

TALLINN UNIVERSITY OF TECHNOLOGY

School of Business and Governance

Department of Law

Jelena Forsby

**ISSUES OF COPYRIGHT IN SHARING USER-GENERATED  
CONTENT ON SOCIAL NETWORKING SITES**

Bachelor's thesis

Programme HAJB, specialization European Union and international law

Supervisor: Pawan Kumar Dutt

Tallinn 2022

I hereby declare that I have compiled the thesis independently and all works, important standpoints and data by other authors have been properly referenced and the same paper has not been previously presented for grading.

The document length is 11 846. words from the introduction to the end of conclusion.

Jelena Forsby .....

(signature, date)

Student code: 185036HAJB

Student e-mail address: jelena.forsby@gmail.com

Supervisor: Pawan Kumar Dutt:

The paper conforms to requirements in force

.....

(signature, date)

Chairman of the Defence Committee:

Permitted to the defence

.....

(name, signature, date)

# TABLE OF CONTENTS

TABLE OF CONTENTS .....	3
ABSTRACT .....	4
ABRREVIATIONS .....	5
INTRODUCTION .....	6
LOOKING INTO SOCIAL NETWORKING SITES .....	8
1.1. Evolution of social networking sites .....	8
1.2. Incentivised content sharing .....	8
2. REGULATORY FRAMEWORK IN EUROPE AND THE US .....	11
2.1. Copyright protection of online content in Germany .....	11
2.1.1. Notable case law in Germany .....	12
2.2. Copyright protection of online content in the United Kingdom .....	13
2.2.1. Notable case law from UK .....	18
2.3. Copyright protection of online content in the United States of America .....	19
2.3.1. Notable case law from the US .....	22
3. CURRENT ISSUES IN COPYRIGHT LAW CONSERNING SHARING CONTENT ON SNS 25	
3.1. Article 17 of the DSM Directive .....	25
4. FOCUSING ON THE FUTURE .....	30
4.1. Upcoming Digital Service Act Regulation .....	30
4.2. New approach to copyright on SNS .....	32
CONCLUSION .....	35
LIST OF REFERENCES .....	37
APPENDICES .....	43

## ABSTRACT

This thesis focuses on the modern issues of copyright protection of user-generated content shared on social media. Social networking sites have evolved and nowadays allow their users to share protected content by simply clicking a few buttons. Since the effects of these easy new ways of sharing could not have been foreseen when existing copyright laws were created, there is a need to examine the current state and efficiency of copyright law. This thesis aims to analyze the state of the current copyright legislation in the countries of interest via a thorough literature review. Additionally, the aim is to bring awareness to some of the current grey areas in relevant copyright law and provide possible suggestions to the identified issues.

Keywords: copyright, user-generated content, social networking sites

## ABBREVIATIONS

CDPA	Copyright, Designs and Patents Act 1988
CJEU	Court of Justice of the European Union
DMCA	Digital Millennium Copyright Act
EUIPO	European Intellectual Property Office
OCSSP	Online Content Service Provider
SNS	Social Networking Site(s)
UCG	User Generated Content
UK IPO	UK Intellectual Property Office
USC	United States Code
WIPO	World Intellectual Property Organisation
VLOP	Very Large Online Platform

# INTRODUCTION

The rapid growth of social networking sites (SNSs) in the last two decades has made sharing information accessible and effortless for a large part of the population. Platforms such as Instagram, Facebook, Twitter, and YouTube have been expanding steadily throughout the last decade and have millions of active daily users.<sup>1</sup> These sites have become one of the easiest ways to consume and generate content for a large amount of people that habitually use the internet.

Social networking sites encourage and facilitate their users to share both user generated content (UGC) and third-party content via various built-in features.<sup>2</sup> It has been argued that encouraging users to actively share pictures and videos goes against the core idea of copyright, which aims to protect the works and to prevent their unlawful distribution.<sup>3</sup> Rapid technological progress and the growing culture of sharing<sup>4</sup> has made infringing copyright easier than ever, thus there is a need to examine the current state and the future of copyright regulation.

As many of the pictures and videos posted online are protected by copyright laws in both EU and United States, it is essential for users to be aware of what type of sharing could be considered as copyright infringement. As pictures and videos often get modified in the process of sharing, it is also important to examine what type of content modification could be considered fair use. Although various types of content can be shared via SNSs, images and videos are the primary focus of this thesis.

This thesis aims to identify how are photos and other shareable content, such as modified pictures, regulated under current copyright legislation in the USA versus in the United Kingdom and Germany. Each jurisdiction's approach to fair use is discussed. Selection of the countries is based on the number of active users of SNSs and the availability of relevant case law. In addition, this thesis aims to bring awareness to the legal issues and grey areas that already exist in this field of copyright law. To paint a full picture, the direction of future development of copyright law is presented and possible solutions to current issues are discussed.

---

<sup>1</sup> Statista Research Department (2022). Most popular social networks worldwide as of January 2022 ranked by number of active users (database) [Online] Retrieved from <https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users> 10.09.2021

<sup>2</sup> Boshier, H., Yeşiloğlu, S. (2019). An analysis of the fundamental tensions between copyright and social media: The legal implications of sharing images on Instagram. *International Review of Law, Computers and Technology*, 33(2), 165.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

The questions posed are the following: How are pictures and modified images posted on the Internet protected under current copyright law in USA versus EU? In this thesis EU legislation is being analyzed by the example of the UK and Germany. How could the current legislation in the USA, UK and Germany be improved to better protect the content creators' rights to their online content?

The research is conducted using qualitative methods. A thorough doctrinal approach is used to analyze the current copyright legislation, available case law and relevant literature from the United States of America and EU to determine the legal standpoint regarding the research questions.

The first part of this thesis provides a short history of social networking sites and discusses their evolution and functions. An overview of the types of content that is most often shared is provided. This part discusses how SNSs are built to gather as much attention from their users as they can and how they are driven by profit.

The second part contains the analysis the current legal situation in USA, United Kingdom, and Germany regarding sharing copyrightable content on SNSs. Similarities and differences in relevant copyright legislation are analyzed in this section. Relevant case law is presented.

The third part of the research is devoted to illuminating some of the shortcomings and grey areas of current copyright law in selected legal systems regarding sharing content on SNSs. The third part also discusses the differences in the approach to online copyright regulation between the selected legal systems.

Lastly, the fourth part of this thesis sheds light on the future of copyright law and offers suggestions to improve legislation. The proposed new DSA Regulation is discussed. Some of the most popular social networking sites are compared in their approach to copyright protection of user-generated content.

## LOOKING INTO SOCIAL NETWORKING SITES

### 1.1. Evolution of social networking sites

Social networking sites can be defined as „web-based services that allow individuals to construct a public or semi-public profile within a bounded system, articulate a list of other users with whom they share a connection, and view and browse their list of connections and those made by others within the system.“<sup>5</sup>

Due to the development of technology and the Internet in general, these sites have not only grown in quantity, but also have gradually evolved to provide more features for their users. SixDegrees.com launched in the end of the 90's and is considered to be the first recognizable SNS.<sup>6</sup> The site only allowed its users to create profiles, connect with others, and only as the service developed, users were given the possibility to see the connections that others made on the site.<sup>7</sup>

In the beginning of the 00's many new SNSs were launched and became more mainstream as their popularity grew. Among these were LinkedIn, MySpace and Facebook. Websites that were previously only focused on sharing media, such as Flickr and YouTube, also became SNSs after adopting the features defined at the start of this chapter.<sup>8</sup>

Nearly thirty years later, SNSs have evolved to accommodate all kinds of interests and social groups. Some SNSs are popular within certain smaller markets, whereas some are globally known and have millions of active users.<sup>9</sup> In addition to multiplying in numbers, the functions that SNS contain have evolved as well. For example, Facebook allows its users to engage in multiple activities, such as *inter alia* post pictures, videos, comments, status updates, organize meetings, share news articles, create blogposts, manage events.<sup>10</sup>

### 1.2. Incentivised content sharing

Social networking sites continue to evolve and it is unlikely that their popularity will decline over time. In 2008 it was estimated that around 75% of Internet users were using some kind of

---

<sup>5</sup> Boyd, D., Ellison, N. (2007) Social Network Sites: Definition, History, and Scholarship, *Journal of Computer-Mediated Communication*, 13(1), 211.

<sup>6</sup> *Ibid.*, 214

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> Statista Research Department *Supra nota* 1

<sup>10</sup> Gangneux J, Docherty S. At close quarters: Combatting Facebook design, features and temporalities in social research. *Big Data & Society*, 5(2) 2.



social media.<sup>11</sup> Today these sites have become an inseparable part of many users' everyday lives, as platforms such as Instagram, Facebook and Twitter are measured to have respectively 1.478 B, 2.910 B, and 436 M active monthly users as of January 2022.<sup>12</sup>

SNSs are being purposefully designed to gather as much attention from their users as they can. This phenomenon has been coined as „attention economy“, where the end user is no longer the source of the revenue, since their attention has become monetizable.<sup>13</sup> Social networking sites are addictive, and studies on college students show how heightened social media addiction correlates with worsened mental health.<sup>14</sup> SNSs are built around incentivising their users to share and generate content constantly, because higher engagement leads to more ad visibility – which leads to more revenue.<sup>15</sup>

User-generated content (UGC) and third-party pictures and videos make up most of the shared content on social media. In Instagram alone, over 95 million photos and videos are shared daily, which accumulates to over 40 billion photos and videos since the site's launch in 2010.<sup>16</sup> Users' desire for video content has also been on a steady rise, evident by the growth of a popular video sharing platform YouTube. As of February 2020, more than 500 hours of video were uploaded to the platform every minute.<sup>17</sup>

The term „user-generated content“ is referred to as content made by amateurs<sup>18</sup> and defined in a 2007 report by the OECD as „content that is created outside of professional routines, uploaded to the Internet and made publicly available, and reflects a certain amount of creative effort“.<sup>19</sup>

---

<sup>11</sup> Kaplan A., Haenlein M. (2010) Users of the world, unite! The challenges and opportunities of Social Media. *Business Horizons*, Volume 53, Issue 1. referenced in Moore, K., McElroy J.C. (2012) The influence of personality on Facebook usage, wall postings, and regret, *Computers in Human Behavior*, Volume 28, Issue 1, 267.

<sup>12</sup> Statista Research Department *Supra nota* 1

<sup>13</sup> Williams, J. (2018) Stand out of our light: Freedom and resistance in the attention economy. Cambridge: Cambridge University Press referenced in Bhargava, V., & Velasquez, M. (2021). Ethics of the Attention Economy: The Problem of Social Media Addiction. *Business Ethics Quarterly*, 31(3), 321.

<sup>14</sup> Hou, Y., Xiong, D., Jiang, T., Song, L., Wang, Q.(2019) Social media addiction: Its impact, mediation, and intervention. *Cyberpsychology: Journal of Psychosocial Research on Cyberspace*, 13(1), article 4, 6.

<sup>15</sup> Boshier, Yeşiloğlu (2019), *supra nota* 2, 165.

<sup>16</sup> *Ibid.*

<sup>17</sup> Statista Research Department (2020) Hours of video uploaded to YouTube every minute as of February 2020 (database) [Online] Retrieved from <https://www.statista.com/statistics/259477/hours-of-video-uploaded-to-youtube-every-minute/> 10.09.2021

<sup>18</sup> Hetcher S., (2008) User-Generated Confusion: The Legal and Business Implications of Web 2.0, *Vanderbilt Journal of Entertainment and Technology Law* 10(4) referenced in Elkin-Koren, N., User-Generated Platforms (2010). WORKING WITHIN THE BOUNDARIES OF INTELLECTUAL PROPERTY, *Oxford University Press*, Forthcoming, 12.

<sup>19</sup> OECD Working Party on The Information Economy (2006), 8. Retrieved from <https://deliverypdf.ssrn.com/> 14.11.2021 referenced in Elkin-Koren, N., User-Generated Platforms (2010). WORKING WITHIN THE BOUNDARIES OF INTELLECTUAL PROPERTY, *Oxford University Press*, Forthcoming, 12.

The term is broad and covers a wide array of content posted online – from pictures or videos, to pieces of code or short temporary videos, which have been coined as “stories”.<sup>20</sup> UGC can be created by anyone using the Internet. In the context of this thesis the term „content“ refers to pictures and videos that are posted on social networking sites by its users.

Sharing and creating content has never been as easy as it is today.<sup>21</sup> The ease of sharing and mixing content online has led to the creation of the term „prosumers“<sup>22</sup> to describe those users who habitually both consume and create content online. The term is word play of „producers“ and „consumers“. Some authors argue that incentivised sharing is blurring the line between authors and the audience.<sup>23</sup>

The complicated relationship between hyper-sharing content online and copyright legislation has gained traction and ignited conversations in the global political discourse. The UK Intellectual Property Office (IPO) and the European Union Intellectual Property Office (EUIPO) have both recently published reports<sup>24</sup> <sup>25</sup> about online intellectual property (IP) infringement through social networking sites.

These reports highlight the necessity to study how new consumer habits and technologies affect IP rights. The focus of these institutions is on social media not only because online IP right infringement affects consumers, but it influences businesses and the global market as well. According to research conducted by EUIPO and the Organisation for Economic Co-operation and Development, intellectual property infringement reached up to 3,3% of world trade in 2019, which is 121 billion annually.<sup>26</sup>

Social networking sites are a fairly new invention in the course of modern history, however their effects are already evident in all areas of life – including the evolution of copyright laws, as will be shown throughout this thesis. The following chapter will discuss the current state of copyright laws in relation to sharing content on SNSs in selected countries.

---

<sup>20</sup> Boshier, H., Yeşiloğlu, S. (2019), *supra nota* 2, 166.

<sup>21</sup> Collins, S. (2010). Digital Fair: Prosumption and the fair use defence. *Journal of Consumer Culture*, 10(1), 38.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*, 39.

<sup>24</sup> See report by Collopy, D., Drye T., (2017) Share and Share Alike: The Challenges from Social Media for Intellectual Property Rights. London: Intellectual Property Office, retrieved from <https://assets.publishing.service.gov.uk/government/> 20.11.2021 referenced in Boshier, H., Yeşiloğlu, S., *supra nota* 2, 165.

<sup>25</sup> EUIPO, Monitoring and analysing social media in relation to IP infringement Report (2021) Retrieved from [https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library](https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library) 20.11.2021, 11.

<sup>26</sup> *Ibid.*

## 2. REGULATORY FRAMEWORK IN EUROPE AND THE US

### 2.1. Copyright protection of online content in Germany

The main source of copyright law in Germany is Act on Copyright and Related Rights (Urheberrechtsgesetz) (henceforth UrhG). As a member of the European Union, Germany has adapted the “digital agenda” of the two WIPO copyright treaties of 1996 through the Information Society Directive<sup>27</sup> in 2001 and the Enforcement Directive<sup>28</sup> into its national law.

European Union’s latest effort to modernize and harmonize copyright law – Directive 2019/790 on copyright and related rights in the Digital Single Market (DSM Directive)<sup>29</sup> – has also been transposed into German national law. Specifically the controversial Article 17, which will be discussed in more detail in the third part of this thesis, was transposed into German national legislation via the Act on the Copyright Liability of Online Content Sharing Service Providers (Urheberrechts-Diensteanbieter-Gesetz) which took effect on 1 August 2021.

User-generated content is most often in the form of pictures and videos, which are categorised as “artistic works” in § 2(1) UrhG. German law considers the creator of the work as the author, and the author as the owner of the copyright. German law does not allow the copyright to be transferred unless it is happening via executing a testament or dividing an estate.<sup>30</sup>

The German copyright law does not list criteria for originality of the work, as it is left for the courts to determine. The degree of originality was tested in *Eva-Maria Painer v Standard Verlags GmbH and Others*, where the CJEU decided that portrait photographs shall enjoy same protection as other works, as the author was able to express her own personality and creative abilities in her portraits.<sup>31</sup>

Copyright protection begins when the work is created by the author. According to § 64 of UrhG, copyright protection lasts 70 years after the author’s death. The UrhG gives the author several

---

<sup>27</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

<sup>28</sup> Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004)

<sup>29</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

<sup>30</sup> Urheberrechtsgesetz § 29(1)

<sup>31</sup> Court decision, 1 December 2011, *Eva-Maria Painer v Standard VerlagsGmbH and Others*, C-145/10, EU:C:2011:798, point 99

exploitation rights throughout Subdivision 3. These rights include: the right of reproduction, distribution, exhibition, and the right to communicate the work to the public.<sup>32</sup>

As a member of the civil law system Germany's copyright law is precise and certain topics are thoroughly explained in the UrhG. For example, § 19(a) UrhG gives the author the right to communicate their work to the public either by wire or wireless means, and in a manner where the public can access the content whenever they choose to. "Members of the public" are defined in § 15(3) UrhG to be: "Those persons, who are not connected to the author or exploiter of the work by a personal relationship." If the intent of the author is to communicate the work to such persons, the communication will be deemed public.

Moral rights are also present in the UrhG throughout § 12 to § 14, and they are similar in nature to those the UK: the author has the right to determine whether and how the work will be published<sup>33</sup>, the right to be identified as the author<sup>34</sup> and the right to prevent distortion or derogatory treatment of the work.<sup>35</sup> The German system does not require the work to be registered, however there is a register for anonymous or pseudonymous works.<sup>36</sup>

German legal system does not currently have a „fair use“ system in place, unlike the US and the UK. Scholars have suggested amending German legislation with a system that would provide a similar right than 17 United States Code (USC) section 107 does.<sup>37</sup>

#### 2.1.1. Notable case law in Germany

In a recent decision<sup>38</sup> the German Federal Court of Justice upheld that photographs of paintings that are in public domain, are copyrightable in certain circumstances. The respondent, Wikimedia Commons, is a platform created by the Wikimedia Foundation which hosts free-use online content under the Creative Commons license. This platform uploaded and housed 17 pictures of famous paintings, all of which are in public domain. These pictures were first commissioned by Reiss Engelhorn Museum in Mannheim, Germany, where the paintings are on display.<sup>39</sup>

---

<sup>32</sup> Urheberrechtsgesetz § 15(1)(2)

<sup>33</sup> Urheberrechtsgesetz § 12

<sup>34</sup> *Ibid.*, § 13

<sup>35</sup> *Ibid.*, § 14

<sup>36</sup> *Ibid.*, § 66

<sup>37</sup> Potzlberger, F. (2013). Google and the thumbnail dilemma fair use in german copyright law. *US: Journal of Law and Policy for the Information Society*, 9(1), 141

<sup>38</sup> Bundesgerichtshof, I ZR 104/17, December 20th, 2018

<sup>39</sup> Michel, S. (2019). Digitisation of art in the public domain—museum urges Wikimedia to take down reproductions of out-of-protection artworks. *Journal of Intellectual Property Law & Practice*. 14(6), 427-428.

The Court decided to affirm the decision of the lower courts and ordered the respondent to remove these photographs from online access, stating that they are protected by a copyright-related right under § 72 UrhG. The decision was affirmed, because the Court saw that the production of the photographs had taken effort and skill, and thus these photographs had qualified as “personal intellectual effort”. The author of these photographs can enjoy copyright protection, however for 50 years since the communication to the public.<sup>40</sup>

Another CJEU decision gave clarification about a different problem in the realm of online copyright: the issue of hyperlinking content. The main question of *GS Media v. Sanoma*<sup>41</sup> was whether hyperlinking content that was made freely available by a third party, but without consent of the rights holder, could be considered as an act of communication to the public.

The court ruled that the deciding factor was the intent of the person who is hyperlinking the content. Namely, if the motivation behind hyperlinking was financial gain, the hyperlinking is considered to be an act of communication to the public. If however, the hyperlink is created by someone who did not know (or could not have known) that the owner did not consent to the sharing of the material, then the act is not considered as communication to the public.<sup>42</sup>

## 2.2. Copyright protection of online content in the United Kingdom

The primary copyright legislation in the UK is the Copyright, Designs and Patents Act 1988 (CDPA).<sup>43</sup> While the UK was still a member state in the EU, the CDPA was supplemented with various EU copyright regulations and directives, such as the Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (Information Society Directive) and Directive 2004/48/EC on the enforcement of intellectual property rights.

The United Kingdom left EU and ceased to be a part of the EEA fully when the Brexit transition period ended 31st December of 2020, at 11 pm.<sup>44</sup> Despite Brexit, the UK continues to be a signatory to various international conventions, treaties and agreements, such as the Berne Convention, Rome Convention and WTO’s intellectual property (TRIPS Agreement).<sup>45</sup>

---

<sup>40</sup> Urheberrechtsgesetz § 1272 (3)

<sup>41</sup> Court decision, 8 September 2016, *GS Media BV v Sanoma Media Netherlands BV*, *Playboy Enterprises International Inc.*, *Britt Gertrudis Dekker*, ECLI:EU:C:2016:644.

<sup>42</sup> *Ibid.*, points 49, 51.

<sup>43</sup> Stokes, S. (2019) *Digital Copyright: Law and Practise*. Bloomsbury Publishing, 26

<sup>44</sup> Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2019 (“Withdrawal Agreement”), Art. 126. Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12020W/TXT> 12.12.2021

<sup>45</sup> Berne Convention contracting parties, retrieved from

After leaving the EU, the UK passed the Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2019, which came into force on 1. January 2021.<sup>46</sup> The purpose of this regulation was to preserve UK copyright law, and to remove or correct old references to the EU, EEA or any other names that were present in the old law and no longer applied.

Knowing that both the US and UK are utilizing the common law system, their approach to copyright is similar. UK copyright laws consider protecting innovation and knowledge to be important for the greater good of the people, making the monetary compensation of the author thus secondary.<sup>47</sup>

There are some differences however in the definitions of pictures and videos in the UK and US legal texts. In UK law, the definition of pictures and videos can be found in Chapter I, section 4 of CDPA. In section 4 (1) photographs are mentioned under “artistic works”, which are explained as “a graphic work, photograph, sculpture or collage, irrespective of artistic quality”. In section 4 (2) photographs are given a further explanation: “recording of light or other radiation on any medium on which an image is produced or from which an image may by any means be produced, and which is not part of a film”. The definition is slightly different from the US definition of photographs, as it does not take the artistic quality of the photo into equation.

Videos are defined in section 5B of the CDPA; however, the law uses the term “film” and gives the following definition for a film: “a recording on any medium from which a moving image may by any means be produced.” The soundtrack that accompanies the film is treated as part of the film, according to 5B (2).

Similarly to the US legislation, the protection of works to which UK copyright laws apply begins when the work is created. However, there are no specific provisions discussing the necessity for the work to be created into a tangible medium, as it is implied throughout the text.

---

[https://wipolex.wipo.int/en/treaties/ShowResults?search\\_what=C&treaty\\_id=15](https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=15) 1.2.2022.

Rome Convention participants retrieved from

[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XIV-3&chapter=14&clang=en#8](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XIV-3&chapter=14&clang=en#8) 1.2.2022.

WTO's intellectual property TRIPS Agreement participants retrieved from

[https://www.wto.org/english/tratop\\_e/trips\\_e/amendment\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/amendment_e.htm) 1.2.2022.

<sup>46</sup> Guidance on UK and EU copyright protection for right holders and users including business, cultural heritage institutions and consumers. Retrieved from <https://www.gov.uk/guidance/protecting-copyright-in-the-uk-and-eu>, 14.02.2022

<sup>47</sup> Senftleben, M. (2010). The international three-step test: model provision for EC fair use legislation. *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 1(2), 68.

The concept of originality differs from US law, as it is not specifically mentioned in the CDPA. Instead, it has been tested in Court of Justice of the European Union (CJEU) in several cases, most notable being *Football Datacoms v. Yahoo! UK (2012)*.<sup>48</sup> In this case it was decided that a work can be considered original, and thus copyrightable, if it was the result of the author's effort, skill, work and judgement.<sup>49</sup> As mentioned before, the UK law in 3A (a) of CDPA does not take the artistic qualities of a photograph into consideration. The method of defining copyrightability that was created in *Football Datacoms v. Yahoo! UK* has been used in multiple British cases pre-Brexit.<sup>50</sup>

The rights guaranteed by the UK Copyright law are similar to those in US. The CDPA gives the copyright holder the right to copy, issue copies to the public, to rent or lend copies to the public, to perform or communicate the work to the public, or make adaptations to their work.<sup>51</sup>

The duration of copyright is generally the same for both pictures and videos. According to sec 12 and 13B of the CDPA, works that fall under UK copyright laws are protected for 70 years after the end of the calendar year in which the author dies. In case of videos the law lists other roles that influence when the 70-year period starts: the principal director, author of the screenplay, author of the dialogue or the composer of the music that was specifically created for and used in the video.<sup>52</sup>

Unlike in the US system, in the UK artistic works (such as pictures) and films are protected by a moral right, according to sec 77 (1)(a) of the CDPA. In order for the copyright holder to have the right to be identified as the author of a photograph, the photograph needs to be either published commercially or exhibited in public. In case of a video, the right comes into existence in similar situations: the video is either published commercially or copies of it are issued to the public.<sup>53</sup> It remains to be seen through future caselaw whether posting a picture or a video online constitutes as "exhibition in public" – and to which extent, as content can be often published online to a very limited audience. One case connected to the right to communicate work to the public via the

---

<sup>48</sup> Court decision, 1 March 2012, *Football Datacom Ltd and Others v Yahoo! UK Ltd and Others*, Case C-604/10, EU:C:2012:115

<sup>49</sup> Rahmatian, A. (2013) Originality in UK Copyright Law: The Old "Skill and Labour" Doctrine Under Pressure. *International Review of Intellectual Property and Competition Law*, 44, 5.

<sup>50</sup> *Ibid.*

<sup>51</sup> Copyright, Designs and Patents Act 1988, Chapter II, sec 16 (1), (a-e)

<sup>52</sup> *Ibid.*, Chapter I, sec 13B

<sup>53</sup> *Ibid.*, Chapter IV, sec 77 (1), (4)(a), (7)(1)

internet has been recently decided on in the High Court of Justice<sup>54</sup> and will be discussed in the next subchapter.

Another moral right that the UK law offers is the right to object to derogatory treatment of work, as stated in sec 80 of the CDPA. According to the law, derogatory treatment of the work happens when the work is distorted or mutilated, or the use is otherwise prejudicial to the author's honour and reputation.<sup>55</sup> The law specifies that the person who publishes the derogatory work commercially or otherwise exhibits the derogatory work publicly is considered the offending party<sup>56</sup>. Again, whether right this will be applicable to various modified pictures posted online remains to be seen. Similarly, it is not clear whether the other moral rights, such as the right to protest wrongful attribution<sup>57</sup> or the right to privacy of private photographs<sup>58</sup>, will be applicable in online circumstances. Unlike the US, in the UK copyright does not need to be registered in order to be enforceable in court, according to the IPO Information Centre in UK. There is also no register for copyrighted works in the UK.<sup>59</sup>

The UK equivalent to fair use is „fair dealing“,<sup>60</sup> which unlike in the American legal system, does not have any statutory definition. However, similarly to US courts, fair use is defined always on a case-by-case basis. The English courts approach this issue by analysing how an honest and fair-minded person would have dealt with sharing the work.<sup>61</sup>

Due to Brexit the UK has not adopted EU's latest copyright legislation (the DSM Directive) nor has there been any fundamental changes to UK copyright legislation during the transition period after Brexit.<sup>62</sup> This means that the UK's approach to regulating online content-sharing service providers (OCSSPs) has stayed the same, while other European countries updated theirs to reflect the DSM Directive. Unlike EU Member States, the UK still allows liability “safe harbours” for social networking sites, as established by the E-Commerce Directive<sup>63</sup> in the 00's,

---

<sup>54</sup> See *infra nota* 73, United Kingdom Court of Appeal, 26 March 2021, [2021] EWCA CIV 441.

<sup>55</sup> Copyright, Designs and Patents Act 1988, Chapter IV, sec 80 (2)(b)

<sup>56</sup> *Ibid.*, Chapter IV, sec 80 (4)(a)

<sup>57</sup> *Ibid.*, Chapter IV, sec 84 (1)(a)(b)

<sup>58</sup> *Ibid.*, Chapter IV, sec 85 (1)(a)(b)(c)

<sup>59</sup> How copyright protects your work. Retrieved from <https://www.gov.uk/copyright/stop-people-using-your-work> 25.03.2022

<sup>60</sup> Owen, L. (2015). Fair dealing: a concept in UK copyright law. *Learned publishing*, 28(3), 229-231.

<sup>61</sup> Details of the exceptions to copyright that allow limited use of copyright works without the permission of the copyright owner. Retrieved from <https://www.gov.uk/guidance/exceptions-to-copyright#fair-dealing> 25.03.2022

<sup>62</sup> Lee, Y.H. (2022) United Kingdom Copyright Decisions and Post-Brexit Copyright Developments 2020. *International Review of Intellectual Property and Competition Law*, 52(3), 326.

<sup>63</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')



meaning the SNS are not responsible for their users uploads if they are not aware of the illegal content, or take it down quickly after becoming aware of such content.<sup>64</sup> Additionally, under this regime the SNS are also not under any general obligation to monitor the information they transmit or store.<sup>65</sup>

However, this does not mean that post-Brexit UK is not interested in developing its legislation to better handle problems that rapidly growing online platforms create. At the time of writing this thesis the UK is undergoing a process to pass the Online Safety Bill<sup>66</sup> (OSB), which will strengthen the protection of UK citizens in online platforms.

The OSB will regulate “user-to-user” services, which are defined as “an internet service by means of which content that is generated directly on the service by a user of the service, or uploaded to or shared on the service by a user of the service, may be encountered by another user, or other users, of the service.”<sup>67</sup> When passed, the OSB will impose several “duties to care” on social networking sites. For example, SNSs will be obliged to create systems that prevent individuals from encountering illegal content<sup>68</sup> and if such content is encountered, uses should be able to alert the provider, that should then swiftly take down such content.<sup>69</sup>

The current draft of the Online Safety Bill will require SNS to *inter alia* to word their terms of service as clearly as possible and explain how their systems work, which is very similar to the provisions in the proposed DSA Regulation<sup>70</sup>, which is discussed in more detail in Chapter 4.1.

The OSB has also clear rules for SNS about protecting users’ freedom of expression when deciding about policies and safety measures. This rule echoes the heated debate around Article 17 of the DSM Directive, which was seen by scholars to have a limiting effect on freedom of speech due to possible over-monitoring of user-generated content. Chapter 3.1. will focus on this issue in more detail.

---

<sup>64</sup> *Ibid.*, Article 14(1)(a)(b)

<sup>65</sup> *Ibid.*, Article 15(1)

<sup>66</sup> Information about draft Online Safety Bill, Retrieved from <https://bills.parliament.uk/bills/3137> 23.04.2022

<sup>67</sup> Draft Online Safety Bill Part 1, Chapter 2, section 2 (1)(2). Retrieved from <https://publications.parliament.uk/pa/bills/cbill/58-03/0004/220004.pdf> 24.04.2022

<sup>68</sup> *Ibid.*, Part 3, Chapter 2, section 9 (3)(a).

<sup>69</sup> *Ibid.*, Part 3, Chapter 2, section 9 (3)(c).

<sup>70</sup> Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC. See also Chapter 4.1. and *infra nota* 129 Proposed DSA Regulation, Article 12(1).

### 2.2.1. Notable case law from UK

One of recent notable cases in the UK was the *Wheat v. Google LLC*, which was brought to the High Court of Justice in 2020. Mr. Wheat (the appellant) operated a website that hosted pictures and articles which were created by Mr. Wheat himself. The appellant took Google LLC (the respondent) to court after he noticed that when users performed google searches for his content, they were presented with links to websites that “hotlinked” his content.

Hotlinking is an internet phenomenon, which happens when content is linked from the website that hosts it to another, making it seem that the hotlinking website is the original host of the content, when it is not.<sup>71</sup> The hotlinking website thus only displays the content, but for the average internet user it looks as if the hotlinking website is the original source. This can be utilized unethically<sup>72</sup>, as it steals traffic, and therefore exposure, from the original host of the content – which is what happened to the appellant. He argued that even though the practice of hotlinking itself was lawful, he did not consent for Google to show its users the hotlinked content, instead of his own. The appellant alleged that Google had infringed his rights to the pictures, by communicating them to the public without the author’s approval.

The Court dismissed the appeal and sided with Google. The Court stated that the way the pictures were displayed in Google’s search engine did not constitute sharing them to a new public or via new technical means. Infringing communication to the public was not found. Even though hotlinking is legal, this case shows that even unauthorized hotlinking through Google does not infringe the author’s rights. It is an interesting decision, which must not be well received among content creators who prefer to showcase their content through own websites online.

Another notable case was decided on in the spring of 2021. As discussed before, newly found freedom of Brexit can give the UK Supreme Court and certain appellate courts the right to move away from the decisions of CJEU. In a recent case of *Tunein Inc V. Warner Music UK Limited, Sony Music Entertainment UK Limited*<sup>73</sup> the Court of Appeal decided, however, that it will not deviate from CJEU precedent.

The case handled the issue of hyperlinking, with the relevant law being section 20 of the CDPA, which deals with infringements of copyright by communicating the works to the public.

---

<sup>71</sup> Chu, Z., Wang, H. (2011) An investigation of hotlinking and its countermeasures, *Computer Communications*, Volume 34(4), 577-578.

<sup>72</sup> *Ibid.*, 578-580

<sup>73</sup> United Kingdom Court of Appeal, 26 March 2021, [2021] EWCA CIV 441

Although the subject matter of the case concerns the copyright of music, the judgement is important to display in the context of this thesis. Lord Justice Arnold gave several reasons for not swaying away from CJEU precedent, referring to the absence of change in both the international copyright legislation and national legislation, as section 20 of the CDPA has also not been changed since Brexit. He explained that since the issue is regulated by international treaties, the contracting parties should strive for consistency of interpretation of the treaties.<sup>74</sup>

This case could be an indicator for the direction of future decisions by the UK Supreme Court and Court of Appeal.

### 2.3. Copyright protection of online content in the United States of America

At the heart of American copyright laws is the idea that uninhibited copying of intangible creations of the mind would bring unwanted consequences to the general public. To this day the public is being perceived as the first beneficiary of copyrighted works, whereas rewarding the author and copyright holder is deemed as secondary.<sup>75</sup>

The current body of federal copyright law is the Copyright Act of 1976 (the Copyright Act), which is codified into Title 17 of the United States Code (USC).<sup>76</sup>

The scope of the Copyright Act was broadened in 1998 with the addition of the Digital Millennium Copyright Act (DMCA). The DMCA was created to implement the two treaties of World Intellectual Property Organization (WIPO), which WIPO itself adopted in 1996.<sup>77</sup> The aim of this change was to modernize and harmonize copyright laws internationally due to the rapid technological progress of the 20th century.

In the US copyright law, photographs and videos are given protection under copyright in Title 17 USC. Photographs are categorized in Chapter 1, §101 into “pictorial, graphic and sculptural works“. The wording is precisely broad as it includes not only pictures, but also reproductions of them and other artistic works. Videos are defined in the category of “audiovisual works“ as series of related images, which are intended to be shown by electronic equipment, with or without accompanying sounds.

According to § 102 of Title 17 USC, copyright protection begins automatically when a work of authorship is created and fixed in a tangible medium by an author. The subject matter of the

---

<sup>74</sup> *Ibid.*

<sup>75</sup> Joyce C., Leaffer M., Jaszi P., Ochoa T., Carroll M., (2003). *Copyright Law*. 6th edition. LexisNexis. 3.

<sup>76</sup> Title 17 of the United States Code, retrieved from <https://uscode.house.gov/browse/&edition=prelim> 07.04.2022

<sup>77</sup> Joyce C., Leaffer M., Jaszi P., Ochoa T., Carroll M., (2003) *supra nota* 75, 26.

work must be copyrightable, and the work must be original. Additionally, it must contain a minimal degree of creativity.

When person takes an original picture or a video, they become the copyright holder of the work. The duration of the copyright depends on the work, however generally for the duration of their lifetime and an additional 70 years after death, according to § 302 of Title 17 of USC. The exclusive rights to the work are listed in § 106 of Title 17 of USC. In regards to pictures and videos, the law gives the owner the right to distribute, reproduce, sell, lease, rent, lend the work, and let it be publicly displayed.

In order to bring an action enforcing one's rights to a piece of work in United States, not only do these conditions need to be fulfilled, but the person must be the legal owner of the exclusive rights under copyright law<sup>78</sup> and the work needs to be registered with the US Copyright Office<sup>79</sup>. For the purposes of registration, US copyright law contains a definition of "Unites States works" in §101 of Title 17 USC. Registration acts as a proof of validity of the copyright. Additionally, by having their copyright registered either before the infringement or three months after the publication, the owner of the work has the right for statutory damages, attorney's fees and other costs.<sup>80</sup>

In the US legal system, in order to share content lawfully, one needs to ascertain that either the content is either in public domain, or they must acquire a valid license from the copyright holder to use the work, or as a last alternative, the usage must fall under fair use.<sup>81</sup> Fair use is the most important limitation to the exclusive rights of copyright holders in America, and its use has increased as SNSs have expanded.<sup>82</sup>

However not all copying is permitted under fair use. The Title 17 USC §107 contains guidelines to the fair use. The fair use principle allows users to modify and use copyrighted content, but for certain reasons only: providing commentary or criticism, reporting news or teaching. To determine whether usage falls under fair use, judges consider the following factors: the purpose of the use, the nature of the work, the amount and substantiality used and the effect on the value of the work.<sup>83</sup> While considering the purpose of the work, the judges also weigh whether it is

---

<sup>78</sup> Neill, A. (2010) H., Social Media & the Law, Here Comes Everybody. *CEB Business Law Quarterly*, 54.

<sup>79</sup> Copyright Basics, publication of United States Copyright Office, revised 09/21, retrieved from <https://www.copyright.gov/circs/circ01.pdf> 14.04.2022

<sup>80</sup> *Ibid.*

<sup>81</sup> Neill A. (2010) *supra nota* 78, 57.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.* 57-58.

commercial in its nature or was created for a nonprofit purpose and whether and how much the work was transformative.<sup>84</sup>

In order to fully understand the roles of both consumers and SNS in the copyright equation, it is important to analyze the liability of social networking sites as well and the scrutiny they are put under.<sup>85</sup> According to section 17 USC sec. 512(c) the service provider (henceforth social networking site) is not liable for the content that its users post, provided that the SNS does not have knowledge about infringing material and is not aware of the facts or circumstances from which the infringing activity is apparent. Or if such knowledge exists, the SNS must act “expeditiously” to remove the infringing content.<sup>86</sup>

The process to have the infringing content taken down is not simple. The copyright holder must send the SNS’s agent a letter that must identify the work being infringed, the material that infringes it and also the location of the material.<sup>87</sup> In addition to this, the copyright holder must provide a statement evidencing their good faith belief about their work being misused, and a sworn statement that the information in the notification is accurate.<sup>88</sup>

As discussed above, after receiving such notification the SNS must quickly remove the infringing content. However, they must also notify the person who posted the infringing content about the removal<sup>89</sup>, who then has the right to file a counter-notification.<sup>90</sup> If a counter-notification is filed, then the copyright owner will also be informed. The copyright owner then has 10 business days to file a court order to stop the alleged infringer from using the copyrighted work. If a court order is not sought and provided to the SNS’s agent, then the content will be back on the website.<sup>91</sup> The purpose of such complicated system is to act as a counterweight – to prevent unjust takedown notices, where the content might not be infringing legally, but otherwise unpleasant (for example embarrassing).

As discussed, the DMCA allows social networking sites a similar “safe harbor” from liability as the UK does. Another piece of legislation that gives US online platforms freedom from liability is Title 47 USC section 230, according to which: “No provider or user of an interactive computer

---

<sup>84</sup> *Ibid.*

<sup>85</sup> Mac Síthigh, D. (2020). The road to responsibilities: New attitudes towards internet intermediaries. Information and Communications Technology Law, 29(1) 2.

<sup>86</sup> United States Code Title 17, Sec. 512(c)(1)(A)(i-iii)

<sup>87</sup> Ginsburg J., (2020) A United States Perspective on Digital Single Market Directive Art. 17, EU Copyright Law: A Commentary, Edward Elgar Publishing, Columbia Public Law Research Paper No. 14-654, 4.

<sup>88</sup> *Ibid.*, 4.

<sup>89</sup> United States Code Title 17, Sec. 512 (g)(2)(A)

<sup>90</sup> United States Code Title 17, Sec. 512 (g)(3)

<sup>91</sup> Ginsburg J., (2020) *Supra nota* 88, 4.

service shall be treated as the publisher or speaker of any information provided by another information content provider”. This means that platforms such as Instagram or Facebook are not liable for their users’ obscene, racist, or otherwise unacceptable comments.<sup>92</sup> Section 230 is considered the to be the law that allowed the Internet to grow and become what it is today, as it allowed the SNS to evolve without constant fear of litigation.<sup>93</sup>

However, this provision is not without its issues. It has been criticized because it technically allows content moderation, but also shields SNSs if they choose not to take part in such moderation.<sup>94</sup> This means that while the platforms do not take the blame for their users’ bad behaviour, and thus can operate more freely, they are also not incentivised to correct the bad behaviour. The advent of online advertisement on SNS is however changing this attitude, as it gives the platforms an incentive to moderate their content more thoroughly to maximize ad revenue.

### 2.3.1. Notable case law from the US

There have been multiple court cases involving online copyright infringement and fair use in the US. This thesis will discuss the cases concerning copyright infringement first.

In 2014 a member of the famous family „the Kardashians“ Khloe Kardashian posted a picture of herself on her Instagram. The rights to the picture were owned by a photo agency Xposure Photos, Inc., which filed a complaint in the U.S. District Court for the Central District of California, resulting in *Xposure Photos UK Ltd. v. Khloe Kardashian*<sup>95</sup>. The agency (the plaintiff) argued that Khloe Kardashian (the defendant) had committed copyright infringement when she or her team had removed the watermark off the photo and posted it on her Instagram as her own. The photo had been taken by a photographer Manual Munoz and licenced for limited use to the Daily Mail, which had posted the image to their own website with a watermark and a copyright notice.<sup>96</sup>

The central argument of the case was that the market value of the photograph was diminished after the defendant had posted it to her Instagram account. Additionally, the plaintiff had brought to the court’s attention that the defendant habitually earns money from pictures posted to her

---

<sup>92</sup> Cramer, B. W. (2020). From Liability to Accountability: The Ethics of Citing Section 230 to Avoid the Obligations of Running a Social Media Platform. *Journal of Information Policy*, 10, 132.

<sup>93</sup> *Ibid.*, 123.

<sup>94</sup> *Ibid.*, 134.

<sup>95</sup> District Court, C.D. California, *Xposure Photos UK Ltd. v. Khloe Kardashian*. 2:17-cv-03088. Filed 2017.

<sup>96</sup> *Ibid.*

social media, including Instagram. The plaintiff sought monetary damages under Section 504(c)(2) of the U.S. Copyright Act 1867. The case was settled out of court.

Much like copyright infringement, the concept of fair use has also been tested in courts. However, in a recent case of *Furie v. Infowars, LLC*<sup>97</sup>, the courts had to tackle a novel angle to this problem. The case was brought up to United States District Court for the Central District of California in 2019 following a dispute between Matt Furie (the plaintiff) and the companies Free Speech Systems, LLC and Infowars, LLC (the defendants). To fully explain the elements of the case, the concept of an “Internet meme” needs to be addressed first.

In 2003 the plaintiff had created a comic book character depicting green frog with distinctive features and colours. This image has since gained sizeable popularity online and became into what is known as an “Internet meme”. The internet has created a phenomenon, where certain images become liked, modified and widely shared online between people, all of whom share specific cultural knowledge that the image conveys. Though modified, these images retain the original distinctive features of the meme. People without that specific cultural knowledge usually do not understand the meaning behind a meme. In addition to a picture, an Internet meme can be a video or a GIF. In short, memes are being used to convey a personalized message through a collectively created template.<sup>98</sup>

In 2017 John Allen created a poster for the then upcoming elections of the 45th President of the United States, which included plaintiff’s frog character and several popular right-wing politicians. The poster was mostly black with red highlights and the frog character was modified slightly, but recognizable to anyone that had seen the meme before. The poster was sold to the defendants and later used for commercial purposes by them. The plaintiff sued the defendants for copyright infringement, whereas the defendants argued fair use.

The court analyzed several factors to determine fair use. First it was determined that the purpose and character of use of the poster were commercial, as they were advertised and sold on the website and social media of the plaintiffs. Next, the courts analyzed whether the use of the character in the poster was transformative. The court stated that even though the image had become very popular online, the right to guard its unauthorized usage remained with the plaintiff. Thus, the defendants’ argument about the loss of copyright from the defendant due to

---

<sup>97</sup> US District Court for the Central District of California, *Matt FURIE v. INFOWARS, LLC, et al.*, 401 F. Supp. 3d 952 (C.D. Cal. 2019). Filed in 2019.

<sup>98</sup> Nissenbaum, A., Shifman, L. (2018) Meme Templates as Expressive Repertoires in a Globalizing World: A Cross-Linguistic Study, *Journal of Computer-Mediated Communication*, Volume 23(5) 295

“meme-ification” of the image was dismissed. Due to conflicting evidence, the court was not able to decide on the amount or substantiality of the work used, or on the effect that the unauthorized use had on the value of the plaintiff’s work. In this case fair use was not found.<sup>99</sup>

This case serves as an example of malleability of US law, as the definition of “pictorial works” is not limited to normal pictures and illustrations, but also to their various edits online. This case might set a precedent to the way the infringing use of “internet memes” on SNSs will be handled in the future.

The provided examples illustrate that copyright infringement lawsuits are becoming more common. It’s easy it is to infringe someone’s copyright online – all it takes is pushing a few buttons. A pattern of lack of awareness can be observed, however it must be studied much deeper than the scope and aim of this thesis set out to do.

---

<sup>99</sup> *Furie v. Infowars, LLC, supra nota 97.*



### 3. CURRENT ISSUES IN COPYRIGHT LAW CONCERNING SHARING CONTENT ON SNS

#### 3.1. Article 17 of the DSM Directive

The latest major copyright legislation in Europe is the Directive on Copyright in the Digital Single Market (the DSM Directive), which came into effect in June 2019 with a deadline of implementation in June 2021.

The DSM Directive has been one of the most controversial pieces of legislation in the copyright realm and not been received well by academic researchers and other stakeholders, as some of them have been very vocal about the ambiguity and complexity of parts of the Directive.<sup>100</sup> Namely, Articles 15 and 17 (originally Articles 11 and 13 in the proposal, respectively) were subject to criticism and were thought to be against public interest.<sup>101</sup> Article 15 of DSM Directive gives additional rights to press publishers and will not be explored further, however Article 17 concerns online content-sharing service providers and therefore will be analyzed in the following paragraphs.

Article 17 of the DSM Directive regulates the use of protected content by “online content-sharing service providers” (OCSSPs), which are defined in Article 2(6) as: “...provider(s) of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organizes and promotes for profit-making purposes.”

This definition applies to most of the popular SNS, such as YouTube, Facebook, and Instagram, and therefore the term SNS will be used in this chapter for clarity. It is also important to note that not all platforms that host user-generated content fall under this definition. Article 2(6) provides guidance on the types of service providers that are excluded from this kind of liability. For example, these include not-for-profit online encyclopedias and cloud services that allow users to upload content for their own use.

Article 17 has been under heavy scrutiny because it radically changes the approach to SNS’s liability that was established in the E-Commerce Directive in the early 00’s. Before the DSM Directive, certain SNSs were not liable for the information or the user-generated content stored

---

<sup>100</sup> Quintais, J. (2020) The New Copyright in the Digital Single Market Directive: A Critical Look. *European Intellectual Property Review*. 2-3.

<sup>101</sup> Open letter to Members of the European Parliament and the Council of the European Union, retrieved from [https://www.create.ac.uk/wp-content/uploads/2017/02/OpenLetter\\_EU\\_Copyright\\_Reform\\_24\\_02\\_2017.pdf](https://www.create.ac.uk/wp-content/uploads/2017/02/OpenLetter_EU_Copyright_Reform_24_02_2017.pdf) 05.05.2022

by their users, provided the SNS's had no knowledge of the infringing content, and if they did - took quick action to remove it<sup>102</sup>. Additionally, there was no general obligation to monitor the information that they stored or transmitted, nor was there an obligation to seek out illegal activity.<sup>103</sup>

Article 17 of the DSM Directive effectively removes this hosting safe harbour and shifts the burden of liability onto the shoulders of social networking sites that fall under the OCSSP definition. For those platforms that do not fall under the OCSSP definition, the regime set by Article 14(1) of the E-Commerce directive still applies.<sup>104</sup> Further, the DSM Directive gives a new edge to the definition of „an act of communication to the public“. According to the definition, SNS's perform „an act of communication to the public“ by giving the public access to copyright protected works which are uploaded by SNS's own users.<sup>105</sup> This definition describes the core function of most social networking sites.

And because they are communicating the works to the public, Article 17 (3) of DSM Directive removes these SNSs from the scope of Article 14(1) of the E-Commerce Directive, which previously allowed them the safe harbour. This makes the SNS that fall under the definition of the DSM Directive become liable for their users' uploads. European Commission has called Article 17 *lex specialis* of the Article 14 of the E-Commerce Directive and Article 3 of the InfoSoc Directive<sup>106</sup>, as it provides a clearer definition of the act of communication to the public.

Article 17 gives SNS two options to escape liability: either obtain a license from the copyright holder(s) or comply with Article 17(4), which describes the conditions that SNS must establish to be able to avoid liability. To escape liability, SNS's must be able to prove that they “made best efforts to obtain an authorisation”<sup>107</sup> and “made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information; and in any event”<sup>108</sup> and “acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from

---

<sup>102</sup> E-Commerce Directive Article 14(1)(a)(b)

<sup>103</sup> *Ibid.*, Article 15(1)

<sup>104</sup> Ginsburg, J. (2020) *Supra nota* 88, 17.

<sup>105</sup> DSM Directive Article 17(1)

<sup>106</sup> Communication From The Commission To The European Parliament And The Council Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market, retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021DC0288> 04.05.2022

<sup>107</sup> DSM Directive Article 17(4)(a)

<sup>108</sup> *Ibid.*, Article 17(4)(b)

their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b)”<sup>109110</sup>

This part of Article 17 has been criticized to not only be problematic but have internal conflicts.<sup>111112</sup> Scholas and other stakeholders were worried it would lead to mass filtering of the uploaded content, even with Article 17(8) explicitly prohibiting any general monitoring obligations. Considering the size of the most popular SNS’s and the vast amount of content posted every second, it would be nearly impossible to comply with Article 17(4) without implementing automated filtering systems. There were also concerns that implementing Article 17(4) would create a conflict with the GDPR Directive and the handling of personal data if automatic monitoring would be established by a SNS.<sup>113</sup>

Another point of criticism was aimed at Article 17(7), which allows users of SNS to post copyrighted content when it’s done with the intent to criticize, review, quote, or parody something. In order to comply with this article and track this type of activity the SNS will have to implement automatic content recognition systems, which, as some authors have argued, can be incapable of making context-specific decisions – and therefore result in many wrongful takedowns of lawful content.<sup>114</sup> The desired effect of the Article 17(7) is not achieved, as it does not provide legal certainty in whether SNS engage in „copyright related acts“.<sup>115</sup>

The severity of the criticism of Article 17 of the DSM Directive is crystalized in Case C-401/19 *Poland v EP and Council*, the judgement of which was delivered on 15th July 2021 by the Advocate General. Republic of Poland sought to either to annul Article 17(4)(b)(c) or Article 17 in its entirety, stating that implementing the article in its passed form would inevitably lead to automatic filtering of UGC. In their view this would result in over-blocking and eventually

---

<sup>109</sup> *Ibid.*, Article 17(4)(c)

<sup>110</sup> Moreno F., (2020) ‘Upload filters’ and human rights: implementing Article 17 of the Directive on Copyright in the Digital Single Market, *International Review of Law, Computers & Technology*, 34:2, 153-160

<sup>111</sup> Shapiro, T., Hansson, S. (2019). The DSM Copyright Directive: EU Copyright Will Indeed Never Be the Same. *European Intellectual Property Review*, 41, 413.

<sup>112</sup> Romero-Moreno, F. (2019). ‘Notice and staydown’ and social media: Amending article 13 of the proposed directive on copyright. *International Review of Law, Computers and Technology*, 33(2), 187-190;

<sup>113</sup> Quintais J., *supra nota* 100, 19-20

<sup>114</sup> *Ibid.*

<sup>115</sup> Communication From The Commission To The European Parliament And The Council Empty, Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market, *supra nota* 110.

towards strong censorship and restricted freedom of expression of users,<sup>116</sup> which are guaranteed in Article 11 of the Charter of Fundamental Rights of the European Union (the Charter).

This opinion was not supported by the Advocate General, who did not find Article 17 of the DSM Directive to be contrary to Article 11 of the Charter. AG stated that it is possible to balance the right to freedom of expression with monitoring and filtering obligations, as long as there are adequate safeguards in place, and in AG's view the Article 17 contains necessary safeguards. Spain and France were also part of the trial and sided with the AG's opinion. However, in their view some restrictions of fundamental freedoms could be justified by the mission and objective of Article 17 of the DSM Directive.<sup>117</sup> The case was dismissed by CJEU in April 2022.<sup>118</sup>

Article 17 of the DSM Directive has set the European Union on a completely different path than the UK or the US when it comes to providing safe harbours to social networking sites. As discussed above, the UK still follows the regime set by Article 14(1) of the E-Commerce directive, and the United States' equivalent is the 17 USC sec. 512 – and both of these systems allow social networking sites to evade liability for their users' content, provided that they comply with the law.

When comparing 17 USC sec 512 to Article 17 of the DSM Directive, it's evident that Article 17 CDSM sets out a vastly different system than what is currently in use in the United States. Article 17 CDSM requires SNSs to acquire a licence up front, instead upholding the "safe harbor" criteria where service providers can evade liability as long as they respond "expeditiously" to takedown notices.<sup>119</sup>

Another key difference between these regimes is that the DMS Directive requires SNS to cooperate with stakeholders and prevent the infringing content from being posted in the first place, whereas the US regime does not contain requirements to block infringing content.<sup>120</sup>

Additionally, the Article 17(4)(c) of the CDSM directive introduces "stay down" mechanisms. And although both systems provide mechanisms to contest the removal of content that the user believes is non-infringing, the American system is much more complicated as discussed in Chapter 2. The CDSM Directive could serve as an example for the direction that US and UK copyright regulation could evolve.

---

<sup>116</sup> Court decision, 26 April 2022, Republic of Poland v European Parliament, Council of the European Union, Case C-401/19, EU:C:2022:297.

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*

<sup>119</sup> Ginsburg, J., *supra nota* 88,19

<sup>120</sup> *Ibid.*, 19



## 4. FOCUSING ON THE FUTURE

### 4.1. Upcoming Digital Service Act Regulation

The digital space has evolved incredibly fast in the last decade. To keep up with the progress, European Commission has created a proposal for a new Digital Services Act (DSA Regulation), which would amend the over two decades old E-Commerce Directive. In the context of the proposal, European Commission concluded that the E-Commerce Directive is no longer effective at achieving the goals that it sets forth, even though its original objectives remain valid. Analysing the complete effects of the DSA Regulation would be out of scope of this thesis, however several curious innovations and some criticisms are discussed below.

This new legislation is aimed to tackle many novel problems of the online environment – both small and big. For example, the DSA Regulation would tackle the problem of vague terms and conditions, as it would create an obligation to the social networking sites that fall under its scope to word their terms and conditions clearly and unambiguously, and to provide information about their policies, measures, tools and procedures.<sup>121</sup> This includes information about the algorithmic decision-making systems and information about the usage of human review.<sup>122</sup>

In its present form the DSA Regulation has five chapters. Chapter I sets out general provisions, where online platforms are defined as: „...provider of a hosting service which, at the request of a recipient of the service, stores and disseminates to the public information...“<sup>123</sup>

Chapter II has provisions explaining the exemption of liability of providers of intermediary services. In this chapter the three types of providers are defined. The social networking sites that are the focus of this thesis will fall under „intermediary services“ and more specifically „hosting services“, as their „service consists of storage of information provided by, and at the request of, a recipient of the service“.<sup>124</sup>

Chapter III contains five sections of due diligence obligations that are meant to increase transparency and safety online. These include the example of terms and conditions of services given above.

---

<sup>121</sup> Proposed DSA Regulation, Article 12(1).

<sup>122</sup> *Ibid.*

<sup>123</sup> Proposed DSA Regulation, Article 2(2)(h).

<sup>124</sup> *Ibid.*, Article 2(f).

Perhaps one of the more interesting innovations in this chapter is the amendment of the classification of intermediary service providers. The chapter creates conditions determining for „very large online platforms“ (VLOP) and sets out additional requirements for those providers that fall into this category. In order to determine whether a platform fits this criteria, Commission will create a specific methodology and assess whether the number of average monthly active users reaches, or is higher than, 45 million.<sup>125</sup> The status of a VLOP would be controlled every six months and subsequently communicated to the platforms.<sup>126</sup> VLOPs would have to take more measures in *inter alia* risk assessment, mitigation of risks, independent audits, and advertising transparency. It would not be impossible that most of the largest SNS would fit under this definition, as Instagram alone had 1,000.8 million active users in 2020.<sup>127</sup> This number is predicted to grow to 1,180.5 million in 2023.<sup>128</sup>

As part of the new obligations set in Chapter III, these very large SNS would have to identify and analyze the systemic risks that stem from the functioning use of their services. These risks include those that stem from the dissemination of illegal content through their services,<sup>129</sup> meaning that SNS will be obliged to analyze copyright infringements as part of their compliance to this Regulation. The DSA Regulation also states that once these risks are identified, the SNS must put in place proportionate and effective mitigation measures tailored to such risks.<sup>130</sup> However these measures must comply with the general prohibition of automatic monitoring set in Article 7 DSA.

Lastly, Chapter IV contains measures of implementation of the Regulation and Chapter V has provisions that delete Articles 12 to 15 of the E-Commerce Directive, as they are incorporated in the Regulation itself, and explains amendments to other Directives currently in force.

The proposed DSA Regulation has been received generally positively among stakeholders, journalists and academics, as evidenced *inter alia* by the Washington Post's opinion endorsing the new DSA Regulation and claiming it could serve as an example to the U.S.<sup>131</sup> Similarly,

---

<sup>125</sup> Proposed DSA Regulation, Article 25(1) and (3).

<sup>126</sup> *Ibid.*, Article 25(4).

<sup>127</sup> Statista Research Department (2020) Number of Instagram users worldwide from 2019 to 2023, (database) [Online] Retrieved from <https://www.statista.com/statistics/183585/instagram-number-of-global-users/> 08.05.2022

<sup>128</sup> *Ibid.*

<sup>129</sup> Proposed DSA Regulation, Article 26(1).

<sup>130</sup> *Ibid.*, Article 27(1).

<sup>131</sup> Editorial Board, (29 January 2022). The U.S. could learn from Europe's online speech rules. The Washington Post. Retrieved from <https://www.washingtonpost.com/opinions/2022/01/29/us-could-learn-europes-online-speech-rules/> 12.05.2022.

organisations, such as the European Publishers Council<sup>132</sup>, have been vocal about supporting the increasing transparency of digital service providers.

Despite the largely positive response to the DSA Regulation, it has not been spared from criticism either. The same issues of automated monitoring that were debated around the time when the DSM Directive was in the works continue to exist in the new Regulation. Article 7 of the DSA Regulation provides that there will be no general monitoring or active fact-finding obligations imposed on SNS, continuing the status quo set by Article 15(1) of the E-Commerce Directive. However, it is stated in Recital 28 of the DSA Regulation that monitoring in specific cases is not against the new Regulation. The line between specific monitoring and general monitoring is not clearly defined and will be up to CJEU to determine.<sup>133</sup> A. Peukert et al. argue that the problem and controversy of Article 17 DMA Directive is not fixed in this attempt at modernising European copyright law.<sup>134</sup>

Even though the DSA Regulation provides for various methods content moderation, such as those in Chapter III DSA Regulation discussed above, the specific limits and requirements are not mentioned in the proposed Regulation. Therefore, it is possible that these requirements will be measured against the opinion of the Advocate General in *Poland v EP and Council* discussed in Chapter 3 of this thesis.

The DSA Regulation will complement other existing European copyright *acquis*, including the GDPR,<sup>135</sup> and will be a monumental step forward in harmonizing and modernizing copyright law. At the time of writing this thesis DSA Regulation is in the trilogue stage, having passed the previous steps.<sup>136</sup>

## 4.2. New approach to copyright on SNS

It is clear that social networking sites have come to stay. They have not only become one of the main sources of entertainment for a large part of the population, but also a source of revenue and a way of promoting a livelihood for certain types of users.

---

<sup>132</sup> Killeen, M. (25 June 2021) Media sector eyes opportunity to rebalance relations with online platforms, Euractiv, retrieved from <https://www.euractiv.com/section/digital/news/media-sector-eyes-opportunity-to-rebalance-relations-with-online-platforms/>06.05.2022.

<sup>133</sup> Peukert, A., Husovec, M., Kretschmer, M. et al. (2022) European Copyright Society – Comment on Copyright and the Digital Services Act Proposal. IIC 53, 367

<sup>134</sup> *Ibid.*

<sup>135</sup> Proposed DSA Regulation Article 1(5).

<sup>136</sup> Legislative Train Schedule, Retrieved from <https://www.europarl.europa.eu/legislative-train/theme-a-europe-fit-for-the-digital-age/file-digital-services-act> 26.04.22



With the rise and heightened popularity of content-sharing platforms such as Instagram and TikTok, a new segment of users has emerged – the influencers. A social media influencer is a type of mini celebrity, whose impact is gained by, and depends on, their ability to market themselves on a competitive online platform.<sup>137</sup> With enough attention these personality brands become valuable and are routinely approached by advertisers with collaboration offers.

The effect of influencers on the regular non-influencer users is immense, as evidenced by the emergence of a specific type of marketing referred to as „influencer marketing“<sup>138</sup>, which is estimated to be worth 15 million USD by 2022.<sup>139</sup>

To influencers, artists, musicians, performers and other users of the like, copyright protection is a necessity. Without strong copyright protection their livelihood can be disseminated all around the internet, resulting in losses of revenue, slower growth, and possible losses of opportunities. As discussed above, it is permissible by law to utilize automated monitoring systems in specific instances. Considering the new proposed DSA regulation and the above discussed opinion of AG in *Poland v EP and Council* it is entirely possible that new ways of monitoring content can be created.

One way to effectively monitor copyright violations on platforms such as Instagram could be adopting the approach that the popular video-sharing platform YouTube already uses. In order to prevent copyright infringement, YouTube has created Content-ID – a tool with a complex algorithm that compares every uploaded video against a database of all videos ever posted on YouTube. When a match is detected, the copyright owner has the option to either take no action, take the offending video down or claim the revenue collected through the advertising displayed on that video.<sup>140</sup>

To better protect content creators, a similar system could be implemented into platforms such as Instagram. Users would have the option to enter into a partner-based program and enjoy a more streamlined copyright protection system. The system could have analytics installed, creating

---

<sup>137</sup> Hudders, L., De Jans S., De Veirman, M. (2021) The commercialization of social media stars: a literature review and conceptual framework on the strategic use of social media influencers, *International Journal of Advertising*, 40:3, 327-328

<sup>138</sup> *Ibid.*

<sup>139</sup> Business Intelligence (2019). Influencer Marketing: State of the social media influencer market in 2020. Online Report. Retrieved from <https://www.businessinsider.com/influencer-marketing-report?t=US&IR=T> 06.05.2022 referenced in *supra nota* 137 Hudders, L., De Jans S., De Veirman, M. (2021) The commercialization of social media stars: a literature review and conceptual framework on the strategic use of social media influencers, *International Journal of Advertising*, 40:3, 327-328.

<sup>140</sup> Magaldi, J. A., Sales, J. S., Davis, W. (2021). All's Fair in Love and War but Nothing's Fair Use on YouTube: How YouTube Policies Favor Copyright Owners and Hinder Legal Fair Use. Pace University Research Paper, 2-3.

monthly or instant reports of possible copyright violations, which the author would have to mitigate. Considering that Instagram already has an option to create a „business account“ for users that want to access deeper functions, this innovation would not be technically impossible. Another available solution for copyright protection is watermarking content. Watermark would create a unique identifier to the picture or video, that would allow the owner to prove the infringement.<sup>141</sup>

---

<sup>141</sup> Rizzo, S. G., Bertini, F., & Montesi, D. (2019). Fine-grain watermarking for intellectual property protection. *Eurasip Journal on Information Security*.

## CONCLUSION

The need for this thesis arose from the rapid growth of social networking sites and the constantly evolving sharing possibilities that these sites, such as Instagram, Twitter, or Facebook, provide. Sharing and consuming both copyright protected, and non-protected content has been made easier than ever. Users' attention has become the desired product of social networking sites, which is evidenced by the way they are built. Users can become addicted to these services, all the while maximising profits with their attention.

The aim of this thesis was thus to identify how are photos and videos protected by copyright online. After analysing the selected countries' legislation, it is evident that there are differences in approaches to copyright protection. The definitions for photos and videos varied slightly in all of the legal systems analysed, however none of the bodies of law had any clauses that would specify the approach to modified internet pictures, which have become extremely popular in the last decade. The UK and the US both have fair use clauses that allow users to modify protected content and claim it as their own, however the last word about whether the modification is infringing will ultimately be with the judges. The presented court case illustrates how even modifying one of the most well-known image did not result in fair use. Additionally, other presented cases illustrate that there is a lack of awareness when it comes to sharing copyright-protected content online.

It was identified that the UK and the US have a similar system in place that allows social networking sites evade liability from the content posted by their users. Both have take-down systems that allow users to request deletion of infringing content. It was noted that the system in US is much more complicated and contains many judicial steps for the copyright owner who wishes to take down content that infringes their work.

One of the problematic pieces of copyright legislation was identified to be the Article 17 of DSM Directive, which gives social networking sites the option to either licence the content of their users or abide by the article's specific rules to evade liability. This article drastically changed the EU's approach to SNS liability, as under the previous regime the platforms were not liable for any infringing content unless they became aware of it. And even after becoming aware, they were able to evade liability by quickly deleting the infringing content.

This article set the EU into a completely different direction than the rest of the analyzed countries. There were concerns that implementing the Article 17 DSM will lead to automatic

monitoring of content, even though the Directive specifically forbids that. Some Member States protested this article very actively – Poland took the matter to the European Court of Justice.

The future of European copyright law was analyzed on through the proposed new DSA Regulation, which will most likely be passed in the near future. The new DSA Regulation will tackle both big and small problems that quick technological progress has brought. It will classify social networking sites into different categories based by size and impose stricter rules on the largest SNSs. The proposed DSA Regulation has been praised for making large social networking sites more transparent and accountable for their action, and giving the layman not only more information, but also more say when using the services. The DSA Regulation will steer the EU even further away from the approach of UK and US.

The rights of social networking users can be protected via not only future DSA Regulation, but also by utilizing existing methods, as proposed in Chapter 4.1. It is proposed that sites which focus heavily on sharing copyright-protected content, such as Instagram, could use automatic systems and databases to actively compare shared images and videos and detect copyright violations.

It is said that law is slow to follow technological progress, however it seems that the European Union will take a big leap forward to solving novel issues of copyright with the new DSA Regulation.

## LIST OF REFERENCES

### SCIENTIFIC BOOKS

1. Joyce C., Leaffer M., Jaszi P., Ochoa T., Carroll M., (2003). *Copyright Law*. 6th edition. LexisNexis.
2. Stokes, S. (2019) *Digital Copyright: Law and Practise*. (5th ed.) Bloomsbury Publishing

### SCIENTIFIC ARTICLES

1. Bhargava, V., Velasquez, M. (2021). Ethics of the Attention Economy: The Problem of Social Media Addiction. *Business Ethics Quarterly*, 31(3), 321-359.
2. Boshier, H., Yeşiloğlu, S. (2019). An analysis of the fundamental tensions between copyright and social media: The legal implications of sharing images on Instagram. *International Review of Law, Computers and Technology*, 33(2), 164-186.
3. Boyd, D., Ellison, N. (2007) Social Network Sites: Definition, History, and Scholarship, *Journal of Computer-Mediated Communication*, 13(1), 210–230\
4. Chu, Z., Wang, H. (2011) An investigation of hotlinking and its countermeasures, *Computer Communications*, 34 (4) 577-590
5. Collins, S. (2010). Digital Fair: Prosumption and the fair use defence. *Journal of Consumer Culture*, 10(1), 37–55.
6. Cramer, B. W. (2020). From Liability to Accountability: The Ethics of Citing Section 230 to Avoid the Obligations of Running a Social Media Platform. *Journal of Information Policy*, 10, 123–150
7. Elkin-Koren, N. (2010) User-Generated Platforms. WORKING WITHIN THE BOUNDARIES OF INTELLECTUAL PROPERTY, Oxford University Press, Forthcoming.
8. Gangneux J, Docherty S. At close quarters: Combatting Facebook design, features and temporalities in social research. *Big Data & Society*. 5(2) 1-10
9. Giancarlo, F., Geiger, C. (2020) Taking Fundamental Rights Seriously in the Digital Services Act's Platform Liability Regime. *European Law Journal*
10. Hetcher S., (2008) User-Generated Confusion: The Legal and Business Implications of Web 2.0, *Vanderbilt Journal of Entertainment and Technology Law*. 10(4) 863-892

11. Hou, Y., Xiong, D., Jiang, T., Song, L., Wang, Q. (2019). Social media addiction: Its impact, mediation, and intervention. *Cyberpsychology: Journal of Psychosocial Research on Cyberspace*, 13(1), article 4.
12. Hudders, L., De Jans S., De Veirman, M. (2021) The commercialization of social media stars: a literature review and conceptual framework on the strategic use of social media influencers, *International Journal of Advertising*, 40:3, 327-375
13. Kaplan A., Haenlein M. (2010) Users of the world, unite! The challenges and opportunities of Social Media. *Business Horizons*, Volume 53, Issue 1. 59-68.
14. Lee, Y.H. (2022) United Kingdom Copyright Decisions and Post-Brexit Copyright Developments 2020. *International Review of Intellectual Property and Competition Law*, 53, 319–328.
15. Mac Síthigh, D. (2020). The road to responsibilities: New attitudes towards internet intermediaries. *Information and Communications Technology Law*, 29(1), 1-21.
16. Magaldi, J. A., Sales, J. S., Davis, W. (2021). All's Fair in Love and War but Nothing's Fair Use on YouTube: How YouTube Policies Favor Copyright Owners and Hinder Legal Fair Use. Pace University Research Paper.
17. Michel, S. (2019). Digitisation of art in the public domain–museum urges Wikimedia to take down reproductions of out-of-protection artworks. *Journal of Intellectual Property Law & Practice*. 14(6), 427-429.
18. Moore, K., McElroy J.C. (2012) The influence of personality on Facebook usage, wall postings, and regret, *Computers in Human Behavior*, Volume 28(1), 267-274.
19. Moreno F., (2020) ‘Upload filters’ and human rights: implementing Article 17 of the Directive on Copyright in the Digital Single Market, *International Review of Law, Computers & Technology*, 34:2, 153-182
20. Neill, A. (2010) H., *Social Media & the Law, Here Comes Everybody*. CEB Business Law Quarterly, 52-64
21. Owen, L. (2015). Fair dealing: a concept in UK copyright law. *Learned publishing*, 28(3), 229-231.
22. Peukert, A., Husovec, M., Kretschmer, M. et al. (2022) European Copyright Society – Comment on Copyright and the Digital Services Act Proposal. *IIC* 53, 367

23. Potzlberger, F. (2013). Google and the thumbnail dilemma fair use in german copyright law. *I/S: Journal of Law and Policy for the Information Society*, 9(1), 141-169
24. Quintais, J. (2020) The New Copyright in the Digital Single Market Directive: A Critical Look. *European Intellectual Property Review*. 1-23.
25. Rahmatian, A. (2013) Originality in UK Copyright Law: The Old “Skill and Labour” Doctrine Under Pressure. *International Review of Intellectual Property and Competition Law*, 44, 4-43.
26. Rizzo, S. G., Bertini, F., & Montesi, D. (2019). Fine-grain watermarking for intellectual property protection. *Eurasip Journal on Information Security*
27. Romero-Moreno, F. (2019). ‘Notice and staydown’ and social media: Amending article 13 of the proposed directive on copyright. *International Review of Law, Computers and Technology*, 33(2), 187-210.
28. Senftleben, M. (2010). The international three-step test: model provision for ec fair use legislation. *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 1(2), 67-82.
29. Shapiro, T., Hansson, S. (2019). The DSM Copyright Directive: EU Copyright Will Indeed Never Be the Same. *European Intellectual Property Review*, 41, 404-410.
30. Venugopal, AV. (2020) Copyright concerns of digital images in social media. *The Journal of World Intellectual Property*. 23: 579– 597
31. Williams, J. (2018) Stand out of our light: Freedom and resistance in the attention economy. *Cambridge: Cambridge University Press*.

#### EU LEGISLATION

1. DIRECTIVE 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.
2. DIRECTIVE 2004/48/EC on the enforcement of intellectual property rights.
3. DIRECTIVE (EU) 2019/790 on copyright and related rights in the Digital Single Market.
4. Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC.

#### LEGISLATION OF THE US

1. Title 17 United States Code

#### CJEU COURT DECISIONS

1. Court decision, 1 December 2011, *Eva-Maria Painer v Standard VerlagsGmbH and Others*, C-145/10, EU:C:2011:798
2. Court decision, 1 March 2012, *Football Dataco Ltd and Others v Yahoo! UK Ltd and Others*, Case C-604/10, EU:C:2012:115
3. Court decision, 8 September 2016, *GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker*, ECLI:EU:C:2016:644.
4. Court decision, 26 April 2022, *Republic of Poland v European Parliament, Council of the European Union*, Case C-401/19, EU:C:2022:297.

#### OTHER COURT DECISIONS

1. US District Court for the Central District of California, *Xposure Photos UK Ltd. v. Khloe Kardashian*. 2:17-cv-03088. Filed in 2017.
2. Bundesgerichtshof, I ZR 104/17, December 20th, 2018
3. US District Court for the Central District of California, *Xposure Photo Agency, Inc. v. Rebel Wilson*, 2:2019cv10585. Filed in 2019, ongoing.
4. United States District Court Eastern District Of New York, *Xclusive-Lee, Inc., Plaintiff, v. Jelena Noura "Gigi" Hadid, Defendant*. 19-CV-520 (PKC) (CLP) (E.D.N.Y. Jul. 18, 2019) Filed 2019.
5. US District Court for the Central District of California, *Matt FURIE v. INFOWARS, LLC, et al.*, 401 F. Supp. 3d 952. Filed in 2019.
6. United Kingdom Court of Appeal, 26 March 2021, [2021] EWCA CIV 441

#### OTHER SOURCES

1. Statista Research Department (2022). Most popular social networks worldwide as of January 2022 ranked by number of active users (database) [Online] Retrieved from <https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/> 10.09.2021
2. Statista Research Department (2020) Hours of video uploaded to YouTube every minute as of February 2020 (database) [Online] Retrieved from <https://www.statista.com/statistics/259477/hours-of-video-uploaded-to-youtube-every-minute/> 10.09.2021
3. OECD Working Party on The Information Economy (2006), 8. Retrieved from <https://deliverypdf.ssrn.com/> 14.11.2021
4. See report by Collopy, D., Drye T., (2017) *Share and Share Alike: The Challenges from Social Media for Intellectual Property Rights*. London: Intellectual Property Office, retrieved from <https://assets.publishing.service.gov.uk/government/> 20.11.2021
5. Copyright Basics, publication of United States Copyright Office, revised 09/21, retrieved at <https://www.copyright.gov/circs/circ01.pdf> 14.04.2022
6. EUIPO, Monitoring and analysing social media in relation to IP infringement Report (2021) Retrieved from [https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library](https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library) 20.11.2021



7. Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2019 (“Withdrawal Agreement”), Art. 126.
8. Berne Convention contracting parties, retrieved from [https://wipolex.wipo.int/en/treaties/ShowResults?search\\_what=C&treaty\\_id=15](https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=15) 1.2.2022.
9. Rome Convention participants retrieved from [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XIV-3&chapter=14&clang=en#8](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XIV-3&chapter=14&clang=en#8) 1.2.2022.
10. WTO’s intellectual property TRIPS Agreement participants retrieved from [https://www.wto.org/english/tratop\\_e/trips\\_e/amendment\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/amendment_e.htm)
11. Guidance on UK and EU copyright protection for right holders and users including business, cultural heritage institutions and consumers. Retrieved from <https://www.gov.uk/guidance/protecting-copyright-in-the-uk-and-eu>, 14.02.2022 \
12. How copyright protects your work, retrieved from <https://www.gov.uk/copyright/stop-people-using-your-work> 25.03.2022
13. Details of the exceptions to copyright that allow limited use of copyright works without the permission of the copyright owner. Retrieved from <https://www.gov.uk/guidance/exceptions-to-copyright#fair-dealing> 25.03.2022
14. Online Safety Bill, United Kingdom Government Bill. Retrieved from <https://bills.parliament.uk/bills/3137> 23.04.2022
15. Ginsburg J., (2020) A United States Perspective on Digital Single Market Directive Art. 17, EU Copyright Law: A Commentary, Edward Elgar Publishing, Columbia Public Law Research Paper No. 14-654, 1-21.
16. Open letter to Members of the European Parliament and the Council of the European Union, retrieved at [https://www.create.ac.uk/wp-content/uploads/2017/02/OpenLetter\\_EU\\_Copyright\\_Reform\\_24\\_02\\_2017.pdf](https://www.create.ac.uk/wp-content/uploads/2017/02/OpenLetter_EU_Copyright_Reform_24_02_2017.pdf) 05.05.2022
17. Communication From The Commission To The European Parliament And The Council Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market, retrieved at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021DC0288> 04.05.2022
18. Statista Research Department (2020) Number of Instagram users worldwide from 2019 to 2023, (database) [Online] Retrieved from <https://www.statista.com/statistics/183585/instagram-number-of-global-users/> 08.05.2022
19. Editorial Board, (29 January 2022). The U.S. could learn from Europe’s online speech rules. *The Washington Post*. Retrieved from <https://www.washingtonpost.com/opinions/2022/01/29/us-could-learn-europes-online-speech-rules/> 12.05.2022.
20. Business Intelligence (2019). Influencer Marketing: State of the social media influencer market in 2020. Online Report. Retrieved from <https://www.businessinsider.com/influencer-marketing-report?r=US&IR=T> 06.05.2022
21. Killeen, M. (25 June 2021) Media sector eyes opportunity to rebalance relations with online platforms, Euractiv, retrieved from

<https://www.euractiv.com/section/digital/news/media-sector-eyes-opportunity-to-rebalance-relations-with-online-platforms/06.05.2022>

## APPENDICES

### Appendix 1. Non-exclusive licence

I Jelena Forsby,

1. Grant Tallinn University of Technology free licence (non-exclusive licence) for my thesis

ISSUES OF COPYRIGHT IN SHARING USER-GENERATED CONTENT ON SOCIAL NETWORKING SITES,

supervised by Pawan Kumar Dutt,

1.1 to be reproduced for the purposes of preservation and electronic publication of the graduation thesis, incl. to be entered in the digital collection of the library of Tallinn University of Technology until expiry of the term of copyright;

1.2 to be published via the web of Tallinn University of Technology, incl. to be entered in the digital collection of the library of Tallinn University of Technology until expiry of the term of copyright.

"2. I am aware that the author also retains the rights specified in clause 1 of the non-exclusive licence." ("CAPILLARY MOVEMENT OF WATER IN A RADIAL DIRECTION AND ...")

3. I confirm that granting the non-exclusive licence does not infringe other persons' intellectual property rights, the rights arising from the Personal Data Protection Act or rights arising from other legislation.

12.05.2022