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## A United States Perspective on Digital Single Market Directive Art. 17

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## CHAPTER 17

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### **A United States Perspective on Digital Single Market Directive art. 17**

Jane C. Ginsburg\*

#### *Abstract*

*To a US appraiser, article 17 of the Digital Single Market Directive suggests the EU has learned from American mistakes (and from its own) in the allocation of internet intermediaries' liability for hosting and communicating user-posted content. Before the DSM Directive, art. 14 of the 2000 eCommerce Directive set out a notice-and-takedown system very similar to the regime provided in 17 U.S.C. section 512(c). Both regimes replaced the normal copyright default, which requires authorization to exploit works, with a limitation on the liability of service providers who complied with statutory prerequisites. Because the limitation ensured that service providers would not be liable in damages, both regimes effectively codified "Seek forgiveness, not permission."*

*Part I of this Chapter will outline the text and judicial interpretation of the US Online Copyright Infringement Liability Limitation Act's (OCILLA) notice and takedown provisions in order to explain the regime that one might view DSM Directive art. 17 as correcting. Part II will analyze the subsections of art. 17 in order to explain how art. 17 works, including how it changes the prior EU legal regime, and what it leaves untouched. Part III will compare art. 17 with US law in order to consider what the US might learn from the EU.*

#### Introduction

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To a US appraiser, article 17 of the Digital Single Market Directive suggests the EU has learned from American mistakes (and from its own) in the allocation of internet intermediaries' liability for hosting and communicating user-posted content. Before the DSM Directive, art. 14 of the 2000 eCommerce Directive<sup>1</sup> set out a notice-and-takedown system very similar to the regime provided in 17 U.S.C. section 512(c). Both regimes replaced the normal copyright default, which requires authorization to exploit works, with a limitation on the liability of service providers who complied with statutory prerequisites. Because the limitation ensured that service providers would not be liable in damages, both regimes effectively codified "Seek forgiveness, not permission."

In both the US and the EU, host service providers incurred no obligation to clear rights in copyrighted content posted by users who were not the authors of that content, nor did they have any "general obligation . . . to monitor the information that they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity."<sup>2</sup> Nor did the law in either the US or the EU require host service providers initially to block unauthorized content from being posted to their sites. Content would go up, and the burden of finding infringements and notifying the host service providers fell on authors and copyright owners. Once notified, it sufficed for the service to respond "expeditiously" to the notice by blocking access to or removing the infringing content.<sup>3</sup> This regime enabled the host provider to derive economic benefits from the availability of the infringing works on the service during the time lag between the initial posting of infringing content and notification and removal. And because other users could repost content when another's posting was blocked, these time lags kept the works available for extended periods.<sup>4</sup> This situation gave rise to what the EU Commission referred to as the "value gap,"<sup>5</sup> in which the

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<sup>1</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) ([OJ L 178, 17.7.2000, p. 1](#)).

<sup>2</sup> Compare eCommerce Directive (Directive 2000/31/EC), art. 15 (no general duty to monitor), with 17 USC sec 512(m)(1) (no duty to monitor, nor to "affirmatively seek . . . facts indicating infringing activity").

<sup>3</sup> Compare eCommerce Directive art. 14 (notice and take down), with 17 USC sec 512(c) (notice and take down).

<sup>4</sup> The CJEU ultimately endorsed a takedown/staydown remedy, which would require some proactive monitoring by the host service provider; such monitoring would not violate the art. 15(1) prohibition on imposing a "general duty to monitor"; see, Case C 18/18, *Eva Glawischnig-Piesczek v. Facebook Ireland Limited*, ECLI:EU:C:2019:821 (3 October, 2019) (defamation), para 53: "Article 15(1), must be interpreted as meaning that it does not preclude a court of a Member State from:

— ordering a host provider to remove information which it stores, the content of which is identical to the content of information, which was previously declared to be unlawful, or to block access to that information, irrespective of who requested the storage of that information . . ." Moreover, the blocking order can extend to blocking "access to that information worldwide within the framework of the relevant international law", *id.*

<sup>5</sup> See, e.g., European Commission, *Questions & Answers: EU negotiators reach a breakthrough to*

services reaped the value of works of authorship without compensating their creators or rightholders.<sup>6</sup>

Part I of this Chapter will outline the text and judicial interpretation of the US Online Copyright Infringement Liability Limitation Act's (OCILLA) notice and takedown provisions in order to explain the regime that one might view DSM Directive art. 17 as correcting. Part II will analyze the subsections of art. 17 in order to explain how art. 17 works, including how it changes the prior EU legal regime, and what it leaves untouched. Part III will compare art. 17 with US law in order to consider what the US might learn from the EU.

- I. How 17 USC sec. 512(c) works
- A. Overview of Section 512(c)

Section 512(c) sets forth cumulative prerequisites to a hosting service provider's qualification for exemption from direct or vicarious liability for copyright infringement.<sup>7</sup> The host must "not have actual knowledge that the material or an

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*modernise copyright rules*, 13 February 2019: "How will the new rules tackle the so-called 'value gap' between the creators and the online platforms?" [https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_19\\_1151](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_19_1151) (discussing "value gap" in connection with an earlier version of the text that became art. 17).

<sup>6</sup> See Recital 61:

In recent years, the functioning of the online content market has gained in complexity. Online content-sharing services providing access to a large amount of copyright-protected content uploaded by their users have become a main source of access to content online. Online services are a means of providing wider access to cultural and creative works and offer great opportunities for cultural and creative industries to develop new business models. However, although they enable diversity and ease of access to content, they also generate challenges when copyright-protected content is uploaded without prior authorisation from rightholders. Legal uncertainty exists as to whether the providers of such services engage in copyright-relevant acts, and need to obtain authorisation from rightholders for content uploaded by their users who do not hold the relevant rights in the uploaded content, without prejudice to the application of exceptions and limitations provided for in Union law. That uncertainty affects the ability of rightholders to determine whether, and under which conditions, their works and other subject matter are used, as well as their ability to obtain appropriate remuneration for such use. It is therefore important to foster the development of the licensing market between rightholders and online content-sharing service providers. Those licensing agreements should be fair and keep a reasonable balance between both parties. Rightholders should receive appropriate remuneration for the use of their works or other subject matter. However, as contractual freedom should not be affected by those provisions, rightholders should not be obliged to give an authorisation or to conclude licensing agreements.

<sup>7</sup> In addition, section 512(i)(1)(A) requires all service providers (access providers and search engines, as well as hosts), to adopt and implement a policy for terminating "repeat infringers". This requirement has been construed, regarding access providers, in *BMG Rights Mgmt. (US) LLC v. Cox Communs., Inc.*, 881 F.3d 293 (4th Cir. 2018); and regarding host providers in *EMI Christian Music Group v. MP3Tunes*, 844 F.3d 79 (2d Cir. 2016) (both finding the policies to be ineffective) and in *Ventura Content, Ltd. v. Motherless, Inc.*, 885 F.3d 597 (9th Cir. 2018) (finding the policy to be sufficiently

activity using the material on the system or network is infringing"; and it must not be "aware of facts or circumstances from which infringing activity is apparent"; moreover, if the host has the "right and ability to control" the originator's activity, the host must not "receive a financial benefit directly attributable to the infringing activity."<sup>8</sup> Once the host becomes "aware" of infringing activity, it must act "expeditiously to remove, or disable access to, the material."<sup>9</sup> Section 512(c)(2) requires that a service provider, in order to benefit from the reduction in liability, designate and provide contact information concerning an agent to receive notification of claimed infringements. The service must also state and reasonably implement a policy for terminating repeat infringers.<sup>10</sup> Copyright owners alleging that the service provider is hosting infringements must send the provider's agent a signed, written communication identifying the work infringed, the material alleged to be infringing and its location; a statement that the complaining party has a good faith belief that the use is unauthorized; and a sworn statement that the information contained in the notification is believed to be accurate. The service provider incurs no duty to "monitor [...] its service or affirmatively seek [...] facts indicating infringing activity."<sup>11</sup>

Upon receiving the notification, the provider must "expeditiously" remove or block access to the alleged infringing material, or else face the full range of liability should the author prevail in an infringement suit. But the provider who removes or blocks the material must also so notify the subscriber; the subscriber may then send a "counter notification" (whose contents the law prescribes).<sup>12</sup> In that event, in order to maintain its immunity, the service must send the counter notification to the person who notified the service of the alleged infringement, and must inform that person that the service will replace the material in ten business days. The copyright owner must within that time "file [...] an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider's system or network." If the copyright owner does not initiate the action, and so inform the service provider's designated agent, then the service provider must put back the material "not less than 10, nor more than 14, business days following receipt of the counter notice ...".<sup>13</sup> The purpose of the put-back requirement is to ensure that § 512

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applied, albeit inadequately stated).

<sup>8</sup> 17 U.S.C. § 512(c)(1)(A), (B).

<sup>9</sup> *Id.* § 512(c)(1)(A)(iii).

<sup>10</sup> *Id.* sec. 512(j).

<sup>11</sup> *Id.* sec. 512(m)(1).

<sup>12</sup> *See id.* § 512(g)(3).

<sup>13</sup> In practice, however, the period prescribed for filing an infringement action before the host service provider reposts the content, has proved problematic for both copyright owners and end users. See SECTION 512 OF TITLE 17, A REPORT OF THE REGISTER OF COPYRIGHTS 162-63 (May 2020) (citations omitted) [hereafter REGISTER'S SECTION 512 REPORT] ("This particular statutory timeframe turns out to present something like a Schrödinger's timeframe: both too long to have non-infringing speech down, and too short to enable a copyright owner to adequately research and file a complaint in federal court.").

does not make it too easy for copyright owners to compel the removal of allegedly infringing material without judicial process. Section 512 initially facilitates that removal because it encourages providers who have received notice to take down the material immediately, since the text insulates service providers who comply with the statutory requirements from suit by persons (including the subscriber) disgruntled at the removal of the material from the server.<sup>14</sup> The put-back provision thus affords an important counterweight. Moreover, if the copyright owner knowingly misrepresented that the posted content was infringing, OCILLA provides for damages, costs and attorneys' fees to be awarded against the copyright owner.<sup>15</sup> The "put back" and misrepresentation provisions were intended to guard against copyright owner abuse of the notice and takedown system, for example, to remove clearly non infringing (but potentially embarrassing) material.<sup>16</sup>

#### B. Technological and economic assumptions underlying OCILLA

Before examining how U.S. courts have interpreted sec. 512(c), it is important to consider the factual and technological backdrop against which Congress enacted OCILLA, and compare it to today's Internet. In a study published in May 2020, the U.S. Copyright Office observed:

At the time the DMCA was crafted and then enacted, the internet had only recently evolved beyond the "walled gardens" of AOL and CompuServe, Yahoo!, Amazon, and eBay were each a few years old, and "social media," to the extent it existed was mainly instant messaging services, on-line dating sites, and Classmates.com. There was no Facebook or YouTube or Twitter; the first MP3 player had just been launched, and Napster, which popularized peer-to-peer ("P2P") file-sharing, would not exist until the following year. Today, the internet is a rich tapestry of social media sites and niche networked communities, online retail giants and e-commerce side businesses, as well as an almost endless amount of music and audiovisual entertainment from major studios and publishers, indie artists, and future stars. Every day countless new internet services join the mix. And new artists continue to find an audience without having to first convince a third party that there is a demand for what they do.<sup>17</sup>

According to testimony presented by Prof. Mark Schultz to the Senate Committee on the Judiciary, Subcommittee on Intellectual Property,<sup>18</sup>

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<sup>14</sup> See *id.* § 512(g)(1).

<sup>15</sup> *Id.* sec. 512(f)

<sup>16</sup> For a detailed study of the put back regime, see, e.g., Zoe Carpou, *Robots, Pirates, and the Rise of the Automated Takedown Regime: Using the DMCA to Fight Piracy and Protect End-Users*, 39 COLUM. J. L. & ARTS 551 (2016).

<sup>17</sup> REGISTER'S SECTION 512 REPORT at 28-29.

<sup>18</sup> *The Digital Millennium Copyright Act at 22: What is it, Why was it Enacted, and Where are We*

1998, the year the DMCA passed	Online Infringement Today
Fewer than 3 million pages.	Over 6.4 billion pages
Most users on home dialup, and a single song took 10 minutes or more to download.	Users connect from multiple super-fast mobile, home wi-fi, and public networks, and a song takes seconds to download.
Online infringement likely started with a particular user, uploading a particular file.	Online infringement occurs constantly as many users and systems upload many different copies of the same work.
Online copyright infringement often spread through the relatively slow, methodical copying of a particular file from one computer to another.	Files spread quickly and simultaneously from many users and sources.
If copyright owners caught and contained an outbreak quickly enough, they could stop the spread of the file and save it from “escaping” into the broader world.	Infringement is a chronic problem that can be suppressed, reduced, and managed, but never fully contained.
Service providers were likely to be more or less indifferent intermediaries that did not derive any great value from infringement.	Many popular and lucrative legal services are built to host user-posted content and benefit greatly from the presence of attractive infringing material.
Infringement notices in the hundreds, at most.	Infringement notices in the billions.

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At the same Senate Hearing, Prof. Jessica Litman, while expressing skepticism about copyright owners’ lamentations, agreed that “The principal weakness of the statutory notice-and-takedown system was that it didn’t easily scale to the size of the 21st century internet. When Congress was debating the appropriate

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*Now Before the Subcomm. on Intellectual Prop. of the S. Judiciary Comm.*, 116th Cong. 5 (2020) (statement of Mark Schultz, Chair, IP & Tech. Law Ctr., Univ. of Akron Sch. of Law).

contours of section 512's notice-and-takedown provisions, the model everyone appears to have had in mind was a human-mediated one."<sup>19</sup>

OCILLA's shortcomings (at least in retrospect) extend beyond its failure to anticipate the tremendous volume of infringing content, much of it disseminated through a means – file-sharing – that fell completely outside the notice and takedown system.<sup>20</sup> Congress' allocation to copyright owners of the burdens of identifying infringing postings, rather than requiring service providers to clear rights in the posted works, has also proved problematic. This attribution of responsibility may have made sense given the premise that the service providers would be passive actors hosting third party websites whose operators posted infringing content,<sup>21</sup> rather than the service providers themselves operating websites that enhanced access to and monetized those postings, as is now the case. Given that premise, and the concomitant anticipated limited economic dependence of the service on the posted content,<sup>22</sup> Congress acceded to service provider insistence that monitoring at the point of upload

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<sup>19</sup> *Id.* at 8 (statement of Jessica Litman, Prof. of Law, Univ. of Mich.).

<sup>20</sup> Jay Dratler & Stephen McJohn, *Cyberlaw: Intellectual Property in the Millennium*, § 6.03 (2018); Annemarie Bridy, *Is Online Copyright Enforcement Scalable?*, 13 *Vand. J. Ent. & Tech. L.* 695, 716 (2011); Niva Elkin-Koren, *Making Technology Visible: Liability of Internet Service Providers for Peer-to-Peer Traffic*, 9 *N.Y.U. J. Legis. & Pub. Pol'y* 15, 37 (2006) (describing a file-sharing network as a "mere conduit," which would fall under 512(a) and therefore not require compliance with a notice-and-takedown regime).

<sup>21</sup> S. Rep. No. 105–190, at 43 (1998) (describing § 512(c) safe harbor and noting "[e]xamples of such storage include providing server space for a user's web site, for a chatroom, or other forum in which material may be posted at the direction of users."); H.R. Rep. No. 105–551, pt. 2, at 53 (1998) (same language). *See also* Senator Orrin Hatch's opening remarks at a 1997 hearing on online service provider liability in the lead up to drafting the OCILLA, wherein he framed in part the needs of online service providers by saying that without legislative intervention, "it might be said that a service provider would be held liable for the unauthorized posting of copyrighted photographs on a Web site or electronic bulletin board residing on the service provider's network, regardless of whether the service provider knew of the posting or exercised any sort of control over the content of the site." *The Copyright Infringement Liability of Online and Internet Service Providers: Hearing Before S. Comm. on the Judiciary*, 105th Cong. 2 (Sept. 4, 1997).

<sup>22</sup> *See, e.g., Religious Tech. Ctr. v. Netcom On-Line Comm. Svcs.*, 907 F.Supp. 1361, 1377 (N.D. Cal. 1995) (finding "no evidence that infringement . . . in any way enhances the value of Netcom's services to subscribers or attracts new subscribers,"); *The Copyright Infringement Liability of Online and Internet Service Providers: Hearing Before S. Comm. on the Judiciary*, 105th Cong. 87 (Sept. 4, 1997) (Testimony of George Vradenburg, general counsel of AOL, disclaiming economic dependence of ISPs on infringing content. But see INFORMATION INFRASTRUCTURE TASK FORCE, *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights* 117–18 (1995): The on-line services provide subscribers with the capability of uploading works because it attracts subscribers and increases usage -- for which they are paid. Service providers reap rewards for infringing activity. It is difficult to argue that they should not bear the responsibilities."

would be infeasible.<sup>23</sup> In the ensuing years, by contrast, automatic *ex ante* filtering has become increasingly realistic and available.<sup>24</sup>

### C. Judicial interpretation

Section 512(c) has spawned an abundant caselaw construing most of its provisions.<sup>25</sup> The decisions of greatest relevance to DSM Directive art. 17 concern

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<sup>23</sup> See, e.g., Cassandra Imfeld & Victoria Smith Ekstrand, *The Music Industry and the Legislative Development of the Digital Millennium Copyright Act's Online Service Provider Provision*, 10 *Comm. L. & Pol'y* 291, 305 (2005), (quoting testimony at a hearing in February 1996 related to the NII Copyright Protection Act by CompuServe General Counsel Steven Heaton that ISPs "simply cannot review and monitor all the data that is transmitted over and stored in their networks or bulletin boards. . . . Providers of online services do not know what is being uploaded onto, transmitted through, stored upon, and downloaded from their systems.").

<sup>24</sup> See, e.g., Aaron Weiss, *Content Filters: Will ISPs Become the Enforcers of the Web?*, 12 *netWorker* no. 1, p. 24 (2008). Indeed, even in 2001, the Ninth Circuit, in affirming the appropriateness of the district court's imposition of a filtering obligation while nevertheless remanding the injunction to modify its scope, observed: "Conversely, Napster may be vicariously liable when it fails to affirmatively use its ability to patrol its system and preclude access to potentially infringing files listed in its search index. Napster has both the ability to use its search function to identify infringing musical recordings and the right to bar participation of users who engage in the transmission of infringing files." *A&M Records v. Napster*, 239 F.3d 1004, 1027 (9th Cir. 2001).

<sup>25</sup> "Service Provider": *Hendrickson v. eBay*, 165 F.Supp. 2d 1082, 1088 (C.D. Cal. 2001) (finding online auction site eBay qualifies), *CoStar Grp. V. LoopNet Inc.*, 373 F.3d 544, 547 (4th Cir. 2004) (applying the safe harbor to a website that allowed real estate brokers to post listings); *contra*, *Agence Fr. Presse v. Morel*, 934 F.Supp. 2d 547, 566 (S.D.N.Y. 2013) (finding a photo licensing website that "directly licens[ed] copyrighted material online" did not "do something useful" with respect to providing or facilitating access to materials online or the activities of internet users," and as such was not a service provider).

Courts have found many functions qualify as "storage at the direction of a user". *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1020 (9th Cir. 2013) (finding that 512(c) protection extends to "access-facilitating processes that automatically occur," including transcoding content and making it available for other users to watch); *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 39 (2d Cir. 2012) (quoting earlier *Shelter Capital* decision, noting that protections extend beyond "mere electronic storage lockers," and finding YouTube's transcoding, playback, and "related videos" functions, albeit not strictly "storage," qualify for safe harbor protection).

The "actual knowledge," 17 U.S.C. § 512(c)(1)(A)(i), and red-flag knowledge ("facts or circumstances from which infringing activity is apparent"), 17 U.S.C. § 512(c)(1)(A)(ii), standards are subject to highly controversial interpretations. *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 31 (2d Cir. 2012) (finding both provisions refer to knowledge of specific infringements, but actual knowledge refers to subjective awareness while red-flag knowledge refers to whether a defendant "was subjectively aware of facts that would have made the specific infringement 'objectively' obvious); *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78, 93–97 (2d Cir. 2016) (holding that red-flag knowledge refers to what would be obvious by "ordinary person" and that a service provider employee viewing and interacting with an infringing video is not sufficient to establish red-flag knowledge absent additional evidence that the employee knew facts sufficient to conclude the video was likely infringing); *EMI Christian Music Grp. v. MP3tunes, LLC*, 844 F.3d 79, 92–94 (2d Cir. 2016) (reversing a directed verdict and finding red-flag knowledge could be established where a service provider was aware that all songs of certain categories—those streamed before 2007 and those recorded by the Beatles—were infringing, and

judicial interpretation of the level of knowledge that will disqualify a service provider from claiming the safe harbor. The statute provides that the service provider must not “have actual knowledge that the material . . . on the system or network is infringing,” or “in the absence of such knowledge” must not be “aware of facts or circumstances from which infringing activity is apparent.”<sup>26</sup> Courts have interpreted the latter, so-

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thus 512(c) could impose a “time-limited, targeted duty” to actively remove these songs from the platform to enjoy safe harbor protection); *Mavrix Photographs, LLC v. LiveJournal, Inc.*, 873 F.3d 1045, 1057–58 (2d Cir. 2017) (finding a service provider employee, or agent, might have knowledge, and reiterating red-flag knowledge requires infringement “be immediately apparent to a non-expert”). “Acts Expeditiously”: *Long v. Dorset*, 369 F.Supp.3d 939 (N.D.Cal. 2019) (reviewing cases and determining that five business days to remove pornographic photos uploaded to Facebook subscriber’s hacked webpage met requirement of expeditious removal when Facebook communicated daily with subscriber); *Rosen v. Global Net Access, LLC*, CV 10-2721-DMG, 2014 WL 2803752 at \*5 (C.D. Cal. 2014) (finding a service provider did not act expeditiously when it took two months to remove content); *Io Grp. v. Veoh Networks, Inc.*, 586 F.Supp.2d 1132, 1150 (N.D.Cal. 2008) (finding that removing content “on the same day the notice is received (or within a few days thereafter)” constitutes expeditious removal); *Square Ring, Inc. v. Doe-1*, No. 09-563, 2015 WL 307840, at \*7 (D. Del. Jan. 23, 2015) (declining to find two days was expeditious as a matter of law where the content at issue was a live broadcast and the service provider had been notified before the broadcast of likely infringement).

“Financial benefit directly attributable to the infringing activity”: *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1117 (9th Cir. 2007) (common law standards and § 512(c)(1)(B) standards are the same); *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1022–1023 (9th Cir. 2001); *Costar Group Inc. v. Loopnet, Inc.*, 164 F. Supp. 2d 688, 704 (D. Md. 2001), aff’d 373 F.3d 544 (4th Cir. 2004) (“Basically, the DMCA provides no safe harbor for vicarious infringement because it codifies both elements of vicarious liability.”).

“Right and ability to control”: *Hendrickson v. eBay, Inc.*, 165 F.Supp.2d 1082, 1093–94 (C.D. Cal. 2001) (finding control must mean more than “the ability of a service provider to remove or block access to materials posted on its website or stored in its system.”); *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1045–46 (9th Cir. 2013) (finding no ability to control absent “evidence of inducement” or evidence “the defendant exerted substantial influence of its users’ activities”); *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 38 (2d Cir. 2012) (requiring “something more” than the ability to restrict access and remove content but remanding the issue for further consideration).

“Designated Agent: *BWP Media USA Inc. v. Hollywood Fan Sites LLC*, 115 F.Supp.3d 397, 402–03 (S.D.N.Y. 2015) (holding designated agents must be identified on both the provider’s website and registered at the Copyright Office, and that a subsidiary service provider cannot rely on a designation by a parent company); *Perfect 10, Inc. v. Amazon.com, Inc.*, No. CV 05-4753, 2009 WL 1334364, at \*8 (C.D. Cal. May 12, 2009) (noting certain allowable, “inconsequential” departures from listed requirements in posting designated agent information).

Adequate Notice: *Hendrickson v. eBay, Inc.*, 165 F.Supp.2d 1082, 1091 (C.D. Cal. 2001) (noting notices must be in writing, while only “substantial compliance” is required for the other statutory notice elements); *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619, 625 (4th Cir. 2001) (finding the notification requirements “are written to as to reduce the burden of holders of multiple copyrights who face extensive infringement of their works”); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1101, 1113 (9th Cir. 2007) (finding inadequate notices cannot impute knowledge to service providers of infringement); *Perfect 10, Inc. v. Giganews, Inc.*, 993 F.Supp.2d 1192, 1200 (C.D. Cal. 2014) (finding that links to a search results page may not sufficiently identify infringing material).

<sup>26</sup> 17 U.S.C. sec. 512(c)(1)(A)(i)(ii).

called “red flag,” standard to impose a “high bar.”<sup>27</sup> Notably, “general knowledge that infringement is ‘ubiquitous’ does not impose a duty on the service provider to monitor or search its service for infringements.”<sup>28</sup> Even a showing that the host was not only “*generally aware* of, but *welcomed*, copyright-infringing material being placed on their website,” does not suffice to overcome its immunity without a further demonstration “as to whether [the host] actually knew, or was aware of facts or circumstances that would indicate, the existence of *particular* instances of infringement.”<sup>29</sup> The requirement that *specific* infringements be “obvious”<sup>30</sup> before the “red flag” will wave, has allowed hosts to remain profitably ignorant of the content of their users’ postings.

That said, courts have acknowledged limits to the extent of service provider passive aggression that section 512(c) permits. While the host may remain blissfully unaware of particular infringements, it may not be “willfully blind” to them.<sup>31</sup> A service provider will be willfully blind if it “made a ‘deliberate effort to avoid guilty knowledge.’”<sup>32</sup> But even if a particular posting might raise some suspicions, the host is not “willfully blind” if it fails to investigate, because another provision of section 512 exonerates hosts from “affirmatively seeking facts indicating infringing activity.”<sup>33</sup> According to the Second Circuit, requiring investigation short of an “obvious” infringement would undermine the balance Congress struck in section 512 reflecting a policy that would foster the development of service providers:

[W]e can see no reason to construe the statute as vitiating the protection of § 512(m) and requiring investigation merely because the service provider learns facts raising a suspicion of infringement (as opposed to facts making

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<sup>27</sup> See, e.g., *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099, 1111 (C.D. Cal. 2009), quoted in *Mavrix Photographs, LLC v. LiveJournal, Inc.*, 873 F.3d 1045, 1058 (9th Cir. 2017).

<sup>28</sup> *Viacom Int’l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 525 (S.D.N.Y. 2010), *aff’d* 676 F.3d 19, 31, 35 (2d Cir. 2012) (affirming that general awareness of possible infringement does not impose a duty to monitor, and that red-flag knowledge refers to awareness of specific instances of infringement).

<sup>29</sup> *Viacom Int’l Inc.*, 676 F.3d at 33 (2d Cir. 2012).

<sup>30</sup> *Capitol Records, Inc. v. Vimeo, LLC*, 826 F.3d 78, 93 (2d Cir. 2016); *Viacom Int’l Inc.*, 676 F.3d at 31 (“the red flag provision turns on whether the provider was subjectively aware of facts that would have made the specific infringement “objectively” obvious to a reasonable person.”). The courts have equated the statutory term “apparent” with “obvious”: it is not obvious that the two are synonymous.

<sup>31</sup> *Viacom Int’l Inc.*, 676 F.3d at 35. On remand, however, the district court did not find facts establishing that YouTube was blind to “specific and identifiable instances of infringement.” *Viacom International, Inc. v. YouTube, Inc.*, 940 F.Supp.2d 110, 116–17 (S.D.N.Y. 2013).

<sup>32</sup> *Viacom Int’l Inc.*, 676 F.3d at 35 quoting *In re Aimster*, 334 F.3d 643, 650 (7th Cir. 2003). Instances in which courts have found “willful blindness” in section 512(c) cases seem to be exceedingly rare, however. See *EMI Christian Music Grp. v. MP3Tunes*, 844 F.3d 79, 92–94 (2d Cir. 2016) (restoring a jury verdict that found red-flag knowledge and willful blindness where an online storage locker website allowed users to copy and store files of recordings which the website operator knew had not been authorized for digital release); 4 Nimmer on Copyright § 12B.04[A][1][b][vi] (no cases other than *EMI Christian Music* have successfully shown willful blindness; *Viacom* “essentially empties any significance from the willful blindness inquiry.”).

<sup>33</sup> 17 USC sec. 512(m)(1).

infringement obvious). Protecting service providers from the expense of monitoring was an important part of the compromise embodied in the safe harbor. Congress's objective was to serve the public interest by encouraging Internet service providers to make expensive investments in the expansion of the speed and capacity of the Internet by relieving them of burdensome expenses and liabilities to copyright owners, while granting to the latter compensating protections in the service providers' takedown obligations. If service providers were compelled constantly to take stock of all information their employees may have acquired that might suggest the presence of infringements in user postings, and to undertake monitoring investigations whenever some level of suspicion was surpassed, these obligations would largely undo the value of § 512(m).<sup>34</sup>

As a result of an absolutist interpretation of § 512(m), courts have released service providers from any duty to investigate, and thus have effectively collapsed the actual and red flag knowledge standards.<sup>35</sup>

By contrast, while the statutory dispensation from a duty to monitor may limit the scope of a "willful blindness" challenge to the safe harbor, a host who "induces" users to post infringing content is not likely to qualify for the safe harbor.<sup>36</sup> Indeed, where the host assists users in uploading files, it is likely to have actual or red flag knowledge of the files' infringing content.<sup>37</sup>

Recent decisions suggest ways in which a right owner might satisfy even an exigent interpretation of the "red flag" standard. Even though "[t]he infringement must be immediately apparent to a non-expert,"<sup>38</sup> the work itself may supply evidence that its uploading was unauthorized. For example, in *Mavrix Photographs, LLC v. LiveJournal, Inc.*, "[s]ome of the [plaintiff's] photographs at issue . . . contained either a generic watermark or a watermark containing Mavrix's website, 'Mavrixonline.com.'" The watermark could have alerted the host that the work, authorized for one site, was not available for posting to another. Similarly, in *EMI Christian Music Group v. MP3Tunes*,<sup>39</sup> the court observed that the host knew that at the time of the infringing files' upload, the musical recordings at issue had not been licensed for dissemination in MP3 format. Accordingly, "the jury reasonably could

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<sup>34</sup> *Capitol Records, Inc. v. Vimeo, LLC*, 826 F.3d at 98–99.

<sup>35</sup> REGISTER'S SECTION 512 REPORT, *supra* note 13 at 123 (noting that at a stakeholder roundtable hosted by the Copyright Office, participants were unable to articulate a scenario that would qualify as red flag knowledge but not also as actual knowledge under existing judicial interpretations).

<sup>36</sup> See, e.g., *EMI Christian Music Group v. MP3Tunes*, 844 F.3d 79, 93 (2d Cir. 2016); *Columbia Pictures Industries, Inc. v. Fung*, 710 F.3d 1020, 1039–40 (9th Cir. 2013) (declining, however, to rule that sec. 512 categorically excludes inducers from the safe harbor).

<sup>37</sup> *Id.*

<sup>38</sup> *Mavrix*, 873 F.3d at 1058, quoting *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099, 1108 (C.D. Cal. 2009) and citing H.R. Rep. 105–551, pt. 2 at 58 (1998) "(explaining that infringements must be 'apparent from even a brief and casual viewing')." )

<sup>39</sup> 844 F.3d 79 (2d Cir. 2016).

have concluded that MP3tunes and Robertson were aware of ‘facts and circumstances that make infringement obvious.’”<sup>40</sup> *EMI Christian* is particularly significant for its embrace of a takedown/stay down remedy. The court distinguished prior decisions which had ruled *ex ante* blocking remedies incompatible with the services’ absence of a duty to monitor their sites. Proof of the host’s red flag knowledge justified an obligation to block content of whose infringing character the host was already aware.<sup>41</sup>

Even accounting for a possible cautious evolution towards remedies imposing some pro-active obligations on host service providers, this caselaw illustrates the difficulties arising from a regime in which the default has shifted from requiring rights clearance before exploiting a work, to absolving the exploiting UGC platform or website from infringement liability unless the rightholder can demonstrate that the exploiter should objectively have known precisely which works it was hosting, and where they could be found on the service. The resulting allocation of benefits and burdens has tipped so far from the equilibrium envisioned in 1998, that the telecoms and infant entrepreneurs whose Internet ventures Congress sought to encourage have become market forces often more dominant than the copyright industries Congress once feared would stifle the new entrants.<sup>42</sup> As the Register of Copyrights has recently concluded: “Based upon its own analysis of the present effectiveness of section 512, the [Copyright] Office has concluded that Congress’ original intended balance has been tilted askew.”<sup>43</sup>

If Congress may have over-achieved its objective of fostering the development of host service providers, its provisions for ensuring that users could continue to post non-infringing content may have fallen short of the mark. It is

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<sup>40</sup> *Id.* at 92.

<sup>41</sup> *Id.* at 93: “the jury was clearly instructed, and we presume it understood, that MP3tunes had no continuing, affirmative duty to monitor its servers for infringement. The jury could comply with that instruction and still find that MP3tunes was required to disable access to pre-2007 songs by “act[ing] expeditiously to remove, or disable access to” the pre-2007 songs . . . The jury was therefore permitted to conclude that a time-limited, targeted duty—even if encompassing a large number of songs—does not give rise to an “amorphous” duty to monitor in contravention of the DMCA. *Viacom*, 676 F.3d at 31; *see also id.* at 34 (suggesting that a reasonable jury could find red-flag knowledge with respect to groups of clips). The same is true of the Beatles songs. The jury heard evidence that Robertson knew there had been no *legal* online distribution of Beatles tracks before 2010, other than one track used within a video game. Robertson further admitted that he authored a 2009 e-mail that showed he was aware of the plaintiffs’ position that “[the] Beatles have never authorized their songs to be available digitally.”

<sup>42</sup> *See, e.g.*, Forbes’ “Global 2000” list, documenting the largest companies in the world in 2019, for instance, where the top 100 companies include (among others) the following American corporations: Alphabet [Google] (#17), Amazon (#28), Facebook (#63). The largest “copyright industry,” Disney, ranks #70. The World’s Largest Public Companies, 2019 Ranking, FORBES, accessible at: <https://www.forbes.com/global2000/list/#country:United%20States> (last visited April 13, 2020).

<sup>43</sup> REGISTER’S SECTION 512 REPORT, *supra* note 13, at 1. *See also id.* at 197: “The Copyright Office concludes that the balance Congress intended when it established the section 512 safe harbor system is askew.”

unclear whether section 512's counter-notice and put-back mechanism has succeeded in maintaining online availability of non-infringing postings. The immense volume of allegedly infringing postings has led to a concomitant volume of "robo-notices"<sup>44</sup> (typically from copyright owners who can afford the costs of identifying infringements and sending mass takedown notices).<sup>45</sup> These notices may sweep in postings that would be non-infringing fair uses. The apparently low proportion of ensuing counter-notifications<sup>46</sup> could mean that many fair uses are being suppressed, or it could simply mean that the vast majority of postings are in fact infringing. Even if the number of takedowns flowing from false positives is not as great as some proclaim,<sup>47</sup> it may well be possible that fear or ignorance will cause some fair users to decline to contest a takedown notice.<sup>48</sup>

A further impediment to preventing the removal of lawful postings may result from judicial interpretation of the statutory disincentives to abuse the notice and takedown system. Section 512(f) provides for damages and attorneys' fees against the rightholder's "knowing material misrepresentation" that the posted content was infringing. Courts' application of that standard has proven very forgiving.<sup>49</sup> The

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<sup>44</sup> Joe Karaganis & Jennifer Urban, *The Rise of the Robo Notice*, 58 COMMUNICATIONS OF THE ACM 28 (2015).

<sup>45</sup> Section 512 of Title 17, *Hearing Before the Subcomm. on Courts, Intellectual Prop. and the Internet of the House Judiciary Comm.*, 113th Congress at 16 (2014) (testimony of Prof. Annemarie Bridy noting copyright owners who "can't afford automated systems" may have to rely on websites with pre-packaged forms to readily send takedown requests); Motion Picture Association of America, *Comment on Section 512 Study Before the U.S. Copyright Office*, 80 Fed. Reg. 81,862, at 16 (April 1, 2016), <https://www.regulations.gov/document?D=COLC-2015-0013-90285> (noting that "smaller entities may not be able to afford to use technology to enable discovery of infringing content").

<sup>46</sup> Though data is limited, one study analyzing the notice and takedown regime interviewed 29 intermediary online service providers of various sizes as well as six "major notice senders" (rightsholders and enforcement agents) and found that one only respondent "reported receiving more than a handful [of counter-notices] a year" and that many reported no counter-notices, despite processing thousands of takedown requests. Jennifer M. Urban, Joe Karaganis & Brianna L. Schofield, *Notice and Takedown in Everyday Practice*, U.C. BERKELEY PUB. L. & LEGAL THEORY RES. PAPER SERIES, 44 (2017). Another study analyzed more than 540,000 notices to Google and Twitter between 2001 and 2012. It estimated that of notices analyzed in 2011, only 0.131 percent were counter-notices, and in 2012 the number was 0.02 percent. It found no counter-notices for the years 2008 through 2010. Daniel Seng, *The State of the Discordant Union: An Empirical Analysis of the State of DMCA Takedown Notices*, 18 VA. J.L. & TECH. 369, 426, 462 (2014). *But see* REGISTER'S SECTION 512 REPORT, *supra* note 13 at 147 n. 788 (raising questions about the Urban et al. study's methodology).

<sup>47</sup> *See, e.g.*, Urban, Karaganis & Schofield, *supra* note 46 at 88, arguing that 31 percent of takedown requests in a survey sample were "potentially problematic." However, the authors said only 4.2 percent were "fundamentally flawed" (for instance, by identifying an incorrect work), while 19.5 percent were due to concerns about meeting the notification requirements (including everything from missing signatures to links the authors thought might be insufficiently specific to allow the service provider to identify the particular infringing work at issue), and another 6.6 percent presented what the authors felt were fair use questions.

<sup>48</sup> *See* Urban, Karaganis & Schofield, *supra* note 46 at 44-45.

<sup>49</sup> On the other hand, the most egregious reported case did result in the award of damages and attorneys' fees, *see Online Policy Grp. v. Diebold, Inc.*, 337 F.Supp.2d 1195 (N.D.Cal.2004), in which

Ninth Circuit has held that “a copyright holder need only form a subjective good faith belief that a use is not authorized.”<sup>50</sup> A kind of symmetry has resulted: just as an infringement must be objectively “obvious” to meet the red flag knowledge standard and thus deprive the host of its statutory immunity, so, to engage the rightholder’s liability for knowing misrepresentation, must the lawful nature of the posting be so patent that the rightholder could not subjectively believe that the content infringed. That, too, sets a “high bar” likely to screen out many misrepresentation claims.

On the other hand, the Ninth Circuit also ruled that a rightholder cannot form a good faith belief in the unlawfulness of the posted content without first endeavoring to ascertain whether the posting could be fair use or otherwise authorized by law. Thus, the indiscriminate sending of takedown notices would contravene the court’s “unequivocal holding that [the rightholder] must consider fair use before sending a takedown notification;” failure to “consider” lawful uses would render the rightholder “liable for damages under § 512(f).”<sup>51</sup> In light of the immense quantity of uploaded content for which a rightholder’s “bot” might find a match, one may wonder how a rightholder could in practice undertake the consideration requisite to a “procedurally ‘informed’ subjective good faith belief on fair use before sending a takedown notice.”<sup>52</sup> It is unclear whether every posting will require human review,<sup>53</sup> or if algorithms could meet the task of identifying probable fair uses,<sup>54</sup> thus circumscribing the universe of postings for which the rightholder’s human agents must form a subjective belief in the posting’s unlawfulness.

## II. How DSM Directive art. 17 Works

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the court found that the copyright owner met the statutory standard because the disclosure of internal company emails for whistle-blowing purposes was clearly fair use, and that the copyright holder was using the notice and takedown regime “as a sword to suppress publication of embarrassing content rather than as a shield to protect its intellectual property.”

<sup>50</sup> See, e.g., *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1153 (9th Cir. 2016); *Rossi v. Motion Picture Ass’n of Am. Inc.*, 391 F.3d 1000 (9th Cir.2004); *Stern v. Lavender*, 319 F.Supp.3d 650, 683 (S.D.N.Y. 2018); *Johnson v. New Destiny Christian Ctr. Church, Inc.*, 6:17-cv-710-Orl-37DCI, 2019 WL 1014245 at \*4–5 (M.D. Fl. March 4, 2019), appeal pending.

<sup>51</sup> *Lenz*, 815 F.3d at 1154.

<sup>52</sup> See Matthias Leistner, *European Copyright Licensing and Infringement Liability Under Art. 17 DSM Directive Compared to Secondary Liability of Content Platforms in the U.S. – Can We Make the New European System a Global Opportunity Instead of a Local Challenge?*, ZEITSCHRIFT FÜR GEISTIGES EIGENTUM/INTELLECTUAL PROPERTY JOURNAL (forthcoming 2020) (including suggestions for overcoming the potentially prohibitive transactions costs).

<sup>53</sup> See, e.g. Matthew Sag, *Internet Safe Harbors and the Transformation of Copyright Law*, 93 Notre Dame L. Rev. 499, 532–33 (2017) (finding an “obvious implication” in *Lenz* to require human review, but suggesting that algorithm-based reviews might still be permissible); REGISTER’S SECTION 512 REPORT, *supra* note 13, at 150-52 (discussing uncertainty regarding need for human review or permissibility of automated search programs to form a good faith belief that posted content is not fair use).

<sup>54</sup> See, e.g., Maayan Perel and Niva Elkin-Koren, *Accountability in Algorithmic Copyright Enforcement*, 19 Stan. Tech. L. Rev. 473, 487–88 (2016).

Article 17 adopts a completely different approach from the US in section 512. We have seen how the text and judicial interpretation of sec. 512 have enabled hosts to develop into massively profitable businesses based in substantial part on their provision of access to copyrighted works. Solicitude for new digital communications intermediaries through statutory immunity, together with technologically-overtaken expectations for effective semi-private copyright enforcement through notices and takedowns, combined to produce a system in which hosts' statutorily-authorized passivity allowed them to reap the benefits of communicating copyrighted works, while copyright owners have struggled to prevent uncontrolled dissemination of their works. Private ordering, through preclearance systems such as Content-ID, has developed alongside the statutory regime, to enable clearance and monetization,<sup>55</sup> but content owners complain that the statutory backdrop diminishes their bargaining power.<sup>56</sup> Worse, for individual authors and small copyright owners, Content-ID does not accommodate small repertoires,<sup>57</sup> thus leaving them only options to block, but not to derive revenue from hosts' dissemination of their works.<sup>58</sup> In light of the shortcomings of the US law, does the DSM Directive strike a better balance?

#### A. Basic structure

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<sup>55</sup> See, e.g., Bruce Boyden, *The Failure of the DMCA Notice and Takedown System*, 3–4 (CPIP 2013) (observing that copyright owners and online services have developed work-arounds to the notice-and-takedown system via “technological tools that allow copyright owners to identify their content and specify what should happen when it appears on the service provider’s system,” calling such “private ordering” a step in the right direction but a sign of the need “for a retooling of the notice and takedown regime.”); REGISTER’S SECTION 512 REPORT, *supra* note 13 at 42–44 (describing Content-ID, and summarizing critiques); *id.* at 45–46 (describing other filtering technologies).

<sup>56</sup> See, e.g. Warner Music Group, *Comment on Section 512 Study Before the U.S. Copyright Office*, 80 Fed. Reg. 81,862 (April 7, 2016), <https://www.regulations.gov/document?D=COLC-2015-0013-86022>; “Fixing the Value Gap: Now on the Legislative Agenda” in *Global Music Report: State of the Industry Overview*, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY 22 (2016); T. Randolph Beard et al., *Safe Harbors and the Evolution of Music Retailing*, Phoenix Center Policy Bulletin No. 41 (March 2017); Peter Kafka, *Here's Why the Music Labels are Furious at YouTube. Again*, RECODE (April 11, 2016).

<sup>57</sup> Using Content ID, YouTube Help, <https://support.google.com/youtube/answer/3244015?hl=en> (last visited April 8, 2020) (“To be approved, you must own exclusive rights to a substantial body of original material that is frequently uploaded by the YouTube user community.”); REGISTER’S SECTION 512 REPORT, *supra* note 13 at 43 (“Participation in the Content ID program is limited to rightsholders who ‘own exclusive rights to a substantial body of original material that is frequently uploaded by the YouTube creator community.’ Some commenters complain that this policy unfairly excludes smaller copyright owners; in their view, ‘every artist should be entitled to this service, to register their music once and for all.’”).

<sup>58</sup> Copyright Management Tools, YouTube Help, <https://support.google.com/youtube/answer/9245819> (last visited April 8, 2020) (describing YouTube’s general takedown notices, its Copyright Match Tool, and its Content Verification Program as alternatives to Content ID, though these alternatives only allow users to request the content be taken down or else request to contact the uploader—there is no provision similar to Content ID’s monetization option).

The Directive, art. 17(4), requires Online Content Sharing Service Providers [hereafter OCSSP] (a defined term, discussed below) to obtain authorization for users' posting of content. The authorization granted to the service provider will also cover its users, "when they are not acting on a commercial basis or where their activity does not generate significant revenues."<sup>59</sup> As a result, the host's license would not automatically shield users who earn revenue, from sponsorship or advertisement, from posted content, but hosts and copyright owners might negotiate to share that revenue, thus extending the license's coverage. By contrast, the sec. 512 safe harbor applies only to the host service provider; even users whose postings are unaccompanied by advertisements remain vulnerable to copyright infringement suits and liable for damages in the event infringement is found (although non-commercial users seem unlikely to target for suits seeking monetary relief).

If the copyright owner is not willing to license, or not willing to license until some period after the initial disclosure of the content on the copyright owner's own site, then the OCSSP must make best efforts to block unlicensed content from appearing on the service, whether forever, or during the rightowner's period of exclusivity. Rightholders and OCSSPs will need to cooperate to identify the content to be blocked. If rightholders fail to provide OCSSPs with the information necessary to implement proactive filtering, the service provider will not be liable for the unidentified content's appearance on its site.<sup>60</sup>

Finally, for content neither licensed nor pre-blocked, the OCSSP is required, "upon receiving sufficiently substantiated notice from the rightholders, to disable access to, or to remove from, their websites the notified works or other subject matter, and ma[k]e best efforts to prevent their future uploads . . ."<sup>61</sup> In other words, art. 17(4) establishes for most OCSSPs, a tripartite regime: license, block, or takedown/stay down.

The Directive's absence of specification as to how the OCSSPs are to obtain permission may prompt two related concerns. First, rights clearance for all works posted to OCSSPs (essentially, large platforms) may entail excessive transactions costs. Second, to reduce those costs, OCSSPs might negotiate only with large

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<sup>59</sup> See DSM Directive, art. 17(2).

<sup>60</sup> See Recital 66: "Where rightholders do not provide online content-sharing service providers with the relevant and necessary information on their specific works or other subject matter, or where no notification concerning the disabling of access to, or the removal of, specific unauthorised works or other subject matter has been provided by rightholders, and, as a result, those service providers cannot make their best efforts to avoid the availability of unauthorised content on their services, in accordance with high industry standards of professional diligence, such service providers should not be liable for unauthorised acts of communication to the public or of making available to the public of such unidentified works or other subject matter."

<sup>61</sup> Art. 17(4).

copyright owners and collectives, leaving individual authors and small rightholders to bear the burden of notifying the OCSSPs of infringing content. But the Directive provides mechanisms to address these potential difficulties. Art. 17(10) mandates “stakeholder dialogues” “to discuss best practices for cooperation between online content-sharing service providers and rightholders” and to “issue guidance on the application of this Article, in particular regarding the cooperation referred to in paragraph 4.” Similarly, art. 17(8) mandates both cooperation and transparency by OCSSPs toward all rightholders: “Member States shall provide that online content-sharing service providers provide rightholders, at their request, with adequate information on the functioning of their practices with regard to the cooperation referred to in paragraph 4 and, where licensing agreements are concluded between service providers and rightholders, information on the use of content covered by the agreements.” As a result, while there will be many details to resolve, it appears that the Directive strives to ensure that individual authors and small rightholders will be able to negotiate permissions<sup>62</sup> and to obtain *ex ante* blocking of works they are unwilling to license for “sharing” on online platforms.

Where art. 17 applies, it replaces the 512-like notice-and-takedown system established in art. 14(1) of the 2000 eCommerce Directive.<sup>63</sup> That regime remains in force for service providers who are not OCSSPs.

#### B. Who is an OCSSP?

Unlike the online actors to whom 17 USC sec. 512(c) (host service providers) and (d) (search engines) broadly apply, DSM Directive art. 17 covers only a narrow class of service providers, focused essentially on large platforms, such as YouTube and Facebook. DSM Directive art. 2(6) defines an OCSSP as:

[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.

Art. 2(6) explicitly *excludes*:

Providers of services, such as not-for-profit online encyclopedias, not-for-profit educational and scientific repositories, open source software-developing and -sharing platforms, electronic communication service providers as defined in Directive (EU) 2018/1972, online marketplaces,

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<sup>62</sup> Collective Management Organizations, more prevalent in the EU than in the US, may grant blanket licenses covering a broader range of works than US CMOs represent, and thus significantly ameliorate the problem of high transactions costs in the EU.

<sup>63</sup> See art. 17(3).

business-to-business cloud services and cloud services that allow users to upload content for their own use.

Thus, it is clear that services such as Wikipedia, Dropbox and eBay fall outside the scope of art. 17, as would all not-for-profit educational sites. As recital 62 specifies: “Such services should not include services that have a main purpose other than that of enabling users to upload and share a large amount of copyright-protected content with the purpose of obtaining profit from that activity.” Equally importantly, given the definition and the recital, search engines would not be considered OCSSPs. Search engines may act for profit, but their main purpose is to locate content (whether or not user-posted), not to enable users to post that content, nor primarily to facilitate their sharing of it.<sup>64</sup>

In addition, art. 17’s duties do not bear equally even on all those who do qualify as OCSSPs. Art. 17(6) limits the liability of small startup platforms “which have been available to the public in the Union for less than three years and which have an annual turnover below EUR 10 million” to “best efforts to obtain authorization,” and failing that, a notice and takedown regime. Startups whose “average number of monthly unique visitors . . . exceeds 5 million” also incur a stay-down obligation.

Art. 17(5) introduces further flexibility by instructing member States to ensure that OCSSPs’ duties are proportional to their size and resources. “Best efforts” clauses temper OCSSPs’ obligations to block unauthorized content and, upon proper notice, to ensure that the content cannot be re-uploaded. The Directive recognizes that the results of the “best efforts” of smaller platforms might be less effective than the more costly “best efforts” of the principal commercial actors.

### C. Exceptions and User Redress Mechanisms

Art. 17(7) requires member States to ensure that users may continue to upload content covered by copyright exceptions and limitations, particularly for quotation, criticism, review, caricature, parody or pastiche. To that end, Recital 70 explains, “It is important to ensure that online content-sharing service providers operate an effective complaint and redress mechanism to support use for such specific

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<sup>64</sup> We can further infer the exclusion of search engines from the rejection of the following amendment added by the EU Parliament as art. 13b: “Member States shall ensure that information society service providers that automatically reproduce or refer to significant amounts of copyright-protected visual works and make them available to the public for the purpose of indexing and referencing conclude fair and balanced licensing agreements with any requesting rightholders in order to ensure their fair remuneration. Such remuneration may be managed by the collective management organisation of the rightholders concerned.” The amendment clearly targeted Google Image Search, but ultimately did not carry the day.

purposes.” Art. 17(9) details the mechanism for expeditious redress. First, OCSSPs’ terms and conditions must inform users that they can avail themselves of copyright exceptions, and the OCSSPs must “put in place” (and implicitly, inform users of) an “effective and expeditious complaint and review mechanism” so that users may challenge the blocking or disabling of their postings. Second, rightholders must “duly justify” their takedown notices. User complaints then must be “processed without undue delay” by the OCSSP, who must engage in human review of the challenged postings. Art. 17(9) also requires member States to provide both access to courts and to alternate dispute resolution measures so that users may assert their entitlement to copyright exceptions (presumably in the event that the OCSSP maintains the takedown over the user’s objection). Finally, art. 17(10) calls for “stakeholder dialogues” to discuss the “best practices” required by art. 17(4) as well as to implement exceptions and limitations.

### III. Comparing DSM Directive art. 17 to sec. 512 of the US Copyright Act

With respect to the service providers it regulates (a much smaller, but economically very significant, subset of the service providers covered by sec. 512), the DSM Directive establishes a regime that is effectively the opposite of sec. 512’s liability limitation approach. Where sec. 512 absolves service providers who meet the statutory “safe harbor” criteria from obtaining authorization, so long as they “respond expeditiously” to takedown notices, the DSM Directive requires that OCSSPs acquire rights from copyright owners up front. Where sec. 512 imposes no *ex ante* proactive duties to block infringing content, the DSM Directive obliges OCSSPs and rightholders to cooperate in preventing unauthorized content from being posted in the first place. And where US courts do not uniformly enter “stay down” remedies,<sup>65</sup> the DSM Directive makes them mandatory for OCSSPs other than economically modest startups.

Both section 512 and art. 17 provide mechanisms to challenge the removal of postings that users believe to be non-infringing, but sec. 512(g) places a higher burden of justification on rightholders: if a user sends a counter notification, the rightholder, in order to maintain the content’s removal, must initiate a copyright infringement suit against the user, otherwise the service will repost the content. Section 512(f), moreover, provides for courts to award users damages and attorneys’ fees against a rightholder “who knowingly materially misrepresents that material or activity is infringing.” Section 512 thus offers two kinds of user redress: automatic

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<sup>65</sup> The Copyright Office has expressed some skepticism about a notice-and-staydown regime, see REGISTER’S SECTION 512 REPORT, *supra* note 13 at 191 (“There are reasons to be cautious regarding the adoption of a general staydown requirement for OSPs. . . . [A]doption of a staydown requirement, with or without an affirmative filtering requirement for all (or even most) OSPs, would represent a fundamental shift of intermediary liability policy in the United States.”).

reposting if the rightholder fails to initiate an infringement action following receipt of a counter notification, and the prospect of substantial monetary liability if the rightholder abuses the notice and takedown process.<sup>66</sup>

In this regard, the role of human review plays out differently in the US and in the EU. Ninth Circuit precedent suggests that to avoid claims of misrepresentation, the rightholder may need to engage in human review of the alleged infringing postings before sending a takedown notice, while art. 17(9) directs the service provider to engage in human review in response to the user's complaint that the OCSSP erroneously blocked her posting. But, under the DSM Directive, if the OCSSP rejects the user's challenge, it appears that the user who seeks the reposting of the content will incur the burden of seeking judicial, or alternate dispute resolution, relief. On the other hand, the participation of user representatives in the "stakeholder dialogs" to articulate criteria for *ex ante* blocking, and the direction to ensure the availability of mandatory exceptions, may effectively reinforce user access to non-infringing content by avoiding its blockage in the first place.

Section 512's effective codification of "seek forgiveness, not permission" has fostered a vast amount of communication among internet users, but also shifted a vast amount of wealth to large commercial actors, without commensurate benefits to the creators of works. The US Congress is now reviewing many aspects of the 1976 Copyright Act, including the section 512 safe harbor regime. If Congress wishes to revise section 512 by returning the default from liability limitation to the normal copyright approach of obtaining authorization, the DSM Directive offers Congress a model, or at least a detailed example of reform. The development of identification tools such as Content-ID has belied at least some of the technological assumptions that underlay the 1998 legislation. Moreover, section 512's notice-and-takedown regime is not cost-free to either the copyright owner or the service provider, especially given the immense volume of notices.<sup>67</sup> Content-ID and equivalent white list/black list systems already implement by private agreement much of the DSM Directive's regime of cooperation in content licensing and blocking. But where these private enforcement measures may not be readily or equally available to all copyright owners, particularly not to individual authors and small rightholders, the EU approach should enable more authors and rightholders to obtain the benefits of

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<sup>66</sup> On the other hand, courts have applied a rather forgiving standard of bad behavior in determining whether a takedown notice constituted a "knowing [...] material [...] misrepresentation." See *Rossi v. Motion Picture Ass'n of Am. Inc.*, 391 F.3d 1000 (9th Cir.2004), discussed *supra*.

<sup>67</sup> Cary Sherman, Valuing Music in a Digital World, *Forbes* (Sept. 23, 2015) (RIAA CEO saying that notice and takedown regime is "a never-ending game that is both costly and increasingly pointless."); How Google Fights Piracy, p. 30 (November 2018), [https://www.blog.google/documents/25/GO806\\_Google\\_FightsPiracy\\_eReader\\_final.pdf](https://www.blog.google/documents/25/GO806_Google_FightsPiracy_eReader_final.pdf) (noting in 2017 YouTube received 2.5 million takedown request for more than 7 million videos, indicating that it "carefully reviewed" the requests and asked for more information or rejected requests related to 300,000 videos).

licensing and *ex ante* blocking.<sup>68</sup> Finally, it will be important to assess which mechanisms, the measures established in section 512(f)(g), or those in art. 17(7)(9) and (10), prove in practice most likely to preserve copyright exceptions in the content-sharing environment.

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<sup>68</sup> For detailed analysis of how this might be achieved within the DSM Directive art. 17 framework, see Matthias Leistner, *European Copyright Licensing and Infringement Liability Under Art. 17 DSM Directive Compared to Secondary Liability of Content Platforms in the U.S. – Can We Make the New European System a Global Opportunity Instead of a Local Challenge?*, ZEITSCHRIFT FÜR GEISTIGES EIGENTUM/INTELLECTUAL PROPERTY JOURNAL (forthcoming 2020).