***Il est plus qu’un* *bémol[[1]](#footnote-2); das ist eine völlig andere Music*[[2]](#footnote-3):comments on certain Recommendations published by a group of European academics to suggest a special way of implementation of Article 17 of the DSM Directive**

**Dr. Mihály J. Ficsor[[3]](#footnote-4)\***

**I. Basic differences of opinion between various groups of European academics in the course of preparation of what became Article 17**

I do not think that I am far away from the truth and that too many people will disagree with me when I state that the preparation of Article 17 (previously Article 13) of the Digital Single Market Directive (Directive (EU) 2019/790) has triggered the most heated debate so far in the field of copyright in the European Union.

In fact, it was considered so important that it drew great attention and a lot of comments even from other parts of the world, in particular from the US where several IT and online giants were closely interested in the outcome of the debates. There were a lot of rumors about how those giants tried to influence the preparatory work and also some reliable information on huge amounts of money transferred to “NGOs”, bloggers and campaign organizers representing their interests[[4]](#footnote-5) and even to some academic circles, universities and research institutions from which they were hoping to get support[[5]](#footnote-6). This is not a complaint or criticism even less a condemnation; it is just a description of what seem to be dry facts. It is understandable that the big online players tried to use their economic and political influence as much as possible to avoid being burdened with legal obligations and liability for what they were enjoying freely. In turn, it was also understandable that creators – authors and performers – as well as publishers and producers investing in the production of works and in legitimate services expressed support for the provisions intended to eliminate or, at least, arrow the “value gap”[[6]](#footnote-7) opening as a result of what Robert Levine has characterized as “Free Ride” in the book in which he presented the tactics of the influential online intermediaries[[7]](#footnote-8).

Quite significant differences of opinion emerged also in the European academic world. It was normal in view of the great attention that the preparatory work of the DSM Directive raised (and not only at copyright symposia, seminars, congresses, etc. but also in the media, the press and the blogsphere). It not unexpected either because serious differences had appeared also in relation to other issues of online uses of works and objects of related rights. For example, in the *Svensson* case – concerning the questions of whether or not hyperlinking may be regarded as an act of interactive making available to the public, and even more importantly, whether such an act takes place already with the making available of the contents or also actual transmission is needed for its completion – the views diametrically differed between a group of European academics having formed a separate European Copyright Association (ECA)[[8]](#footnote-9) and the Executive Committee of the International Literary and Artistic Association (ALAI)[[9]](#footnote-10), with a number of well-known academics in the latter’s membership who (although there are national groups of the Association also in other continents) in majority, are also Europeans. There was no problem with this. It happened that the European Court of Justice (CJEU), in the said aspects, adopted a judgement that basically corresponded to the analysis made and the position expressed on behalf of ALAI[[10]](#footnote-11). And, of course, this was accepted by the other group of European academics. (In fact, there is an overlap between the two groups of academics; some of the members of the ECA are also members of the ALAI Executive Committee, where they work together smoothly and in good atmosphere with all the other members under the able leadership of the Association).

Therefore, it was not a surprise that the views also differed between the two groups of European academics concerning Article 13 of the draft DSM Directive – later adopted, with some amendments, as Article 17. The main differences concerned those provisions the purpose of which was to guarantee due balance of interests between authors’ rights and the right to property as human rights, on the one hand, and other human rights (in particular, the freedom of expression) on the other hand. The ALAI Executive Committee – with a number of European academics in its membership – kept expressing support in its subsequent opinions[[11]](#footnote-12) for the provisions which, as regards their decisive aspects, appear now in the text of the Article. This position of ALAI was confirmed also concerning one of the last versions of the draft Directive before its adoption:

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

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

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

ALAI, *while noting that the version resulting from the trialogue is less protective of authors' rights* because of the desire to strike a certain balance with the defence of other interests, *approves, in its entirety, the provisions of Article 13* aimed at ensuring better value sharing as a result of the making available to the public of intellectual works by providers of online content sharing services.[[12]](#footnote-13) (Emphasis added.)

The other group of European academics adopted a diametrical opposing resolution. While the ALAI Executive Committee, as quoted above, noted with a touch of regret that “the version resulting from the trialogue is less protective of authors' rights because of the desire to strike a certain balance with the defence of other interests”, the other group in an “Open Letter to Members of the European Parliament and the Council of the European Union” dated April 26, 2018, stated as follows:

*There is scientific consensus*[[13]](#footnote-14)… *that the proposals for Art. 13 threaten the user participation benefits* of the [e-Commerce Directive](https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32000L0031) (2000/31/EC) which shared the responsibility for enforcement between rightholders and service providers. (Emphasis added.)

They also questioned the validity of the argument presented by the Executive Committee of ALAI that Article 13 (later Article 17) of the draft Directive was necessary to achieve fairer sharing of value when works and other protected material are made available by online content-sharing service providers (OCSSPs). The other group of academics was of the view that “the misleading rhetoric of a ‘value gap’ clouds the true nature of the issues for online platforms.” They concluded that, for that and other reasons, ”[t]he Copyright in the Digital Single Market Directive [was] failing its stated goals to improve choice, access and fairness in the digital environment” and called on the Parliament and the Council to reject the proposed directive which “[would] not serve the public interests”.[[14]](#footnote-15)

**II. Honest (but not fully successful) attempt by the group of European academics previously rejecting Article 17 to work out an interpretation on the basis of which it might become acceptable to them**

The above-quoted Open Letter did not achieve the result intended by its authors and signatories. Although certain amendments were made, Article 17 of the Directive has been adopted, as regards its main aspects, in the form in which they did not find it acceptable.

In November 2019, more or less the same group of academics published a document – for the purpose of the stakeholder dialogue foreseen in Article 17(10) – entitled “Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics”[[15]](#footnote-16). Although the document still characterizes Article 17 as containing “the most controversial provisions” of the Directive, it reflects a laudable change of attitude from the rejection of the Article to concentrating on the tasks of implementation. The Recommendations is an honest attempt to eliminate what that group of academics consider negative features through a special way of implementation of the relevant provisions suggested by them.

However, with due respect to the sincere efforts and eloquent arguments of the drafters, in my view, the interpretation they outline and the way of implementation they propose would undo the extremely delicate balance established through the complex structure of Article 17, would not correspond to the objectives stated in the recitals of the Directive, and would not correspond to the provisions to be implemented.

The main element of the Recommendation is the proposal on a special procedure to be applied as a “complaint and redress mechanism” provided in Article 17(9) of the Directive and it is in that aspect that the above-mentioned contradictions are mainly manifested. I discuss mainly this proposal below. I do agree that the compliant and redress mechanism is a key component of the regulation in Article 17 and that it must be effective and expeditious in order to ensure the applicability of the exceptions and limitations concerned and to offer protection against “over-blocking”. However, other ways should be found to achieve these objectives than what is proposed in the Recommendations because it would contradict the very concept of a “complaint and redress mechanism” and the related provisions. It would introduce completely new rules to which, because they would be of a critical importance, there must have been some clear and emphatic reference in the provisions, or as a minimum in the recitals, of the Directive, if they really had been contemplated, but there is none. No such kind of preliminary procedure has been foreseen that could be characterized as a “complaint and redress mechanism”.

Instead of trying to de facto amend the Directive in the suggested way at this stage through such “implementation”, we should rather concentrate on making the mechanism truly effective and expeditious in the way it is provided in Article 17. This is possible through close and meaningful cooperation of the OCSSPs and the rightholders. In the context of that cooperation, certain ideas mentioned in the Recommendations may also be applied usefully – just not in the framework of a “complaint and redress mechanism” available to rightholders in case of non-application of the provisions of the Article (not blocking access to alleged infringing copies) as is proposed in the Recommendations, but as a mechanism allowing users to complain when, in their view, their uploads have been blocked without valid reasons.

In addition to the above-mentioned alternative complaint and redress mechanism proposed in the Recommendations (in fact, an alternative to the mechanism provided in the Directive), there are two other issues that I discuss below.

The first one is only indirectly related to the regulation of the complaint and redress mechanism. It is the question of how the OCSSPs may obtain authorization in accordance with paragraph (1) of Article 17. The indirect relationship exists because the obligations of seeking authorization and blocking access to infringing materials are the key alternatives under the Article. In the Recommendations, this issue is dealt with relatively first, therefore I also discuss it first.

The other issue is much more significant; in fact, its importance goes beyond the context of the Directive and might have relevance for the entire European copyright system. This is what seems to be an attempt in the Recommendations to introduce the theory of “users’ rights” for those cases where certain acts are *permitted* as exceptions to or limitations of copyright and related rights subject to the cumulative conditions of the three-step test. In the Recommendations, a form of this theory appears in the analysis of the second subparagraph of Article 17(7) of the DSM Directive, which obligates EU Member States to make certain exceptions provided in the Information Society Directive (Directive 2001/29/EC) mandatory. According to the Recommendations, for those exceptions and limitations, the DSM Directive has created a special category of “users’ rights” requiring broad interpretation. Although the authors of the Recommendations rightly state that those exceptions and limitations have been made mandatory (which was found necessary by the EU legislators as part of the delicate balance established in Article 17), there is no basis in the Directive, either in the provisions or in the recitals, to visualize a new type of permitted uses other than what exists for the exceptions and limitations concerned under Article 5 of the Information Directive and the relevant provisions of the international treaties. Although, in the Recommendations, this alleged special “users’ rights” category of exceptions serves as a justification for replacing the complaint and redress mechanism provided in paragraph (9) with a reverse complaint and redress mechanism, due to the broader significance of the “users’ rights” theory, it is discussed separately below.

It goes without saying that there are many other aspects of the complex provisions of Article 17 which need interpretation and require efforts for due implementation. This paper only covers the above-mentioned issues.

**III. An authorization to be obtained *from the rightholders* is an authorization**

**to be granted by, or on behalf of, rightholders; a statutory license is**

**not an authorization to be obtained *from the rightholders***

The basic pillar of the regulation in Article 17(1) is the recognition that OCSSPs engage in “copyright-relevant acts” for which they “need to obtain authorization from the rightholders”, acts which are basically acts of interactive making available to the public of works and objects of related rights (in the case of works, as a special form of “communication to the public” also covering interactive making available of intangible copies).

Paragraphs (1) and (2) of the Article provide as follows:

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

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

2. Member States shall provide that, where an online content-sharing service provider obtains an authorisation, for instance by concluding a licensing agreement, that authorisation shall also cover acts carried out by users of the services falling within the scope of Article 3 of Directive 2001/29/EC when they are not acting on a commercial basis or where their activity does not generate significant revenues (Emphasis added.)

I would like to stick to my intention that I only deal with the above-mentioned three issues. Therefore, I do not elaborate on the reasons for which, in my view, the last phrase of paragraph (2) is one of the weak points of the Article; it may be misused and what may be, will be. (It is an oxymoron to speak about revenue-producing non-commercial activity just because the actor does not succeed in obtaining a bigger income; it somewhat reminds me of the recognition of an unsuccessful company: „we are a non-profit entity; we did not intend to be, but we are”). The topic of this paper is not this or the several other weak points of the Directive (to which the above-quoted opinion of the ALAI Executive Committee has referred when it stated that “the version resulting from the trialogue is less protective of authors' rights”); otherwise, the volume of this paper would have to multiply.

The Recommendations correctly refer to the fact that concluding a licensing agreement (direct licensing) is mentioned as one of the examples of the form of authorization and note that other forms of authorization also exist, such as licensing by collective management organizations on behalf of the rightholders. Reference is made to the various forms of collective management: voluntary, extended and mandatory. In that connection, it should be noted that the Directive does not change the conditions of collective licensing to be fulfilled in order to be in accordance with the EU law and the international treaties. Mandatory collective management is a limitation of exclusive rights which may only be applied exceptionally subject to the three-step test,[[16]](#footnote-17) and extended collective management is also only applicable in the cases mentioned and with the fulfillment of the conditions prescribed in Article 12 of the Directive.

However, the Recommendations also suggest that authorization by rightholders may take the form of “statutory licensing (relying on remunerated exceptions or limitations)”. This is not the case under the Directive; while a collective license may be regarded as authorization granted on behalf the rightholders, legal licensing cannot be qualified as authorization granted either by or on behalf of rightholders. It is a license granted by the law *instead of* the rightholders concerned, depriving them from their right of authorization. The application of legal licenses would be in obvious conflict with the second subparagraph of Article 17(1) which provides that an “online content-sharing service provider shall…. obtain an authorisation *from the rightholders*” (Emphasis added.). Direct licensing mentioned as an example for authorization by the rightholders is the form that corresponds in the fullest possible way to the exclusive nature of rights. The appearance of the word „licensing” in connection with direct licensing referred to as an example does not change the meaning of the provision; it cannot be understood that legal licenses (not obtained from – not granted by or on behalf of – the rightholders) are also allowed.

Licensing by the rightholders is always a preferred way of exercising rights, rather than fighting against unauthorized rights. Therefore, it may hardly be regarded as specificity just for the application of Article 17 when it is stated in recital (61) of the Directive that “[i]t is… important to foster the development of the licensing market between rightholders and online content-sharing service providers”.  This can in no way be understood as a permission of compulsory licensing, some statutory license or any kind of legal or ethical obligation of rightholders to authorize uses that they do not wish to authorize. The reference to “market” rather than regulatory settlement in itself indicates this. It is even more clearly confirmed by the fact that the statement about the importance of a healthy licensing market, in the recital, follows a sentence that provides what is supposed to be achieved by licensing (by “authorization” according to the text of the provision): “*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” (emphasis added). The key aspect is the ability of rightholders to determine whether their works and other subject matter are used, and under what conditions. For this, an indispensable, but in itself not sufficient (and in no way just a possible alternative), element is the ability to obtain appropriate remuneration.

However, if there might emerge any unjustified doubt that there is no licensing obligation and no statutory licensing may replace authorization by or on behalf of rightholders, the last sentence of the recital eliminates any chance of misinterpretation: “*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.”*  (Emphasis added.)

**IV. Article 17(9) of the DSM Directive provides for an effective and expeditious complaint and redress mechanism for users of OCSSPs in relation to their uploads to which access *has been* disabled or that *has been* removed – and not for a pre-blocking preliminary procedure as suggested in the Recommendations to clarify whether OCSSPs are “allowed” to disable access to or remove uploads as provided in Article 17(4)(b) and (c)**

In Article 17(9) of the Directive, the following dispute settlement system is foreseen:

Member States shall provide that online content-sharing service providers put in place *an effective and expeditious complaint and redress mechanism that is available to users* of their services in the event of *disputes over the disabling of access to, or the removal of, works or other subject matter uploaded by the*m.

Where rightholders request to have access to their specific works or other subject matter disabled or to have those works or other subject matter removed, they shall duly justify the reasons for their requests. Complaints submitted under the mechanism provided for in the first subparagraph shall be processed without undue delay, and decisions to disable access to or remove uploaded content shall be subject to human review. *Member States shall also ensure that out-of-court redress mechanisms are available for the settlement of disputes*. Such mechanisms shall enable disputes to be settled impartially and shall not deprive the user of the legal protection afforded by national law, without prejudice to the rights of users to have recourse to efficient judicial remedies. In particular, *Member States shall ensure that users have access to a court or another relevant judicial authority to assert the use of an exception or limitation to copyright and related rights*. (Emphasis added.)

For the interpretation of these provisions, it is necessary to take into account the provisions of Article 17(4)(b) and (c):

If no authorisation is granted, online content-sharing service providers *shall be liable* for unauthorised acts of communication to the public, including making available to the public, of copyright-protected works and other subject matter, *unless the service providers demonstrate that they have*:

(a) made best efforts to obtain an authorisation, 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 rightholders* *have provided* the service providers with the relevant and necessary *informatio*n; and in any event

(c) *acted expeditiously*, upon receiving a sufficiently substantiated notice from the rightholders, *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).* (Emphasis added.)

These provisions read together provide for a notice-and-stay down system which includes not only *post festa* measures to ensure *future* unavailability of works and objects of related rights that had been made available without authorization but also “*to prevent their future uploads.*”

It is hardly necessary to elaborate on the reasons for which the preventive/proactive – rather than just reactive – nature of the measures foreseen in points (b) and (c) is indispensable in the online environment. If a work or other protected content becomes available without authorization – and in particular if it remains available without being promptly blocked or, after blocking, it may be uploaded again – due to the viral effect of online uses, within a very short time, this may cause serious unjustified prejudice to the legitimate interests of rightholders and may also undermine the chance for normal exploitation of the works and other protected materials.

The purpose of the complaint and redress mechanisms is to deal with the problem of possible “over-blocking” which might happen in the case of applying the system of notice-and-stay-down not only where it is necessary to eliminate and prevent infringements, but also where there is no infringement for some reasons, in particular where exceptions and limitations are applicable with special attention to those provided in the Information Society Directive, subject to the three-step test, to protect the freedom of expression listed in the second subparagraph of Article 17(7). Since it is applicable where the contents uploaded by the users are blocked or removed as a preventive measure, it should be truly effective and expeditious. If it is (and it should be) so, it will guarantee the availability of non-infringing contents without any true delay. Although it may create some prejudice that, let us say, a parody is not available for a day or two, the level of unreasonableness is certainly justified if compared with the prejudice that may be caused to the rightholders if their works remain available without authorization for the same period to the “tiny” internet population of cca. 4.5 billion possible users in those cases where the application of no exception is justified

Therefore, it is understandable – since it is indispensable for establishing reasonable balance of the legitimate interests – that under the provisions of Article 17, the OCSSPs must first take the *preventive* measures asked for by rightholders and the complaint and redress mechanism may be applied after that. This follows from the plain ordinary meaning of “complaint” by users and “redress” something. If an upload is not blocked or removed yet, there is no reason yet to complain for something and to “redress” (to correct) something.

However, all this follows not only from the validity of this kind of literal, systematic and teleological interpretation, but it is also explicitly confirmed in the second subparagraph of recital (70) of the Directive in this way:

Online content-sharing service providers should also put in place effective and expeditious complaint and redress mechanisms allowing users *to complain about the steps taken* with regard to their uploads, in particular where they could benefit from an exception or limitation to copyright *in relation to an upload to which access has been disabled or that has been removed*. (Exception covered.)

Thus, it is clear that the complaint is supposed to be for steps *already taken* and in relation to uploads for which *access has been already disabled* or which *has already been removed*.

The key elements of the reverse mechanism suggested in the Recommendations to be applied before the application of preventive measures are these (in order to avoid unintentionally misrepresenting it, I quote the relevant parts extensively):

[*W]e recommend that*, where *preventive measures* in paragraphs (4)(b) and (c) are applied, especially where they lead to the filtering and blocking of uploaded content before it is made available to the public, Member States *should, to the extent possible, limit their application to cases of prima facie copyright infringement*. In this context, a prima facie copyright infringement *means the upload of protected material that is identical or equivalent to the “relevant and necessary information”* previously *provided by the rightholders* to OCSSPs, including information previously considered infringing. The concept of equivalent information *should be interpreted strictly*.

If content is disabled or removed in the prima facie infringement scenario, *users are entitled to the safeguards included in Article 17(9) and explained above*. *In the remaining cases (no prima facie infringement)* there should be no presumption that the uploaded content is infringing, meaning that *such content should remain available to the public* in the OCSSP *until its legal status is determined*, following a procedure consistent with Article 17(9). We recommend that such procedure abides by the following principles.

*When the content uploaded by users does not meet the prima facie infringement threshold* but partially matches the “relevant and necessary information” provided by the rightholder, *OCSSPs must offer users the possibility to declare that the content at issue is covered by an E&L or user right/freedom…*

*If a user does not provide that declaration* within a reasonable period of time, during or following the upload process, then the *OCSSP should be allowed* *to disable or remove access to the content*. If access to the content is disabled or removed, users may use the in-platform and out-of-court procedural safeguards in Article 17(9).

*If a user provides such a declaration*…, the same *should automatically qualify as a “complaint” under Article 17(9),* triggering the mechanism set forth therein. The OCSSP must then inform the relevant rightholder of this complaint. *If the rightholder wishes to remove or disable access* *to the content at issue it must duly justify its request*, i.e. it must explain not only why the use in question is prima facie an infringement but also why it is not covered by an E&L and, in particular, the E&L invoked by the user.

*The OCSSP will then subject the decision to disable or remove content to human review*. The safeguards regarding the availability of out-of-court redress mechanisms and efficient judicial review remain applicable.

*Since the legal status of the prima facie non-infringing user upload is only determined at the end of this procedure, OCSSPs that comply with the requirements of such procedure should not be liable for copyright infringement* for the content made available to the public under Article 17 of the DSM Directive for the duration of the procedure. (Emphasis added, but the word “allowed” is underlined is also highlighted in the Recommendation.)

With due respect, it is submitted that the above-outlined reverse complaint and redress mechanism to be applied *before* – and as a *precondition* of – the application of preventive measures foreseen in Article 17(4)(b) and (c) would be in multiple conflicts with the letter, the meaning, the system and the clearly stated (“teleological”) objectives of the relevant provisions.

First, the categories of “prima facie” and non-prima facie infringements do not exist in the Directive and there is no even indirect reference to anything that might be understood as the existence of such categories. This is telling in itself because, if it were allowed to use them, it would fundamentally transform the application not only of paragraph (9) of Article 17 but its entire complex structure. The absence of any mention of such kinds of categories shows that the recognition thereof, which would seriously influence – in fact, would undo – the finely tuned balance established in the Directive, would not be acceptable.

Second, the provisions of Article 17(4)(b) and (c) are unambiguous in that no such categorization is allowed if OCSSPs want to avoid liability for direct infringements; they must make “best efforts *to ensure the unavailability* of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information”; to ensure unavailability not only of certain categories of specific works and other subject matter, but of any for which such information has been provided. If there may be any “over-blocking”, it is the effective and expeditious complaint and redress mechanism that has to take care of it.

Third, therefore, it would not be a way of implementation of Article 17(4)(b) and (c), but its fundamental modification in conflict with those provisions, irrespective of what kinds of methods is applied – literal, systematic, teleological, any – for its interpretation if, as suggested in the Recommendations, the OCSSPs could avoid liability even where, at the end of the preliminary procedure suggested in the Recommendations, it would turn out that the making available of the work or object of related rights was infringing.

Fourth, under Article 17(4)(b) and (c), it is an *obligation* to make best efforts to ensure the unavailability of specific works or other protected materials in order to avoid liability for infringements. In contrast with this, it is suggested in the Recommendations that the obligation should be transformed in the course of the “implementation” of the provisions into a *prohibition* of blocking the availability of or removing uploads in the case of the (in the Directive non-existing) broad category of materials the use of which are not fully identical with or equivalent of the works or objects of related rights for which due information has been made available. Such transformation of the obligation into permission would take place whenever users declared their belief that the uploads are non-infringing. The idea of such transformation of the obligation to act into a prohibition to act is clear on the basis of the sentence where it is stated that “[i]f a user does not provide that declaration within a reasonable period of time, during or following the upload process, then the OCSSP should be *allowed* to disable or remove access to the content” (the emphasis on the word „allowed” is in the text quoted). It is hardly necessary to state that this idea is in conflict with the provisions of the Directive and to elaborate on the obvious reasons.

Fifth, as discussed above, the provisions of the Directive make it clear that the complaint and redress mechanism is applicable *after* an OCSSP has taken the steps provided in Article 17(4)(b) and (c) and this is confirmed explicitly in recital (61) as quoted above. No literal, systematic or teleological interpretation may justify disregarding this and introduce instead a preliminary procedure during which the works and objects of related rights would continue being available.

Sixth, in Article 17(9), the effective and expeditious complaint and redress mechanism is provided to be *available to users* in case of the blocking of access to, or removal of, their uploads. There is no basis in the provisions of the Article to transform it into a mechanism, as the Recommendations suggest, *available to rightholders* to complain in cases where the OCSSPs, for the reasons mentioned above, do not fulfill their obligations to ensure their exemption from liability for infringements whenever their users declare that no infringement has taken place.

Seventh, and most importantly, as pointed out above, as a result of the preliminary procedure suggested in the Recommendations, the works and objects of related rights would remain available online for a while in spite of the request of the rightholders to block access to, or to remove, them in accordance with Article 17(4)(b) and (c), which might cause serious unjustified prejudice to them and would likely conflict with the normal exploitation of their works and objects of related rights.

Nevertheless, there are typical forms of uploaded materials where the use of works and objects of related rights are not infringements. The rightholders certainly will be ready to identify such cases; it is not in their interests to insist on the OCSSPs’ intervention where obviously there is such a situation. It would undermine the credibility of the system provided in Article 17 which may be useful for them to narrow the “value gap” in their favor and to fight online infringements.

This may be achieved through appropriate instructions *by the rightholders* to exclude blocking of uploaded contents in those cases where the probability of the application of exceptions listed in the second subparagraph of Article 17(7) is high (due to the limited volume of the use or other possible objective criteria[[17]](#footnote-18)). This kind of limitation might be applied through software solutions too. It goes without saying that limitation of blocking *by the rightholders* would not exclude *post festa* application of the notice-and-stay-down provisions under Article 17(2)(iii) where it turns out that, in the cases preliminary excluded from blocking, still infringements have taken place

An expeditious complaint and redress mechanism provided in Article 17(9) of the Directive would take care of the cases where still some over-blocking may happen.

The “ugcprinciples” agreed upon about one-and-half decades ago in the U.S. between some big rightholder companies and also big companies that seem to correspond to the concept of OCSSPs under the DSM Directive offer some examples for such a solution. It is worthwhile quoting the relevant provisions in the agreement:

In coming together around these Principles, Copyright Owners and UGC Services recognize that *they share several important objectives*: (1) *the elimination of infringing content on UGC Services*, (2) *the encouragement of uploads of wholly original and authorized user-generated audio and video content*, (3) *the accommodation of fair use* of copyrighted content on UGC Services, and (4) *the protection of legitimate interests of user privacy*. We believe that adhering to these Principles will help UGC Services and Copyright Owners achieve those objectives…

1. *If a Copyright Owner has provided*: (1) *the reference data* for content *required to establish a match with user-uploaded content*, (2) *instructions regarding how matches should be treated,* and (3) *representations made in good faith that it possesses the appropriate rights* regarding the content (collectively, “Reference Material”), then *the UGC Service should apply the Identification Technology to that content to implement the Filtering Process described below…*
2. The Identification Technology should use Reference Material to identify user-uploaded audio and video content that matches the reference data and should permit Copyright Owners to indicate how matches should be treated.
3. *If the Copyright Owner indicates in the applicable Reference Material that it wishes to block* user-uploaded content that matches the reference data, *the UGC Service should use the Identification Technology to block* such matching content before that content would otherwise be made available on its service (“Filtering Process”). *The Copyright Owner may indicate in the applicable Reference Material that it wishes to exercise an alternative to blocking (such as allowing the content to be uploaded, licensing use of the content or other options)*, in which case, the UGC Service may follow those instructions or block the content, in its discretion.[[18]](#footnote-19) (Emphasis added.)

First, through the conclusion and application of such agreements or MoUs as the one on the ugcprinciples.com website allowing differentiation – and, in appropriate cases, the limitation – of the application of the measures „to ensure unavailability of specific works and other subject matter for which the rightholders have provided… necessary information” the scope of “over-blocking” may be reduced significantly.

Second, even if where no such complete agreements are made, the identification of certain typical forms of uploads might be useful also in a *post-blocking* situation; for example, through some expedited consultation procedure agreed upon by the OCSSPs and the rightholders, as a result of which the possible period of blocking might be minimized in the justified cases.

Third, even where the complaint and redress mechanism would be needed in certain cases, it would be possible to apply appropriate rules on the basis of which the mechanism could be made truly expeditious and the disputed uploads, where it is justified, be de-blocked very quickly without any unreasonable prejudice to the freedom of expression and to the legitimate interests of users.

**V.** **Although the second subparagraph of Article 17(7) of the DSM Directive makes the application of certain exceptions mandatory, it does not introduce a new category of “users’ rights” to be applied “broadly”; those exceptions, as any others, are to be applied in a balanced way neither broadly nor narrowly as required by the three-step test**

The second subparagraph of Article 17(7) provides in this way:

Member States shall ensure that users in each Member State are able to rely on any of the following existing exceptions or limitations when uploading and making available content generated by users on online content-sharing services:

(a) quotation, criticism, review;

(b) use for the purpose of caricature, parody or pastiche.

These exceptions, as it is indicated, exist already in EU law, in particular as provided in Article 5 of the Information Society Directive – including, of course, paragraph (5) of the Article under which all these exceptions are only, and to the extent, applicable if they fulfill the cumulative conditions of the three-step test. The only new aspect under these provisions of the DSM Directive is that, while these exceptions are optional under the Information Society Directive, in respect of uploading and making available content generated by users, it has been made mandatory.

It is the first subparagraph of recital (70) which indicates the reasons for making these exceptions mandatory:

The steps taken by online content-sharing service providers in cooperation with rightholders should be without prejudice to the application of exceptions or limitations to copyright, including, in particular, those which guarantee the *freedom* of expression of users. Users should be allowed to upload and make available content generated by users for the specific purposes of quotation, criticism, review, caricature, parody or pastiche. That is particularly important for the purposes of striking a balance between the fundamental rights laid down in the Charter of Fundamental Rights of the European Union (‘the Charter’), in particular the freedom of expression and the freedom of the arts, and the right to property, including intellectual property. Those exceptions and limitations should, therefore, be made mandatory in order to ensure that users receive uniform protection across the Union. It is important to ensure that online content-sharing service providers operate an effective complaint and redress mechanism to support use for such specific purposes. (Emphasis added.)

On the basis of the text of the second sentence of Article 17(7) read together with Article 17(9) and recital (70), it can be seen that:

(i) reference is made to *existing* exceptions in the EU law (as provided in Article 5 of the Information Society Directive);

(ii) it is recalled that the justification of providing exceptions in the special cases covered by them is striking a balance between the fundamental rights laid down in the Chapter, in particular, on the one hand, the freedom of expression and the freedom of the arts and, on the other hand, the right to property, including intellectual property;

(iii) the exceptions existing already in the EU law in an optional manner are made mandatory in order to be applied uniformly in the EU; and

(iv) the mandatory nature of the exceptions is to be guaranteed by a complaint and redress mechanism.

It follows from the literal, systematic and teleological interpretation of these provisions that the Directive does not establish some specific category of exceptions and limitations and does not change the justification and nature of the existing exceptions; just it makes them mandatory and guarantees their mandatory application through a complaint and redress mechanism.

Article 17(7) does not introduce new exceptions but refers to existing ones as provided in Article 5 of the Information Society Directive. The justification of the exceptions to be applied (to form a special case) is the same as under the existing EU and international norms; the fact that the optional exceptions are made mandatory does not change their nature and conditions of applicability either. It may be easily realized that this is the case since, when these until now optional exceptions were applied in national laws – and thus became mandatory in the given countries – it did not change in any way their justification and nature or the conditions of their application. The existing exceptions listed in Article 17(7) are subject to the three-step test; thus they may only be applied in the given special cases provided they do not unreasonably conflict with a normal exploitation of the works and objects of related rights concerned and further provided that they do not unreasonably prejudice the legitimate interests of rightholders.

The three-step test is supposed to serve to achieve the key teleological objective of the regulation in Article 17 as indicated in recital (70): striking a balance between the various legitimate public and private interests, in particular between the various human rights of which, on the one hand, the freedom of expression and the freedom of the arts and, on the other hand, the right to property, including intellectual property are mentioned. However, the fact that only property rights are mentioned obviously does not mean that, under the Directive, it would not be necessary to also establish due balance with the moral rights of authors and performers prescribed in the international treaties binding the EU and its Member States, which are also recognized – along with authors’ economic rights – as human rights under Article 27(2) of the Universal Declaration of Human Rights.

These decisive aspects for literal, systematic and teleological interpretation make it clear why there is no indication in the Directive of any intention to establish a specific category of exceptions to cover those listed in the second subparagraph of Article 17(7) as some new “users’ rights” or otherwise to be applied “broadly” as it is suggested in the Recommendations. Simply, there is no such intention, and the requirement to be in accordance with the EU law and the treaties binding the EU and its Member States would not allow to proceed along that line either; corresponding to the basic objective stated in recital (70), the exceptions mentioned in Article 17(7) are to be applied in a duly balanced way; neither narrowly nor broadly; adequately as prescribed in the three-step test.

About the theory of “users’ rights”, it should be pointed out that, under the EU and international norms (although, for the provisions on exceptions and limitations, inter alia, the need for balancing with certain other rights, in particular with other human rights is the justification), no such kind of competing rights but permissions for the use of the works and objects of rights are granted in limited special cases as exceptions to or limitations of copyright and related rights. It becomes evident in view of the usual language of provisions on exceptions. They are worded as “it is permitted”, “it is allowed”, etc. and not as “it is a right…” of users. This is also the case in Article 10(1) of the Berne Convention on exceptions for quotations (which is the only provision on exceptions which is of a self-executive nature); it begins in this way: “It is permissible…” not in this way: “it is a right of users…”

The fact that exceptions and limitations are not rights but permissions to use works and objects of related rights in limited special cases subject to certain conditions and always also to the three-step test (when already provided in the special cases in a law in accordance with the first step, at least to the second and third cumulative conditions of the step) does not change at all the conditions of their applicability.

There is a country – Canada -- where, the theory of “users’ rights” to be applied broadly (in the Canadian version “in a large and liberal way”) as suggested in the Recommendations has been introduced through the case law of the Supreme Court. It may be the source of inspiration for the drafters, it seems worthwhile reviewing how this happened and why it is not justified to apply this ideology-routed model. Since I had acted as a member of the WTO panel which interpreted the three-step test for the first time in 2000 (in its version for patent rights provided in Article 30 of the TRIPs Agreement) in a dispute between the European Communities and Canada in an important patent case[[19]](#footnote-20), I kept following the legislative and case law developments in that country with interest. Thus, I had also noted the developments concerning exceptions and limitations leading to the introduction of the theory of “users’ rights”.

In the 2000 patent case, our panel found more in favor of Canada and only partly against it. I noted that, if a WTO Member had initiated a dispute settlement procedure claiming that the educational exceptions in Canadian copyright law based on the theory of “users’ rights” to be applied broadly (in a “large and liberal way”) was not in accordance with the TRIPs Agreement, the findings of a panel probably would have been much less favorable from the viewpoint of Canada. I expressed this opinion pointing out the conflicts of this theory with the three-step test in a paper entitled “Conflict of the Canadian legislation and case law on fair dealing for educational purposes with the international norms, in particular with the three-step test” and published it on my website [www.copyrightseesaw.net](http://www.copyrightseesaw.net).

The paper is 76-page-long as published, but at the beginning, there is an executive summary. I quote those points of the summary which relate mainly to the emergence of the “users’ rights”. It has turned out that it was based exclusively on a remark in a scholarly publication referring to an isolated theory rejected in practice (also somewhat misunderstanding it) without any analysis whatsoever of the relevant provisions of the treaties binding Canada, in particular not those on the three-step test – with which the theory of “users’ rights” applicably “largely and liberally” instead of appropriately, in a duly balanced way, neither narrowly nor broadly, had gotten in undeniably conflict.

1) The Canadian legislation on fair dealing for educational purposes, in the way fair dealing and other exceptions are interpreted by the Supreme Court of Canada (SCC), is in conflict with the international treaties; in particular with the three-step test under Article 9(2) of the Berne Convention, Article 13 of TRIPs Agreement and Article 10 of the WIPO Copyright Treaty (WCT) for the following reasons.

2) Those elements of the case law which are incompatible with the international treaties appeared first in *CCH*[[20]](#footnote-21) where the Court – contrary to its declared intention of establishing better balance – introduced the “user rights” doctrine and the principle of “large and liberal” application of the provisions of fair dealing (in the given case, fair dealing for research purposes under section 29 of the CAA) through which it upset the copyright balance in favor of those so-called “user rights” and to the detriment of the rights and legitimate interests of authors and other owners of copyright.

3) The “user rights” doctrine introduced in *CCH* was lent from legal literature where it had been developed in rejection of the traditional concept according to which fair dealing was a “defense to infringement”. However, speaking about fair dealing as a “defense to infringement” – from the viewpoint of balancing of interests – may be just a matter of rhetoric; it is not supposed to necessarily determine the interpretation of fair dealing substantively; it may be unduly restrictive or unduly extensive, but it may be very well also just adequate. If the expression “user rights” had remained just a matter of rhetoric, it would not have led to substantive conflict with the international copyright treaties. However, in *CCH*, the concept of “user rights” was not applied in that way. It was not used as the recognition that, in those cases where it is justified to permit free uses of works, there is no infringement; it was transformed into a doctrine according to which “user rights” are – at least – at equal footing with authors’ rights and they have even a superior legal-political status.

4) The way in which the “user rights” doctrine was presented and applied created multiple conflicts with the objectives and provisions of the international treaties. The very concept of exceptions to and limitations of copyright – as provided, and identified *expressis verbis* as such in the treaties – was, at least implicitly, rejected. The extremely “large and liberal” way in which the SCC interpreted “research” as a fair dealing purpose showed how seriously the application of this doctrine may get into conflict already with the first – and basic – condition of the three-step test, under which exceptions and limitations must be confined (limited to) certain special cases (also subject to the other two cumulative conditions of the test).

5) In *CCH*, six factors were provided – in accordance with the principle of “large and liberal” interpretation based on the postulated legal-political superiority of “user rights” – to determine whether or not a given dealing is fair. The factors, in the manner understood and applied by the Court, have the potential of getting into conflict also with the other two conditions of the three-step test, under which an exception must not conflict with a normal exploitations of works and must not unreasonably prejudice the legitimate interests of authors and other owners of copyright. This is particularly clear in the case of the sixth factor: “the effect of the dealing on the works” (on authors’ rights and their chance to exploit their works). According to the Court, this is just one of the factors and not a decisive one; the fact that non-authorized copies compete on the market with authorized copies “may suggest that dealing is not fair” – but only “*may*”. In contrast, under the three-step test, if exceptions were in conflict with a normal exploitation of works (in the sense that they got into competition on the market with the exploitation of authorized copies), they must not be applied.

6) In *Alberta (Education)[[21]](#footnote-22)* – adopted by a narrow (5:4) majority in 2012 as one of the so-called pentalogy decisions – the SCC revised the Copyright Board’s decision on reprographic reproduction rights tariffs for K-12 educational institutions (for primary and secondary education). The Board had found that the regular use of unauthorized extracts from works (in course packs or otherwise) made by teachers or, at their initiative, by the schools for class room instruction, had the cumulative effect of conflicting with a normal exploitation of works and unreasonably prejudicing the legitimate interests of authors and other owners of copyright. The SCC majority applied in a fully-fledged manner the “user rights” doctrine and the principle of “large and liberal” interpretation of fair dealing as developed in *CCH*. In contrast with the ordinary meaning of “research and private study”, on the one hand, and “education” and “teaching”, on the other hand, it found that class room teaching is “research and private study” of the students – just facilitated by the teachers. In this way, the Court *de facto* amended section 29 of the CCA extending fair use purposes to education – before such extension, adopted by the Parliament, entered into force. At the same time, the Court interpreted this new fair dealing purpose (introduced by itself) so “largely and liberally” that – as recognized even by the supporters of the Court’s “user rights” doctrine (see below) – it resulted with clear conflict with the objectives of the international treaties on the protection of copyright and, in particular, with the three-step test.

I do not suggest that the theory of “users’ rights” to be applied broadly as suggested in the Recommendations is the same and would have the same effects as the theory of “users’ rights” to be applied largely and liberally as introduced in the Canadian case law. However, the main point is that there is no basis for such a theory either in the EU law and the international treaties binding the EU, its Member States or in the DSM Directives in particular. It would not be appropriate to introduce such a theory even as a matter of rhetoric (which was also just the case in Canada at the beginning) and even less along with the suggestion that it requires “broad” application. The interests other than the protection of copyright – including the basic interest of guaranteeing other human rights – may be fully taken into account in the way in which this is provided in the existing norms; that is, on the basis of exceptions and limitations *permitting* the use of works and objects of related rights in special cases duly determined, and to be applied not broadly or narrowly but adequately in order to establish due balance as stated in recital (70) of the Directive.

**VI. Conclusions**

It may not be that there is truly a need for a separate summary, since the titles of parts III, IV and V may also function for this purpose too. Nevertheless, let me repeat the main points:

1. The paper, of the great number of issues of interpretation of the provisions of Article 17 of the DSM Directive, only deals with three, mainly in reaction to the Recommendations adopted by a group of European academics (with whom other European academics do not necessarily agree); namely the questions of (i) whether or not the authorization to be obtained by the OCSSPs under Article 17(1) of the Directive may also take the form of a legal license; (ii) whether or not the pre-blocking procedure proposed in the Recommendations would be in accordance with Article 17(9) of the Directive providing for a post-blocking effective and expeditious complaint and redress mechanism, and (iii) whether or not the second subparagraph of Article 17(7) read together with Article 17(9) and recital (70) – and also taking into account the relevant norms of the Information Directive -- might be understood in a way that a special category of exceptions and limitations is established as “users’ rights” to be applied “broadly”.
2. The Recommendations suggests affirmative answers to the three questions mentioned in point 1) above, which are not justified for the following reasons.
3. Article 17(1) of the Directive obligates OSSCPs to obtain authorization *from the rightholder*s for the use of works and related rights uploaded by their users and made available to the public. The Recommendations rightly note that the authorization – in addition to direct licensing mentioned in the provision as an example – may also take the form of collective licensing. In contrast, the thesis of the Recommendations according to which authorization may also be granted through statutory licensing is not in accordance with the text, the context and the clearly stated objectives of the provision of Article 17(1). Authorization to be obtained from the rightholders means authorization obtained from them (or on their behalf); a statutory license is not an authorization obtained from the rightholders. This is stated in an unmistakable manner in recital (61): *“contractual freedom should not be affected*…, *rightholders should not be obliged* to give an authorization or *to conclude a licensing agreement*.”
4. Article 17(9) of the DSM Directive provides for an effective and expeditious complaint and redress mechanism for *users* of OCSSPs in relation to their uploads to which access *has been* disabled or that *has been* removed *ex ante* – and not for a pre-blocking preliminary procedure to be carried out by the OCSSPs (as suggested in the Recommendations) to clarify *post fe*s*ta* whether or not OCSSPs are “*allowed*” to disable access to, or remove, uploads (which is their *obligation* under Article 17(4)(b) and (c) if they want to avoid liability). The right solution might be the elimination from blocking, on the basis of instructions given *by the rightholders*, of certain uploads in the case of which the probability of the application of the exceptions listed in the second subparagraph of Article 17(7) is high – due to the very limited volume of the use (far from the use of entire works and other protected materials and obviously with different levels of applicability depending on the nature of works and other subject matter), or some other possible objectively measurable criteria. This might take the form of software solutions too. The compliant and redress mechanism would only be needed in the remaining cases where some possible “over-blocking” might still happen. On the basis of appropriate agreements or MoUs to be concluded between the OCSSPs and the rightholders for this purpose, de-blocking could take place very quickly also in those cases, without any limitation of the freedom of expressions.
5. Although the second subparagraph of Article 17(7) of the DSM Directive makes the application of certain exceptions mandatory, it does not introduce a new category of “users’ rights” to be applied “broadly”; those exceptions, as any others, are to be applied in a balanced way neither broadly nor narrowly in accordance with the three-step test.

Budapest, March 9, 2020; a slightly corrected version of the paper originally published on my website on February 21, 2020.

1. *Mettre en bémol* is a quite frequently used expression in publications and presentations in French. It is an elegant way to express nuanced differences of opinion, as is indicated by this definition: *„*[*Atténuer*](https://www.linternaute.fr/dictionnaire/fr/definition/attenuer/)[*un*](https://www.linternaute.fr/dictionnaire/fr/definition/un/)[*propos*](https://www.linternaute.fr/dictionnaire/fr/definition/propos/)[*en*](https://www.linternaute.fr/dictionnaire/fr/definition/en/)[*y*](https://www.linternaute.fr/dictionnaire/fr/definition/y/)[*apportant*](https://www.linternaute.fr/dictionnaire/fr/definition/apportant/) *une* [*rectification*](https://www.linternaute.fr/dictionnaire/fr/definition/rectification/)*,* [*adoucir*](https://www.linternaute.fr/dictionnaire/fr/definition/adoucir/)[*l*](https://www.linternaute.fr/dictionnaire/fr/definition/l/)*'*[*importance*](https://www.linternaute.fr/dictionnaire/fr/definition/importance/)[*de*](https://www.linternaute.fr/dictionnaire/fr/definition/de-1/)[*quelque chose*](https://www.linternaute.fr/dictionnaire/fr/definition/quelque-chose/)*,* [*faire*](https://www.linternaute.fr/dictionnaire/fr/definition/faire/)[*preuve*](https://www.linternaute.fr/dictionnaire/fr/definition/preuve/)[*de*](https://www.linternaute.fr/dictionnaire/fr/definition/de-1/)[*modération*](https://www.linternaute.fr/dictionnaire/fr/definition/moderation/)[*dans*](https://www.linternaute.fr/dictionnaire/fr/definition/dans/)[*ses*](https://www.linternaute.fr/dictionnaire/fr/definition/ses/)[*affirmations*](https://www.linternaute.fr/dictionnaire/fr/definition/affirmation/)*.”* (See at <https://www.linternaute,fr/dictionnaire/fr/definition/mettre-un-bemol/>; this and also all the other webpages referred to in the paper were last visited on February 21, 2020.) There is also a specific reason for which I have chosen a French expression to express that there are differences that concern more than just nuances between the regulation in Article 17 of the DSM Directive and the way of interpretation and implementation suggested in the Recommendation to which the title of the paper refers. It is a kind of recognition of the French contribution to the preparation and adoption of Article 17 (previously Article 13). It is well-known that the proposal to clarify direct responsibility of „fake intermediaries” – which in the Directive received the nicer name of online content-sharing service providers (OCSSPs) – originally emerged in France in a document prepared by Pierre Sirinelli and his team for the French Ministry of Culture and also that the French administration played a decisive role in the last stage of the preparatory work to maintain the remaining positive features of the draft Directive, and in particular Article 17. [↑](#footnote-ref-2)
2. This choice of German language - to express my view that the suggestions of the Recommendations for a preliminary procedure to be carried out before blocking alleged infringing content do not correspond to the provisions in Article 17(9) on a post-blocking complaint and redress mechanism - is to be a form of recognition of the brave resistance of Axel Voss, the German rapporteur in the European Parliament against the hysterical populist and anarchist attacks against the remaining pro-copyright elements of the Directive. [↑](#footnote-ref-3)
3. \* Honorary President of the Hungarian ALAI Group, Member of the Executive Committee of ALAI, former Assistant Director General of WIPO. The views expressed in this paper are mine; they are not necessarily in accordance with the position of the organizations in which I am a member or for which I work or used to work. [↑](#footnote-ref-4)
4. For example, The Times, one of the most recognized British newspapers, reported on August 6, 2018, which was in a period when the attacks against the draft Directive seemed to be successful, as follows:

   Google is helping to fund a website that encourages people to spam politicians and newspapers with automated messages backing its policy goals.

   The campaigning site is intended to amplify the extent of public support for policies that benefit Silicon Valley… The tools were recently used to bombard MEPs with phone calls opposing EU proposals to introduce tighter online copyright rules. The proposed legislation was rejected by the European parliament last month after a lobbying campaign led by Google and Facebook.

   (See at <https://www.thetimes.co.uk>/article/google-funds\_activist-site-that-pushed-its-views\_rg25cr6t.) [↑](#footnote-ref-5)
5. See, for example, the articles and studies published

   (i) *in the Wall Street Journal*: “*Hidden Influence. Paying Professors: Inside Google’s Academic Influence Campaign*” at <https://www.wsj.com/articles/paying-professors-inside-googles-academic-influence-campaign-1499785286>. The deatailed article referred to what a former Google lobbyist had said; namely that Google „compiled wish lists of academic papers that included working titles, abstracts and budgets for each proposed paper—then they searched for willing authors”.

   (ii*) in the Los Angeles Times*: „*Has Google paid off an army of academic researchers*?” available at

   <https://www.latimes.com/opinion/op-ed/la-oe-bridy-perzanowski-google-tp-20170721-stg.html>.

   # (iii) *in The Times*: “*Google pays academics millions for key support. British and American researchers get secret funds*” at <https://www.thetimes.co.uk/article/google-pays-academics-millions-for-key-support-tnb3zgpxp>. According to the newspaper: “The authors, who received payments of between $5,000 and $400,000, did not disclose Google’s funding in two thirds of cases. Emails suggest that some researchers shared papers with Google before publication, seeking suggestions for changes.”

   # (iv) by *Politico*: “*Google’s academic links under scrutin*y.” at [https://www.politico.eu/articles/google-campaign-for-accontability-lobbying-humb](https://www.politico.eu/articles/google-campaign-for-accontability-lobbying-humboélts)olts-ceps-astroturfing. The article refers to research reports when it states that “as part of a decade-long lobbying campaign, the American tech company earmarked millions of euros to support think tanks in Germany, the United Kingdom and Brussels that focused on hot-button topics like competition and copyright reform central to Google’s core advertising business” and it quotes one of the researchers as saying: "Google's strategy is to put money into a few institutions. If they can muddy the waters by pointing to academic papers, it helps their cause."

   # (v) on the website of *Campaign for Accountability*: “*Google’s Academic Influence in Europe*” at https:// campaignforaccountability.org/work/googles-academic-influence-in-europe. The thoroughly researched paper published in March 2018, to which reference made also in the above-mentioned Politico article, states inter alia, this: “Over the past decade, Google has invested heavily in European academic institutions to develop an influential network of friendly academics, paying tens of millions of euros to think tanks, universities and professors that write research papers supporting its business interests. Those academics and institutions span the length and breadth of Europe, from countries with major influence in European Union policymaking, such as Germany and France, to Eastern European nations like Poland… For example, Google has paid at least €9 million to help set up the Alexander von Humboldt Institute for Internet and Society (HIIG) at Berlin’s Humboldt University… The Institute has so far (until March 2018) published more than 240 scholarly papers and reports on internet policy issues, many on issues of central importance to Google’s bottom line. HIIG also runs a Google-funded journal, with which several Google-funded scholars are affiliated, to publish such research… In Poland, Google has funded the Digital Economy Lab (DELab) at the University of Warsaw [and also] started funding one of Brussels’ most influential think-tanks, the Centre for European Policy Studies (CEPS) in 2014.”

   # It would not be appropriate to apply the saying “[Wer zahlt, bestimmt die Musik](https://austria-forum.org/af/Wissenssammlungen/Sprichw%C3%B6rter/Wer%20zahlt%2C%20bestimmt%20die%20Musik)” to the academic world. It is sure that the academics whose research is financed by Google, in general, try to remain objective as much as possible when they deal with issues relevant for the interests of the huge company. However, it is not sure that they always succeed in this. And it is even much more important what the above-mentioned Wall Street Journal quoted from Google’s statement about their academic financing projects: “We’re happy to support academic researchers across computer science and policy topics, including copyright, free expression and surveillance, *and to help amplify voices* that support the principles of an open internet [emphasis added]” Normal; this is dictated by their genuine interest: the freer access is, the more clicks on their website, and thus the bigger advertising income. It is logical tactics on their behalf to amplify such voices so loudly that the contrary voices may be suppressed and as closely with their academic amplifier to the ears of government officials and legislators as possible. It would be pointless to blame them for doing so when they have a lot of money for this from that advertising income. Just, it is worthwhile taking it into account what happens, how and why.

   [↑](#footnote-ref-6)
6. See for example the „Joint statement on transfer of value/value gap” of October 27, 2017 on behalf of 28 NGOs representing authors and other beneficiaries of copyright and related rights, including CISAC, GESAC, CIAM, CIAGP, SAA, FERA, FEP, ICMP, IFPI, ACT, etc.) addressed to Axel Voss, rapporteur of the draft Directive, available at <https://www.cisac.org/Newsroom/Society-News/Jpont-statement-on-trasfer-of-value-value-gap>. [↑](#footnote-ref-7)
7. Robert Levine: *Free Ride – How Digital Parasites Are Destroying the Cultural Business, and How the Cultural Business Can Fight Back*, Doubleday, 2011. [↑](#footnote-ref-8)
8. For the opinion of the ECA, see <https://europeancopyrightsocietydotorg.filesworkpress.com/2015/12/european-copyright-society-opinion-on_Svensson-firstsignatoriespaginatedv31.pdf> [↑](#footnote-ref-9)
9. For the opinion of ALAI, see

   https://www.alai.org/en/assets/files/resolutions/making-available-right-report-opinion.pdf. [↑](#footnote-ref-10)
10. Judgment C-466/12 the CJEU adopted on February 13, 2014. [↑](#footnote-ref-11)
11. See the references to the subsequent opinions in the text of the last one quoted below. [↑](#footnote-ref-12)
12. Adopted on 21 March 2019. [↑](#footnote-ref-13)
13. Although the members of the European Parliament and the Council might have understood this statement in the „Open Letter” in a way that there is truly general „scientific consensus” among European academics concerning that highly debated issue, the drafters certainly did not understand it in that way. Certainly not, because otherwise they would have implied (i) either that the European academics participating in the adoption of the above-mentioned ALAI opinion also shared the “consensus” (which was obviously not the case; just the contrary was quite evident); or (ii) that the views expressed by ALAI were unscientific (which certainly was not the intention). Thus, it seems to be certain that, by „scientific consensus”, they just meant consensus among themselves and their followers and not a European-level scientific consensus. [↑](#footnote-ref-14)
14. The text of the Open Letter is available at https://www.create.ac.uk/blog/2018/04/26/european\_copright\_ditective\_failing. [↑](#footnote-ref-15)
15. The text of the document is available at <https://uva.nl/ws/files/44253510/43688117.pdf>. [↑](#footnote-ref-16)
16. For the reasons for which mandatory collective management is a limitation of exclusive rights, *s*ee my chapter entitled „Collective Rights Management from the Viewpoint of International Treaties, with Special Attention to the ’*Acquis’*”, Chapter 2 in Daniel Gervais: *Collective Management of Copyright and Related Rights*, *Third Edition,* Wolters Kluwer, 2016, pp. 31 to 79. [↑](#footnote-ref-17)
17. Three comments should be added to this:

    First, it is hardly imaginable to limit blocking on bases other than such objective criteria, in particular if it was based – as it would be desirable – on some software solution. A limitation certainly could not be based on such a criterion as, for example, in connection with the parody exception, whether or not it is sufficiently humorous.

    Second, on the basis of the text, its context and the stated objectives of Article 17(9) of the Directive, the exclusion of blocking for cases other than those where a full work or other protected material is used – as suggested by the Recommendation – is far from being an acceptable idea. If such an idea was applied, there would hardly be any case where the OCSSPs would be obligated to apply Article 17(4)(b); the provision would be practically abolished along with the need for any complaint and redress mechanism under Article 17(9). Nearly always the rightholders would have to prove – while their works or other protected materials would continue being available to the Internet population – that there was infringement and that, therefore, as the Recommendations suggests, the OCSSPs would be “allowed” to block access.

    Third, of course, the application of a volume-based limitation of blocking would have to depend also on the genres of works and other protected materials concerned. There would be differences between audiovisual works, e-books, phonograms, and so on, and certainly even more in respect of works of art and photographic works. [↑](#footnote-ref-18)
18. Available at ugcprinciples.com. [↑](#footnote-ref-19)
19. See WTO document WT/DS114/R of March 17, 2000. [↑](#footnote-ref-20)
20. [Footnote 2 in the original text] *CCH Canadian Ltd v. Law Society of Upper Canada*, [2004] 1 SCR 339 (hereinafter: CCH). [↑](#footnote-ref-21)
21. [Footnote 3 in the original text] *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 SCR 345 (hereinafter: Alberta (Education)). [↑](#footnote-ref-22)