from the WIPO

[77] Wilman (2022) 3
[78] Christina Angelopoulos and Martin Senftleben, 'An Endless Odyssey? Content Moderation Without General Content Monitoring Obligations' (2021) 26 http://dx.doi.org/10.2139/ssrn.3871916 accessed 27 November 2022
[79] Wilman (2022) 8
[80] DSA Recital 17
[81] DSA Recital 18; Wilman (2022) 6
[82] DSA art. 6 (3)
[83] InfoSoc Directive Recital 59 and art. 8 (3)

Copyright Treaty (WCT)[84] and is obtained as an exclusive right to the authors to help them communicate their work with the public under Article 3(1).

In the Stichting Brein v Jack Frederik Wullems judgment[85], the CJEU established a concept for this exclusive right stated in Article 3 (1) of the InfoSoc Directive. It explains this concept by starting from the high protection afforded to the authors in Recitals 9 and 10 by allowing the copyright owner to receive an appropriate reward for each use of their work, independent of time and place.[86] In other words, this provision for communication to the public within the meaning of Article 3 (1) of the InfoSoc Directive covers every method offline or online, such as the sale of a multimedia player with pre-installed add-ons. The CJEU has set two cumulative criteria for this concept. These are the act of communication of a work which refers to Recitals 4 and 9, and the act of communication of that work to the public.[87] Amongst those criteria, CJEU's interpretations of increasing the extent of communication to the public carry two different criteria: intentional intervention and the new public.[88] As a consequence, such video-sharing platforms where UGC is carried out, like YouTube, can make communication to the public by giving the public access to protected work without the authorization of the rightsholder that their users uploaded.[89] In addition, the CJEU has excluded Member States from extending this provision in Article 3 (1) of the InfoSoc Directive for Svensson Case[90]. If this is the fact, according to the CJEU's interpretation, rightsholders would be awarded broader protection for a more comprehensive range of activities by Member States, stimulating legal uncertainty.[91] However, as technology develops and changes the nature of the internet and people's behaviour, new challenges will arise as to which acts will be considered communication to the public. It is possible to change this by making European legislation more flexible and endeavour to provide more excellent protection to copyrighted work and protect the rights of all stakeholders.

### 3.1.2.2. CDSM Directive: Article 17

This directive deals with only a specific online intermediary, OCSSP. The concept of the CDSM Directive for OCSSPs does not include the safe harbour regime provided for in Article 14 of the E-Commerce Directive. Moreover, Recital 62 distinguishes OCSSPs from other online intermediaries by stating that "The services covered by this Directive are services, the main or one of the main purposes of which is to store and enable users to upload and share a large amount of copyright-protected content with the purpose of obtaining profit therefrom…".[92] In light of Recital 62 of the CDSM Directive, at least one sign is sufficient for a business operator to be distinguished as an OCSSP and, accordingly, only a provider of a

[84] World Intellectual Property Organisation Copyright Treaty, adopted in Geneva on December 20, 1996, WIPO Lex No. TRT/WCT/01

[85] Case C-527/15, Stichting Brein v Jack Frederick Wullems (Filmspeler), judgment of 26 April 2017, ECLI:EU:C:2017:300

[86] Case C-527/15 para.27

[87] Joined Cases C-682/18 and C-683/18, Frank Peterson v Google LLC, YouTube Inc., YouTube LLC, Google Germany GmbH (C-682/18), Elsevier Inc. v. Cyando AG (C-683/18), judgment of 22 June 2021, ECLI:EU:C:2021:503

[88] Joao Pedro Quintais and Peter Mezei and Istvan Harkai and Joao C Magalhaes and Christian Katzenbach and Sebastian Felix Schwemer and Thomas Riis, 'Copyright Content Moderation in the EU: An Interdisciplinary Mapping Analysis' (reCreating Europe Report 2022) 77 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4210278> accessed 30 September 2022

[89] Joint Cases C-682/18 and C-683/18, YouTube v Cyando, para. 75

[90] Case C-466/12, Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v Retriever Sverige AB, judgment of 13 February 2014, ECLI:EU:C:2014:76

[91] Ibid para. 33-34

[92] CDSM Directive Recital 62

service that occupies a significant place in the online market by competing with other online content-sharing services, such as online audio and video streaming services for the same audiences, can be considered an OCSSP as envisaged by the Recital 62 of the CDSM Directive.[93] Victor C. Rosa, with one more addition, points out that another clue comes from the natural behaviours of OCSSPs. In his view, these providers organise and support the creation of content to attract more users.[94] Again, it may be that the CJEU has linked the inclusion of ISPs in the safe harbour regime according to their active or passive role. This is because, in the case law of the CJEU so far, the criteria for deciding whether the online intermediaries in question are active or inactive allow us to make assumptions about whose service is covered by the safe harbour immunity of the E-Commerce Directive. However, the important difference for OCSSPs is that if they do not have authorisation from the rightsholder, they are directly responsible for disseminating infringing content through their services. For the first time, the liability of online intermediaries has explicitly mentioned whether their liability is first or second-degree.

Pursuant to Article 17 (1) of the Directive, OCSSPs' actions of making the work available to the public or other materials subject to copyright protection uploaded by their users will be considered as an act of communication to the public within the meaning of Article 3 (1) of the InfoSoc Directive. Thus, the uncertainty regarding the legal nature of such activities has been eliminated for OCSSPs' services. The natural consequence of this context is that OCSSP must obtain authorization from the copyright holder for their act of communication to the public.[95] This authorization is provided by concluding a licence agreement.[96] If OCSSPs do not have permission from the rightsholder, then they are directly liable for illegal content uploaded by their users.[97]

However, a licence agreement is not the only way out for OCSSPs. Article 17(4) lists certain conditions that must be met to escape liability. In fact, the CDSM directive requires OCSSPs to coordinate with authors in case they fail to fulfil certain obligations. This is because the legislator wants to ensure here, as seen from Article 17 (1) and paragraph 4 (a), that infringing material will not be available on the platform in the future. However, it must be said that from the standpoint of balancing rights, the CDSM's conditions for OCSSPs to be exempted from liability are controversial. In the wording of the directive, a subjective state has been obtained. An OCSSP is requested to show their best efforts to obtain authorization[98], to safeguard the unavailability of the infringing material[99], and to act promptly if OCSSP receives a request from the rightsholder to prevent the dissemination of the infringing material along their platforms proactively[100] if they want to be exempted from the liability. Even though the legislator does not explicitly mention the term, best efforts, it has set the condition that professional diligence should be in accordance with high industry standards as a condition as to how this can be ensured.[101] If the scope of Article 17 (4) (a) is considered, it is necessary to get a separate licence for each sector that may exist on the platform for licensing and to enter

[93] Rosa (2021) 51
[94] Ibid 52
[95] CDSM Directive art. 17(1), second sentence
[96] CDSM Directive art. 17 (2)
[97] Kristofer Erickson and Martin Kretschmer, 'Empirical Approaches to Intermediary Liability' in Giancarlo Frosio (ed.) 106
[98] CDSM Directive art. 17 (4) (a)
[99] CDSM Directive art. 17 (4) (b)
[100] CDSM Directive art. 17 (4) (c)
[101] Matthias Leistner, '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?' (2020) 1 Zeitschrift für Geistiges Eigentum/Intellectual Property Journal (ZGE/IPJ), 23 https://ssrn.com/abstract=3572040 accessed 17 January 2023

into a separate negotiation process with the professional associations or other copyrighted work owners who are not under its umbrella. Moreover, according to the dominant view in academia, Article 17 (1) and 17 (4) should not be considered separately from each other.[102] In the absence of a licence, it may be possible for OCSSPs to enforce the general monitoring obligation, even though Article 17(8) states that it does not apply. In particular, the general impression gained in the academia from the wording of "best efforts" is that content recognition technologies or filtering methods are not mandatory for an OCSSP to be deemed to have made such efforts.[103] The CJEU has already ruled in the case of Poland v. European Parliament and Council of the European Union[104] that there is no incompatibility with the Charter over the concerns of balancing fundamental rights and rights obtained for copyright owners under the European legislation. In this case, Poland requested the annulment of Article 17(4)(b) and (c) of the CDSM Directive on the grounds that it is contrary to the freedom of expression and information set out in Article 11 of the Charter, as it requires a filtering obligation.[105] However, the court rejected Poland's request, recognizing, as in the Glawischnig-Piesczek judgment[106], that some monitoring obligations are not considered illegal in the light of the EU Directives. In fact, the CDSM Directive was proposed to strike a fair balance between fundamental rights. Especially when the CJEU interprets the contexts of the E-Commerce Directive and InfoSoc Directive, there is a legal gap and the injunctions requested by the copyright owners violate the fundamental right of online intermediaries as business owners and users. In practice, however, and especially in respect of the concerns considered by Poland, the outcome is unfavourable considering fundamental rights.

These new provisions under the CDSM Directive also introduced notice and stay-down, a new mechanism for the liability of online intermediaries.[107] As it is a different mechanism from the E-Commerce's stay and take-down mechanism, it takes precautions before the content is shared on the platform, affecting future uploads. However, this mechanism is stricter than the mechanism in E-Commerce Directive. At the same time, big platforms such as Facebook, YouTube, and Google Inc can set out autonomous content recognition systems, which require high technological investments and time. Consequently, the CDSM directive requires platforms to fulfil time-consuming and financially burdensome obligations under the license agreement. They must compensate for the damage if they fail. Although it is left to OCSSPs to take the necessary safeguards, they are limited in enforcing their rights, considering the high protection afforded to copyright owners. Consequently, in addition to the shortcomings of this Directive, there is also a context that is interpreted in such a way as to violate fundamental rights. It cannot be said that the objectives set out in the Proposal[108] have been successfully implemented from paper to practice.

### 3.2. Consequences of Liability Regime

[102] Christophe Geiger and Bernd Justin Jütte, 'Platform Liability Under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering, and Fundamental Rights: An Impossible Match' (2021) 64 PIJIP/TLS Research Paper Series, 45 <https://digitalcommons.wcl.american.edu/research/64> 23 September 2022

[103] Angelopoulos and Senftleben (2020) 23

[104] Case C-401/19, Republic of Poland v Parliament and Council, judgment of 26 April 2022, ECLI:EU:C:2022:297

[105] Case C-401/19, para 54

[106] Case C-18/18, Eva Glawischnig-Piesczek v Facebook Ireland Limited, judgment of 3 October 2019, ECLI:EU:C:2019:821, para. 52-53

[107] Geiger and Jütte (2021) 40

[108] Proposal for a Directive of The European Parliament and of the Council on copyright in the Digital Single Market, 2016/0280 (COD), COM (2016) 593 final, p. 2-5

Regarding the Enforcement Directive, Article 11 provides the author with the same opportunity against online intermediaries as the InfoSoc directive. The point to be noted here is that there is no direct regulation in any directive, except for the CDSM, regarding intermediaries' primary or secondary liability. While the first sentence of Article 11 states that judicial authorities may apply for an injunction against the direct infringer, the third sentence emphasises that this action may also be applied to intermediaries. In other words, it separates the primary wrongdoer's injunction request from the intermediaries. Namely, it separates the injunction request for primary wrongdoers from the intermediaries. But the overall conclusion that can be drawn from here is that even if the liability of the intermediaries is secondary, the injunction to be applied against the primary wrongdoers will also be applied to them by the Member State. Moreover, there is also a limit for injunction requests of copyright holders under the scope of Article 3 of the Enforcement Directive. According to Article 3, these requests should be "fair and equitable" and not be "unnecessarily complicated or costly or entail unreasonable time-limits or unwarranted delays."[109] The following paragraph also emphasises that proportionality, effectiveness, and dissuasiveness should exist when requesting injunctions.[110] This relevant article is important for protecting the fundamental rights of each party to the liability regime. For instance, in SABAM v. Netlog, the filtering injunction requested by the rightsholder was found to be expensive, time-consuming, and complicated by the court based on Article 3 of the Enforcement Directive.[111] If the online intermediary imposes this obligation, it will harm their business and the users' fundamental rights.[112] Therefore, the court refused to enforce the filtering obligation. [113] Although the CJEU rejected the filtering obligation in Scarlet Extended[114] and Netlog decisions because it would not be able to achieve the expected balance between fundamental rights and found it even contrary to Article 16 and Article 11 of the Charter, it seems to have ignored the fact that the obligations under the Article 17(4) of the CDSM Directive constitute general monitoring. According to the view of the academia, even though Article 17(8) of the CDSM Directive explicitly provides that the general monitoring obligation shall not apply, it is incompatible with subparagraphs (b) and (c) of Article 17 (4). For the conditions in these two subparagraphs to be compatible with paragraph 8, the notification of the rightsholders should be construed to include a court decision that specific use of the rights holders' work or other protected subject matter on OCSSP's services is indeed infringing.[115]

### 3.3. Role of the Liability Regime for Balancing Rights

Although the Internet is an environment where we can express ourselves more securely, and it opens new opportunities for business owners, things become more complicated when the concepts of rights and legality come into play. As it can be understood from the arrangements made by the legislator regarding the liability of online intermediaries in the previous section and the case law before the CJEU, there is a restriction of fundamental rights in enforcing

[109] Enforcement Directive art. 3 (1)
[110] Enforcement Directive art. 3 (2)
[111] Case C-360/10 para. 44-48
[112] Ibid
[113] Ibid para. 53
[114] Case C-70/10, Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM), judgment of 24 November 2011, ECLI:EU:C:2011:771, para. 48-55
[115] Julia Reda and Joschka Selinger and Michael Servatius, 'Article 17 of the Directive on Copyright in the Digital Single Market: a Fundamental Rights Assessment' (2020) Creative Commons CC-by 4.0 international Gesellschaft für Freiheitsrechte e.V., 20 https://freiheitsrechte.org/uploads/publications/Demokratie/Article17_Fundamental_Rights-Gesellschaft_fuer_Freiheitsrechte_2020_Projekt_Control_C.pdf accessed 23 September 2022

copyright law. Moreover, the regulations of the directives on online intermediaries are not up to date enough to cope even with the technological revolutions soon. Leaving all these aside, the balance between the rights and the relationship between the rights of copyright holders, users, and online intermediaries, which are constantly interacting with each other, will exist if society continues. Geiger and Jütte's triangular relation between respective fundamental rights, based on the SABAM v Netlog case, will be more explanatory in this case.[116] This is because there are three actors in the concept of intermediary liability: author, user, and intermediary. These actors' rights and responsibilities in the digital domain are intertwined in a triangular structure. When the rights of one party are infringed, the other parties are also affected. However, the maximum protection afforded to the author in European copyright law and the precise language makes the flexibility of interpretation of the legislation difficult. This leads to a disturbance in the balance of rights.

Comparing the protection of the author's rights in the internet environment, the public interest also has the right to freedom of expression and information, which are fundamental rights protected under Article 11 of the EU Charter. The CJEU has also drawn attention to the high level of protection afforded to the author in the InfoSoc Directive and has expressed concern about whether the provision ensures a fair balance between users' rights and the rights of the copyright holder. It is essential to ensure a balance between the actors to eliminate legal uncertainty. For example, the blocking injunction requested in the UPC Telekabel case is not considered by the CJEU as limiting or infringing freedom to conduct business.[117] It was deemed sufficient to ensure legal certainty. It was not considered to have a negative impact on either Article 16 of the Charter (freedom to conduct business) or Article 11 (freedom of expression and information) of the Charter.[118] However, the same cannot be said for the SABAM v Netlog Case in which filtering obligation is discussed whether it is lawful. The Court found the filtering obligation, together with the general monitoring, to be too costly, time-consuming, and unnecessary for an intermediary when it is considered with the Article 3 of Enforcement Directive[119]. The reason is that the intermediary controls the users' activities by installing a permanent device in its system and infringes the data protection in Article 8 of the EU Charter by having access to their messages or private information stored on the platform.[120] The conclusion to be drawn from this is that the CJEU is unfavourable to the injunction requests in terms of ensuring a fair balance.

Although the application of general monitoring and filtering obligations is not considered appropriate by the CJEU in terms of protecting the fundamental rights of online intermediaries and users, this is precisely the situation faced today in the context of the CDSM Directive. In fact, it is obvious that the mandatory nature of the licence agreement in the directive will implicitly neutralise the balance that exceptions and limitations, which are also considered as a brake mechanism, which comes from the Article 5 of the InfoSoc Directive, should automatically provide in copyright law. Naturally, another factor in the establishment of these balances is proportionality, which is a core principle of law. The CJEU has also expressed its concerns about compliance with the principle of proportionality with the wording of fair balance while evaluating injunction requests against online intermediaries (i.e., Scarlet Extended, Netlog Cases). Proportionality is particularly relevant in reflecting on the constraints on fundamental rights of rightsholders, platform operators, and users in a fundamental rights constellation such as Article 17 of the CDSM Directive.[121] To undertake a proportionality

[116] Geiger and Jütte (2021) 13
[117] Case C-314/12 para. 51-52
[118] Ibid para 45-49
[119] Case C-360/10 para 44-50
[120] Ibid
[121] Geiger and Jütte (2021) 23

analysis, it is necessary first to map the relevant rights obtained considering the Charter before applying the proportionality analysis to the legal process of Article 17.[122]

## 4. Conclusion

The services that online intermediaries provide mean being both inside and outside of life. Therefore, it has an ambiguous feature. For instance, people living in metropolitan areas; communicate with each other. Since they have difficulty allocating time for many things, they open an account on TikTok, Facebook, Twitter, or Instagram, meeting their needs to experience the satisfaction of social relations and to be informed. On the other hand, since social media offers an accessible environment for expressing ideas and getting information, it does not bring real socialization but an artificial taste of social life to individuals in a virtual environment. In addition to establishing an environment where people can both socialize and practice their rights, it is necessary to protect these rights in the digital environment and ensure this protection's continuity. However, in terms of European copyright law, it is evident that the legislator has imposed responsibilities on online intermediaries beyond their capacity, both due to the CJEU decisions and the implementation of the DSA regulation. It should be remembered that while providing a high level of protection to the copyright owner, the rights of online intermediaries and the users of their services must also be respected. Therefore, the EU copyright regime must give a healthy environment within its border. To establish this healthy environment, the provisions of the directives must be relaxed in the public interest and in favor of small-scale online intermediaries. These intermediaries provide services and offer their users a business opportunity where they can earn money more quickly through their creative work without the obstacles of traditional methods. In other words, they have a significant and effective place in the digital single market from an economic point of view. Therefore, the problem here needs to be finalized and handled with caution. This is to practice the fundamental rights and freedoms provided to people by the legal system, which is their protective shield from the moment they are born. However, the legal gap in the law leads to a limit on the fundamental rights of others. If such things continue to happen, it cannot be said that there is a safe environment for activities in the digital world. This eliminates legal security. To ensure legal security, more user-oriented rules should be set. While creativity should be encouraged in every environment, the high protection afforded to authors should be relaxed. It should also be noted that the fact that the CJEU binds itself and the Member States to the EU Directive on the protection of copyright and considers related fundamental rights as a defense to copyright to the extent permitted by the Directive may be interpreted as a wink to the traditional understanding of copyright and may be considered to provide an environment for possible conflicts regarding human rights.

In conclusion, more effective brake mechanisms should strike a fair balance between stakeholders' rights. Legislators and judges should think more far-sighted and consider users' rights on the internet, especially protecting their fundamental rights in the digital environment where the public can express themselves freely from governmental order.[123] Although it may seem nice for the author to have high protection, eventually, the market disappears once the interest in the market ends. Without a market to compete in, the author will cease to create works and lose his creativity without feeling the public's curiosity.

[122] Ibid
[123] Mezei (2018), p. 202

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