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THE SAFE HARBOUR REFORM OF ARTICLE 17 OF COPYRIGHT DIRECTIVE: REDUCED SCOPE AND EFFECT OF INFORMATION SOCIETY SERVICE PROVIDERS

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ABSTRACT

The online environment has changed the field of copyright protection in many ways. The new Directive on Copyright in the Digital Single Market 2019/790 gives the EU copyright protection scheme a new direction. It aims to further harmonisation across the EU to ensure the smooth enforcement of copyright and fair remuneration for authors of their works. The terminology is updated to reflect the modern and online environment better, and the Directive established a new definition for "online content-sharing service providers", a new class of services that communicate copyrighted works to the public uploaded by their users.

The most significant change is related to the expansion of responsibility, as the enforcement of Article 17 of the Directive has created changes to the liability of certain information society service providers, requiring them to obtain authorisation from rightholders when performing acts of communication to the public or acts of making available to the public. Hence, the thesis analyses how and in what way was the safe harbour provisions under the e-Commerce Directive reduced in scope and effect by Article 17 of the new Copyright Directive and argues that the new Directive overrules certain aspects of the liability exemption provided under the Article 14 of the e-Commerce Directive.

The research is conducted with qualitative methods based on the EU legislation, guidelines, literature, and the European Court of Justice case law. The results reflect that there are some unclarities around Article 17, and a significant issue is how exemptions of parody, caricature and pastiche will be identified online, as the content recognition technologies cannot be trusted alone.

Keywords: Directive on Copyright in the Digital Single Market, online content-sharing service provider, Directive on e-Commerce, safe harbour, intellectual property rights

LIST OF ABBREVIATIONS

CJEU	Court of Justice of the European Union
CDA	Communications Decency Act
Copyright Directive	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
DMCA	Digital Millennium Copyright Act
DSM	Digital Single Market
EC	European Commission
e-Commerce Directive	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
EU	European Union
ISS	Information Society Service
ISP	Information Society Service Provider
OCSS	Online Content-Sharing Service
OCSSP	Online Content-Sharing Service Provider
TFEU	Treaty on the Functioning of the European Union
TRIPS	The Agreement on Trade-Related Aspects of Intellectual Property Rights
WCT	World Intellectual Property Organization Copyright Treaty
WIPO	World Intellectual Property organization
WTO	World Trade Organization

INTRODUCTION

The technological changes over the years have brought challenges to the legislator, as digitalisation has changed the ways in which copyrighted material is stored, distributed and exploited.[1] The online environment that we are continuously attached to and digital technology, in general, has revolutionised how our society works – as individuals, in the business industry and in communities. Year after year, digital services are becoming more closely connected to all sectors of the economy and society.[2] Over the last decades, with the rapid pace of digitalisation, we have come to realise that the changes in the legislation are crucial in determining how the online platforms and services can be applied and how the copyright can be protected in the online environment, while the digitalisation has promoted creativity online it has also facilitated copyright infringement.[3] While the current e-commerce sphere in the European Union (EU) has speeded up and simplified many measures, the role of online copyright protection, the liability of intermediaries, including the compensation practices for copyright holders still lack development.[4] The legislation dating back to the beginning of this Millenium does therefore not fit into today's highly developed online environment.

The Directive of the European Parliament and of the Council on Copyright in the Digital Single Market (Copyright Directive) which entered into force on 7 June 2019,[5] has given copyright protection in the EU a completely new direction. A new obligation established under the Directive, namely Art. 17 provides for a specific regime of authorisation, such as concluding license agreements and liability for copyright and rights related to copyright which applies to certain

[1] Directive 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, O.J. (L 130), 17.4.2019, recital 3.
[2] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions: A Digital Single Market strategy for Europe COM(2015)192 final, p 3.
[3] Burri, M., Zihlmann, Z. (2020). *Intermediaries' Liability in Light of the Recent EU Copyright Reform.* Indian Journal of Intellectual Property Law, 11, p 35.
[4] Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market COM(2016) 593 final, p 3.
[5] 20 days after the publication in the Official Journal of the EU.

information society service providers (ISP) defined as online content-sharing service providers (OCSSP) under Article 2(6) of the Directive.[6]

Before the new Directive, the legal framework of copyright protection and the safe harbours of ISP has been mainly built upon the e-Commerce Directive 2000/31/EC.[7] In addition, under the Information Society Directive 2001/29/EC, authors and rightsholders are given certain exceptions and limitations on their liability for infringement of reproduction rights, that the Member States could implement in national laws.[8] But as the exceptions are voluntary to be implemented, tackling acts of illegal uploading of copyrighted content uploaded online is not working appropriately. [9] Under the E-commerce Directive, safe harbours regard ISPs exemption from liability for "mere conduit"[10], "catching"[11], and "hosting"[12]. The aim of this thesis is to assess whether the Art. 17 of the Copyright Directive overrules the safe harbours with the ISPs falling into the scope of OCSSPs.

This thesis is set against this backdrop of both the increasing liability of intermediaries as actors in copyright enforcement and the reduced scope and effect of the safe harbour provisions under the e-Commerce Directive. The thesis seeks to explore, in particular, the recent reform of the EU copyright law. Hence the focal point of this thesis is the highly contested Art. 17 of the new Copyright Directive. To answer the key research question of how and in what ways has the safe harbour provisions reduced in scope and effect after the implementation of the Copyright Directive, the thesis focuses on two specific aspects: (a) what is the legal status of the new online content-sharing service providers in comparison to all information society service providers? And (b) how does the "fair use" principle of copyright law correlate to Art. 17(7) setting up certain types of content, such as parody, excepted when uploading and making available content generated by users on online content-sharing services (OCSS)?

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[6] Directive 2019/790, *supra nota 1*, Art. 17.
[7] Curto, N. E. (2020). *EU Directive on Copyright in the Digital Single Market and ISP Liability: What's Next at International Level?*, 11 Case W. Res. J.L. Tech. & Internet Iss. 1, p 88.
[8] 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. *OJ L 167, 22.6.2001, p. 10–19, Art 5.*
[9] Ferri, F. (2021). *The dark side(s) of the EU Directive on copyright and related rights in the Digital Single Market.* China-EU Law J. 7, p 24.
[10] 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), *OJ L 178, 17.7.2000,* Art. 12.
[11] *Ibid*, Art 13.
[12] *Ibid*, Art 14(a)(b).

Moreover, as online distribution of copyright-protected content is, by essence, cross-border and as the exceptions and limitations to copyright and related rights are rather harmonised within the EU, the leeway of Member States in creating or adapting them is limited.[13] Hence, the thesis also seeks to analyse the national implementation of the Copyright Directive and its Art. 17 in Estonia and Finland to establish a comparative analysis of the extent to which the protection of authors' and performers rights reach on a national level. The thesis follows the qualitative research method, and the research problem is approached by systematising and interpreting the norms that are the subject of the research. The analysis method is thus juridical; ergo, legal dogmatic interpretation of legal sources, scientific publications and court judgements.

The thesis consists of three main chapters. The first chapter analyses how copyright protection has developed throughout the decades on the international level and further within the EU and its current state concerning the liability of information society service providers. The thesis will examine the liability under the United States (US) laws and give an overview of the impact that the US has had on the EU copyright legal regime. The EU legal instruments regarding copyright protection in the online environment and their main aims are introduced. The purpose and scope of central EU legislation concerning safe harbours are presented. The second chapter reviews the e-Commerce Directive and its safe harbour provisions in detail and discusses how the scope and effect have been reduced due to the Art. 17 of the Copyright Directive. Furthermore, the second chapter addresses the safe harbour and the legal issues that have emerged in the jurisprudence of the Court of Justice of the European Union (CJEU). Chapter three focuses on the national implementation of the Copyright Directive in Estonia and Finland. The thesis ends with a conclusion.

[13] COM(2016) 593 final, *supra nota 4*, p 5.

1. HISTORY OF COPYRIGHT PROTECTION

We have come a long way from the monopolistic era of the printed press to the era of technology, where authors with the exclusive rights to use and distribute their works utilise various online platforms.[14] Copyright is a legal concept that primarily refers to "the right to copy", and it grants the author of an original work the exclusive rights to its use and distribution.[15] This allows the author to be compensated for his work and to be able to support himself financially.[16] But due to the dissemination factor of the internet and the ease by which reproducing is easier and it can be done by everyone without a loss in quality, the copyrights are thus challenged more than ever.[17]

The central question of this thesis is how and in what way was the safe harbour provision under the e-Commerce Directive reduced in scope and effect by Article 17 of the Copyright Directive. To answer this key question, Chapter one provides a brief inspection of the history of the copyright protection and the liability of the ISPs internationally and the impact that the EU has taken outside its borders, and towards what direction it is heading with its new Copyright Directive. Furthermore, Chapter one introduces the main definitions, concepts and principles of the EU copyright protection law concerning the liability of the ISP.

1.1. International Copyright Protection Scheme and the Norms

To be able to examine the copyright protection and its changes concerning the ISP and their liability between the new Copyright Directive and the e-Commerce Directive, it is essential to have a general understanding of the international copyright protection scheme and its norms. It can be stated that generally, both substantive international copyright norms, as well as exclusive rights for the protected subject matter, have evolved in the direction of increased minimum

[14] Schmitz, S. V. I. (2015). *The Struggle in Online Copyright Enforcement.* Problems and Prospects. Luxembourg Legal Studies.Volume 8, p 22.
[15] *Ibid*, p 49.
[16] *Ibid*, p 49.
[17] *Ibid*, p 49.

standards.[18] The Universal Declaration on Human Rights provides that everybody has the right to protection of works that they are the author of.[19]

The copyright norms around the world are embodied in an interconnected network formed by, inter alia, the Berne Convention of 1886[20], Universal Copyright Convention of 1952[21], and World Intellectual Property Organization Copyright Treaty (WCT)[22]. Berne Convention and the Universal Copyright Convention are the two principal conventions that were the first to coordinate the protection of copyrights internationally. Furthermore, as the international copyrights and international trade are inextricably linked, we must also consider the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),[23] an annexe to the World Trade Organization (WTO) Agreement, strengthening the worldwide protection of intellectual property rights.[24] TRIPS is an example of the perceived benefits of the trade process in resolving differences over the protection of intellectual property rights,[25] and the substantive and procedural norms of TRIPS play a role in copyright protection.[26] The WCT, a special agreement under the Berne Convention, was the first one to address the new questions raised by the cultural, economic and technological developments.[27] It made the copyright system more adaptable to the online environment, and moreover also directed the contracting states to protect against circumvention of encryption technologies for copyrighted works and against interference with electronic rights management information and called for effective remedies to enforce rights under the Treaty.[28] The concept of ”making available” was introduced by the Treaty, as the necessity to control the use of material in addition to control the existence of the copies was drawn attention to.[29] It was realized already 26 years ago that the increasing dematerialisation of content has led to a greater need for control over

[18] Goldsteind, P., Hugenholtz, B. (2010). *International Copyright, Principles, Law and Practice.* Second Edition. Oxford University Press, p 29.
[19] *Ibid*, p 23. See also The Universal Declaration of Human Rights, Art. 17 and 27(2).
[20] Berne Convention for the Protection of Literary and Artistic Works of 1886. *See also* Schmitz S. V. I., (2015), *supra nota 14*; The convention set up minimum standards for copyright protection and requires the parties of the Conventions to recognize the copyright of works by authors from other signatory states have the same rights of protection as works by authors within their own country.
[21] Universal Copyright Convention of 1952.
[22] World Intellectual Property Organization (WIPO) Copyright Treaty (WCT) of 1996.
[23] Agreement on Trade-Related Aspects of Intellectual Property Rights of 1995.
[24] Schmitz, S. V. I. (2015), *supra nota 14*, p 54.
[25] Goldsteind, P. *et al.* (2010), *supra nota 18*, p 72.
[26] Schmitz, S. V. I. (2015), *supra nota 14*, p 55.
[27] *Ibid*.
[28] Goldsteind, P. *et al.* (2010), *supra nota 18,* p 47.
[29] *Ibid*.

the use of material.[30] The Treaty was the basis for the Digital Millennium Copyright Act of the United States which will be further inspected in the next sub-chapter 1.2.[31]

1.2. Copyright Protection and ISP in the United States

The United States (US) is the homeland of many major global internet platforms hosting content and making it available to the users, meaning that many of the major ISP's originate from the States. Naturally, the US is also the home country to a significant and robust content industry and copyright regimes, which has been developing the protection of online intermediaries in situations where third parties seek to hold them liable for users' conduct.[32]

1.2.1. United States Legal Acts on Copyright

The cornerstone of preventing unauthorised copying of a work in the US is the United States Copyright Act dating all the way back to 1790[33], but due to the technological developments in copyright and anticipation of the Berne Convention adherence by the US, it went thought a revision in 1976.[34] Moreover, the Communications Decency Act (CDA) of 1996, inter alia, established a federal immunity protecting the liability of ISPs from any cause of action that would come from information collected from third parties using the service under its section 230(c). Some of the portions of the Act have been argued to be conflicting and have been challenged. Especially those regarding phraseology were quickly challenged in court, such as in *Reno v. ACLU,* resulting in some of the pieces being removed due to violations against freedom of speech.[35] Provisions concerning whether the content is shared with a global community with varying standards were challenged in *Nitke v. Ashcroft.*[36] The section 230(c) provides that *"no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider"*, thus, preventing online intermediaries from being treated as the publisher of content from users of the intermediaries.[37] It removes any duty

[30] Schmitz, S. V. I. (2015), *supra nota 14*, p 55-56.
[31] Moreover, the Treaty was also implemented as part of EU by the Directive 2001/29/EC.
[32] Holland, A., Bavitz, C., Hermes, J., Sellars, A., Budish, R., Lambert, M., Decoster N. (2015). *Intermediary Liability in the United States.* Berkman Center for Internet & Society at Harvard University, p 1.
[33] The United States Copyright Act of 1976.
[34] Patry, W. (2003). *The United States and International Copyright Law*: From Berne to Eldred Considering Copyright: Institute for Intellectual Property & Information Law, p 751.
[35] Reno v. Americal Civil Liberties Union (ACLU), 521 U.S. 844 (1997): the provisions regarding indecent and patently offensive material were found to violate the freedom of speech protected were removed.
[36] Nitke v. Ashcroft, 253 F. Supp. 2d 587 (S.D.N.Y. 2003).
[37] Holland, A. *et al.* (2015), supra nota 32, p. 8.

for an interactive computer service to monitor content uploaded or available on its platforms.[38] The Digital Millennium Copyright Act (DMCA)[39] of 1998 constitutes the implementation by the US of the WCT. It was *"designed to facilitate the robust development and worldwide expansion of electronic commerce, communications, research, development, and education in the digital age"*[40], and it is one of the most critical and far-reaching revisions of the US copyright law made in history.[41] In the DMCA, the safe harbours were introduced, meaning that several "limitations of liability" were enacted.[42]

1.2.2. Limitation on Liability of Internet Service Providers Under the DMCA

The immunity of internet service providers within the DMCA was brought up under Title II, 17 U.S.C. § 512, where the grounds for limitation on liability relating to material online can be found.[43] The Act lays out four conditional liability exemptions for service providers, namely, for transitory digital network communications or '*mere conduit'*, system caching, information residing on systems or networks at users' direction, including '*hosting*', and information location tools.[44] These are more commonly referred to as safe harbours.[45] A service provider in the sense of § 512 (b) to (d) is *"a provider of online services or network access, or the operator of facilities therefore"*.[46] For instance, Youtube, Meta, Twitter, Amazon and eBay fall under the DMCA's scope of the definition of online 'service provider'.[47]

To qualify for any of these limitations on liability, a service provider must adopt and reasonably implement a policy that stipulates that repeat infringers will be terminated when appropriate.[48]

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[38] *Ibid*, p 9.
[39] The Digital Millennium Copyright Act (DMCA) of 1998, to amend title 17, United States Code, to implement the WCT and Performances and Phonograms Treaty, and for other purposes.
[40] DMCA, Report, S. Rep. No. 105-190 (1998), 1 et seq.
[41] Lamoureux, E. L., Baron, S. L., Stewart, C. (2015). *Intellectual Property Law and Interactive Media, free for a fee*. Second Edition, p 46.
[42] Travis, H. (2008). *Opting out of the internet in the united states and the EU: copyright, safe harbors, and international law.* Notre Dame Law Review, 84(1), p 348.
[43] DMCA, *supra nota 39*. Online Copyright Infringement Liability Limitation Act, Pub. L. No. 105-304, sec. 201–02, 112 Stat. 2877 (1998) (codified as amended at 17 U.S.C. § 512 (2006)).
[44] DMCA, *supra nota 41*, 17 U.S.C. § 512 (a)-(d).
[45] Schmitz, S. V. I. (2015), *supra nota 14*, p 100. The established safe harbour mirrored the conclusions of the Case *Netcom I*, 907 F. Supp. At 1377.
[46] DMCA, *supra nota 39,* sec 512 (k)(1)(B).
[47] Schmitz, S. V. I. (2015), *supra nota 14*, p 100; Hanley, J. L. (2012). *ISP Liability and Safe Harbor Provisions: Implications of Evolving International Law for the Approach Set Out in Viacom V. Youtube*. Journal of International Business and Law, Vol. 1: Iss. 1, Article 9, p 183. See also *Viacom International v. Youtube*, 718 F. Supp. 2d 514, 523 (S.D.N.Y. 2010).
[48] DMCA, *supra nota 39,* Sec 512 (i)(1)(A).

Secondly, there should be no interference with "standard technical measures", referring to the measures that copyright owners use to identify or protect copyrighted works.[49]

For the purposes of this thesis, it is only relevant to inspect the provision regulating service providers that "host" or store material on the internet at the request of their users. Provisions § 512 (b) to (d) of DMCA relate to the location of the material in question, and they refer to infringing material that resides on a system controlled by the service provider. For the ISP to avoid the liability when hosting, under C(1)(A) it must provide that it (i) ”does not have actual knowledge that the material or an activity using the material on the system or network is infringing” and (ii) ”in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent” or (iii) ”upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material”, meaning that a “notice and take-down system is required.[50] The liability exemption can be illustrated in the case CoStar Group, Inc. v. LoopNet, Inc.[51]

1.2.3. Disqualifying From the Safe Harbour Protection

In order for the ISP to avoid liability when hosting, it must fulfil the criteria under § 512(c). The case of *Viacom v. Youtube*[52] illustrates how Youtube avoided the liability, as it was not aware of the user’s infringement. Viacom alleged copyright infringement of their works based on the public performance of those works without authorisation on YouTube’s website, but the judge held that an ISP's "mere knowledge of prevalence" of users' infringing activity on its site is insufficient to disqualify an ISP from the DMCA safe harbour protections.[53] The legal obligation to combat copyright infringement on their platforms is limited to removing the infringing posts by the users through an established “notice-and takedown” system, and it was found that YouTube qualified for safe-harbour protection under section 512(c) of the DMCA.[54]

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[49] *Ibid.*
[50] *Ibid*, sec 512 (C)(1)(A).
[51] GoStar Group, Inc. V. LoopNet, Inc., 373 F. 3d 544 (4th Cir. 2004); The question of whether LoopNet should be held directly liable for GoStar’s copyrighted photographs posted by LoopNet’s subscribers on LoopNet’s website. As LoopNet was an ISP that automatically and passively stored material at the direction of its users, the court ruled that they did not violate the Act by copying it, hence the defendant was found not liable for direct copyright infringement.
[52] *Viacom International v. Youtube*, *supra nota 47.*
[53] *Ibid*., at 525.
[54] Hanley, J. L. (2012), *supra nota 47,* p 184.

1.2.4. Challenges for the Safe Harbours Under the DMCA

One of the substantive challenges encountered by the US copyright law is the inconsistency between the original intentions compared to the realities of how those protections often manifest.[55] As originally intended, the safe harbours appear to protect the ISP from liability over copyright infringement. Still, the very same protection can encourage illegal or even ethical questionable behaviours on the parts of providers and users alike.[56] *Lamoureux* asserts that the *Viacom v. Youtube* case demonstrates both the general contours of the safe harbour provisions and the problems that will increase in the future, as ISPs like Youtube have always hosted materials that infringe copyright uploaded by users on their platforms.[57] Possible reform of DMCA has been discussed, but opinions have polarised, and so far, the US copyright regime has remained the same when it comes to safe harbours.[58]

1.3. EU Regulatory Framework

European Union (EU) is a relatively new coalition established by the Maastricht Treaty in 1993.[59] However, the origins of the EU can be traced deeper in the history,[60] and the EU's impact on copyright matters began with a Directive on computer matters in 1991[61], issued under the internal market provisions of the Treaty of Rome.[62] Nowadays, within the EU, there are multiple directives harmonising the fundamental rights of the authors, producers, performers, and broadcasters in the Member States, including the rights of ISP. The majority of the directives reflect Member State's obligations under the Berne Convention, TRIPS Agreement and the WCT.[63] Moreover, copyright

[55] Lamoureux, E. *et al.* (2015), *supra nota 41*, p 50.
[56] *Ibid*., p 54.
[57] *Ibid.*
[58] Hinze, G. (2019). *A Tale of Two Legal Regimes: An Empirical Investigation into How Copyright Law Shapes Online Service Providers' Practices and How Online Service Providers Navigate Differences in U.S. and EU Copyright Liability Standards*, UC Berkley, p 97.
[59] Craig, P., & De Burca, G. (2015). *Eu Law: Texts, Cases and materials*, p 3-5, 10-11.
[60] *Ibid*.
[61]Directive 91/250/EEC on Computer Programs; the most recent consolidate version is the Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs *OJ L 111, 5.5.2009, p. 16–22.*
[62] The Directive contained controversial provisions mirroring the debates in the US. *See* Patry, W. (2003), *supra nota 34*, p 752.
[63] European Commission website: Shaping Europe's digital future. Retrieved 23. March 2022, available: *https://digital-strategy.ec.europa.eu/en/policies/copyright-legislation.*

protection was proclaimed in the Charter of Fundamental Rights of the European Union in 2000, stating that *"intellectual property rights shall be protected"*.[64]

The legal framework under which the EU operates has for a long time provided ISPs with similar protections from secondary liability as compared to the protections under the DMCA.[65] For over 20 years, the liability of online intermediaries[66] and online platforms[67] in the EU has been governed by the E-Commerce Directive 2000/31/EC, which lays out the safe harbours for ISP[68], and more specifically, in the transposing laws in each Member State. Initially, it appears that the statutory limitation of liability frameworks in the DMCA and the e-Commerce Directive appear superficially similar. However, they differ substantially in their coverage scopes and criteria for eligibility.[69]

The digital environment we live in poses challenges to the regulatory framework, despite its positive benefits for trade, innovation, growth and job creation within the EU. In response, the EC pointed out that only by creating a European Digital Single Market (DSM) could they address and overcome the challenges.[70] In May 2015, a Digital Single Market strategy was launched.[71] Among others, one of the strategy's main objectives is to modernise the EU copyright rules to fit the digital age by creating a modern European copyright framework with better access to digital content.[72] Moreover, the DSM strategy sparked the creation of the Copyright Directive, [73] which is the focal point of this thesis and will be inspected in Chapter 2.

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[64] Charter of the Fundamental Rights of the European Union, Art. 17(2). The Charter was ratified in 2000 but was legally effective only after the Treaty of Lisbon did enter into force in 2009.
[65] Hanley, J. L. (2012), *supra nota 47,* p 188.
[66] *See* World Intellectual Property Organization homepage, about IP, Copyright. Retrieved 23. March 2022, available: https://www.wipo.int/copyright/en/internet_intermediaries/. According to WIPO, internet intermediaries are essential because they host, locate and search for content online and facilitate its distribution whilst also developing the internet.
[67] *See* Communication from the commission COM(2016) 288 final, p 2-3; an online platform is a service defined by the EC that facilitates the interaction of user groups on the Internet. EC has also given a non-exhaustive set of examples of an online platform including Google's AdSense, eBay and Amazon, Google and Bing Search, Facebook and YouTube, Google Play and App Store, Facebook Messenger, PayPal, Zalando and Uber.
[68] Senftleben, M., & Angelopoulos, C. (2020). *The Odyssey of the Prohibition on General Monitoring Obligations on the Way to the Digital Services Act: Between Article 15 of the E-Commerce Directive and Article 17 of the Directive on Copyright in the Digital Single Market*, p 6.
[69] Hanley, J. L. (2012), *supra nota 47*, p 189; Hinze, G. (2019), *supra nota 58,* p 70.
[70] COM(2015) 192 final, *supra nota 2*, p 3.
[71] Montagnani, M. L., & Trapova, A. Y. (2018). Safe harbours in deep waters: a new emerging liability regime for Internet intermediaries in the Digital Single Market. *International Journal of Law and Information Technology, 0, 1–17,* p 3.
[72] *Ibid*., p 6.
[73] In addition, as an outcome of the strategy, the EC has on 15 December 2020 proposed a Digital Services Act and a Digital Markets Act, to tackle the challenges which have not been addressed with the E-Commerce Directive. *See* Regulation COM/2020/825 final and Regulation COM/2020/842 final.

2. THE SAFE HARBOUR REFORM

Following the discussion of the background underlying the international and EU's legal framework, Chapter 2 focuses specifically on reviewing the safe harbour provision of the e-Commerce Directive in detail and discusses how the scope and effect have reduced due to the Article 17 of the Copyright Directive. This includes the analysis of the scope of the OCSSP compared to an information society service provider. Furthermore, the second chapter addresses certain legal issues concerning the safe harbour that have emerged in the jurisprudence of the CJEU. Moreover, the chapter introduces the "fair use" principle and seeks to determine how it correlates to the exemptions provided under Art. 17(7).

2.1. The Road from E-Commerce Directive to the New Copyright Directive

The e-Commerce Directive implemented on 8 June 2000 by the EU is one of the most fundamental legislative frameworks for digital services, as it provides for the freedom to provide information services from another Member State[74] without prior authorisation.[75] Furthermore, it lays down the harmonised rules on issues, amongst others, limitations of liability of ISPs.[76]

By adopting the Directive, the EU aimed to achieve a high level of community harmonisation, promote the digital economy for small- and medium-sized enterprises, and ensure higher consumer confidence and legal certainty within the digital market.[77] The e-Commerce Directive has a comprehensive legal framework encompassing most of the platforms for digital services and online intermediaries in the European digital market.[78] Articles 12-14 of the e-Commerce Directive lays out the limited liability exemptions for information service providers, which

[74] Directive 2000/31/EC, *supra nota 10*, Art. 3.
[75] *Ibid*., Art. 4.
[76] Barnard, C. (2019). *The Substantive Law of the EU, The Four Freedoms*. Sixth Edition, Oxford University Press, p 609. *See also* the homepage of the EC, policies, e-Commerce Directive, retrieved 20. March 2022. Available: https://digital-strategy.ec.europa.eu/en/policies/e-commerce-directive.
[77] Directive 2000/31/EC, *supra nota 10*, p 1.
[78] Sagar S., & Hoffman, T. (2021), Intermediary Liability in the EU Digital Common Market – from the E-Commerce Directive to the Digital Services Act, p 3.

attempts to outline and define the conditions under which certain service providers would be exempted from liability for third-party content.[79] The three exceptions are the following; mere conduit[80], catching[81] and hosting[82]. The latter concerning hosting, namely Art. 14 of the e-Commerce Directive, establishes a safe harbour regime. To illustrate what is meant by a safe harbour, it can be stated that the thought behind safe harbours initially has rested on the idea that it would be too heavy of a burden to hold platforms liable for the illegal activity of their users.[83]

The new Copyright Directive constitutes a step forward in EU copyright harmonisation. Harmonisation by the Directive mainly concerns the rights of the authors of the works and exceptions to those rights,[84] as it explicitly states that to assure fair competition in the European internal market, more common rules on copyright are crucial and are expected to stimulate "*innovation, creativity, investment and production of new content, also in the digital environment, to avoid the fragmentation of the internal market*".[85] The InfoSoc Directive provides "authors with the exclusive right to authorise or prohibit any communication to the public of their works, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them or either prohibiting the making of available to the public".[86] In short, the exclusive right of a rightholder includes the right to decide on the use of the subject matter of protection, including the possibility to deny the use of the object of protection if desired.[87] When a significant amount of copyrighted content is stored on an online platform, a way must be found to enforce this right of the rightholder. The question of the allocation of responsibilities for communication to the public has been a significant part of the ambiguity of the current e-Commerce Directive for a long time. Is the user responsible for the potential infringement, or should the OCSSP be liable for the infringement? This is one of the questions that the new Copyright Directive seeks to address.[88]

[79] Directive 2000/31/EC, supra nota 10, Articles 12-14.
[80] *Ibid*., Art.12.
[81] *Ibid*., Art.13.
[82] *Ibid*., Art.14.
[83] Senftleben, M. *et al.* (2020), supra nota 68, p 6. It has been presented, that safe harbours have a significant impact on the evolution of intermediaries dealing with third party content and moreover on the development of e-commerce as a whole.
[84] Ferri, F. (2021), *supra nota 9,* p 26.
[85] Directive 2019/790, *supra nota 1*, recitals 1-2.
[86] Directive 2001/29/EC, *supra nota 8*, Art. 2-3.
[87] *Ibid*.
[88] Directive 2019/790, *supra nota 1,* recital 65.

2.1.1. Rationale Behind the Safe Harbour Reform

The new Copyright Directive is a reform for the entire copyright protection scheme within the EU, and it is part of a broader initiative of the EU to update its legal framework and make it fit for the digital age as part of the so-called "Digital Single Market Strategy".[89] The Art. 17 of the new Copyright Directive is remarkable because it provides for a new specific regime of authorisation and liability for copyright which applies to certain ISPs defined as OCSSP under Article 2(6) of the Directive.[90]

It has been argued that Art. 17 was prompted by the so-called "value gap".[91] Essentially, it refers to an alleged imbalance in revenues generated by ISPs from copyright protected content uploaded by their users and the revenues earned by copyright holders.[92] Without further assessing whether it is a question of a value gap, the problem has been argued to arise from the safe harbour regime of the e-Commerce Directive, which provides platforms with a liability privilege and thus does not incentivise them to enter into licensing agreements or otherwise offer for conditions more accommodating for rightsholders.[93] Due to the fact that most of the dominant platforms are based in the US[94], and the generated revenue rarely stays within the EU, the problem can be seen only more acute, and that is why the Art. 17 of the Copyright Directive has been argued to address this "value gap" through changes in the existing intermediaries' liability regime under Art. 14 of the E-Commerce Directive.[95] Because the enforcement of this new Copyright Directive brings in many changes concerning ISP's liability exemption on safe harbours, the phenomenon is referred to as a safe harbour reform.

2.1.2. Challenge Against the Directive by Poland

The ambitious reform by the Directive strengthens the EU's regulatory role, but it has also been met by controversy since the outset.[96] The Directive has been criticised, namely Art. 17 has been one of the most contentious provisions of the Directive, and it has been claimed to violate the

[89] COM(2015) 192 final, *supra nota 2.*
[90] Directive 2019/790, *supra nota 1*, Art.17.
[91] Angelopoulos, C. (2017). *On Online Platforms and the Commission's New Proposal for a Directive on Copyright in the Digital Single Market.* Centre for Intellectual Property and Information Law (CIPIL) University of Cambridge, p 7.
[92] Burri, M. *et al.* (2020), *supra nota 3*, p 50; It has been argued both ways of whether such a 'value gap' exists, but this thesis will not further analyze the question of whether there is a value gap or not.
[93] *Ibid*.
[94] Information service providers such as Google, Youtube, Meta, Twitter, Wikipedia, eBay.
[95] Burri, M. *et al.* (2020), *supra nota 3,* p 50.
[96] *Ibid*., p 48.

freedom of expression.[97] There has been critique that the Article will encourage providers to use automated content filtering technologies, which can cause legal content to be blocked because of their lack of human intuition. [98]

The Polish government lodged an action against the European Parliament and Council claiming that introducing such mechanisms would lead to preventive censorship of the Internet.[99] Poland did primarily seek the annulment of Art. 17(4)(b) and 17(4)(c) of the new Copyright Directive and, in the alternative, annulment of Art. 17 in its entirety for its incompatibility with Art. 11 of the EU Charter of Fundamental Rights.[100] Poland claimed that the ”preventive control mechanisms” would "undermine the essence of the right of freedom of expression and information and do not comply with the requirement that limitations imposed on that right be proportional and necessary"[101], and as a basis for their claim, they link overly interventionist platform roles with overblocking concerns, both of which negatively would impact the freedom of expression.[102] CJEU gave its ruling on 26 May 2022, confirming the opinion of Advocate General Henrik Saugmandsgaard Øe, who already advised of the validity of the Art. 17 in July 2021.[103] It was concluded that the contested provisions do indeed have the effect of interfering with the freedom of expression of online content users. Still, they do not infringe the essence of this right and are therefore compatible with EU primary law.[104]

[97] Tyner, A. (2020). *The EU Copyright Directive: "Fit For The Digital Age" or Finishing It?*, 26 J. INTELL. PROP. L. 275 (2020), p 276 and 285; Yanisky-Ravid, S. (2020). *Intellectual Property Laws in the Digital Era: An International Distributive Justice Perspective. In Intellectual Property, Innovation, and Global Inequality, D. Benoliel, F. Gurry, K. Lee & P. Yu, eds.* Cambridge University Press, Intellectual Property and Information Law series, p 4; Reda, J., Selinger, J., Servatius, M. (2020). *Article 17 of the Directive on Copyright in the Digital Single Market: a Fundamental Rights Assessment,* p 4 and 18.
[98] Montagnani, M. L. *et al.* (2018), *supra nota 71,* p 11 and 15. *See also* Montagnani, M. L., & Trapova, A. (2019). *New Obligations for Internet Intermediaries in the Digital Single Market — Safe Harbors in Turmoil?* Journal of Internet Law 2019, vol. 22(7), p 11 and 15.
[99] Reda, J. *et al.* (2020), *supra nota 97*, p 5.
[100] Action brought up on 24.5.2019, *Republic of Poland v European Parliament and Council of the European Union*, C-401/29. Pleas in law and main arguments, paragraph 4.
[101] *Ibid.*
[102] *Ibid*.
[103] Court decision, 26.4.2022, *Republic of Poland v European Parliament and Council of the European Union,* C-401/29, EU:C:2022:297.
[104] Opinion of Advocate General, *Republic of Poland v European Parliament and Council of the European Union,* 15.07.2021, EU:C:2021:613, recitals 77, 84-85, 114.

2.2. The Legal Status of OCSSPs

To determine how and in what ways have the safe harbour provisions reduced in scope and effect after the implementation of the Copyright Directive, the legal status of the new OCSSPs must be determined by comparison to the legal status of the ISPs under the e-Commerce Directive. In addition to the Art. 17 of the Copyright Directive itself, the Guidance on Art. 17 of Directive 2019/790 on Copyright in the Digital Single Market by the EC[105] will be taken into account when inspecting the legal status of OCSSPs.

2.2.1. The Service Providers Covered by Article 17: OCSSPs

As previously brought up, the e-Commerce Directive concerns service providers on the internet. By service providers, the Directive refers to any natural or legal person providing an information society service, meaning that the scope is relatively broad.[106] Terms service provider and ISP are used interchangeably under the Directive. The scope of the Directive is limited to information society services (ISS), which means a service within the meaning of Art. 1(1)(b) of Directive (EU) 2015/1535. That is to say, ”any service usually provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.”[107] Hence, ISPs are the ones providing the ISSs.[108]

With the new Copyright Directive, the scope is further narrowed down. Whilst the Directive refers to ISPs, it also lays out a new definition for ‘online content-sharing service providers’ (OCSSPs), referring to a ”provider of an ISS of which the main or one of the primary purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject-matter uploaded by its users, which it organises and promotes for profit-making purposes.”[109] To fall within the definition of an OCSSP, the service provider must also fall into the scope of an information society service.[110] The Directive clarifies that despite certain ISS are designed to give access to the public to ”copyright-protected content or other subject matter uploaded by their

[105] Directive 2019/790, *supra nota 1*, Art.17(10); 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, COM(2021) 288 final.
[106] Directive 2000/31/EC, *supra nota 10*, Art.2(b).
[107] Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services *OJ L 241, 17.9.2015*, Art. 1(1)(b).
[108] Directive 2000/31/EC, *supra nota 10*, Art.2(b).
[109] *Ibid*., Art. 2(6).
[110] COM(2021) 288 final, *supra nota 105*, p 4.

users", they should be differentiated from OCSSPs, as they should only target services that play an important role on the online content market by competing with the other online content services, such as online audio and video streaming services, for the same audiences.[111] Moreover, certain providers, such as non-profit online encyclopaedias, open-source software-developing and sharing platforms, as well as business-to-business cloud services, are excluded.[112] This has been stated to be due to the recognition that the notice and takedown system of the E-Commerce Directive works well enough for most ISPs, and that Art. 17 may harm entities which do not bear the risks of infringement that it is designed to address.[113] Nevertheless, the scope is further narrowed down to a requirement of a case-by-case evaluation, taking into account the audience of the service and amount of works uploaded by the users.[114] The scope of Art. 17 is limited to the use of protected content by OCSSPs. Moreover, it can be concluded that the newly established scope of OCSSPs can be seen as a sub-category for ISPs, meaning that some ISPs also fall into the scope of Art. 17.

2.2.2. Exclusions From the Scope of OCSSPs

In the future, the interpretation of ambiguity may be caused when it comes to whether a certain ISP also fulfils the scope of an OCSSP. In the jurisprudence of CJEU, it has not even always been clear what fills the scope of an ISP. To illustrate, in the case *Sotiris Papasavvas v O Fileleftheros Dimosia Etairia Ltd,* it was established that an online version of 'O Fileleftheros' newspaper is not considered to be an ISP within the meaning of the e-Commerce Directive.[115]

Art. 2(6) of the Copyright Directive provides for an OCSSP to be an ISP whose main purpose or one of its main purposes is to preserve and make available to the public for profit a large number of copyrighted works or other subject-matter which its service organizes and promotes.[116] Consequently, even some large players are excluded from the scope of the Art. 17 and the definition of OCSSP. It could be argued, that such actors include for example non-commercial dictionaries like Wikipedia, cloud services like DropBox, e-commerce services like Amazon, personal blogs

[111] Directive 2019/790, *supra nota 1*, recital 62.
[112] *Ibid*., Art. 2(6) and recital 62.
[113] Burri, M. *et al.* (2020), *Supra nota 3*, p 51.
[114] Directive 2019/790, *supra nota 1*, recitals 62-63.
[115] Court decision, 11.8.2014, *Sotiris Papasavvas v. O Fileleftheros Dimosia Etairia Ltd., Takis Kounnafi, Giorgos Sertis,* C-291/13, EU:C:2014:2209, para. 58; The limitations of civil liability laid out in the art. 12-14 of the e-Commerce Directive do not apply to the case of online newspaper websites, which are remunerated by income generated by commercial advertisements due to having knowledge of the information posted and exercising control over it regardless of whether access to such a website is free of charge.
[116] Directive 2019/790, *supra nota 1*, recital 62.

and discussion forums. [117] It remains unclear whether for example dating sites such as Tinder, would potentially fill the scope of an OCSSP needing to follow the Art. 17.[118] Placing new entrants in the loose criteria of the article and scope of OCSSP can be problematic given the constant evolution of technology and services.

2.3. Liability and Obligations of OCSSPs

An OCSSP performs an act of communication to the public[119] or an act of making available to the public when it gives the public access to "copyright-protected works or other protected subject-matter uploaded by its users".[120] In order to do so, the OCSSP shall therefore obtain an authorisation from the rightholders, meaning authors with the exclusive right to authorise or prohibit any communication to the public of their works under the art. 3(1)-(2) of InfoSoc Directive.[121] The article further suggests that authorisation can be obtained by concluding a license agreement.[122] By this way, it aims to facilitate the development of license markets between rightholders and OCSSPs, which in turn increases their possibilities for remuneration of their copyright.[123]

2.3.1. Direct Liability

In the first instance, the Directive requires an OCSSP to obtain the authorisation from the rightholder as presented, but if no authorisation is granted, the Art. 17 has introduced a direct liability for OCSSPs which make available user-generated protected content without a license unless they can demonstrate that they have a) "made best efforts to obtain an authorisation by the

[117] Zapala, I. (2021). *Territorial scope of the authorization requirement and liability regime under Directive (EU) 2019/790 on copyright and related rights in the digital single market*. Journal of Intellectual Property Law & Practice, Vol. 00, No. 0, p 6. *See also* Dusollier, S. (2020). *The 2019 Directive on Copyright in the Digital Single Market: Some progress, a few bad choices, and an overall failed ambition*. Common Market Law Review, Kluwer Law International, 57 (4), p 1012.
[118] Reda, J. *et al.* (2020), *supra nota 97,* p 43. Tinder is an online application hosting photographs that are, for the most part, created and uploaded by the users themselves.
[119] *See* Court decision, 13.6.2017, *Stichting Brein v Ziggo BV and XS4All Internet BV*, C-610/15, EU:C:2017:456 for interpretation of what can be a communication to the public. CJEU held that making available and managing an online peer-to-peer file-sharing platform, and notably indexing metadata and providing a search engine, can be a communication to the public.
[120] Directive 2019/790, *supra nota 1*, Art. 17(1).
[121] *Ibid*., Directive 2001/29/EC art. 3(1) and (2) provides the right of communication to the public of works and right of making available to the public other subject-matter. In addition, when an OCSSP obtains an authorisation it should also cover acts that are carried out by the users of the services that wall within the scope of art. 3 of the InfoSoc Directive when they are not acting on a commercial basis or where their activity does not generate significant revenues.
[122] *Ibid*.
[123] COM(2021) 288 final, *supra nota 105,* p 2.

rightholders"; b) "ensured the unavailability of specific works for which the rightholders have provided the relevant and necessary information, by high industry standards of professional diligence"; c) "disabled access to content expeditiously, upon receiving a sufficiently substantiated notice from the rightsholders"[124]; and also d) "made best efforts to prevent future unauthorized uploads."[125] Hence, the OCSSPs have a duty to take active steps to prevent copyright infringement. The conditions laid out must be explicitly introduced by Member States into their national laws, and. For example the concept of 'best efforts' is an "autonomous notion of EU law", according to the EC it should be transposed by the Member States in accordance with the guidelines and interpreted in light of the Art. 17 as a whole.[126]

Art. 17(5) provides, that OCSSPs must be assessed in light of the principle of proportionality when assessing whether they meet the conditions outlined in Art. 17(4).[127] Following up Art. 17(6) that provides for an special liability regime for new service providers, such as startups, under certain conditions.[128] OCSSPs whose annual turnover is below EUR 10 million are able to benefit from this favorable regime[129], nevertheless they are still required to make their best efforts to obtain an authorisation.[130] In addition, if a new OCSSP has less than 5 million unique visitors, they are only required to make their best efforts to obtain an authorisation and to comply with the 'notice and take down' obligation.[131]

2.3.2. Art. 17 Overruling the Liability Exemption under Art. 14 of the e-Commerce Directive

Art.17(3) provides that, when the OCSSPs carry out an act of communication to the public under the provisions of the Copyright Directive, the limitation of liability established in Art. 14(1) of e-Commerce Directive does not apply. Under Art. 14(1) where an ISS is provided that consists of the "storage of information provided by a recipient of the service", Member States shall ensure that the ISP is not liable for the "information stored at the request of a recipient of the service", on

[124] Ibid., p 17; also referred to as the 'notice and take down' obligation.
[125] Directive 2019/790, *supra nota 1,* Art. 17(4).
[126] COM(2021) 288 final, *supra nota 105.*
[127] Directive 2019/790, *supra nota 1,* Art. 17(5); the following elements shall be taken into account, namely "the type, the audience and the size of the service and the type of works or other subject matter uploaded by the users of the service"; and "the availability of suitable and effective means and their cost for service providers."
[128] *Ibid*., art. 17(6).
[129] *Ibid*., the annual turnover is calculated in accordance with Commission Recommendation 2003/361/EC concerning the definition of micro, small and medium-sized enteprises (OJ L 124, 20.5.2003), p 36.
[130] *Ibid*.
[131] *Ibid.*

three different conditions.[132] The first condition being that "the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent"[133] or secondly, that "upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information"[134], as it can bee seen in the *Google France & Google Inc. et al. v. Louis Vuitton Malletier et al.*[135] The Court concluded that an intermediary service provider which has not played an active role on the data stored cannot be held liable if, once it acquired knowledge of the unlawful nature of this data, it has removed or disabled access to it. Moreover, when concerning an operator of an online marketplace, such as in *L'Oréal SA and others v. eBay*[136], the CJEU held that if it plays an active role it cannot fall under the exemption from liability, meaning that it was in fact aware of the circumstances and failed to act expeditiously in accordance with the Article (1)(b).[137]

The Art. 17 excludes the availability of the hosting safe harbour in relation to copyright infringements.[138] To illustrate how the scope of ISP has reduced, when a user uploads a video on an online platform considered an OCSSP, the liability of the OCSSP is no longer exempted under the safe harbour and it should obtain the authorisation from the rightholder in order to communicate to the public or make available to the public works or other subject matter.

2.3.3. Lex Specialis

EC has stated that the Directive can be considered as *lex specialis* to Art. 3 of InfoSoc Directive and Art. 14 of e-Commerce Directive.[139] No new rights are being introduced, rather the act of 'communication to the public' is being addressed in what the EC refers to as "limited circumstances by the Art. 17".[140] Hence, it is necessary for Member States to implement specifically the provision

[132] Directive 2000/31/EC, *supra nota 10,* Art. 14(1)(a)-(b). Article 14(2) further specifies that the conditions (a) and (b) shall not apply when the recipient of the service is acting under the authority or the control of the provider.
[133] *Ibid*., Art. 14(1)(a).
[134] *Ibid*., Art. 14(1)(b).
[135] Court decision, 23.10.2010, *Google France and Google Inc. et al. v. Louis Vuitton Malletier et al*, C-236/08 to C-238/08 (joined cases), EU:C:2010:159. The case illustrates the importance of an active role of the ISP.
[136] Court decision, 12.7.2011, *L'Oréal SA and others v. eBay*, C-324/09, EU:C:2011:474.
[137] *Ibid.,* paragraph 124.
[138] Directive 2019/790, *supra nota 1,* Art. 17(3).
[139] COM(2021) 288 final, *supra nota 105,* p 2. *See also* Hummer, F. (2022). *The German transposition of Article 17 of the Copyright DSM Directive and its 'presumed legal use': incompatible with EU law or a model for balancing fundamental rights in the age of upload filters?* Journal of Intellectual Property Law & Practice, p 24.
[140] Directive 2019/790, *supra nota 1,* recitals 64-65.

instead of relying solely on their national implementation of Art. 3 of InfoSoc Directive due to the lex specialis status of Art. 17.[141]

2.3.4. No Monitoring Obligation

In addition, it is relevant to mention that safe harbours have been supplemented by a prohibition of general monitoring obligations.[142] The EU law explicitly provides that intermediaries may not be obliged to monitor their services in a general manner to detect and prevent the illegal activity of their users.[143] Similarly to DMCA[144], under Art. 15(1) of the e-Commerce Directive, Member States shall not impose a general obligation on providers when providing the services covered by Art. 12-14, to monitor the information they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.[145] In *SABAM v. Netlog*, the CJEU insisted that a general obligation to monitor infringes the intermediary's freedom to conduct business and may violate the users' fundamental rights. [146] Under Art. 17(8) of the Copyright Directive, it is stated that the application of the Directive shall not lead to any general monitoring obligation. Regardless, the Art. 17(4) gives OCSSPs a direct liability, namely to establish content recognition technologies, which can be seen as a threat to cause censorship, as seen from *Poland v. European Parliament.*[147]

2.3.5. Additional Obligations of OCSSPs

Additional obligations stated under the Art. 17, provides for OCSSPs a legal protection obligation of setting up complaint and redress mechanism and furthermore, an obligation to "disclose information to rightholders on the exploitation of cypyright-protected content in a transparent manner."[148]

[141] COM(2021) 288 final, *supra nota 105,* p 2. *See also* Senftleben, M. *et al.* (2020), *supra nota 68*, p 24-26.
[142] Directive 2000/31/EC, *supra nota 10*, Art. 15.
[143] Senftleben, M. *et al.* (2020), *supra nota 68*, p 6.
[144] Hinze, G. (2019), *supra nota 58,* p 69.
[145] Directive 2000/31/EC, *supra nota 10*, Art 15(1).
[146] Court decision, 16.2.2012, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*, C-360/10, EU:C:2012:85, paragraph 48.
[147] C-401/29, *supra nota 103.*
[148] Directive 2019/790, *supra nota 1*, Art. 17(9)

2.4. Fair Use

Art. 17(7) of the Copyright Directive stipulates that when OCSSPs cooperate with rightsholders avoiding unauthorised content, it shall not result in the unavailability of works and other subject matter uploaded by users that are not infringing copyright and related rights.[149] Moreover, it provides that users shall be able to rely on specifically mentioned exceptions or limitations when uploading and making available content generated by them. The exceptions provided by the Article can be parallelled to the fair use principle, used for example in the US where the major big online intermediaries come from. This subchapter seeks to analyse, how does the "fair use" principle of copyright law correlate to Article 17(7) setting up certain types of content, such as parody, that are exempted when uploading and making available content generated by users on OCSSs.

2.4.1. The Fair Use Principle

The national laws limit the use of intellectual property in different ways, from precisely circumscribed exceptions[150] to more flexible "fair dealing" or "fair use" exceptions found in the common law tradition.[151] A number of limitations found in almost all national laws are recognised by the Berne Convention, such as the mandatory "quotation right" of Art. 10(1), but it also allows contracting states some discretion to carve out limitations specific to their own needs.[152]

The fair use doctrine in the US codifies years of judicial decisions by excusing certain uses in circumstances in which the social value is greater than its private cost and, generally, the transaction costs make licensing impractical for the copyright owner.[153] According to Section 107 of the 1976 Act, uses for such purposes as criticism, comment, news reporting, teaching, scholarship and research are fair and non-infringing[154] based on a calculus of four factors: "purpose and character of the use, nature of the copyrighted work, the amount of appropriated from the copyrighted work and the effect of the use upon the potential market for or value of the copyrighted work.".[155]

[149] Ibid., Art.17(7).
[150] Found widely among countries following the droit d'auteur tradition. *See* Copyright Law in the EU: Salient features of copyright law across the EU Member States. European Parliament, Study 13-07-2018, p 3.
[151] Goldstein, P. *et al.* (2010), *supra nota 18,* p 360.
[152] *Ibid*.
[153] *Ibid.,* p 362.
[154] Matthew, D., Halbert. D., (2015). *The Sage Handbook of Intellectual Property*, p 40.
[155] *Ibid*., p 362.

In civil law practise, there is no specific provisions for fair dealing. Regardless, copyright legislation in most civil law countries, including EU Member States contains exceptions comparable to those provided under the fair dealing defense.[156]

2.4.2. Safeguards for Legitimate Use of Content

The InfoSoc Directive Art. 5 lays out an exhaustive list on limitations that Member States may implement into their national laws, containing only one mandatory limitation permitting transient copying incidental to digital communications, including catching and browsing. In the case of quotation, criticism and review, they limitations are subject to the application of specific conditions. [157] As oppose to this, the specific exceptions and limitations of Art. 17(7) are to be transposed by the Member States to their laws, and they apply to all users uploading and making available content generated by users on OCSSs, and are not subject to any additional requirements for application.[158] The exceptions covered by the article are quotation, criticism and review for the purpose of caricature, parody or pastiche.[159] It could be already stated at this point, that as Art. 17(7) obliges the Member States to transpose the exceptions to their national law it could be compared to the fair use regime established under the 1976 Act.

2.4.3. Possible Over-filtering of Parody, Caricature and Pastiche

In order for OCSSPs to comply with the Art. 17(4) it is rather necessary to establish certain automated systems like content recognition technologies to avoid copyright infringements.[160] If an OCSSP is notifies with the relevant information, it must block the upload of the respective content in accordance with “high insudtry standars of professional diligence”.[161] The recital of the Directive does not explicitly mention the use of any technology, but it seems to be impossible to meet the requirement with anything else than algorithm-driven tools, such as content recognition.[162] In addition, despite the fact that the Copyright Directive excempts certain permissible uses of copyrighted content, on the opposite, it is almost impossible for automated

[156] Ibid., p 363. *See also* the German Copyright Act Section VI and French Intellectual Property Code Act Art. L. 122-5. Both Acts provide a list of limited exceptions to copyright.
[157] Directive 2001/29/EC, *supra nota 8,* Art. 5; The article contains a list of 21 optional limitations that Member states can implement, and when implemented they must comply with the "three-step test.”
[158] COM(2021) 288 final, *supra nota 105*, p 18.
[159] Directive 2019/790, *supra nota 1,* Art.17(7).
[160] *Ibid.,* p 20.
[161] Directive 2019/790, *supra nota 1,* recital 66.
[162] *See* Burri, M. *et al.* (2020), *supra nota 3,* p 59; Content recognition tools have also been referred to as ”upload filters”.

systems to distinguish between legitimate and infringing uses, which is even hard for humans. Automated systems and robots lack both a critical eye and a sense of humor, when it comes to for example parody and memes.[163] EC in its Guidelines also indicates that no technology can currently evaluate to the standard required by law whether a user's intention to upload content is infringing or a legitimate use. It is possible, however, for content recognition technology to identify certain copyright-protected content if the ”rightholders have provided relevant and necessary information to the service provider.”[164]

The Copyright directive does not provide any information on how to ensure compliance with art.17(7) in practice. According to EC, when content uploaded by a user matches a specific file by rightholders, it should be automatically blocked.[165] They further specify that technology should be limited to going through manifestly infringing uploads, meaning, for example pictures or videos that are pure copies. Other uploads, which are not manifestly infringing, should be made available online but may be subject to ex post a human review if rightholders object by sending a notice.[166] It is arguable that the guidance on preventing copyright infringing materials with content recognition technology is rather vague.

To comply with the new EU copyright laws, companies falling into the scope of an OCSSP will need to develop policies and algorithms for filtering the requisite content, for identifying parody or criticism as exceptions, and identifying rightsholders and pursuing licenses for the content appearing on their sites.[167] But content recognition technologies are not new for all players in the field[168], and there is also evidence that they can be quite problematic because they do not often work.[169] *Tyner* brings out Youtube’s content ID system[170] as an example that has been criticised to be “over-blocking fair use and non-protected content.”[171] It remains to be seen how the content recognition technologies are going to deal with parodies, caricatures and pastiche as the application

[163] Tyner, A. (2020), *supra nota 97,* p 285.
[164] COM(2021) 288 final, *supra nota 105*, p 20.
[165] *Ibid*.
[166] *Ibid*.
[167] Burri, M. *et al.* (2020), *supra nota 3,* p 41.
[168] *Ibid.,* p 41-42; Apart from measures prescribed in law, many intermediaries have taken proactive measures, such as filters and monitoring mechanisms, to detect illegal content-mostly as a response to rightsholders' pressure.
[169] Tyner, A. (2020), *supra nota 97,* p 285. *See also* Bartholomew, T. B. (2014-2015). *The Death of Fair Use in Cyberspace: Youtube and the Problem with Content ID.* Duke Law & Technology Review, p 87.
[170] Burri, M. *et al.* (2020), *supra nota 3,* p 41-42; YouTube is an American online video sharing and social media platform, that introduced its automated content recognition and filtering mechanism ("Content ID") going beyond the requirements of DMCA, as a response to a major copyright lawsuit in 2012 that it was exposed to.
[171] Tyner, A. (2020), *supra nota 97,* p 285.

of these technologies may offer efficient tools to deal with the allegedly large amounts of infringing content. Still, they might also raise some negative implications, particularly about fair use of copyrighted content or public domain works.[172] As aforementioned, there is no law regulating 'fair use' in the EU, but the limitations provided under Art. 17(7) of the Copyright Directive correlates to the purpose of a fair use principle.

2.4.4. Preventing Copyright Infringement – Ex Post to Ex Ante?

It seems that previously where the law has been enforced after a violation of law has taken place (*ex post*), in this case, a copyright infringement is no longer a legislative regime rather we are shifting towards a regime where technology ensures that copyright infringements, namely violations of the Copyright Directive and further the national law of the Member States do not occur in the first place (*ex ante*).[173] In today's world, where information spreads at the speed of light, also applying to materials uploaded on the platforms and made available to the public. Hence, by preventing possible copyright infringements under Art. 17(4) of the Copyright Directive safeguards the rights of the rightholders of copyright-protected work.

[172] Burri, M. *et al.* (2020), *supra nota 3,* p 41-42.
[173] *Ibid*., p 59.

3. NATIONAL COMPARISON OF THE IMPLEMENTATION OF ARTICLE 17

This chapter examines the national implementation of the Directive in Estonia and Finland. The inspection of national implementation will focus on analysing how Art. 17 has been implemented and, more specifically, how the exclusions under Art. 17(7) of the Directive have been transposed. Estonia and Finland were chosen to be inspected in the thesis, as they are both civil law countries with a somewhat similar legal framework. The Copyright Directive has been implemented in Estonia, while in Finland it is still in the implementation process.

3.1. National Implementation of the Copyright Directive

The legal basis for the Copyright Directive is Article 114 TFEU, which allows the European Parliament and the Council to adopt measures for the approximation of national laws, regulations and administrative acts to ensure the establishment and functioning of the internal market.[174] The ratio legis underlying the Directive is the further harmonisation of EU level law applicable to copyright in the framework of the internal market, in particular digital and cross-border uses of protected content.[175] The Directive entered into force on 7 June 2019, and should have been trasposed by the Member States into national law by 7 June 2021.[176]

Not all of the Member States managed to implement it before the deadline, and some Member States have yet to do so. Due to the controversies around the Art. 17 Member States have been discussing different approaches to national implementation.[177]

[174] Consolidated version of the Treaty on the Functioning of the European Union, *OJ C 326, 26.10.2012, p. 47–390*, Art. 114 (previously, Art. 95 of the Treaty of the Economic Community EEC).
[175] Directive 2019/790, *supra nota 1,* Art. 1(1).
[176] *Ibid*., Art. 29(1).
[177] Reda, J. *et al.* (2020), *supra nota 97,* p 8.

3.2. Implementation in Estonia

The draft amending the Copyright Acts was presented to the Parliament on 5 April 2021. After multiple meetings of the Parliaments Committee on Culture, the Parliament adopted the Act amending the Copyright Act on 8 December 2021, and it was published in the Official gazette on 28 December 2021. The new Copyright Act of Estonia entered into force on 7 January 2022. The implementation of Art. 17 largely restates what's provided in the Directive.

3.2.1. Liability of OCSSPs

The new Estonian Copyright Act regulates communication to the public and making available to the public of works and objects of related rights by OCSSPs under its Chapter VII. The content of Art. 17 of the Copyrigt Directive has been transposed almost from word to word into the national legislation and can be found under § 57^{8}- 57^{15} of the Copyright Act.[178] More precisely, the liability provisions under Art. 17(4) of Copyright Directive are represented under § 57^{9} (3) of the Estonian Copyright Act, and they are in a form of a new sui generis exclusive right that works as a lex specialis to the existing law, with its own conditions and liability mitigation mechanisms.[179] Additionally, it requires OCSSPs to take measures in order to enable users to lawfully make publicly accessible protected materials under copyright exceptions, which is a deviation from the directive.[180]

3.2.2. Quotation, Criticism and Review for the Purpose of Caricature, Parody or Pastiche Treated as User Rights

Chapter IV of the Estonian Copyright Act provides for the limitations on the exercise of economic rights of authors, namely, the free use of works. The legislator retained its existing education exception, which permits all educational uses of protected materials for educational purposes by any user, as allowed under Art. 5(3)(a) of the InfoSoc Directive. As novelty, under the Chapter, § 19(1) provides that "the following is permitted without the authorisation of the author and without payment of remuneration if mention is made of the name of the author of the work, if it appears thereon, the name of the work and the source publication: 1) making summaries of and quotations from a work which has already been lawfully made available to the public, provided that its extent does not exceed that justified by the purpose and the idea of the work as a whole

[178] Estonian Copyright Act, 7.1.2022, §57^{8}- 57^{15}.
[179] *Ibid*., §57^{9} (3).
[180] *Ibid.,* §57^{9} (5).

which is being summarised or quoted is conveyed correctly"[181] and 7) "the use of a lawfully published work in a caricature, parody or pastiche to the extent justified by such purpose."[182] The Act further provides under § 75 a list of limitations providing that "without the authorisation of the holder of related rights specified in the Chapter, and without payment of remuneration, are permitted to use the performance, phonogram, radio or television broadcast or recordings thereof, film, unpublished work, literary criticism or scientific publication, or press publication, including by reproduction" to, inter alia, do quotations.[183]

Based on the overview of the new Estonian Copyright Act, it does grant the right to exceptions and limitations under Art. 17(7) of the Copyright Directive, and goes beyond that by including several cases of free use.[184] Anyhow, Estonia however did not introduce quotation, criticism, review, and use for the purpose of caricature, parody or pastiche newly under the Copyright Directive.

3.3. Implementation In Finland

The Ministry of Education and Culture has been preparing the national implementation of the new Copyright Directive in Finland. The proposal for amendments, namely the Dart Bill implementing the Copyright Directive and CabSat Directive was presented in a round of opinions that took place 27 September 2021.[185] A draft of the government's proposal was published on 3 March 2022, and it was further submitted to the Parliament on 13 April 2022. According to the proposal, the proposed law is to be expected to enter into force on 1 January 2023.[186] However, the Finnish Council of Regulatory Impact Analysis published a statement on the Government proposal on April 1, 2022, emphasizing the need for further clarification of how the impact assessment would impact the target groups. [187]

[181] *Ibid*., § 19(1)1).
[182] *Ibid*., § 19(1)7).
[183] *Ibid*., § 75(1).
[184] *See* Explanation submitted by the Estonian Ministry of Justice 368 SE, 21.09.2021; where it strikes a reasonable balance between the solution proposed in the draft, to not limit the free use to few cases and the proposals by the Estonian Authors Association and the Estonian Association of Phonogram Producers.
[185] The Bill was open to the public consultation until 31 October 2021, but later on 2 November 2021 the period was extended until 3 November 2021.
[186] HE 43/2022 vp, Government's proposal to Parliament to amend the Finnish Copyright Act and the Act on Electronic Communications Services, p 1.
[187] Statement of the Finnish Council of Regulatory Impact Analysis to the Ministry of Education and Culture on the draft amendment of section 184 of the Copyright Act and the Act on Electronic Communications Services, 1.4.2022.

3.3.1. Liability of OCSSPs

In accordance with Art. 17 of the Directive, an OCSSP shall be deemed to make works or other subject matter available to the public. Thus, the service is not considered as passive in relation to the content stored by users on the service when the OCSSPs organizes and promotes and markets the content for profit. Hence, the law proposes a new regulation on liability and exemption from liability for OCSSPs, which differs in its principles and grounds from the current notification and removal procedure build upon the e-Commerce Directive. In the current legal state, the service provider according to the law does not know and cannot know what content the users store in the service. OCSSPs under the proposed law, on the other hand, actively store and promote and market content for profit, making them responsible for this copyright-relevant activity.[188]

Under Art. 17(3) of the Directive, the exemption rule for hosting services in Art. 14(1) of the E-Commerce Directive does not apply to situations falling within the scope of that Article. On the basis of this provision, it is necessary to clarify in the legislation the relationship between the liability provisions of the Directive and the liability regime for hosting services in the e-Commerce Directive.[189]

3.3.2. Restrictions to Safeguard Freedom of Expression and Fair Use

Art. 17(7) of the Copyright Directive requires Member States to ensure that users in each Member State are able to rely on certain existing exceptions or limitations aimed at safeguarding freedom of expression and freedom of speech.[190] The exceptions referred to in Art. 17(7)(b) to caricature, parody and pastiche clearly refers to a restriction under Art. 5(3)(k) of the InfoSoc Directive 2001/29/EC.[191] By contrast, the "quotation, criticism and review" mentioned in Art. 17 (7)(a) of the Directive do not directly correspond to any individual copyright restriction in Art. 5 of the InfoSoc Directive.[192]

In the Finnish proposal for a Copyright Act, the limitations of Art. 17(7) of the Copyright Directive are embedded in § 23 a concerning the use of the work in parody.[193] According to the section, the

[188] HE 43/2022 vp, *supra nota 186,* p 143.
[189] *Ibid*, p 27.
[190] Directive 2019/790, *supra nota 1,* Art. 17(7).
[191] Directive 2001/29/EC, *supra nota 8,* Art. 5(3)(k).
[192] HE 43/2022 vp, *supra nota 186,* p 20.
[193] Ibid., p 89; *See* Court decision, 3.9.2014, *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others,* C-201/13, EU:C:2014:2132. CJEU peovides analysis of the definition of parody. The Court ruled that parody is a concept of EU law which must be interpreted uniformly throughout the Union. The essential features of parody

uploaded work would be allowed to be used in accordance with good faith in parody, caricature or pastiche. The use of a work in a parody has been previously also considered permissible in Finland, provided that the free modification results in an independent work. On the other hand, the copyright law does not include a restriction on parody, caricature and pastiche in accordance with Article 5(3)(k) of the InfoSoc Directive.[194] The section further defines caricature and pastiche and concludes that in order to fall into the scope of limitation, the user shall act in good faith.[195]

3.4. Conclusions

When concerning the implementation of the Copyright Directive into the national legislative frameworks of Estonia and Finland, it is still very hard to tell concrete differences and similarities as the amendment to the Finnish Copyright Act has yet not been forced.

The primary objective of Art. 17 is to clarify the liability of OCSSPs on the copyrighted material made available on the service. Naturally, either Estonian or Finnish legislation does not recognize the concept of an OCSSP, which is why new provisions for such service providers must be included in the legislation.[196] Furthermore, Art. 17 of the Copyright Directive does not change the concept of communication to the public, so the provision does not affect the rights provided for in Art. 2 of the Finnish Copyright Act nor the Art. 10 of Estonian Copyright Act.

are, on the one hand, that it refers to an existing work but deviates from it in a perceptible way, and, on the other hand, that it is a manifestation of humor or ridicule.
[194] HE 43/2022 vp, *supra nota 186,* p 89.
[195] *Ibid.*
[196] *Ibid.*, p 26.

CONCLUSIONS

This thesis has focused on examining how and in what ways the safe harbour provisions have been reduced in scope and effect after implementing the Copyright Directive by comparing the new legal framework to the previous safe harbour provisions under the e-Commerce Directive. Thus it has aimed to assess whether the Art. 17 of the Copyright Directive overrules the safe harbours with the ISPs falling into the scope of OCSSPs. It can be concluded that it at hand reverses the previous limited and conditional liability exception of ISPs as granted under Art. 14 of the e-Commerce Directive. Previously, various platform services could take advantage of content created by users and generate advertising revenue through it. Unlike in the past, now service providers falling into the scope of an OCSSP will no longer invoke liability when exploiting copyrighted material in their business.

The thesis focused on further inspecting two key aspects, namely (a) what is the legal status of the new OCSSPs in comparison to all ISPs? and (b) how does the "fair use" principle of copyright law correlate to Art. 17(7) setting up certain types of content, such as parody, excepted when uploading and making available content generated by users? The analysis in Chapters 1 and 2 presents that it is plausible that the EU copyright reform will create a divergence between the US and EU copyright liability rules governing service providers. EU has clearly taken a step forward into a completely new direction by establishing that now OCSSPs are responsible for being aware of all content that users upload while performing pre-licensing copyrighted content. Only after doing so it can transmit content to the public in accordance with the Directive. Considering fair use, it is on the shoulders of the OCSSPs to establish such content recognition mechanisms that can fight against copyright infringements without over filtering the content uploaded by users.

The following requirements must be met cumulatively for a service provider to fall into the scope of an OCSSP and the size of the regime in Art. 17: a) be an ISS as defined in Art. 1(1)(b) of Directive (EU) 2015/1535, b) have as its main or one of its primary purposes: 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 c) organises and promotes for profit-making purposes. If the

service provider does not fulfil the scope of an OCSSP, it is then inside the previous legal regime Art. 14 of the e-Commerce Directive and Art. 3 of the InfoSoc Directive.

When it comes to the legal status of OCSSPs, in practice, they will need to obtain licenses for uploaded content in advance rather than to block infringing content or obtain the necessary permissions retrospectively. To date, there has been little incentive for ISPs to enter into fair licensing agreements with copyright holders, as companies have not been liable for content uploaded to them. If an OCSSP is unable to obtain the authorisation, namely to conclude a license agreement, it will be directly liable for any copyright infringement.

However, as Chapter 3 indicates, the process of national implementation of the Directive has not progressed as planned due to controversies caused by Art. 17. Estonia managed to implement the Directive relatively quickly, whereas the implementation is still in the process in Finland. Due to the deficiencies found by the Council of Regulatory Impact Analysis on the impact assessment, it remains to be seen whether the proposed Finnish Copyright act will become effective in its current form or whether further amendments and delays will be necessary. The indications are that both Estonia and Finland will implement the Directive somewhat similarly, with very few specifying stricter requirements in addition to the minimum requirements established by the Directive.

Furthermore, it is questionable if filtering technologies are capable of recognising cases of copyright infringement in a contextual and culturally aware manner and therefore protect the freedom of expression of the users generating content. Moreover, identifying parody, caricature and pastiche cannot rely on the content recognition technologies but requires human review. When the Directive is implemented, it will require companies to invest and develop new technical solutions to enforce copyright protection on the platforms. The threat can be seen in the significant difficulties in operating the platforms and in the market access of similar or new players. The exemption for new small operators under Art. 17(6) does not relieve operators from the obligation of doing their best efforts to obtain authorisation and to supervise, meaning complying with the 'notice and take down' obligation. The realisation of this threat would be a significant obstacle to the wide availability of content in the internal market. It remains to be seen whether the thought behind safe harbours that it would be too heavy a burden to hold platforms liable for the illegal activity of their users becomes a reality, as now the platforms will be the ones liable. On the other hand, Art. 17(4) could be argued to provide for a new specific safe harbour with different requirements based on the size of the ISP involved.

EU copyright law, which has been the subject of this thesis, is still going through the reform. Consequently, it is not yet possible to critically assess the impact of the Copyright Directive in practice or fully determine the legal status of OCSSPs compared to ISPs. It will still take years before all of the Member States have transposed it into their national laws and relevant case law has been formed, and it can be analysed whether the effects of Art. 17 will be counterproductive to the Directive's goal, which is "stimulating innovation, creativity, investment and production of new content, in the digital environment, to avoid the fragmentation of the internal market".[197]

[197] Directive 2019/790, *supra nota 2*, recital 2.

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67. Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market COM(2016) 593 final, 2016/0280 (COD).

68. 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 2020/0361(COD).

69. Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) COM/2020/842 final.

70. The Universal Declaration of Human Rights of 1948.

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72. World Intellectual Property Organization (WIPO) Copyright Treaty (WCT) of 1996.

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APPENDICES

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