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ALGORITHMIC PARODY PROTECTION IN THE EUROPEAN UNION: CDSM DIRECTIVE AND DSA REGULATION PERSPECTIVE

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ABSTRACT

This research aims to evaluate the CDSM Directive and DSA regulation effectiveness in protecting the EU copyright exception for parody, caricature, and pastiche set in Article 5 (3)(k) of the InfoSoc Directive and capture quintessential issues of the regulation that make the conditions for potentially reduced ability to disseminate creative parody content in the online content-sharing service platforms in the EU. The subject of this paper is the complex relationship between algorithmic content recognition tools and creative parody content qualification. Based on EU copyright law doctrinal consensus, a legislative move to introduce liability for copyright-infringing content to online content-sharing service providers induces algorithmic content moderation on digital platforms. The triangular challenge to balance EU copyright and exception protection without disrupting the online content-sharing service leads to algorithmic recognition-based parody recognition solutions.

KEYWORDS

CDSM Directive, Digital Services Act, copyright, parody, algorithmic parody recognition.

INTRODUCTION

It is commonly understood that "copyright law has weathered several technological storms" throughout its existence.[1] One can claim that such a technological storm clouds over European Union (EU) copyright law. The EU experiences rapid change as an information society, which involves many aspects of daily cultural life, including how cultural and copyright-related creative information is disseminated and consumed in the digital environment. Online content-sharing services, such as Youtube and Vimeo, play a crucial role in setting trends in how creative information is consumed and disseminated daily in the European Union. These online content-sharing service platforms form an infrastructure to rapidly disseminate huge volumes of creative content and easily access such content[2].

For a long time, the EU kept the safe-harbor provision in Articles 12-14 of the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (E-commerce directive) and did not introduce any liability–based incentive for the online content-sharing service providers to conduct prevention of copyright–infringing content dissemination in the online content sharing service platforms[3]. It led to basically uncontrolled dissemination of copyright-infringing digital creative content[4]. For creators themselves, the online content-sharing service platforms have become a double-edged-sword: a stage to promote oneself on the one hand and a convenience for copyright–infringing activity on the other, bearing in mind that Articles 2–4 of the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc Directive) regulating the exclusive economic copyrights do not protect interests of creators effectively anymore[5]. In the EU copyright doctrine and legislation, this setting is often called a 'value gap': the copyright–infringing content attracts users and aggregates advertising value for the online content-sharing service providers. The copyright holders lose the audience for the creative content via their respective outlets[6].

The Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (CDSM Directive) is aimed directly at the 'value gap', issue stating the goal that "Rightholders should receive appropriate remuneration for the use of their works or other subject matter" and introducing liability for copyright infringing activity regime that is utterly contrary to the one previously set in the

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1 Ruth Towse, Christian Handke and Paul Stepan, "The Economics of Copyright Law: A Stocktake of Literature," *Review of Economic Research on Copyright* 5, 1 (2008): 1.

2 Gilles Fontaine, Christian Grece and Marta Jimenez Pumares, *Online video sharing: Offerings, audiences, economic aspects* (Strasbourg: European Audiovisual Observatory (European Commission), 2018), 20-21.

3 *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)*, Official Journal (2000, no. L178).

4 Giancarlo F. Frosio, "Reforming Intermediary Liability In The Platform Economy: A European Digital Single Market Strategy," *Northwestern University Law Review* 112 (2017): 21.

5 Federico Ferri, "The dark side(s) of the EU Directive on copyright and related rights in the Digital Single Market," *China-EU Law Journal* (2021): 24-25.

6 Annemarie Bridy, "The Price of Closing the "Value Gap": How the Music Industry Hacked EU Copyright Reform," *Vanderbilt Journal of Entertainment & Technology Law* 22 (2020): 326; Valentina Moscon, "Free Circulation of Information and Online Intermediaries – Replacing One "Value Gap" with Another," *IIC – International Review of Intellectual Property and Competition Law* 51 (2020): 978.

E-commerce directive[7]. Article 17 (1) of the CDSM Directive provides that "an online content-sharing service provider performs an act of communication to the public or an act of making available to the public of the creative content" when it gives the public access to copyright-protected works or other protected subject-matter uploaded by its users and shall "therefore obtain an authorization from the rights holders referred to in Article 3(1) and (2) of the InfoSoc Directive, 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"[8]. Furthermore, Article 17(4) of the CDSM Directive declares that online content-sharing service providers shall be liable for unauthorized acts of making creative content available to the public unless they made the best efforts to obtain authorization (Article 17(4)(a) CDSM Directive), to ensure unavailability of specific works provided with relevant and necessary information (Article 17(4)(b) CDSM Directive) and acted expeditiously upon receiving notice to disable access to or remove the notified works and prevent future uploads of such works (Article 17(4)(c) CDSM Directive)[9].

In addition, CDSM Directive has transformed the nature of the parody-based exceptions to the exclusive copyrights protection in the EU, previously set in the Article 5(3)(k) of the InfoSoc Directive. Article 5(3)(k) of the InfoSoc Directive stated that such exceptions were optional for EU member states and thus parody-based exceptions to to the exclusive copyrights protection was regulated inconsistently across EU member states[10]. With regulation of Article 17 (7) the CDSM Directive instates mandatory protection of parody-based exceptions to the exclusive copyrights[11]. Thus, Article 17 (7) the CDSM Directive explicitly has made protection of parody-based uses of copyrighted works in the online content-sharing services a new imperative in the EU copyright regime.

It is an understatement to say that Article 17 of the CDSM Directive caused controversy among EU copyright scholars. The knowledge-based liability mechanism forms immense pressure for online content-sharing service providers to find a content monitoring solution that would prevent any instances of unauthorized creative content upload from being unnoticed[12]. While there is no absolute consensus on the practical

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7 *Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC*, Official Journal (2019, no L 130), rec. 61; Christophe Geiger and Bernd Justin Jütte, "Platform liability under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering, and Fundamental Rights: An Impossible Match," *GRUR International* 70, 6 (2021): 535-537; European Commission, "Commission Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market (14 September 2016) pt 1, COM (2016) 593 final ('CDSMD Proposal')," (September 2016) // https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0593.

8 *Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, supra* note 7, art. 17 sec. 1.

9 *Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC*, *supra* note 7, art. 17 sec. 4.

10 *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*, Official Journal (2001, no. L-167), art. 5 sec. 3(k).

11 Federico Ferri, *supra* note 5, 35; The mandatory nature of parody-based exception to the exclusive copyrights protection, as per Article 17 (7) of the CDSM Directive is also implied from recital 70 of the CDSM Directive noting that 'Users should be allowed to upload and make available content generated by users for the specific purposes of quotation, criticism, review, caricature, parody or pastiche'. See: *Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC*, *supra* note 10, rec. 70.

12 Folkert Wilman, "The EU's system of knowledge-based liability for hosting service providers in respect of illegal user content – between the e-Commerce Directive and the Digital Services Act," *JIPITEC* 12, 1 (2021): 322.

implications of the Article 17 of the CDSM Directive, many scholars tend to conclude that the inevitable practical option to conciliate Article 17 of the CDSM Directive with the online content-sharing service platform structure is the application of algorithmic content moderation[13].

Potential implications of algorithmic content moderation in the online content-sharing service platforms raise a threat in the EU copyright law domain – elimination of parody-based limitation of copyrights set in Articles 2 – 4 of the InfoSoc Directive[14]. The risk of over-blocking parody creative content stems from the fact that, structurally, parody is based on a reproduction of another creative content represented humorously. This criterion is not in itself conceivable by an algorithmic content moderator[15]. As mentioned above, Article 17 (7) of the CDSM Directive maintains protection of parody-based limitation of copyrights set in Articles 2 – 4 of the InfoSoc Directive[16]. However, concerns are raised whether such clause is sufficient to ensure the users the freedom to disseminate parody-based derivative works. The premise for such concerns is that Article 17 (7) of the CDSM Directive does not reflect on a situation when the online content-sharing service provider might use a convenient algorithmic content recognition tool for derivative content upload inspection that fails to identify nuances separating parody-based derivative content from illicit copyrighted content reproductions[17].

This argument extends to the point that some scholars dismiss the functioning of Article 17 (7) of the CDSM Directive completely and posit that Article 17 (7) of the CDSM Directive is set to achieve 'false positives' unless it further regulates distinguishing legitimate parody-base creative work uses from illegal practices via algorithmic content recognition tools[18]. In other words, there is a lingering doubt that protection of parody-based limitation of copyrights as per Article 17 (7) of the CDSM Directive might not function expeditiously. Thus, Article 17 of the CDSM Directive represents a potentially paradoxical outcome when the aim to strengthen creators' economic interests may deny parody creators to make their parody works available to the public using online content-sharing service platforms in the EU[19]. The EU copyright law might become defective, denying the paradigm that "one's expressed idea becomes a source for further creation"[20].

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13 Martin Husovec, "The Promises of Algorithmic Copyright Enforcement: Takedown or Staydown? Which Is Superior? And Why?", *Journal of Law and the Arts* 42, 53 (2018): 53-60; Felipe Romero Moreno, "Upload filters' and human rights: implementing Article 17 of the Directive on Copyright in the Digital Single Market," *International Review of Law, Computers, and Technology* 34, 2 (2020): 174-178; Gerald Spindler, "The Liability system of Art. 17 DSMD and national implementation: Contravening prohibition of general monitoring duties?", *JIPITEC* 10 (2019): 344.

14 *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*, *supra* note 10, art. 5 sec. 3(k); Christophe Geiger and Bernd Justin Jütte, *supra* note 7, 517, 558.

15 Joshua L. Weese, William H. Hsu, Jessica C. Murphy and Kim Brillante Knight, "Parody Detection: An Annotation, Feature Construction, and Classification Approach to the Web of Parody": 71; in: Shalin Hai-Jew, *Data Analytics in Digital Humanities*, Shalin Hai-Jew (Cham: Springer International Publishing AG, 2017).

16 *Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC*, *supra* note 7, art. 17 sec. 7.

17 Sevra Guler Guzel, "Article 17 of the CDSM Directive and the Fundamental Rights: Shaping the Future of the Internet," *European Journal of Law and Technology* 12, 1 (2021): 22-23.

18 Sebastian Felix Schwemer and Jens Schovsbo, "What is Left of User Rights? – Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime": 580-582; in: Paul Torremans, ed., *Intellectual Property Law and Human Rights, 4th edition* (Alphen aan den Rijn: Wolters Kluwer, 2020).

19 Mark J. Thronson, Gabrielle S. Roth and Jon D. Grossman, *Intellectual Property Legal Opinions. Second Edition* (New York: Wolters Kluwer, 2021), 87-88.

20 Giancarlo Frosio, *Reconciling copyright with cumulative creativity* (Cheltenham: Edward Elgar Publishing, 2018), 22.

A circumstance that adds complexity to the matter is the recently enacted Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (DSA). DSA regulates that the concept of 'illegal content' in the DSA includes "the non-authorized use of copyright protected material" and that DSA regulation covers caching services, which by provided technical definition, amount to online content sharing service, thus making it potentially applicable to such service providers[21]. DSA includes a few remarkable rules: it reintroduces the no-general-monitoring clause for the online content-sharing service providers (Article 7), but it also installs 'notice-and-action' mechanisms for the service providers as a service-level obligation (Article 14)[22]. With regards to the no-general-monitoring rule, the DSA regulation seems to be more moderate, but the notice-and-action mechanisms obligation raise concerns regarding the right to disseminate creative parody works as installation of digital notice-and-action mechanisms creates a possibility of abusive notifications and subsequent automated content over-blocking[23].

The execution of the right to parody creative works dissemination in the EU content-sharing services sector is potentially imperiled: 1) Article 14 of the DSA does not give clearance that ability of parody creators to disseminate their creative parody works in the online content-sharing service platforms will not be restricted by automated content blocking; and, 2) the current wording of Article 17 (7) of the CDSM Directive does not provide definite instructions how parody-based creative content dissemination in the online content-sharing service platforms should be protected against possible algorithmic content moderation practices.

From the EU copyright law perspective, it is a potentially severe shortcoming. As CJEU AG Yves Bot puts it, restricting the functioning of the exceptions of copyrights set in Articles 2 – 4 of the InfoSoc Directive amounts to the inadequacy of the EU copyright law itself[24]. Thus, analysis of Article 17 of the CDSM Directive and DSA regulation regarding creative parody content dissemination could be advantageous in balancing the EU copyright law for the online content-sharing service sector, namely: 1) by identifying critical elements of the regulation that formulates risks of creative parody content over-blocking in the online content sharing service platforms; 2) by determining the efficacy of the newly-regulated protection of parody-based creative content dissemination in the online content-sharing service platforms; and 3) by introducing possible solutions to improve practical safeguards for parody creative content dissemination in the online content sharing service platforms.

The research presented in this article discusses the algorithmic content management measures that may stem from Article 17 of the CDSM Directive and Article 14 of the DSA and inspects how such measures impact the possibility of freely disseminating creative parody content as per Article 5 (3)(k) of the InfoSoc Directive. The following

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21 *Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance)*, Official Journal (2022, no. L-277), art. 5 sec. 1, recital 11.

22 *Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance)*, Official Journal (2022, no. L-277), art. 7, art. 14; Gerald Spindler, *Digital services act: Adapting commercial and civil law rules for commercial entities operating online: Legal assessment. Research Paper* (Brussels: European Union, 2020), 202.

23 Jörg Wimmers, "The Out-of-court dispute settlement mechanism in the Digital Services Act: A disservice to its own goals," *JIPITEC* 12, 4 (2021): 427.

24 Sky Österreich GmbH v. Österreichischer Rundfunk, Opinion of Advocate General Bot, Court of Justice of the European Union (2012, no. C-283/11).

research goes through regulation of Article 17 (7) of the CDSM Directive seeking to uncover the practical implementation of provided protection to the parody-based creative work dissemination in the online content-sharing service platforms. The analysis also dissects functional and structural parody creative work criteria, aiming to deliver insight into whether such criteria can be transposed into legislative strategies to prevent the over-blocking of creative parody content and secure a more balanced and effective use of parody copyright exception in the online content sharing service platforms.

1. ARTICLE 17 OF THE CDSM DIRECTIVE: THE GENERAL CONTENT MONITORING AND LACK OF SAFEGUARDS FOR THE PARODY CREATIVE CONTENT DISSEMINATION

1.1. Article 17 of the CDSM Directive impact on the general content monitoring application

The essential change brought by the Article 17 of the CDSM Directive regarding copyright protection and copyright infringement identification is the shift of responsibility from copyright holders to the online content-sharing service providers. As mentioned in the introduction, the combined effect of Article 17(1) and Article 17(4) of the CDSM Directive renders that: the online content-sharing service providers make an act of making a creative work available to the public in each case where the user uploads a creative work via their platform and are liable for such unauthorized acts unless they made best efforts to obtain an authorization, to ensure unavailability of specific works with relevant and necessary information and acted expeditiously upon receiving notice to disable access to or remove the notified works and prevent future uploads of such works[25]. However, without applying measures laid out in Article 17(4) of the CDSM Directive, any content made available via the platform becomes a potential subject to the liability of the online content-sharing service providers. Article 17 of the CDSM Directive represents an imperative manner of obligations, not leaving any space for the online content-sharing service providers to avoid liability in any way other than complying with conditions set in Article 17(4) of the CDSM Directive[26]. Thus, a pressure of liability is generated for online content-sharing service providers.

One way to avoid liability for copyright infringing content dissemination is the execution of license aggregation mechanisms and finding ways of "obtain authorization from the rights holders referred to in Article 3(1) and (2) of InfoSoc Directive, for instance by concluding a licensing agreement' as set in Article 17(1) paragraph 2 of the CDSM Directive"[27]. However, two fundamental problems persist. Firstly, there is opacity regarding the concept of authorization and how online content-sharing service providers would determine the authenticity of digital authorization provided by the user[28]. Secondly, it remains to be seen how authorization would be obtained regarding the con-

[25] *Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC*, *supra* note 7, art. 17 sec. 1, art. 17 sec. 4.

[26] Eleonora Rosati, "The legal nature of Article 17 of the Copyright DSM Directive, the (lack of) freedom of Member States and why the German implementation proposal is not compatible with EU law," *Journal of Intellectual Property Law and Practice* 15, 11 (2020): 874.

[27] *Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC*, *supra* note 7, art. 17 sec. 1; Joao Pedro Quintais, "The New Copyright in the Digital Single Market Directive: A Critical look," *European Intellectual Property Review* 42, 1 (2020): 35-39.

[28] Gerald Spindler, *supra* note 11, 343-48.

tent already made available to the public via the online content-sharing platform. Since there is no reliable method to acquire authorization via reaching out to the users, the online content-sharing service provider would have to remove all the preexisting content or experience overwhelming transaction costs attempting to acquire all the authorizations from the users[29]. Therefore, the licensing aggregation option in Article 17(1) Paragraph 2 of the CDSM Directive could be more convenient for online content-sharing service providers.

The other option to avoid liability for copyright-infringing content dissemination in online content-sharing service platforms is compliance with conditions set in Article 17(4) of the CDSM Directive[30]. Since the online content-sharing service providers must cumulatively demonstrate their best efforts to obtain authorization and ensure the unavailability of specific works following high industry standards of professional diligence, complying with such requirements from a technical perspective becomes possible only with the application of algorithmic content moderation[31].

Algorithmic content moderation contains technological equipment to serve both tasks. Firstly, a copyrighted creative content sample is registered in a specific database (black box). By setting a service rule to provide (authorize) protected creative content files to the black box, the online content-sharing service provider starts to collect the catalog of protected and fingerprinted creative content[32]. An algorithmic content recognition tool is activated to moderate the online content-sharing service platform. The algorithmic content recognition tool applies the fingerprints given to the uploaded protected creative content regarding each subsequent creative content provided to the platform by the users. Any content coincidence automatically refers to an unauthorized creative content reproduction. The user is denied the option of making a particular creative content available to the public via the hosted platform[33].

Complying with the rules of Article 17(4) of the CDSM Directive by applying algorithmic content moderation tools is the most economically justified solution. Any alternative measures to satisfy the rules of Article 17(4) of the CDSM Directive in comparison are deemed incomprehensible[34]. Algorithmic content moderation not only ticks all the boxes of Article 17(4) of the CDSM Directive but also does it in a fashion that is sustainable for online content-sharing service providers and does not include high transaction costs. Thus, the impact of Article 17 of the CDSM Directive on the algorithmic content moderation in online content-sharing service platforms is provoking not only due to the scope of content monitoring obligations but also due to limited technological options to fulfill these obligations efficiently.

1.2. Risk of parody creative content over-blocking

At first glance, implementing algorithmic content moderation in online content-sharing service platforms might seem like a viable input in enhancing the digital protection

29 Giancarlo F. Frosio, "Reforming the C-DSM Reform: a User-Based Copyright Theory for Commonplace Creativity," *IIC – International Review of Intellectual Property and Competition Law* 51, 6 (2020): 720.
30 Joao Pedro Quintais, *supra* note 22, 35-39.
31 Eleonora Rosati, "Five considerations for the transposition and application of Article 17 of the DSM Directive," *Journal of Intellectual Property Law and Practice* (2021): 269-270; Joao Pedro Quintais and Martin Husovec, "How to License Article 17 of the Copyright in the Digital Single Market Directive? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms," *GRUR International* 4 (2021): 338.
32 *Ibid*., 338.
33 Joao Pedro Quintais and Martin Husovec, *supra* note 31, 337-339; Martin Husovec, *supra* note 11, 261.
34 Giancarlo Frosio, *supra* note 24, 23; Sevra Guler Guzel, *supra* note 17, 17-20.

of copyrights set in Articles 2 – 4 of the InfoSoc Directive and as an improvement of the overall EU copyright law. But Article 17 of the CDSM is also viewed as a source of over-blocking creative content dissemination, which stems from the parody exception set in the Article 5 (3)(k) of the InfoSoc Directive[35].

One must understand creative parody content's structural and functional peculiarity to understand the issue at stake. As AG Saugmandsgaard Øe puts it, whether the information brought to the service provider is sufficient to render the information illegal "depends on all the circumstances of each case, in particular the degree of precision of the notification, the complexity of the analysis required to understand the illegality of the information and the resources available to the provider"[36]. Identifying the legality of creative content based on parody exception, set in Article 5 (3)(k) of the InfoSoc Directive, requires complex content analysis[37].

The first problem of algorithmic parody detection relates to the functional aspect of creative works. The function of parody is a subjective humorous message of a creative work that involves a parody object – usually, a reproduction of a copyrighted creative work or a fragment of such work that serves as an object of humor, satire, or parody included in the work[38]. The function of parody or other similar humorous genres is essential for creative work to qualify as serving the use of parody[39]. In the case Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others, the CJEU held that essential characteristics of parody in creative work are to ,evoke an existing work while being noticeably different from it and secondly, to constitute an expression of humor or mockery[40]. AG Cruz Villalon describes the functional aspect of parody as if "parody pursues a particular effect, almost as a necessary consequence of the reworking of an earlier work"[41]. Thus, the functional aspect of creative parody works is best described as a complex internal design of creative work when the author sends a humorous or mockery message to the audience using reproduced creative work[42].

The problem regarding algorithmic functional parody aspect parody detection is that the functional parody aspect is subjective. AG Cruz Villalon stresses that the functional aspect of parody also seeks external parody effect – selective reception that must have a particular effect on the addressees, at the risk of being a complete failure[43]. The function of parody heavily relies on the reception of the humorous message in the cre-

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35 *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*, *supra* note 12, art. 5 sec. 3(k); Thomas Spoerri, "On Upload-Filters and other Competitive Advantages for Big Tech Companies under Article 17 of the Directive on Copyright in the Digital Single Market," *JIPITEC* 10, 2 (2019): 176.

36 Frank Peterson v Google LLC and Others and Elsevier Inc v Cyando AG ('YouTube v Cyando'), Opinion of Advocate General Saugmandsgaard Øe, Court of Justice of the European Union (2020, no. C-682/18 and C-683/18).

37 David E. Shipley, "Derivative Works And Making Sense Of The Maxim That "Others Are Free To Copy The Original. They Are Not Free To Copy The Copy," *University of Dayton Law Review* 44, 2 (2019): 235.

38 Daniël Jongsma, "Parody after *Deckmyn*. A comparative overview of the approach to parody under copyright law in Belgium, France, Germany, and the Netherlands," *International Review of Intellectual Property and Competition Law* 48 (2017): 655.

39 Philippe Laurent, "The concept of parody and the legitimate interests of parodists and copyright holders," (September 2014) // http://copyrightblog.kluweriplaw.com/2014/09/08/the-concept-of-parody-and-the-legitimate-interests-of-parodists-and-copyright-holders/.

40 Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others, Court of Justice of the European Union (2014, no. C-201/13).

41 Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others, Opinion of Advocate General Cruz Villalon, Court of Justice of the European Union (2014, no. C-201/13).

42 Amy Lai, *The Right To Parody – Comparative Analysis of Copyright and Free Speech* (Cambridge: Cambridge University Press, 2019), 145; Tyler T. Ochoa, "Dr. Seuss, The Juice And Fair Use Revisited: Two Decades Of Parody And Satire In Copyright Law," *The Law Review of the Franklin Pierce Center for Intellectual Property* 59, 1 (2018): 240-42.

43 Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others, Opinion of Advocate General Cruz Villalon, Court of Justice of the European Union, *supra* note 36.

ative work, which entirely depends on the variety of how differently the users perceive and experience humor[44]. An algorithmic content recognition tool has no tangible criteria on which it could identify the function of parody within a creative work[45]. Algorithmic content recognition tools currently possess no technological capacity to identify humor *per se*[46].

Things get even more complicated regarding the structure of creative parody works. Structurally, parody creative works are derivative works that use intertextuality expression forms that integrate reproductions or samples of protected creative works[47]. AG Cruz Villalon refers to such reproductions as "the structural features of parody" and notes that parody "is always a copy" and "borrows elements from a previous work' that are 'essential to the meaning of the work," and the inclusion of unoriginal elements must always correspond to the intended effect of the parody[48]. Reproduced elements of a creative work serve as a critical structural feature of creative parody works – a parody object used to express the functional parody element (mockery). As mentioned, the algorithmic content recognition tools cannot recognize the functional aspect of parody (the lyrical parody element). However, using the black box database of fingerprinted protected creative works, the algorithmic content recognition tools will always qualify the content match between the fingerprinted work and elements of fingerprinted work reproduced in a parody. The structural element of parody creative works creates parody content over blocking risk when implementing Article 17(4) of the CDSM Directive in the online content-sharing service platforms. AG Saugmandsgaard Øe notes that the intermediary providers' cannot be expected to make "independent assessments of the lawfulness of the information disseminated through their services"[49]. Thus, online content-sharing service providers are more than likely to apply automated content blocking whenever the algorithmic content moderation tools detect content matches and create the over-blocking issue[50].

Article 17(4) of the CDSM Directive requirements presuppose algorithmic content recognition tools in online content-sharing service platforms as the sole economically sustainable compliance and liability prevention option. However, the algorithmic content recognition tools can only make quantitative distinctions between creative works and cannot discern particular reproductions as serving the uses of parody, caricature, or pastiche[51]. The technology required to achieve requirements of Article 17(4) of the CDSM Directive sets preconditions for automated parody creative content over blocking.

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44 Daniël Jongsma, *supra* note 33, 655.
45 Robert Gorwa, Reuben Binns and Christian Katzenbach, "Algorithmic content moderation: Technical and political challenges in the automation of platform governance," *Big Data and Society* 7, 1 (2020): 8.
46 Michael Dellwing, "The Continuities of Twitter Strategies and Algorithmic Terror," *Wiley Online Library* (January 2022): 483 // DOI: 10.1002/symb.585.
47 Thomas Spoerri, *supra* note 30, 182.
48 Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others, Opinion of Advocate General Cruz Villalon, Court of Justice of the European Union, *supra* note 36.
49 Republic of Poland v European Parliament and Council of the European Union, Opinion of Advocate General Saugmandsgaard Øe, Court of Justice of the European Union (2021, no. C-401/19).
50 Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV, Court of Justice of the European Union (2012, no. C-360/10).
51 Finn J. Hümmer, "Balancing Article 17 CDSMD and the Freedom of Expression," *Stockholm Intellectual Property Law Review* 5, 2 (2022): 25.

1.3. The practical implementation of Article 17(7) of the CDSM Directive and possible outcome of parody creative content dissemination protection

Preconditions for algorithmic content moderation set in Article 17(4) of the CDSM Directive affirm the importance of Article 17(7) of the CDSM Directive to parody creative content creators to provide practically effective and balanced parody creative content dissemination safeguard against algorithmic content moderation and potential over blocking. Paragraph 1 of Article 17(7) of the CDSM Directive notes that "the cooperation between online content-sharing service providers and rightholders shall not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation". Article 17(7)(b) regulates that EU member states shall ensure that users in each Member State are able to rely on existing exceptions or limitations for uses of parody, caricature or pastiche when uploading and making available content generated by users on online content-sharing services[52]. According to C. Geiger and B. J. Ju¨tte, Paragraph 1 of Article 17(7) of the CDSM Directive "should be read to the effect that initial (read: preventive) filtering of content should not lead to the unavailability of works the upload of which is lawful or non-infringing"[53]. But is Article 17(7) of the CDSM Directive current wording set to prevent this?

In simple terms, Article 17(7) of the CDSM Directive has no guidelines for the online content-sharing service providers how the process of differentiating parody-based creative content from illegal uses of copyrighted content should take place in the online content-sharing service platforms[54]. The problem is that apart from the imperative set by paragraph 1 of Article 17(7) and Article 17(7)(b) of the CDSM Directive there is literally no regulation that integrates parody-based derivative creative content detection through the process of algorithmic content moderation. It should be noted that Article 17(7) of the CDSM Directive has to be implemented by the EU member states in accordance with Article 17(4) of the CDSM Directive. This means that essentially any practical outcome that will stem out of online content-sharing service providers trying to comply with obligations set in Article 17(4) of the CDSM Directive will simultaneously condition the practical technological obstacles that regulation Article 17(7) of the CDSM Directive will have to overcome to sustain safeguards for parody-based creative content dissemination in the online content-sharing service platforms.

At face value, Article 17(7) of the CDSM Directive cannot be viewed as an effective safeguard for parody-based creative content dissemination in the online content-sharing service platforms simply because it does not respond to the Article 17(4) of the CDSM Directive practical implementation scenarios (that will more than likely include algorithmic content moderation and does not respond in a way and potential parody-based creative content over blocking) in a way that would allow parody creators to experience parody-based creative content upload legitimacy inspection as expeditious and as rapid as the algorithmic content moderation technology itself. Without additional instructions about how the algorithmic content moderation process should involve parody creative content detection, the efficacy of Article 17(7) of the CDSM Di-

[52] *Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC*, *supra* note 7, art. 17, sec. 7, para. 1., art. 17, sec. 7(b).
[53] Christophe Geiger and Bernd Justin Jütte, *supra* note 7, 539.
[54] Sevra Guler Guzel, *supra* note 17, 25.

rective is bound to become out a victim of algorithmic content moderation technology shortcoming only to make quantitative distinctions of moderated content and not be able to recognize parody, caricature or pastiche indications and qualities[55].

In spite of that, it cannot be stated that paragraph 1 of the Article 17(7) and Article 17(7)(b) of the CDSM Directive does not provide any protection over parody-based creative content dissemination in the online content-sharing service platforms. As mentioned before, Article 17(7) and recital 70 of the CDSM Directive assert the mandatory nature of protection of exceptions and limitations to copyrights set in Article 17(7) of the CDSM Directive[56]. It posits imperative for EU member states to transpose Article 17(7) of the CDSM Directive in a way that secures the right for parody-based creative content creators to enforce their right to content dissemination via online content-sharing service platforms in court. However, considering that accomplishing obligations set in Article 17(4) of the CDSM Directive requires algorithmic content moderation, right to enforce parody-based creative content dissemination against an online content-sharing service provider in practice means that a parody creator will have to bring his case of denied rights as per Article 17(7) of the CDSM Directive to court each time a parody creator intends to make a parody-based creative work available to the public. In this regard a 'mere defense' clause in Article 17(7) of the CDSM Directive, as J. Brieske puts it, is not practical anymore[57].

Infeasibility of Article 17(7) of the CDSM Directive is even more apparent considering not only occasional attempts to make parody creative content available on the online content-sharing service platforms for self-expression merits, but also taking into account parody creators who monetize their parody creative content via the online content-sharing service platforms and deliver continuous creative output as a business model. Monetization of parody creative content on the platforms can be based on various strategies, for instance, advertising integration, attraction of user audience, etc.[58] The key for sustaining such a business model is to have the conditions of economically feasible and expeditious creative content upload infrastructure – a setting that cannot be derived from the present wording of Article 17(7) of the CDSM Directive. The practical judicial defense threshold is simply too high for economic exploitation of parody-based creative content dissemination on online content-sharing service platforms. If parody-based creative content upload procedure efficacy is deteriorated to a course through judicial protection, then Article 17(7) of the CDSM Directive provides no feasible ways to protect the right to disseminate parody-based creative content in the online content-sharing service platforms, be it for self-expression or even more so for commercial premises. In other words, Article 17(7) of the CDSM Directive provides no backup for parody authors on a user-rights level[59].

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55 Finn J. Hümmer, *supra* note 51, 25.

56 *Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC*, *supra* note 7, art. 17 sec. 7, rec. 70; Federico Ferri, *supra* note 5, 35.

57 Jasmin Brieske, "The Digital Services Act and Its Impact on the Right to Freedom of Expression: Special Focus on Risk Mitigation Obligations," *The Journal of World Intellectual Property* (2023): 7 // DOI: https://doi.org/10.1111/jwip.12286.

58 Mark Marciszewski, "The Problem of Modern Monetization of Memes: How Copyright Law Can Give Protection to Meme Creators," *University of Virginia School of Law* 9, 1 (2020): 6-7 // DOI: https://doi.org/10.58948/2329-9894.1076.

59 Jens Schovsbo, "Making sure copyright works – safeguarding authors' and users' rights": 219; in: Gustavo Ghidini and Valeria Falce, *Reforming Intellectual Property* (Cheltenham: Edward Elgar Publishing Limited, 2022).

However, the real safeguard effect of Article 17(7) of the CDSM Directive could potentially be wider than what is contained in the wording of the article itself. Article 17(9) of the CDSM Directive posits that "Member States shall provide that online content-sharing service providers put in place an effective and expeditious complaint and redress mechanism that is available to users of their services in the event of disputes over the disabling of access to, or the removal of, works or other subject matter uploaded by them"[60]. In the EU copyright law doctrine, there is a notion that installation of the complaint and redress mechanisms referred in the Article 17(9) of the CDSM Directive might act as conformity with safeguards of Article 17(7) of the CDSM Directive. As E. Rosati points out, while in-advance protection of legitimate uses of copyrighted content is preferred, that might not necessarily the requirement of Article 17(7) of the CDSM Directive and reliance on complaint and redress mechanisms for users might be sufficient actions of the online content-sharing service providers complying with Article 17(7) of the CDSM Directive[61]. In other words, the preventive parody-based creative content over blocking measures set in Article 17(7) of the CDSM Directive might be reached in an *ex-post* manner following the procedures set in Article 17(9) of the CDSM Directive as the CDSM Directive does not explicitly object[62]. Installation of such mechanisms would not neglect the right for parody creators to defend their right to parody-based creative content dissemination before the court[63].

But in terms of practical implementation, interpretation the content of Article 17(7) of the CDSM Directive with respect to Article 17(9) of the CDSM Directive likely does not provide any additional safeguards beyond the right to judicial protection as discussed above. The problem is that the CDSM Directive does not detail further and particular requirements for complaint and redress mechanisms' functioning[64]. This leaves the space for the online content-sharing service providers to construct the complaint and redress mechanisms in an economically viable way, i.e. handling the complaints by using algorithmic content moderation and matching notified content with flagged protected content where overlaps of copyrighted content for parody purposes will not be identified. Although theoretically redress and complaint mechanisms could include human moderators in content review process, due to burden of costs and enormous scope of daily content uploads and potential complaints it's practically unimaginable that parody-based creative content dissemination protection can be executed expeditiously by human moderators or even executed at all[65].

To conclude with, Article 17(7) of the CDSM Directive cannot be regarded as providing efficient safeguards for parody-based creative content dissemination in the online content-sharing service platforms. At the core, Article 17(7) of the CDSM Directive definitely provides judicial protection of exceptions and limitations to exclusive copyrights stated therein. Unfortunately, it conveys that Article 17(7) of the CDSM

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60 *Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC*, *supra* note 7, art. 17, sec. 9.

61 Eleonora Rosati, *supra* note 31, 268-270.

62 Joao Pedro Quintais, Giancarlo Frosio, Stef van Gompel, P. Bernt Hugenholtz, Martin Husovec, Bernd Justin Jütte and Martin Senftleben, "Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations From European Academics," SSRN (2019): 4 // DOI: http://dx.doi.org/10.2139/ssrn.3484968.

63 Federico Ferri, *supra* note 5, 35.

64 Jens Schovsbo, *supra* note 59, 219-220.

65 Christophe Geiger and Bernd Justin Jütte, "The EU Commission's Guidance on Article 17 of the Copyright in the Digital Single Market Directive – A Guide to Virtue in Content Moderation by Digital Platforms?" *SSRN* (2021): 11 // DOI: http://dx.doi.org/10.2139/ssrn.3876608.

Directive does not contain any practical safeguards for parody-based creative content dissemination in the online content-sharing service platforms that are relatable to frequent collaboration with the online content-sharing service platforms, particularly when it comes to commercial parody-based creative content dissemination. Potential backing of Article 17(9) of the CDSM Directive does little to nothing to help the matter since in contains no regulation to counter the mismatch between parody-based creative content detection and algorithmic content moderation. Therefore, all of the above justifies the 'declaratory' label for Article 17(7) of the CDSM Directive protection[66].

2. ARTICLE 14 OF THE DSA: THE EFFECT OF THE PARODY EXCEPTION IN THE HANDS OF USERS AND PLATFORM SELF-ACTIVITY?

2.1. Platform liability for copyright infringements through notice-and-action mechanisms and systemic risk management obligations

At first glance and comparing to Article 17 of the CDSM Directive, the DSA regulation takes an entirely different direction in setting the scope of online content-sharing service platform liability for copyright infringements. Article 5(1) of the DSA determines that, where an information society service consists of the storage of information provided by a recipient of the service, the service provider shall not be liable for the information stored at the request of a recipient of the service, on conditions that the service provider does not have actual knowledge of illegal activity or awareness of facts or circumstances from which such activity is apparent and acts expeditiously to remove or disable access to illegal content upon gaining knowledge of it[67].

Essentially, Article 5(1) of the DSA reintroduces the safe-harbor provision for the online content-sharing service providers set in Articles 12-14 of the E-commerce directive[68]. Furthermore, Article 7 of the DSA prohibits general monitoring obligations also reinstating the prohibition in Article 15(1) of the E-commerce directive[69]. In doing so, DSA takes a direction opposite from the *ex-ante* liability regime set in Article 17(4) of the CDSM Directive and confirms the role of online content-sharing service providers as neutral technical intermediaries[70]. However, in the context of copyright protection, this is true only up to a point.

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66 Sebastian Felix Schwemer and Jens Schovsbo, *supra* note 18, 576.

67 *Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance)*, *supra* note 16, art. 5, sec. 1.

68 *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)*, *supra* note 3, art. 12-14;

69 *Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance)*, *supra* note 16, art. 7;
Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), *supra* note 3, art. 15; Alexander Peukert, Martin Husovec, Martin Kretschmer, Peter Mezei and Joao Pedro Quintais, "European Copyright Society – Comment on Copyright and the Digital Services Act Proposal," *IIC – International Review of Intellectual Property and Competition Law* 53 (2022): 367 // DOI: https://doi.org/10.1007/s40319-022-01154-1.

70 Joan Barata, "The Digital Services Act and Its Impact on the Right to Freedom of Expression: Special Focus on Risk Mitigation Obligations," (July 2021) // https://dsa-observatory.eu/2021/07/27/the-digital-services-act-and-its-impact-on-the-right-to-freedom-of-expression-special-focus-on-risk-mitigation-obligations/.

DSA introduces an elaborate illegal content moderation system often referred to as notice-and-action procedure[71]. DSA defines the concept of 'illegal content' as including unauthorized uses of copyrighted material[72]. Article 14(1) of the DSA posits that "providers of hosting services shall put mechanisms in place to allow any individual or entity to notify them of the presence on their service of specific items of information that the individual or entity considers to be illegal content" and that such mechanisms must be easy to access, user-friendly and allow submissions of notices exclusively by electronic means[73]. In addition, the notice mechanisms must facilitate electronic submissions that include an explanation of the reasons why the individual or entity considers the information in question to be illegal content, a clear indication of the electronic location of that information, in particular the exact URL or URLs, and, where necessary, additional information enabling the identification of the illegal content, the name and an electronic mail address of the individual or entity submitting the notice and a statement confirming the good faith belief of the individual or entity submitting the notice that the information and allegations contained therein are accurate and complete[74]. Decisions regarding noticed information must be made in a timely, diligent, and objective manner[75].

Furthermore, Article 14(3) regulates that notices submitted via notice-and-action systems are considered to give the online content-sharing service provider awareness or knowledge of the noticed information unit to remove the safe-harbor liability exemption as per Article 5(1) of the DSA[76]. Thus, upon receiving a notice, the online content-sharing service providers become pressured to analyze the information unit to prevent copyright infringements and avoid liability[77].

A novel pattern of online content-sharing service platform liability emerges. Under Article 17(4) of the CDSM Directive, the scope of online content-sharing service provider liability for copyright infringements is determined by the number of content units made available on the hosted platform (*erga omnes* liability). Under Article 14 of the DSA, on the other hand, the scope of the online content-sharing service provider liability is determined *ad hoc* based on notices submitted by the users via the notice-and-action mechanisms. Structurally, the online content-sharing service providers are in a somewhat asymmetric position: the users have a one-sided right to determine the scope and intensity of copyright infringement investigations and potential liability extent.

Thus, compared to Article 17(4) of the CDSM Directive, the combined force of Articles 5 and 14 of the DSA forms paradoxical liability conditions for online content-sharing service providers. Whereas Article 17(4) of the CDSM Directive essentially imposes

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71 Ilaria Buri and Joris van Hoboken, "*The Digital Services Act (DSA) Proposal: a critical overview,*" (October 2021) // https://dsa-observatory.eu/wp-content/uploads/2021/11/Buri-Van-Hoboken-DSA-discussion-paper-Version-28_10_21.pdf.

72 *Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance)*, *supra* note 16, rec. 12.

73 *Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance)*, *supra* note 16, art. 14, sec. 1.

74 *Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance)*, *supra* note 16, art. 14, sec. 2.

75 *Ibid*., art. 14, sec. 6; Pietro Ortolani, "The resolution of content moderation disputes under the Digital Services Act," *Giustizia Consensuale* 2 (2022): 540-542.

76 *Ibid*., art. 14, sec. 3.

77 Ilaria Buri and Joris van Hoboken, *supra* note 53.

a general content monitoring obligation, Articles 5 and 14 impose a general obligation to perform specific content moderation upon receiving a notice from a user.

To add to the mixture, the DSA regulation introduces additional content moderation obligations for very large online content-sharing service providers. One of the three systemic risks through misuse of the online content-sharing services is considered to be dissemination of illegal content[78]. Article 27(1) paragraph a of the DSA requires very large online platforms to put in place reasonable, proportionate, and effective mitigation measures tailored to the specific systemic risks, such as adapting content moderation or recommender systems, their decision-making processes, the features or functioning of their services, or their terms and conditions[79]. However, precise requirements towards content assessment procedures and notice-and-action mechanisms remain absent[80]. In this regard, potential extent of notice-and-action procedures and the fact that very large online content-sharing service providers will have to assess the whole range of illegal content detailed in recital 57 of the DSA, will likely lead to decision-making processes using algorithmic content moderation. As DSA doesn't introduce any precise safeguards for parody-based creative content qualification, parody-based creative content dissemination is in potential jeopardy due to Articles 26-27 of the DSA.

Safeguards for parody-based creative content dissemination particularly in very large online content-sharing service platforms are essential for parody creators. The large-scale availability of user uploaded content offered by the largest online content-sharing service platforms globally amounts to potential of attracting more users and generating more advertising revenue[81]. In other words, the very large online content-sharing service platforms such as Youtube, essentially provide conditions for economic exploitation of parody-based creative content.

2.2. Management of abusive content notification practices and systemic risks

At first, the general obligation for the online content-sharing service provider to be able to perform specific content moderation upon receiving a notice from a user in comparison to the general content monitoring obligation is much more 'ergonomic' in its application. An argument can be made that Article 14 of the DSA 'actualizes' the scope of content moderation by reducing the liability of the online content sharing service providers only to those instances where an electronic notice regarding a particular information unit is made via the platform to its host. It implies a sort of 'public spirit' based copyright infringement prevention where copyright infringement analysis cases are decided directly by the user's actions and subsequent liability to the platform.

However, the word user is essential to bring up in regard to the risk of abusive practices. The notice-and-action mechanism requirements in Article 14(1) of the DSA do not detail at further length what circle of subjects are permitted to submit notices regarding illegal content and what subjects are not permitted. The wording of Article 14(1) of the DSA openly allows 'any individual or entity' to submit notices regarding

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78 *Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance)*, *supra* note 16, rec. 57, art. 26, sec. 1.

79 *Ibid*., art. 27, sec. 1.

80 Alexander Peukert, Martin Husovec, Martin Kretschmer, Peter Mezei and Joao Pedro Quintais, *supra note* 69, 369-370.

81 Henning Grosse Ruse-Khan, "Automated Copyright Enforcement Online: From Blocking to Monetization of User-Generated Content," *PIJIP Research Paper Series* 51 (2020): 6.

potentially illegal information made available to the public via the platform[82]. In doing so, Article 14(1) of the DSA weakens the effectiveness of the copyright infringement prevention ergonomy and lays the perfect foundation for abusive practices of users becoming able to overflow platforms with unjustified notices of illegal content[83].

It is more than likely that such abusive actions would take place. First of all, Article 14(1) of the DSA makes it convenient: the 'user-friendly' and electronic submission requirements form a comfortable setting for the abusers to submit notices, particularly bearing in mind that the online content-sharing services will probably comply with Article 14(1) of the DSA requirements by introducing electronic notice templates where the subject will only need to insert URL of the notified information unit and indicate basic contact information, specified in the Article 14(2) of the DSA. Secondly, the DSA does not require severe authentication, so the notices will more than likely be able to submit while using the fake contact information. Effectively, Article 14 of the DSA formulates conditions for anonymous notification of illegal content and implements tendencies for the users to submit notices without assessing whether such notices are substantiated[84].

In a scenario where the online content-sharing service provider is constantly overwhelmed with electronic notices regarding potentially illegal content, there is no possibility that the content analysis can use human moderators simply due to the volume of the online content-sharing service platforms and the potential scope of notices. It implies two possible outcomes of how the online content-sharing service providers will retort notice outbursts: 1) to apply automatic content blocking once the user has notified the content; and, 2) to apply algorithmic content moderation regarding the notified content[85].

In addition, the systemic illegal content risk management obligation set in Article 27(1) paragraph a of the DSA also makes the online content-sharing service providers inclined to apply algorithmic content moderation, perhaps towards all the content made available to the public via platforms. Considering the magnitude of the content catalog stored in very large online platforms such as Youtube, any manual content moderation option seems implausible. Such interactive content moderation tools as content recommender systems are unlikely to deliver fruitful results, mainly because they completely rely on user engagement[86].

It should be noted that recital 47 of the DSA requires the online content-sharing service providers to put in place "appropriate and proportionate safeguards" against misuse of submitting manifestly unfounded notices[87]. Recital 47 of the DSA goes on further to suggest that "under certain conditions, online platforms should temporarily suspend their relevant activities in respect of the person engaged in abusive behaviour"[88].

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82 *Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance)*, *supra* note 16, art. 14, sec. 1.

83 Jörg Wimmers, *supra* note 18, 427.

84 Daniel Holznagel, "A Self-Regulatory Race to the Bottom through Art. 18 Digital Services Act. How the DSA will introduce competition for the Meta Oversight Board (and the German FSM) and why we should be worried about this," (March 2022) // https://verfassungsblog.de/a-self-regulatory-race-to-the-bottom-through-art-18-digital-services-act/.

85 Stefan Kulk, *Internet and Intermediaries and Copyright Law: Towards a Future-proof EU Legal Framework* (Alblasserdam: Ridderprint, 2018), 50-51.

86 A. R. Lodder and Jorge Morais Carvalho, "Online Platforms: Towards an Information Tsunami with New Requirements on Moderation, Ranking, and Traceability," *European Business Law Review* 33, 4 (2022): 550.

87 *Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance)*, *supra* note 16, rec. 47.

88 *Ibid*.

However, these safeguards seem to be dismal regarding parody-based creative content dissemination protection in the online content-sharing service platforms.

Firstly, appropriate safeguard against misuse of submitting manifestly unfounded notices presumes inspecting facets of groundless submission act and unfounded illegal content, i. e. assessing the intention and the legality of notified content. While the abusive intention qualification task might be retorted with automatically banning the accounts of users that surpass a certain number of submitted notices per particular time period, assessing the legality of content might be an incredibly complex task requiring thorough evaluation of the context of the content[89]. Given the scope of supervised content, the online content-sharing service providers will find it more feasible to automatically block the notified content or apply algorithmic content moderation rather than confront the user submitting the notice[90]. Even in a structure where the online content-sharing service providers would set a threshold of notices deemed to be abusive practice by the user and apply suspension measures set in article 47 of the DSA, it would be unlikely to put a stop to unfounded notices as the online content-sharing service platforms usually make the conditions for easily and rapidly setting up a new feigned accounts and continue abusive practices.

In summary, the DSA regulation raises the likelihood of algorithmic content recognition tools application in online content-sharing service platforms in two instances: 1) to counter and manage potential illegal content notification overflows; and, 2) to secure compliance with systemic risk management requirements.

2.3. The risk of neglecting the parody exception with algorithmic content recognition tools

As mentioned in the previous section, Article 14 of the DSA presents a more moderate scope of content moderation than the one potentially formulated by Article 17 of the CDSM Directive. Nevertheless, even the more moderate user-dependent automatic content moderation application would potentially limit the ability of parody creators to disseminate their creative works via online content-sharing service platforms.

Firstly, creative parody works are subject to a more intense prejudice from the creators of parodied creative output. For instance, in the audiovisual sector, the empirical data shows that creative parody works on the Youtube platform tend to attract more copyright takedown attempts via notices primarily due to emotional motives behind such claims, mainly the creators being concerned that parody of a particular creative work is harmful to the reputation and commercial capacity of the parodied work[91]. It leads us to think the conditions to abusively notify copyright infringements created by Article 14 of the DSA mainly target parody creative (derivative) works.

Secondly, and most importantly, just like Article 17 of the CDSM Directive, Article 14 of the DSA does not include any algorithmic safeguards for the creative parody works to be differentiated from illicit uses in the context of algorithmic content moderation application. As discussed above, the main concern with Article 17 of the CDSM Directive regarding the protection of creative content dissemination for parody, caricature, and pastiche is regulatory vagueness regarding how the use of parody should be

89 Jörg Wimmers, *supra* note 23, 438.
90 *Ibid*., 440.
91 Kristofer Erickson and Martin Kretschmer, "This Video is Unavailable. Analyzing Copyright Takedown of User-Generated Content on YouTube," *JIPITEC* 9, 1 (2018): 86-87.

identified via algorithmic content moderation and presuming the inevitable use of such technology[92]. In other words, DSA regulation forms inclinations to introduce algorithmic content moderation tools but does not conceptualize creative parody works to compensate natural state of algorithmic tool inability to perceive parody[93].

Although Article 14 of the DSA represents an utterly different copyright infringement prevention concept that includes a much narrower application of liability for copyright-infringing content, ironically, it represents an identical regulatory problem to the one mentioned above and concerning Article 17 of the CDSM Directive. The issue at stake is complex in practice but simple in definition: since both Article 17 of the CDSM Directive and Article 14 of the DSA presuppose the application of the algorithmic content recognition tools, both regulations require the introduction of 'by design' algorithmic parody qualification rules[94].

The need to balance DSA content moderation rules with parody recognition provisions is magnified even further in the context of DSA systemic risk management obligations. Bearing in mind that these obligations will likely require proactive and technologically convenient solutions to monitor platform content, the DSA application might require general content moderation in the online content-sharing service platforms, and limitations of creative parody content dissemination might then expand to erga omnes creative parody content unrestricted to individual cases of notifications.

Regarding the restrictive impact on creative parody content dissemination on online content-sharing service platforms, the DSA regulation shares almost identical issues compared to Article 17 of the CDSM Directive: creative parody content will almost inevitably have to face the algorithmic content recognition marginal ability in order to separate the legality of creative work reproduction for parody. In turn, it is informative for the EU copyright legislator: balancing EU copyrights and their exceptions protection in the online content-sharing services sector must involve algorithmic parody detection rules.

3. ALGORITHMIC PARODY DETECTION: PARODY CRITERIA TRANSPOSITION INTO ALGORITHMIC PARODY DETECTION CRITERION

Effective creative parody work detection through algorithmic content recognition would benefit the entire EU online content-sharing services industry. Obviously, such achievement through regulation would benefit the parody creators. However, also it would be fruitful for online content-sharing service providers to use efficient copyright infringement prevention technologies that are timely with the service itself and, in doing so, to achieve long-term copyright infringement and value gap hindrance. The axis of algorithmic parody detection regulation is a two-step process: recognition of aspects conceptualizing parody and transformation into information units comprehensible to the algorithm of content unit comparison and differentiation therein or "translating parody into a set of instructions that can be executed on certain data sources"[95].

There are two possible directions when formulating such rules based on different categories of creative parody work qualities. One direction is to formulate algorithmic

92 Dan L. Burk, "Algorithmic Fair Use," *The University of Chicago Law Review* 86 (2019): 283.
93 Martin Senftleben, "Institutionalized Algorithmic Enforcement – The Pros and Cons of the EU Approach to UGC Platform Liability," *FIU Law Review* 14, 2 (2020): 313.
94 Maxime Lambrecht, "Free Speech by Design. Algorithmic protection of exceptions and limitations in the Copyright DSM directive," *JIPITEC* 68, 1 (2020): 69.
95 Niva Elkin-Koren, "Fair Use by Design," UCLA Law Review 64 (2017): 1095.

parody recognition criteria based on the functional aspect of parody – the parody effect[96]. Essentially it means shortlisting cosmetic or literary features of a parody creative work that should be algorithmically identified as humorous, and constituting a parody performance within an information unit. In other words, it means regulation using the bright-line principle of the strict definition of what content features presuppose the existence of parody[97].

However, algorithmic parody detection criteria formulation based on parody function recognition should be treated skeptically. Firstly, there is the issue of parody subjectivity: while in some instances particular domestic language (phraseology, quotations) can indicate parody intent, in other cases, such intent can perform without using such language[98]. Thus, regulating algorithmic parody detection criteria based on parody function is subject to a narrow understanding of parody function and parody expression perception bias[99]. Of course, there is the option to introduce the rule of the non-finite list of parody criteria. But such regulation would revert algorithmic parody detection to platform autonomy without safeguards of general and coherent parody qualification[100].

The other direction is to formulate algorithmic parody recognition criteria based on parody creative work structure (structure of derivative work) and focus on the quantitative aspects of creative work reproduction[101]. This legislative strategy has one tremendous advantage – it does not formalize the cosmetic aspect of the parody creative work. It focuses only on quantitative measures that indicate the balanced use of copyrighted work for the presumed use of parody. Therefore, the parody creators are not obliged to synthetically incorporate particular language for algorithmic parody qualification and formalize expression of parody function.

A perfect example is the German solution of implementing Article 17 of the CDSM Directive into national legislation, introducing the concept of algorithmically 'presumed legal uses'[102]. The presumed legal use criteria are laid out in Article 9(2) of the Act on the Copyright Liability of Online Content Sharing Service Providers (Act): content use is presumed legal if the content contains less than half of one or several other works or entire images combines this third-party content with other content, and uses the works of third parties only to a minor extent or, in the alternative, is flagged by the user as legally authorized (minor extent is defined as up to 15 seconds of a cinematographic work or moving picture, up to 15 seconds of an audio track, up to 160 characters of a text, and up to 125 kilobytes of photographic work, photograph or graphic[103].

Further defining the quantitative criteria of parody object reproduction is a question of future debate. Although the Act serves as a pioneer legal example in the EU of

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96 Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others, Opinion of Advocate General Cruz Villalon, Court of Justice of the European Union, *supra* note 40.

97 Maxime Lambrecht, *supra* note 94, 76-77.

98 Eleonora Rosati, "Just a matter of laugh? Why the CJEU decision in Deckmyn is broader than parody," *Common Market Law Review* 52, 2 (2015): 515.

99 Thomas Margoni, Joao Pedro Quintais and Sebastian Felix Schwemer, "Algorithmic propagation: do property rights in data increase bias in content moderation? Part I," (June 2022) // http://copyrightblog.kluweriplaw.com/2022/06/08/algorithmic-propagation-do-property-rights-in-data-increase-bias-in-content-moderation-part-i/?fbclid=IwAR2nGKcbP9e0IyUNei2Sdt_Pw8SYG5nA_zOPSa14px2kBpAZBqjrupI-DiHk.

100 Niva Elkin-Koren and Orit Fischman-Afori, "Rulifying Fair Use," *Arizona Law Review* 59 (2017): 180.

101 Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others, Opinion of Advocate General Cruz Villalon, Court of Justice of the European Union, *supra* note 40.

102 Finn J Hümmer, "The German transposition of Article 17 of the Copyright DSM Directive and its 'presumed legal use': incompatible with EU law or a model for balancing fundamental rights in the age of upload filters?," *Journal of Intellectual Property Law & Practice* 17, 1 (2022): 22-24.

103 Alexander Peukert and Jasmin Brieske, "Coming into force, not coming into effect? The Impact of the German Implementation of Art. 17 CDSM Directive on Selected Online Platforms," *Weizenbaum Journal of the Digital Society* (2022): 8-9 // DOI: 10.34669/wi.wjds/2.1.4.

integrating structural parody criteria into algorithmic content recognition tools, it also leaves space for possible improvements and balancing in the future. As CJEU AG Cruz Villalon notes, elements of imitation and elements of originality in a parody creative work must strike a certain balance to correspond to the intent of the parody. In doing so, the parody creators are left with graphic freedom to encapsulate parody function, with the only limit of expression being restricted quantitative use of the parody object reproduction[104]. Therefore, it is likely that structural limits of permitted uses of reproductions for parody purposes have space to be affirmed and expanded in the future developments of the EU copyright law.

CONCLUSIONS

This article reveals that Article 17 of the CDSM Directive and overall DSA regulation(s) in their application introduce the necessity for online content-sharing service providers to apply algorithmic content recognition tools to comply with copyright infringement prevention. Although in terms of liability-invoking content definition, DSA, in comparison to CDSM Directive, demonstrates a potential reduction of coverage, a technological proposition to avoid liability remains the same and algorithmic. The research aimed to accentuate this pattern in order to reveal a general practical consequence regulating copyright infringement prevention in online content-sharing service platforms: introducing online content-sharing service provider legal encumbrance for the copyright-infringing activities will always lead to the most technologically convenient compliance mechanism, which in turn will always lead to algorithmic content moderation.

The differences in liability mechanisms discussed in Article 17 of the CDSM Directive and Article 14 of the DSA only divulge that the scope of liability for content defines the coverage of algorithmic content moderation tools but is not decisive for the applicability of algorithmic content moderation tools. Thus, the research of liability mechanisms in the CDSM Directive and DSA respectively infers empirical expectations for the EU copyright legislator: eliminating safeguards from liability for copyright infringements to almost any extent will persuade the online content-sharing service provider to seek such safeguards with automatic long-term content moderation solutions. Therefore, any encumbrance-based incentive for copyright infringement prevention in the EU online content-sharing service sector shall be met with an algorithmic response. The legislator should make in-advance regulatory solutions to strike a balance between copyright protection and copyright exception protection.

The study reveals that the parody-based copyright exception, as per Article 5 (3)(k) of Directive 2001/29/EC, is wholly neglected in the DSA. Article 17(7)(b) of the CDSM Directive does indeed dictate no less than judicial protection for parody-based creative content dissemination in the online content-sharing service platforms. However, as presently constructed, Article 17(7) of the CDSM Directive does not secure parody-based creative content dissemination on a rapid service level against algorithmic content moderation, and in doing so, prospects of exploiting parody-based creative content for self-expression and particularly commercial reasons are vastly diminished in the online content sharing service platforms.

The natural relationship between algorithmic content recognition tools and creative parody content recognition is distant and conflicting. Algorithmic content recog-

[104] Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others, Opinion of Advocate General Cruz Villalon, Court of Justice of the European Union, *supra* note 40.

nition technology has no intrinsic capacity to pick out parody-incentivized derivative creative works from illicit reproductions, so creative parody works are at a technological disadvantage. Two critical findings stem from this dysfunctional parody creative content and algorithmic content recognition tools relationship: 1) when introducing liability-based incentives to copyright infringement prevention in the online content-sharing service platforms, the EU copyright legislator should expect absorption of creative parody content into presumed illegal copyrighted content reproductions; and, 2) treating online content-sharing service algorithmic content recognition tools as a natural, technological response to copyright infringement prevention obligations the EU copyright legislator should regulate mandatory definitions of creative parody content to apply in the algorithmic content recognition tool practice. Thus, this research shows the general strategic legislative guideline to secure the efficacy of Article 5 (3)(k) of the Directive 2001/29/EC in the EU online content-sharing service sector. Through regulatory formalization, the creative parody work definition should be integrated into algorithmic content recognition technology.

Empirical examples of how creative parody work qualification can effectively consolidate with algorithmic content recognition tools still need to be explored and are primarily a question of future debate. However, the structural parody criterion introduced by CJEU is the basis for algorithmic parody recognition regulation in line with the most efficient and coherent parody function recognition. Formulating algorithmic parody detection criteria based on reproduced and original content element architecture instead of elements of expression eliminates the risk of overly subjective and formalized parody function definition. It leaves space for unrestricted long-term parody function expression developments.

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