**Comments on the German „Discussion Draft” for non-transposition of**

**Article 17 of the DSM Directive as adopted**

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1. **Introduction; background of the non-transposition**

**of Article 17 of the DSM Directive as adopted**

After the unilateral declaration made by Germany[[2]](#footnote-2) on the occasion of the adoption of the DSM Directive (Directive (EU) 2019/790) in which it signalled that it did not intend to transpose Article 17 of the Directive as adopted, the content of the „Discussion Draft”[[3]](#footnote-3) published by the German Ministry of Justice has not come as a surprise.

The key elements of the Article (in the course of the preparatory works numbered as Article 13) that were declared „controversial” by a colourful alliance – composed of Google and other big online platforms with an enormous lobbying network, of certain academics (several of them financed by those platforms[[4]](#footnote-4)), of so-called non-governmental organizations and activist movements (heavily financed by those platforms[[5]](#footnote-5)) – in the Discussion Draft are not transposed as adopted. Certain provisions have been included instead about which it would be difficult to say that they guarantee faithful transposition of Article 17.

It would be a challenging topic to analyse the reasons for which Germany was so reluctant to agree on Article 17; why the question of the inclusion or non-inclusion of certain provisions became an issue of the coalition agreement; how the German Axel Voss was fighting for effective protection of copyright and how the German Pirate Party was a key player on the other side; how the Directive was saved despite German resistance – in a weakened but still a meaningful manner – as a result of President Macron’s badly needed energetic intervention; how the anti-Article-17 elements of the coalition agreement appeared in the German declaration at the adoption of the Directive; what kind of impact it has had on the Discussion Draft that it has been prepared by a Ministry that happens to belong to junior coalition party which was so much opposed to certain elements of Article 17; and so on. It would be an interesting topic to describe what kinds of religious-war-type ideological and political battles were raging around the “value gap”. (But it would be risky; if the author dared to be sincere, he or she might be virtually crucified or become the victim of character assassination in the beautiful online realm of freedom of expression[[6]](#footnote-6).)

At the same time, in order to understand why and how certain provisions appear in the Discussion Draft, it is necessary to refer to the role of academics who actively participated in the debates about Article 13 – turned Article 17 – of the Directive. There was a group which vehemently opposed certain crucial elements of the draft provisions and remained opposed also after the adoption of the Directive, while there was another group of academics – consisting of members of the Executive Committee of the International Literary and Artistic Association (ALAI) – who did support the same. The members of the first group went so far as that they, in an “open letter”[[7]](#footnote-7), called on the Council and the European Parliament to reject the entire Directive if the then Article 13 continued corresponding to the main features of the compromise text presented by Axel Voss, the rapporteur of the European Parliament. Those academics expressed the view that the rightholders’ demand to narrow the “value gap” – between the big advertising income obtained by Google-type platforms for the use of works and objects of related rights, on the one side, and the absence of due remuneration therefor, on the other – was a mere “misleading rhetoric”[[8]](#footnote-8), and that, instead of recognizing direct liability of such platforms, their secondary liability status under the Electronic Commerce Directive (Directive 2000/31/EC) should be maintained.[[9]](#footnote-9) In contrast, the ALAI academics, in various documents, expressed support for the creators’ demands to narrow the “value gap” and for those elements of the draft Article which were strongly criticized by the other group of academics[[10]](#footnote-10).

After the adoption of Article 17 which – although in a watered-up way but still – contained the original key elements, another round of debate took place between the above-mentioned two groups of academics. The anti-Article-13/17 group, in certain “Recommendations”[[11]](#footnote-11) published in November 2019 – originally prepared by seven researchers, but then signed by several others – tried to present an interpretation that would correspond both to their opinion how the provisions should have been adopted and to the German declaration signalling the intention of not transposing the provisions of Article 17 as adopted. In response to this, an ALAI working group published an opinion pointing out the reasons for which the interpretation suggested by the other group was not well-founded.[[12]](#footnote-12)

The drafters of the Discussion Draft have gratefully applied the basic suggestions presented in the Recommendations how Article 17 should have had to be adopted. This means mainly two things. First, that the exclusive right of authorization of the acts performed by online content-sharing service providers (OCSSPs) as clarified in Article 17(1) of the DSM Directive in accordance with Article 3(1) and (2) of the InfoSoc Directive (Directive 2001/29/EC) may be transformed to a mere right to remuneration through statutory licensing (as it can be seen below, in the Discussion Draft, this has been applied in a special way). Second, that the effective and expeditious post-blocking complaint and redress mechanism available to users as provided in Article 17(9) should be replaced with a procedure with the protected materials already made available – a kind of notice-and-take-down system – available to rightholders (an idea fully implemented in the Draft).

However, there is an even more fundamental aspect of the Discussion Draft that is not in accordance with the provisions of Article 17. It was not signalled in the German declaration yet on the occasion of the adoption of the DSM Directive, which is understandable because it seems that it has been based on a theory presented by two of the seven co-authors of the Recommendations mentioned above only several months after the adoption of the Directive, in October 2019[[13]](#footnote-13). According to the theory, the acts of communication and making available to the public performed by OCSSPs for which, as provided in Article 17(1), they must obtain authorization from the owners of the exclusive rights of communication and making available to the public provided in Article 3(1) and (2) of the InfoSoc Directive are not acts of communication and making available to the public under Article 3(1) and (2) of the InfoSoc Directive; therefore, a *sui generis* right is involved to which no provisions of the InfoSoc Directive (and apparently no provision of the international treaties implemented in the Directive) apply.

One may have the impression that there is a touch of sarcasm in the description of the theory at the end of the preceding paragraph, because it looks absurd. Nevertheless, as it is discussed more in detail below, the description seems to be correct. Although the Recommendations were adopted a month later after the publication of the paper of the two researchers – in November 2019 – the theory was not used in the Recommendations, in spite of the fact that the two co-authors of the paper were among the seven co-authors of the Recommendations too. Therefore, when the ALAI working group adopted its opinion to rebut the interpretation of certain key elements of Article 17 presented in the Recommendations, it did not pay attention to the theory of the two researchers. It was so far away from what is provided in the Article that it did not appear to be worthwhile discussing it. In my paper analysing the suggestions made in the Recommendations published on my website,[[14]](#footnote-14) I did not refer to the theory for the same reasons.

Now that the Discussion Draft has also adopted that theory, there is a need to analyse it in substance. This paper is mainly devoted to this analysis. First, the provisions of the InfoSoc Directive and the international treaties on the rights of communication and making available to the public are described (title II). Second, all the provisions of the Discussion Draft to transpose Article 17 of the DSM Directive are reviewed briefly (title III). Third, those provisions and arguments of the Discussion Draft are analysed more thoroughly in which the above-mentioned theory on the *sui generis* nature of the rights of communication and making available to the public is presented (title IV). Fourth, the position and the paper of the two researchers are analysed also with reference to those aspects of their theory and their arguments which have not been specifically mentioned in the Discussion Draft (title V). Fifth, a conclusion is offered outlining possible alternatives and consequences of the non-transposition of Article 17 of the DSM Directive in the Discussion Draft (title VI).

**II. The InfoSoc Directive and the WIPO Treaties (WCT and WPPT) on the rights of communication and making available to the public**

Article 3 of the InfoSoc Directive provides as follows:

1. Member States shall provide authors with the exclusive right to authorise or prohibit *any* communication to the public of their works, by wire or wireless means, *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. (Emphasis added.)

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

(a) for performers, of fixations of their performances;

(b) for phonogram producers, of their phonograms;

(c) for the producers of the first fixations of films, of the original and copies of their films;

(d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.

In paragraph (1), the word “any” is emphasized. That is, if an act qualifies as communication to the public, it is necessarily covered by this exclusive right. Recital (23) of the InfoSoc Directive further underlines that “this right should be understood … *all* communication to the public not present at the place where the communication originates” (emphasis added). Since in Article 17(1) of the DSM Directive (as also confirmed by Recital (64)), it is clarified that the acts performed by OCSSPs are acts of “communication to the public or making available to the public”, it is inevitable to state that “therefore” (or as it is put in Recital (64): “consequently”), for a lawful performance of such acts, the authorization of the rightholders is needed as provided in Article 3(1) and (2) of the InfoSoc Directive. This in itself shows how clearly the “*sui-generis*”-right theory conflicts not only with the DSM Directive but also with the EU law in general, since it suggests that, although the acts performed by OCSSPs are communication and making available to the public *any* of which are covered by Article 3(2) and (2) of the InfoSoc Directive, somehow Article 3(1) and (2) of the InfoSoc Directive still do not apply to these acts of communication and making available to the public.

The word “including” is also emphasized in Article 3(1) to underline that, in the case of copyright, the broad right of communication to the public also covers acts of interactive making available to the public for which, in Article 3(2), a stand-alone exclusive right is provided for the owners of related rights. Such acts are described in the two paragraphs in the same way as “making available to the public, by wire or wireless means, in a way that members of the public may access them from a place and a time individually chosen by them.” Since in Article 17(1) or any other provision of the DSM Directive, there is no definition of this term – and since, in contrast, in Article 17(1), there is a reference to Article 3(1) and (2) of the InfoSoc Directive on the rights covered by such acts – it is hardly questionable that the acts of “making available to the public” performed by OCSSPs mentioned in Article 17(1) mean such interactive acts determined in Article 3(1) and (2) of the InfoSoc Directive.

In Article 17(1) of the DSM Directive, it is clarified that the act performed by an OCSSP as “an act of communication to the public or an act of making available to the public” is that it “gives the public access to copyright-protected works or other protected subject matter uploaded by its users”. Such an act in the way it is described is an act of interactive making available to the public covered both by the broad right of communication to the public as provided in Article 3(1) and by a stand-alone right in Article 3(2) of the InfoSoc Directive. Therefore, in fact, in Article 17(1) of the DSM Directive, it would have been sufficient to clarify directly that acts of (interactive) making available to the public are involved (instead of referring to communication to the public which – in the case of copyright, but not in the case of related rights – also covers interactive making available to the public).[[15]](#footnote-15)

Article 3(1) of the InfoSoc Directive, in all substantive aspects, corresponds to Article 8 of the WCT on the exclusive right to authorize communication, including interactive making available, to the public, while Article 3(2) of the Article, as regards the rights of performers and producers of phonograms, corresponds to Article 10 and 14 of the WPPT on the exclusive right to authorize interactive making available to the public. An agreed statement added to Article 8 of the WCT, and in accordance with it, Recital (27) of the InfoSoc Directive, clarifies that “the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication” (which, of course, is true also concerning the acts of interactive making available to the public as covered both by the broad right of communication to the public and by a stand-alone right). This is a reference to an aspect that is quite relevant from the viewpoint of the copyright status of OCSSPs; namely that, while passive intermediaries may not be directly liable for the acts performed through their systems, active online platforms may be liable.

**III. Provisions of the Discussion Draft that are not in accordance with**

**the EU law and with the international treaties**

***The definition of OCSSPs is significantly narrower than what is provided in Article 2(6) of the DSM Directive***

The definition of OCSSPs in Article 2(6) of the DSM Directive reads as follows:

online content-sharing service provider’ means a provider 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 organises and promotes for profit-making purposes.

The definition in § 2(1) of the Discussion Draft narrows the definition of OCSSPs in two aspects. The first one is that while, in the Directive, the criterion of *promoting* the uploaded content appears, the Discussion Draft uses the criterion of *advertising* the content. Promotion is a broader concept than advertising; thus, in this way already certain providers to be covered obligatorily under the Directive would be excluded. However, point 4 of § 2(1) of the Draft would result in a more drastic limitation of the scope of service providers to which Article 17 of the Directive must be applied. Under that point, even if the activity of a service provider fully corresponds to all the criteria under Article 2(6) of the Directive (and also under the three other points of the § 2(1) of the Draft), even if it uses a very large amount of works and objects of related rights for profit-making purposes, the obligations under Article 3(1) and (2) of the InfoSoc Directive as clarified in Article 17(1) of DSM Directive would not be applied to it, unless it would „compete with online content services for the same target audience”. It is true that, in Recital 62, it is stated that the targets of the regulation are those “online services that play important role on the online content market by competing with other content services”, but this is not an objective definitional criterion. If this limitation were adopted, a highly subjective element would be introduced, as a result of which the new law may not be in accordance with the Directive.

***In contrast with what is prescribed in Article 17(1) and (4)(a) of the DSM Directive, there is no clear provision in § 4 of the Discussion Draft on the obligation to obtain authorization from the rightholders (obligation under those provisions of the German Copyright Law in which the rights of communication and making available to the public are provided in accordance with Article 3 of the Information Society Directive)***

In the first sentence of § 4(1) of the Discussion Draft, there is a provision on the obligation of OCSSPs “to make every effort to acquire the contractual rights of use for communication to the public and the reproduction required for this purpose of copyright-protected work”. The way in which the phrase “to acquire contractual rights of use” appears in the provision might be understood to mean to obtain authorization, and “to make every effort” seems to be at least as strong obligation as “to make best efforts”. However, as it is reviewed below, in the light of the second sentence of paragraph (1) and of paragraph (2) of the §, significant doubts emerge about this. Furthermore, as it can be seen, only the use for *communication to the public and the reproduction* *required for that purpose* of “copyright-protected works” are mentioned; thus, it is not clear whether or not this also means *interactive making available to the public* (provided not only in Article 3(1) of the InfoSoc Directive linked to the provision on the right of communication to the public, but also as a stand-alone right of owners of *related rights* under Article 3(2) of the Directive). This may be settled to avoid further conflicts with Article 17, but without referring to the existing rights of communication and making available to the public as provided in the German Copyright Law transposed in accordance with Article 3(1) and (2) of the InfoSoc Directive, it will be difficult. (As regards the right of reproduction, Article 17(1) of the DSM Directive does not refer to it, but an act of interactive making available to the public inevitably includes storage of protected materials on the system, as an interim step, from where it is made available for interactive access, and that is an act of reproduction.)

However, the absence of reference to the existing rights of communication and making available to the public as provided in the German Copyright Law is not just a drafting difference in contrast with Article 17(1) (where it is clarified that the authorization must be obtained from the rightholders of the rights determined in Article 3(1) and (2) of the InfoSoc Directive). It should be seen in the light of the theory presented in the explanatory notes in connection with § 6 of the Discussion Draft on “mechanically verifiable uses authorized by law”. According to that theory, the acts of communication and making available to the public performed by OCSSPs are not acts of communication and making available to the public under Article 3(1) and (2) of the InfoSoc Directive, but they are covered by a *sui generis* right. As mentioned above, the discussion and rebuttal of this theory – apparently taken from the paper of two anti-Article-17 researchers – is the main topic of this paper (see below). It is sufficient to signal here my opinion that, if the clarification in Article 17(1) – as also confirmed in Recital (64) – according to which the acts performed by OCSSPs are covered by the existing rights provided in Article 3(1) and (2) of the InfoSoc Directive (and in accordance with it by the corresponding provisions of the German Copyright Law) were rejected also in the adopted version of the provisions, it would result in multiple conflicts with Article 17 of the DSM Directive, Article 3 to 6 of the Information Society Directive and with the relevant international provisions (with the WCT and the WPPT and quite probably also with the TRIPs Agreement).

***Read together with the second sentence of § 4(1) and with 4(2), the expression in the first sentence of 4(1) of the Discussion Draft “to make every effort to acquire the contractual right of use” would mean much narrower obligations of OCSSPs than “to make best efforts to obtain authorization” under Article 17(1) and (4)(a) of DSM Directive***

The obligation „to make every effort”, at first sight, may sound even stronger than „to make best efforts” under Article 17(4)(a) of the Directive (although they may also be considered just synonyms). However, it turns out from the second sentence of § 4(1) of the Discussion Draft that “every effort” (or “best efforts”) may mean very little or zero effort. This is so because, while by virtue of Article 17(4)(a) of the DSM Directive, an OCSSP becomes liable for unauthorized acts of communication or making available to the public if it does not make best efforts to obtain authorization, the second sentence of § 4(1) of the Draft provides that an OCSSP fulfills its obligation if it acquires rights of use “which are either *offered t*o him or which are *available* through a collecting management organization or an independent collecting body…” It is not sufficient for a user to lawfully perform acts covered by a right of authorization just to wait for offers or make use of what is available through collective management organizations; about such a user it cannot be said that it makes “every” effort (or “best efforts”) to obtain authorization.

There are some notes in the Discussion Draft which confirm that, in contrast with what is provided under Article 3(1) and (2) of the InfoSoc Directive, and consequently under Article 17(1) and (4)(a) of the DSM Directive, it would not be an obligation of the OCSSPs to try to actively seek authorization. The notes reveal this as follows:

[I]t follows from sentence 2 [of § 4(1)] that *service providers are not obliged to actively search for licence offers from individual right holders*. *This* *would* be disproportionate due to the by definition large amount of uploaded copyrighted material (see § 1 No. 1 UrhDaG-E) and the resulting unmanageable number of potential rightholders and therefore *not compatible with* Article 17 (5) DSM-Directive implemented in § 1 (2) UrhDaG-E (*principle of proportionality and reasonableness*).

*It is true that individual rightholders do have substantial parts of the repertoires* relevant under paragraph 2, such as major labels or film studios. However, *it is not clear where a legally secure boundary could be drawn* between individual rightholders on the one hand, whom the service provider would have to approach because of their importance, and those rightholders whose portfolio is not sufficiently relevant on the other. Due to the consequences for copyright liability (see § 1 (1) UrhDaGE), however, such a clear demarcation is indispensable. *However, the service provider is of course still free to obtain or accept offers for individual licences.*[[16]](#footnote-16) (Emphasis added.)

The Discussion Draft, first, recognizes that there are well-known owners of substantial (in fact, it seems not just substantial but fundamentally important) parts of the repertoires used by OCSSPs, such as the major film studios; then, it concludes that, since the service providers may not be obligated to seek licenses for the use of all the works and objects of related rights of less known or unknown individual rightholders, they should not be obligated to search for authorization even in the obvious cases of big well-known repertoires of the biggest film studios (and the biggest record labels and publishers are certainly in the same category).

The Draft refers to the principles of proportionality and reasonableness to justify this conclusion[[17]](#footnote-17). However, it should be taken into account that, under Article 17(1) and (4)(a) of the DSM Directive, OCSSPs are obligated to make best efforts to obtain authorization (not just to accept if offered, which may require zero effort) from the rightholders of the exclusive rights provided in Article 3(1) and (2) of the InfoSoc Directive. In view of this, one could hardly speak about proportionality and reasonableness if, under German law, an OCSSP would *not* be obligated to “actively search” – that is, to make at least some efforts, but rather as required by the DSM Directive “best efforts” – to obtain authorization at least from the best-known rightholders with the most important repertoires. Such a legislative arrangement would not be in accordance not only with Article 7(1) and 4(a) of the DSM Directive and Article 3(1) and (2) of the InfoSoc Directive on which the provisions of those provisions of the DSM Directive are based, but neither would it be with the relevant provisions of the international treaties.

It seems that § 4(2) of the Discussion Draft further narrows the scope of uses for the performance of which, under Article 17(1) and 4(a), OCSSPs must obtain authorization (but under the Discussion Draft not) by limiting the concept of “use” by such unclear criteria as “works typically uploaded”, “comprising a representative repertoire” and as “[use] enabling “the use [sic!] on appropriate conditions”.

***“Mechanically verifiable uses authorized by law”: serious doubts about the compatibility with the EU law and the international treaties***

It is in connection with § 6 of the Discussion Draft that the drafters present the theory that the acts of communication and making availability to the public performed by OCSSPs – for which, consequently, as clarified in Article 17(1) and Recital (64) of the DSM Directive, they must obtain authorization from the rightholders of the exclusive rights to authorize communication and making available to the public under Article 3(1) and (2) of the InfoSoc Directive – are not acts of communication and making available to the public under Article 3(1) and (2) of the InfoSoc Directly. This is discussed below in detail since – as mentioned above – the rebuttal of this theory is the main objective of this paper.

The Discussion Draft presents the theory in connection with § 6, because the drafters are of the view that, if the rights of communication and making available to the public covering the acts of OCSSPs were not be regarded *sui generis* rights, the exceptions provided in the § would not be in accordance with the EU law.

It seems, however, that there would be doubts regarding the compatibility of the provisions of § 6 with the EU law and the international treaties also if the above-mentioned fundamental conflict were eliminated and the Discussion Draft were brought into accordance with the clarification in Article 17(1) the DSM Directive that the acts of OCSSPs are acts covered by Article 3(1) and (2) of the InfoSoc Directive and the relevant provisions of the international treaties. This is so for the following reasons.

As the notes in the Discussion Draft also underlines it, § 6 is to cover *de minimis* uses. It is a question of whether or not the numbers of seconds, characters and kilobytes indicated in the § truly correspond to the concept of such uses, but this is a detail with which it is not necessary to deal with in this paper. It is another matter that it is justified to consider such kinds of software-based solutions to deal with certain *de minimis* uses. This has been recognized in the ALAI opinion[[18]](#footnote-18) and also in my paper on the Recommendations[[19]](#footnote-19) – but not in a legislative context, rather as an issue to be settled in the framework of the stakeholder dialogue to be organized as provided in Article 17(10) of the DSM Directive. What is foreseen in that provision is not that national laws are to octroy such kinds of rigid rules on the stakeholders, but that it should happen in the spirit of “cooperation” – through “dialogue” and “consultation” between the stakeholders – working out “guidance” by means of “discussing best practices”. That would be the right method, not only because it is provided in Article 17(10) in this way, but also because the most appropriate framework to address these sorts of minor uses would be an agreement to be negotiated between the stakeholders. The system agreed upon between rightholders and service providers (the latter *de facto* corresponding to the criteria of OCSSPs) and published on the ugcprinciples.com website offers a good example: when rightholders make available information to identify their works and other protected productions, they also give instructions what the service providers must do depending on the nature of protected material and on the way it is used: take-down, monetizing or “tracking” (the latter which, it seems, not frequently applied, does not require any immediate measure).[[20]](#footnote-20)

By following this line, the German drafters could also avoid the dilemma they can see in providing a *de minimis* exception about which they themselves are of the view that it would not be in accordance with the EU law concerning acts of communication and making available to the public covered by Article 3(1) and (2) of the InfoSoc Directive. The way they refer to this dilemma reveals that they consider the application of the badly founded *sui- generis-*rights theory (see below) as a solution. (They seem to perform a kind of legislative “reverse engineering”. In § 6, the limitation of the Draft of the rights of communication and making available to the public is only in accordance with the EU law if the acts to which they apply are not recognized as communication and making available to the public under Article 3 of the InfoSoc Directive; thus, they think that, if those rights are qualified as *sui generis* rights, the dilemma is solved.)

In any way, if the drafters only wanted to solve the dilemma of *de minimis* uses by means of legislative rules rather than in accordance with Article 17(10) of the DSM Directive, the non-recognition of the fact that – as clarified in Article 17(1) and Recital (64) – the acts of communication and making available to the public performed by OCSSPs are acts of communication and making available to the public would seem to be unreasonably heavy. However, this seems to be a relatively less important, although significant, manifestation of an apparent objective; namely, the objective to avoid the obligation to grant national treatment to foreign rightholders. This is discussed below under title IV in connection with the *sui-generis*-right theory.

***Direct remuneration to authors for the use of their works when they have transferred their exclusive right of authorization: grave questions to be answered***

As emphasized above, the main objective of this paper is to rebut the theory according to which the acts of communication and making available to the public to be authorized by the rightholders as determined in Article 3(1) and (2) of the InfoSoc Directive are not acts of communication and making available to the public as determined under Article 3(1) and (2) of the InfoSoc Directive. The provisions of § 7 on a right to direct remuneration for authors raise so many questions about their compatibility with the EU law and the international treaties that it would require another voluminous paper to deal with.

According to § 7 of the DSM Directive, the remuneration would have to be paid for uses covered by the exclusive rights to authorize the acts of communication and making available to the public as provided in Article 3(1) and (2) of the InfoSoc Directive. These exclusive rights are not only covered by the obligation to grant national treatment, but it is a minimum obligation to grant these rights to the nationals of other Contracting Parties of the WCT and the WPPT. An exclusive right of authorization does include the right to obtain remuneration for the uses authorized by the rightholders. When an exclusive the right is transferred, the right to obtain remuneration is also transferred to the new owner of the right. Thus, a provision by virtue of which not the entire right to receive remuneration for the acts authorized by the owners of the right of authorization may be obtained by the owner of the right has a significant impact on the value and the exploitation of the right concerned.

The Discussion Draft refers to a similar regulation in the Rental, Lending and Related Rights Directive (Directive 2006/115/EC), where – in Article 5 – there are provisions on a right of authors and performers to an unwaivable right to receive remuneration for rental directly from the users when they have transferred their rights to the producers. It should be seen, however, that those provisions were adopted in 1992 (in the original 92/100/EC version of the Directive) when there were no international norms on the right of rental (at the international level, it was only recognized in 1994 in the TRIPs Agreement and in 1996 in the WCT and the WPPT). In the meantime, the importance of rental – due to the migration of uses to the Internet – has been fading away.

This seems to be the reason for which certain questions regarding minimum obligations, national treatment and, in general, the impact of dissecting an exclusive right into two rights, have never been seriously discussed. In the case of the exclusive rights of authorization of such acts as communication and making available to the public (as well as the acts of reproduction which are inseparably involved with such acts, as also recognized in the Discussion Draft) that are indispensable for the exploitation of works and objects of related rights in the ever more relevant online environment, the situation is different from what existed in 1992 without any international norms on the right of rental. Now a more thorough analysis of this model seems to be necessary.

The Discussion Draft does not deal with the question of how the extension of this model from certain acts of secondary importance to mainstream means of exploitation of works and objects of related rights would look like from the viewpoint of contractual freedom (the respect for which is specifically confirmed in Recital (61) of the DSM Directive concerning the application of Article 17). It is highly important that copyright function as advertised; that is, as a legal system to promote, and recognize the results of, human creativity. This is also a basic condition of political justification, public acceptance and credibility of copyright and related rights: Therefore, it is also a genuine interest of producers and publishers of creative productions to be able to show that the contractual system is in accordance with this requirement. However, any legislative intervention into the copyright “ecosystem” operated by means of traditional – complex but well-established – contractual models needs caution.

In Article 20 of the DSM Directive, there is a provision on a “best-seller clause”; that is, on a right of authors and performers to “claim additional, appropriate and fair remuneration… from the party with whom they entered into a contract for the exploitation of their rights,… when the remuneration originally agreed turns out to be disproportionately low compared to *all the subsequent relevant revenues derived from the exploitation of the works or performances*”. (Emphasis added.) In contrast with what is referred to the last phrase, the system foreseen in § 7 of the Discussion Draft would function in a different situation. Authors and performers would receive remuneration directly, irrespective of whether or not any disproportionality has emerged in view of the subsequent revenues, and even where disproportionality might emerge but to the detriment of the publishers or producers (because the productions have not produced the expected results on the market). With the remuneration to be shared immediately between the transferors and transferees, it is foreseeable that publishers and producers would conclude contracts with increased circumspection.

The system foreseen in § 7 of the Discussion Draft might function in the case of new contracts concluded in Germany between German authors and performers, on the one hand, and German publishers and producers on the other. However, the Draft does not seem to indicate how this system would look like in respect of contracts concluded in the past and, in particular, how it would function where the parties are nationals of other Contracting Parties of international treaties binding Germany. This is not only an issue for national treatment but a matter of minimum obligations to recognize these rights of for the nationals of other Contracting Parties.

As it is outlined above, there are a number of unanswered questions how this model of dissection of exclusive rights might function. The international community did not deal with these issues in the case of the marginal right of rental which keeps losing relevance. Now that the model is intended to be applied for mainstream rights of great importance for the exploitation of works and objects of related rights, it would be necessary to subject it to a more thorough scrutiny.

***Application of a post-making-available complaint and redress mechanism for rightholders in conflict with the provisions of DSM Directive requiring a post-blocking complaint and redress mechanism for users***

The idea of replacing the complaint and redress mechanism to be made available to users when their uploads are *blocked* by OCSSPs in accordance with Article 17(4)(b) and (c) and (9) of the DSM Directive with a “pre-flagging” system where the protected content would be already made available online (contrary to the rightholders instruction that they should not be made available) was developed in the Recommendations of the anti-Article-13 (-turned-17) group of academics. In the above-mentioned ALAI opinion it has pointed out why such a system would be in conflict with the provisions and the very objective of Article 17.[[21]](#footnote-21) In my paper uploaded on my [www.copyrightseesaw.net](http://www.copyrightseesaw.net) website, I have also presented the reasons in detail why, in my view, this is the case.[[22]](#footnote-22) Thus, I do not rehearse all the arguments and counter-arguments here. I only note that the Discussion Draft has included provisions on this “pre-flagging” mechanism in an even more extreme manner than the way it was suggested in the Recommendations. For example, it would allow the making available to the public of any content that would be incorrectly (but just not “obviously” incorrectly) “pre-flagged” as covered by exceptions (*see* § 8(2) of the Draft); it would available to the Internet population during a procedure that would not be much more effective than a mere notice-and-take down system; it would define “obviously incorrect” uploads that it would cover more than 90% of the work or other protected production were concerned, without any differentiation (apart from “individual images”) between the various categories of protected materials and the nature of the possible exception (*see* § 12 of the Draft) which, in the case of a film or a novel (for example, to be used for quotation or parody) would not be a real limitation; and the Draft would even exempt the OCSSPs along with their users (who together are interested in as free access to works and objects of related rights irrespective of whether or not finally infringements would be proved) from any liability as long as the complaint and redress mechanism to be made available under the Discussion Draft to the rightholders is not completed finally with a finding that the uploads are infringing (*see* § 16).

This mechanism – which would be the exact opposite of what is foreseen in Article 17(9) of the Directive – would also be in serious conflict with the principle of proportionality and reasonableness. It would be so because what should be compared is, for example, on the one hand, a possible one-day delay of uploading a lawful parody as the result of an effective and expeditious complaint and redress mechanism available for users as foreseen in Article 17(9) which would hardly cause any substantive prejudice and, on the other hand, the same delay (but, due to the nature of the kind of notice-and-take-down system under the Draft, probably longer) to block access to a film or a novel already made available for use by the huge internet population about which it would turn out later that it is an infringing act (with hardly reparable prejudice to the legitimate interests of the rightholders due to the quick viral effect of free availability).

The idea of applying some kind of “pre-flagging” mechanism might only emerge if it were in accordance with Article 17 (4)(b) and (c), (9) and (10) of the DSM Directive as part of a voluntarily established mechanism between the stakeholders. The *conditio sine qua non* would be its application *before and not after* the making available of uploads by the OCSSPs. That is, in a way that, as a minimum, it would need green light by the rightholders who provide information to prevent unauthorized uploads – as quickly and in as simple procedure possible – when free use of the works and other productions are justified. Such a pro-blocking procedure might only be reversed – but also based on flexible agreements between the stakeholders with due attention to the nature of both the protected materials and the uses – by maintaining the applicability of a post-making-available notice-and-take-down procedure, in the case of real *de minimis* uses identifiable through software applications).

The replacement of the post-blocking complaint and redress mechanism available for users with a post-making-available mechanism available for rightholders would drastically upset the finely-tuned balance of interests established in Article 17 of the DSM Directive to the detriment of rightholders. Allegedly, it would be applied to guarantee freedom of expression. However, it might be counterproductive for this purpose too. It goes without saying that anybody may express any political, social, cultural or whatever other opinions also without using literary and artistic works and other protected productions. The exceptions provided in Article 5 of the InfoSoc Directive specifically mentioned and made obligatorily applicable in Article 17(7) of the DSM Directive certainly facilitate the expression of certain opinions – that is because they are granted – but they should correspond to certain conditions guaranteeing due balance between the interests of the rightholders and such users of the works and other materials (and definitely, as required by the three-step test, must not be in conflict with a normal exploitation thereof and must not otherwise unreasonably prejudice the legitimate interests of rightholders). A duly construed, effective and expeditious complaint and redress mechanism available for users as provided in Article 17(9) in the Directive operated on the basis of dialogue, consultation and cooperation of the stakeholders as foreseen in Article 17(10) (instead of rigid legislative intervention) may serve the purpose of ensuring both the avoidance of “overblocking” (or minimize it or eliminate it quickly) and adequate protection of copyright and related rights. Upsetting the balance to the detriment of rightholders would have a chilling effect on the creation of original productions and would undermine the freedom of expression of creators. It would also have the inevitable negative collateral effect also on the freedom of expression of those who would need the use of other peoples’ creations to express their own opinion.

**IV. The *sui-generis*-right theory lent from the paper of two researchers**

**as presented in the Discussion Draft**

***Introductory remarks***

As summed up above, the drafters have used the ideas of the Recommendations in which a group of academics tried to “correct” certain aspects of the provisions Article 17 as adopted that they had kept opposing during the preparatory work.[[23]](#footnote-23)

However, the drafters have also presented a theory suggested by two researchers (see under title V below) who were not only against the key elements of what became Article 17, but they were also of the view that the problem the Directive was supposed to be solved did not even exist. According to them, the allegation of the rightholders about a “value gap” emerging as a result of the activities of such huge commercial users as Google was badly founded. Consequently, they were of the view that any possible liability of such commercial users should continue being settled by the Electronic Commerce Directive. They have worked out a special “teleological” – purpose-driven – interpretation of Article 17 where the purpose (*telos*) was trying to “fix” somehow the errors committed with the adoption of the provisions with which, including its basic justification of the provisions, they did not agree.

As mentioned above, the essence of the theory of the two researchers was that the acts of communication and making available to the public performed by OCSSPs – about which the DSM Directive has clarified that, since they are such acts, they are covered by the exclusive right of rightholders as determined in Article 3(1) and (2) of the InfoSoc Directive – are not acts of communication and making available to the public as determined in Article 3(1) and (2) of the InfoSoc Directive; therefore a *sui generis* right applies not regulated in any other way in the EU law and not provided yet in the international treaties either.

Under this title of the paper, I first quote how this theory is used in the Discussion Draft, then analyze and rebut the arguments lent from the two researchers’ paper in the way in which they are presented in the Draft. Since not all elements and arguments of the two researchers’ paper appear in the Draft, those elements and arguments are reviewed under the following title.

***The suis-generis-right theory as presented in the Discussion Draft***

The theory is presented in connection with § 6 of the Discussion Draft on “automatically verifiable legally permitted uses” in this way:

Article 17 of the DSM-Directive regulates a new legal regime which *differs fundamentally from the previous understanding of the right of communication to the public or making available to the public*: *Thus* (sic!)*, the author does not have the exclusive right* (Article 3 InfoSoc-Directive), *but it is stipulated* *that* the service provider has to provide *a "permission" because otherwise it would interfere with the right of the author* (Article 17 (1) DSM-Directive)[[24]](#footnote-24). Article 17(4) of the DSM-Directive *also removes the responsibility for this interferenc*e through a complex mechanism and complements this structure *with a complaints mechanism in favour of users.* As far as can be seen, this regulatory technique is not found elsewhere in European (or international) copyright law.

Article 17 of the DSM-Directive *thus* (sic!) *constitutes a new sui generis legal regime* for service providers as actors of a new type, which as a special regulation stands *alongside the provisions of the InfoSocRL*. *This is also supported by the wording* of Article 17 (1) of the DSM-Directive, according to which the service provider undertakes an act of exploitation *"for the purposes of this Directive".* Recital 64 DSM-Directive additionally clarifies that the requirements of Article 3 InfoSoc-RL (definition of communication to the public) remain unaffected. *According to this understanding, § 6 UrhDaG-E is not subject to the exhaustive list of restrictions of Article 5 InfoSoc-RL.*[[25]](#footnote-25)(Emphasis – and to the word “thus” double emphasis – is added.)

***Allegation no 1 presented in the Draft: the acts of communication or making available to the public performed by OCSSPs are not acts of communication or making available to the public under Article 3(1) and (2) of the InfoSoc Directive (and the WIPO Treaties)***

* ***because, although they are acts of communication or making available to the public, they are “fundamentally” different from other acts of communication or making available to the public under Article 3(1) and (2) of the InfoSoc Directive***

In the first paragraph of the Discussion Draft quoted above, the word “thus” suggests that the content of the statement follows from the reasons presented before. It is an example of *non sequitur* inference. In the previous sentence, it is only alleged (as discussed below, without any sound reason) that the legal regime regulated in Article 17 differs from “the previous understanding of the right of communication to the public or making available to the public*”.*  It is stated after this that *“[t]hus the author does not have the exclusive right (Article 3 InfoSoc-Directive)”.* This clearly takes the form of the following syllogism: “For *any* act that is A, X is applicable. This act is A, but it is different from certain other acts that are also As. Thus, X is not applicable to this A.”

The “previous” (in fact, the present) understanding – to which the drafters refer— was (and is) that, under the EU law, an exclusive right must be granted (unless there is an exception or limitation) to authorize *any* act of communication or making available to the public. Article 17(1) clarifies that the acts of OCSSPs are acts of communication to the public or making available to the public. In contrast with this, the drafters allege that, although Article 3(1) and (2) of the InfoSoc Directive cover all acts of communication or making available to the public, the OCSSPs’ acts about which it has been clarified that they are also acts of communication or making available to the public still do not qualify as acts of communication or making available to the public because those acts of communication or making available to the public differ from other acts of communication or making available to the public. Thus, according to them, for the OCSSPs’ acts of communication or making available to the public about which it has been clarified that they are acts of communication or making available to the public for which, to be performed lawfully, the authorization of the rightholders as determined in Article 3(1) and (2) of the InfoSoc Directive is needed are not acts of communication or making available under Article 3(1) and (2) of the InfoSoc Directive.

This is the same as if one alleged that, although, under the Berne Convention, the TRIPs Agreement, the WCT and the WPPT, also in views of the agreed statements, the rightholders (unless some exception or limitation applies) must be granted an exclusive right to authorize *any* acts of reproduction, in view of some “fundamental” differences between the various acts of reproduction – copying by handwriting, photocopying, printing, recording, including in CDs, flash drives, in computer memories, in cloud lockers, and so on – the Contracting Parties are free to apply a *sui generis* right for certain acts of reproduction because they are “fundamentally” different from others acts of reproduction. Of course, no such idea has emerged.

***The allegation is badly founded***

* ***because what is decisive from the viewpoint of the international treaties, the EU law and national norms is whether or not an act – along with other possible acts that may be more or less (even “fundamentally”) different – qualifies as an act covered by an exclusive right; the differences between the various acts all qualifying as such acts is not an acceptable reason for not applying the right covering all such acts, but rather applying a sui generis right.***

***Allegation no 2 presented in the Draft: the acts of communication or making available to the public performed by OCSSPs are not acts of communication or making available to the public under Article 3(1) and (2) of the InfoSoc Directive (and the WIPO Treaties)***

* ***because such acts do not correspond to the “previous understanding” of the concept of communication or making available to the public under the provisions of Article 3 of the InfoSoc Directive; they do not correspond to such “understanding” in the same way, as certain acts recognized by the CJEU as acts of communication or making available to the public do not correspond either to the “previous understanding” of the concept under those provisions of the InfoSoc Directive***

The Discussion Draft only uses the thesis taken from the two researchers’ paper in the way mentioned above; it does not elaborate on the allegation that an act of “communication to the public or making available to the public”performed by OCSSPs “*differs fundamentally from the previous understanding of the right of communication to the public or making available to the public”.* At the same time, this allegation is a key element of the two co-authors’ theory and, although it is not stated explicitly, probably the drafters of the Discussion Draft have understood the “fundamental difference” in the same way.

The basic allegation of the two co-authors is that the Court of Justice of the EU (CJEU) has interpreted Article 3(1) and (2) of the InfoSoc Directive and the relevant provisions of the WCT and the WPPT in a way that it has recognized certain acts as communication or making available to the public that, under those provisions, are *not* acts of communication or making available to the public. This is discussed more in detail under the next title.

Here it is sufficient to mention that this implied criticism of, and disagreement with, the case law of the CJEU is neither duly substantiated nor well-founded in the way the paper tries to justify it. The Court has always based its judgments on the analysis of both the EU law and the underlining international norms when it had to rule on the various questions of the application of the rights of communication to the public and making available to the public. It has always analyzed the relevant provisions in a detailed manner and indicated the reasons for which it has found that an act is communication to or making available to the public. It may be that some academics do not agree with the judgments of the CJEU recognizing that certain acts are covered by Article 3(1) or (2) of the InfoSoc Directive and the relevant provisions of the WIPO Treaties, but it does not change the fact those acts are covered by Article 3(1) and (2) of the InfoSoc Directive and the WIPO Treaties. The Court did not have the intention to find about any acts that are not covered by those provisions that they still are, and it has not adopted such findings.

In the same way, Article 17(1) of the DSM Directive also recognizes the acts performed by OCSSPs as communication and making available to the public because those acts do correspond to the concepts (to the “understanding”) of such acts under Article 3(1) and (2) of the InfoSoc Directive and the relevant provisions of the WCT and the WPPT.

***The allegation is badly founded***

* ***because the CJEU has applied the provisions of Article 3(1) and (2) of the InfoSoc Directive – in which Article 8 of the WCT and Articles 10 and 14 of the WPPT have been implemented, in all relevant aspects, in a verbatim manner – adequately; it has not recognized any acts as communication or making available to the public that are not covered by those provisions, and***
* ***because Article 17(1) of the DSM Directive also recognizes the acts performed by OCSSPs as communication or making available to the public since, in accordance with the “understanding” reflected in the said provisions of InfoSoc Directive and the WIPO Treaties, they are acts of communication of making available to the public.***

***Allegation no 3 presented in the Draft: the acts of communication or making available to the public performed by OCSSPs are not acts of communication or making available to the public under Article 3(1) and (2) of the InfoSoc Directive (and the WIPO Treaties)***

* ***because, under Article 17(1) and (4)(a) of the DSM Directive “permission“ is needed for lawful performance of the acts of communication or making available to the public, while under Article 3 of the InfoSoc Directive, “authorization” is needed.***

This allegation appears after the strange syllogism presented for allegation no 1 analyzed above. In the case of this allegation no 3, an even more bizarre syllogism is applied: “Both A and B are X. Therefore B is not X.” With full sympathy to the suffering of the drafters who had to try to prove something that does not exist, there is no other way to understand their text, which after the *non-sequitur* phrase “[t]hus the author does not have the exclusive right (Article 3 of Info-Soc Directive) continues in this way: “but it is stipulated that the service provider has to provide a ‘permission’ because otherwise it would interfere with the right of the author.”[[26]](#footnote-26)

The allegation is that, while Article 3(1) and (2) of the InfoSoc Directive provide that the rightholders have an exclusive right to *authorize* (or prohibit) any acts of communication or making available to the public, Article 17(1) does not provide so; under the latter, for a lawful performance of an act of communication or making available to the public, the OCSSPs must obtain “*permission*”.

In principle, to assess the validity of this statement, it would be sufficient to draw attention to the fact that “permission” is a full-coverage synonym of “authorization”. Thus, there would be no real difference between Article 3(1) and (2) of the InfoSoc Directive and Article 17(1) of the DSM Directive if, in the former, the word “authorization”, while in the latter the word “permission” were used. However, if there were any doubt about the same meaning of “permission” and “authorization” (to be granted by the rightholders), it is sufficient to refer to the German expression translated in the English version of the “Discussion Draft” as “permission”: “Erlaubnis”. Truly that word appears in the German version of Article 17(1) of the DSM Directive corresponding to the word “authorization” used in the English version of the Directive[[27]](#footnote-27). However, this does not support the allegation that the OCSSPs’ acts of communication or making available are not acts of communication or making available under Article 3(1) and (2) of the InfoSoc Directive. If this linguistic comparison may serve for anything in connection with the alleged difference between communication and making available to the public, on the one hand, and communication and making available to the public, on the other hand, it rather crystal clearly rebuts the allegation. This is so, because, in the German version of Article 3(1) and (2) of the InfoSoc Directive, also the expression “ausschließliche Recht… zu *erlauben* (oder zu verbieten) (emphasis added) appears.

The other linguistic innovation in the above-quoted text of the Discussion Draft used in order to try to prove that the acts of communication or making available to the public performed by OCSSPs are not acts of communication or making available to the public as provided in Article 3(1) and (2) of the InfoSoc Directive, is that under Article 17(1), the “permission” (= ”authorization”= “Erlaubnis”) is needed for performing an act of communication or making available to the public “*because otherwise it would interfere with the right of the author*”. It is hardly necessary to elaborate too much why there is no difference in the nature of the right due to this alleged difference. The difference simply does not exist either in the text or in the meaning of the text of the relevant provisions. It does not exist, for the simplest possible reason that there is nothing like this appears in the text of Article 17(1). Otherwise, even if the text of Article 17(1) spoke about “inference with the right of author” (although it does not), its meaning could not be understood in any way other than that an act performed without authorization is an unauthorized act; that is – unless some exception or limitation is applicable – it is an infringement of the exclusive right of authorization.

***The allegation is badly founded***

* ***because the requirement of “permission” for lawful performance of acts of communication or making available to the public is exactly the same as the requirement of “authorization” of such acts;***
* ***because, in the English version of both Article 17(1) DSM Directive and Article 3(1) and (2) of the InfoSoc Directive, the concept “authorization” and “to authorize” appears (which is a synonym of “permission”); and***
* ***because, in the official German versions of both provisions, also the same concept may be found to correspond to “authorization” and “to authorize”: “Erlaubnis” and “zu erlauben”.***

***Allegation no 4 presented in the Draft*: *the acts of communication or making available to the public performed by OCSSPs are not acts of communication or making available to the public under Article 3(1) and (2) of the InfoSoc Directive (and the WIPO Treaties)***

* ***because, their responsibility for unauthorized acts of communication or making available to the public is “removed… through a complex mechanism”****.*

It is difficult to see for what reason it might be considered as an argument for the existence of a difference between acts of communication or making available to the public performed by OCSSPs and of *any* acts of communication or making available to the public under Article 3 of the InfoSoc Directive that, as the Discussion Draft states it, “Article 17(4) of the DSM-Directive *also removes the responsibility for this interferenc*e through a complex mechanism”. It is difficult to see it because the “removal of responsibility” simply means that (i) where the OCSSPs are authorized by the rightholders to perform an act of communication or making available to the public; or (ii) where they do not perform the act because it is not authorized (and thus they block the upload); or (iii) where an exception to or limitation of the right of communication or making available to the public is applicable – the OCSSPs are not liable for infringement of the rights of rightholders as determined in Article 3(1) and (2) of the InfoSoc Directive. There is no element of these alternatives to suggest that the acts are not covered by the exclusive right of communication and making available to the public under Article 3(2) of the InfoSoc Directive but by some *sui generis* right.

Under Article 17(4), the OCSSPs’ responsibility emerges where they do not respect the exclusive right of communication or making available to the public by performing acts without the righholders’ authorization for the obtaining of which they do not make “best efforts”. Their responsibility is not “removed”, but simply they do not become responsible, if they obtain authorization for the acts performed by them (unless an exception or limitation is applicable and, thus, no authorization is needed) and, where the acts are not authorized, they do not perform it (they do not communicate or make available the works or objects of related rights for which they are not authorized by the rightholders). The alleged “complexity” follows from this; it does not make the acts of communication or making available to the public performed by OCSSPs different from the concept of such acts under Article 3(1) and (2) of the InfoSoc Directive. Such kind “complexity” also exists in the case of other rights.

***The allegation is badly founded***

* ***because the “complex mechanism” is nothing but provisions on the conditions to be fulfilled to avoid, by the OCSSPs, performing unauthorized acts of communication or making available to the public; and***
* ***because it does, in no way, influence the concept and meaning of the acts covered by a right for the performance of which authorization is needed that there are rules on how the responsibility for unauthorized acts may be avoided.***

***Allegation no 5 presented in the Draft***: ***the acts of communication or making available to the public performed by OCSSPs are not acts of communication or making available to the public under Article 3(1) and (2) of the InfoSoc Directive (and the WIPO Treaties)***

* ***because, a complaint and redress mechanism is to be provided for users***

It is mentioned above that the Discussion Draft is in clear conflict with the basic provisions – and the very objective – of the DSM Directive when it tries to replace the complaint and redress mechanism foreseen in Article 17(9) to be made available for users (when their uploads are blocked or removed in accordance with Article 17(4)) with a procedure to be made available for rightholders to complain about the availability of their works or objects of related rights to the public without their authorization in violation of Article 17(1) and (4)(a) of the DSM Directive (and of Article 3(1) and (2) of the InfoSoc Directive as clarified in Article 17(1)).

The scope and conditions of the applicability of the existing exceptions provided in Article 5(3) and (s) of the InfoSoc Directive do not change just because, while their transposition has been optional until now, under Article 17(7) it has become mandatory for national laws to permit such exceptions. The acts of communication or making available to the public performed by OCSSPs do not become different just because certain exceptions that were applicable under Article 5 of the InfoSoc Directive and already applied in certain Member States now are to be applied in all Member States.

The availability of a complaint and redress mechanism does not change either the nature or the coverage of the acts of communication and making available to the public or the conditions of the application of permitted exceptions and limitations. Where there is no exception to or limitation of exclusive rights of authorization, authorization of the righholders are needed, and where certain uses are permitted as exceptions to or limitations of such rights, the acts may be performed without authorization. This is guaranteed by the mechanism under Article 17(9) allowing users to complain about blocking or removal of their uploads by the OCSSPs in accordance with Article 17(4) and to ensure redress if their complaints are well founded.

As discussed below concerning the badly founded allegation no 6, the Member States apply also other mechanisms that correspond to the concept of complaint and redress mechanisms to guarantee the applicability of certain exceptions and limitations (existing exceptions and limitations provided in Article 5(3) and (5) of the InfoSoc Directive).

***The allegation is badly founded***

* ***because it does not change the concept of the acts covered by an exclusive right of authorization that, in certain special cases, exceptions to or limitations of the right are applicable; neither changes its concept if a complaint and redress mechanism is provided to guarantee the applicability of those exceptions and limitations.***

***Allegation no 6 presented in the Draft:*** ***the acts of communication or making available to the public performed by OCSSPs are not acts of communication or making available to the public under Article 3(1) and (2) of the InfoSoc Directive (and the WIPO Treaties)***

* ***because “this regulatory technique” is not found elsewhere in European (or international) copyright law***

The regulation applicable in the EU concerning acts of communication and making available to the public is contained in particular in Articles 3 to 8 of the InfoSoc Directive. Under Article 3 (1) and (2), it is provided that the authors are granted an exclusive right to authorize or prohibit any acts of communication to the public, including – what is particularly relevant in the case of the acts performed by the OCSSPs – any acts of interactive making available to the public, and the beneficiaries of related rights are granted an exclusive right to authorize any acts of interactive making available to the public. Article 3(3) makes it clear that the right of the above-mentioned broad right of communication to the public and the stand-alone right of making available to the public are not exhausted with the performance of any acts covered by Article 3(1) and (2), including the case, where the act of making available to the public consists in making available of copies online. Article 4, in principle, is just on the right of distribution, but it is relevant for the right of interactive making available to the public as covered under Article 3(1) and (2) because it makes it clear (along with Article 3(3) from another side) that making available of protected content for downloading (even in a compressed manner where during the transmissions no real communication takes place) is also an act of making available (since the right of distribution is only applicable for tangible copies as “objects”). Article 5 contains an exhaustive list of exceptions and limitations, including exceptions to and limitations of the exclusive rights of communication and making available to the public, also those exceptions which are mentioned in Article 17(7) of the DSM Directive and for the applicability of which a complaint and redress mechanism is foreseen in Article 17(9). Articles 6 and 7 contain provisions on technological measures and rights management information to protect, *inter alia*, the application and exercise of the rights of communication and making available to the public. Finally, Article 8 is on the legal sanctions to be applied in case of infringements of the rights mentioned in the Directive, including the rights of communication and making available to the public. This complex “regulatory technique” does exist and is applicable to any acts of communication or making available to the public, including the acts of communication and making available to the public performed by OCSSPs. The DSM Directive does not contain any provision the nature of which would defer from these provisions of the InfoSoc Directive.

The complaint and redress mechanism is not a “regulatory technique” either that allegedly cannot be found yet in Europe. It is not necessary to go far away to find one in the EU law. It is sufficient to refer to the intervention mechanism to be made available for users under the above-mentioned Article 6(4) of the InfoSoc Directive to guarantee the applicability of certain exceptions and limitations where the rightholders themselves do not make the application thereof possible. In many Member States – including in mine, Hungary – expedited mediation or arbitration procedures have been made available for this purpose, which are not necessarily called complaint and redress mechanisms but, in fact, they are: users may complain that a work or object of related rights is not available for benefitting from an exception or limitation listed in Article 6(4) and, where justified, they are granted redress.

The technique exists and functions also elsewhere not only in Europe. The system provided on the website ugcprinciples.com mentioned above functions in a similar way. This is also true as regards a guarantee for the applicability of free uses including those which correspond to the exceptions mentioned in Article 17(7) of the DSM Directive. Point 3(i) of the principles agreed upon by platforms de facto qualifying as OCSSPs and rightholders provides as follows:

Copyright Owners and UGC Services should cooperate in developing reasonable procedures for promptly addressing conflicting claims with respect to Reference Material and user claims that content that was blocked by the Filtering Process was not infringing or was blocked in error.[[28]](#footnote-28)

As it can be seen, these procedures are applicable in the same, or at least similar, situations as the complaint and redress mechanism foreseen in Article 17(9) of the DSM Directive: an upload is blocked as by virtue of Article 17(4) and a procedure is to be available to complaint and get redressed where the content was blocked in error.

***The allegation is badly founded,***

* ***because it is a generally applied “regulatory technique” to obligate those who perform acts covered by an exclusive right to obtain authorization and to avoid and prevent unauthorized acts covered by the right;***
* ***because it is a generally applied “regulatory technique” to provide for exceptions to or limitations of an exclusive right to balance the interests of rightholders, including their fundamental rights, with other legitimate interests, including the protection of other fundamental rights;***
* ***because it is not an unknown “regulatory technique” either in the EU that could not be found elsewhere to make the applicability of some exceptions or limitations mandatory in the laws of Member States (see, e,g., Article 5(1) of the InfoSoc Directive or certain exceptions provided in the Computer Programs Directive or those applied to implement the Marrakesh Treaty or, in the DSM Directive itself, the exceptions or limitations for text and data mining, illustration for teaching in the digital environment, for preservation of cultural heritage and for certain uses of out-of-commerce works (Articles 3(1), 5(1), 6(1), 8(2));***
* ***because, the “regulatory technique” of national laws to provide for a certain exception or limitation does not depend on whether its inclusion is mandatory or optional;***
* ***because even the “regulatory technique” of providing complaint and redress mechanisms to guarantee the applicability of certain exceptions or limitations is not unknown (see Article 6(4) of the InfoSoc Directive) ; and***
* ***because, neither the application of an exception or a limitation of an exclusive right, nor a complaint and redress mechanism to guarantee the applicability of certain exceptions or limitations transforms an exclusive right provided in an EU Directive (and in the international treaties implemented in the Directive) to a sui generis right.***

***Allegation no 7 presented in the Draft: “Article 17 of the DSM-Directive thus constitutes a new sui generis legal regime for service providers as actors of a new type, which as a special regulation stands alongside the provisions of the InfoSocRL”.***

The second paragraph of the Discussion Draft presenting the sui-generis-right theory quoted above begins with this sentence. However, since until this point, all the allegations presented by the drafters are badly founded, this conclusion is a *non sequitur* conclusion.

***The allegation as a conclusion is badly founded***

* ***because all the allegations presented before it in the Discussion Draft are badly founded; neither of them justifies the thesis that a sui generis right has been introduced through a previously unknown “regulatory technique”;***
* ***because the acts of communication or making available to the public performed by OCSSPs fully correspond to the concept of the acts under the provisions of Article 3(1) and (2) of the InfoSoc Directive (and the relevant provisions of the WCT and the WPPT) on exclusive rights to authorize such acts; consequently, they do not apply “alongside”, but in accordance, with those provisions – also in accordance with all the other provisions of the InfoSoc Directive concerning such rights, with the (from the viewpoint of the concepts of the acts and rights concerned irrelevant) only difference that the provisions on certain exceptions under Article 5(3) of the Directive that previously (since they were optional) were not provided in the laws of all Member States, now they will be provided mandatorily in the laws of all of them, along with a complaint and redress mechanism to guarantee their applicability where certain contents have been blocked in spite of the applicability of an exception (due to which, however, as discussed above, the very concept of the acts and the exclusive rights to authorize them and the conditions of the applicability of the exceptions do not change).***

***Allegation no 8 presented in the Draft***: ***the acts of communication or making available to the public performed by OCSSPs are not acts of communication or making available to the public under Article 3(1) and (2) of the InfoSoc Directive (and the WIPO Treaties)***

* ***because, in Article 17(1), it is provided that “an online content-sharing service provider performs an act of communication to the public or an act of making available to the public for the purposes of this Directive”***

There is no explanation in the Discussion Draft why and in which way “the wording of Article 17 (1) of the DSM-Directive, according to which the service provider undertakes an act of exploitation ‘for the purposes of this Directive’” might “also support” the conclusion of the arguments presented before: “Article 17 of the DSM-Directive *thus* (sic!) *constitutes a new sui generis legal regime* for service providers as actors of a new type, which as a special regulation stands *alongside the provisions of the InfoSocRL*.” As analyzed above, there is nothing that this wording could “also support”; there are no well-founded allegations presented by the drafters from which such a conclusion might be deduced.

The wording of Article 17(1) not only does not “also support” what otherwise the drafters have failed to prove but definitely rebut the theory adopted from the two researcher’s paper:

1.   Member States shall provide that *an online content-sharing service provider performs an act of communication to the public or an act of making available to the public for the purposes of this Directiv*e when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users.

An online content-sharing service provider *shall therefore obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC*, for instance by concluding a licensing agreement, in order to communicate to the public or make available to the public works or other subject matter. (Emphasis added.)

In the first sentence, it is provided that „*an online content-sharing service provider performs an act of communication to the public or an act of making available to the public for the purposes of this Directiv*e when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users”. It is difficult to see why such acts would not qualify as interactive making available to the public (as covered by a broad communication to the public rights or by a stand-alone right) under Article 3(1) and (2) of the InfoSoc Directive just because, in the text of Article 17(1), a synonym expression “giving the public access” is used (about which it is clarified and confirmed in Article 17(1) and in Recital (64) that it is communication or making available to the public). The very expressions “communication to the public” and “making available to the public” would simply floating in the air without their meaning determined, if they were not regarded to be covered by Article 3(1) and (2) of the InfoSoc Directive. This is true in particular in respect of the expression of “making available to the public” used in Article 17 in the DSM Directive which is what is truly relevant regarding the acts performed by OCSSPs. Its meaning is only understandable, and the provisions of Article 17 in which they are mentioned may only be applied adequately, if it is understood the way it appears in the InfoSoc Directive in Article 3(1) for copyright and in Article 3(2) for the beneficiaries of related rights:

Article 3(1): “making available to the public 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”.

Article 3(2) „making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them: (a) for performers, of fixations of their performances; (b) for phonogram producers, of their phonograms; (c) for the producers of the first fixations of films, of the original and copies of their films; (d) for broadcasting organisations, of fixations of their broad casts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.”

Article 17(1) of the DSM Directive, which clarifies that the OCSSPs perform acts of communication or making available to the public, does not contain any specific provisions on the concept of such acts; this is regulated in the InfoSoc Directive. In contrast, Article 17 of the DSM Directive includes specific provisions – not on the concept of such acts, but – on the liability of OCSSPs for such acts. It was obviously necessary to make it clear that these specific liability rules do not apply to other acts of communication and making available to the public covered by Article 3 of the InfoSoc Directive. This is certainly the reason for the use of the expression “for the purposes of this Directive” in Article 17(1).

If there were any reasonable doubt whatsoever (as there is none) that, although specific liability rules apply to the acts of communication or making available to the public performed by OCSSPs, those are acts of communication tor making available to the public under Article 3(1) and (2) of the InfoSoc Directive, the second sentence of Article 17(1) of the DSM Directive would completely dissolve it. This is so because in the second sentence – after that in the first sentence it is clarified that the acts of OCSSPs’ mentioned there are acts of communication or making available to the public – the following deduction is made from the clarification: [the OCSSPs] “shall *therefore* obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC.” (Emphasis added.) That is, since acts of communication or making available to the public are involved (“therefore” – or as it is put in Recital (64): “consequently”), Article 3(1) and (2) of the InfoSoc Directive apply. If the text had been intended to suggest that the OCSSPs’ acts are not acts of communication or making available to the public covered by Article 3(1) and (2) of the Information Society Directive, no “therefore” (and “consequently”) language would have been used, but something like this: “[the OCSSP] shall obtain an authorization from the rightholders mentioned in Article 3(1) and (2) of Directive 2001/29/EC as if the acts of communication to the public or making available to the public performed by them were acts of communication to the public or making available to the public under those provisions.” But no such language is used, of course.

***The allegation is badly founded***

* ***because, although OCSSPs perform acts of communication or making available to the public as clarified in Recital (64) and Article 17(1) of the DSM Directive, they do so by making available to the public works and objects of related rights uploaded by their customers on their system in a way that it has required specific liability rules in the Directive; the clarification that OCSSPs perform such acts has been made for the purposes of the application of those specific liability rules of the Directive; that is, more briefly “for the purposes of this Directive”.***

***Allegation no 9 presented in the Draft: the acts of communication or making available to the public performed by OCSSPs are not acts of communication or making available to the public under Article 3(1) and (2) of the InfoSoc Directive (and the WIPO Treaties)***

* ***because “[t]he second sentence [of Article 17(1] clarifies that the beneficiaries of this right should be the same as beneficiaries of Article 3 InfoSoc right. If Article 17 was merely meant to clarify that providers falling under the definition perform the act of communication to the public within the meaning of Article 3 of the InfoSoc Directive, there would have been no reason to […[[29]](#footnote-29)] repeat the same set of beneficiaries.”***

This allegation is based on the mixture of misquote and misinterpretation of the text. The entire text reads as follows:

1.   Member States shall provide that *an online content-sharing service provider performs an act of communication to the public or an act of making available to the public* for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users.

*An online content-sharing service provider shall therefore obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC*, for instance by concluding a licensing agreement, *in order to communicate to the public or make available to the public works or other subject matter*. (Emphasis added.)

As it can be seen, what the second sentence does is *not* that it “clarifies that the beneficiaries of this right should be the same as beneficiaries of Article 3 InfoSoc right” as it is suggested in the paper. In the second sentence, the words „this right” do not appear. They do not appear for the very simple reason that, if they appeared, they would be meaningless, because there is no word about any “right” before this in Article 17(1) of the DSM Directive. No “right” is provided in the first sentence; there is nothing to which the words “this right” could have referred; this is the reason for which they cannot be found in the second sentence.

No right is provided in the first sentence; it is only clarified that the acts performed by OCSSPs are acts of communication to the public and making available to the public. Since, however, there are provisions in the EU law – namely in Article 3(1) and (2) of the InfoSoc Directive – on the copyright and related rights status of such acts, it was logical to take it as granted that those provisions apply.

This would have been the point where something should have been suggested, hinted, implied, indicated, but preferably rather stated in a crystal clear manner, if the intention had been to provide that, although the acts are clarified in “this Directive” to be the same as those covered by Article 3(1) and (2) of the InfoSoc Directive, still they were not to be covered by those provisions. This would have been the point to include some statement – anything whatsoever somehow to this effect – that for these acts of communication and making available to the public performed by the OCSSPs, a *sui generis* right is granted. In that case, however, it would have been necessary to also say something about the nature of the alleged new *sui generis* right (something more than what – according to paper – is only provided in the second sentence, namely that the beneficiaries of the alleged new right are the same as the beneficiaries of the rights provided in Article 3(1) and (2) of the InfoSoc Directive). For example, as a minimum, to clarify what the right of communication to the public and the right of making available to the public mean. It could have been stated, of course, that they mean the same rights as those provided in Article 3(1) and (2) of the InfoSoc Directive – but, in that case, the question would have emerged even more emphatically: how the new *sui generis* right may be different if it is the same.

Nothing like that may be found in Article 17(1) or elsewhere in the DSM Directive including nowhere in the recitals. It is in the second sentence of the paragraph where it is clarified what kinds of rights are involved and covered by which provisions in the EU law. What happens in the second sentence is not that the “same set of beneficiaries” of “this right” is “repeated” as in Article 3(1) and (2) of the InfoSoc Directive. There is no repetition; it is simply clarified: “An online content-sharing service provider shall *therefore* obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC […] in order to communicate to the public or make available to the public works or other subject matter”(emphasis added.) These are the only rights to which any reference is made and on which there is any provision in Article 17. If, for a lawful performance of an act, authorization must be is obtained, it means an exclusive right to authorize the act. It is in Article 3(1) and (2) of the InfoSoc Directive that the exclusive rights are provided to authorize any act of communication to the public and making available to the public. It is there where it is determined more in detail, in paragraph (1) of Article 3 what “communication to the public” means in the case of copyright (namely that it also means interactive making available to the public), and where in the two paragraphs of the Article it is also determined in the same way (in the case of paragraph (2) as covered by a stand-alone right of related rights beneficiaries) that “making available to the public” means the interactive act of “making available to the public of [works][objects of related rights], by wire or wireless means, in a way that members of the public may access them from a place and at a time individually chosen by them” (acts that Google and the other OCSSPs do perform).

Thus, by providing that, for the acts performed by the OCSSPs, authorization must be obtained from the owners of the rights provided in Article 3(1) and (2) of the InfoSoc Directive – not from the holders of an imaginable *sui generis* right who would be the same as if they were holders of rights provided in Article 3(1) and (2) of the InfoSoc Directive, but “from the rightholders referred to in Article 3(1) and (2)” of the Directive– it is also determined what rights are involved under Article 17, namely rights covered by those provisions of the InfoSoc Directive. It is not suggested that, contrary to other exclusive rights, the exclusive rights to authorize the acts performed by OCSSPs must be absolute rights; the existing exceptions to and limitation of the rights of communication and making available to the public provided in Article 5(2) to (5) of the InfoSoc Directive (and not only those which are explicitly mentioned in Article 17(7) of the DSM Directive) apply. Thus, when it is provided in the second sentence of Article 17(1) that – since the acts of the OCSSPs are acts of communication or making available to the public, “therefore” – the acts must be authorized by the owners of exclusive rights under Article 3(1) and (2) of the InfoSoc Directive, in fact, the complete regulation of those rights in the InfoSoc Directive is necessarily meant.

***The allegation is badly founded***

* ***because, in the first sentence of Article 17(1), no right is provided or mentioned in any context; it is only clarified that the acts performed by OCSSPs are acts of communication or available to the public,***
* ***because, in the second sentence of the paragraph, there is no reference to some imaginable right provided in the first sentence or otherwise that would be other than the rights provided in Article 3(1) and (2) of the InfoSoc Directive;***
* ***because, what is stated in the second sentence is that, since the OCSSPs perform acts of communication or making available to the public, as clarified in the first sentence, they “therefore [must] obtain an authorization from the rightholders referred to in Article 3(1) and (2) of [the InfoSoc]Directive” on the exclusive rights to authorize such acts; thus, not the “same set of beneficiaries” are “repeated” as the owners of some sui generis right other that what are provided in the InfoSoc Directive; what is provided is that, since acts of communication or making available are involved, the exclusive rights to authorize such acts under Article 3(1) and (2) of the InfoSoc Directive apply****;*
* ***because, if really a sui generis right had been provided, this should have been indicated somehow in the first sentence of Article 17(1) or somewhere in connection with it and, thus, in the second sentence, what would have been stated would not have been that authorization must be obtained from the owners of rights provided in Article 3(1) and (2) of the InfoSoc Directive, but that authorization must be obtained from the owners of the sui generis right (if it really would have been provided) who would be those mentioned in Article 3(1) and (2) of the InfoSoc Directive as if they had been owners of rights provided in those provisions.***

***Allegation no 10 presented in the Draft***: ***the acts of communication or making available to the public performed by OCSSPs are not acts of communication or making available to the public under Article 3(1) and (2) of the InfoSoc Directive (and the WIPO Treaties)***

* ***because “[r]ecital 64 DSM-Directive additionally clarifies that the requirements of Article 3 InfoSoc-RL (definition of communication to the public) remain unaffected”***

In the third sentence of Recital (64), it is truly stated that the concept of communication or making available to the public is not affected under the EU law. That is, both the provisions of Article 3(1) and (2) of the InfoSoc Directive and the judgments of the CJEU interpreting those provisions continue being applicable; the specific liability rules of OCSSPs for the acts of communication or making available to the public do not affect the liability of service providers others than OCSSPs when they perform acts of communication or making available.

There is no modification of the concepts of communication and making available to the public as provided in Article 3(1) and (2) of the InfoSoc Directive just because, in the DSM Directive, it is clarified that the OCSSPs who perform acts of making available their users’ uploads to the public perform acts of making available to the public. From the viewpoint of Article 17 of the DSM Directive, not only there is no reason not to apply the same concepts, but the application of those concepts is inevitable. Inevitable simply because the DSM Directive does not contain any stand-alone definitions or descriptions of those concepts; it only states that OCSSPs perform such acts and provides that, because the acts are communication to the public or making available to the public, “therefore” (“consequently”), the authorization of the rightholders determined in Article 3(1) and (2) of the InfoSoc Directive is needed. Without the application of the concept of communication to the public as provided in Article 3(1) of the InfoSoc Directive, it could not be understood what this term means as used also in the DSM Directive. It only turns out from that provision – also for the purpose of the use of the term in the DSM Directive – that the exclusive right of communication to the public is only applicable for copyright owners (and is not applicable for the beneficiaries of related rights who do not have an exclusive right of communication to the public) and, more importantly, that it also covers interactive making available to the public. Even more importantly – because, in the case of the OCSSPs’ acts of online making available to the public of their users’ uploads this is what is relevant – it is also only on the basis of Article 3(1) and (2) of the InfoSoc Directive that it may be understood that the full concept of the acts to which the DSM Directive refers is making available to the public [works][objects of related rights], by wire or by wireless means, in a way that members of the public may access [them] from a place and at a time individually chosen by them”.

Thus simply it was justified to make it clear that the specific liability rules in Article 17 of the DSM Directive concerning the acts of communication and making available to the public performed by OCSSPs do not affect the concepts and provisions on such acts under Article 3(1) and (2) of the InfoSoc Directive.

***The allegation is badly founded***

* ***because it does in no way influence the fact that the acts performed by OCSSPs – as clarified in Article 17(1) of the DSM Directive – are acts of communication or making available to the public that the general concepts of communication and making available to the public as provided in Article 3(1) and (2) of the InfoSoc Directive and as interpreted by the CJEU remain unaffected; and also***
* ***because, without taking into account all aspects of the – unaffected – general concepts of communication and making available public as determined in Article 3(1) and (2), and not repeated in Article 17(1) of the DSM Directive, the terms “communication to the public or making available to the public” in the latter would not be determined; without making it clear in it (as it is) that Article 3(1) and (2) apply, they would be meaningless.***

***Summary of the analysis of the allegations presented in the Discussion Draft: Ten allegations have been reviewed as presented in the Draft. None of them seems to be well-founded. The sui-generis-right theory as presented in the Draft is not in accordance with the provisions of Article 17 of the DSM Directive, nor with the InfoSoc Directive and the EU law in general, nor with the relevant provisions of the international treaties binding Germany.***

***Direct purpose of the application of the sui-generis-right theory: to prove that Article 3(1) and (2) of the InfoSoc Directive on the exclusive right to authorize any acts of communication to the public and making available to the public are not applicable to the acts of communication to the public or making available to the public performed by OCSSPs in order to introduce a limitation to a right to remuneration for certain de minimis uses***

This turns out from the last sentence of the second paragraph of the explanation quoted above from the Discussion Draft: “*According to this understanding, § 6 UrhDaG-E is not subject to the exhaustive list of restrictions of Article 5 InfoSoc-RL.*”

As discussed above and as pointed out in the ALAI Opinion[[30]](#footnote-30) (and also in my paper on the interpretation of Article 17[[31]](#footnote-31)), very-short-time uses may truly be exempted from the scope of application of preventive blocking prescribed in Article 17(4) of the DSM Directive as part of the understanding and agreement to be established between the various stakeholders in accordance with Article 17(10). As stressed above under title III, there is no need for – and it is not an appropriate solution – providing rigid legislative rules instead. However, it is worthwhile discussing what else the Discussion Draft deduces, in general, from the theory of *sui generis* rights concerning the application of the rights concerned.

***In for a penny in for a pound? Does the Discussion Draft signal that Germany does not intend to apply Article 8 of the WCT and Article 10 and 16 of the WPPT either for the acts of communication and making available to the public performed by OCSSPs?***

There is the saying “who says A, should also say B” in several countries (also there is a version in my country, Hungary: *“aki A-t mond, mondjon B-t is”*) and it is known also in Germany: “*wer A sagt, muss auch B sagen*”. It corresponds to the English saying “in for a penny, in for a pound”, and both mean that, if you start something, you should see it through. Therefore, the question emerges inevitably whether or not the apparent intention signaled by the drafters of the Discussion Draft according to which Article 3(1) and (2) of the InfoSoc Directive are not applicable to the acts of communication and making available to the public performed by OCSSPs (“*wer A sagt*”) also means that Germany does not intend to fulfill its obligations under Article 8 of the WCT implemented in Article 3(1) and under Articles 10 and 14 implemented in Article 3(2) of the InfoSoc Directive (“*muss auch B sagen”*).

It does not need too much effort to recognize that, since OCSSPs – as clarified in the DSM Directive – are not passive intermediaries and they actively perform acts of communication and making available to the public, their acts are covered by the obligation of Contracting States to grant exclusive right to authorize (or prohibit) any acts of communication and making available under those provisions of the WCT and the WPPT.

It would be quite a spectacular consequence of the application of the badly founded “No InfoSoc Article 3” theory if it were also applied as “No WCT and WPPT” theory (and even as “No TRIPs” theory). It is not stated clearly in the Discussion Draft but, if this were truly the intention, Germany would not fulfill its obligations under the WIPO Treaties (and probably neither under the TRIPs Agreement). (It is another matter what might be the consequence, if any, of the non-fulfilment of the obligations under the WIPO Treaties, since there is no provision for such a case in the WCT and the WPPT, not even a provision on the unpractical – and thus never used – possibility of bringing the case before the International Court of Justice as in Article 33 of the Berne Convention.)

There is no clear indication that the intention of not transposing Article 17 as adopted also extends to the non-application of the relevant provisions of WCT and the WPPT. Even the Recommendations of the group of academics mentioned above did not go so far as to suggest that Article 3(1) and (2) of the InfoSoc Directive (and/or the relevant provisions of the WIPO Treaties) do not cover the acts of communication and making available to the public performed by OCSSPs. As mentioned above, the theory of non-application of Article 3(1) and (2) of the InfoSoc Directive has certainly been lent by the drafter of the Discussion Draft from the paper of the two researchers who were also among the seven co-authors of the Recommendations published a month later in which no such theory appeared.

Thus, the two co-authors have gone even much further than what are suggested in the Recommendations, and it seems that the drafters of the Discussion Draft sympathize with all aspects of that theory too. Under the next title, that source of the Drafting Paper is analyzed.

**V. The source of the *sui-generis*-right theory: the two researchers’ paper**

***The background: fierce opposition to the recognition of OCSSP’s direct liability for acts of interactive making available to the public performed by them instead of their secondary liability for activities as mere intermediaries under the Electronic Commerce Directive***

Martin Husovec and João Pedro Quintais published their paper entitled “How to license Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms” in October 2019[[32]](#footnote-32); that is, before the publication of the Recommendations which took place in November 2019[[33]](#footnote-33).

The co-authors of the Recommendations consistently opposed certain key elements of what became Article 17. Thus, it was not a surprise that they tried to present some ideas how to try to avoid the application of those elements which, in spite of their opposition, had been maintained in the adopted provisions. Nevertheless, the theories presented in the Recommendations did not go so far as what Husovec and Quintais suggested in their paper published before, although they were also among the seven co-authors of the Recommendations.[[34]](#footnote-34)

This may indicate that the other five co-authors of the Recommendations did not necessarily share the views expressed in the paper. If they had agreed with the theory presented in the paper, it certainly would have been used in the Recommendations to try to justify the replacement of the exclusive right of authorization of the rightholders recognized in Article 17(1) of the DSM Directive with statutory licensing.

At least, one of the two co-authors of the paper, Husovec, from the very beginning of the preparatory work, fiercely opposed the key aspects of what was finally adopted as Article 17, so much that he questioned even the existence of a “value gap” the elimination of which was the objective of the new rules.[[35]](#footnote-35) When the draft of the DSM Directive was leaked just before it was published, he expressed his deep resentment in this way[[36]](#footnote-36):

European Commission does not care about the future of the digital single market. This is basically what it just communicated to citizens of Europe in its recently leaked [proposal on Directive on copyright in the Digital Single Market](https://drive.google.com/file/d/0B6d07lh0nNGNNjZpcGlsQ3pJN3M/view). Its content is nothing but a shameful statement of where a lobbying muscle of the music industry can drag *our* policy makers. [Evidence](http://ssrn.com/abstract=2755628)[[37]](#footnote-37) does not matter; the [public consultations](https://t.co/1pQvrbvl8Y)[[38]](#footnote-38) are not worth the paper they are written on.[…]

The proposal tries to address the so called 'value gap' problem. *Value gap* is a rhetorical device borrowed from the music industry that mostly likely coined the term for the first time in its global music reports.

The text of the Article (at that time still numbered as Article 13) has changed somewhat since then but the basic elements of the provisions against which Husovec stated his indignation so emotionally have been maintained. Namely, (i) the clarification that OSSPs actively perform acts of interactive making available to the public; (ii) thus, they cannot enjoy exemption as passive intermediaries under the Electronic Commerce Directives; and (iii) consequently, they (unless some exceptions or limitations apply) must obtain authorization from the owners of exclusive rights under Article 3(1) and (2) of the InfoSoc Directive or must apply measures not only to eliminate unauthorized uploads (take down) but also preventing (through filtering) uploads of the same works or objects of related right for which rightholders make available identification information (stay down). In spite of certain not quite welcome amendments to the provisions, these basic elements have been maintained in Article 17 as adopted; fortunately, because the entire regulation would have been pointless without them.

Husovec expressed the opinion that, in general, it would be sufficient to settle the possible liability issues of the online platforms which later became referred to as OCSSPs on the basis of the Electronic Commerce Directive. He also implied that the validity of the guidance by the CJEU in the *L'Oréal v eBay* case with which the clarification of direct liability of OCSSPs was in accordance was questionable (because the Court’s judgment was “much criticized in the literature”[[39]](#footnote-39)):

Since the EC has to live with the E-Commerce Directive, because [citizens clearly support it](https://ec.europa.eu/digital-single-market/en/news/study-role-intermediaries-summary-public-consultation)[[40]](#footnote-40), it does a trick. First, it says that direct liability does not apply in case you are covered by a safe harbour, while immediately stressing its limited applicability. The proposal says that to assess neutrality, it is necessary to verify whether the hosting provider plays an active role, including that it optimizes or promotes user generated content (the language originates from the *L'Oréal v eBay* and was much criticized in the literature).

Husovec’s criticism was directed in particular against a recital which – with some wording modification – became Recital (64) in the DSM Directive when adopted. He wrote this:

The proposal attacks the existing law already in Recital 39. Pretending that it summarizes some established principles, it says that hosts and other service providers who are not passive [don't provide technical infrastructure], are *automatically* ('thereby') communicating work to the public and thus have to license the content. If this was true than none of the courts in Member States would have to struggle with its own domestic secondary liability laws. Yes, because unlike the European Commission, most of the scholars, case-law and policy people think that if you assist in disseminating content, you might have that dissemination attributed to you under some circumstances (secondary liability), but don't pretend that dissemination is your own (direct liability).[[41]](#footnote-41)

He certainly wanted to refer mainly to Recital (38) (possibly, in the meantime, there had been some re-numbering) because, in Recital (39), only certain consequences were deduced of what was stated in the previous recital (in particular, the need for and obligation of using content recognition technologies – that is, filtering – in certain cases). Recital (38), in the draft Directive, read as follows:

(38) Where information society service providers store and provide access to the public to copyright protected works or other subject-matter uploaded by their users, thereby going beyond the mere provision of physical facilities and performing an act of communication to the public, they are obliged to conclude licensing agreements with rightholders, unless they are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC of the European Parliament and of the Council .

In respect of Article 14, it is necessary to verify whether the service provider plays an active role, including by optimising the presentation of the uploaded works or subject-matter or promoting them, irrespective of the nature of the means used therefor.

In order to ensure the functioning of any licensing agreement, information society service providers storing and providing access to the public to large amounts of copyright protected works or other subject-matter uploaded by their users should take appropriate and proportionate measures to ensure protection of works or other subject-matter, such as implementing effective technologies.

Under Article 3(1) and (2) of the InfoSoc Directive, in accordance with Article 8 of the WCT and Articles 10 and 14 of the WPPT, the owners of copyright and related rights provided in those provisions must be granted an exclusive right to authorize (or prohibit) any act of interactive making available to the public (*any* such act, irrespective of who performs it (unless an exception or limitation is permitted)). Recital (27) of the InfoSoc Directive clarifies – in accordance with an agreed statement concerning Article 8 of the WCT – that “[t]he mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive”. In Recital (42) of the Electronic Commerce Directive, it has been determined more in detail under what conditions a service provider may enjoy exemptions by claiming that it only provides its system to others to perform acts covered by copyright or related rights and it does not itself perform such acts. Namely, where “[its] activity is of a mere technical, automatic and passive nature”. It was on the basis of a faithful interpretation and application of these norms that the CJEU, in *L'Oréal v eBay –* noting that the exemption for a hosting provider under Article 14(1) of the Electronic Commerce Directive only applies where its activity is of a mere technical, automatic and passive nature – stated that, consequently, the exemption did not apply in the given case and, thus, the service provider was directly liable for the acts concerned. The Court has found that, if a hosting provider “provides assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting them”, it plays such an active role.

As it can be seen above, the European Commission, in Recital (38) of the draft Directive, did not “attack”, as Husovec alleged, but adequately reflected the “existing law”. It did not “pretend” to summarize “some established principles” but it precisely summarized the relevant European law, both the provisions of the directives and the case law of the CJEU. It does follow from the existing law that, if service providers “are not passive”, but play an active role (as Google and other OCSSPs happen to do), as the draft recital stated (and as, in other wording, Recital (64) in the adopted Directive, states) they do perform acts of communication to the public, including in particular, in the given context, acts of interactive making available to the public. Since this was (and is) true “none of the courts in Member States would have to struggle with its own domestic secondary liability laws”, simply because what would apply is not secondary liability, but direct liability of those who perform acts covered by Article 3(1) and (2) of the InfoSoc Directive and the relevant international norms.

No element of Husovec’s this above-quoted sweeping statement is well-founded: “unlike the European Commission, most of the scholars, case-law and policy people think that if you assist in disseminating content, you might have that dissemination attributed to you under some circumstances (secondary liability), but don't pretend that dissemination is your own (direct liability).” It turns out from several ALAI resolutions and opinions that there are many academics who do not agree with the theories of the group of “scholars” to which he belongs. The CJEU’s case law is just the contrary to what he states (even if his fellow “scholars”, as he has mentioned, do not like it). The statement is no more correct concerning “policy people” either, unless it is justified not to recognize the officials and experts of the European Commission or, for example, the French Ministry of Culture as “policy people” just because they are of different views. (It is not just haphazardly that I mention the French Ministry; it is quite well known that the French government and, within it, the Ministry, was one of the main initiators of the recognition that the acts of interactive making available to public performed by Google and the other similar platforms are acts of interactive making available to the public.[[42]](#footnote-42)) And, of course, I have not mentioned yet the “existing law” itself which, as analyzed above, clearly rebuts the statement.

Since Article 17 has been adopted in the way in which Husovec so fiercely opposed it, the paper he has prepared with Quintais was not a surprise. The basic message of the paper is that Article 17 should not have been adopted in the way it had been. It was in harmony with the promise made by the German government that it would not transpose the Article as adopted; thus, it is not a surprise either that the drafters of the Discussion Draft have made use of several elements of the theory outlined in the paper (although rather just the basic suggestions and not necessarily reproducing all the underlining arguments).

***Denying that Recital (64) and Article 17 provide what they provide***

The central element of Husovec’s and Quintais’ paper is the theory that the acts performed by OCSSPs recognized under Article 17(1) of the DSM Directive as acts of “communication to the public or making available to the public” are not acts of “communication to the public or making available to the public” under Article 3(1) and (2) of the InfoSoc Directive (and thus neither under Article 8 of the WCT and Articles 10 and 14). According to them, a completely new *sui generis* right has been provided in the implementation and application of which the Member States are free; neither the InfoSoc Directive nor the international treaties bind them; they are not obligated either to take it seriously that Article 17(1) provides for exclusive rights of authorization by the rightholders; those rights may be replaced by a right to remuneration to be determined by a the governments through statutory licenses.

I present below how I can see that, according to the Husovec – Quintais theory, Recital (64) and Article 17(1) may be interpreted and transposed (the differences from the original text are indicated in bold and italics):

Recital (64): It is appropriate to clarify in this Directive that online content-sharing service providers perform an act of communication to the public or of making available to the public when they give the public access to copyright-protected works or other protected subject matter uploaded by their users. ***However, such an act of communication to the public or making available to the public does not fall within the scope of Article 3(1) and (2) of Directive 2001/29/EC on an exclusive right of authorization of the rightholders as provided in those provisions. A sui generis right to remuneration should be granted instead****.* Consequently, online content-sharing service providers ***~~should~~* *shall not be* *obligated to*** obtain authorisation***~~, including via a licensing agreement~~*,** from the ***~~relevant~~***rightholders ***mentioned in Article 3(1) and (2) of Directive 2001/29/EC for performing such an act, but they should pay remuneration to the rightholders of the sui generis right who should be considered to be the same as if the acts of communication to the public or making available to the public performed by online content-sharing service providers were acts of communication to the public or making available to the public under Article 3(1) and (2) of Directive 2001/29/EC.*** This does not affect the concept of communication to the public or of making available to the public elsewhere under Union law, nor does it affect the possible application of Article 3 of Directive 2001/29/EC to other service providers using copyright-protected content.

Article 17. (1)   Member States shall provide that an online content-sharing service provider performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users. ***Nevertheless, such an act of communication to the public or making available to the public shall not fall within the scope of Article 3(1) and (2) of Directive 2001/29/EC on the exclusive right of the rightholders to authorize acts of communication to the public and making available to the public as provided in those provisions. For such an act, a sui generis right to remuneration shall be provided to be determined in the laws of the Member States for those rightholders who are mentioned in Article 3(1) and (2) of Directive 2001/29/EC as if the acts of communication to the public or making available to the public performed by online content-sharing service providers were acts of communication to the public or making available to the public under those provisions of Directive 2001/29/EC.***

An online content-sharing service provider ***~~shall~~*** therefore ***shall not need*** *to* obtain any authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, ***~~for instance by concluding a licensing agreement~~****~~,~~* in order to communicate to the public or make available to the public works or other subject matter ***but shall be obligated to pay remuneration to the rightholders mentioned in the first sentence of this paragraph.***

As it is stressed above, this kind of description is not a caricature; not an expression of some kind of sarcasm. Truly such sort of interpretation is suggested in the paper.

The theory presented for such an interpretation is in so obvious conflict with the text, the preparatory work, and the objectives of Article 17 that the commentator is tempted to propose as an obvious rebuttal just to read the text of Recital (64) and Article 17(1) of the Directive as adopted. Nevertheless, since it seems that the drafters of the Discussion Draft apply it, it is necessary to further review certain aspects of the two co-authors’ key arguments, the more so, because they are somewhat more detailed in the paper than in the way they are used in the Discussion Draft as a kind of summary. Those elements of the theory which are mentioned in the Discussion Draft are not revisited here in detail; only those are analyzed which have *not* been used explicitly in the Discussion Paper.

***Badly founded allegation: the Council and the European Parliament have wrongly stated that, in Article 17(1), it is clarified that the acts performed by OCSSPs are acts of “communication to the public or making available to the public” under Article 3(1) and (2) of the InfoSoc Directive.***

The drafters of the Discussion Draft, as quoted, have summed up this element of the theory presented in Husovec’s and Quintais’ paper in this way:

This [[[43]](#footnote-43)] is also supported by the wording of Article 17 (1) of the DSM-Directive, according to which the service provider undertakes an act of exploitation *"for the purposes of this Directive".* Recital 64 DSM-Directive additionally clarifies that the requirements of Article 3 InfoSoc-RL (definition of communication to the public) remain unaffected.

As discussed above, there is nothing before this statement that might justify the allegation that something has been proved and what follows would just serve supporting the findings. It is also pointed out why the reference to the purpose of the Directive and the confirmation of the concept of communication and making available to the public under Article 3(1) and (2) of the InfoSoc Directive do not support the *sui-generis*-right theory. However, in the two researchers’ paper from where the drafters of the Discussion Paper have lent the theory, this argument is presented more in detail:

*Despite political declarations in Recital 64* of the DSM Directive, *Article 17 can hardly be said to clarify existing law*. Legally speaking, it changes the law in at least two ways. First, it introduces a special liability mitigation mechanism which has no precedent in the history of copyright law, either in International Treaties, in the EU copyright *acquis* or, to the best of our knowledge, in any national law. Second, it goes beyond current case-law of the Court of Justice of the European Union (CJEU) by stating that OCSSPs, as a rule, carry out acts of “communication to the public” when they give access to content uploaded by their users.[[44]](#footnote-44) (Emphasis added.)

Recital (64) of the DSM Directive reads as follows:

I*t is appropriate to clarify in this Directive that online content-sharing service providers perform an act of communication to the public or of making available* to the public when they give the public access to copyright-protected works or other protected subject matter uploaded by their users. *Consequently, online content-sharing service providers should obtain an authorisation*, including via a licensing agreement, *from the relevant rightholders*. This does not affect the concept of communication to the public or of making available to the public elsewhere under Union law, nor does it affect the possible application of Article 3(1) and (2) of Directive 2001/29/EC to other service providers using copyright-protected content*.* (Emphasis added.)

A recital is not an independent normative provision the same way as the provisions of the articles of a directive are, but it is not just a „political declaration” as the two researchers state it. A paper prepared for a seminar organized by the European Commissions’ Quality of Legislative Team has appropriately summed up the legal effect of recitals in this way:

Recitals can help to establish the purpose of a provision (Case C-173/99 BECTU [2001] ECR I-4881, paras 37-39) or its scope (Case C-435/06, C[2007] ECR I-10141, paras. 51-52) But they cannot take precedence over those substantive provisions. ‘Whilst a recital in the preamble to a regulation may cast light on the interpretation to be given to a legal rule, it cannot in itself constitute such a rule.’ (Case 215/88 Casa Fleischhandels [1989] ECR 2789, para. 31). Moreover, ‘the preamble to a Community act has no binding legal force and cannot be relied on as a ground for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner clearly contrary to their wording...’ (Case C-162/97 Nilsson [1998] ECR I-7477, paragraph 54. See also Case C-412/93 Edouard Leclerc-Siplec [1995] ECR I-179, para. 47; Case C-308/97 Manfredi [1998] ECR I-7685, para. 30; Case C-136/04 Deutsches Milch-Kontor [2005] ECR I-10095, para. 32; Case C- 110/05 Commission v Italy [2009] ECR I-519. [[45]](#footnote-45)

The role of Recital (64) fully corresponds to this; it states the objective and justification of Article 17(1) and (4)(a) of the Directive. It does not include an independent rule and does not derogate any provision in the Article. Article 17(1) provides, in accordance with the Recital, the legislative clarification that the acts performed by the OCSSPs are acts of communication and making available to the public and then deduces from this, as the Recital does, that “consequently” (in the wording of the paragraph “therefore”) the OCSSPs should obtain authorization as the Recital puts it “from the relevant rightholders”; then, in the provision, it is more precisely referred to who are the “relevant rightholders” where acts of communication and making available to the public are involved; namely, the rightholders of the rights determined in Article 3(1) and (2) of the InfoSoc Directive. Thus, the Council and the European Parliament, contrary to what Husovec and Quintais have alleged, have not committed the error in wrongly stating in Recital (64) that a clarification of the existing legal situation takes place through the legislative interpretation of Article 17(1); in the provision exactly this happens.

As quoted above, the two researchers present two arguments that have not been discussed and rebutted above – or at least they present those arguments with more emphasis as it is done in the Discussion Paper. The first argument is that “a special liability mitigation mechanism” is provided which, according to them, is unknown in the EU law and, thus, they conclude – with a huge jump to conclusion – that, in Article 17(1), it is not clarified that the acts performed by OCSSPs are acts of communication and making available to the public covered by the exclusive rights of the rightsholders as provided in Article 3(1) and (2) of the InfoSoc Directive but that they are covered by a *sui generis* right. Under title IV above, in connection with allegations nos 5 and 6 presented in the Discussion Draft, I deal with this. It was easy to prove that it is a badly founded allegation because there is a well-known “special liability mitigation” – or “compliant and redress” mechanism – in the EU law in Article 6(4) of the InfoSoc Directive (also provided to guarantee the applicability of certain exceptions and limitations, *inter alia* concerning the rights of communication and making available to the public) and it has not occurred to anybody that therefore the rights concerned might have become *sui generis* rights. The two researchers’ second argument is that the CJEU does not have case law on the issue of the acts of communication and making available to the public performed by platforms referred to in the Directive as OCSSPs. It seems that the suggestion is that, as long as it is not found yet in a CJEU judgment that an act of communication or making available to the public provided or clarified in a directive is an act of communication or making available to the public, such acts are not covered by the right of communication or making available to the public but by a *sui generis* right. It is hardly needed to point out how anachronistic this kind of argument is in view of the legislative and judicial competences in the EU and the basic principle of distribution of power.

***Badly founded allegation: the CJEU has erred in interpreting and applying the provisions of Article 3(1) and (2) of the InfoSoc Directive and of the relevant provisions of the WCT and the WPPT on the rights of communication and making available to the public by qualifying certain acts as communication or making available to the public that are not such acts – and if Article 17(1) were to be regarded as clarifying that the acts performed by OCSSPs are covered by those rights, it would have the same effect***

Husovec and Quintais allege that CJEU has adopted such kind of *contra legem* interpretation of the EU and international law and outline the consequences of qualifying acts as communication or making available to the public that according to them are not such acts under the EU law and the international treaties in this way:

In our view, the development of the CJEU case law concerning communication to the public over the years shows that the EU notion goes beyond the international minimum standard. This is particularly clear in the area of online exploitation, in which the CJEU started extending the right to spaces previously occupied by secondary liability scenarios that are traditionally non-harmonized, e.g. “mediated types” of use like hyperlinking (...) Therefore, from the perspective of international law, Article 17 of the DSM Directive is hardly objectionable: it only abridges the rights of rightholders under EU law *beyond* the minimum international standards.[[46]](#footnote-46)

It should be noted that the provision of Article 3(1) and of the InfoSoc Directive on the concept and right of communication to the public (apart from certain irrelevant *mutatis mutandis* aspects) is verbatim the same as the provision of Article 8 of the WCT and this is true also concerning the provisions of Article 3(2) of the Directive compared to the provisions of Articles 10 and 14 of the WPPT. Thus, the CJEU’s findings are equally applicable to the provisions of the InfoSoc Directive and to the relevant provisions of the WCT and the WPPT. If it were true that the Court has abridged the rights of rightholders “beyond the minimum international standards”, it would have done so equally beyond the standards provided in the EU law in Article 3(1) and (2) of the InfoSoc Directive.

The two co-authors do not really substantiate their allegation why would it be true that the CJEU has erroneously qualified acts as communication or making available to the public which were not such acts. As can be seen above, the judgment in the *Svensson* case[[47]](#footnote-47) is mentioned as the only concrete example to support the allegation. There was a group of academics – the core of which was the same as that of the group which has adopted the above-mentioned Recommendations – which expressed the opinion that the use of hyperlinks in the way as in the given case did not qualify as making available to the public (because according to them, for the performance of an act of making available to the public, it is not sufficient to make available a work, it is also necessary that the members of the public actually make the system to transmit the work to them)[[48]](#footnote-48). However, the CJEU did not rule in that way; it correctly applied Article 3(1) and (2) of the InfoSoc Directive, in this respect, in accordance with the relevant provisions of the WIPO Treaties. As the opinion adopted by the Executive Committee of ALAI[[49]](#footnote-49) pointed out, on the basis of the literary, contextual and teleological interpretation of the provisions, the Court had rightly found that an act of online making available works to the public in a way that members of the public may access them takes place when the works are made available in that way; the acts of accessing the works by different members of the internet population is not a condition for the act to be performed. Thus, in *Svensson*, the CJEU has not extended but rightly applied the concept and right of interactive making available to the public.

While, in the case of certain forms of “clickable links”, a more thorough analysis was needed to find correctly that acts of interactive making available to the public are performed as provided in Article 3(1) and (2) of the InfoSoc Directive and the relevant provisions of the WIPO Treaties, this is much more evident in the case of “false intermediaries”, which are among the biggest online users of works and objects of related rights, and which only differ from the platforms that upload on their systems and make available online protected contents with the authorization of the rightholders in that they make available protected contents uploaded by their customers (and they harvest the huge advertisement income for themselves). No extension of the application of the right of interactive making available to the public has taken place in the DSM Directive; what has only happened is that it has been clarified in interpretative provisions what follows from the existing EU law (in accordance with the international norms implemented in the EU legislation).

**VI. Conclusions; alternatives and consequences of the non-transposition of Article 17 of the DSM Directive as adopted**

After the resistance of Germany to the key aspects of the DSM Directive, and the declaration made on the occasion of the adoption of the Directive, it is not a surprise that a draft has been prepared that is not in accordance with Article 17. However, the Discussion Draft seems to have gone even much further than expected in view of the German declaration; the drafters have also adopted the theory of two fiercely anti-Article-17 researchers according to which, in Article 17(1), it has not taken place what clearly has taken place; namely that it has been clarified that the acts performed by OCSSPs are acts of communication and making available to the public, and, therefore, in accordance with Article 3(1) and (2) of the InfoSoc Directive on the exclusive rights of communication and making available to the public, the authorization of the owners of those rights is needed for lawful performance of such acts. Instead of that, according to the theory, a kind of *sui generis* right is provided in Article 17 for which neither Article 3(1) and (2) of the InfoSoc Directive (to which the provisions of Article 17 refer) nor the relevant provisions of the WCT and the WPPT apply. The Discussion Draft has implemented this theory in various ways; *inter alia*, by dissecting the exclusive rights and providing mere rights to remuneration, which apparently are not intended to be granted to the nationals of other Contracting Parties of the international treaties.

It is submitted that, if the Discussion Draft went through in this way based on anti-Article-17 theories and with these provisions, it would be in conflict with the EU law and the international treaties binding Germany. It would violate also the French-German deal which made the adoption of the Directive possible even if in a watered-up form. Axel Voss’ and his allies’ courageous resistance against fearmongering, fake news, artificial hysteria (with people putting plastic bands on their mouths and complaining that they cannot speak, exactly just because they have put plastic bands on their mouths) and bots-generated “public opinion” campaigns has saved Article 17 in a way that it might still serve the objectives for which it has been adopted (for which President Macron’s brave intervention was also needed). However, with this weak parody of the provisions of the Directive as now it is presented in the Discussion Draft, he would badly lose in his own country.

In the Discussion Draft, there is a title – C. Alternatives – after which a single word appears: “None”. Hopefully, in spite of this, there might still be an alternative in Germany. There is an appropriate model for it; namely the French draft law to transpose Article 17.[[50]](#footnote-50) It consists in transposing the provisions of the DSM Directive in the way they are provided. The definition of OCSSPs is the same as in the Directive, there are no provisions as in the German Draft in conflict with Article 2(6) of the Directive by dramatically reducing the scope of such service providers; the rights of communication and making available to the public are provided in accordance with Article 17(1) and (4)(a) of the Directive, that is in accordance with Article 3(1) and (2) of the InfoSoc Directive, there is no attempt to regulate them as *sui generis* rights; there are no provisions to transform the exclusive rights into a mere right to remuneration; and, as provided in Article 17(9) of the Directive, a post-blocking complaint and redress mechanism is provided for users and not the opposite; and, of course, there is no provision about “pre-flagging”, 90% free use of all kinds of works and objects of related rights which might only be opposed by rightholders after and during making them available to the public in a kind of – for this purpose ineffective – notice-and-take-down procedure. There is nothing like this in the French draft; the provisions of the Directive are transposed and not something else completely alien to it.

The hope is there that the French alternative – the transposition of Article 17 instead of a caricature thereof – might still emerge in Germany. But this hope is not strong; it would not be even much stronger in more peaceful times, but with the enormous problems created by the corona virus pandemic, the chance is even more meager that sufficient attention will be paid to the non-transposition of a key article in a copyright directive. Macron and Merkel have a lot to do in trying to save not only the health of European people but also the economy of the Union; the probability is quite weak that the problem of this kind of (non)transposition of directive provisions might become an agenda item for the two leaders.

What happens if the Discussion Draft is adopted and becomes law in Germany with its current contents? If a Member State does not implement EU law as prescribed, an infringement procedure follows. Thus, Germany – even if it is the most important economy in the Union – might have to be faced with such consequences. It should have to learn from the example of the United Kingdom. The U.K. denied the implementation of Article 5(2)(b) of the InfoSoc; it did not provide for a right to remuneration to rightholders as compensation for massive private copying that unreasonably prejudices their legitimate interests. The European Commission did not care that it was one of the most important Member States that had violated its obligations under the EU law and did what it was supposed to do in such a case: launched an infringement procedure against the U.K. Then, when the U.K. still did not fulfill its obligations, the Commission turned to the CJEU which applied serious sanctions against the U.K. As a consequence, those smaller Member States which had been emboldened by the British example and had not transposed Article 5(2)(b) either, became frightened and they, along with the U.K., also brought their legislation into accordance with the InfoSoc Directive.

I am not sure, however, that my recollection is correct and that truly this has happened to the U.K. If my memory is wrong (and now that I try to remember better, it seems to be the case) and thus this has not happen to the U.K., it might not happen to Germany either. Then, what about possible consequences of the application of the *sui-generis*-right theory and, thus, of not fulfilling the international obligations to grant exclusive rights for the acts identified in Article 17(1) of the DSM Directive as acts of communication and making available to the public. It would mean conflicts with Article 8 of the WCT and Articles 10 and 14 of the WPPT. However, as WIPO-administered treaties in general, the WCT and WPPT do not include any dispute settlement system for such a case (even less than the Berne Convention does which, as mentioned above, in its Article 33, at least, refers to the – not quite practicable – possibility of bringing a dispute before the International Court of Justice).

Thus, only the TRIPs Agreement would remain. At least, about the acts of reproduction performed by hosting works and objects of related rights on the systems of OCSSPs – which seems to be called “public reproduction”[[51]](#footnote-51) in the Discussion Draft (certainly in contrast with “private reproduction” covered by Article 5(2)(b) of the InfoSoc Directive) – might be considered in a sufficiently well-based manner that the exclusive rights of reproduction provided in the Agreement apply to them (in view of the obligation by virtue of Article 9.1 of the Agreement to comply with Article 9 of the Berne Convention and of the provisions of Article 14 on the right of reproduction of the owners of related rights). Thus, while as regards the acts of interactive making available to the public (exactly due to the interactive aspect), it may not be necessarily alleged that they are covered by the TRIPs Agreement too, about reproduction in electronic format, it may be stated that, in the agreed statement concerning Article 1(4) of the WCT (and, through it, Article 9 of the Berne Convention) it is just clarified what is the case under the existing treaty provisions; that is, that it is also reproduction. Thus, in principle, the non-respect of the obligation to grant exclusive right of reproduction might be an issue for a WTO dispute settlement case. Might it be? More than probably, it will not be. A voluminous book could be filled in with a list of provisions in the copyright laws of WTO Members that – in many cases, even more obviously – are not in accordance with the TRIPs Agreement and still no dispute settlement procedure has been launched.

*Summa summarum*, there is quite a robust chance that a law for non-transposing Article 17 of the DSM Directive will be adopted in a key Member States of the EU and probably certain other Member States will follow this model rather than the example of correct transposition of the Directive as in the French draft law. We may just accept this as a matter of “*Realpolitik*” and recall what is happening to Manneken Pis’ costume in Brussels when a strong counter wind blows. Nevertheless it may be asked naively whether or not this is good from the viewpoint of rule of law, respect for EU law and international treaties along with such principles as *pacta sunt servanda*, and from the viewpoint of the interests of Europe to build stronger creative industries rather than remaining net importers of cultural and information products and trying to avoid the economic burdens of negative balance in the markets through protectionist and populist provisions.

Certainly, there are different views about this. In my view, it is not good.

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1. \* Member of the Hungarian Copyright Council; former Assistant Director General of WIPO. [↑](#footnote-ref-1)
2. See Council document https://data.consilium.europa.eu/doc/document/ST-7986-2019-ADD-1-REV-2/en/pdf. [↑](#footnote-ref-2)
3. In original German language: „Diskussionsentwurf [Stand: 24. Juni 2020] des Bundesministeriums der Justiz und für Verbraucherschutz - Entwurf eines Zweiten Gesetzes zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes”; available at

   <https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/DiskE_II_Anpassung%20Urheberrecht_digitaler_Binnenmarkt.pdf?__blob=publicationFile&v=2>. In English translation:

   Discussion Draft [as of 24 June 2020] of the Federal Ministry of Justice and Consumer Protection - Draft of a second law adapting copyright law to the requirements of the digital single market (hereinafter: “Discussion Draft); available at

   [https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/DiskE II\_Anpassung%20Urheberrechtdigitaler\_Binnenmarkt\_englischeInfo.html](https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/DiskE%20II_Anpassung%20Urheberrechtdigitaler_Binnenmarkt_englischeInfo.html). [↑](#footnote-ref-3)
4. See Mihály Ficsor: „*Il est plus qu’un* *bémol; das ist eine völlig andere Music*:comments on certain Recommendations published by a group of European academics to suggest a special way of implementation of Article 17 of the DSM Directive”, available at [www.copyrightseesaw.net](http://www.copyrightseesaw.net) (hereinafter: Ficsor on the Recommendations), p. 2, footnote 4. [↑](#footnote-ref-4)
5. *Ibid*., p. 1, footnote 3. [↑](#footnote-ref-5)
6. The guardians and warriors of which truly do everything to guarantee total freedom of expression without any possible restriction whatsoever, with one tiny condition; namely that the views freely expressed should be 100% identical with theirs. [↑](#footnote-ref-6)
7. „The Copyright Directive is failing (Open Letter to Members of the European Parliament and the Council of the European Union)” published on 26 April 2018; available, *inter alia*, at http://www.eblida.org/News/2018/OpenLetter\_EU\_Copyright\_Research\_Centres\_26\_04\_2018.pdf. [↑](#footnote-ref-7)
8. The open letter reads as follows: “’Fake news’ is dressed as a copyright issue (which can only be characterized as cynical), and the misleading rhetoric of a ‘value gap’ clouds the true nature of the issues for online platforms.” [↑](#footnote-ref-8)
9. They stated that there was “scientific consensus” (certainly they only meant that they agreed between each other) that „the proposals for Art. 13 threaten the user participation benefits of the e-Commerce [Directive](https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32000L0031) (2000/31/EC) which shared the responsibility for enforcement between rightholders and service providers.” [↑](#footnote-ref-9)
10. ALAI adopted two resolutions rebutting the arguments of the anti-Article-13(→17) academics in February and September 2018. Furthermore, when the other group made the above-mentioned strong attack against the compromise text presented by Axel Voss (claiming verbatim that their position represent European academic consensus to reject the text), ALAI – also indicating in that way that the alleged consensus did not exist – adopted still another resolution confirming the Alliance’s support for the provisions of the Article as it had emerged from the EU trialogue consultations (although also expressing regret that the text had become less protective of the creators’ interests). It seems worthwhile to quote the third, relative short resolution published summing up the position of the Alliance (available at: <https://www.alai.org/en/assets/files/resolutions/190321-article-13-proposal-directive-copyright-digital-single-market-en.pdf>):

    Considering the resolution adopted by ALAI on 18 February 2017 on the European proposals of 14 September 2016 to introduce fairer sharing of the value when works and other protected material are made available by electronic means <http://www.alai.org/en/assets/files/resolutions/170218-value-gap-en.pdf>.

    Considering the further reflections adopted by ALAI on 16 October 2017, on the European proposals of 14 September 2016 to introduce fairer sharing of the value when works and other protected material are made available by electronic means <http://www.alai.org/en/assets/files/resolutions/171016-alai-further-reflections-value-gap.pdf>.

    Considering the version of Article 13 of the proposal for a Directive on copyright in the Digital Single Market as adopted by the trialogue of 13 February 2019.

    ALAI, while noting that the version resulting from the trialogue is less protective of authors' rights because of the desire to strike a certain balance with the defence of other interests, approves, in its entirety, the provisions of Article 13 aimed at ensuring better value sharing as a result of the making available to the public of intellectual works by providers of online content sharing services. [↑](#footnote-ref-10)
11. „Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics”; available, *inter alia*, at <https://www.jipitec.eu/issues/jipitec-10-3-2019/5042>. [↑](#footnote-ref-11)
12. See <https://www.alai.org/en/assets/files/resolutions/200330-opinion-article-17-directive-2019_790-en.pdf>. (hereinafter: ALAI Opinion). [↑](#footnote-ref-12)
13. It is to be noted that the date of the Directive is 17 April 2019. [↑](#footnote-ref-13)
14. *See* footnote 3 above. [↑](#footnote-ref-14)
15. In view of this, in this paper, in general, the complex expression “communication to the public and making available to the public” is only used when reference is made to the text of Article 17. Otherwise, its shorter version is used: “communication or making available to the public”; and, in some cases, simply what is truly involved in the context of Article 17: interactive making available to the public. [↑](#footnote-ref-15)
16. Discussion Draft, p. 84. [↑](#footnote-ref-16)
17. *Ibid*. [↑](#footnote-ref-17)
18. ALAI opinion, p. 5 [↑](#footnote-ref-18)
19. Ficsor on the Recommendations, pp. 13-14. [↑](#footnote-ref-19)
20. *See* [www.ugcprinciples.com](http://www.ugcprinciples.com); point 3. [↑](#footnote-ref-20)
21. *See* ALAI opinion, pp. 3-4. [↑](#footnote-ref-21)
22. *See* Ficsor on the Recommendations, pp. 11-15. [↑](#footnote-ref-22)
23. At the same time, there is no sign in the Draft that the drafters would have taken into account the ALAI opinion in any way whosoever (even in a way that, if they did not agree with it, they would have by tried to rebut it). [↑](#footnote-ref-23)
24. In the original German text is this: “sondern es wird bestimmt, dass der Diensteanbieter eine ‘Erlaubnis’ benötigt, weil er ansonsten in das Recht des Urhebers eingreift (Artikel 17 Absatz 1 DSM-RL).” [↑](#footnote-ref-24)
25. Discussion Draft, p. 33. [↑](#footnote-ref-25)
26. In the original German text: ’sondern es wird bestimmt, dass der Diensteanbieter eine „Erlaubnis“ benötigt, weil er ansonsten in das Recht des Urhebers eingreift (Artikel 17 Absatz 1 DSM-RL). [↑](#footnote-ref-26)
27. In the German version of the DSM Directive, Article 17(1) reads as follows: Ar Ein Diensteanbieter für das Teilen von Online-Inhalten muss deshalb die *Erlaubnis* von den in Artikel 3 Absatz 1 und 2 der Richtlinie 2001/29/EG genannten Rechteinhabern einholen, etwa durch den Abschluss einer Lizenzvereinbarung, damit er Werke oder sonstige Schutzgegenstände öffentlich wiedergeben oder öffentlich zugänglich machen darf. (Emphasis added.) [↑](#footnote-ref-27)
28. See point 3(i) of the principles at <https://ugcprinciples.com>.

    [↑](#footnote-ref-28)
29. The text reads fully in this way: „If Article 17 was merely meant to clarify that providers falling under the definition perform the act of communication to the public within the meaning of Article 3 of the InfoSoc Directive, there would have been no reason *to include the text ’for the purposes of this directive’ or* repeat the same set of beneficiaries”. The highlighted phrase “to include the text ’for the purposes of this directive or” is left out here, because the reference to the purpose of the Directive is discussed below in connection with allegation no 8 above. [↑](#footnote-ref-29)
30. ALAI Opinion, p. 5. [↑](#footnote-ref-30)
31. Ficsor on the Recommendations, pp. 13-14. [↑](#footnote-ref-31)
32. *See, inter alia*, at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3463011> (hereinafter: Husovec – Quintais). [↑](#footnote-ref-32)
33. *See* footnote 10 above. [↑](#footnote-ref-33)
34. The ALAI Opinion also only concentrated on rebutting the arguments presented in the Recommendations, and not with the paper published a month before by two co-authors. The theory contained in it was so obviously in contradiction with text of the Directive it was not considered to be worthwhile dealing with it too. [↑](#footnote-ref-34)
35. He wrote with sarcasm on how the music industry tried to prove the existence of such a gap, instead of using notice-and-take-done systems appropriately which would be sufficient. (As it can be seen, there is no word about other industries and conspicuously no word about the fight of authors and performers to narrow the gap at least between the big income obtained by Google and the other such platforms from the advertisements attracted by their works and performances used by those platforms and the absence of remuneration for the use of their works and performances):

    What music industry is really complaining about is that since they cannot perfectly enforce their rights against infringing users (or perhaps because it costs money), intermediaries should pay them for users, and the fee should be equal to what the highest paying sort of clients pay - those selling the music itself. This is not a place to expand on this debate too much, but let me just say one thing. If hosts see notice-and-takedown as a real alternative to negotiations with right holders, perhaps it indicates that the music is not so indispensable for the online service. Right holders can expose services without such agreements to more enforcement, and so if the music would be so crucial, notorious take-downs would destroy its business. (*See* Martin Husovec: “EC Proposes Stay-down & Extended Obligations to License UGC Services” post of 1 September 2016 at <http://www.husovec.eu/2016/09/ec-proposes-stay-down-expanded.html>. (hereinafter: Husovec blog post of 1 September 2016). [↑](#footnote-ref-35)
36. *Ibid.* [↑](#footnote-ref-36)
37. The link to the so-called „evidence” is a study prepared for UC Berkeley (Berkeley Public Law Research Paper No 2755628) by Jennifer M. Urban, Joe Karaganis & Brianne L. Schofield): “Notice and Takedown in Everyday Practice”; available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628>. It is mainly an interview-based study. Husovec certainly had found the interviews and the co-authors’ conclusions as “evidence” to support his views that there is no need for a notice-and-stay-down system (wich whould have necessitated arily with appropriate filters); and that a notice-and-take-down procedure (even if it is not perfect) must be sufficient for rightholders; *s*ee, in this respect, the summary of policy measures in the Berkeley paper that should not be applied: “Policy measures should not: Require filtering, staydown, or automated systems more general.” (p. 140). [↑](#footnote-ref-37)
38. Certainly he has referred to the public consultations the summary of which was prepared by himself, Martin Husovec, with Ronald Leenes and financed by DG Connect of the European Commission: „Study on the role of intermediaries – Summary of the public consultation”, available at <https://ec.europa.eu/digital-single-market/en/news/study-role-intermediaries-summary-public-consultation>. (hereinafter: Husovec – Leenes) [↑](#footnote-ref-38)
39. *See* Husovec blog post of 1 September 2016. [↑](#footnote-ref-39)
40. The link to „citizens’” support points to Husovec -Leenes. [↑](#footnote-ref-40)
41. Husovec blog post of 1 September 2016. [↑](#footnote-ref-41)
42. *See* „Mission to Link Directives 2000/31 and 2001/29 - Report and Proposals” of 3 November 2015 prepared, on behalf of the French High Council for Literary and Artistic Property, prepared by Pierre Sirinelli, President, Josée-Anne Benazeraf, Vice-President Alexandra Bensamoun and Vice-President 3 November 2015; available at

    <https://www.jipitec.eu/issues/jipitec-7-2-2016/4436/mission%20to%20link%20directives%202000_31%20and%202001_29_jipitec%207_2_2016_88.pdf>. [↑](#footnote-ref-42)
43. That is, the allegation that the acts of „communication to the public or making available to the public” performed by the OCSSPs are not acts of „communication to the public or making available to the public” under Article 3(1) and (2) of the InfoSoc Directive. [↑](#footnote-ref-43)
44. Husovec – Quintais, p. 3. [↑](#footnote-ref-44)
45. Roberto Baratta – Luis-Guido Carli: „Complexity of EU law int he domestic implementation process” presented at a seminar organized in Brussels om 3 July 2014 by the EC Servive Juridique’s Quality of Legislative Team; available at <https://ec.europa.eu/dgs/legal_service/seminars/20140703_baratta_speech.pdf>; p. 9 and footnote 23. [↑](#footnote-ref-45)
46. Husovec - Quintais, p. 9. [↑](#footnote-ref-46)
47. Judgment of 14 February in Case C-466/12. [↑](#footnote-ref-47)
48. *See* „Opinion on the Reference to the CJEU in Case C-466/12 Svensson” by the European Copyright Society (ECS) at <https://europeancopyrightsociety.org/opinion-on-the-reference-to-the-cjeu-in-case-c-46612-svensson/>. [↑](#footnote-ref-48)
49. *See* „Report and Opinion on the making available and communication to the public in the internet environment – focus on linking technology on the Internet”, at <https://www.alai.org/en/assets/files/resolutions/making-available-right-report-opinion.pdf>. [↑](#footnote-ref-49)
50. # *See* article 16 and 17 of the *Projet de loi No 2488 relatif à la communication audiovisuelle et à la souveraineté culturelle à l’ère numérique* at http://www.assemblee-nationale.fr/dyn/15/textes/l15b2488\_projet-loi#

    [↑](#footnote-ref-50)
51. *See* pp. 1, 32, 33, 35, 82, 89 and 93 of the Discussion Draft. [↑](#footnote-ref-51)