THE DEATH OF ARTICLE 17: HOW THE CJEU IN *POLAND V. PARLIAMENT* CREATED A FRAMEWORK WHICH PREVENTS HOLDING YOUTUBE LIABLE FOR COPYRIGHT INFRINGEMENT UNDER DIRECTIVE (EU) 2019/790

Lucas Blackwell*

* J.D., Southwestern Law School, 2024.

INTRODUCTION

On March 23, 2020, nearly 170,000 people[1] across Europe took to the streets to protest an existential threat[2] the world has never seen before. It was not a mass protest against an unprovoked invasion, societal injustices, or the results of an election. Rather, the uproar caused by a revolutionary copyright directive was denounced by over five million online users,[3] and aimed to modernize European copyright law for the digital era.

In 2014, the European Commission found a need to develop a more modern, more European copyright framework by creating a digital single market.[4] Five years later, the European Union Parliament passed Directive (EU) 2019/790[5] (the "Directive"). Under Article 17, Section 4 of the Directive, online content-sharing service providers ("OCSSP(s)") shall be liable for unauthorized acts of communication to the public unless they demonstrate they have: (a) made best efforts to obtain authorization, (b) made diligent best efforts to ensure the unavailability of specific works, and (c) acted expeditiously when notified to remove infringing content and prevent future uploads.[6] Although the Directive did not single out any individual OCSSP, "anyone versed in the political economy of digital

[1] Philipp Grüll, *One year of EU copyright reform: Is the Internet still working?*, EURACTIV (Apr. 20, 2020) https://www.euractiv.com/section/digital/news/one-year-of-eu-copyright-reform-is-the-internet-still-working/ (last visited Oct. 4, 2022).

[2] Lauren Feiner, *YouTube and its users face an existential threat from the EU's new copyright directive*, CNBC (May 12, 2019, 6:00 A.M.). https://www.cnbc.com/2019/05/10/youtube-faces-existential-threat-from-the-eus-new-copyright-directive.html (last visited Oct. 4, 2022).

[3] Save The Internet, *Stop the censorship-machinery! Save the Internet!*, CHANGE.ORG (June 2018) https://www.change.org/p/european-parliament-stop-the-censorship-machinery-save-the-internet (last visited Oct. 4, 2022).

[4] *A Digital Single Market Strategy for Europe*, at 6, COM (2015) 192 final (June 5, 2015).

[5] 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, 2019 O.J. (L 130) 92 [hereinafter *Directive*].

[6] *Id.* art. 17, at 4.

copyright knows that Article 17 was designed specifically to make YouTube pay."[7]

One week after the Directive passed, the Republic of Poland brought an action of annulment against the European Union Parliament.[8] Poland argued Article 17, Section 4, Points B and C should be severed from the Directive, or, in the alternative, Article 17 should be annulled entirely.[9] The Court of Justice of the European Union (the "CJEU") rejected the notion Article 17 violated fundamental rights protected by the Charter of Fundamental Rights of the European Union.[10] Accordingly, the CJEU upheld Article 17 in its entirety.[11]

The CJEU's judgment laid out a thorough interpretation of Article 17, which arguably gutted the stringent standards intended by the European Union to open OCSSPs to liability for copyright infringement. The CJEU's discussion of Article 17 included three significant findings. First, OCSSPs can determine and choose the measures that qualify as their "best efforts."[12] Second, liability only arises after the rightsholder provides the OCSSP with relevant and necessary information about their copyrighted content.[13] Third, OCSSPs are not required to prevent unlawful, infringing content on their platform, when it requires an independent assessment to determine if the content violates copyright law.[14]

Therefore, the CJEU's judgment in *Poland v. Parliament* effectively prevents YouTube from being held liable for copyright infringement under Article 17(4), because the Charter of Fundamental Rights of the European Union enables YouTube to create their own "best efforts" of content moderation. YouTube's current copyright policies qualify as "best efforts" to remove infringing content once the platform is notified and prevents future uploads, and any external determination of copyright infringement thereafter, precludes liability for YouTube.

This paper will analyze the CJEU's judgment in *Poland v. Parliament* within the context of OCSSP copyright infringement litigation and its

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[7] Annemarie Bridy, *The Price of Closing the "Value Gap": How Music Hacked EU Copyright Reform*, VAND. J. ENT. & TECH L. 323, 325 (2020) [hereinafter *The Price of Closing the Value Gap*].

[8] Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶¶ 1-2 (Apr. 26, 2022).

[9] *Id.*

[10] *Id.* ¶ 98.

[11] *Id.* ¶ 100.

[12] *Id.* ¶ 73.

[13] *Id.* ¶ 89.

[14] *Id.* ¶ 90.

potential effect as a robust liability shield for YouTube. Part II will overview EU copyright law and discuss YouTube's current copyright policies. Part III will dissect the CJEU's judgment in *Poland v. Parliament* and explain how YouTube's determination of "best efforts" under Article 17(4) is protected by the Charter of Fundamental Rights of the European Union. Part IV will detail how YouTube's copyright policies comply with Article 17(4), thereby greatly limiting YouTube's potential for liability. Part V will discuss the role independent legal assessments and exceptions to copyright infringement play in precluding liability for YouTube. Finally, Part VI will briefly conclude this article's major arguments and forecast future developments in OCSSP copyright infringement litigation.

I. YOUTUBE'S COPYRIGHT MANAGEMENT TOOLS, EU COPYRIGHT LAW, AND THE BATTLE TO HOLD OCSSPS LIABLE FOR COPYRIGHT INFRINGEMENT.

YouTube is the second largest online content-sharing service provider (OCSSP) in the world, with over 2.56 billion active monthly users.[15] The main purpose of an OCSSP "is to store and give the public access to a large amount of copyright-protected works or other protected subject-matter uploaded by its users, which it organizes and promotes for profit-making purposes."[16] In the United States alone, YouTube's creator economy contributed over twenty-five billion dollars to the nation's gross domestic product ("GDP") and over 425,000 full-time equivalent jobs in 2021.[17] From August 2018 to August 2021, YouTube paid thirty billion dollars in advertising revenue from its videos to media companies, creators, and artists.[18]

A. YouTube's Copyright Management Tools

YouTube utilizes three tools, the Webform, Copyright Match Tool, and Content ID, to manage copyright infringing content uploaded, published,

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[15] Stacy Jo Dixon, *Most popular social networks worldwide as of January 2023*, *ranked by number of monthly active users*, STATISTA, (Aug. 29, 2023), https://0-www-statista-com.library.swlaw.edu/statistics/272014/global-social-networks-ranked-by-number-of-users/.

[16] *Directive*, *supra* note 5, art. 2(6), at 29, 30.

[17] HAMILTON GALLOWAY, OXFORD ECONOMICS, THE STATE OF THE CREATOR ECONOMY—ASSESSING THE ECONOMIC, SOCIETAL, AND CULTURAL IMPACT OF YOUTUBE IN THE US IN 2021 6, (2022).

[18] Marco Pancini, *YouTube's approach to copyright*, GOOGLE BLOG (Aug. 31, 2021), https://blog.google/around-the-globe/google-europe/youtubes-approach-to-copyright/ (last visited Nov. 13, 2022).

improperly monetized, or a combination thereof on YouTube.[19] The Webform allows any YouTube creator to submit a copyright removal request to remove the rightsholder's copyright-protected work uploaded without their authorization.[20] The removal request consists of six elements: the copyright owner's contact information, a description of the copyrighted work, specific URL(s) of the infringing video(s), an agreement that the rightsholder has a good faith belief the material was used without authorization, an assertion under the penalty of perjury that they are the copyright owner, and a signature.[21] After three "copyright strikes," a channel may be terminated from YouTube.[22]

The Copyright Match Tool is available to over two million channels who fall into three categories: users in the YouTube Partner Program, those granted access through the Copyright Management Tool application, and users who have previously removed a video due to a valid copyright takedown request.[23] The Copyright Match Tool scans YouTube for reuploads of all the user's public, unlisted, and private videos uploaded after the user's initial video to identify potential matches of that specific video.[24] Unlike Content ID, the tool only looks for complete or nearly complete matches to the user's videos, so the tool will not identify videos that include short clips of copyrighted material.[25] The user reviews any matched videos to determine whether they want to archive the video, request removal, or contact the channel.[26] The removal request can be effective immediately or seven days after the request is filed, and the user can prevent future copies from being uploaded to YouTube.[27]

Content ID is available to over nine thousand channels, primarily "movie studios, record labels, and collecting societies."[28] The channels provide YouTube with reference files so that YouTube can create "digital

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[19] YOUTUBE, YOUTUBE COPYRIGHT TRANSPARENCY REPORT H1 2021 1 (2021).

[20] *Submit a copyright removal request*, *YouTube Help*, https://support.google.com/youtube/answer/2807622?hl=en (last visited Nov. 12, 2022).

[21] *Requirements for copyright infringement notifications: Videos*, *YouTube Help*, https://support. google.com/youtube/answer/6005900 (last visited Nov. 12, 2022).

[22] YouTube Creators, *Copyright Takedowns & Content ID - Copyright on YouTube* (Oct. 12, 2020), https://www.youtube.com/watch?v=4qfV0PRsCrs (last visited November 12, 2022).

[23] YouTube Creators, *How to use the Copyright Match Tool*, (Aug. 16, 2022), https://www.youtube.com/watch?v=R_zXuVReajA (last visited Nov. 12, 2022).

[24] *Id.*

[25] *Id.*

[26] *Use the Copyright Match Tool*, *YouTube Help*, https://support.google.com/youtube/answer/7648743?hl=en (last visited Nov. 12, 2022).

[27] *Submit a copyright removal request*, *supra* note 20.

[28] YOUTUBE COPYRIGHT TRANSPARENCY REPORT, *supra* note 19, at 3.

fingerprints" from the program scans the entire platform to identify infringing uploads that match the reference files.[29] Copyright owners are then able to block, monetize, or track infringing videos.[30]

From July 1, 2021, to December 31, 2021, Content ID identified 759,540,199 videos on YouTube with infringing content.[31] The uploading user disputed 3,810,395 Content ID claims, but only 3,965 counter notifications were received.[32] Less than one percent of filed counter notifications resulted in a lawsuit.[33]

B. Recent CJEU Caselaw Regarding OCSSP Liability

Over the past two decades, YouTube and its parent company, Google, have been repeatedly dragged into European courts on various copyright infringement-related actions. In 2006, Copiepresse, a Belgian copyright management company for newspapers, sued Google, alleging copyright infringement.[34] Google provided links to cached copies of newspaper articles within its search results and published headlines and snippets of the articles on Google News.[35] The Belgian Court of Appeals affirmed the trial court's decision, which found Google liable for copyright infringement.[36]

In 2019, the CJEU addressed whether OCSSPs must disclose a user's personal information to the copyright owner after the user commits copyright infringement. Constantin Film Verleih GmbH sued YouTube, seeking access to the email addresses, IP addresses, and mobile telephone numbers of users who infringed upon Constantin Film's rights by illegally uploading protected cinematographic works.[37] Under Article 8(2)(a) of Directive 2004/48/EC, judicial authorities may order that the names and addresses of an intellectual property infringer must be provided to the rightsholder.[38]

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[29] *Id.*

[30] *Id.*

[31] *Id.* at 10.

[32] *Id.* at 10-11.

[33] *Id.* at 11.

[34] Graham Smith, *Copiepresse v Google - the Belgian judgment dissected,* LEXOLOGY (Mar. 13, 2007), https://www.lexology. com/library/detail.aspx?g= befe6258-9709-4eb8-9557-d9ee0e99cff5 (last visited Nov. 13, 2022).

[35] *Id.*

[36] Bart Van Besien, *Copiepresse versus Google: a legal analysis of news aggregation and copyright infringement under Belgian law*, NEWMEDIA-LAW (Sept. 17, 2013, 06:47 AM), https://www.newmedia-law.com/news/copiepresse-versus-google-a-legal-analysis-of-news-aggregation-and-copyright-infringement-under-belgian-law/ (last visited Nov. 13, 2022).

[37] Case C-264/19, Constantin Film Verleih GmbH v. YouTube LLC, Google Inc., ECLI:EU:C:2020:542, ¶ 2 (July 9, 2020).

[38] Council Directive 2004/48/EC, art. 8, 2004 O.J. (L 157).

The CJEU held that email addresses, telephone numbers, and IP addresses are not within the definition of "addresses" within Article 8(2)(a).[39] Nonetheless, EU Member States have the option to require the disclosure of such information, provided the nation's measures comply with other general principles of EU law.[40] Germany's Federal Court of Justice is one national court that has followed the CJEU's ruling in *Constantin Film Verleih GmbH* and reaffirmed that YouTube does not have to disclose the email addresses, telephone numbers, and IP addresses of infringing users to rightsholders.[41]

The CJEU laid the groundwork for some of their later holdings in *Poland v. Parliament* regarding OCSSP liability in a 2019 defamation case. Eva Glawischnig-Piesczek, a member of Austria's National Council, sued Facebook after a user published a defamatory comment about her, and the platform refused to delete the comment.[42] Facebook knew the illegal content and did not act expeditiously to remove the content.[43] The CJEU held that courts could require OCSSPs to block content that is identical to content that has previously been declared illegal without violating the EU's prohibition against implementing a general monitoring scheme.[44]

Nonetheless, courts cannot require OCSSPs to actively "seek facts or circumstances underlying the illegal content."[45] The CJEU held that when an OCSSP searches for and blocks content identical to content that has previously been declared illegal, OCSSPs are not required to carry out an independent assessment, because they already have access to and use automated search tools and technologies.[46] Overall, OCSSPs are allowed to monitor, remove, and block content when they have been provided with the relevant and necessary information regarding the infringing content and have no obligation to perform an independent legal assessment.[47]

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[39] Case C-264/19, Constantin Film Verleih GmbH v. YouTube LLC, Google Inc., ECLI:EU:C:2020:542, ¶ 40.

[40] *Id.* ¶ 39.

[41] EUROPEAN UNION INTELLECTUAL PROPERTY OFFICE, RECENT EUROPEAN CASE-LAW ON THE INFRINGEMENT AND ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS 136 (2023).

[42] Case C-18/18, Glawischnig-Piesczek vs. Facebook Ir. Ltd., ECLI:EU:C:2019:821, ¶¶ 10-14 (Oct. 3, 2019).

[43] *Id.* ¶ 27.

[44] *Id.* ¶ 37.

[45] *Id.* ¶ 42.

[46] *Id.* ¶ 46.

[47] 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?, 2* ZEITSCHRIFT FÜR GEISTIGES EIGENTUM/INTELL. PROP. J. 1, 16 (2020) [hereinafter Leistner].

The battle to hold YouTube liable for copyright infringement in the EU culminated in *Frank Peterson v. Google LLC*. Frank Peterson, a German music producer, sued YouTube over songs and the performance of songs from an album he produced.[48] Peterson owns the copyright to the songs that third parties allegedly uploaded.[49] This litigation is being decided under Directive 2000/31/EC (E-Commerce Directive), Directive 2001/29/EC (InfoSoc Directive), and Directive 2004/48/EC, not Directive 2019/790.[50]

The CJEU held that under InfoSoc Directive Article 3(1), OCSSPs do not make a "communication to the public" unless they have:

> [1] specific knowledge that protected content is available illegally on its platform and refrains from expeditiously deleting it or blocking access to it, or [2] where that operator, despite the fact that it knows or ought to know, in a general sense, that users of its platform are making protected content available to the public illegally via its platform, refrains from putting in place the appropriate technological measures that can be expected from a reasonably diligent operator in its situation in order to counter credibly and effectively copyright infringements on that platform, or [3] where that operator participates in selecting protected content illegally communicated to the public, provides tools on its platform specifically intended for the illegal sharing of such content or knowingly promotes such sharing, which may be attested by the fact that that operator has adopted a financial model that encourages users of its platform illegally to communicate protected content to the public via that platform.[51]

The CJEU held OCSSPs violate Article 3(1) when a rightsholder notifies the platform that unlawful content has been uploaded, and the OCSSP does not immediately take action to prevent access to this unlawful content by deleting or blocking it.[52]

C. EU Copyright Law Before and After Directive (EU) 2019/790

While efforts to hold OCSSPs, like YouTube, liable for copyright infringements have ramped up over the past decade, copyright law in the European Union remained largely stagnant before the Directive. The Berne Convention for the Protection of Literary and Artistic Works is an international agreement that sets minimum standards of copyright law for its

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[48] Joined Cases C-682/18 & C-683/18, Frank Peterson v. Google LLC, YouTube Inc., YouTube LLC, Google Germany GmbH (C-682/18), and Elsevier Inc. v. Cyando AG (C-683/18), ECLI:EU:C:2021:503, ¶¶ 18-24 (June 22, 2021).

[49] *Id.*

[50] *Id.* ¶¶ 1, 59.

[51] *Id.* ¶ 102.

[52] *Id.* ¶ 145.

179 contracting nations.[53] In the EU, original literary and artistic works are protected by copyright from the moment of creation until seventy years after the author's death.[54] Copyright protection grants the author of the work exclusive economic and moral rights which are automatically assigned upon creation.[55] Economic rights are broken down into three broad categories: reproduction, communication to the public, and distribution.[56]

Copyright law within individual EU Member States is governed by national law.[57] Therefore, the European Parliament harmonizes and standardizes national copyright law across the EU through the passage of numerous directives.[58] Once the European Parliament passes a directive, Member States have a certain timeframe to transpose the directive into national law.[59]

In 2000, the European Union sought to protect the free movement of information across OCSSPs by establishing national provisions to regulate OCSSP liability.[60] The following year, the European Union implemented its first major copyright directive in the digital age.[61] The InfoSoc Directive attempted to harmonize EU Copyright Law with the emerging technologies that gave rightsholders new ways to exploit their copyright interests. However, it simultaneously opened the floodgates for OCSSPs to commit copyright infringement with no legal recourse for rightsholders.[62] In 2014, the EU Commission began to develop a legislative plan for a new digital single market, which encompassed the new copyright framework enacted by the Directive.[63]

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[53] Berne Convention for the Protection of Literary and Artistic Works art. 1, July 14, 1967, 102 Stat. 2853, 828 U.N.T.S. 11850.

[54] EUROPEAN UNION, Copyright, https://europa.eu/youreurope/business/running-business/intellectual-property/copyright/index_en.htm#:~:text=Nobody%20apart%20from%20you%20has,a%20work%20of%20joint%20authorship. (last visited Nov. 12, 2022).

[55] *Id.*

[56] Council Directive 2001/29/EC, arts. 2-4, 2001 O.J. (L 167) [hereinafter *InfoSoc Directive*].

[57] EUROPEAN PARLIAMENT, COPYRIGHT LAW IN THE EUU: SALIENT FEATURES OF COPYRIGHT LAW ACROSS EU MEMBER STATES 1 (2018), https://www.europarl.europa.eu/RegData/etudes/STUD/2018/625126/EPRS_STU(2018)625126_EN.pdf.

[58] *Id.*

[59] Council Directive 2016/C 202/171, art. 288, 2016 O.J. (L 59) 171, 171-72 (EU).

[60] Council Directive 2000/31/EC, art. 1, 2000 O.J. (L 178) [hereinafter *E-Commerce Directive*].

[61] *InfoSoc Directive*, *supra* note 56, art. 1.

[62] *InfoSoc Directive*, *supra* note 56, recitals 1-6.

[63] European Commission, A Digital Single Market Strategy for Europe, at 2, COM (2015) 192 final (June 15, 2015).

Under Article 17, Section 4, of Directive (EU) 2019/790, online content-sharing service providers (OCSSPs) shall be liable for unauthorized acts of communication to the public, unless they demonstrate they have:

> (a) made best efforts to obtain an authorization, and (b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightsholders have provided the service providers with the relevant and necessary information; and in any event, (c) acted expeditiously, upon receiving a sufficiently substantiated notice from the rightsholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b).[64]

Article 17(4) is based on the premise that OCSSPs are unable to obtain authorization for all copyrighted content uploaded by users.[65] Rightsholders are under no obligation to license their content to OCSSPs.[66] Thus, in the absence of an authorization and users upload unlawful content, the OCSSP must meet all Article 17(4) requirements to avoid liability.[67] The defendant OCSSP has the burden to prove the platform complied with the requirements set forth in Article 17(4).[68]

In 2019, the Directive made four noticeable changes to the InfoSoc Directive and the E-Commerce Directive: it redefined communication to the public, changed the preexisting notice-and-takedown regime to a notice-and-stay-down regime, enshrined copyright exceptions into law, and introduced a specific liability regime for OSCCPs.[69]

The Directive changed the InfoSoc Directive's original definition[70] of when OCSSPs make an act of communication to the public. Article 17(1) of the Directive clarified that an OCSSP performs an act of communication to the public when they unlawfully make copyright-protected works available to the public on their platform.[71]

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[64] *Directive*, *supra* note 5, art. 17(4), at 38.

[65] Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶ 48 (Apr. 26, 2022).

[66] *Directive*, *supra* note 5, recital 61, at 19.

[67] *See* Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶ 49; *Leistner*, *supra* note 47, at 12.

[68] *Directive*, *supra* note 5, art. 17(4), at 38.

[69] *See Id.* art. 17(1) & 17(7), at 38, 39; Christopher Geiger & 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*, 70(6), GRUR INT'L, 1, 10 (2021) [hereinafter *Platform Liability Under Article 17*]; Bridy, *supra* note 7, at 354-55.

[70] *See* Joined Cases C-682/18 & C-683/18, Frank Peterson v. Google LLC, YouTube Inc., YouTube LLC, Google Germany GmbH (C-682/18), and Elsevier Inc. v. Cyando AG (C-683/18), ECLI:EU:C:2021:503, ¶ 120 (June 22, 2021).

[71] *Directive*, *supra* note 5, art. 17(1), at 38.

The Directive also changed the E-Commerce Directive's notice-and-takedown regime into a notice-and-stay-down regime.[72] The E-Commerce Directive required OCSSPs to take down infringing content once they had knowledge of the illegal activity.[73] Under Directive Article 17, OCSSPs not only must take down infringing content once they are notified, but they must also make best efforts to prevent future uploads of the infringing content.[74]

Under InfoSoc Directive Article 5, Member States had the option to provide exceptions or limitations to copyright regarding the right of reproduction or communication to the public.[75] Now, Member States are required to recognize the enumerated exceptions in Article 17(7) of the Directive.[76]

The most controversial measure of this new directive was Article 17, which introduced a specific liability regime for OCSSPs. OCSSPs are now presumptively held liable for an unlawful communication to the public unless they prove otherwise.[77] For example, if a YouTube user uploads a clip of *Star Wars Episode III: Revenge of the Sith* without obtaining a license from The Walt Disney Company, both the user and YouTube could be held liable in a court of law for copyright infringement. Simply put, OCSSPs can now be found "directly liable for copyright infringements by user uploads."[78]

EU Member States had until June 7, 2021, to transpose the Directive into law.[79] On May 19, 2022, the European Commission sent reasoned opinions to Belgium, Bulgaria, Cyprus, Denmark, Greece, France, Latvia, Poland, Portugal, Slovenia, Slovakia, Finland, and Sweden for failing to fully transpose the Directive.[80] On February 15, 2023, the European Commission referred Bulgaria, Denmark, Finland, Latvia, Poland, and Portugal to the CJEU after the countries did not comply with the reasoned

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[72] Bridy, *supra* note 7, at 357.

[73] *E-Commerce Directive*, *supra* note 60, art. 14(1)(b).

[74] *Directive*, *supra* note 5, art. 17(4)(c), at 38-39.

[75] *InfoSoc Directive*, *supra* note 56, art. 5.

[76] *Directive*, *supra* note 5, art. 17(7), at 39.

[77] *Id.* art. 17(4), at 38-39.

[78] SEBASTIAN FELIX SCHWEMER & JENS SCHOVSBO, WHAT IS LEFT OF THE USER RIGHTS?-ALGORITHMIC COPYRIGHT ENFORCEMENT AND FREE SPEECH IN THE LIGHT OF THE ARTICLE 17 REGIME 572 (Paul Torremans ed., 4th ed. 2020) [hereinafter *What is Left of User Rights?*].

[79] European Commission Press Release IP/ 22/2692, Copyright: Commission urges Member States to fully transpose EU copyright rules into national law (May 19, 2022).

[80] *Id.*

opinion and failed to transpose the Directive.[81] Under Article 260(3) of the Treaty on the Functioning of the European Union, the CJEU may impose financial sanctions on a Member State that fails to transpose an adopted directive.[82] The financial penalty considers "the seriousness of the infringement, its duration, [and] the need to ensure that the financial sanction itself is a deterrent to further infringements."[83] The financial sanction is levied via a "lump sum" or a "penalty payment" and must be proportionate to both the established breach, and the penalized Member State's capacity to pay the fine.[84]

Although EU Member States still have concerns about the strict liability regime introduced by Article 17, the CJEU's judgment in *Poland* should encourage the remaining countries to transpose the Directive. The CJEU's judgment in *Poland v. Parliament* effectively prevents OCSSPs, like YouTube, from being held liable for copyright infringement under Article 17(4) because the Charter of Fundamental Rights of the European Union enables YouTube to create their own "best efforts" of content moderation, YouTube's current copyright management systems qualify as "best efforts" to remove infringing content once the platform is notified, and any external determination of copyright infringement precludes liability for YouTube.

II. YOUTUBE IS PERMITTED TO DETERMINE "BEST EFFORTS"

In compliance with the Charter of Fundamental Rights of the European Union (CFREU), nations are obligated to allow OCSSPs like YouTube to determine what qualifies as "best efforts" under Article 17.[85] In *Poland v. Parliament*, the CJEU recognized that the freedom to conduct business is furthered by permitting OCSSPs to define "best efforts" of content moderation.[86] To respect a fair balance between fundamental rights and OCSSPs' business practices, CFREU Article 11 (freedom of expression and information) and CFREU Article 17 (right to property) act together to protect YouTube's autonomy from government control.

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[81] European Commission Press Release IP/23/704, The European Commission decides to refer 11 Member States to the Court of Justice of the European Union for failing to fully transpose EU copyright rules into national law (Feb. 15, 2023).

[82] Consolidated Version of the Treaty on the functioning of the European Union art. 260, 2016 O.J. (C 202) 47 (EU).

[83] *Communication from the Commission for Financial sanctions in infringement proceedings*, at 2, COM (2023) 9973 final (Apr. 1, 2023).

[84] *Id.*

[85] Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶ 75 (Apr. 26, 2022).

[86] *Id.*

The Charter of Fundamental Rights of the European Union enshrined the universal values of human dignity, freedom, equality, and solidarity into law within the context of societal progress and scientific and technological developments.[87] The Republic of Poland's annulment action against the EU regarding the Directive was based on alleged violations of CFREU Articles 11(1) and 17(2).[88]

CFREU Article 11(1) protects the right to freedom of expression.[89] This right includes the freedom to hold opinions and to receive and communicate information and ideas through any means without interference by public authorities.[90] Poland argued that to avoid liability by complying with Article 17(4) Points B and C, OCSSPs are forced to review every user's upload.[91] Such a process would seriously interfere with the right to freedom of expression and information because lawful content may be blocked, and it is unlawful to block such content before it is disseminated.[92]

Before the CJEU's judgment in *Poland v. Parliament*, commentators widely construed that Article 17's obligations do not allow for a proper balance between free expression and a lawful filtering system.[93] Some critics believed a fair balance between these competing interests is extraordinarily difficult, if not impossible, to accomplish.[94] Critics of the Directive believed implementing Article 17 forces OCSSPs to implement algorithmic filtering systems, which could make the "internet less diverse, interesting, equitable,

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[87] Charter of Fundamental Rights of the European Union art. 1, 2010 O.J. (C 83) 389 [hereinafter *CFREU*].

[88] Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶ 1 (2022).

[89] *CFREU*, *supra* note 87, art. 11(1), at 394.

[90] *Id.*

[91] Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶ 39-40 (2022).

[92] *Id.* ¶ 39-42.

[93] *See Leistner*, *supra* note 47, at 60 ("A bifurcated approach which construes art. 17(4) et seq. exclusively with regard to the balance of interests of rightsholders and [OCSSPs] while the protection of user freedoms . . . is mainly guaranteed through the user redress mechanism according to art. 17 (9) will not work."); João Pedro Quintais et. al, *Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics*, 10 U. AMSTERDAM J. INTELL. PROP., INFO. TECH. AND ELEC. COM. L. 277, 277-82 (2019 (discussing algorithmic copyright enforcement tools should only be used if they are proportionate according to Article 17(5), recognize mandatory exceptions and limitations to copyright, and "in no way affect legitimate uses" of copyrighted content); *What is Left of User Rights?*, *supra* note 78, at 16 ("Article 17 . . . constitutes a change…to a situation where over-enforcement via algorithmic content enforcement is deemed acceptable… So, what is left of user rights?").

[94] *Platform Liability Under Article 17*, *supra* note 69, at 47.

and useful."[95] As a result, the Directive could not only lead to censorship across OCSSP platforms but could limit the amount and type of OCSSPs that can operate within the EU.[96]

The CJEU previously held a filtering system that does not adequately distinguish between unlawful and lawful content, and does not respect the fair balance between the right to freedom and expression and the right to intellectual property.[97] In *Poland*, the CJEU reaffirmed that a filtering system that blocks lawful communications is incompatible with CFREU Article 11(1).[98] The CJEU also recognizes when an OCSSP implements a review and filtering system before publication, and it restricts the dissemination of online content.[99] Such a system constitutes a limitation on the right to freedom of expression and expression protected and guaranteed by CFREU Article 11.[100]

A limitation on any enumerated freedom protected by the CFREU must meet the requirements in CFREU Article 52(1) to be valid.[101] CFREU Article 52(1) states that a limitation on the exercise of the rights and freedoms recognized by the CFREU must be provided for by law, and must respect the essence of said rights and freedoms.[102] The limitation must be proportional and either genuinely and necessarily fulfill general interest objectives recognized by the EU, or derive out of a necessity to protect the rights and freedoms of others.[103]

The Republic of Poland argued that Article 17 does not meet CFREU Article 52(1)'s requirements because OCSSPs can implement any prior review and filtering mechanisms they want, which may infringe on users' rights.[104] Poland believed that giving OCSSPs' sole discretion over implementing algorithmic copyright enforcement mechanisms created a

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[95] Ally Boutelle & John Villasenor, *The European Copyright Directive: Potential impacts on free expression and privacy*, BROOKINGS INSTITUTE (Feb. 2, 2021), https://www.brookings.edu/blog/techtank/2021/02/02/the-european-copyright-directive-potential-impacts-on-free-expression-and-privacy/ (last visited Nov. 11, 2022).

[96] Alexandra Brooks*, Liable for Anonymous: The Danger of Holding Digital Platforms Liable for Copyright Infringement of Third-Party Users*, 52 GEO.WASH. INT'L L. REV. 129, 150 (2020) [hereinafter *Brooks*].

[97] Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶ 86 (Apr. 26, 2022).

[98] *Id.*

[99] *Id.* ¶ 55.

[100] *Id.* ¶ 58.

[101] *CFREU*, *supra* note 87, art. 52, at 402.

[102] *Id.*

[103] *Id.*

[104] Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶ 59-61 (Apr. 26, 2022).

great imbalance between rightsholders and OCSSP users.[105] However, the EU Council and Parliament intentionally did not define the specific measures that qualify as "best efforts."[106] Article 17(4)'s intentionally vague wording of "best efforts" was deliberately constructed to ensure the specific liability regime could be adapted to the specific circumstances of each OCSSP, regardless of future developments in industry practices and available technologies.[107]

OCSSPs like YouTube "must comply with the right to freedom of expression and information of internet users."[108] OCSSPs cannot implement measures that affect the fundamental rights of users who do not upload infringing content.[109] "Best efforts" under Article 17(4) must achieve a delicate balance: such measures must offer effective protections to copyright owners without affecting any lawful user of OCSSP platforms.[110] The European Commission clarified that OCSSPs are free to select the technical measures or other solutions to meet "best efforts" within Article 17 based on their specific situation.[111] Assessing whether or not an OCSSP has made "best efforts" under Article 17(4)(B) should occur on a case-by-case basis, taking into account the principle of proportionality outlined in Article 17(5), exceptions to copyright law in Articles 17(7)-(8), and redress mechanisms described in Article 17(9).[112]

OCSSPs are permitted to determine which specific measures should be implemented, to achieve a proper balance between the freedom of expression and rightsholders' copyright interests.[113] This explicit delegation allows OCSSPs to choose the "best efforts" that are best adapted to the resources and technologies available to them and congruent with the challenges and constraints that OCSSPs face in providing their services to the masses.[114]

CFREU Article 17(2) states that "[i]ntellectual property shall be protected."[115] Although CFREU Article 17(2) enshrines the protection of

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[105] *Id.*

[106] *Id.* ¶ 73.

[107] *Id.*

[108] *Id.* ¶ 81.

[109] *Id.* ¶ 80.

[110] *Id.* ¶ 81.

[111] *Commission Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market*, at 12, COM (2021) 288 final (Jun. 4, 2021) [hereinafter *Guidance on Article 17*].

[112] *Id.* at 13.

[113] Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶ 75 (Apr. 26, 2022).

[114] *Id.*

[115] *CFREU*, *supra* note 87, art. 17(2), at 395.

intellectual property rights into EU law, this right is not inviolable.[116] Neither Article 17(2)'s wording nor the CJEU caselaw demonstrates that intellectual property rights are an absolute right, and must be protected without exception or limitation.[117]

Other proposed liability mechanisms do not offer the necessary and appropriate protections for intellectual property that Article 17(4) provides.[118] As an alternative to Article 17(4) points A, B, and C, Poland argued that Article17(4)(A), and the first part of Article 17(4)(C), provided sufficient safeguards for intellectual property rightsholders.[119] Poland's alternative proposal would be less restrictive than Article 17(4), because it would not require OCSSPs to make diligent best efforts to ensure the unavailability of specific works.[120] As a result, Poland's proposed mechanism would not be as effective as Article 17(4) in protecting intellectual property rights.[121] Therefore, upholding Article 17(4) in its entirety was necessary to comply with CFREU Article 17(2) and bolster a well-functioning and fair marketplace for copyright through strong protections for intellectual property rights.[122]

The obligation on OCSSPs to review content after content is uploaded to its platform and before it is published, must be accompanied by appropriate safeguards by the EU Parliament to ensure respect for the right to freedom of expression, information of OCSSP users, and the right to intellectual property.[123] The CJEU recognized that copyright protections offered by OCSSPs in compliance with CFREU Article 17(2) must inevitably be accompanied by a limitation on the right of OCSSPs users' freedom of expression and the information enshrined in CFREU Article 11.[124] Although CFREU Article 11 protects user sharing information on OCSSP platforms, the specific liability regime set forth in Article 17(4) is a legitimate "limitation on the exercise of the right to freedom of expression and information."[125]

Article 11 and Article 17 of the Charter of Fundamental Rights of the European Union work in tandem to protect YouTube's business practices and policies from government control. Overall, the CFREU demands that

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[116] Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶ 92 (2022).
[117] *Id.*
[118] *Id.* ¶ 83.
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.* ¶ 82.
[123] *Id.* ¶ 98.
[124] *Id.* ¶ 82.
[125] *Id.*

YouTube be allowed to specifically determine the "best efforts" they take to ensure the quick removal of infringing content on its platform.

III. YOUTUBE'S COPYRIGHT POLICIES BALANCE USERS' FREEDOMS AND RIGHTSHOLDERS' INTERESTS

YouTube's two main copyright management systems, the Webform tool and Content ID, properly balance users' freedoms and rightsholders' interests because they comply with the requirements set forth in Article 17(4)(B). In *Poland v. Parliament*, the CJEU emphasized liability for OCSSPs only arises after the rightsholder provides the platform with relevant and necessary information about their own copyrighted content.[126] Therefore, YouTube can only be held liable for copyright infringement after the platform has been specifically notified that copyrighted content has been impermissibly uploaded.

In the absence of users notifying OCSSPs of their copyright interests, platforms cannot be held liable under Article 17(4).[127] Prior to *Poland*, critics of Article 17 believed OCSSPs would be forced to "take full responsibility for the infringing actions of their users in certain situations, regardless of knowledge."[128] There was widespread concern that OCSSPs, like YouTube, would be held liable whenever infringing content was uploaded and made accessible to the public through their platforms.[129] This is simply not the case. As explicitly stated in Recital 66 of the Directive, when rightsholders do not provide OCSSPs with the relevant and necessary information of their specific works or submit a notification to disable access or remove specific unauthorized works, OCSSPs cannot make "best efforts" to ensure the unavailability of specific works and therefore should not be held liable for copyright infringement.[130]

Copyright ownership over content within videos uploaded on YouTube can be asserted in two different ways: copyright removal requests and Content ID claims.[131] YouTube's Webform tool, open to all users, complies with the CJEU's requirement that a rightsholder's notification to an OCSSP that their copyrighted content has been impermissibly uploaded, must contain "sufficient information" to prove the use of the copyrighted

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[126] *Id.* ¶ 89.
[127] *Id.*
[128] *Brooks*, *supra* note 96, at 143.
[129] *Id.* at 144.
[130] *Directive*, *supra* note 5, ¶ 66.
[131] *What is a copyright claim?*, *YouTube Help*, https://support.google.com/youtube/answer/7002106?hl=en (last visited Nov. 12, 2022).

content is illegal.[132] This information is necessary so the OCSSP's removal of the content does not violate the user's freedom of expression and information.[133] Further, the notification must be sufficiently detailed so there is no need for the OCSSP to conduct a thorough legal examination.[134]

A copyright removal request is submitted by the copyright owner through the Webform tool to remove unlawfully uploaded content due to an alleged copyright infringement claim.[135] When YouTube determines that a copyright removal request is valid, the user's content is removed, and the channel receives a copyright strike.[136]

YouTube uses copyright strikes to punish users who unlawfully use copyrighted material on their platform. A user who receives their first copyright strike is required to go through "Copyright School."[137] YouTube's Copyright School is a four-and-a-half-minute animated video that briefly summarizes U.S. copyright law and YouTube's copyright policies.[138] After watching the video, the user is required to complete a quiz on copyright law based on the video.[139] If a user receives three copyright strikes, the user's account is subject to termination, all the user's uploaded videos are deleted, and the user cannot create any other YouTube channel.[140]

Content ID allows a select group of over nine thousand users to upload their copyrighted material into a database containing over eighty million active reference files of rightsholders' copyrighted material.[141] Every video uploaded to YouTube is scanned against the database, identifying and removing infringing videos.[142] Thus, YouTube can be held liable for Content ID claimed videos that it does not expeditiously remove because the rightsholder has already notified the platform about their copyright interests,

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[132] Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶ 91 (Apr. 26, 2022).

[133] *Id.*

[134] *Id.*

[135] *What is a copyright claim?*, *supra* note 131.

[136] *Id.*

[137] *Copyright strike basics*, *YouTube Help*, https://support.google.com/youtube/answer/2814000?hl=en (last visited Dec.12, 2022).

[138] YouTube, *YouTube Copyright School* (Mar. 24, 2011), https://www.youtube.com/watch?v=InzDjH1-9Ns.

[139] Corynne McSherry, *YouTube Sends Users To Copyright School: Will Content Owners Have to Go, Too?* ELECTRONIC FRONTIER FOUNDATION (Apr. 15, 2011), https://www.eff.org/deeplinks/2011/04/youtube-sends-users-copyright-school-will-content.

[140] YouTube, *Copyright strike basics* Google Support, https://support.google.com/youtube/answer/2814000 (last visited Dec. 12, 2022).

[141] GOOGLE, HOW GOOGLE FIGHTS PIRACY 13 (2018), https://blog.google/documents/27/How_Google_Fights_Piracy_2018.pdf/ [hereinafter *How Google Fights Piracy*].

[142] *Id.*

and Content ID has provided a notice that infringing content was uploaded to YouTube.[143]

A Content ID claim is automatically generated by the Content ID system, not the copyright owner, over ninety-nine percent of the time.[144] Uploaded content that matches the digital fingerprint created by the Content ID system receives a Content ID claim.[145] The OCSSP user who impermissibly uploaded the Content ID claimed video has three options:[146] they can leave the content in the video, allowing the video's revenue to be given to the copyright owner if they are in the YouTube Partner Program, remove the claimed content from the video to automatically release the Content ID claim, or dispute the claim.[147]

The copyright owner can block, monetize, or track a video claimed by Content ID.[148] Blocking the video will remove the entire video from YouTube.[149]

By monetizing the content, the video remains viewable on YouTube, but the rightsholder can place ads on the video and receive ad revenue if the infringing user is a member of YouTube's Partner Program.[150] Over 90% of Content ID claims are monetized, which has resulted in seven-and-a-half billion dollars in ad revenue paid to rightsholders.[151] The video stays on YouTube by tracking the content, but the rightsholder can track the video's viewership statistics.[152] Unlike a copyright removal request, Content ID claims do not result in a copyright strike, even if the content is rightfully claimed for infringement.[153]

The Content ID dispute process reflects Article 17's requirements that OCSSP users must have access to both in-court and out-of-court redress mechanisms to resolve copyright disputes.[154] An escalation of a Content ID

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[143] Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶ 89 (Apr. 26, 2022).

[144] YOUTUBE COPYRIGHT TRANSPARENCY REPORT, *supra* note 19, at 12.

[145] Copyright Takedowns & Content ID - Copyright on YouTube, *supra* note 22.

[146] *Learn about Content ID claims*, *YouTube Help,* https://support.google.com/youtube/answer/6013276?hl=en&co=GENIE.Platform%3DDesktop#zippy=%2Cremove-the-claimed-content%2Cshare-revenue%2Cdispute-the-claim (last visited Nov. 13, 2022).

[147] *Id.*

[148] *Id.*

[149] Copyright Takedowns & Content ID - Copyright on YouTube, *supra* note 22.

[150] *Id.*

[151] YOUTUBE COPYRIGHT TRANSPARENCY REPORT, *supra* note 19, at 3.

[152] Copyright Takedowns & Content ID - Copyright on YouTube, *supra* note 22.

[153] *Id.*

[154] *Directive*, *supra* note 5, art. 17(9), at 120-21.

dispute leads directly into legal proceedings. If the claimant blocked the user's content, they could appeal the claim without submitting a Content ID dispute.[155] If the user's content was monetized or tracked, the user can file a Content ID dispute.[156] The claimant has thirty days to respond to a Content ID dispute.[157]

The copyright owner can release, uphold, or let the claim expire.[158] The user can appeal the decision if the copyright owner upholds their Content ID claim.[159] After submitting an appeal, the copyright owner has seven days to release the claim, let the claim expire, or submit a copyright takedown request.[160] A valid takedown request results in the video's removal from YouTube and a strike against the user.[161] If the user still believes they are not committing copyright infringement, they can submit a counter notification.[162]

YouTube has invested over one hundred million dollars in creating and maintaining Content ID.[163] Content ID can identify impermissible uses of copyrighted content even when the user changes a video's aspect ratio or orientation, an audio track's speed or pitch, and the color or surroundings of a video.[164] Additionally, Content ID can "detect copyrighted melodies, video, and audio, helping identify cover performances, remixes, or reuploads" rightsholders may want to monetize, track, or block and remove from YouTube.[165]

In the wake of the Directive, many have promulgated Content ID's insufficiency in preventing infringing content from being uploaded onto YouTube.[166] Content ID "struggles to recognize the difference between copyrighted material and works belonging to the public domain."[167] Additionally, Content ID is often unable to identify content that contains a

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[155] YouTube Creators, *Content ID Claims & Dispute Process: Manage & Action Claims in Studio* (Sept. 13, 2022), https://www.youtube.com/watch?v=ybmRMEJG6LY&t =324s.

[156] *Id.*

[157] *Dispute a Content ID claim*, *YouTube Help*, https://support.google.com/youtube/answer/2797454# zippy= (last visited Nov. 13, 2022).

[158] *Content ID Claims & Dispute Process: Manage & Action Claims in Studio, supra* note 155.

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *How Google Fights Piracy*, *supra* note 141, at 27.

[164] *Id.*; YOUTUBE COPYRIGHT TRANSPARENCY REPORT, *supra* note 19, at 13.

[165] *How Google Fights Piracy*, *supra* note 141, at 27.

[166] *Brooks*, *supra* note 96, at 145.

[167] 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*, 10 J. INTELL. PROP. INFO. TECH. & ELEC. COM. L. 173, 182 (2019).

legal use of copyrighted content under an expectation or limitation to copyright law.[168] Due to the current technological limits of filtering algorithms like Content ID, such systems carry "the risk to create disproportionately many 'false positives,' i.e., takedowns of content which do not infringe or which is covered by an exception or imitation."[169] If true, the multitude of false positive would constitute an infringement on the right to freedom of expression.[170]

Litigants may argue that by allowing an infringing video flagged by Content ID to remain on YouTube, the platform violates Article 17(4)(C) because the video with infringing content may remain published on YouTube. Through "second level agreements," YouTube contracts with Content ID participants allowing rightsholders to benefit from impermissible infringement.[171] By permitting an unlawful use of their copyrighted material to remain on YouTube, rightsholders receive revenue from the use without an explicit license agreement between the user and rightsholder.[172]

As part of the Content ID program, YouTube makes licensing deals with organizations like the American Society of Composers, Authors, and Publishers (ASCAP), which represents over 875,000 songwriters, composers, and music publishers.[173] "YouTube pays ASCAP a licensing fee for the right to perform [ASCAP] members' music in YouTube videos."[174] When Content ID identifies a video that contains an unauthorized use of an ASCAP member's music, Content ID automatically places a Content ID claim on the video on behalf of the copyright owner.[175]

Unless the ASCAP member specifically requests ASCAP to block the video, the ASCAP Content ID claim will not mean the video is removed from YouTube.[176] Rather, the revenue collected from the ads on the Content ID claimed video, is distributed to the ASCAP member(s) instead of the

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[168] Sabine Jacques et. al, *An Empirical Study of the Use of Automated Anti-Piracy Systems and Their Consequences for Cultural Diversity*, 15 SCRIPTED 277, 287 (2018).

[169] *Platform Liability Under Article 17*, *supra* note 69, at 37 n. 225.

[170] *Id.*

[171] Abigail R. Simon, *Contracting in the Dark: Casting Light on the Shadows of Second Level Agreements*, 5 WM. & MARY BUS. L. REV. 305, 321-323 (2014).

[172] Maayan Perel & Niva Elkin-Koren, *Accountability in Algorithmic Copyright Enforcement*, 19 STAN. TECH. L. REV. 473, 512-13 (2016) [hereinafter *Accountability in Algorithmic Copyright Enforcement*].

[173] *FAQs for YouTube Content Uploaders*, https://www.ascap.com/ help/music-business-101/youtube-faq-uploaders (last visited Nov. 13, 2022).

[174] *Id*.

[175] *Id*.

[176] *Id*.

infringing YouTube user.[177] Thus, when infringing content identified by Content ID remains on YouTube, YouTube cannot be found liable under Article 17 because the rightsholder authorizes the content to remain online.

YouTube's current copyright policies comply with Article 17(4)(B) because once YouTube is made aware that a specific video contains infringing content, the video is either removed from YouTube or is allowed to remain online after YouTube receives authorization from the true rightsholder. Therefore, the platform cannot be liable for copyright infringement.

IV. ANY EXTERNAL DETERMINATION OF COPYRIGHT INFRINGEMENT PRECLUDES LIABILITY

Due to the nuances of copyright law, an independent legal assessment is often required to determine copyright infringement. In *Poland v. Parliament*, the CJEU stated OCSSPs are not required to prevent content from being uploaded and published when, to be found unlawful, the OCSSP would be required to conduct an independent legal assessment of the content by weighing information provided by the rightsholder and exceptions to copyright.[178]

A. OCSSPs Do Not Need to Conduct an Independent Legal Assessment to Avoid Liability

Article 17, Section 7, of the Directive ensures that OCSSP users can use copyrighted material for the purposes of quotation, criticism, review, caricature, parody, or pastiche.[179] However, none of these terms are defined in the InfoSoc Directive or Article 17(7).[180] Thus, the meaning and scope of these copyright exceptions is determined by considering their usual meaning in everyday language, the context in which they occur, and the purposes of the rules of which they are a part.[181] Additionally, Article 17(9) requires OCSSPs to inform their users in their platform's terms and conditions that users can use copyrightable material under exceptions and limitations to copyright law.[182]

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[177] *Id*.

[178] Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶ 90 (Apr. 26, 2022).

[179] *Directive*, *supra* note 5, art. 17, at 120.

[180] *Guidance on Article 17*, *supra* note 111, at 19.

[181] *Id.*

[182] *Directive*, *supra* note 5, art. 17, ¶ 9.

The enumerated exceptions to copyright law in Article 17(7), encompassed within the fair use doctrine in the U.S., allow the use of copyrighted material without the rightsholder's permission.[183] While the EU does not use the term "fair use," YouTube explicitly states that only individual countries and the courts of each nation, not YouTube, can determine what constitutes fair use.[184] YouTube itself is unable to make determinations that "require a detailed factual or legal assessment" regarding whether the use of copyrighted content is fair, since the platform is not a court of law.[185] Therefore, YouTube's copyright management tools, procedures, and policies, in-line with applicable law, allow disputes to be resolved between rightsholders.[186]

The CJEU's independent legal assessment exception to OCSSP liability articulated in *Poland* derives from their decision in *Glawischnig-Piesczek*.[187] In *Glawischnig-Piesczek*, the CJEU held that the obligation of OCSSPs to block and remove illegally defamatory content does not require platforms to conduct an independent legal assessment of the content.[188] In *Poland*, the CJEU analogized *Glawischnig-Piesczek* to the present case and held Article 17 cannot require OCSSPs to conduct independent legal assessment's to identify unlawful content and prevent it from being uploaded and published.[189] Therefore, even when a rightsholder provides relevant and necessary information about their copyrighted content, the OCSSP need not perform an independent legal assessment to determine the legality of uploaded content to avoid liability under Article 17.[190] Imposing such a requirement would violate the EU's prohibition on implementing a general monitoring scheme.[191]

Suppose an OCSSP uses an automated or algorithmic filtering system to identify manifestly infringing content. In that case, such a system does not amount to the OCSSP conducting an independent legal assessment to

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[183] *Id.* art. 17, ¶ 7.

[184] YouTube Creators, *Fair Use - Copyright on YouTube* (Oct. 8, 2019), https://www.youtube.com/watch?v=1PvjRIkwIl8.

[185] YOUTUBE COPYRIGHT TRANSPARENCY REPORT, *supra* note 19, at 9.

[186] *Id.*

[187] Eleonora Rosati, *What does the CJEU judgment in C-401/19 mean for the national transpositions and applications of Art. 17?*, THE IPKAT (Sept. 18, 2022), https://ipkitten.blogspot.com/2022/09/what-does-cjeu-judgment-in-c-40119-mean.html.

[188] Case C-18/18, Glawischnig-Piesczek vs. Facebook Ir. Ltd., ECLI:EU:C:2019:821, ¶ 53 (Oct. 3, 2019).

[189] Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶ 90 (Apr. 26, 2022).

[190] *Id.*

[191] *Id.*

determine whether specific content violates copyright law.[192] Thus, when YouTube uses Content ID to identify infringing content, utilizing Content ID does not amount to YouTube performing an independent legal assessment.

Between the complicated process of analyzing copyright exceptions and a prohibition against implementing a general content monitoring scheme, OCSSPs are shielded from liability when an independent legal assessment is necessary to determine copyright infringement.[193] Since such a determination is obviously required to award relief in a court of law, Article 17 precludes holding YouTube liable for copyright infringement in every circumstance where the platform could only determine a valid copyright infringement claim through an independent legal assessment.

B. Developing Algorithmic Tools as a Means to Identify Infringing Content

A common critique to Article 17 is OCSSPs will ~~now~~ be required to over-filter content because algorithmic systems cannot distinguish between copyright exceptions and copyright infringement.[194] Because OCSSPs have a financial incentive to over-filter content on their platforms, there are concerns that filtering systems would block videos from being published for alleged copyright infringement, even though the content does not contain any copyrighted content.[195] Further, others have argued since Content ID cannot accurately consider and identify copyright exceptions, YouTube should be open to liability for misrepresentation and no longer be protected by OCSSP safe harbor provisions.[196] However, OCSSPs cannot be held liable under Article 17 simply because their algorithmic systems do not accurately distinguish copyright exceptions from copyright infringement and absent rightsholders, providing the relevant and necessary information about their copyrights to the OCSSP.[197]

In *Poland*, the CJEU made the policy decision to prioritize free speech over protecting copyrighted content by precluding liability for OCSSPs when copyright infringement is not obvious.[198] Thus, the OCSSP's user, not the OCSSP platform, has the duty to raise a copyright infringement claim

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[192] *Guidance on Article 17*, *supra* note 111, at 20-21.

[193] Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶ 90 (2022).

[194] Boutelle & Villasenor, *supra* note 95.

[195] *Id.*

[196] Laura Zapata-Kim, *Should YouTube's Content ID Be Liable for Misrepresentation under the Digital Millennium Copyright Act*, 57 B.C. L. REV. 1847, 1867-1873 (2016).

[197] *Guidance on Article 17*, *supra* note 111, at 20.

[198] Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶ 90 (2022).

through the submission of "relevant and necessary" information about their copyright interests,[199] and OCSSPs are not liable for unauthorized uploads. When rightsholders fail to provide OCSSPs with relevant and necessary information about their copyright interests, OCSSPs are not liable for unauthorized uploads.[200] Contrary to some scholars' earlier reading of Article 17's obligations, OCSSPs do not have to develop algorithmic tools that determine and distinguish when copyrighted material is used lawfully or unlawfully to comply with Article 17's requirements and avoid liability.[201]

YouTube concedes it is "impossible for matching technology to take into account complex legal considerations like fair use, fair dealing, or other copyright exceptions."[202] One recent large-scale analysis of YouTube's copyright enforcement system found Content ID worked "relatively well to remove apparently infringing content from YouTube."[203] However, the data raised "some concerns about potential misidentification and over blocking" of copyrighted content, particularly in the categories of sports highlights and recorded music.[204]

Developing algorithmic copyright filtering tools is extremely complicated because such tools must apply flexible legal standards on a mass scale, typically applied case-by-case to individual pieces of content.[205] OCSSPs are notorious for obscuring the development, training, and performance of algorithmic filtering tools behind the "veil of a proprietary code."[206] While the exact Content ID algorithm is unknown to the greater public, broadly speaking, its algorithms are "'trained' on existing content pieces to detect similar units in new content pieces."[207] On YouTube, the Content ID's filtering algorithm "seems to remain wild and free"[208] because it filters and blocks content "based on an entirely undisclosed, self-determined threshold."[209]

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[199] *Guidance on Article 17*, *supra* note 111, at 11.

[200] *Id.*

[201] *Id.* at 20.

[202] YOUTUBE COPYRIGHT TRANSPARENCY REPORT, *supra* note 19, at 12.

[203] Joanne E. Gray & Nicolas P Suzor, *Playing With Machines: Using Machine Learning To Understand Automated Copyright Enforcement At Scale*, 7 BIG DATA & SOC'Y, 1, 11 (2020).

[204] *Id.*

[205] *Accountability in Algorithmic Copyright Enforcement*, *supra* note 172, at 486.

[206] *Id.* at 513.

[207] Toni Lester & Dessislava Pachamanova, *The Dilemma of False Positives: Making Content ID Algorithms More Conducive To Fostering Innovative Fair Use In Music Creation* 24 UCLA ENT. L. REV. 51, 68 (2017).

[208] *Accountability in Algorithmic Copyright Enforcement*, *supra* note 172, at 516.

[209] *Id.* at 506.

While calls have increased for greater transparency surrounding how filtering algorithms operate, full transparency may be an impossible standard. Full transparency is an impossible ask for OCSSPs, because secrecy is necessary to prevent intentional infringers from learning how to circumvent the system and to prevent competitors from copying their code.[210] Without careful oversight and precise training of algorithms used for copyright enforcement, there will be widespread under-enforcement or over-enforcement of copyright infringement.[211]Nonetheless, OCSSPs continue to employ copyright enforcement algorithms that are empowered to make determinations of copyright infringement.

While OCSSPs work on developing "perfect" algorithmic filtering systems, it has been suggested tools like Content ID should merely identify potentially infringing content and notify the respective rightsholder, who would then decide whether to pursue a claim.[212] However, in practice, this offers no meaningful difference from the current system. Currently, even when Content ID determines there is a match and a video contains an unlawful use of copyrighted material, the copyright holder can simply release the claim. This human review by the rightsholder allows for an immediate course correction when Content ID fails to distinguish a lawful use of copyrighted material under an exception to copyright. Rightsholders may benefit from the presumption a Content ID claim equates to a valid copyright infringement claim, unless the allegedly infringing user navigates through the Content ID dispute process and perhaps into a court of law. However, if OCSSPs used filtering tools like Content ID to merely identify potentially infringing content without preemptively blocking potentially infringing content, they would be subject to widespread liability under Article 17.[213]

C. Manifestly Infringing Content Versus Not Manifestly Infringing Content

The CJEU held that lawful uses of copyrighted material shall not prevent the availability of other uploaded works which do not infringe on copyright and related rights.[214] By drawing a distinction between manifestly infringing content and not manifestly infringing content, OCSSP liability is

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[210] *Id.* at 523.

[211] *Id.* at 492-93.

[212] Michael Bechtel, *Algorithmic Notification and Monetization: Using YouTube's Content ID System as a Model for European Union Copyright Reform*, 28 MICH. STATE INT'L L. REV. 237, 263-264 (2020).

[213] *Guidance on Article 17*, *supra* note 111, at 20-21.

[214] Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶ 90 (Apr. 26, 2022).

limited only to instances where manifestly infringing content is uploaded on its platform.[215] Uploads that are not manifestly infringing should be published online; only then, they may be subject to human review after the rightsholder opposes the use of their copyrighted material by sending a takedown notice.[216]

While not binding law, the European Commission's "Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market" (Guidance on Article 17) provides a framework to further limit OCSSP liability under Article 17 amidst the independent legal assessment exception.[217] Guidance on Article 17 details the manifestly infringing versus not manifestly infringing content distinction.[218] Manifestly infringing content contains exact matches or significant portions of copyright works.[219] For example, a fan-made lyric video of *Hope* by NF that plays the entire song is manifestly infringing content.[220] Not manifestly infringing content contains partial matches, small portions, or significant creative modifications to copyrighted works.[221] Thus, a fifteen-minute video discussing a user's top ten favorite movies of the year that includes a short, ten-second clip of each film is not manifestly infringing content.[222]

If an OCSSP uses an algorithmic system like Content ID to identify manifestly infringing content, then it does not qualify as the OCSSP conducting an independent legal assessment to determine the legitimacy of an upload containing copyrighted content.[223] Thus, manifestly infringing uploads should be preemptively blocked by the OCSSP, while not manifestly infringing content is allowed to be uploaded to the platform.[224]

The European Commission recommends copyright claim processes, which YouTube has already implemented through its takedown notice procedure and Content ID dispute process.[225] The European Commission foresees implementing this regime as follows:

Online content-sharing service providers should be deemed to have complied, until proven otherwise, with their best efforts obligations under

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[215] *Guidance on Article 17*, *supra* note 111, at 20-21.
[216] *Id.* at 20.
[217] *See generally Guidance on Article 17*, *supra* note 111.
[218] *Id.* at 20-24.
[219] *Id.* at 21.
[220] *Id.*
[221] *Id.*
[222] *Id.* at 21-22.
[223] *Id.* at 20-21.
[224] *Id.* at 23.
[225] *Id.*

Article 17(4)(b) and (c) in light of Article 17 (7) if they have acted diligently as regards to content which is not manifestly infringing following the approach outlined in [Guidance on Article 17], taking into account the relevant information from right holders. By contrast, they should be deemed not to have complied, until proven otherwise, with their best effort obligations in light of Article 17 (7) and be held liable for copyright infringement if they have made available uploaded content disregarding the information provided by rightsholders . . . .[226]

This regime reflects the CJEU's decision in *Glawischnig-Piesczek* that OCSSPs cannot be expected to conduct independent assessments to determine the legality of a user's impermissible use of copyrighted content.[227] Even if an algorithmic filtering system could be developed and implemented via a stay-down regime, it would likely impose a general monitoring scheme that violates EU law.[228] Therefore, to avoid violating the prohibition of implementing a general monitoring obligation, EU Member States should let uploads be initially available on OCSSPs, and then rightsholders can flag infringing content to the OCSSP.[229]

D. Counter Notifications and Out-of-Court Redress Mechanisms

In *Poland*, the CJEU reinforced that EU Member States must ensure all OCSSP users are given access not only to efficient judicial remedies to assert their rights but also to out-of-court redress mechanisms that allow for copyright disputes to be settled impartially.[230] When an OCSSP user asserts they have legally used copyrighted content due to an exception or limitation to copyright, the user must have access to a court or another relevant judicial authority to assert a claim.[231] YouTube's copyright claim and dispute process on YouTube reflects the legal process to resolve copyright infringements that arise on OCSSP platforms enshrined in U.S. copyright law.

YouTube's takedown notice and counter-notification procedures are directly taken from U.S. law. The six elements of a takedown notice are modeled after 17 U.S.C. §512(C)(3)(A)(i-vi). The elements of a counter-notification are modeled after 17 U.S.C. §512(G)(3)(A-D). Under

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[226] *Id.*

[227] Case C-18/18, Glawischnig-Piesczek vs. Facebook Ir. Ltd., ECLI:EU:C:2019:821, ¶ 17 (Oct. 3, 2019).

[228] Giancarlo Frosio, *To Filter, or Not to Filter? That is the Question in EU Copyright Reform*, 36 CARDOZO ARTS & ENT. L. J. 331, 348-49 (2017).

[229] *Guidance on Article 17, supra* note 111, at 23.

[230] Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶ 95 (Apr. 26, 2022).

[231] *Id.*

§512(G)(2)(C), the OCSSP will cease disabling access to the infringing content not less than ten, but no more than fourteen business days after the submission of a counter-notification unless the rightsholder has filed an action in court against the infringing user.[232]

The copyright claim and dispute process on YouTube, culminating in the submission of a counter-notification, allows users to access a court to assert their legal usage of copyrighted material. A counter-notification on YouTube can only be filed when a user's video has been removed after the copyright owner submitted a valid takedown notice.[233] If the allegedly infringing user believes YouTube disabled their video due to a mistake or misidentification, the user can submit a counter-notification and legally request YouTube to reinstate their removed content.[234]

By submitting a counter-notification, the party asserting the takedown notice is forced to either withdraw their copyright claim on YouTube or initiate a lawsuit against the infringer within ten business days.[235] By filing a lawsuit, YouTube will keep the infringing content off its platform unless the alleged infringer wins the copyright infringement lawsuit.[236] If the copyright owner does not show evidence of legal action within ten U.S. business days, the video will be reinstated.[237]

Overall, YouTube offers both out-of-court redress mechanisms through its platform and the opportunity for users to pursue legal action where copyright infringement claims can be adjudicated in a court of law. Both routes provide the copyright owner with sufficient remedial measures against the infringer, all without YouTube being a party that can be held liable for the misappropriation.

YouTube concedes that it is currently impossible for algorithmic copyright matching systems like Content ID to consider complex legal considerations like fair use or fair dealing when attempting to identify whether a video uploaded containing copyrighted content is unlawful.[238] Consequently, to prevent OCSSPs from implementing a general monitoring

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[232] 17 U.S.C. § 512 (2022).

[233] *Submit a copyright counter notification*, *YouTube Help*, https://support.google.com/youtube/answer/2807684?hl=en (last visited Nov. 13, 2022).

[234] *Id.*

[235] *Respond to a counter notification*, *YouTube Help*, https://support.google.com/youtube/answer/12497556?hl=en (last visited Feb. 28, 2023).

[236] *Id.*

[237] *Id.* Evidence of legal action can be "[a]n action seeking a court order against the uploader to restrain the allegedly infringing activity (not just a claim for damages). A claim of copyright infringement against the uploader (if such uploader is based within the United States) with the US Copyright Office's Copyright Claims Board (CCB), where applicable."

[238] YOUTUBE COPYRIGHT TRANSPARENCY REPORT, *supra* note 19, at 12.

scheme in violation of EU law, the CJEU interpreted Article 17 as not imposing an obligation on OCSSPs to prevent content that includes copyrighted material from being uploaded and published when an independent legal assessment is necessary to determine copyright infringement.[239]

In short, when content requires an external determination to determine copyright infringement, YouTube cannot be held liable if copyright infringement is found.

CONCLUSION

Fears that Article 17 contravenes individual freedoms were largely dispelled by the CJEU's ruling in *Poland v. Parliament*. First, the Charter of Fundamental Rights of the European Union protect YouTube's ability to determine "best efforts" to obtain authorization and ensure the unavailability of specific copyrighted works on its platform. Second, YouTube's copyright policies already comply with Article 17, and once the platform is made aware by the rightsholder of manifestly infringing content, it acts swiftly to remove infringing content. Finally, since litigation is required to determine whether copyright infringement exists, the involvement of any external determination of copyright infringement bars holding YouTube liable for copyright infringement.

As the remaining EU Member States transpose the Directive into national law, countries should follow the CJEU's judgment in *Poland v. Parliament* to ensure the protection of fundamental freedoms, while promoting a lawful and robust online ecosystem. Although the CJEU in *Poland* promulgated a clear, fair, and balanced interpretation of the Directive, there will undoubtedly be more challenges to the legality of Article 17's requirements in the years to come. While it appears, that for now, the Directive will fail to accomplish its original goal to make YouTube pay for the sins of its users, the EU remains undeterred in its attempts to hold OCSSPs liable for the illegal activities of its users.

The EU continues to lead the world in regulating OCSSPs. With the passage of the Digital Services Act (DSA), which comes into force on February 17, 2024, the EU once again attempts to further protect the fundamental rights of online users and harmonize rules governing OCSSP liability.[240] Under the DSA, OCSSPs remain liable for illegal content on

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[239] Case C-401/19, Republic of Pol. v. Parliament, ECLI:EU:C:2022:297, ¶ 90 (Apr. 26, 2022).

[240] 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), art. 1, 2022 O.J. (L 277) 41.

their platform only when they have obtained knowledge of such content and fail to expeditiously remove the content.[241] OCSSPs can now be ordered to act against illegal content or provide information to national judicial or administrative authorities, create annual content moderation reports, and establish a compliance function to ensure the platform complies with the DSA.[242] The newly established European Board for Digital Services will assist in investigating and auditing OCSSPs to ensure compliance with the DSA.[243] Nonetheless, the Digital Services Act mentions that the specific rules and procedures established in the Directive remain unaffected by this new legislation.[244]

Creating a legal framework that fairly balances copyright rightsholders' interests, the freedom of speech and expression of OCSSP users, and the cost and feasibility of OCSSPs' business practices is a complex and daunting. By following the CJEU's judgment in *Poland v. Parliament*, the international community can implement an equitable legal system that accurately reflects the interdependent digital community of modern society, while continuing to offer necessary and substantial protections for artistic expression.

[241] *Id.* art. 6, at 45.
[242] *Id.* arts. 9-10, 15, 41, at 46-47, 50, 72.
[243] *Id.* art. 61, at 87.
[244] *Id.* recital 11, at 4.