

Universität Wien
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Doctoral dissertation

**THE BALANCING ACT: Intermediary liability and the copyright
balance under the DSM Directive**

EXPOSÉ

Author: Saša Krajnc (Ljubljana, Slovenia)
Student No.: 0963021

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Introduction to the topic and legal background

Internet platforms such as Twitter and Facebook have not only become an integral part of our private lives, but also shape the public landscape, influencing politics, economy and societal values at an unprecedented rate. Under the protectionist regime of the E-Commerce Directive and the enactment of *safe harbours* and liability exemptions for online intermediaries, user-generated content (UGC) platforms have thrived and multiplied. This brought on an abundance of content, information, networking options and business opportunities. But also the calumny of vast amounts of social power and unaccountability, on which the abuse of personal data, political agitation and copyright infringement seemed to have found fertile ground. In its Digital Single Market Strategy¹ the European Commission (EC) planned to introduce sectorial legislation that aimed to curb illicit and infringing activities online, targeting especially minors' protection from harmful content, incitement through hatred and protection of copyrighted content against infringement.

The copyright-related aspects of the EC Strategy were incorporated in a set of legislative acts that together formed the so-called copyright reform package². Among these was the Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market (in continuation: DSM Directive), widely expected to provide for cross-border access to copyright-protected content, facilitate new uses in the fields of research and education, and clarify the role of online services in the distribution of works. Following the legislative procedure in the Council, Commission and Parliament, the final text of the directive was

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52015DC0192>.

² Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market - COM(2016)593;

Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes - COM(2016)594;

Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society - COM(2016)596;

Proposal for a Regulation of the European Parliament and of the Council on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled - COM(2016)595).

passed in the European Parliament on the 13. 2. 2019 and subsequently published³ in the Official Journal of the European Union. EU Member States will have until 7 June 2021 to adopt the provisions laid down in the DSM Directive into their respective copyright laws.

Two of the most important (and most wildly debated) issues, addressed in the DSM Directive, were licensing and filtering obligations for intermediaries (Article 17) and a new neighbouring right for publishers of press publications (Article 15) – both an attempt at closing the so-called value gap - a hypothetical difference between the incomes achieved by platforms exploiting protected content vs. the incomes shared with rightsholders of this content. Together these two provisions are estimated to cause a substantial shift in the legal position and interest balance of copyright intermediaries – old and new. While platforms will be forced to accept more (primary) liability for copyright breaches and supposedly share more revenue with copyright holders (traditionally publishers and producers), the question remains how will this shift affect the other key players in the copyright chain – authors and users, and in what ways (if at all) does the DSM Directive provide for the proverbial *fair balance* between the interests and rights of key stakeholders.

Key research topics and questions

The dissertation will be structured around three major focal points:

- a) the regulation of intermediary liability for copyright infringement in EU legislation
- b) the balance of rights and interests between key copyright stakeholders (authors, intermediaries and users) under the EU copyright reform
- c) the challenges and opportunities for selected EU member states in the implementation process of the DSM Directive relating to online exploitation of copyrighted works (most likely the chosen member states will be Slovenia, Austria and Germany, alternatively also Croatia or the Netherlands⁴).

³ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2019:130:TOC>.

⁴ The countries will be selected based on available resources on their national legislation, enforcement and best practices, also considering possible language barriers of the author of the dissertation (Slovene, Croatian, German and English) and the possibility of UK as the only English speaking member state exiting the EU during the course of the research.

a) Intermediary liability

Before the adoption of the DSM Directive, online intermediaries in the EU were provided with exceptions from liability for copyright infringement by the users of their services (*safe harbours*) in cases of mere conduit, caching and hosting of content. Aside from this, intermediaries were not required to generally monitor all their online traffic or to actively seek out individual cases of possible wrongdoing by the users (like uploading of content for which copyrights were not previously cleared). Their liability was accessory (secondary) and based on culpability – only if made aware of a specific infringement and failing to act appropriately upon such notification, the intermediary was liable to the copyright holder, as the primary liability for copyright infringement has been that of the user.

In recent years, policy debates turned towards stricter liability for online intermediaries, where platforms would be responsible for copyright infringement, if specific measures are not applied (like content filtering). Alongside this notion, the EC also suggested an allocation of value generated by the distribution of works online, through licensing obligations for user-generated content platforms. Articles 15 and 17 of the DSM Directive are a direct result of this narrative.

The dissertation aims to examine the changes in intermediary liability brought on by the EU copyright reform and dissect the legal (and where necessary economic) arguments for and against these changes in order to establish whether a stricter liability is indeed the route to a fairer allocation of value from intermediaries to content creators. The placement of the new liability regime within the broader context of pre-existing EU law and jurisprudence will also be closely examined (in particular decisions of the CJEU on the liability of online intermediaries in cases like *Telekabel* and *YouTube C-682/18*, which is expected to be issued during the course of the preparation of the dissertation), in order to establish possible complementary/adverse effects between the existing legal framework and the provisions of the DSM Directive. In this part the dissertation will also take a short but intriguing detour into the question of where EU copyright would be regarding intermediary liability, if the DSM Directive were not adopted (or if it were adopted sans Article 17).

The dissertation will also feature a review of the obligations of intermediaries to filter online traffic and in this context, a discourse on weather through the introduction of measures, featured in the the DSM Directive, the EU is moving towards privatization of copyright enforcement through algorithmic tools and weather such trends are appropriate and legitimate when considering, that the question of copyright infringement is a legal question, and as such subject to judicial review.

b) The balance of rights

One of the key arguments in support of both Article 15 and Article 17 of the DSM Directive were the benefits these provisions should have for authors and users alike. On the one hand they are supposed to provide for compensation mechanisms, that would enable authors to participate at the revenues platforms make form exploiting the content they created. On the other hand, the shift in intermediary liability would exempt users, who post third party content online, from claims by copyright holders, as those would be enforceable directly against the platform. However, there had been warnings by authors, that the mechanisms intended to improve the position of authors vs. the persons they transfer their copyrights to, are insufficient. On the other side of the spectrum, civil society groups have expressed concerns that the filtering obligations imposed on platforms might hamper freedom of expression and information. In this context, the EU copyright reform has been accused of being a power play between the old and new intermediaries, rather than a facilitator of harmonised solutions for better access to copyrighted works and fairer rewarding for creativity EU wide.

As its main focus area, the dissertation will examine the fair balance between copyright and fundamental rights, as established through existing EU legislation (Charter of Fundamental Rights) and the case law of the CJEU (like *Promusicae*, *Sabam*, *Scarlet and Netlog*), and address the question of how the new regime of intermediary liability under the DSM Directive might influence the definition and application of this principle in the future.

Subsequently, the dissertation aims to review various mechanisms, built into the DSM Directive, which are intended to balance the interests of three key stakeholders – creators,

intermediaries and users, and assess the potential of these mechanisms to mitigate the disruptive effects Articles 15 and 17 might have on EU copyright law.

These “balancing mechanisms” include especially:

- Fair remuneration for creators (specifically for authors of press publications and generally for all authors when transferring their rights)
- Transparency obligations when authors transfer their rights
- Redress mechanism for users of UGC platforms
- Exceptions under Article 17 for quotation, criticism, review, caricature, parody or pastiche
- Exceptions under Article 15 for hyperlinking
- Extended collective management as an option for copyright clearance
- Limitation of general monitoring obligations

While assessing the individual “balancing mechanisms”, as listed above, the dissertation will draw parallels with existing EU legislation already in force (like the redress mechanisms in case of applying technological measures under the InfoSoc Directive and filtering of content, harmful for minors, under the AVMS Directive) in assessing the enforcement and effectiveness of such measures and drawing conclusions as to the possibilities of the proposed measures to achieve better balance in EU copyright law.

The dissertation will also reflect on some broader issues, which arise from the complex new legislation, especially the following: *Does Article 17, when providing for exceptions for quotation, criticism, review, caricature, parody or pastiche, impose on member states an obligation to implement all of these exceptions into their national laws, should they not already have them?* and *Are member states free to refuse the implementation of certain provisions, if they deem those provisions to be contrary to national, EU and international legislation already in force (like general filtering obligations)?*.

c) The implementation possibilities

The dissertation will analyse existing national legislation and jurisprudence relating to intermediary liability and online exploitation of copyrighted works on UGC platforms in

selected EU member states (as stated above, possibly Slovenia, Austria and Germany). Through this analysis the dissertation aims to establish how the parameters already in place in model member states might influence the implementation of the DSM Directive and whether the existing national legislative frameworks might adversely effect harmonized implementation throughout the EU.

Subsequently, the dissertation will aim to establish whether and to what extent the implementation of the DSM Directive might tip the balance of rights between key stakeholders in favour one or several of them and if the DSM Directive through the “balancing mechanisms” provides for enough manoeuvring space to hypothetically restore disruptions in copyright balance through adequate implementation of these measures (like the implementation of extended collective management and limitation of general filtering obligations).

Finally, the dissertation will develop a model law for the implementation of the DSM Directive into Slovene legislation, in a manner that safeguards (or re-establishes) the balance between authors, intermediaries and users. The author of the dissertation is aware, that this evaluation may be subject to the authors subjective socio-political beliefs, but the author will make all efforts to construct the model law as objectively as possible, based on the results of her research of the chosen *materiae*. It is, however the very aim of this dissertation to touch back on the fundamental question of *Is it appropriate to see copyright purely as property (and the internet purely as a marketplace?)*. It is the view of the author that this question is worth addressing and readdressing through research continuously.

Preliminary index

1. Introduction

- 1.1 Problem definition
- 1.2 Research questions
- 1.3 Terminology
- 1.4 Methodology
- 1.5 Selection of national jurisdictions

2. On intermediary liability

- 2.1 The current EU legal framework

- 2.2.1 EU Copyright Regulation
 - 2.2.2 Rules on intermediary liability
- 2.2 Intermediary liability under the E-Commerce Directive
 - 2.2.1 Regimes under Articles 12 to 14
 - 2.2.2 The standard of knowledge
 - 2.2.3 Notice-and-takedown
 - 2.2.4 Duty of care
 - 2.2.5 General monitoring obligations
- 2.3 Intermediary liability in CJEU Case Law
 - 2.3.1 The impossible future – what the intermediary liability landscape could look like without the DSM Directive
- 2.4 Intermediary liability under the DSM Directive
 - 2.4.1 The Digital Single Market Strategy for intermediary liability
 - 2.4.2 Introduction to the DSM Directive
 - 2.4.3 Article 15 – New ancillary right for press publishers
 - 2.4.4 Article 17 – Licensing obligations and Content filtering
 - 2.4.4.1 New definition of Communication to the public
 - 2.4.4.2 Licensing obligations
 - 2.4.4.3 Liability and exemption from safe harbours
 - 2.4.4.4 Filtering obligations
 - 2.4.4.5 Notice-and-takedown, notice-and-action, notice-and-staydown
 - 2.4.5 Discourse: Compatibility of new provisions with the existing legal framework

3. The Copyright Balance

- 3.1 Principle of fair balance in EU law
- 3.2 Fair balance between copyright and fundamental rights in CJEU case law
- 3.3. The principle of fair balance and intermediary liability
 - 3.3.1 Balancing intermediary liability before the DSM Directive
 - 3.3.2 The balancing mechanisms within the DSM Directive
 - 3.3.2.1 Licensing obligations for UGC platforms
 - 3.3.2.2 General monitoring obligations
 - 3.3.2.3 Filtering and blocking
 - 3.3.2.4 Redress mechanisms for users of UGC platforms
 - 3.3.2.5 Exceptions under Article 17
 - 3.3.2.6 Exceptions under Article 15
 - 3.3.2.7 Fair remuneration for creators
 - 3.3.2.8 Transparency obligations when authors transfer their rights
 - 3.3.2.9 Extended collective management as an option for copyright clearance
- 3.4 Balancing as legal discourse

4. Implementation – Opportunities and Threats

- 4.1 National approaches to intermediary liability
 - 4.1.1 Slovenia
 - 4.1.2 Croatia*
 - 4.1.3 Austria
 - 4.1.4 Germany
- 4.2 Differences and similarities: Will national frameworks facilitate harmonisation or fragmentation?
- 4.3 Tipping the scales: Achieving fair balance on a national level through implementation of the DSM Directive
- 4.4 Best case scenario: Model implementation legislation for Slovenia

5. Conclusion

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